

SEPTEMBER 2017

# Infringement Review Committee (non-parking) Policy

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## Overview

### Purpose of these guidelines

The Infringement Review Committee (IRC) is convened under the provisions of the *Infringements Act 2006 (the "Act")* which requires Council, acting as an "enforcement agency", under prescribed circumstances, to consider written representations regarding offences for which an infringement has been issued other than for parking, thereafter referred to as an 'internal review'. Parking infringements are determined by a separate Internal Review Committee.

### Internal review process

The internal review process provides the recipient of an Infringement Notice with a process to apply to an enforcement agency (Council) for a review of a decision to issue the infringement notice. In accordance with the legislative requirements of the *Act*, any internal review is determined by a member of Council staff not involved in making the decision to serve the infringement notice which is the subject of the review.

## Legislative and procedural requirements

### The Act and the Guidelines

Internal reviews of Infringement Notices are conducted in accordance with the requirements of:

- The Infringements Act 2006 Part 2, Division 3
- Any Internal Review Guidelines (the "Guidelines") made pursuant to Part 3A of the *Act*.

In applying the internal review process, Council and the IRC will at all times comply with the prescribed requirements of the relevant legislation.

The IRC will consider and apply, where appropriate, the guidance notes and the general purport of the Guidelines in any decision making processes relating to internal reviews. The Guidelines form part of this policy and are "Attachment A".

### Grounds for review

All applications for internal review must include at least one ground for review, as contained in section 22(1) of the *Act*.

The ground for review are:

- Contrary to law
- Mistake of identity
- Special circumstances
- Exceptional circumstances
- Person unaware

Detailed explanations of the grounds for review are contained within the Guidelines. Additionally Council may, at its absolute discretion, consider any application for an internal review, notwithstanding that it may not meet the above requirements.

## The Infringement Review Committee

### Structure

The IRC is to be comprised of a minimum of two persons comprising of either of:

- The General Manager Assets and Services
- The General Manager Corporate Services
- Stonnington's Corporate Counsel

The IRC is empowered to determine internal reviews in accordance with the prescribed requirements of the Act and under an Instrument of Delegation signed by the Chief Executive Officer of Council.

## Decision making

### The general requirements of decision making in internal review

IRC members may take a range of factors into account when determining an application for internal review, including administrative law principles such as lawfulness, fairness, openness and efficiency. Good internal review decision making requires Council to consider a range of matters. Many of these are technical requirements to ensure decision makers exercise their functions properly.

The Guidelines also provide members with specific criteria that may be applied to various grounds for review categories

### Notifying the applicant and reasons for decision

Council is required to conduct internal reviews within 90 days of receiving an application. The applicant must be notified, in writing, of the outcome of any internal review within 21 days of that decision.

Whilst there is no clear legislative requirement to provide reasons for a decision, in the interests of procedural fairness Council will provide reasons why IRC members reached their decision. Reasons are not required to be extensive or overly detailed but are an important tool to support the transparency of decision making and fairness of the internal review system. Consideration may be given to providing reasons for:

- The power the decision maker is exercising, including the delegation or authority and the relevant section of the *Act*.
- The steps in the reasoning process that led to the decision, linking the facts to the decision, to enable the applicant to understand how the decision was reached.
- Why the facts were or were not accepted.
- Any other relevant matter.

## Human Rights Consideration

This policy has been assessed in accordance with the requirements of the relevant legislation and which complies with the Victorian Charter of Human Rights and Responsibilities Act 2006.

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# Internal Review Guidelines

Infringement Management and Enforcement Services

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# 1 Overview

## 1.1 Purpose of these Guidelines

The Internal Review Guidelines (Guidelines) encourage development of consistent decision making processes and assist agencies in identifying the legal and practical requirements of an internal review process.

Enforcement agency decision makers are required to exercise their discretion in making decisions within a legal framework consisting of legislative provisions and the requirements of general administrative law. These Guidelines provide guidance on that decision making framework, its legal requirements, and the policy aims that underpin them for agencies and their staff. Examples given are specific to those circumstances and the legislation at the time of publication. If in doubt, you should seek independent legal advice about administrative law decision making, policy and the underlying legislation.

These Guidelines form part of the internal review oversight function established by the internal review reforms. The new oversight regime aims to support the capacity and capability of enforcement agencies to carry out internal reviews through education, review, resource production and collaborative development of best practice.

## 1.2 What is an internal review

The internal review mechanism<sup>1</sup> in relation to infringement fines allows a person to apply to an enforcement agency for a review of the decision to issue the infringement notice.

Internal review is an important part of the infringement system because it acts as a first stage of assessment as to whether it is appropriate for that person to receive an infringement fine based on their life circumstances or other relevant ground.

Internal review is available to infringement notice recipients up to the time of registration of the penalty with the Infringements Court or Director, Fines Victoria.<sup>2</sup>

# 2 The role of internal review in the infringement system

The internal review process is set out in legislation.<sup>3</sup> The infringement fine system promotes public safety and public order by holding people accountable for behaviour which impacts on or endangers the community members whilst recognising the variable impact of enforcement action on vulnerable and disadvantaged community members. Internal review is an important mechanism for early identification of this cohort of community members that should not be captured by the system.

As decision makers are exercising power under legislation for public purposes, administrative law principles such as lawfulness, fairness, openness and efficiency apply to the making of those decisions. Compliance with legislation, policy and administrative law principles will support lawful decision making by agencies.

Good internal review decision making requires agencies to consider a range of matters. Many of these are technical requirements to ensure decision makers exercise their functions properly. But the *purpose* of internal review and the role it plays in the infringement system is also a factor that should be taken into account.

# 3 Internal review applications

This section provides further detail on the legislative and procedural requirements for processing applications for internal review.

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<sup>1</sup> Until 31 December 2017, internal review rights are governed by Part 2, Division 3 of the *Infringements Act 2006*. From 31 December 2017, internal review amendments in Division 3, Part 17 of the *Fines Reform Act 2014* will commence.

<sup>2</sup> The Director, Fines Victoria will commence from 31 December 2017. Prior to this, internal review will operate under the *Infringements Act 2006* and references to the Director, Fines Victoria are to be read as references to the Secretary of the Department of Justice and Regulation.

<sup>3</sup> Until 31 December 2017, internal review rights are governed by Part 2, Division 3 of the *Infringements Act 2006*. From 31 December 2017, internal review amendments in Division 3, Part 17 of the *Fines Reform Act 2014* will commence.

## 3.1 Who can apply for an internal review, when and for what offences

A person who receives an infringement notice can apply for an internal review to the issuing enforcement agency. They can also authorise another person (such as a family member, a friend, support worker or solicitor) making an application for an internal review on their behalf.<sup>4</sup>

Enforcement agencies should ensure any authority is in writing, signed by the applicant and accompanied by proof of identity from the person authorising the agent.

### 3.1.1 Application by a Body Corporate

Corporations and other entities known collectively as bodies corporate (those entities with a separate legal identity which are not natural persons) may also make internal review applications. A “person” generally includes a body corporate unless there is clear legislative intent that they are not to be considered so.

Generally if the penalty notice is in the name of the body corporate, it has standing (the legal status) for the purposes of an internal review application. The special circumstances ground relates to matters that only affect natural persons and will not be available to bodies corporate. However, other grounds may be relevant. Decision makers should apply the evidentiary and other requirements to applications on those grounds in the same manner as for natural persons.

## 3.2 Infringement notices that cannot be internally reviewed

A number of offences relate to conduct that is of such a risk to public safety and/or amenity that any challenge to, or review of, the penalty notice should be dealt with by a court. These offences are therefore not subject to internal review.

These notices are where the offence alleged is:

- ◆ excessive speed, drink and drug driving under sections 89A to 89D of the *Road Safety Act 1986*,
- ◆ prescribed concentration of alcohol (transport workers) under section 95 of the *Transport (Safety Scheme Compliance and Enforcement) Act 2014* and
- ◆ prescribed concentration of alcohol (boating) under sections 61A and 61BA of the *Marine Drug, Alcohol and Pollution Control) Act 1988* are subject to separate review (objection process) in their respective legislation.<sup>5</sup>

In addition, there is no right to apply for internal review on the ground that the person was unaware of the notice having been served, where there was no personal service of the penalty notice, if the infringement notice relates to an alleged offence under:

- ◆ section 67 or 89B of the *Road Safety Act 1986*
- ◆ section 87A of the *Melbourne City Link Act 1995*
- ◆ section 96 of the *Transport (Safety Scheme Compliance and Enforcement) Act 2014*
- ◆ section 61B of the *Marine (Drug, Alcohol and Pollution Control) Act 1988*
- ◆ section 219A of the *East Link Project Act 2004*<sup>6</sup>

The rationale for exclusion of this category from the “person unaware” ground is that the above provisions contain separate processes for seeking an extension of time on the grounds of being unaware of service, and in effect replace the need for a person unaware review ground.

This provision is designed to ensure those penalty notices that should not be proceeded with, because of an error in law or because of the life circumstances of the recipient, are identified before enforcement. Where applicants do not exercise their right to apply for an internal review this provision limits excessive delay.

## 3.3 Timing requirements for internal review applications

An application for an internal review must be made:

- ◆ before the infringement penalty together with any prescribed costs are registered with the Infringements Court/Director, Fines Victoria<sup>7</sup>

<sup>4</sup> Registration will be with Director, Fines Victoria after commencement of the *Fines Reform Act 2014*.

<sup>5</sup> Section 21 of the *Infringements Act 2006*.

<sup>6</sup> Section 21(2) of the *Infringements Act 2006*.



- ◆ in the case of an infringement served on a child, at any time before the infringement penalty is registered with the Children's Court
- ◆ in the case of a non-registrable infringement offence, at any time before the expiry of the period to which the infringement notice relates, or
- ◆ in the case of any application made on the ground of "person unaware" the application must be made within 14 days of the applicant becoming aware of the infringement notice.

### 3.4 Matters referred to court

The applicant may request that their matter be referred to the Magistrates' Court of Victoria (MCV) or the Children's Court even if they have made an application for an internal review.<sup>8</sup> If this occurs the processing of the internal review application must be terminated by the enforcement agency.

### 3.5 Suspension of enforcement activity

When an enforcement agency receives an internal review application, the enforcement agency must suspend any enforcement activity until the enforcement agency has completed its review and has sent the applicant advice of the outcome.<sup>9</sup>

### 3.6 Internal reviews must be completed within time

Upon receiving an internal review application, an enforcement agency must review its decision to issue the infringement within the prescribed timeframe of 90 days<sup>10</sup>. A request for further information from the applicant stops that clock for a maximum 35 days. If these timelines are not met by the agency, the infringement notice will be deemed to have been withdrawn.

## 4 Steps in the decision making process for internal review

The Guidelines set out some steps that enforcement agencies may want to follow in processing internal review applications to ensure legislative and administrative law requirements are duly considered. These are not prescribed steps.

### 4.1 Step 1: assessing whether an internal review application is valid

An enforcement agency will need to first assess whether the internal review application satisfies the requirements outlined in section 22 of the Infringements Act.

Enforcement agencies are not obliged to conduct an internal review unless the application satisfies these prescribed requirements. All internal review applications must:

- ◆ be made in writing<sup>11</sup>,
- ◆ include a current address for service<sup>12</sup>,
- ◆ can only be made once in relation to any one infringement offence in respect of the applicant<sup>13</sup>, and
- ◆ must specify ground/s for review (contrary to law, mistaken identity, special circumstances, exceptional circumstances and person unaware)<sup>14</sup>.

Whilst there is no prescribed internal review form, enforcement agencies may consider introducing an application form with specified content to assist applicants to understand requirements. A pro-forma internal review application form is attached (see Appendix 'A') to assist agencies to consider this.

Enforcement agencies are encouraged to assist applicants by:

- ◆ permitting applicants to rectify or replace an application that does not meet requirements
- ◆ permitting or encouraging an applicant who is unsure which ground to apply under to apply under a number, or even all of, the grounds

<sup>7</sup> The enforcement agency must register the penalty within six months from the date when the original notice was served (section 17 of the Fines Reform Act).

<sup>8</sup> Section 16 of the *Infringements Act 2006*

<sup>9</sup> Section 24 of the *Infringements Act 2006*.

<sup>10</sup> Section 22(3)(a)(i) of the *Infringements Act 2006* and regulation 16 of the Infringements Regulations 2016

<sup>11</sup> Section 22(2)(b) of the *Infringements Act 2006*.

<sup>12</sup> Section 22(2)(b) of the *Infringements Act 2006*.

<sup>13</sup> Section 22(2)(e) of the *Infringements Act 2006*.

<sup>14</sup> Section 22(1)(a)-(d) of the *Infringements Act 2006*.

- ◆ providing details of information that may be relevant or required to support the application (for example agencies may make available a list of examples of relevant information for internal review applications via a website or through correspondence with applicants), and
- ◆ providing suggested agencies who can assist the applicant in making an internal review application.

## 4.2 Requesting additional information

Enforcement agencies should assist applicants to provide sufficient information to establish a ground for review. Where accompanying information is not sufficient, section 23 of the Infringements Act gives agencies the ability to request further information. Enforcement agencies should take steps to assist the applicant in correcting an application including making reasonable efforts to encourage the applicant in providing relevant information to support their application.

Enforcement agencies are encouraged to consider both the technical requirements for internal review grounds but also the policy purpose applications under those grounds serve in making the infringement system fairer for Victorians and ensuring that any mistakes in law are remedied.

Where, for example, an applicant discloses a mental health disorder agencies may request the applicant provide evidence from a medical practitioner that includes details of their mental health disorder and provides advice as to whether on the balance of probabilities their mental health disorder contributed to the offending conduct. This is the legal test for the application to meet for the “special circumstances” ground. Agencies may need to assist applicants to meet this requirement in this circumstance because of the nature of the eligibility category.

Where an enforcement agency makes a request for additional information, it must:

- ◆ make the request for additional information in writing;
- ◆ suspend the internal review until the earlier of:
  - 35 days from the date specified in the correspondence requesting the additional information, or
  - the date when the additional information is provided.

An applicant has 14 days, from receipt of the request, to respond to the enforcement agency’s request for additional information.<sup>15</sup>

If the applicant is unable to provide the additional information, they may ask the agency for an extension of time. The enforcement agency may refuse or grant the extension of time and must advise the applicant of that decision in writing. If an enforcement agency decides to grant the applicant’s request for an extension of time, it must inform the applicant (in writing) of its decision and the period of the extension.

If the applicant fails to provide the requested information within the relevant period, the enforcement agency may complete its review without the additional information. If the additional information is received out of time, the agency *may* decide to accept the late information provided and complete the internal review.<sup>16</sup>

## 4.3 Step 2: assessing whether the grounds for internal review apply to the facts

The grounds for internal review reflect the purposes of internal review in the infringement system. These purposes are to ensure:

- ◆ where there has been an error in exercising legal power by the agency, the notice can be withdrawn, and
- ◆ where the notice was valid but circumstances in the applicant’s life means that enforcement of the infringement notice is not appropriate on fairness or equity grounds, the notice can be withdrawn.

### 4.3.1 Grounds for review

All applications for internal review must include at least one ground for review, as contained in section 22(1) of the Infringements Act.

<sup>15</sup> Section 23(1)-(4) of the *Infringements Act 2006*.

<sup>16</sup> Section 23(4)-(6) of the *Infringements Act 2006*.

The grounds are:

- ◆ contrary to law
- ◆ mistake of identity
- ◆ special circumstances
- ◆ exceptional circumstances, and
- ◆ person unaware.

Further detailed information about each of these grounds, guidance around evidentiary requirements and options for enforcement agencies after an internal review has been considered is available at Section 5 of the Guidelines.

### 4.3.2 The general requirements of decision making in internal review

Decision makers may take a range of factors into account when applying the internal review grounds to the set of facts before them in the application.

Enforcement agencies may choose to structure the decision making process by producing a set of questions for decision makers to consider whether there is sufficient evidence to allow the application to be granted. These questions may be designed to meet administrative law requirements.

For example, a decision maker may consider:

- ◆ if required, is there evidence that supports a connection between the ground being claimed and the condition or circumstance that the applicant is purporting to rely on (considering particularly the standard of proof required and whether a relevant causal link is demonstrated)
- ◆ is the evidence authentic, current (where applicable) and provided by an appropriate person (for example a health practitioner)
- ◆ has the applicant provided further information, where possible, when requested to do so and is further information realistic in the circumstances, and
- ◆ are there other relevant factors or information of a general nature which may not be capable of documentary proof.

Enforcement agencies may refer to section 5 of these guidelines for details of the specific kind of evidence outlined for each ground of internal review.

## 4.4 Step 3: notifying the applicant and reasons for decision

Once the enforcement agency has completed the internal review decision, it must serve the applicant with a written notice of the outcome within 21 days of that decision. If these timelines are not met by the agency, the infringement notice will be deemed to have been withdrawn.

While there is a requirement for notifying the applicant of the decision, there is no clear legislative requirement to provide reasons for a decision. However, the principles of procedural fairness may require enforcement agencies to provide the applicant with reasons for the outcome of a decision.

These may be sent automatically as part of the decision sent to the applicant, or be available only on request by the applicant. Enforcement agencies should develop a policy on the provision of reasons and establish consistent practice.

Notification could include a section indicating why the decision maker reached that conclusion. It may refer to matters such as:

- ◆ validity issues ( for example, timelines or standing)
- ◆ failure to provide information to support the review ground
- ◆ failure to provide information which established the required nexus between the disability or disadvantage claimed and the conduct involved in the offence, and/or
- ◆ withdrawal of the application or referral of the matter to court

The statement of reasons should include:

- ◆ what power the decision maker is exercising, including the delegation or authority and the relevant section of the Act
- ◆ steps in the reasoning process that led to the decision, linking the facts to the decision. The applicant should be able to understand how the decision was reached, and

- ◆ why facts were or were not accepted.<sup>17</sup>

Reasons are not required to be extensive or overly detailed but are an important tool to support the transparency of decision making and fairness of the internal review system.

## 5 Grounds for internal review

An internal review application must specify at least one ground of review. The grounds of review are set out in legislation. The following section provides further guidance about the considerations which may support each ground, evidential support which an agency may receive or request and the options available to an agency after consideration of the ground.

### 5.1 Contrary to law

The *contrary to law* ground can be used if a person believes that the decision to serve the infringement notice was contrary to law (for example, the infringement notice is not valid, or an infringement officer has acted unlawfully, unfairly, improperly or beyond their authority in taking that action or decision).

If an applicant makes this claim the enforcement agency would need to consider in conducting its review include:

- ◆ whether the officer was authorised to make the decision to serve the infringement notice
- ◆ whether the agency complied with all the procedural requirements (as required by legislation)
- ◆ whether the issuing officer made a mistake in deciding to issue the notice
- ◆ whether the issuing officer acted improperly or unfairly in deciding to issue the notice, and/or
- ◆ whether all the relevant signs were clear and visible (for example, were parking signs and signage relating to non-smoking areas and liquor licences visible).

Applications for internal review that are made on the ground of contrary to law should (where appropriate) be accompanied with supporting evidence. This may include photographs of parking signage, witness statements or other evidence that goes to establishing facts.

An enforcement agency may make the following decision upon reviewing an application for internal review based on the grounds of contrary to law:

- ◆ confirm the decision to serve an infringement notice
- ◆ withdraw the infringement notice and service an official warning
- ◆ withdraw the infringement notice
- ◆ withdraw the infringement notice and refer the matter to Court (Magistrates' or Children's Court)
- ◆ in the case of an infringement offence involving additional steps, alter or vary those steps provided the alteration or variation is consistent with the Act or other instrument establishing the offence
- ◆ waive all or any prescribed costs, and/or
- ◆ approve a payment plan.

In some cases, it may be appropriate to do a combination of the actions above.

### 5.2 Mistake of identity

The *mistake of identity* ground is intended to apply to circumstances where a person claims that they were not the person who committed the infringement offence.

This ground is not available in circumstances where a person has been served with a traffic or parking infringement notice and they allege that they are not liable for the offence and cannot reasonably ascertain the identity of the person who was responsible for the offence. Such circumstances should be more appropriately addressed by lodging an unknown user nomination statement.

Applications for internal review that are made on the grounds of mistaken identity should (where appropriate) be accompanied with supporting evidence. Examples of supporting evidence for mistake of identity include the applicant's birth certificate, driver's license or passport which shows:

- ◆ a different person than the one who received the penalty notice in the applicant's name, or

<sup>17</sup> Administrative Review Council 'Decision Making: Reasons' Administrative Review Best Practice Guide, 2007, pp 7 - 9

- ◆ evidence that the applicant could not have committed the conduct because they could not have been in the relevant location.

The relevant factors decision makers may consider are:

- ◆ how was the person identified at the time of the penalty notice issuing
- ◆ was there a statutory or procedural requirement for the issuing officer to confirm identity, and if so is there evidence this requirement was met
- ◆ did the conduct of the applicant contribute to misidentification at the point of issue? Was the applicant's conduct unreasonable in the circumstances (for instance did the applicant intentionally provide another person with their identification)?
- ◆ is there any evidence that there was conduct by an authorised officer or a third person that resulted in misidentification (for instance, this might include failure of the authorised officer to follow or document compliance with procedural requirements).

An enforcement agency may make the following decision upon reviewing an application for internal review based on the grounds of mistake of identity:

- ◆ confirm the decision to serve an infringement notice
- ◆ withdraw the infringement notice and service an official warning
- ◆ withdraw the infringement notice
- ◆ withdraw the infringement notice and refer the matter to Court (Magistrates' or Children's Court)
- ◆ in the case of an infringement offence involving additional steps, alter or vary those steps provided the alteration or variation is consistent with the Act or other instrument establishing the offence
- ◆ waive all or any prescribed costs, and/or
- ◆ approve a payment plan.

In some cases, it may be appropriate to do a combination of the actions above.

### 5.3 Special circumstances

An applicant may lodge an internal review application on the ground that *special circumstances* apply to them.

This provision of the Infringements Act is designed to divert those with *special circumstances* from the infringements system at the earliest opportunity. This category was introduced in 2006 as:

*'A ground for seeking a review of a notice (is) that the person has 'special circumstances' that affected the behaviour at the time of the offence. This is a critical change to filter the vulnerable in the community out of the infringements system. People with special circumstances are disproportionately, and often irrevocably, caught up in the system...'*<sup>18</sup>

There are several categories of 'special circumstances' as defined in the legislation – further detail on those categories and the evidence which may be required to rely on each category is set out below. Note that "special circumstances" is practically and conceptually distinct from "exceptional circumstances" which is discussed in the following subsection.

An enforcement agency may make the following decision upon reviewing an internal review based on special circumstances:

- ◆ confirm the decision to serve the infringement notice<sup>19</sup>
- ◆ withdraw the infringement notice and serve an official warning
- ◆ withdraw the infringement notice.

Enforcement agencies should also note the power they have under section 17 of the Act to refer a matter to the Magistrates' Court. This power must be exercised before the penalty is registered with the Director, Fines Victoria<sup>20</sup> (or where it is a non-registerable matter before the expiry of the date for commencing proceedings).

<sup>18</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2187, (Rob Hulls MP, Attorney-General).

<sup>19</sup> Note that an applicant will have alternative payment options available to them to discharge the infringement as outlined in section 5.6.2.

<sup>20</sup> After commencement of that office on 31 December 2017. Until then the current infringements court will operationally absorb this function.

This power does not apply to penalty notices relating to offences listed in section 17(2). The legislation that establishes those offences has separate processes for referral to court.

For penalty notices related to alleged offences by children, agencies are limited to exercising this power to the period before an enforcement order is issued under Schedule 3 of the *Children Youth and Families Act 2005*. Where the penalty notice matter cannot be registered under that Schedule the time limit on exercising the power is before the expiry of the period for commencing proceedings in relation to that matter.

### 5.3.1 Special circumstances categories

The definition of *special circumstances* in the Act is:

**special circumstances**, in relation to a person means—

- a) a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable—
  - i to understand that conduct constitutes an offence; or
  - ii to control conduct that constitutes an offence; or
- b) a serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the *Drugs, Poisons and Controlled Substances Act 1981* where the serious addiction results in the person being unable—
  - i to understand that conduct constitutes an offence; or
  - ii to control conduct which constitutes an offence; or
- c) homelessness determined in accordance with the prescribed criteria (if any) where the homelessness results in the person being unable to control conduct which constitutes an offence;
- d) family violence within the meaning of section 5 of the *Family Violence Protection Act 2008* where the person is a victim of family violence and family violence results in the person being unable to control conduct which constitutes the offence.<sup>21</sup>

These definitions are expanded upon below.

### 5.3.2 Establishing the “results in” nexus

The definition of ‘special circumstances’ in the Act requires a connection or nexus to be made between the special circumstances category and the offending behaviour. The applicant is required to demonstrate, that it is more probable than not, that the special circumstances resulted in their inability to understand that their conduct constitutes an offence, or that they are unable to control that conduct.

The applicant must show that:

- 1) the person suffers from one of the conditions or circumstances that falls within the definition of special circumstances (for example, mental or intellectual disability, disorder, disease or illness, a serious drug/alcohol/volatile substance addiction, homelessness or family violence), and
- 2) the condition or circumstances resulted in the applicant being unable to either understand the conduct constituting the offence or control the conduct that constitutes an offence.<sup>22</sup>

### 5.3.3 Evidence required to support special circumstances

Applications for internal review on the grounds of special circumstances should be accompanied with supporting evidence. Acceptable evidence is evidence that establishes the nexus required for special circumstances. That is, the evidence confirms:

- ◆ the existence of a relevant condition, and
- ◆ connects that condition to the offending conduct.

Evidence that is acceptable includes (but is not limited to) reports, letters, statements, submissions, statutory declarations, police reports, family violence safety notices.

Decision makers should also consider the reasonableness of asking for particular information. For instance, proving homelessness is in effect proving a negative, that is proving you do not have something. This can be difficult to do and this difficulty of proof is a relevant factor in deciding the reasonableness of requiring written evidence.

<sup>21</sup> Section 3 of the *Infringements Act 2006*.

<sup>22</sup> See definition of ‘special circumstances’ in section 3 of the *Infringements Act 2006* and Regulation 7 of the Infringement Regulations 2016.

A range of individuals including professionals and practitioners can provide evidence in circumstances where the application is based on:

- ◆ a mental or intellectual disability disorder, disease or illness: evidence can be obtained from a medical practitioner, psychiatrist, psychiatric nurse or psychologist and can include a letter, statement or report that includes:
  - ◆ the practitioner/counsellor's qualification and relationship with the applicant and the period of engagement
  - ◆ the nature, severity and duration of the applicant's relevant condition and/or symptoms
  - ◆ an assessment on whether the applicant was suffering from the relevant condition at the time the offence was committed, and
  - ◆ whether, in the opinion of the practitioner, it is more likely than not that the applicant's relevant condition resulted in the applicant's inability to understand or control the conduct constituting the offence.
- ◆ a serious addiction to drugs, alcohol or a volatile substance: evidence can be obtained from a medical practitioner, psychiatrist, psychologist, accredited drug treatment agency, drug counsellor, case worker (from a community or social work facility) and can include a letter, statement or a report. Information that may support an application includes the:
  - ◆ practitioner/counsellor's qualification and relationship with the applicant including the period of engagement
  - ◆ the nature, severity and duration of the applicant's relevant condition and/or symptoms
  - ◆ whether the applicant was suffering from the relevant condition at the time the offence was committed, and
  - ◆ whether, in the opinion of the practitioner, it is more likely than not that the applicant's relevant condition resulted in the applicant's inability to understand or control the conduct constituting the offence.
- ◆ homelessness: evidence can be obtained from a medical practitioner, psychiatrist, case worker or social worker, health or community welfare service providers and can include a letter, statement or a report. Information that may support an application includes:
  - ◆ the practitioner/case worker's qualification and relationship and the period of engagement
  - ◆ a summary of the applicant's circumstances
  - ◆ whether the applicant was homeless at the time the offence was committed, and
  - ◆ whether, in the opinion of the practitioner, it is more likely than not that the applicant's circumstances resulted in the applicant's inability to control the conduct constituting the offence.
- ◆ family violence: evidence can be obtained from family violence case workers or social workers, Victoria Police, medical practitioners or health or community welfare service providers and can include a statement, report, letter, family violence safety notice or a family violence intervention order. Information that may support an application includes:
  - ◆ the practitioner/case worker's qualification and relationship and the period of engagement
  - ◆ a summary of the applicant's circumstances
  - ◆ whether the applicant was experiencing family violence at the time the offence was committed, and
  - ◆ whether, in the opinion of the practitioner/case worker, it is more likely than not that the applicant's circumstances involving family violence resulted in the applicant's inability to control the conduct constituting the offence.

### 5.3.4 Currency of information

The currency of evidence should be considered when contemplating evidence of special circumstances. As a general rule, evidence provided by professionals or practitioners should be signed and dated within the last 12 months. However, enforcement agencies should take a case by case approach to this requirement depending on the condition or circumstance being relied upon. For example, where the applicant relies on the ground of special circumstances and cites a lifelong intellectual disability, application of the 12 month rule will likely be unnecessary.

The following requirements for information may be given to professionals and practitioners to assist them in supporting an application for special circumstances:

- ◆ details of the individual providing the information including their name, position and qualifications
- ◆ the relationship the individual has with the applicant (for example, treating physician, case worker, family violence case worker)
- ◆ a submission about the applicant's condition (this may include particulars about the nature of the circumstances/condition), and
- ◆ an assessment of whether the applicant's condition/circumstances resulted in the applicant being unable to either understand or control the conduct constituting the offence.

### 5.3.5 Special circumstances categories

#### Mental disability, disorder, disease or illness

In accordance with section 4 of the *Mental Health Act 2014* and the definition of 'disability' contained in the *Disability Discrimination Act 1992* (Cth) a mental disability, disorder, or disease or illness means a diagnosed medical condition that is characterised by a disturbance of thought, mood, perception or memory. This may include:

- ◆ a total or partial loss of a person's mental functions, or
- ◆ a disorder, disease or illness that affects a person's thought processes, perception of reality, emotions or judgment, or that results in disturbed behaviour.<sup>23</sup>

By way of guidance 'The Guide to Specialist Courts & Support Services'<sup>24</sup> cites common examples of mental illnesses of which include:

- ◆ bipolar disorder
- ◆ serious depression and anxiety
- ◆ psychosis
- ◆ schizophrenia
- ◆ severe mood disorder
- ◆ antisocial personality disorder
- ◆ borderline personality disorder
- ◆ post-traumatic stress disorder, and
- ◆ attention deficit and hyperactivity disorder.

#### Intellectual disability, disorder or disease

In accordance with the definitions of 'disability' and 'intellectual disability' in section 3 of the *Disability Act 2006* and the *Disability Discrimination Act 1992* (Cth), an intellectual disability, disorder or disease means a disorder or malfunction that results in a person learning differently to a person without the disorder or malfunction. This includes:

- ◆ the coexistence of significant sub-average general intellectual functioning and significant deficits in adaptive behaviour, which became manifest before the age of 18 years, or
- ◆ cognitive impairment, including a neurological condition or acquired brain injury, or a combination of both, which:
  - is, or is likely to be, permanent, and
  - causes a substantially reduced capacity in at least one of the areas of self-care, self-management, or mobility.<sup>25</sup>

Common examples of cognitive or intellectual disability cited in 'The Guide to Specialist Courts & Support Services' include the following:

- ◆ autism spectrum disorder

<sup>23</sup> This guideline is adapted from section 4 of the *Mental Health Act 2014* and the definition of 'disability' contained within the *Disability Discrimination Act 1992* (Cth).

<sup>24</sup> Guide to Court Support & Diversion Services, Magistrates' Court of Victoria, March 2011, p 25.

<sup>25</sup> This guideline is taken from the definitions of 'disability' and 'intellectual disability' in section 3 of the *Disability Act 2006* and the *Disability Discrimination Act 1992* (Cth).



- ◆ dementia
- ◆ motor neurone disease
- ◆ Parkinson's disease
- ◆ stroke
- ◆ Huntington's disease, and
- ◆ acquired brain injury.<sup>26</sup>

### Serious addiction to drugs, alcohol or volatile substance

A person is considered to have a serious addiction to drugs, alcohol or volatile substances if that person has a maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring any time in the same 12 month period:

- ◆ tolerance, as defined by either of the following:
  - a need for markedly increased amounts of the substance to achieve intoxication or the desired effect, or
  - markedly diminished effect with continued use of the same amount of the substance.
- ◆ withdrawal, as manifested by either of the following:
  - the characteristic withdrawal syndrome for the substance, or
  - the same (or closely related) substance is taken to relieve or avoid withdrawal symptoms.
- ◆ the substance is often taken in larger amounts or over a longer period than intended.
- ◆ there is a persistent desire or unsuccessful efforts to cut down or control substance use.
- ◆ a great deal of time is spent in activities necessary to obtain the substance, use the substance, or recover from its effects.
- ◆ important social, occupational, or recreational activities are given up or reduced because of substance use.
- ◆ the substance use is continued despite knowledge of having a persistent physical or psychological problem that is likely to have been caused or exacerbated by the substance (for example, current cocaine use despite recognition of cocaine-induced depression or continued drinking despite recognition that an ulcer was made worse by alcohol consumption).<sup>27</sup>

#### **Volatile substance – definition:**

Section 57 of the *Drugs, Poisons and Controlled Substances Act 1981* defines volatile substances as:

- ◆ plastic solvent
- ◆ adhesive cement
- ◆ cleaning agent
- ◆ glue
- ◆ nail polish remover
- ◆ lighter fluid
- ◆ gasoline
- ◆ any other volatile product derived from petroleum, paint thinner, lacquer thinner, aerosol propellant, or anaesthetic gas, and
- ◆ any substance declared volatile by the Governor in Council from time to time.

### Homelessness

The criteria for determining if a person is homeless is prescribed by the Infringements Regulations.

A person is considered homeless if he or she —

<sup>26</sup> Guide to Court Support & Diversion Services, Magistrates' Court of Victoria, March 2011, p 25.

<sup>27</sup> This is based on the definition of substance dependence in American Psychiatric Association, the Diagnostic and Statistical Manual of Mental Disorders: DSM-V. 5<sup>th</sup> edition, Washington D.C: American Psychiatric Association (2013).

- ◆ is living in crisis accommodation, or
- ◆ is living in transitional accommodation, or
- ◆ is living in any other accommodation provided under *the Supported Accommodation Assistance Act 1994* (Cth), or
- ◆ has inadequate access to safe and secure housing as defined in section 4 of the *Supported Accommodation Assistance Act 1994* (Cth)

Common examples where a person may be considered homeless are where a person is:

- ◆ without conventional accommodation, for instance, sleeping in parks or on the street, squatting, living in cars or in improvised dwellings
- ◆ moving from one form of temporary accommodation to another, for example, refuges, emergency hostel accommodation, or temporary space in the homes of family and friends
- ◆ as a result of unsafe living conditions (such as family violence) or inability to afford other housing, the person is living in temporary accommodation
- ◆ living in a caravan park due to their inability to access other accommodation, or
- ◆ living in boarding houses on a medium to long-term basis.<sup>28</sup>

### Family violence

The *Fines Reform and Infringements Acts Amendment Act 2016* expanded the definition of special circumstances to include a person who is a victim of family violence within the meaning of section 5 of the FVPA. This provision will commence by default on 1 July 2017.

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Section 5 of the FVPA defines family violence as:

- 1 For the purposes of the *Family Violence Protection Act 2008* family violence is—
  - a) behaviour by a person towards a family member of that person if that behaviour—
    - i is physically or sexually abusive; or
    - ii is emotionally or psychologically abusive; or
    - iii is economically abusive; or
    - iv is threatening; or
    - v is coercive; or
    - vi in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another
    - viii person; or
  - b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).
- 2 Without limiting subsection (1), **family violence** includes the following behaviour—
  - a) assaulting or causing personal injury to a family member or threatening to do so;
  - b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
  - c) intentionally damaging a family member's property, or threatening to do so;
  - d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;
  - e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.
- 3 To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

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The Royal Commission into Family Violence report<sup>29</sup> tabled in Parliament on 30 March 2016, recognised the difficulties faced by victims within the infringements framework and considered that there are a range of car-related debt issues that arise in circumstances of family violence. In making recommendations 112 and 113, the Royal Commission considered that family violence arose in circumstances where:

- ◆ victims committed infringement offences (including parking and traffic offences) while experiencing family violence (for example, escaping violence), or

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<sup>28</sup> These examples are based on the Chamberlain and McKenzie definition of homelessness, a commonly used definition in Australia.

<sup>29</sup> Royal Commission into Family Violence website, see: <http://www.rcfv.com.au/Report-Recommendations>

- ◆ perpetrators of family violence incurred infringements while driving a vehicle registered in the victim's name and the victim was unable to nominate due to safety fears.

## 5.4 Exceptional circumstances

The exceptional circumstances ground provides decision makers with the discretion to determine whether, taking into account the circumstances in which the offending conduct occurred, the imposition of the penalty is appropriately enforced in light of the exceptional circumstances

Unlike special circumstances, there is no prescribed definition of this ground of review in the Act. It is intended to apply to one-off circumstances, all of which cannot be categorised. This category is designed to include circumstances where the applicant has enough awareness and self-control to be liable for their conduct, but has a good excuse for that conduct.

Some examples include circumstances where the applicant committed the offence due to unforeseen or unpreventable circumstances including medical emergencies, unavoidable or unforeseeable delay and vehicle breakdown. The decision making criterion then is whether imposition of a penalty is fair in the circumstances.

Applications for internal review that are made on the grounds of exceptional circumstances should (where appropriate) be accompanied with supporting evidence. Examples of supporting evidence could include medical evidence from medical practitioners, an invoice from a mechanic or a towing service.

Decision makers can take any matter a reasonable person would consider as relevant information into account.

An enforcement agency may make the following decision upon reviewing an application for internal review based on the grounds of exceptional circumstances:

- ◆ confirm the decision to serve an infringement notice
- ◆ withdraw the infringement notice and service an official warning
- ◆ withdraw the infringement notice
- ◆ withdraw the infringement notice and refer the matter to Court (Magistrates' or Children's Court)
- ◆ in the case of an infringement offence involving additional steps, alter or vary those steps provided the alteration or variation is consistent with the Act or other instrument establishing the offence
- ◆ waive all or any prescribed costs, and/or
- ◆ approve a payment plan

In some cases, it may be appropriate to do a combination of the actions above.

### 5.4.1 Financial hardship

While financial hardship is not a ground for review, enforcement agencies may consider such applications under the exceptional circumstances ground. It is open to enforcement agencies to implement an exceptional circumstances financial hardship policy. Alternatively, where a person is experiencing financial hardship and is unable to pay their outstanding fines, enforcement agencies should assist the applicant, where appropriate, to negotiate a payment plan.

## 5.5 Person Unaware

This new ground of internal review enables an applicant to lodge an internal review application on the ground that they were unaware that the infringement notice has been served. Service must not have been by personal service.

An enforcement agency must not consider an application made on the ground of 'person unaware' if the applicant has not updated their authorised address within 14 days of changing address.<sup>30</sup>

An 'authorised address' as defined in the Infringements Act means:

- ◆ an address that is recorded in relation to a person in a register kept by a public statutory authority (including a Director under the *Corporations Act 2001*), if by law that person is required to notify that public statutory body of any change in that address. An example of a public statutory authority is VicRoads.

<sup>30</sup> Section 22(3) of the *Infringements Act 2006*.

- ◆ in relation to a transport infringement, within the meaning of Part VII of the *Transport (Compliance and Miscellaneous) Act 1983* or a ticket infringement within the meaning of that Part, an address provided by a person to an authorised officer or police officer under section 218B of that Act after that officer has requested the person to state his or her name and address because the authorised officer or police officer believes on reasonable grounds that the person has committed a transport infringement or a ticket infringement, as the case requires.

An application made on the ground of 'person unaware' must:

- ◆ be made within 14 days of the applicant becoming aware of the infringement notice (a person may evidence the date they became aware of the infringement notice by executing a statutory declaration);
- ◆ be made in writing;
- ◆ state the grounds on which the decision should be reviewed;
- ◆ provide the applicant's current address for service; and
- ◆ may only be made once in relation to any one infringement offence in respect of the applicant.

The enforcement agency must suspend all other procedures (including enforcement action) until the agency has completed reviewing the person unaware application and the applicant has been sent advice of the outcome.<sup>31</sup>

Applications for internal review that are made on the grounds of person unaware should (where appropriate) be accompanied with supporting evidence. For example, copies of date-stamped passports, boarding passes, removalist invoices and mail theft reports made to Victoria Police.

Where an enforcement agency grants an internal review application made on the ground of person unaware, the following the applicant may opt to:

- ◆ pay the infringement
- ◆ apply for a payment plan
- ◆ apply to the Director, Fines Victoria for a payment arrangement
- ◆ apply for a review of the decision to serve an infringement offence under section 22(1)(a), (b) or (c) of the Act
- ◆ nominate another person for the infringement offence (in the case of traffic or parking offences)
- ◆ elect to have the matter heard in Court (Magistrates' or Children's Court), or
- ◆ if the person is eligible, an accredited organisation may apply to the Director, Fines Victoria for a Work and Development Permit on behalf of the applicant.<sup>32</sup>

## 5.6 Options for applicants when an application for internal review is refused

### 5.6.1 Contrary to law, mistaken identity and exceptional circumstances

For applications made on the grounds of contrary to law, mistaken identity and exceptional circumstances, the following options are available where a decision maker refuses the application and confirms the infringement:

- ◆ pay the infringement and any prescribed costs by the due date
- ◆ where an infringement offence involves additional steps and the enforcement agency confirms the decision, the applicant must pay the infringement and perform all the additional steps by either the end of the period specified in the infringement notice or within 14 days after the applicant has been sent advice of the outcome of the review.
- ◆ apply for a payment plan
- ◆ apply to the Director, Fines Victoria for a payment arrangement
- ◆ elect to have the matter heard in Court (Magistrates' or Children's Court), or
- ◆ if the person is eligible, an accredited organisation may apply to the Director, Fines Victoria for a Work and Development Permit on behalf of the applicant.<sup>33</sup>

<sup>31</sup> Section 24(1A) of the *Infringements Act 2006*.

<sup>32</sup> Further detail on Work and Development Permit options and eligibility are available on the Fines Victoria website.

## 5.6.2 Special circumstances

For applications made on the ground of special circumstances, the following options are available where a decision maker refuses the application and confirms the infringement:

- ◆ pay the infringement
- ◆ apply for a payment plan
- ◆ apply to the Director, Fines Victoria for a payment arrangement
- ◆ elect to have the matter heard in Court (Magistrates' or Children's Court), or
- ◆ if the person is eligible, an accredited organisation may apply to the Director, Fines Victoria for a Work and Development Permit on behalf of the applicant.<sup>34</sup>

## 5.6.3 Person unaware

If a decision to refuse an internal review on the ground of person unaware is made, the applicant must pay the penalty and prescribed costs (within 14 days from receiving the refusal notice).<sup>35</sup> The applicant will have alternative payment options available to them as are available for other grounds of review (that is, payment plans or arrangements, court referral or work and development permits (if eligible)).

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<sup>33</sup> Further detail on Work and Development Permit options and eligibility are available on the Fines Victoria website.

<sup>34</sup> Further detail on Work and Development Permit options and eligibility are available on the Fines Victoria website.

<sup>35</sup> Section 25(4) and (5) of the *Infringements Act 2006*.

## Appendix 1      Sample form: Internal review application

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# Application for Internal Review (Infringements Only)

- Please complete all sections below to have your infringement reviewed. Please complete the white sections, print clearly in ink using BLOCK letters, cross where applicable and then sign below.
- Only one Internal Review may be submitted per Infringement Notice, unless applying when an internal review has been granted on the ground of Person Unaware of Fine.
- Internal reviews are not permitted for an alleged drink-driving, driving under the influence of drugs, or excessive speed infringements that result in a loss of licence.

## Applicant details

Who is applying (confirm who is making the application):

<input checked="" type="checkbox"/> <b>Person named on the infringement notice</b>	<input checked="" type="checkbox"/> <b>Other person with consent</b> <small>(You must also complete the 'Consent for Internal Review' on reverse side of this page)</small>	<input checked="" type="checkbox"/> <b>Authorised company representative</b>
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## Your personal details

Surname / Company Name															
First name / Company ACN															
Address of person / Company															
												State		Postcode	
Email															

## Infringement details

Your obligation number								Infringement notice number							
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## Grounds for application

Descriptions are located on the reverse side of this page.

<input checked="" type="checkbox"/> <b>Exceptional Circumstances</b> <small>See description 1</small>	<input checked="" type="checkbox"/> <b>Contrary to Law</b> <small>See description 2</small>	<input checked="" type="checkbox"/> <b>Special Circumstances</b> <small>See description 3</small>	<input checked="" type="checkbox"/> <b>Mistaken Identity</b> <small>See description 4</small>
<input checked="" type="checkbox"/> <b>Person Unaware of Fine</b> <small>See description 5</small>	<input checked="" type="checkbox"/> <b>Penalty Reminder Notice/ Fee Waiver Request</b> <small>See description 5</small>		

I have attached an explanation of my circumstances and ground(s) in support of my application

## Declaration details

I understand that this is the only Internal Review for this Infringement that I am able to submit pursuant to s.22 (2) of the Infringements Act 2006.

I declare that the information that I have supplied in this form, and any attachments to this form, are true and correct to the best of my knowledge.

I understand that by making a false or misleading statement in support of this claim, I may be prosecuted.

Signature of Applicant

Date  

D	D	/	M	M	/	Y	Y	Y	Y
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## Description of relevant grounds for internal review appeal

### 1 Exceptional Circumstances

Please provide details of the exceptional circumstances (where you have committed the offence due to unforeseen or unpreventable circumstances, e.g. medical emergencies).

### 2 Contrary to Law

Please provide the reasons why you consider the decision to issue you with an Infringement was unlawful (e.g. the Infringement was not valid).

### 3 Special Circumstances

Special circumstances includes:

- a mental or intellectual disability, disorder, disease or illness
- a serious addiction to drugs, alcohol or volatile substance
- homelessness, or
- family violence within the meaning of the Family Violence Protection Act 2008.

You must provide evidence (e.g. letter, report, statement) from one of the following parties to support you application.

- a case worker, case manager or social worker
- a general practitioner, psychiatrist or psychologist, or
- an accredited drug treatment agency.

Evidence (e.g. letter, statement or a report) from practitioner or case work should include the following information:

- the practitioner/case worker's qualification and relationship with you, including the period of engagement
- the nature, severity and duration of your condition or your circumstances:
  - a) whether you were suffering from the relevant condition or circumstances at the time the offence was committed, and
  - b) whether, in the opinion of the practitioner/case worker, it is more likely than not that your condition/ circumstances resulted in your inability to understand or control the conduct constituting the offence.

The practitioner or agency report must show that because of your condition/situation you could not understand or control constituting the offence.

### 4 Mistaken Identity

Please provide an explanation of why you rely on the ground of mistake of identity (including evidence e.g. copy of your driver's licence, in support).

### 5 Person Unaware of Fine

An application made on the ground of 'person unaware' must:

- be made within 14 days of you becoming aware of the infringement notice (You may evidence the date that you became aware of the infringement notice by executing a statutory declaration)
- state the grounds on which the decision should be reviewed, and
- provide your current address for service.

### 6 Penalty Reminder Notice Fee Waiver Request

Please provide the reason(s) why you believe the Penalty Reminder Notice Fee should be waived.

Note: The original penalty amount is still applicable under this request.

#### Applicants please note:

If you do not provide sufficient information, the enforcement agency may request further information. If you do not provide this further information within 28 days of the date of request, the enforcement agency may determine the application without further information. Internal reviews are not permitted for an alleged drink-driving, driving under the influence of drugs, or excessive speed infringements that result in a loss of licence.

## Consent for internal review

To be completed if another person is acting on your behalf.

I (person named in the infringement) .....,  
of (address of person named on the infringement) ....., give my  
consent to (name of person making the application on your behalf) ....., to apply  
for an Internal Review on my behalf to Infringement Number .....

Signature of person named on the infringement

Date

D	D	/	M	M	/	Y	Y	Y	Y
---	---	---	---	---	---	---	---	---	---

Signature of other person with consent

Date

D	D	/	M	M	/	Y	Y	Y	Y
---	---	---	---	---	---	---	---	---	---