



**Advocacy Centre
for the Elderly**

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April 27, 2015

BY E-MAIL

POA-AMP Consultation
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, Ontario
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Dear Sir/Madam:

Re: Administrative Monetary Penalty System for Provincial Offences

We are writing this letter as a response to the consultation "Exploring an Online Administrative Monetary Penalty System for Infractions of Provincial Statutes and Municipal By-Laws in Ontario" conducted by the Ministry of the Attorney General. We thank you for the opportunity to provide our submissions in this regard.

About the Advocacy Centre for the Elderly

The Advocacy Centre for the Elderly (ACE) is a specialty community legal clinic funded by Legal Aid Ontario which was established to provide a range of legal services to low income older adults in Ontario. The legal services include individual and group client advice and representation, public legal education, community development, and law reform activities. ACE has been operating since 1984 in Toronto, and is the first and oldest legal clinic in Canada with expertise in legal issues of the older population.

The individual client services are in areas of law that have a particular impact on older adults. These include, but are not limited to: regulatory issues, capacity, substitute decision-making and health care consent; end-of-life care; supportive housing and retirement home tenancies; long-term care homes; patients' rights in hospitals; and elder abuse. ACE also publishes widely on these issues and has been consulted by many levels of government as well as private sector entities.

Given ACE's experience over the years of working on legal and policy issues that impact older adults in Ontario and across Canada, we trust that our submissions concerning the Online Administrative Monetary Penalty (AMP) system will be of assistance.

Online AMP System

We have reviewed the Online AMP system consultation document dated March 3, 2015. The document itself does not provide specifics regarding the system proposed. Nevertheless, we have endeavoured to respond to some of the questions outlined in the document as they relate to older adults.

The proposed AMP system would entail a penalty being imposed once an infraction is detected rather than once a party has pled guilty to an offence or the court has convicted a defendant.¹ The regulator-imposed AMP would only be subject to rights of review made available under the AMP scheme.² For some offences, the only review would be an application for judicial review to the Court. The proposed AMP system would no longer allow justices of the peace at the Ontario Court of Justice to preside over trials of the selected offences, but intimates that there would be some process of review of monetary penalties. This review process has not yet been established, but could involve any number of mechanisms, from a written application to an in-person hearing in front of non-judicial hearing officers.

Our submissions in relation to the Online AMP system will primarily address the following:

1. The offences to which monetary penalties would apply;
2. The accessibility of an online AMP system; and,
3. The constitutionality/procedural fairness of an online AMP system.

1. Types of offences to which the AMP system would apply

There are myriad provincial statutes, regulations and municipal by-laws which designate offences to be prosecuted under the *Provincial Offences Act*, and touch a diverse range of subject matters. Some of the offences which impact older adults include:

- *Highway Traffic Act*;
- *Long Term Care Homes Act*;
- *Retirement Homes Act*;
- *Consumer Protection Act*;
- *Trespass to Property Act*;
- *Housing Services Act*;
- *Compulsory Automobile Insurance Act*;
- Municipal by-laws which relate to parking;
- Municipal by-laws which relate to animal control;

¹ Law Commission of Ontario, *The Modernization of the Provincial Offences Act*, available at: <http://www.lco-cdo.org/en/provincial-offences-interim-report>, at p. 3

² *Ibid.*, p. 50

- *Fire Protection and Prevention Act*,
- *Smoke-Free Ontario Act*, and,
- *Family Law Act*.

Some of the offences presently carry a possible term of imprisonment as well as significant fines.

The consultation document itself recognizes that not all matters would be suitable for an AMP system, including offences where the penalty includes imprisonment. As indicated by the Law Commission of Ontario in their interim report on the *Provincial Offences Act*, including these offences may fall afoul of the legal rights provided in the *Canadian Charter of Rights and Freedoms*.³ All offences in the referenced statutes, regulations or municipal by-laws must be examined to determine if they are suitable in some circumstances for merely incurring an administrative monetary penalty. If there is any potential for penal consequences, the case could be diverted to the Ontario Court of Justice.

ACE recommends that offences which have significant monetary penalties either not be subject to the AMP system or that the system contain a process for the person incurring the penalty to make submissions on the undue hardship of the penalty. If the penalty is objectively significant, it may be considered punitive and the *Canadian Charter of Rights and Freedoms* may be engaged.

Although lower monetary penalties may not be considered to have penal consequences, many of our clients are on fixed incomes and a monetary penalty would have a significant impact on their ability to pay for basic necessities such as food or shelter. Without such a mechanism for review on the basis of hardship, a monetary penalty would have disproportionate impacts on these persons.

Further, offences which have a defence, such as due diligence, or that require that the defendant have intent or knowledge, may not be suitable for the AMP system. For example, in the *Housing Services Act*, sections 55(1) and 92) create offences where:

No member of a household shall knowingly obtain or receive rent-geared-to-income assistance for which the household is not eligible. 2011, c. 6, Sched. 1, s. 55 (1).

(2) A person shall not knowingly aid or abet a member of a household to obtain or receive rent-geared-to-income assistance for which the household is not eligible. 2011, c. 6, Sched. 1, s. 55 (2).

These types of offences require that the person have knowledge that a person is not eligible for the services. For these types of offences, it would not be appropriate to use an

³ *Ibid.*

AMP system at all. For strict liability offences, a review mechanism must exist where defences of due diligence can be raised.

ACE recommends that the Ministry undertake a review of the offences subject to the *Provincial Offences Act* in order to determine where an AMP system may be appropriate. ACE further recommends that the public be permitted to make comments once the review of these offences has been completed and the Ministry has made recommendations regarding which offences would be subject to the AMP system.

2. Accessibility of an online AMP system

It is essential that the system by which even minor provincial offences are addressed is accessible, given the fact that this system, which pervades almost every sphere of life, is the face of justice for most Ontarians. Any efficiency gained by creating an AMP system must be balanced against access to justice considerations.

While an online system may be beneficial for some to obtain supporting information, and guidance regarding the AMP system through instructional videos or other media would be useful for self-represented persons, it is key that this information also be available offline. While many seniors are technologically savvy, ACE submits that a large proportion still rely on print materials. Certainly, this is the case for many seniors living in congregate settings such as retirement homes and long-term care homes. Many of the residents of retirement homes and long-term care homes do not readily have access to a telephone (if at all) let alone a computer with an Internet connection. Information about the AMP system should be accessible through a phone system or in the form of physical information sheets that can be obtained by visiting the regulator's office or a courthouse.

Any review mechanisms decided upon in the AMP system should not merely be online. One of the suggestions outlined in the consultation document included online mediation. Owing to the issues related to internet access identified above, it is vital that other methods of participation be available for both defendants and possible witnesses, should the AMP system include a review process.

Further, where the offence allows for a defence to be raised, any review mechanism raised should clearly indicate which defences can be used. This information should be provided to both the adjudicator and the person incurring the penalty. As most of the defendants are self-represented, such procedural guidelines would be very useful and ensure accessibility.

Lastly, any penalties imposed under the AMP systems should allow for accessible methods of payment, including payment through a bank, by cheque or cash in person at a central location.

3. Constitutionality/Procedural Fairness of an online AMP system

The Law Commission of Ontario has written extensively on the constitutionality of an AMP system in their interim report. As indicated above, the penalties themselves cannot be punitive. Owing to the range of possible issues raised by Part I offences under the *Provincial Offences Act*, the Law Commission of Ontario recommended that these offences be reviewed to determine which, if any, would best be addressed through the AMP system.⁴ We support this recommendation.

The nature of each offence will determine the constitutionality of the AMP system as well as the necessary content of the duty of fairness to which a person incurring the monetary penalty will be entitled. For example, certain offences will necessitate certain pre-hearing rights, such as the notice of the penalty, disclosure or discovery. Other offences will also require specific hearing rights, such as the right to counsel, the right to make oral or written submissions or the right to written reasons for the decision. This may render the offences as inappropriate for the AMP system or they might dictate the nature of the review mechanism that would be necessary for an AMP system to fulfil their duty of fairness. Nevertheless, any review mechanism must be independent from the decision-maker under the AMP system itself to be considered procedurally fair.

RECOMMENDATIONS:

The reform of the administration of justice under the *Provincial Offences Act* has the potential to make a tremendous impact on the lives of older adults. As such, ACE makes the following recommendations:

- Offences which have significant monetary penalties either should not be under the AMP system or the AMP system should contain a process for the person incurring the penalty to make submissions on the undue hardship of the penalty;
- Strict liability offences under the AMP system should permit defences of due diligence to be raised at a hearing stage within a review mechanism;
- Offences under the *Provincial Offences Act* should be reviewed to determine whether the AMP system is appropriate from a procedural fairness/constitutional perspective; and indicate whether diversion to the Ontario Court of Justice is suitable in cases where penal consequences are possible;
- Once these offences are reviewed, the public should be provided an opportunity to make submissions;
- Offline systems should be established to provide guidance to persons trying to navigate the AMP process;
- Offline systems to participate in the AMP system should be established;
- Clear guidance regarding possible defences to be raised during the review process should be provided to adjudicators and persons incurring the administrative penalty; and,

⁴ *Ibid.*, pg. 3.

- Offline systems to pay the penalty should be established.

We thank you for the opportunity to respond to the consultation document and are available to discuss this letter if requested.

Yours very truly,

Advocacy Centre for the Elderly

Per:

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