

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ms Essie Dempster (on behalf of Ms A)
Agency	Department of Planning, Transport and Infrastructure (the department)
Ombudsman reference	2015/02653
Date complaint received	10 April 2015
Issues	<ol style="list-style-type: none">1. Whether the department acted in a manner that was wrong by issuing an expiation notice2. Whether the department acted in a manner that was wrong by refusing to withdraw the expiation notice

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

The complainant is a counsellor at Thebarton Senior College (**the college**). She lodged the complaint with my Office on behalf of Ms A, who is a student in the new arrivals programme at the college. Ms A speaks limited English.

Section 13(3) of the Ombudsman Act provides that I must not investigate any administrative act where the complainant has an alternate avenue of appeal, unless I am of the opinion that it is not reasonable, in the circumstances of the case, to expect that the complainant should resort or should have resorted to that appeal.

Ms A has an alternate avenue of appeal, being election for prosecution. Ms A is from Burundi in East Africa. She has limited English, a lack of financial means and, because of her cultural background, is fearful of authority. As such, I consider that it is not reasonable, in the circumstances of the case, to expect that she should elect for prosecution and it is reasonable for me to investigate the complaint.

By letter dated 10 June 2015, I advised the department's principal officer that I had decided to undertake a full investigation of the complaint, in accordance with section 18(1a) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the department
- seeking further information from the department

- considering the *Expiation of Offences Act 1996*
- considering the *Passenger Transport Act 1994*
- considering the *Passenger Transport Regulations 2009*
- providing the department and the complainant with my provisional report for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

The complainant advised my Office that she had no comments to make in response to my provisional report.

The department responded to my provisional report by way of a letter from Ms Julienne TePohe, Chief Corporate Officer, dated 19 November 2015. A summary of her comments are as follows:

- the department did not act in a manner that was wrong by issuing and refusing to withdraw the expiation notice
- it was reasonable for Ms A to elect to be prosecuted
- there are inconsistencies in Ms A version of events
- my report relies heavily on the finding that Ms A may not have understood what the officer told her and that she was required to purchase a ticket due to the language barrier
- I have not given sufficient weight to the reporting officer's evidence
- the reporting officer did not report a language barrier and the report reveals that Ms A had a conversation which suggests she did understand what the officer was saying
- I erred in stating, at paragraph 46, that the details of the incident were recorded by the inspector in the Transit Incident Report two days after the incident, when in fact they were recorded two hours and twenty minutes later. I agree that this was an error, and have amended my report in response
- my findings rely on an erroneous interpretation of "compelling humanitarian reasons"
- the definition of "humanitarian" requires "having regard to the interests of other people... rather than circumstances personal to the alleged offender"
- the defence contained in regulation 100(6) of the *Passenger Transport Regulation 2009* would not be available on these facts as it would be limited to mistakes of fact and would not extend to mistakes of law, such as whether a particular ticket was valid for use
- my finding that the offence is otherwise trifling at common law or within the meaning of section 4(2)(b) and 4(2)(c) of the *Expiation of Offences Act 1996* is erroneous in that

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

regulation 100(3) is a provision that is intended to impose a requirement to buy a ticket at a particular point in time of a journey, namely immediately upon boarding a public passenger vehicle. A normal or typical example of this offence cannot be limited only to a situation where a passenger is attempting to avoid paying for a ticket. There is no element of *mens rea* so the fact that a person did not intend to commit an element of the offence is inconsequential

- she disagrees with my view that the purpose of an expiation notice ought to be for the purpose of bringing a person to account for committing an offence, stating that “the purpose of an expiation notice is informed by the legislative purpose of the Expiation of Offences Act and cannot be informed by a subjective assessment of what the purpose ought to be”
- she submits that alleged discriminatory conduct on the part of the reporting officer is “an extraordinary bold allegation that relies on the finding that there was a language barrier, which is problematic”, and the allegation has not been put to the officer and, as such, is “unfair and “merely provocative”. I have removed my reference to alleged discriminatory conduct on the part of the officer in response to this submission.
- my report relies upon an error of fact, at paragraph 50, in noting that this incident is not an isolated case. There is no evidence to support this claim and referring to the complainant’s letter dated 24 March 2015, that comment was made with reference to alleged vending machine faults
- my report finds that Ms A believed the ticket to be valid and that she subsequently purchased a ticket. There is no evidentiary basis for this finding and it “contradicts the evidence of the complainant in her letter to the department dated 24 March 2015”
- my finding that it was wrong to issue an expiation notice in the circumstances is flawed
- there was no evidence to suggest that the offence was trifling at the time that the expiation notice was issued.
- there was no evidence to suggest that the offence was trifling after all submissions were received
- my finding that the offence was trifling cannot be sustained
- my finding assumes that the inspector issued the expiation notice and imposed a penalty. “This is incorrect as the reporting officer had no involvement in the decision to issue an expiation notice nor did the department have the power to “impose a penalty.” As such, no policies, procedures or guidelines for inspectors are necessary.” I contacted the department for clarification on this point and was advised that the inspector does not issue the expiation notices, but rather, reports the passenger to the prosecutions branch of the department, who issue the expiation notice. I was also advised that the power to impose a penalty is held by the court. The department has only the power to “issue” the expiation notice. I have amended my report to reflect this.
- my decision to commence an investigation did not inform the department’s decision to withdraw the expiation notice. A notice in accordance with section 16(9) of the Act was posted to Ms A on 28 July 2015
- it is erroneous to consider the broad dictionary definition of ‘trifling’ when the common law has defined its meaning
- the finding that “budget constraints” was a relevant consideration in determining whether or not the offence was trifling is based on an assumption
- my report, at paragraph 77, relies on an assumption that Ms A purchased a ticket at some point as she would not have been able to exit the train station at Adelaide on her arrival. The department submits that the evidence “does not support this assumption and overlooks the real possibility that the defendant was permitted to exit the station without a ticket after being reporting [sic] for an alleged offence”
- my finding at paragraph 78 is “erroneous in that the alleged offence was committed before the reporting officer spoke to Ms A. That finding cannot be correctly made based on one aspect of the interaction with the reporting officer after the elements of the offence have been satisfied.”

- my assessment of the expiation process document “does not reflect the intended nature of the document”, being that it is “intended to provide guidance as to the use of internal systems and databases”
- the trifling offences document is used to “assist with the decision making process” and, as such, it is “immaterial that the latest case referred to in that document was handed down in 2010 as the legal principles have remained the same”
- it would be “inappropriate” for the department to have processes, policies and guidelines in place given:
 - the “unique facts and circumstances of every individual case”
 - that “the law is reluctant to approach any case in this fashion as it limits the ability to take into account any unique failure of a case and the fact that not one case will be exactly the same as another
 - that this course would also contradict the prosecution guidelines published by the Director of Public Prosecutions.
- my “findings, opinions and recommendations” are “founded on significant errors”
- she has “grave concerns about the soundness of [my] investigation and the provisional report in light of the errors made and the time of the report”
- my report is unreasonably critical of all aspects of the department’s dealing in this matter without any proper basis
- my proposed recommendations are “superfluous and will not assist the department in dealing with future similar decision” given that unique circumstances of every case
- it “cannot” be open to me to find that it is in the public interest to publish my report. Should I decide to publish my report the department’s submission should form a part of the published report “to provide the public with a balanced assessment”, stating that otherwise the report would “be merely inflammatory.”

I have considered the department’s submission and have amended my provisional report in response as I consider appropriate, noting the following:

- in my view, it is clear that Ms A has difficulties with the English language
- I have no reason to disbelieve Ms A’s version of events that a woman on the train gave her the money to purchase a valid ticket
- whether or not the ticket machine was operating is irrelevant as I remain of the view that it is likely that Ms A purchased a valid ticket at some stage prior to leaving the train station
- I remain of the view that the offence was trifling pursuant to section 4(2)(a) of the Expiation of Offences Act
- I remain of the view that the expiation notice was trifling and, as such, the department was wrong in refusing to withdraw the expiation notice pursuant to section 8A(1) of the Expiation of Offences Act
- I disagree with the department’s submission that policies, procedures or guidelines would not assist the department. In my views, such documents would not “inappropriately pre-determine definite courses of action for future decisions”, as submitted by the department, but would provide guidance to assist staff and to ensure a consistent approach was followed in various circumstances
- I remain of the view that it would be appropriate for the department to have policies, procedures or guidelines for the issuing of expiation notices
- I remain of the view that Passenger Service Assistants (**PSAs**) should be provided a component of training specifically addressing dealing with people from non-English speaking backgrounds
- I remain of the view that the department should implement a policy and procedure for considering withdrawal of expiation notices on the grounds that the offence was trifling
- I consider that it is in the public interest to publish my report.

Background

1. The complaint alleges that the department erred in:
 - issuing an expiation notice to Ms A for failing to purchase a ticket on boarding a passenger vehicle, in breach of Regulation 100(3) of the Passenger Transport Regulations, and
 - failing to withdraw the expiation notice.
2. Ms A is a student in the 'New Arrivals Program' at the college. The New Arrivals Program is a program for newly arrived immigrants which teaches them English language and literacy. It aims to prepare students for living and working in the Australian community and for further study.³
3. The complainant is a counsellor at the college.
4. On 4 February 2015 the complainant gave Ms A a multi-trip ticket (**the multi-trip ticket**). The college has the authority to assist those students who experience financial hardship, and this was such a case.
5. On 19 February 2015 Ms A used the multi-trip ticket given to her by the complainant to catch a train from Gawler to Adelaide.
6. Ms A was approached by an inspector on the train who told her that the ticket she had used was an old ticket which had been superseded and, as such, she would need to purchase a new valid ticket.
7. Neither the complainant, nor Ms A, had known that the multi-trip ticket was invalid.
8. Ms A's account of what happened differs from that of the department.
9. The department has advised my Office that after the inspector told Ms A to purchase a valid ticket, she refused to do so, said "what ever" and sat back down. The department provided my investigation with the Transit Incident Report, which included the following 'Details of Incident':

On 04/02/2015 I, Prescribed Officer [name and number], was performing a routine ticket check of passengers on train number 332W. This was the 1855 scheduled service from Gawler Central to Adelaide. At approximately 1923 I came across a female who appeared to be of African appearance at approximately 175cm.s tall with short straight black coloured hair of slim build with brown coloured eyes who was wearing a black and white coloured top with a brown coloured dress.

I now know this person to be [Ms A].

I said can I check your ticket or MetroCARD please?

[Ms A] then produced a concession All times Multi trip LOCO ticket.

I said these tickets are no longer in use they expired on New Years Eve you can take them into the city and exchange them but you will need to buy a ticket on board the train today.

I observed [Ms A] sit straight back down without making any attempt to go and purchase a ticket. After we had passed through 2 stops I approached [Ms A].

³ <http://www.tsc.sa.edu.au/English-Program-New-Arrivals>

I said I told you to go and purchase a ticket from the machine and you went and sat straight down.

She said you told me to go to the city.

I said no I told you to go and purchase another ticket.

She said what ever.

I said can I see some ID please?

[Ms A] then produced a South Australian Learners Permit and the photo resembled [Ms A].

I said your details will now be passed onto the department of planning, transport and infrastructure's compliance department and they will decide what happens from here.

She said ok.

At this time conversation ceased.

Notes completed at 2140 on the 04/02/2015.

10. Ms A told the complainant, through an interpreter, that her understanding of what occurred was that the inspector told her that she could change the multi-trip ticket in the city office for a valid ticket, so she sat back down, intending to swap the ticket when she arrived in the city.
11. It appears that Ms A did come to understand that she needed to purchase a valid ticket. However, she did not have any money. The complainant has advised that Ms A said that another passenger on the train gave her money for a ticket and she purchased a ticket.
12. Ms A was issued an Expiation Notice for \$220 for 'failing to purchase ticket on boarding passenger vehicle' (**the Expiation Notice**). The due date for the Expiation Notice was 19 March 2015.
13. The complainant contacted the department on behalf of Ms A on a number of occasions seeking withdrawal of the Expiation Notice and advising the department that Ms A 'struggled with the English language and has difficulties understanding instructions'.
14. By letter dated 28 February 2015, the complainant wrote to the department requesting a withdrawal of the Expiation Notice.
15. By letter dated 13 March 2015 the department wrote to Ms A, including:

I refer to the letter received from Ms Essie Dempster on 2 March 2015 in response to the above numbered expiation notice issued to you on 19 February 2015.

I have considered the issues raised in the letter, but have decided that there are insufficient grounds to withdraw the expiation notice.

Regulation 100(3) of the Passenger Transport Regulations 2009 states:
A person who boards a regular passenger service vehicle without a ticket must immediately purchase a ticket.

The onus is on the passenger to ensure that they purchase a ticket immediately upon boarding a passenger service vehicle. It is alleged that you failed to purchase a ticket despite being given a further opportunity to purchase a ticket.

The expiation fee must now be paid by 30 March 2015 to avoid incurring further fees...

16. The complainant, in a letter to the department dated 24 March 2015, stated:

...[Ms A] is a student at Thebarton Senior College studying in the Certificate of English Proficiency. She is a student who struggles with the English Language and has difficulties understanding instructions.

She came to see me extremely distressed regarding the payment of \$220. She is not in a financial situation to pay the fine. I issued [Ms A] this multi trip ticket on 04/02/2015 in good faith assuming that the ticket was still current as there was no indication on the ticket that it had expired. I was with the understanding that there would be no problems with this ticket and gave it to [Ms A] as she has severe financial difficulties.

Further to the telephone conversation on Wednesday 11th March I spoke with Dwayne on the Metro line, where I got new insight to the new rules on multi trip tickets. He said the ticket had expired but could be cashed in for blue tickets.

Furthermore, I met with [Ms A] and a Social Worker who speaks Swahili which is [Ms A's] second language. We managed to gain further information pertaining to the case. She said she showed her multi trip ticket upon which she was informed that they are no longer in use and that she needed to acquire a ticket for that trip. As a consequence, she wanted to get off the train at the next stop but was advised by the driver to go and get the five blue tickets in the city office. When the ticketing inspectors came she was asked to pay for that trip. She was in a situation that she did not have money, a woman from the Sudanese community who was on the train at that time offered her \$2.60 for the trip. When she went to purchase the ticket the ticketing machine in the train was not working. That was the onset of her troubles. This is not an isolated case because there are other people who have undergone similar experiences with buses and trains.

Please consider waiving this fine as [Ms A] had no intention of travelling free of charge. She took the initiative of requesting for tickets from myself, Counsellor at Thebarton Senior College. ...

17. The department's Transit Incident Report Diary on the matter includes the following entry dated 13 March 2015:

Application for review. Ltr (1 page typed) received from Essie Dempster, counsellor at Thebarton Senior College, received 2/3/15.

- Subs:
 - Defn is student at Thebarton Senior College studying certificate in English proficiency;
 - Struggles with English and has difficulty understanding directions;
 - Not in financial position to pay;
 - Dempster issued defn with multi trip ticket on 4/2/15 assuming, in good faith, that the ticket was still current.
- Offence proved - travelled while holding a concession multi trip LOCO ticket, Was told she can take the ticket and swap it but that she would need to buy one on board today. Defn sat back down without making any attempt to buy a ticket and then argued (after being approached again) that she was told to go to the city - when clarified by PSA, the defn said "what ever".
- No evidence of disability that prevented compliance with regulation;
- Not trifling - failed to purchase a ticket on boarding - nothing to suggest the offence was otherwise atypical. Absence of fault does not make the offence trifling - no fault is required to be proved.

18. By letter dated 13 March 2015, the department advised the complainant that there were insufficient grounds to withdraw the Expiation notice.

19. By letter dated 24 March 2015 the complainant contacted the department seeking a review of the department's decision not to withdraw the Expiation Notice.
20. By letter dated 1 April 2015 the department advised the complainant that the review was unsuccessful. The letter included:

I refer to the letter written by Essie DEMPSTER, received on 27 March 2015 in response to the above numbered expiation notice.

I note that Essie Dempster has admitted some responsibility for providing you with the wrong ticket.

I have considered the issues raised in your letter, but have decided that there are insufficient grounds to withdraw the expiation notice.

Regulation 100(3) of the Passenger Transport Regulations 2009 states:

A person who boards a regular passenger service vehicle without a ticket must immediately purchase a ticket.

The onus is on the passenger to ensure that they purchase a ticket immediately upon boarding a passenger service vehicle.

The expiation fee must now be paid by **15 April 2015**. ...

21. On 10 April 2015 the complainant contacted my Office.
22. On 15 April 2015 my Assessment Officer spoke to Mr Dwayne Schmerl, Prosecutions Officer, Public Transport, on the telephone. Mr Schmerl agreed to adjust the due date of the Expiation Notice.
23. On 16 April 2015 my Assessment Officer spoke to Mr Paul Simionato, Unit Manager Prosecutions and Recovery Services, on the telephone. Mr Simionato advised my officer that 'poor English is not an acceptable excuse for not having a valid ticket.' Mr Simionato also advised my Assessment Officer that 'budget constraints are such that the department is reluctant to waive fines.'
24. By email dated 1 May 2015 Mr Simionato advised my Office that the complaint had been reviewed further and he provided my Office with a further response, including the following:

...The allegation is that [Ms A] boarded a Gawler to Adelaide train without a ticket and failed to immediately purchase a ticket, [Ms A] had in her possession an 'all times' multi trip ticket, which was no longer valid. In any event, [Ms A] was given an opportunity to purchase a ticket on board the train by the reporting officer, and was observed to sit back down without making any attempt to purchase a ticket. She was approached again by the reporting officer approximately 2 stops later, and the reporting officer advised her that she was told to buy a ticket but she instead had sat back down. [Ms A] told the reporting officer that he told her to go to the city. The reporting officer clarified his instructions, but [Ms A] replied "what ever".

...

The review was unsuccessful on the ground that the elements of the offence were satisfied - in fact, she was afforded a further opportunity to make good her error, but she essentially refused to do so. There is on our assessment no evidence to support [Ms A's] disability defence. The absence of fault does not make this offence "trifling." The fact that [Ms A] relied on advice or assumption of the counsellor Ms Essie Dempster, does not excuse the offence as trifling either. In our assessment there is nothing atypical in this case as it appears on the reported facts. Arguably in fact, [Ms A's] final response to the reporting officer may contradict any submission that she acted in good faith or misunderstood as a result of her language barrier.

It appears that Ms Dempster may have been responsible for issuing [Ms A] with the expired ticket. Therefore [Ms A's] recourse may be to complain about Ms Dempster's failure to provide accurate advice or reliance on an ignorant assumption that the ticket was still valid.

A response was sent directly to [Ms A] on 13 March 2015. In our response, it was noted that [Ms A] failed to purchase a ticket despite being given a further opportunity to purchase a ticket.

...

Ms Dempster insists that [Ms A] is not liable to pay a penalty for the alleged offence because she issued her with a ticket that she thought was still valid, an apparent language barrier, inability to afford the penalty and that [Ms A] could not purchase a ticket on board because she did not have any money (initially) and then made an attempt to after being given money but could not do so as the TVM was not working.

The submissions are inconsistent with the reported events and in our view have evolved over time as the matter has progressed, which may suggest a degree of invention. The report reveals a refusal to purchase a ticket, rather than a failed attempt due to technical malfunctions (there is no independent evidence to support this). There was no attempt to purchase a ticket made throughout the interactions with the reporting officer. Ms Dempster was responsible for initially issuing [Ms A] with the invalid ticket and did not do so in 'good faith', but as a result of ignorance. The report does not suggest any sufficient language barrier that made [Ms A] unable to understand what was going on. In this matter [Ms A's] personal circumstances do not outweigh the public interest and general deterrence. ...

25. On 7 May 2015 my Assessment Officer emailed Mr Simionato requesting that the Expiation Notice be put on hold while the matter was under consideration by my Office. Mr Simionato confirmed that it would be.
26. By letter dated 10 June 2015, I advised the department that I had decided to conduct a preliminary investigation of the complaint under section 18(1) of the Ombudsman Act, and sought a response and further information from the department.
27. The department provided a response and further information by letter dated 24 July 2015. The letter included:

I acknowledge receipt of your correspondence dated 10 June 2015 in respect to [Ms A] being issued with an expiation notice for travelling without a ticket.

Upon a further review of the submissions provided by your office on behalf of [Ms A], we are of the view that there is no evidence to suggest that the offence of failing to purchase a ticket on boarding a passenger vehicle was detected or reported incorrectly.

I can advise that taking all factors into consideration the expiation notice has been withdrawn. It is worth noting that this was done under a discretionary authority and should any further transgression occur any application for review may not result in a similar outcome.

I trust that this matter has now been resolved to the satisfaction of Ms Dempster and [Ms A].

...

In respect to the overview of the provision of public transport information in languages other than English for customers calling the Adelaide Metro InfoLine, or visiting the Infocentres, there is availability of access to the Interpreter and Translating Centre (ITC). If a customer contacts the InfoLine via the ITC, our Department accepts the costs of this service. In addition there are telephones at the InfoLine counters to contact the ITC. Indications are that the use of these services has been minimal.

In regards to printed products in multiple languages, they are no longer on offer, due to the diverse range of languages, and the short life span of print material. the DPTI website

translates into a wide range of languages, a function that will be applied to the Adelaide Metro website through accessibility upgrades in the near future. In addition, the Adelaide Metro communications team are proactive in providing information to international students through the various schools of English, information guides and sessions to external providers, a service that has been in existence for many years. ...

Relevant law/policies

28. Section 64(1) of the Passenger Transport Act:

- (1) The Governor may make regulations as contemplated by this Act, or as necessary or expedient for the purposes of this Act, including regulations that make provision for or in relation to any of the matters specified in Schedule 1.

29. Schedule 1(51) of the Passenger Transport Act:

- 51 The fixing of expiation fees, not exceeding \$500, for alleged offences against the regulations.

30. Regulation 100(3) of the Passenger Transport Regulations:

A person who boards a regular passenger service vehicle without a ticket must immediately purchase a ticket.

Maximum penalty: \$1 250.
Expiation fee: \$160.

31. Regulation 100(6) of the Passenger Transport Regulations:

In proceedings for an offence against subregulation (3) or (5), it is a defence to prove that the act or omission constituting the offence was attributable to an honest and reasonable mistake on the defendant's part;

32. Section 4(2) of the Expiation of Offences Act:

An alleged offence will, for the purposes of this Act, be regarded as trifling if, and only if, the circumstances surrounding the commission of the offence were such that the alleged offender ought to be excused from being given an expiation notice on the ground that—

- (a) there were compelling humanitarian or safety reasons for the conduct that allegedly constituted the offence; or
- (b) the alleged offender could not, in all the circumstances, reasonably have averted committing the offence; or
- (c) the conduct allegedly constituting the offence was merely a technical, trivial or petty instance of a breach of the relevant enactment.

33. Section 6(1)(ha) of the Expiation of Offences Act provides that an expiation notice should not be issued in respect of a trifling offence.

34. Section 8A(1) of the Expiation of Offences Act provides that a person who has been given an expiation notice issued after the commencement of this section may apply to the issuing authority for a review of the notice on the ground that an offence to which the notice relates is trifling.

35. Section 8A(5) of the Expiation of Offences Act provides that if the issuing authority is satisfied that the offence is trifling, the authority must, by notice in writing given

personally or by post to the alleged offender, withdraw the notice in respect of that offence.

36. Section 16 of the Expiation of Offences Act enables an authority which issues an expiation notice, in limited circumstances and within a specified period from the expiration of the notice, to withdraw the notice. Section 16(1) includes:

16—Withdrawal of expiation notices

- (1) The issuing authority may withdraw an expiation notice with respect to all or any of the alleged offences to which the notice relates if—
- (a) the authority is of the opinion that the alleged offender did not commit the offence, or offences, or that the notice should not have been given with respect to the offence, or offences; or
- ...
- (9) The withdrawal of an expiation notice under this section is effected by giving written notice of the withdrawal, personally or by post, to the person to whom the expiation notice was given.

Whether the department acted in a manner that was wrong by issuing an expiation notice

37. The expiation notice was issued to Ms A for failing to purchase a ticket on boarding a passenger vehicle, in breach of Regulation 100(3) of the Passenger Transport Regulations.
38. Regulation 100(3) is given legal effect in this State through section 64 of the Passenger Transport Act, which permits the Governor to make regulations as contemplated by the Passenger Transport Act, including regulations that make provision for or in relation to any of the matters specified in Schedule 1. Schedule 1 specifies the fixing of expiation fees, not exceeding \$500, for alleged offences against the regulations.
39. Regulation 100(3) of the Passenger Transport Regulations is enforceable through the issue of an expiation notice. The Expiation of Offences Act then operates by virtue of section 5 of that Act, which provides that if an expiation fee is fixed under a regulation, an expiation notice may be given to a person who is alleged to have committed the offence.⁴
40. Section 6(1)(ha) of the Expiation of Offences Act provides that an expiation notice should not be issued in respect of a trifling offence.
41. I have considered whether the offence was trifling, and as a result, whether the department erred in issuing Ms A an expiation notice.
42. In order for an offence to be regarded as trifling, the grounds in either section 4(2)(a), 4(2)(b) or 4(2)(c) of the Expiation of Offences Act must be satisfied [my emphasis]. At the stage of initially issuing the expiation notice, section 4(2)(a) was, in my view, most relevant.
43. In order to satisfy section 4(2)(a) of the Expiation of offences Act, the alleged offence will be regarded as trifling if, and only if, the circumstances surrounding the commission of the offence were such that the alleged offender ought to be excused from being

⁴ *Expiation of Offences Act 1996* section 5(1):

If an expiation fee is fixed by or under an Act, regulation or by-law in respect of an offence, an expiation notice may be given under this Act to a person alleged to have committed the offence and the alleged offence may accordingly be expiated in accordance with this Act.

given the expiation notice on the grounds that there were compelling humanitarian or safety reasons for the conduct that allegedly constituted the offence.

44. For the reasons below, I consider that the circumstances, particularly Ms A's difficulties with the English language, could potentially constitute compelling humanitarian grounds sufficient to consider the offence trifling pursuant to section 4(2)(a) of the Expiation of Offences Act. However, based on the evidence available to me, I do not consider that the inspector had enough information available to him to be able to establish that the offence could have been considered trifling.
45. The Australian Human Rights Commission, in its 2010 review of human rights and social inclusion issues relating to African Australians, stated:

Transport was identified by some community participants as a key issue for successful settlement and integration, particularly for newly-arrived African Australia. Transport contributes to social inclusion by providing access to work, education, healthcare and grocery shopping, as well as allowing people to participate in social, cultural and sporting activities.

However, African Australians faced a range of barriers when using public transport, including:

- lack of knowledge of the system
- a fear of crime and personal safety, especially for women
- experiences of discrimination and racism, from transport operators and other passengers.⁵

46. I requested that the department provide me with the details of training given to staff responsible for detecting offences and issuing expiation notices, including details of any specific training, if any, that addresses dealing with people from non-English speaking backgrounds. The department advised me that PSAs undertake an eight week course before commencing work under supervision. Once they have worked under supervision for ten days they are then able to work unsupervised. The eight week course trains the PSAs in customer service training and tactical communications. The department advised my investigation:

In customer service training and tactical communications training some reference is made to dealing with people from non - English speaking back grounds.⁶

47. In my view, the training in dealing with people from non-English speaking backgrounds is insufficient. I would reasonably presume that inspectors would often have to deal with people from non-English speaking backgrounds during the course of their work. I also note that the complainant, in her letter to the department said that 'this is not an isolated case because there are other people who have undergone similar experiences with buses and trains'.
48. I am not suggesting that a lack of competency in the English language should lead to people avoiding penalties for committing offences. However, in my view, some understanding must be exercised and inspectors should adopt reasonable and appropriate measures in situations where there is an obvious language barrier and the person is attempting to do the right thing.
49. I also note with concern that it appears that the inspector did not consider that Ms A may not have understood what he had told her, or that he sufficiently attempted to assist her to understand prior to issuing her with the expiation notice. According to the Transit Incident Report, after the inspector told Ms A that her ticket was not valid he

⁵ Australian Human Rights Commission, 'In Our Own Words: African Australians: A review of human rights and social inclusion issues', 2010, accessed at

https://www.humanrights.gov.au/sites/default/files/content/africanaus/review/in_our_own_words.pdf, page 37.

⁶ Letter from the department to the Ombudsman dated 15 September 2015.

watched her sit back down, without attempting to assist her to understand that she was required to purchase a ticket. When the inspector approached Ms A two stops later he told her that she had been told that she needed to purchase a ticket. It is alleged that she then said “whatever” before he issued her reported her details to the department in order for it to issue the expiation notice. In my view, it appears that the inspector did not sufficiently attempt to assist Ms A to understand that she needed to purchase a valid ticket, both when he first spoke to her, and when he approached her again two stops later.

50. Further, in my opinion, it is highly unlikely that Ms A said “whatever” to the inspector on the train as reported. Even if I am wrong, and she did say “whatever”, it may have been as a result of her lack of understanding of English. I consider that it should have been evident to the inspector that there was a language barrier.
51. As such, whilst I consider that Ms A’s difficulties with the English language could constitute compelling humanitarian grounds sufficient to consider the offence trifling pursuant to section 4(2)(a) of the Expiation of Offences Act, I accept that the inspector believed that Ms A was deliberately trying to avoid purchasing a valid ticket. Given this, I do not consider that the inspector was wrong to pass Ms A’s details to the department, or that the department was wrong to issue an expiation notice, in the circumstances.
52. I note that there appears to be no policy, procedure or guidelines for inspectors to follow when reporting passengers for the purposes of them being issued expiation notices. Specifically, there appears to be nothing to guide inspectors as to when they should report the passenger to the department for the issuing of an expiation notice or when they should issue a warning instead. Whilst this information is no doubt covered in the training of new inspectors, in my view, there should be an ongoing, regularly reviewed and updated policy document to provide guidance to inspectors and to ensure consistency.

Opinion

In light of the above, I consider that, in issuing the expiation notice, the department did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the department acted in a manner that was wrong by refusing to withdraw an expiation notice

53. Pursuant to section 8A(1) of the Expiation of Offences Act, a person who has been issued an expiation notice may apply to the department for a review of the notice on the grounds that the offence to which the notice relates is trifling.
54. By letter dated 28 February 2015, the complainant wrote to the department requesting a withdrawal of the Expiation Notice.
55. By letter dated 13 March 2015, the department wrote to Ms A, advising that there ‘are insufficient grounds to withdraw the expiation notice’.
56. By letter dated 24 March 2015, the complainant contacted the department seeking a review of the department’s decision not to withdraw the Expiation Notice.
57. By letter dated 1 April 2015, the department advised the complainant that it had ‘considered the issues raised’ in her letter, but had ‘decided that there are insufficient grounds to withdraw the expiation notice.’

-
58. I note that the department has now withdrawn the expiation notice, stating ‘this was done under a discretionary authority’. However, the department only withdrew the notice after the commencement of my investigation of the matter. As such, I have considered whether the department erred in failing to withdraw the expiation notice in response to the earlier requests from the complainant on behalf of Ms A.
59. Pursuant to section 8A(5) of the Expiation of Offences Act, if the department is satisfied that the offence was trifling it must withdraw the notice in respect of that offence.
60. Whilst I am of the view that the department was not wrong in issuing the expiation notice (as the inspector was of the belief that Ms A deliberately failed to purchase a valid ticket), when the department reviewed the expiation notice it was required to give proper consideration to whether there were sufficient grounds to establish that the offence was trifling.
61. When the inspector reported Ms A to the department for the issuing of the expiation notice to Ms A, he would not have been able to establish the relevant facts to have been able to satisfy the grounds in section 4(2)(b) and 4(2)(c) of the Expiation of Offences Act due to Ms A’s language difficulties.
62. However, when the department conducted its review of the expiation notice in accordance with section 8A(1) of the Expiation of Offences Act, I consider that it had been provided with sufficient information from the complainant to enable it to properly consider whether the common law grounds and the grounds in sections 4(2)(b) and 4(2)(c) could also be satisfied in order to determine if the offence was trifling. In my view, the department was obliged to consider these grounds in order to satisfy the statutory requirement that it conduct a review of the expiation notice on the grounds that the offence to which the notice related may have been trifling.
63. The dictionary definition of ‘trifling’ is ‘unimportant or trivial.’⁷
64. The Supreme Court of South Australia considered ‘trifling’ in the case of *Roberts v Police*.⁸ The case relates to an application applying to have an offence under the *Motor Vehicles Act 1959* reviewed pursuant to section 8A of the Expiation of Offences Act. Justice Stanley considered whether the offence was trifling at [17]:
17. The conclusion that an offence is trifling is a finding of fact. It is a characterisation of a particular state of affairs, not an exercise of discretion. The question on appeal is whether that conclusion was wrong, having regard to all the circumstances of the offence.^[5] The notion of trifling has been considered by this Court on a number of occasions. In *Siviour-Ashman v Police*,^[6] Doyle CJ reviewed the authorities dealing with the topic. The relevant principles which can be distilled from that analysis are as follows:
- the word “trifling” means of slight importance, insignificant or of little moment;
 - the fact that an offence is serious does not, of itself, preclude the finding that a particular instance of it is trifling;
 - a normal or typical example of the offence ordinarily will not be trifling;
 - ordinarily there should be a soundly based belief in the lawfulness of the impugned conduct;
 - the court must pay regard to the purpose behind the obligation to observe the statutory requirement in question;
 - a deliberate breach will rarely be described as trifling save in cases where humanitarian considerations or considerations of urgency arise.

⁷ <http://www.oxforddictionaries.com/definition/english/trifling>

⁸ [2013] SASC 190.

65. In *Lehmann v Police*⁹ Justice Gray considered how to assess whether an offence is trifling [at 29]:

In assessing whether an offence is trifling, the offending conduct and the circumstances in which it took place, must be viewed as a whole. The reasons why a person acts in a way may be relevant as part of the circumstances of the offending.

66. In my view, a normal or typical example of the offence would be that a passenger was attempting to avoid paying for a ticket. In this case, when Ms A boarded the train she believed that her ticket was valid and that she was acting lawfully. When she was told that the ticket was not valid she wanted to get off the train as she did not have any money to purchase a valid ticket. Given these factors, I consider that the offence was atypical.
67. I find the evidence that Ms A was given money from another passenger on the train to subsequently purchase a ticket credible. I understand that Ms A would not have been able to exit the train station when she arrived in the city had she not purchased a valid ticket.
68. In my view, the department did not properly consider that Ms A may not have understood what the inspector told her. The department accepted as fact that Ms A said “whatever” to the inspector and failed to properly consider whether the offence was trifling.
69. I do not agree with Mr Simionato’s view that the submissions ‘are inconsistent with the reported events’ and ‘have evolved over time as the matter has progressed’ suggests ‘a degree of invention’. In my view, it is more likely that any inconsistencies are the result of the language barrier and the fact that Ms A’s version of events has been relayed to the complainant first by Ms A herself, and then through an interpreter. I am also more inclined to accept the complainant’s view that Ms A’s understanding of the English language is not sufficient for her to have understood what the inspector had told her, rather than Mr Simionato’s view that there was nothing to ‘suggest any sufficient language barrier that made Ms A unable to understand what was going on’.
70. The purpose of an expiation notice ought to be for the purposes of bringing a person to account for committing an offence. As such, I consider that the purpose behind the obligation to observe Regulation 100(3) of the Passenger Transport Regulations, by purchasing a ticket on boarding a passenger vehicle, is to penalise people who are attempting to avoid paying for a ticket.
71. The circumstances relevant to determining whether the offence was trifling are:
- the complainant gave Ms A the multi-trip ticket in good faith
 - Ms A believed she had a valid ticket when she boarded the train
 - Ms A subsequently purchased a valid ticket
 - Ms A did not deliberately breach Regulation 100(3)
 - Ms A had difficulties understanding what the inspector said to her.
72. I express my concern about the comment Mr Simionato made to my Assessment Officer during their phone conversation on 16 April 2015 that ‘budget constraints are such that the department is reluctant to waive fines.’ The budget constraints of the department are not relevant to the determination of whether the offence was trifling.
73. I note that there is contradictory evidence about whether the ticket machine on the train was working or not. The department denies that the ticket machine was faulty. In my view, it is not relevant whether the ticket machine was working or not, given that it is

⁹ [2010] SASC 102.

most likely that Ms A did purchase a ticket at some point or she would not have been able to exit the train station upon her arrival in the city. The department, in its response to my provisional report, submitted that there was a “real possibility” that Ms A was permitted to exit the station without a ticket after being reported for an alleged offence. In my view, it is more likely that Ms A did purchase a ticket at some point with the money given to her by the woman on the train. I do not find it credible that Ms A would invent the scenario that a woman on the train gave her money to purchase another ticket, or that Ms A would have kept the money given to her by the woman and asked to be permitted to leave the station in Adelaide without a ticket.

74. I am satisfied that the alleged offence was trifling pursuant to section 4(2)(b) of the Expiation of Offences Act on the grounds that Ms A could not, in all the circumstances, reasonably have averted committing the offence, given that she did not understand what the inspector had told her.
75. I am also satisfied that the alleged offence was trifling pursuant to section 4(2)(c) of the Expiation of Offences Act on the grounds that the ‘conduct allegedly constituting the offence was merely a technical... instance of a breach of the relevant enactment.’
76. I note that regulation 100(6) of the Passenger Transport Regulations provide that, in proceedings for an offence against regulation 100(3), it is a defence to provide that the act or omission constituting the offence was attributable to an honest and reasonable mistake on the defendant’s part. Given that Ms A and the complainant believed the ticket to be valid, and that I am of the view that Ms A subsequently purchased a ticket, I consider that this defence would apply if Ms A had elected to be prosecuted for the offence.
77. I also note that section 16(9) of the Expiation of Offences Act provides that the withdrawal of an expiation notice under this section is effected by giving written notice of the withdrawal to the person to whom the expiation notice was given. I do not know whether the department has done this.
78. I requested that the department provide me with any policies and/or procedures relating to how it deals with and assesses requests for withdrawals of expiation notices when the offender thinks that the offence was trifling, and with reviews of decisions not to withdraw expiation notices. By letter dated 15 September 2015, the department advised:

Two internal working documents are used when assessing matters that maybe [sic] considered trifling. “The Expiation Process” (Attachment 1) provides an overall guide for Prosecutors when dealing with expiation notices.

Attachment 2 “Trifling” provides a statutory interpretation of trifling as defined in the *Expiation of Offences Act 1996* with supporting case law regarding a Court’s interpretation of trifling.

Both documents are readily accessible to Prosecutors and are available electronically within the unit.

79. I have considered the documents provided by the department. In my view, these documents do not amount to sufficient policy or procedure documents regarding waiving expiation notices and reviewing decisions of failures to withdraw expiation notices.
80. In my view, the first document, titled ‘The Expiation Process’ does not provide enough details to guide staff. It is more of a list of dot points setting out the obligations resulting from the Expiation of Offences Act. It is undated and does not include a review date.

81. The second document titled 'Trifling under the Expiation of Offences Act, Regulations and case law' provides the relevant sections of the Act and excerpts from five cases in which trifling has been considered. The latest case included is from 2010.
82. In my view, the documents are not policy or procedure documents. They lack specificity and do not contain definite courses of action sufficient to guide and determine present and future decisions in a consistent manner.
83. The department ought to have policies, procedures and/or guidelines to provide its employees with information to ensure that there is fairness and consistency in the issuing, management and review of expiation notices.

Opinion

In light of the above, I consider that, by refusing to withdraw the expiation notice, the department acted in a manner that was wrong within the meaning of section 25(1) of the Ombudsman Act.

Recommendations

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the department:

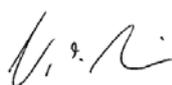
1. ensure that current and new PSAs be provided a component of training specifically addressing dealing with people from non-English speaking backgrounds
2. implement a policy and procedure for issuing expiation notices which includes guidance on the issuing of expiation notices to people from non-English speaking backgrounds
3. implement a policy and procedure for considering withdrawal of expiation notices on the grounds that the offence was trifling.

Final comment

In accordance with section 25(4) of the Ombudsman Act the department should report to the Ombudsman by 1 August 2016 on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

9 May 2016