NEW SOUTH WALES

The Chief Magistrate of the Local Court

26 November 2010

The Hon. J Wood AO QC
NSW Law Reform Commission
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SYDNEY NSW 2001

By email: nsw_lrc@agd.nsw.gov.au

Dear Chairperson

Submission – Penalty Notices

Thank you for the opportunity to provide a submission in respect of the above inquiry. As you will appreciate, a number of issues are addressed in the consultation paper. I am therefore responding in relation to those areas of most direct relevance to the Local Court.

Suitability of offences for treatment as penalty notice offences

Offences involving a fault element

Offences that involve a fault element or those in respect of which a defence might be raised are not necessarily unsuitable for treatment as penalty notice offences, provided that the option of making an election to have a matter dealt with in the court always remains available. Recipients of penalty notices then have the opportunity to contest the allegation before a Court.

Offences that require judgment as to community standards

Offences that require judgment as to community standards including "offensiveness" (such as Criminal Infringement Notices for offensive language or offensive conduct) are not necessarily better suited to being dealt with in the courts. Of cases involving charges of offensive language or offensive conduct that come before the courts, the majority involve a plea of guilty being entered by the defendant, suggesting hindsight, self-assessment and acceptance by defendants of the offensiveness of the language or conduct charged. Matters where pleas of not guilty are entered that proceed to hearing usually have some other issue attached.

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Offences involving violence

I agree with the Commission's preliminary view that offences involving an element of violence are not suitable for issuance of a penalty notice.

An illustration of the unsuitability of offences involving violence for treatment as penalty notice offences can be seen in the frequent association between such offences and apprehended violence orders (AVOs). Depending on the circumstances, an offence involving violence may be a domestic violence offence where the Court will also have before it associated AVO proceedings.

Section 27 of the *Crimes (Domestic and Personal Violence) Act* 2007 requires a police officer to apply for a provisional order, which acts as an application to the court, in situations where the officer believes or suspects a domestic violence offence has recently been committed. In the event that a person pleads guilty to or is found guilty of a domestic violence offence, section 39 of the Act provides that an AVO ***must*** be made.

The seriousness with which domestic violence offences are to be regarded is also reinforced by section 12(2) of that Act, which makes provision for the offence to be marked on the person's criminal record as a domestic violence offence.

If certain offences involving violence committed in a domestic context were to be dealt with via penalty notice rather than domestic violence offence proceedings, the purpose and effect of these provisions may be subverted in some cases.

Foregoing considerations to one side, section 9A (1A)(a) of the *Bail Act* 1978 makes a previous history of violence a relevant consideration in relation to the exception from presumption in favour of bail. The wording of sub-section (2) suggests that offences involving violence ought be dealt with through the traditional charge and hearing process.

Offences where imprisonment is an option if the matter were to be determined by a court

Based on previous approaches taken in relation to the use of the penalty notice procedure, availability of imprisonment as a sentencing option in the event an offence was to be determined in court is not, of itself, a reason why an offence should not be dealt with by way of a penalty notice. Various summary offences are punishable by a fine or sentence of imprisonment or both. As any sentence of imprisonment necessarily involves the Court determining that no other penalty is appropriate,[1] first-time offenders of prior good character where the objective seriousness of the offending is low almost universally receive a sentence other than one of imprisonment, despite imprisonment being available as a penalty for the offence in question.

A pertinent example is the summary offence of possess prohibited drug, which is an offence pursuant to section 10(1) of the *Drug Misuse and Trafficking Act* 1995.

[1] Section 5, *Crimes (Sentencing Procedure) Act* 1999

Section 21 of that Act provides a maximum penalty of 20 penalty units or 2 years imprisonment or both.

Since 1997, the Local Court has typically dealt with about 8,000 to 10,000 individuals per year who are charged with at least one count of possess prohibited drug. The vast majority receive a sentence other than imprisonment, with options such as a fine or bond most frequently used. In addition, a sizeable minority of cases (about 20 percent) are dealt with by way of an order under section 10 or 10A of the *Crimes (Sentencing Procedure) Act* 1999. Where imprisonment is imposed it is invariably associated with a sentence of imprisonment imposed for more serious offending arising out of the same set of circumstances, such as supplying a prohibited drug.

Analysis of sentencing data available from the Judicial Commission of New South Wales' Judicial Research Information System indicates the following breakdown of sentences for 21,934 charges of possess prohibited drug in the period January 2006 to December 2009:

Fine	14,017	63.9%
Section 10 order	4,159	19.0%
Bond	2,422	11.0%
Full-time imprisonment	519	2.4%
Section 10A order	376	1.7%
Suspended sentence	258	1.2%
Community service order	96	0.4%
Periodic detention	20	0.1%
Home detention	2	0.0%
Other	65	0.3%
TOTAL	21,934	100.0%

In view of the substantial majority of offences being dealt with by way of non-custodial alternatives, the summary offence of possess prohibited drug involving a small quantity of drug is one that may be suitable for disposition in an alternate arena to the court system in many, if not most, cases.

An alternative would be to widen the cannabis cautioning scheme that has operated since 2000, which diverts minor offenders from the Local Court by giving the police discretion to issue a formal warning to an adult first offender found in possession of a small quantity of cannabis. In light of the decision of *Adams v R* [2008] HCA 15, there is an inconsistency in the operation of the Adult Cannabis Cautioning Scheme apropos prosecution for possession of small quantities of other prohibited drugs. Another option would be to include possess prohibited drug in the category of offences able to be dealt with by way of Criminal Infringement Notice.

In either case, I suggest this would also require that police retain the discretion to bring charges to be dealt with in court to deal with instances where a more serious penalty may be warranted, such as in the case of individuals who re-offend within a short period of time.

Consequences of a penalty notice

Power of review of demerit points in relation to traffic offences

The Consultation Paper refers to a proposal by the Youth Justice Coalition that the Local Court should have the power to review demerit points. This is not a position with which I agree in the context of vesting the Court with a positive power to exercise an administrative function. I do agree, however, that it is less than palatable for a Court exercising a sentencing discretion pursuant to section 10 of the *Crimes (Sentencing Procedure) Act* 1999 to have part of the effect of its sentence undermined by an administrative arm of government without any reference to the basis upon which the Court exercised its sentencing discretion. If an offender satisfies a Court that the provisions of section 10(3) are met such as to warrant dismissal following a finding of guilt, blanket application of demerit points effectively renders this form of sentence nugatory or unjust in the mind of the offender.

On the other hand, if the Local Court was given the power to review demerit points for particular traffic offences, it can reasonably be expected this will generate a considerable increase in the number of elections to have penalty notices dealt with in court. The Court as presently resourced could not cope with the anticipated increase in demand. Such a caseload impact would need to be supported by a commensurate increase in resources.

Further, the majority of elections are made in circumstances where the licence holder pleads guilty but wishes to provide an explanation of the offence or obtain a lesser penalty. One would expect that a power to review demerit points would increase the attractiveness of the option of making an election, despite individuals perhaps not being aware that the court has the power to impose a penalty that is higher than the penalty notice amount.

As an aside, and in light of the exposure of those making elections to higher court imposed penalties consideration should be given to amending the wording of penalty notices to contain a clear warning to that effect if an election is made to have the matter determined in court a higher fine than the penalty notice amount may be imposed.

Availability to the court of a person's penalty notice history in the event of sentencing for another offence

There are several reasons why a person's penalty notice history should be available to the court when sentencing for another offence.

There is potential for uneven treatment of offenders if a person's penalty notice history is not provided. Where an election is made to have a penalty notice offence dealt with by the court and a finding of guilt is recorded, that offence will appear on the person's criminal record in the event of sentencing for any subsequent offence. By contrast, if the person pays the fine in satisfaction of the penalty notice, the offence will not appear on the person's criminal record. However, like a criminal

record, a person's penalty notice history may be relevant on sentencing to issues such as the person's character or the need for specific deterrence.[2]

In some circumstances, the court may be led into error if a person's penalty notice history is not made available. For instance, there is legislative provision for differential penalties in relation to a number of prescribed penalty notice offences depending on whether the offence is a first or subsequent offence. If the court is not informed as to whether an offence is a first or subsequent offence, an error may be made in the penalty imposed.

Children

Issuance of penalty notices to offenders under the age of 16

In my view, penalty notices should not be issued to children under the age of 16. I have nominated the age of 16 on the basis that it is the age at which children become eligible to apply for a driver's licence. Penalty notices are frequently issued in respect of traffic matters, and it would seem inconsistent that a person could be regarded as appropriately able to bear the responsibilities of a driver but not face the penalties applicable to drivers above the age of 18 years.

Having made this observation I concede that generally speaking children of or under the age of 16 lack an independent capacity to pay penalty notices or fines. As the Commission has noted, when a court determines to impose a fine, including in situations where an election was made to have a penalty notice dealt with in court, section 6 of the *Fines Act* 1996 requires the court to have regard to a person's means to pay a fine when fixing the amount. In the relatively few matters involving a court election by a child, it will therefore often be appropriate for the fine imposed, if any, to be a relatively low amount.

Vulnerable people

Issuance of penalty notices to people with mental illnesses or cognitive impairment

From the Court's perspective, this issue is has a limited practical impact upon the Court's operations, due to the not surprisingly limited number of elections made by individuals with a mental illness or cognitive impairment.

At best there is a limited deterrent benefit in adopting punitive measures against individuals who are already socially disadvantaged. Those who are manifestly disadvantaged or who can produce evidence in the form of social security entitlement relevant to their disadvantage/disability, mental illness or cognitive impairment would be better dealt with by way of a caution than through the issue a penalty notice.

There is no empirical evidence to rebut the possibility that such an approach is likely to be a less effective a deterrent than a penalty notice. However, there is an abundance of anecdotal evidence to support the contention that imposing financial

[2] See *Tsakonas v R* (2009) 197 A Crim R 581; [2009] NSWCCA 258

burdens on those least able to understand or meet them can result in further disadvantage and further consequential involvement with the criminal justice process. License and registration suspension for non payment of penalty notices followed by prosecutions for driving whilst suspended, unregistered, uninsured are cases in point where had a different methodology been applied at the entry point of the first penalty notice the litany of subsequent outcomes may have been avoided.

Earlier this year, I wrote to the Commission in relation to its consultation on mental health in the criminal justice system, in which I made the observation that every year the Local Court deals with many individuals with a mental illness or cognitive impairment who are likely to benefit more from diversion into the health system for treatment than involvement in the criminal justice system. I also suggested that greater use could be made of police discretion in using the provisions of the *Mental Health Act* rather than bringing a charge against an individual with an apparent mental illness or cognitive impairment. Such an observation might similarly be made in respect of the issuance of penalty notices.

Criminal Infringement Notices

Possible net-widening effect

To the Court's knowledge, there does not appear to be any evidence that Criminal Infringement Notices (CINs) have had a net-widening effect.

Very few elections are being made to have CINs dealt with in court. Anecdotally, magistrates report having never had or having only had a few such matters come before them since the statewide rollout of the CIN scheme. These observations would appear to accord with the low level of elections reported by the Ombudsman in his 2005 review of the CIN trial: during the trial period, only 41, or 2.6 percent, of 1,598 CINs were the subject of a court election.[3]

There may be many reasons for a low rate of elections, but one contributing factor may be a level of self-acceptance by recipients as to the appropriateness of the issuance of the CIN. If so, this would tend to support the view that net widening is not a matter of concern.

Deterrent impact of CINs

In my view, CINs are unlikely to meet the purpose of general deterrence. It is also possible to conclude that they may have the effect of reducing the perceived seriousness of offending behaviour in the mind of an offender.

In the Court's experience, many instances of offences that are now covered by the CIN scheme are alcohol related or due to entrenched attitudes, and may be committed spontaneously rather than with any thought or planning. Offensive language and offensive conduct are pertinent examples of offences where this is often the case. In such instances, the fact that a person may be required to answer a

[3] NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police., April 2005*, p 38

charge before a court of itself may have a specific deterrent effect, albeit one of limited degree.

Use of CINs in respect of indictable offences under the *Crimes Act* 1900 is not supported. There is a limit in the extent to which the role of the Courts may be reduced through administrative means. Diminishing the extent to which individual and public perceptions regarding the seriousness of offending conduct[4] operate in a society as pre-offending deterrence simply for the sake of administrative convenience or cost is a potentially dangerous path to tread. In my view, CINs should only be available in respect of summary offences.

While not raised in the Consultation, I also wish to briefly raise two other issues in relation to CINs.

Effect upon court bonds

One difficulty that may arise in circumstances where a CIN is issued for conduct that may amount to a breach of a bond is that as the payment of a fine under a CIN has the effect that the person is not liable to any further proceedings for the offence,[5] the Court may not be notified of, and will not then deal with, the breach of bond.

The issuance of a CIN in such circumstances could therefore have the effect of enabling an offender to escape the often-serious consequences of a breach of bond. Upon such a breach, an offender can be brought back before the court, the bond revoked, and the offender re-sentenced for the original offence. For a breach of a bond entered into upon the suspension of a sentence of imprisonment pursuant to section 12 of the *Crimes (Sentencing Procedure) Act* 1999, an offender can typically expect the bond to be revoked and to be required to serve the sentence of imprisonment.

Due to the very nature of the issue, it is not possible to assess the extent to which conduct that may amount to a breach of bond has been dealt with via a CIN and thus escaped notice of the Court.

However, to ensure that this problem is not occurring, subject to the availability of appropriate technology in the hands of law enforcement officers, use of CINs should be limited to first-time offenders.

Victims' compensation

Another consequence of dealing with a criminal offence by way of a CIN rather than court proceedings is that provisions in the *Victims Support and Rehabilitation Act* 1996 will not apply.

When an offender is convicted of an offence in court, the court may then, on the application of the victim or of its own motion, direct the offender to pay a specified

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[4] See further the submissions of my predecessor as Chief Magistrate, Judge Price, set out in the Ombudsman's 2005 review, above note 3, at p 77

[5] *Criminal Procedure Act* 1986, s 338

sum to the victim as compensation for injury or loss.[6] In the context of offences such as shoplifting, goods in custody or unauthorised entry of vehicle or boat, it is easy to foresee situations in which there is an identifiable victim who may have a legitimate claim for compensation pursuant to the *Victims Support and Rehabilitation Act* in relation to damage to property. However, this option will not be open to a victim where the offence is dealt with by way of CIN.

I therefore suggest that CINs should not be used in situations where it is apparent that a victim may have a legitimate claim for compensation, as this may at best hamper or at worst prevent an award of compensation.

Similarly, offenders dealt with by CIN are not required to pay the Victims Compensation Levy. The levy only applies in respect of offences where imprisonment is a sentencing option that are dealt with by a specified court, including the Local Court.[7] A person convicted of an applicable offence is liable to pay the levy, which operates in addition to any pecuniary penalty (such as a fine) or specific order for compensation imposed in respect of the offence.[8] Summary conviction in the Local Court currently attracts a levy of $64.

An option to consider may be to amend the *Victims Support and Rehabilitation Act* to require the payment of a Victims Compensation Levy by the offender.

Thank you for the opportunity to contribute to this inquiry. Should you have any questions in respect of the enclosed submission or wish to discuss any details with me further, please do not hesitate to contact me.

Yours sincerely,

Judge Graeme Henson
Chief Magistrate

[6] Part 4, *Victims Support and Rehabilitation Act* 1996
[7] *Victims Support and Rehabilitation Act* 1996, s 78
[8] Above note 7, s 79