The Shopfront
YOUTH LEGAL CENTRE

Penalty notices: submission to NSW Law Reform Commission December 2010

1 Introduction

1.1 Should there be a stand-alone statute dealing with penalty notices?

Although we do not have a strong view on this, we tend to think that a stand-alone statute may be of some benefit. It would allow more emphasis to be placed upon the guiding principles for issuing and reviewing penalty notices, as well as setting penalty notice amounts.

1.2 Should the term “penalty notice” be changed to ”infringement notice”?

Although we tend to use the terms interchangeably, we believe that “infringement notice” is a preferable term. The word “penalty” implies that there has been a finding of guilt, which may be inappropriate given that payment of a penalty notice does not amount to an admission or finding of guilt.

2 Guiding and overseeing the penalty notice system

2.1 Should principles be formally adopted for the purpose of assessing which offences may be enforced by penalty notice?

We support the adoption of formal guiding principles to ensure consistency, equity and clarity. These principles should be subject to parliamentary scrutiny, not simply made administratively.

2.2 Should there be a central body in NSW to oversee and monitor the penalty notice regime as a whole?

We see some attraction in this idea, as long as it is a robust and independent body that will subject the system to proper scrutiny. It is beyond our expertise to suggest how this body should be constituted.

2.3 What resourcing is required to effectively oversee the operation of the penalty notice regime?

We do not have the expertise to comment on this.

2.4 Should there be a provision for annual reporting to parliament and type of penalty notices issues and any other relevant data? If so, who should be responsible for this?

There should be a mechanism to ensure that information about issue of penalty notices is publicly available and subject to appropriate scrutiny. We do not offer any comment as to who should be responsible for this.

3 Determining penalty notice offences

3.1

(1) Should penalty notices be used only for offences where it is easy and practical for issuing officers to apply the law and assess whether the offence has been committed?

(2) If so, should this principle mean that penalty notices should only apply to strict and absolute liability offences, or should they also apply to offences that contain a fault element and/or defences?

Problems undoubtedly arise from issuing officers not being trained or skilled to access to assess the fault elements of offences. There is a very real risk that people will be required to pay penalties (and suffer other consequences) for offences which would not be proved in court.

On the other hand, restricting penalty notices to strict and absolute liability offences could cause injustice. There are many very trivial offences which involve a fault element. If people accused of such offences were denied the opportunity to be dealt with by penalty notice, this could occasion not only inconvenience (having to attend court) but also injustice (being exposed to the risk of conviction when the triviality of the offence does not warrant it).

3.2 If penalty notices apply more broadly to offences with a fault element and/or defences, what additional conditions should apply?

Operational guidelines, combined with appropriate training, would be useful (although, in practice we doubt whether it is feasible to have all enforcement officers trained to an adequate level).

There should be a requirement to consider a warning or caution in all cases, not just those offences with a fault element.

3.3 Should penalty notices be used when an offence includes an element that requires judgment about community standards, for example "offensiveness"?

As noted in our preliminary submission, and in the NSW Ombudsman's *Review of the impact of criminal infringement notices on Aboriginal communities*, there are significant problems with penalty notices or criminal infringement notices being issued for offences such as offensive language.

A significant number of our clients have been issued with penalty notices for "offensive language on railway land" or criminal infringement notices for "offensive language in a public place." In many of these cases, the language allegedly used would not meet the legal test for "offensiveness". Fortunately, we have been able to assist clients to defend these matters, often leading to the withdrawal or dismissal of the charge.

However, we suspect this is just the tip of the iceberg, and that large numbers of penalty notices for offensive language are being issued to disadvantaged people who, for various reasons, find it difficult to access legal advice and to challenge matters in court. Such people are likely to be young, homeless, Aboriginal and/or affected by a mental illness or cognitive impairment. The lack of court scrutiny over these offensive language allegations has in our view produced significant injustice.

Similarly, young people are often issued with penalty notices for the offence of "disobey police direction". Again, this is an offence which is rarely proved if challenged in court, as police must prove a number of elements including that there were reasonable grounds to issue the direction and that the nature of the direction was reasonable in the circumstances. Again, we are concerned that significant numbers of these matters go unchallenged.

We are not convinced that the solution lies in attempting to train police and other issuing officers about the legal elements of these offences. Experience shows that, despite very clear and repeated statements by the courts on what does and does not amount to offensiveness, police officers continue to take criminal proceedings against persons whose language fails to meet the legal test of offensiveness. Unfortunately we do not see the value of improved training unless it is accompanied by a radical shift in police culture.

Our primary position is that all provisions which create offensive language offences be repealed. Only language that is so grossly offensive as to amount to vilification or intimidation ought to be criminalised.

If penalty notices are to be used for such offences, it is essential that there be improved training for issuing officers, stringent guidelines, enhanced review mechanisms and a significant reduction in the prescribed penalty.

3.4 Should the concept of "minor offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "minor offence" be defined?

We see some value in the concept of "minor offences". We would suggest that these could include all offences capable of being dealt with summarily, for which the maximum penalty is a fine only or imprisonment for 6 months or less.

3.5 Are there any circumstances under which an offence involving a victim of violence could be a penalty notice offence?

It depends on the definition of "violence".

Minor offences of resiting or obstructing an officer (which might involve some physical force or verbal aggression) may be suitable for penalty notices.

3.6 Should the concept of "low penalty" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "low penalty" be defined?

We do not find this concept very useful. Ironically, many of these offences for which low penalties are commonly imposed by the courts are offences which are mainly committed by impoverished and disadvantaged people. For reasons which are discussed elsewhere in this submission, such offences do not always lend themselves to being dealt with by penalty notice, as the penalty notice amount is often beyond the alleged offender's means, and the lack of court scrutiny causes significant injustice.

3.7 Should offences with imprisonment as a possible court imposed penalty be considered for treatment as penalty notice offences? If so, under what circumstances?

There may be some imprisonable offences that are appropriate to be dealt with by way of penalty notice. Offences such as shoplifting (which is already capable of being dealt with by criminal infringement notice) spring to mind. There are other summary offences such as soliciting, custody of a knife in a public place and custody of an offensive implement, which carry a period of imprisonment but for which imprisonment is very rarely imposed. Summary drug offences such as possession, self administration and possession of equipment are often of a very trivial nature and most commonly attract a fine or a dismissal under section 10 or 10A at court.

For reasons discussed elsewhere in this submission, we have serious concerns about penalty notices being used for offensive language and conduct offences, and for other offences commonly committed by impoverished and disadvantaged people. However, if penalty notice amounts were set appropriately low, we see no reason in principle why minor imprisonable offences should not be dealt with by penalty notice.

3.8 Should "high volume offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "high volume offence" be defined?

We see no good reason for penalty notice offences to be restricted to "high volume" offences.

3.9 Should the concept "regulatory offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "regulatory offence" be defined?

While we broadly support the concept that penalty notices lend themselves to offences without a high degree of criminality and which do not offend against our society's moral standards, it is difficult to see how this could be applied in practice.

As your consultation paper shows, it is not easy to define the concept of "regulatory offence".

For example, many traffic offences are considered regulatory offences, but some offences (eg. drink driving, dangerous driving) have come to be considered truly criminal offences and somewhat of an affront to public morality because of the disregard for public safety inherent in such offences. Conversely, possession and use of prohibited drugs are no longer considered "immoral" as they once were; we suggested that the majority of community now considers this as a public health issue rather than a moral or criminal one.

3.10 Is it appropriate to issue multiple penalty notices in relation to conduct that amounts to a continuing offence? If not, how should the penalty notice amount be determined for continuing offences?

As your consultation paper points out, the issue of continuing offences is a difficult one. We would like to see some limits placed on the number of penalty notices that can be issued for a continuing offence, but we are not in a position to offer any suggestions as to how this would be achieved.

3.11 Are there principles other than those outlined in Questions 3.1-3.10 that should be adopted for the purpose of setting penalty notice amounts?

From the context, we take this question to mean "Are there principles other than those outlined in Questions 3.1-3.10 that should be adopted for the purpose of determining which offences should be penalty notice offences?"

Although this may be difficult to achieve in practice, we believe it is important to consider the demographics of people who are likely to be issued with penalty notices for particular types of offences. We refer to our preliminary submission in which this issue was discussed.

Some types of offences (eg. travelling on a train without a ticket, unlicensed driving, driving an unregistered vehicle) are predominantly committed by disadvantaged people who find it difficult to comply with these laws due to poverty or other factors such as mental illness or homelessness. Such people rarely have the capacity to pay a penalty notice. Not only is the fine no deterrent to further offending but it is likely to increase the risk of re-offending by worsening the person's financial hardship. If dealt with in court, these offenders are usually dealt with quite leniently and fined a lesser amount than the prescribed penalty (and in many cases, not fined at all).

On the other hand, we would not like to see this disadvantaged people completely denied the opportunity to be dealt with by penalty notice and to avoid being drawn into the court system with the risk of a conviction and the associated stigma.

The solution probably lies in a combination of measures including:

- Lower penalty notice amounts for impoverished and disadvantaged people (see discussions elsewhere in this submission);
- Increased use of discretion by issuing officers;
- Widening the availability of alternatives such as cautions;
- Repealing offences such as offensive language and "conducting a commercial activity on railway land" to the extent that it includes begging;
- Reducing offending through measures such as free public transport for young people and people on Centrelink benefits, and removing the excessive social, legal and financial barriers to obtaining a driving licence.

4 Determining penalty notice amounts

4.1 Should principles be established to guide the setting of penalty notice amounts and their adjustment over time?

Yes, and we believe such principles should have legislative backing.

4.2 Should a maximum be set for penalty notice amounts? If so:

(1) What should the maximum be?

(2) Should the maximum be exceeded in some cases? If so:

(a) On what grounds (eg the need to deter offending)?

(b) Should the public interest be among the grounds? If so, how should it be defined or characterised?

(3) Should the maximum be different for individuals and corporations?

In principle we believe that there should be a maximum set for penalty notice amounts. However, we are not able to comment on what this maximum should be, given the wide range of offences for which penalty notices are currently issued. Some environmental, workplace safety and corporate regulatory offences can, and should, carry high prescribed penalties if they are dealt with by penalty notice.

Perhaps it would be possible to set maximum penalty notice amounts for different classes of offences.

If a maximum penalty notice amount is to be set, we see little point in allowing for exceptions.

4.3 Should there be a principle that the penalty amount should be set at a level that would deter offending, but be considerably lower than the penalty a court would impose?

The Shopfront assists many young people to court-elect on penalty notices or seek annulment of enforcement orders. It is almost always the case that our clients receive a better result in court, especially in the Children's Court (where it is common for magistrates to caution the young person). In our view, this reflects proper sentencing practice and indicates that magistrates are taking into account the important principles of proportionality and capacity to pay when considering a financial penalty.

This is reflective of the fact that the penalty notices issued are often excessive or unfair to our client group. For example, offences such as fare evasion are commonly survival offences. It is not unusual for young homeless people to sleep on trains because this is the safest option they have. We believe that penalty notices effectively punish these young people for their homelessness (often because they are victims of family dysfunction or violence) and their poverty.

The discussion about deterrence and diversion away from court resources is a confused one. This is because if people are receiving better results in court, then the aim to divert less serious offences away from courts is not achieved. If the penalty notice amounts are excessive or unfair to our client group, then we will be seeking remedy through the courts.

Further, if the social reasons for offending are not addressed then the aim of deterrence (reflected in penalty notice amounts) is not meaningful to our client group. That is, if the problems with homelessness, poverty, family breakdown, intellectual disability or mental illness are not being addressed then our clients will continue to commit these survival crimes (in particular fare evasion).

The fact that we have many young people with tens of thousands of dollars worth of fines illustrates that the principle of deterrence is not working in relation to our vulnerable and disadvantaged client group.

Even in the general community, it is debatable whether fine amounts play a major role in deterring offending. Criminological research has consistently shown that *certainty* of punishment is a stronger deterrent than the *severity* of the potential penalty.

Research by the NSW Bureau of Crime Statistics and Research *(The deterrent effect of high fines on recidivism: driving offences*, March 2007*)* found that traffic fine amounts appeared to have no discernable impact on reoffending. These findings appear to be consistent with a number of other studies on deterrence which were discussed in BOCSAR's research paper.

For those who are able to exercise some meaningful choice over their behaviour, measures that increase the likelihood of detection (such as speed cameras, random breath testing and railway ticket barriers) are more likely to deter offending than high fine amounts.

4.4

(1) Should there be a principle that a penalty notice amount should not exceed a certain percentage of the maximum fine for the offence? If so, what should be the percentage?

(2) Should a principle allow the fixing of penalty notice amounts beyond the recommended percentage in special cases? If so what should the grounds be?

(3) Should there be an upper percentage limit in those special cases? If so, what should this percentage be?

We support the principle that a penalty notice amount should not exceed a certain percentage of the maximum penalty. Setting such a percentage is somewhat arbitrary but in most cases the prescribed penalty should only be a small percentage of the maximum.

It must be remembered that the maximum penalty is reserved for the worst type of case. It is to be expected that most penalty notices will be issued for offences which fall far short of the "worst case" category.

There are currently some offences where the prescribed and maximum penalties are the same (eg. possession of liquor by minors, failure to comply with police direction). If these were to be brought into line with the above principle, we support a reduction in the prescribed penalty and not an increase in the maximum penalty.

4.5 Should there be a principle that a penalty notice amount should be lower than the average of any fines previously imposed by the courts for the same or a similar offence, if such information is available?

We give our qualified support for such a principle. If people coming before the courts are routinely being dealt with more leniently than those who receive penalty notices, it would appear that the penalty notice amounts are too high. However, it must be acknowledged that many people court-elect because of inability to pay the fine or extenuating circumstances relating to the offence. It may be that current penalty notice amounts are appropriate for people who do not have special circumstances and who can afford to pay.

4.6 Should there be a principle that in setting penalty notice amounts, consideration should be given to the proportionality of the amount to the nature and seriousness of the offence, including the harms sought to be prevented?

Yes. It is a fundamental principle of criminal law that a penalty should be proportionate to the severity of the offence, and that there should be parity in penalty between offences of similar criminality.

4.7 Should there be a principle that in setting a penalty notice amount, consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences?

Yes, absolutely. See also our answer to question 4.6.

4.8 Should there be a principle that for offences that can be committed by both natural and corporate persons, higher penalty notice amounts should apply to corporations? If so, what should be the guidelines for setting such amounts?

We believe that penalties should be generally higher for corporations but we are not in a position to comment further on this.

4.9 Are there principles other than those outlined in Questions 4.1-4.8 that should be adopted for the purpose of setting penalty notice amounts?

As we have already mentioned, a penalty that is far in excess of a person's capacity to pay causes financial hardship and also offends the important principle that a penalty must be proportional to the circumstances of the offence and the offender.

Moreover, if the amount is too large it will be virtually meaningless and will not operate as an effective punishment or deterrent. Conversely, a penalty that is a minuscule proportion of a person's income is unlikely to have any meaningful impact.

If the primary aim of penalties is to punish and deter offending (and not simply to raise revenue), penalty notice amounts should be linked to the recipient's capacity to pay. Capacity to pay is, of course, something the courts must take into account when deciding to impose a fine.

We acknowledge it is more difficult for an officer issuing a penalty notice to take into account a person's means. Nor would it be practicable to implement a system in New South Wales along similar lines to the "unit fine" or "day fine" system that operates in Finland and some other countries (under such a system, fines are calculated according to a formula, taking into account a person's net income, assets and dependants). However, we do see scope for a system where people on low incomes, particularly Centrelink benefits, pay lower penalty notice amounts. This idea will be further discussed in our answer to question 7.8.

We believe that the demographics of people who are fined for certain types of offences should play a role in setting penalty notice amounts. While it is overly simplistic to suggest that offences can easily be divided into "offences of poverty" and "middle class offences", we believe there are some types of offences that clearly fall into the former category.

As previously mentioned, penalty notices for certain types of offences (eg. railway ticketing offences) are commonly committed due to poverty and disadvantage. Other types of penalty notices (eg. offensive language, disobey police direction) are issued mainly to young people and Aboriginal people, often as a result of police targeting of these groups. High penalty notice amounts for such offences are unlikely to deter offending and will instead worsen financial hardship for those affected.

5 Issuing and enforcing penalty notices – practice and procedure

5.1 Taking into account the recent reforms, is there sufficient guidance on:

(1) when to issue penalty notices; and

(2) the alternatives available?

The recently introduced cautioning guidelines are a step in the right direction and provide significant guidance to issuing officers. However, we believe that more guidance – and more options - should be available to issuing officers, and that these should be widely publicised in the community.

5.2

(1) Should government agencies (including statutory authorities) responsible for enforcing penalty notice offences be able to engage the services of private organisations to issue penalty notices? If so, what should be the requirements?

(2) Is there any evidence of problems with the use of contractors for the purpose of enforcing penalty notice offences?

We have grave concerns about the use of private organisations to issue penalty notices.

Our experience working with young people has shown that there are already significant problems with the use of private security guards in places such as shopping centres, entertainment venues and public buildings. In our experience, these security guards do not always have the necessary skills to handle young people sensitively and appropriately.

More importantly, private contractors are not subject to the same accountability mechanisms as public offices, particularly oversight by the Ombudsman.

We are not aware of any evidence of problems with the use of contractors for the purpose of enforcing penalty notice offences. However, there is evidence of significant problems with collection agencies enforcing private debts (see, for example, *Debt collection practices in Australia: summary of stakeholder consultation,* Australian Competition and Consumer Commission, May 2009). If it is suggested that private contractors be used to enforce unpaid penalty notices, we would be strongly opposed to this. Enforcement should be left to the SDRO and the Sheriff who, in our experience, generally act in a reasonable manner and are subject to appropriate accountability mechanisms.

5.3

(1) Should a limit be placed on the number or value of penalty notices that can be issued in respect of one incident or on the one occasion of offending behaviour?

(2) If so, should this be prescribed in legislation, either in the *Fines Act 1996* (NSW) or in the parent statute under which the offence is created, or should it be framed as a guideline and ultimately left to the discretion of the issuing officer?

In principle, we believe there should be a limit on the amount of penalties that can be imposed on one occasion. However, in practice, it is difficult for us to suggest what this limit should be and how it should be set.

5.4 Should the power to withdraw a penalty notice only be available in limited circumstances on specific policy grounds? What should those grounds be?

We believe there should be a broad discretion to withdraw penalty notices. However, in your consultation paper, the discussion preceding this question relates to penalty notices being withdrawn in circumstances where the issuing authority has changed its mind and decided to commence criminal proceedings instead. In such circumstances, we believe that the discretion to withdraw a penalty notice and instead commence criminal proceedings should be exercised only in exceptional circumstances, on public policy grounds, subject to strict guidelines.

5.5 Are current procedural provisions relating to how a penalty notice is to be served on an alleged offender, contained in each relevant parent statute, adequate?

We are not fully conversant with the current procedural provisions relating to service of penalty notices. In our view, there should be a general procedural provision in the *Fines Act* (or in a separate statute relating to penalty notices) rather than in each separate parent statute.

5.6 It is feasible to require the State Debt Recovery Office or the issuing agency to confirm service of the penalty notice or subsequent correspondence?

Where penalty notices are served personally, there should be a requirement to confirm service by asking the recipient to sign and acknowledge service (or, if the recipient refuses to sign, the issuing officer should be required to explain the circumstances in an affidavit of service).

Of course, personal service is not feasible in all cases; many penalty notices are served by post or by securing them to the windscreen of a vehicle. In such cases, an affidavit of service should be required. Of course, this does not prove that the penalty notice was actually received but at least it would confirm the steps taken to effect service.

5.7

(1) Should the *Fines Act 1996* (NSW) prescribe a period of time within which a penalty notice is to be served after the commission of the alleged offence? If so, what should the time limit be?

Penalty notices should, of course, be served as soon as possible after the alleged offence, before memories fade and the recipient loses the opportunity to properly respond to the allegations against them.

What is an appropriate time frame will vary according to the circumstances but, in general, we would support a time limit of three months. In our view, the twelve-month period proposed by the ALRC and mentioned in your consultation paper is too long, except perhaps in the case of very serious offences.

(2) If the penalty notice is served after this time has elapsed, should the Act provide that the penalty notice is invalid?

A penalty notice served outside the time limit should be rendered invalid by legislation.

5.8 If it is inappropriate to prescribe a time limit in legislation, should agencies be required to formulate guidelines governing the time period in which a penalty notice should be served?

Whether or not a time limit is specified in legislation, we support the development of guidelines. As we have already mentioned, the appropriate time frame for serving penalty notices will vary according to the alleged offence and the circumstances.

In many cases, there is no good reason why a penalty notice cannot be issued on the spot. However, in some situations, an issuing officer may be prepared to exercise their discretion not to issue a penalty notice, upon receipt of further information from the alleged offender or their advocate. In such circumstances it would be reasonable to allow a longer period for service of any penalty notice. There may also be some offences, particularly more serious ones, which require some investigation before a penalty notice is issued.

5.9

(1) What details should a penalty notice contain?

Penalty notices currently contain details including the recipient's name and address, a brief description of the alleged offence, the time and place at which it is said to have occurred, the penalty notice amount, and options for payment or court election.

In our view, the penalty notice should also include the following:

- Act and section (or Regulation and clause) under which the relevant offence is created (currently most penalty notices only contain the "law part code" which has meaning for the issuing authority but not for the recipient);
- Name and place of duty of issuing officer;
- A clear explanation of options available to the recipient, including the right to seek review;
- Details of how to obtain legal advice.

(2) Should these details be legislatively required? If so, should the *Fines Act 1996* (NSW) be amended to outline the form that penalty notices should take, or is this more appropriately dealt with by the legislation under which the penalty notice offence is created?

In our view, these details should be set out in a regulation made under the *Fines Act* (or any stand-alone statute that is enacted to cover penalty notices).

5.10 Are the recent amendments to the *Fines Act* (NSW) relating to internal review of penalty notices working effectively?

In our view, it is too early to assess whether the new internal review provisions are working effectively.

We would comment that there does not appear to be widespread knowledge of the right to review or the criteria for such a review. These need to be better publicised if the provisions are to work effectively.

We believe that a decision to issue a penalty notice should be able to be reviewed before a person has to make the decision to court-elect. There should be clear guidelines and policies articulated in legislation, allowing for a broad basis upon which a person can seek a review of a penalty notice. The factors that should be taken into account on review include:

- Age;
- Financial hardship;
- Mental health;
- Disability;
- Homelessness; and
- Special circumstances relating to the alleged offence.

5.11

(1) Should a period longer than 21 days from the time a penalty notice is first issued be allowed to pay the penalty amount?

Yes. For many people it impossible to pay a fine in full within 21 days (or even the further 28 days allowed after the reminder notice is sent).

Currently, when a fine proceeds to the enforcement stage, the fine defaulter has 28 days to pay the amount on the enforcement order or otherwise make arrangements acceptable to the SDRO (eg application for time to pay, annulment, write-off, Work and Development Order).

We suggest that a similar system be explored at penalty notice stage – ie that the recipient of the fine be given 28 days to either pay, court-elect, apply for review or (upon satisfying the SDRO of financial hardship) entering into a time-to-pay arrangement. For the purpose of imposing demerit points for traffic offences, we suggest that the demerit points would be imposed when the first payment is made or when the matter is referred for enforcement, whichever is sooner.

(2) Can the time-to-pay system be improved?

The system can definitely be improved. Under the current system, time-to-pay options are extremely limited until the matter has reached enforcement stage (by which time the fine defaulter, who in many cases is already impoverished, has incurred an extra $25 or $50 enforcement cost). The lack of Centrepay options at pre-enforcement stage is also a problem.

5.12 Could the operation of fines mitigation mechanisms, including the recent Work Development Order reforms, be improved?

The Shopfront has worked extensively with fine defaulters, and with the agencies responsible for enforcing fines, both before and after the enactment of the *Fines Act*.

Over the years we have observed great improvements in the availability of fine mitigation mechanisms. We commend the SDRO on its improved understanding of the hardships faced by disadvantaged people, and its efforts to minimise such hardship. We also commend the NSW Parliament and Government for introducing legislative and policy changes directed at fine mitigation. However, there is still considerable room for improvement.

Work and Development Orders are a positive development but are currently under-utilised because of the onerous application requirements.

Firstly, a prospective WDO applicant needs the support of an approved organisation or enrolled health practitioner. These organisations and practitioners do not receive any additional funding or resources to apply for and supervise WDOs for their clients. Feedback from many approved organisations suggests that the paperwork is quite onerous and the application process unduly time-consuming. We acknowledge that the SDRO has taken these comments on board and has made some changes; however, the fact that the WDO scheme is not properly resourced remains a problem.

There are also access and equity issues, in that some of the most deserving candidates for a WDO (particularly those in rural and regional areas) may be unable to access an approved organisation or health practitioner to support their application.

Additionally, we believe that the eligibility criteria for WDOs are too narrow. Firstly, the definition of “acute economic hardship” needs to be broadened. Most of our clients on Centrelink benefits are, in our view, suffering acute financial hardship, but proving this to the satisfaction of the SDRO is sometimes difficult. Secondly, young people who incurred their fines when they were under 18 should be eligible for WDOs without having to demonstrate homelessness, mental illness, cognitive impairment or acute economic hardship.

We also submit there is room for improvement when it comes to write-off applications. We do not suggest that a write-off should be easy to get – this should remain a measure for people in extreme financial hardship, usually accompanied by a significant disability or health problem. However, we believe that a “write-off” should be a genuine write-off and not a conditional deferral.

If the practice of conditional deferral is to remain, the "good behaviour" period should be much shorter than the 5-year period that currently applies. We suggest 12 months would be more appropriate.

5.13 Should information about penalty notice history be provided to courts for the purpose of determining sentence for any offence?

The receipt or payment of a penalty notice does not amount to an admission or a finding of guilt, and nor should it. Therefore we have significant concerns about penalty notice histories (and criminal infringement notice histories) being tendered to courts in sentence proceedings. Although it is a widespread practice in relation to traffic offences in NSW, we prefer the Victorian position as outlined in paragraph 5.111 and 5.112 of your consultation paper.

5.14 Are there other issues relating to the consequences of payment of the penalty notice amounts?

The issue of demerit points for traffic offences is a very real one and has already been raised in your consultation paper. We note with approval the recent legislative amendments which will allow people dealt with in court under section 10 of the *Crimes (Sentencing Procedure) Act* to avoid demerit points.

While this is not exactly a "consequence of payment of the penalty notice amounts" (in fact, it is a consequence of non-payment), the use of RTA sanctions to enforce fines, especially non-traffic fines, is a serious problem for our client group. The consequences of the use of licence sanctions for disadvantaged people are well-known and have been discussed at some length in previous submissions from us and other organisations. Until the link between non-traffic offences and licence sanctions is severed, people who are disadvantaged by factors such as mental illness, cognitive impairment, homelessness, youth or Aboriginality will continue to experience hardship, despite the existence of fine mitigation mechanisms such as Work and Development Orders.

Another problematic consequence of the payment of a penalty notice is the apparent inability to seek a review should the person change their mind and wish to challenge the matter in court.

A person will often pay a penalty notice because of a perceived lack of options, or sometimes because they fear enforcement action if the fine is not paid by the due date. Upon reflection, or after receiving legal advice, the person may come to the view that they have a good defence or that the penalty notice amount is excessive in the circumstances. If the due date for payment has not passed (i.e. it is still less then 7 weeks after the penalty notice is issued) our understanding is that a person may still court-elect and the amount paid will be refunded. At the other end of the spectrum, if the fine proceeds to enforcement and is paid after the making of an enforcement order, the person may apply for annulment of the enforcement order and, if such annulment is granted, the amount paid will be refunded and the matter listed in court.

However, a person who pays the penalty notice before the due date, but then decides they wish to challenge the matter more than 7 weeks after the penalty notice has been issued, has no formal means of having the matter brought before the court or seeking a review. This is a situation which may not arise very often but which we have encountered from time to time and which can cause injustice.

While we acknowledge that there is a need for certainty and finality, we suggest that there should be a mechanism to have a penalty notice reviewed or brought to court after it is paid. Such a review mechanism could operate in a similar manner to the procedure for annulment of enforcement orders.

6 Impact on children and young people

6.1

(1) Should penalty notices be issued to children and young people? If so, at what age should penalty notices apply and why?

(2) Are there offences where penalty notices should be issued notwithstanding the recipient is a child below the cut-off age?

Our position is that children under 18 should never be issued with penalty notices, with the possible exception of traffic infringement notices being issued to children aged 16 and over who have a driving licence.

If penalty notices are to be issued to children, we suggest that the minimum age should be 16, and that under no circumstances should penalty notices be issued to children below this age.

Most young people, especially those who are likely to be issued with penalty notices for railway and public order type offences, have a very low income and no means of paying a financial penalty. We note the comments in your discussion paper.

We note the information in paragraph 6.9 of your consultation paper regarding the proportion of young people engaged in employment and education. According to recent data from the Australian Bureau of Statistics, in 2009 only 31% of young Australians aged 15 – 24 were in full-time employment. About 49% were studying full time, 8% were working part-time without being enrolled in study, 1% were in part-time study only, 5% were unemployed and 6% were not in the labour force (see *Learn or Earn Discussion Paper*, CREATE Foundation, November 2010).

Even for children with some form of income, financial penalties are not necessarily appropriate. It is a well-established principle, not only in NSW but internationally, that rehabilitation should generally prevail over deterrence when dealing with offences committed by children. There are sound reasons for this principle which are no doubt well known to the NSW Law Reform Commission from its previous reference on *Sentencing Young Offenders*.

In most situations, determining the age of a person being issued with a penalty notice presents no practical difficulty. When a penalty notice is issued in person, it usually will not be issued until the recipient's identity (including date of birth) has been verified. With railway ticketing offences, there are differential penalty notice amounts for people under and over 18, and our experience suggests that issuing officers are usually able to determine the person's age and issue a penalty notice for the correct amount.

Parking and camera-detected traffic offences pose more of a problem, although this is not insurmountable. Penalty notices for camera-detected traffic offences are generally issued by the RTA, which presumably has access to the date of birth of the registered owner of each vehicle.

We note with interest that the NSW Police Force does not support the issuing of penalty notices to children. We suggest this presents a real opportunity to develop an alternative approach to penalty notices for children.

6.2 Are there practical alternatives to penalty notices for children and young people?

Just as warnings and cautions provide a practical alternative to court proceedings for less serious offences, these options would also be practical alternatives to penalty notices for children. An informal warning under the *Young Offenders Act* can be given by a police officer to a child for a summary offence not involving violence (nearly all penalty notice offences would meet this criterion). Formal cautions are also available for children who

commit a range of offences, if the child admits the offence and has not previously been cautioned by police on three occasions.

While officers other than police do not have the power to warn or caution a child under the *Young Offenders Act*, most officers have the discretion to issue an informal warning, or to issue an official caution in accordance with the *Fines Act*. Alternatively, in appropriate circumstances the police could be contacted and the child offered a formal caution under the *Young Offenders Act*.

Another possible alternative could be an "opt in" system where, instead of being issued with a penalty notice with the option of court election, a child could be given a court attendance notice with the option of submitting a written notice of pleading or avoiding court altogether by paying a prescribed penalty. With the default option being court proceedings, there would be a reduced likelihood of disadvantaged young people accumulating large amounts of fines without any legal advice or court scrutiny. Young people who have the capacity to pay a fine would still have this option.

Obviously this model would not be a perfect solution: for example, disadvantaged young people often find it difficult to get to court and may fail to appear. However, based on our extensive experience in the Children's Court, we suggest that a child who is found guilty and fined in their absence by a court would usually end up with a lesser fine than a young person issued with a penalty notice. As the Children's Court has no power to record a conviction against a child under 16, and a discretion whether or not to record a conviction against an older child, it is likely that the recording of a conviction for such offences would be the exception rather than the rule. Indeed, if such a system were to be adopted, we suggest that the *Children (Criminal Proceedings) Act* should be amended to provide that the Children's Court has no power to record a conviction against a child in relation to a penalty notice offence, or has the power to record a conviction only in exceptional circumstances.

Another possible objection to such a system is that it would be costly. In our view, however, the cost of adopting such a system must be balanced against the importance of ensuring just outcomes for some of the most vulnerable people in our community. There would also be cost savings in reducing secondary offending.

Alternatively, a model could be adopted where penalty notices issued to children are subject to automatic review by the Children's Court. The child would not have to appear in court unless they wished to, and would not have to pro-actively seek a review, but could be contacted by the court and asked if there was any information they wished to provide about their circumstances. Clearly, the practical and resource implications of such a model would have to be carefully thought through.

We also refer to our answer to question 3.11, where we commented on the importance of reducing offending by dealing with systemic problems such as the cost of public transport, lack of assistance for disadvantaged young people to learn to drive and obtain their licence, inadequate income support, and inadequate training for police and other officers.

6.3 Should parents be made liable for the penalty notice amounts incurred by children and young people?

We are firmly of the view that parents should not be liable for penalty notice amounts incurred by children and young people.

While we are the first to admit that juvenile offending often has its origins in poor parenting, the solution does not lie in making parents liable for their children's fines.

Such a situation would exacerbate tenuous family relations. More importantly, it offends a basic principle of criminal law that a person should not be punished for a crime committed by another.

6.4 Should enforcement officers be required to consider whether a caution should be given instead of a penalty notice when the offender is below the age of 18 years?

Yes, definitely. We are of the view that training for enforcement officers is critical to ensure that this policy is given priority. Further, any decision to issue a penalty notice should be further reviewable by a senior officer having regard to very clearly defined principles.

6.5

(1) Should police officers dealing with children who have committed, or are alleged to have committed, penalty notice offences be given the option of issuing a caution or warning, or referring the matter to a specialist youth officer under *Young Offenders Act 1997* (NSW) to determine whether a youth justice conference should be held?

Yes. As these options are available to police for more serious offences, it seems inconceivable that they are not available for more minor offences able to be dealt with by penalty notice.

We note the concerns raised in the report that extending diversionary options to penalty notice offences might net-widen. However, in our experience, issuing penalty notices often has the inevitable effect of net-widening in any case.

In our view, penalty notices do not divert young people away from formal court processes. On the contrary, they bring young people before the courts, either because of a court election or because of secondary offending following enforcement action and licence sanctions.

Children who challenge penalty notices (because they cannot afford to pay the fine or seek to raise a defence) end up before the courts in any case. In our view a warning, formal caution or youth justice conference has less of a net-widening impact.

In relation to those matters that end up before the Children's Courts, it is our experience that courts take into account the principle of capacity to pay and children receive a much better result than they do at the hands of the enforcement officer issuing a penalty notice. In our view it is sensible that an officer be required to consider the *Young Offenders Act* before issuing a child with a fine. Children's Courts are obliged to consider a variety of sentencing options, including fines. Perhaps officers with the power of penalising should also.

In terms of diversion and net-widening, the irony is that children and young people who incur penalty notices often end up before an adult court, charged with driving whilst unlicensed, suspended or disqualified, as a result of RTA sanctions. Even if they are still children, they appear in an adult court because the Children's Court does not have jurisdiction over traffic matters for young people aged 16 and over. This means that ultimately the impact has been extremely severe and disproportionate to the initial offence that attracted the penalty notice.

(2) Should some of the diversionary options under *Young Offenders Act 1997* (NSW) apply and, if so, which ones?

Yes. It is our view that all diversionary options under the *Young Offenders Act* should apply. However, the more onerous option of a youth justice conference should only relate to more serious offences or to repeat offenders (for example, if the child or young person has been warned or cautioned on several occasions previously).

We note the concern raised in your consultation paper that, if *Young Offenders Act* cautions were to be used for penalty notice offences, a young person might "use up" their allocation of cautions on trivial matters. This problem could easily be addressed by

legislative amendment. It is worth remembering that the upper limit of 3 cautions was not originally part of the *Young Offenders Act.*

(3) For which penalty notice offences should these diversionary options apply?

We believe diversionary options should apply to all penalty notice offences relating to children under 18, including traffic offences committed by children aged 16 and over.

6.6

(1) Should a lower penalty notice amount apply to children and young people? If so, should this be achieved by providing that:

(a) penalty notice amounts are reduced by a set percentage when the offence is committed by a child or young person; or

(b) the penalty notice amount could be set at a fixed sum, regardless of the offence; or

(c) a maximum penalty notice amount is established for children and young people?

(2) What would be an appropriate percentage reduction or an appropriate maximum amount?

It is our firm view that children and young people should not be issued with penalty notices at all.

However, if penalty notices are issued to children we believe that the penalty notice amount should be lesser for children and young people and be a fixed sum.

We are of the view that this should be a nominal fine (no more than $50, and in most cases much less), given that children and young people usually have no financial means at all.

6.7 Should a child or young person be given the right to apply for an internal review of a penalty amount on the grounds of his or her inability to pay?

Yes. We believe that a child or young person should have an easily-exercisable right to apply for an internal review of a penalty amount on the grounds of his or her ability to pay. This accords with the principles of diverting young people away from formal court processes, focusing on rehabilitation rather than deterrence, and not imposing a crushing penalty on an impecunious child or young person.

We support further exploration of the proposal to give the Children's Court power to review penalty notice amounts. See also our answer to Question 6.2.

6.8 Should a cap be put on the number of penalty notices, or the total penalty notice amount, a child or young person can be given:

(1) for a single incident; and/or

(2) in a given time period?

Yes. There should be a cap put on the number of penalty notices for a single incident. It is not unusual, in our experience, for there to be an escalation of the situation involving a law enforcement officer and a young person. This usually results in a number of penalty notices, and often means that the penalty is disproportionate to the offending behaviour.

6.9 Should driver licence sanctions be used generally in relation to the offenders below the age of 18 years?

Definitely not.

The application of licence sanctions, combined with the regime of mandatory disqualifications set out in the Road Transport Legislation, has a disproportionately harsh impact on disadvantaged people. Young people in particular are severely affected. The Shopfront continues to act for large numbers of young people who are in serious difficulty because of licence sanctions imposed in relation to fines incurred when under the age of 18.

Although the SDRO asserts that licence sanctions are an effective way of enforcing payment, we believe the SDRO would acknowledge that licence sanctions are *not* effective in obtaining payment from people without the means to pay, and in fact are likely to be counter-productive.

For further discussion of this issue, we refer you to our preliminary submission to this reference (including the documents attached to it).

6.10 Should driver licence and registration sanctions be applied to people under the age of 18 years for non-traffic offences?

Definitely not, for the same reasons expressed in our answer to the previous question, and for the additional reason that attaching licence sanctions to non-traffic offences has no logical or moral justification.

6.11 Should a young person in receipt of penalty notices for both traffic and non-traffic offences be issued with separate enforcement notices in relation to each offence?

In our view this would be a good idea, especially if traffic offences and non-traffic offences are to be treated differentially when it comes to imposing licence sanctions.

Licence sanctions aside, it is often the case that we advise our clients to make annulment applications in respect of enforcement orders relating to non-traffic fines, but would not necessarily advise annulment applications for enforcement orders relating to traffic fines.

6.12 Should a conditional “good behaviour” period shorter than five years apply to children and young people following a fine or penalty notice debt being written-off?

5 years is unrealistic and onerous, and often sets young people up to fail.

Our primary position is that a conditional good behaviour period should not apply at all.

If there is to be a conditional good behaviour period, we suggest it should be 6 months or, at the most, 12 months.

6.13 Should any of the measures proposed in the New Zealand Ministry of Justice’s 2009 (sic) research paper titled *Young People and Infringement Fines: A qualitative Study* be adopted in NSW?

We see merit in many of these proposals, and we think they should be further explored in NSW.

We note that these recommendations were made by the New Zealand Ministry of Justice in 2005. Your consultation paper is not clear about whether any of these recommendations have been implemented and, if so, whether they have been effective.

We would be interested in finding out further information about this but time does not permit us to do our own research at this stage.

7 Impact on vulnerable groups

7.1 Should penalty notices be issued at all to people with mental illness or cognitive impairment? If not, how should such people be identified?

We do not believe penalty notices should be issued at all to people with significant mental illness or cognitive impairment.

Firstly, many such people may lack the mens rea to commit a criminal offence; at the very least, their culpability is reduced and they are an inappropriate vehicle for deterrence.

Secondly, these people are often in the same position, in terms of lack of income, as children and young people. These are usually the most disadvantaged, financially struggling and vulnerable people in our community. There is a genuine issue about the disproportionate impact of a monetary penalty on this group of people.

If required to pay back a debt to the State Debt Recovery Office there is the perverse situation where a person in these circumstances is paid Centrelink benefits and then the money from their Centrelink payment (sometimes under management by the NSW Trustee and Guardian) goes back to government coffers when they are repaying a State Debt Recovery Office debt.

7.2

(1) Should alternative action be taken in response to a penalty notice offence committed by a person with mental illness or cognitive impairment? If so, what is an appropriate alternative?

(2) Do the official caution provisions of the *Fines Act 1996* (NSW) provide a suitable and sufficient alternative?

Yes. We believe that an official caution would be appropriate for such offenders in most circumstances.

While the current cautioning guidelines do not prevent cautions from being given on more than one occasions, we suspect that issuing officers will generally be reluctant to continue issuing cautions to the same offender. The reality is that many people in this group (particularly those with significant intellectual disabilities or psychotic illnesses) will continue to incur fines no matter what official action is taken against them. For this group of people, the guidelines should make it clear that multiple cautions may be appropriate.

If multiple cautions are thought to be inappropriate, perhaps these alleged offenders could be referred to a program similar to the Work and Development Order scheme, but with more structure and resources, with the aim of supporting the person to address the root causes of their offending.

7.3 Should a list be maintained of people who are eligible for automatic annulment of penalty notices on the basis of mental health or cognitive impairment? If so:

(1) What should the criteria for inclusion on the list be?

Yes. People could apply and be assessed for inclusion on the list in a similar manner that applicants apply and are assessed for Work and Development Orders.

(2) How should privacy issues be managed?

With the consent of and on the application of the person to be on that list, privacy issues can thus be managed. Further, we note that there is no privacy for these people whose enforcement orders are annulled when these issues are discussed in open court.

(3) Are there any other risks, and how should these be managed?

This is not a risk as such, but an issue arising from this proposal. We would of course prefer the adoption of mechanisms aimed at preventing such people from receiving penalty notices in the first place. For example, with the person's consent, a notation could be placed on computer system of police and other relevant agencies to the effect that this person has a serious mental illness or cognitive impairment and is not an appropriate person to be issued with a penalty notice.

7.4 Should fines and penalty notice debts of correctional centre inmates with a cognitive impairment or mental illness be written off? If so, what procedure should apply, and should a conditional good behaviour period apply following the person's release from a correctional centre?

We strongly support this proposal. A person with a cognitive impairment or mental illness, and the added handicap of having been in prison, has little hope of paying of their outstanding fines or (if they spend a long time in custody) of completing a Work and Development Order.

For reasons expressed elsewhere in this submission, we believe that there should be no conditional good behaviour period. If there is to be such a period, we suggest it should be no more than 12 months.

Further, we would support a presumption in favour of write-offs for all correctional inmates, unless they are in custody for a very short period and/or clearly have the means to pay their fines.

7.5 Should pro-rata reduction of the penalty notice debt (and/or outstanding fines) of offenders in custody be introduced?

Yes. Our primary position is that most people in custody should be eligible to have their fines written off.

However, if this is not to be adopted, we would support a system where people can "work off" their fines while in custody. Some prison inmates have access to employment, but for a nominal wage only. It would not be "double-dipping" if this employment were also to contribute towards the reduction of an inmate's fine debt. Alternatively, educational and development programs in custody could be counted towards fine reduction in a similar manner as Work and Development Orders.

7.6 Should some other strategy be adopted in relation to offenders who have incurred penalty – or fine – debt? If so:

(1) In relation to which groups should any such strategy be adopted, and

(2) What strategy or strategies would be appropriate?

We support the development of a range of strategies to minimise the financial hardship, and thereby improve the rehabilitation prospects, of people who have been involved with the criminal justice system. We would welcome the opportunity to be involved in further discussions with a view to developing such strategies. One idea worth exploring is to better integrate Work and Development Orders with supervision on community-based orders such as parole, good behaviour bonds and intensive correction orders.

7.7 How should victims' compensation be dealt with in any proposed scheme?

We presume that this question means "How should victims compensation levies be dealt with in any proposed scheme?".

In our view, the victims compensation levy is simply a tax arbitrarily imposed on persons convicted of offences, regardless of their capacity to pay or whether their offence actually involves a victim.

The Shopfront acts for many victims of violence pursuing victims compensation claims and we understand the necessity for the victims compensation scheme to be properly funded. However, we do not believe that the collection of the victims compensation levy from some of the most impoverished and vulnerable people in our community (many of whom have themselves been victims of serious crime) is a fair or effective way to maintain the fund.

In our view, if victims compensation levies are capable of being enforced in the same way as fines (eg. with RTA sanctions and civil enforcement) these levies must be capable of being written off or mitigated in the same way as fines.

(1) Should a concession rate apply to penalty notices issued to people on low incomes? If so, how should "low income" be defined?

Yes, definitely. Perhaps a means test could be applied similar to the one used by Legal Aid NSW in assessing whether a person qualifies for legal assistance. Although this involves some adjustment for assets and dependants, it is not overly complex and should be relatively easy to administer. A person on the full rate of Centrelink benefits automatically meets the Legal Aid means test.

(2) Should a person in receipt of certain Centrelink benefits automatically qualify for a concessional penalty amount? If so, which benefits?

We believe that people in receipt of most Centrelink benefits including Youth Allowance, New Start, Austudy, Disability Support Pensions, Age Pensions and Parenting Payments should automatically qualify for concessional penalty amounts.

7.9 If a concession rate were applied to people on low incomes, should the penalty amount be reduced by a fixed percentage or determined by some other formula?

Reducing the penalty amount by a fixed percentage would be relatively simple and in most cases would be fair to people on low incomes.

Additionally, there should be an upper limit on penalty notice amounts for people on Centrelink benefits. In our answer to question 6.6, we propose a cap of $50 for children. We would suggest that a similar cap (possibly $100) should apply to people on Centrelink benefits. Of course, for certain types of offences (eg. fare evasion) the penalty notice amount for people on benefits should be much lower (we suggest $20).

7.10 How could such a system be administered simply and fairly?

People on low incomes could qualify for a lower penalty notice amount upon presentation of a current Centrelink card to the issuing officer.

Alternatively, there could be a procedure for the person to provide the officer with their Centrelink reference number and sign a consent form authorising the issuing authority to contact Centrelink to verify that the person is on benefits.

Where neither of these options is possible (eg. where penalty notices are not issued personally) there could be a simple procedure for the recipient of the fine to provide the relevant Centrelink details to the SDRO.

7.11

(1) Are the write-off provisions of the *Fines Act 1996* (NSW) effective in assisting vulnerable individuals deal with penalty notice debts?

(2) What improvement, if any, could be made to the write-off procedures under the *Fines Act 1996* (NSW)?

A write-off, if granted, can be of great assistance in helping a vulnerable person deal with their outstanding penalty notice debt. However, applying for a write-off involves providing comprehensive information to the SDRO; most vulnerable people would need the assistance of a competent advocate to do this.

For reasons mentioned elsewhere in this submission, we are of the view that a 5-year conditional deferral is inappropriate. Our primary position is that a write-off should be unconditional, especially for those with a mental illness or an intellectual disability. Insight into offending, in these circumstances, is often extremely limited; and so is the person's capacity to remain of "good behaviour".

7.12 Should participation in discrimination awareness and disability awareness training be required for all law enforcement officers authorised to issue penalty notices? How else could awareness be raised?

Yes. We agree that such training should be required for all relevant officers.

Awareness could also be raised through the issuing of more comprehensive guidelines, and possibly though the provision of some kind of hotline for officers to call if they suspect a person may have a mental illness or a disability.

7.13 How effective are the review provisions for people with a mental health or cognitive impairment?

The review provisions for people with mental health or cognitive impairment, in our view, are too narrow.

The current grounds rely on the reviewer to come to some conclusion about whether or not the alleged offender was capable of understanding that the conduct constituted an offence and/or capable of controlling such conduct. This may require expert evidence that goes directly to these issues. We are concerned that the grounds as they stand would require some advocacy on behalf of the person to address these grounds. We suspect that there are many people who have intellectual disabilities or mental illnesses who do not have access to the necessary advocacy or resources.

It is our view that this group of people are so vulnerable and often impecunious that, irrespective of their capacity to understand or control their conduct, the circumstances might be such that the penalty notice should be withdrawn.

7.14 Given that it may be difficult for some vulnerable people to make a request in writing for review of a decision to issue a penalty notice, what practical alternatives could be introduced either to divert vulnerable people from the system or to support review in appropriate cases?

In answer to question 7.3, we suggested a system whereby vulnerable people, with their consent, could be "flagged" on relevant authorities' computer systems so that officers are aware of their vulnerability.

As mentioned elsewhere in this submission, we also believe that practical measures such as free public transport for people on benefits would significantly assist in preventing offending.

We have also commented on the need for more widespread use of diversionary measures such as cautions.

In situations where vulnerable people have been issued with penalty notices, review mechanisms need to be simplified. Although this would need to be carefully thought through, we suggest that it should be possible to apply for a review by telephone in appropriate cases.

7.15 Should the requirement to withdraw a penalty notice following an internal review where a person has been found to have an intellectual disability, a mental illness, a cognitive impairment, or is homeless, be extended to apply specifically to:

(1) Persons with a serious substance addiction?

(2) In "exceptional circumstances" more generally?

Yes, we believe that the requirement to withdraw a penalty notice should be extended to all people in our community who are vulnerable, including both of these categories.

It is worth noting that serious substance abuse problems often have their origins in trauma such as child abuse, sexual assault or serious physical injury. There is also a very high correlation between substance misuse and mental illness, especially among young people. Some people in our community (including some policy makers and judicial officers) still tend towards the view that people with substance abuse problems have brought it upon themselves and are less deserving of leniency; however, our experience suggests that this is not generally the case.

7.16

(1) Is the State Debt Recovery Office's Centrepay Program helping people receiving government benefits deal with their outstanding fines and penalty notice amounts?

(2) Are there any ways of improving this program?

Many of our clients have taken up the Centrepay option since it has become available. It provides a more convenient way of making instalment payments and reduces the likelihood of defaulting.

However, we have a fundamental problem with the notion that a person on Centrelink benefits should be expected to make any payments towards their outstanding fines.

In our experience, Centrelink benefits are often not enough to meet the basic living needs of our clients. This includes everything from housing, to bills, to transport and to food. The system whereby the government gives with one hand and takes with the other under the guise of assisting our client group with their debts is, in our view, quite perverse. Taking money from their Centrelink income only exacerbates their vulnerability. It is our view that a different arrangement should be in place that does not plunge these people further into poverty.

8 Criminal infringement notices

8.1 Should there be formal principles for determining whether a particular criminal offence is suitable to be dealt with by way of a Criminal Infringement Notice? If so, what should those principles be? Should they

be different from the principles that apply to penalty notice offences generally?

There should definitely be formal principles and we suggest the adoption of principles recommended by the NSW Ombudsman, as summarised in paragraph 8.16 of your consultation paper.

These principles should be broadly similar to those applying to penalty notices generally, but recognising that criminal infringement notices are generally issued for offences that are more serious (and more likely to be regarded by the community as "criminal" as opposed to regulatory) than the average penalty notice offence.

Also, if criminal infringement notice histories are to be handed up in court in sentencing proceedings (which we strongly oppose) it is fundamental that criminal infringement notices are not issued where there is any reasonable doubt about a person's guilt.

8.2 Are there any views about the recommendations in the 2009 Ombudsman's Review of the impact of Criminal Infringement Notices on Aboriginal communities and their implementation?

We support the Ombudsman's recommendations, for the reasons expressed by the Ombudsman.

8.3

(1) Are Criminal Infringement Notices having a net-widening effect, in particular in relation to the offences of offensive language and offensive behaviour? If so, what measures should be adopted to prevent or minimise this effect?

We cannot say from personal experience whether criminal infringement notices are having a net-widening effect. However, we note the concerns expressed by the Ombudsman and discussed in your consultation paper. We are concerned that the availability of CINs is making it easier for police to proceed against people for offensive language and conduct, and to avoid court scrutiny.

(2) Should official cautions (governed by police guidelines) be available as part of the Criminal Infringement Notice regime, as recommended by the Ombudsman?

Yes, we believe that official cautions should be available. However, as with formal cautions under the *Young Offenders Act*, such caution should only be available if a person has admitted the offence after having access to legal advice.

(3) Should the offences of offensive language and offensive conduct continue to be among the offences for which Criminal Infringement Notices may be issued?

Again, we reiterate our primary submission that offensive language and offensive conduct should not be offences at all. See also our response to Question 3.3.

We believe these offences should *not* continue to be dealt with by CIN. There is too high a risk of people being punished for offences of which they are not guilty, or of being fined an amount which is disproportionate to the severity of the offence.

We are very concerned about the Ombudsman's estimate that approximately 60% of offensive language offences for which CINs were issued would most likely have been dismissed by a court.

If CINs are to be used for such offences, we support the suggestion from the Department of Justice and Attorney General (referred to in paragraph 8.32 of your consultation paper) that all CINs for these offences be reviewed by a senior police officer. In fact, we would go further and suggest that they should also be reviewed by a police prosecutor.

8.4

(1) What steps should be taken to address the issue of under-payment of criminal infringement notices issued to Aboriginal persons?

This problem could be addressed in a number of ways including issuing CINs more sparingly, reducing the penalty amount, making payment options more flexible, and issuing cautions as an alternative to CINs.

The attachment of licence sanctions to outstanding CINs is inappropriate and does nothing to encourage Aboriginal people to pay their CINs; on the contrary, licence sanctions worsen hardship for this vulnerable group and diminish their capacity to pay.

(2) Should recipients of criminal infringement notices be able to apply for an extension of the prescribed time to elect to have the matter dealt with by a court? If so, under what circumstances?

Yes. There should be a reasonable time to allow the person to obtain legal advice. 21 days is not sufficient for this purpose. Of course, people whose CINs proceed to SDRO enforcement also have the right to seek an annulment of the enforcement order in certain circumstances; this right should be retained.

8.5 Should Criminal Infringement Notices be issued at all to persons with a cognitive impairment or mental illness? If so, should police have the discretion to issue a Criminal Infringement Notice, even after an arrest has been made, if satisfied that the offender has a support person who has understood the offence and consequences of the Criminal Infringement Notice as recommended by the Ombudsman?

We have concerns about the issuing of CINs to people with cognitive impairments and mental illnesses. Many of these matters, if dealt with in court, would attract the diversionary provisions of section 32 of the *Mental Health (Forensic Provisions) Act*.

We concede that it may appropriate to issue a CIN to person with a mental illness or cognitive impairment, but only if they have had an opportunity to speak with a support person (and preferably a lawyer) and have made an informed choice to be dealt with by CIN rather than a court.

We note that in your current reference on *People With Cognitive and Mental Health Impairments in the Criminal Justice System,* one of the options under discussion is the establishment of a system where alleged offenders with cognitive or mental health impairment can be diverted or cautioned by police. While our support for such a scheme is qualified (see our submission on *Consultation Paper 7: Diversion*) we believe this merits exploration in the context of Criminal Infringement Notices.

8.6 Should police have the power to withdraw a Criminal Infringement Notice if subsequently satisfied of the vulnerability of the person to whom the Criminal Infringement Notice was issued?

Definitely yes. Although there is a need for checks and balances within the police force, we are of the view that the procedure for withdrawing a Criminal Infringement Notice ought not be unduly cumbersome (as is the current procedure for withdrawing criminal charges).

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