



New South Wales
Law Reform Commission

Report
132

Penalty notices

February 2012
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The Hon G Smith SC MP
Attorney General for New South Wales
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1 Farrer Place
SYDNEY NSW 2000

Dear Attorney

Penalty notices

We make this report pursuant to the reference to this Commission received 5 December 2008.

The Hon James Wood AO QC
Chairperson
February 2012

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We acknowledge the assistance of Mr Michael Katz in providing technical statistical analysis in Chapter 10 of this report.

Terms of reference

I, JOHN HATZISTERGOS, Attorney General of New South Wales, having regard to the importance of a fair, just and effective penalty notice system,

REFER to the New South Wales Law Reform Commission, for inquiry and report pursuant to section 10 of the Law Reform Commission Act 1967, the laws relating to the use of penalty notices in New South Wales.

In carrying out this inquiry, the Commission will have particular regard to:

1. whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate;
2. the consistency of current penalty amounts for the same or similar offences;
3. the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices;
4. the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time;
5. whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so:
 - (a) whether penalty amounts for children and young people should be set at a rate different to adults;
 - (b) whether children and young people should be subject to a shorter conditional "good behaviour" period following a write-off of their fines; and
 - (c) whether the licence sanction scheme under the Fines Act 1996 should apply to children and young people;
6. whether penalty notices should be issued to people with an intellectual disability or cognitive impairment; and
7. any related matter.

In undertaking this reference, the Commission will consult with agencies that issue and enforce penalty notices.

While the Commission may consider penalty notice offences under road transport legislation administered by the Minister for Roads, the Commission need not consider any potential amendments to these offences as these offences have already been subject to an extensive review.

[Reference received 5 December 2008]

Executive summary

Part One Preliminary matters

- 0.1 The NSW Law Reform Commission Report 132 **Penalty Notices** reviews and makes recommendations in relation to the penalty notice system in NSW. Penalty notices are imposed most often for minor offences, but the topic is nevertheless an important one. People are far more likely to have contact with the justice system through a penalty notice than through a court. In 2009/10, 2.83 million penalty notices were issued in NSW, with a total value of more than \$491 million dollars. In comparison, in 2009 the NSW Local Court imposed 116,915 penalties, of which 53,543 were fines. If, as appears likely, people make judgments about the justice system on the basis of experience with penalty notices, the fairness, consistency, and transparency of the penalty notice system is important, not only to those who receive a penalty notice, but potentially to the reputation of the justice system more broadly.
- 0.2 The efficiencies associated with issuing and enforcing penalty notices act as an inducement to extend the number of offences dealt with in this way. NSW has over 7,000 penalty notice offences under some 110 different statutes. The number of penalty notice offences is growing steadily and the seriousness of the offences is increasing. Most recently, penalty notices in the form of Criminal Infringement Notices (CINs) are being issued for minor criminal offences that have traditionally been dealt with by courts.
- 0.3 Penalty notices were introduced, and have expanded in scope, because of their significant advantages, especially their cost benefits. They save time and money for the agencies that issue them, for courts that avoid lengthy lists of minor offences, and for recipients who do not have to take time off work to attend court or pay court or legal costs. The penalty is immediate and certain and is usually significantly lower than the maximum penalty available for the offence, were it to be dealt with by a court. Penalty notice recipients also avoid having a conviction recorded.
- 0.4 However penalty notices also have disadvantages. One of these is their tendency to proliferate in ways that are not always consistent and fair. The inconsistencies in the present system, dealt with in Part Two of this report, are severe enough to threaten the reputation of the penalty notice system. They have led to suggestions, reported to this inquiry, that penalty notice offences may be created, and penalty levels set, for improper reasons such as revenue raising.
- 0.5 The ease with which penalty notices are issued may also fuel a tendency for notices to be issued when they should not be, or when a warning or caution may be more appropriate (the 'net-widening' effect). A penalty notice may be seen as the first response to offending when, in reality, there are other options. For example a warning can be given (such as a request to 'take your feet off the train seat') or a caution delivered to educate and deter future offending.
- 0.6 The penalty notice system does not have the transparency normally associated with justice systems in democratic societies. Penalty notices are issued by a wide range of issuing officers and agencies. Most people simply pay the penalty. Only 1% elect

to go to court, so that the guilt or innocence of the recipient is rarely scrutinised. It may be the case that some people who believe that they are not guilty nevertheless pay the penalty because they are apprehensive about courts or because of the cost benefits of doing so. There are avenues for independent review of a penalty notice, but they are limited. Further the system is regulated by guidelines. Some of these are public but others are not. This can leave people, and their legal representatives, at a loss to know how to proceed.

- 0.7 However, responding to these problems by reintroducing all of the protections of the criminal justice system would remove many advantages of the penalty notice system. It is important to get the balance right.
- 0.8 A further problem with penalty notices is that the penalty is fixed and cannot be tailored to the circumstances of the recipient. Members of some vulnerable groups may be particularly susceptible to receiving penalty notices and also be ill-equipped to pay a monetary penalty. For example, people with intellectual disabilities may not understand what is required to avoid offending, what a penalty notice is, or where to go for help. They may accrue significant penalty notice debts that they cannot pay. People who live in regional areas may have their driver licence withdrawn for failing to pay a penalty, with significant flow-on effects. If they continue to drive to access essential services they commit more offences, and may accrue more penalties. More seriously they may ultimately be imprisoned, not for penalty notice debt, but for offences such as driving while disqualified, that flow on from penalty notice debt. Consultations and submissions demonstrated that the extent of this problem is significant.
- 0.9 This report is divided into five parts. In the first of these we outline the broad themes that are important to the penalty notice system and evaluate its strengths and weaknesses. For those who are not familiar with it, we describe how the penalty notice system operates and examine the ways in which it is regulated by law through the *Fines Act 1996* (NSW) (*Fines Act*) and the guidelines promulgated under that Act. We recommend clarification of the guidelines-making power in the *Fines Act* (Recommendation 2.2).

Part Two Penalty notice offences and amounts

- 0.10 Part Two of the report deals with the principles that govern which offences should be penalty notice offences and the setting of penalty notice amounts. Penalty notice offences and amounts are created and administered by various government agencies, each with expertise in its own sphere of responsibility. One consequence of this diversity is that some penalty notice offences have developed without reference to developments in other areas of regulation, so that significant inconsistencies, and consequent unfairness, have arisen in the system over time.
- 0.11 Penalty notices are generally used for high-volume, minor offences involving a low penalty notice amount. However, even this simple statement raises a number of questions, such as what is meant by a minor offence, and what constitutes a low penalty notice amount? Further, where an offence involves a mental element, or where serious breaches are punishable by imprisonment, is that offence suitable to be a penalty notice offence? Government departments and agencies in NSW

making decisions about which offences are suitable to be subject to the penalty notice system presently have no principles to assist them in answering such questions. We recommend that guidelines be developed to assist these decisions (Recommendation 3.1). We examine the principles that are important when making such decisions and make recommendations about the content of the proposed guidelines (Recommendations 3.2 – 3.12).

- 0.12 Significant inconsistencies exist in relation to penalty notice amounts in NSW. There are sometimes widely divergent penalty notice amounts for the same or similar behaviour. For example, offensive language penalties range from \$100 to \$400, depending not on the seriousness of the offending behaviour, but on the location of the alleged offence. Some minor offences, such as spitting on a railway platform, attract a comparatively high penalty of \$400 compared to a penalty of \$353 for offences that involve unsafe conduct such as tailgating or driving through a red light. This does little to enhance respect for the penalty notice system. Again there is no clear, consistent set of principles to guide government agencies in the setting of penalty notice amounts. We recommend that guidelines be developed to govern penalty notice amounts (Recommendation 4.1). We consider the principles that are important when setting penalty notice amounts and make recommendations as to the content of the proposed guidelines (Recommendations 4.2 – 4.8).

Part Three Issuing and enforcing penalty notices

- 0.13 Part Three of the report deals with issuing and enforcing penalty notices. It follows the pathway from the initial decision about whether or not to issue a penalty notice through to review, enforcement and the mitigation measures designed to assist people who have genuine difficulty meeting a financial penalty. It builds on an earlier review of fines and penalty notices by the Sentencing Council and the evaluation of the 2008 amendments to the *Fines Act* by the Department of Attorney General and Justice.

Warnings and cautions

- 0.14 An officer who is considering issuing a penalty notice has a number of options. The officer can simply deliver a warning on the run, as when a RailCorp officer asks a passenger to take his or her feet off the seat of a train. The officer can also give a caution. A caution can take a number of forms, depending on context, ranging from a verbal caution delivered on the spot to a letter received after a period of time.
- 0.15 Cautions use education and persuasion as a first response to offending. They maintain respect for the system through proportionate and fair responses to offending. They are particularly helpful in relation to vulnerable people who may have difficulty understanding that their behaviour is wrong or in paying a penalty notice. They have been evaluated as a successful part of the penalty notice system. However, there are ways in which cautioning practice in NSW can be improved. There is evidence that some agencies do not issue cautions; that others issue them according to guidelines that are not made public; and that cautions could be used much more for vulnerable people in appropriate cases.

- 0.16 We recommend that it be mandatory for issuing officers to consider, each time, whether or not a caution is appropriate instead of a penalty notice (Recommendation 5.1). This recommendation does not restrict the discretion of issuing officers but rather is designed to ensure that they turn their mind to the possibility of a caution in all cases. Deciding whether to issue a caution or a penalty notice is not a simple task. It involves knowledge of the *Fines Act* and the exercise of judgment and discretion. We recommend mandatory training on cautions for issuing officers, especially in identifying vulnerable people for whom a penalty notice may be an ineffective response. To assist in maintaining and improving standards in cautioning we also recommend that agency practice and training in this area be monitored (Recommendation 5.2).
- 0.17 Most agencies that issue cautions do so according to guidelines. Many use the guidelines issued by the Department of Attorney General and Justice (AGJ), which have wide acceptance; others use their own internal guidelines. Where agencies use their own guidelines we recommend that they be published and scrutinised for consistency with the Attorney General's Caution Guidelines (Recommendation 5.3). Perhaps most importantly, we recommend that cautions be issued in writing in order to increase their educational effect and so that cautioning practice can be monitored and, if necessary, improved (Recommendation 5.4).
- 0.18 Finally, we recommend that the Attorney General's Caution Guidelines should apply to police officers, or alternatively that NSW Police should issue its own, publicly available, guidelines (Recommendation 5.5). Police perform a very important function in the penalty notice system. They have considerable discretion to issue warnings and cautions but there is little publicly available information about how they exercise their discretion.

Issuing penalty notices

- 0.19 Fairness and justice require that certain basic information appear on all penalty notices. However there is great variation in the content of these notices in practice. We recommend (Recommendation 6.1) that all penalty notices contain sufficient detail to allow the recipient to identify:
- the alleged offending behaviour
 - the law that has been allegedly infringed
 - how to respond to the notice, including the possibility of electing to go to court, and
 - basic information about sources of help.
- 0.20 Other information that should be on the notice, or otherwise easily accessible, includes:
- information about payment options
 - the availability of time-to-pay arrangements
 - the consequences of court election, and

- information about the right to internal review.
- 0.21 We recommend that provision for electronic service of penalty notices be made where the recipient consents (Recommendation 6.2). To give penalty notice recipients a reasonable chance of remembering the circumstances of their alleged offending behaviour we recommend that there be time limits, set according to the context of the particular offence, within which a penalty notice should be served. Where exceptions to the time limits are appropriate these should be defined (Recommendation 6.3).
- 0.22 Some issuing agencies engage private contractors to issue penalty notices. We make recommendations designed to ensure that, where this happens, proper safeguards are put into place to ensure that those notices are issued fairly and appropriately (Recommendation 6.4).
- 0.23 In response to concerns about the issuing of multiple penalty notices arising out of the same incident, we recommend that the ‘totality principle’ be embodied in the penalty notice legislation and guidelines, so that the issuing and reviewing officers take into account whether the aggregate penalty imposed on the offender is proportionate to the totality of his or her offending (Recommendation 6.5).
- 0.24 Further we make recommendations regarding the withdrawal of penalty notices (Recommendation 6.6).

Internal review

- 0.25 Amendments to the *Fines Act* in 2008 introduced provisions for the internal review of penalty notices. Their purpose was to divert vulnerable groups out of the system and to enable reviewing officers to consider whether a person should have been given a caution. Guidelines on internal review have been issued by the Attorney General. Any internal review guidelines issued by other agencies must be consistent with the Attorney General’s Internal Review Guidelines. There is no guideline-making power in the *Fines Act* in relation to internal review and we recommend that this omission be corrected (Recommendation 2.2).
- 0.26 Some agencies use their own internal review guidelines and not all of these are publicly available or consistent with the Attorney General’s Internal Review Guidelines. We recommend that these problems be addressed in the interests of consistency and transparency. Review of the State Debt Recovery Office (SDRO) guidelines for quality and consistency is also recommended. Further, we recommend monitoring of all internal review guidelines to improve their overall quality and consistency (Recommendation 7.1).
- 0.27 Internal review of penalty notices issued to vulnerable people should be made more effective. Presently, people who have cognitive and mental health impairments who apply for internal review must prove that their disability means they are unable to understand that their conduct constituted an offence or that they are unable to control their conduct. We heard that this test deters meritorious applications because it sets a threshold that is difficult to satisfy. We recommend relaxing the test so that people with cognitive and mental health impairments need only show that their impairment was a contributing factor to the commission of an offence or

that it reduced their responsibility for the offence (Recommendation 7.2). This maintains the nexus between the offending behaviour and the disability but makes the test less onerous.

- 0.28 We also recommend that the grounds for internal review should be extended so that a penalty notice may be withdrawn where severe substance dependence was a contributing factor or lessened the responsibility of the person for the offence (Recommendation 7.3). This ground would only apply to people with a long-term serious substance addiction, not to people temporarily affected by drugs or other substances. There was strong support for this change in submissions, especially because of the frequent coexistence of serious substance addiction with other grounds for internal review such as mental illness.
- 0.29 Training of reviewing officers on the impact of penalty notices on vulnerable people is important, and is recommended (Recommendation 7.4). If the circumstances of vulnerable people are not taken into account at this stage, and penalty notices withdrawn where appropriate, more expensive problems may arise later.
- 0.30 It appears to be generally assumed that the internal review provisions of the *Fines Act* do not apply to NSW Police. We have considered whether this is appropriate, and recommend that the *Fines Act* be amended to clarify that the internal review provisions do apply to NSW Police (Recommendation 7.6). While police are well trained and qualified to issue penalty notices, mistakes may sometimes be made. It should not be necessary for people who receive a penalty notice from a police officer to go to court for a review when a much simpler and far less expensive administrative review could be made available, and would have been available had the notice been issued by any other agency.
- 0.31 We also recommend various steps to improve and simplify the process for applying for internal review, and suggest certain technical amendments to deal with the relationship between court election and internal review (Recommendations 7.5, 7.7, 7.8).

Enforcing penalty notices

- 0.32 Enforcement measures ensure that the integrity of the penalty notice system is maintained through effective sanctions against non-compliance. If a penalty notice has not been paid within 21 days, a reminder notice is issued. After a further 28 days, enforcement processes are instituted. At this point enforcement costs are added to the penalty notice debt.
- 0.33 While some people try to evade payment and therefore vigorous efforts to secure it are appropriate, others have a good reason for not responding to a penalty notice. They nevertheless accrue enforcement costs and sanctions that make their situation worse. For example, a person with an intellectual disability may not understand the notice and may not seek help for some time, by which time his or her debt has increased by the addition of enforcement costs. We recommend that the SDRO develop a fee-waiver policy for deserving cases. If a person wishes to challenge a penalty notice after the enforcement process has begun he or she must apply for annulment – but this application involves further costs that appear to be deterring applications in deserving cases. Therefore we recommend that the fee-

waiver policy should apply to people who are in receipt of Centrelink benefits and who apply for their penalty notice to be annulled (Recommendation 8.1).

- 0.34 Driver licence sanctions are the first enforcement measure imposed in NSW. They are generally very effective. However they can cause severe problems, especially for people who live in areas not well served by public transport and who require a driver licence to work or to access essential services. Some people may continue to drive after their licence has been suspended and acquire subsequent convictions for driving without a licence and driving while disqualified. Ultimately, they may be imprisoned for these flow-on offences. This has been called the ‘slippery slope’. Thus, although imprisonment for penalty notice debt is not permitted in NSW in theory, it can occur indirectly by way of this ‘slippery slope’.
- 0.35 Penalty notice recipients at the top of the ‘slippery slope’ do have options that would allow them to retrieve their licence, including time-to-pay arrangements (see ‘mitigation measures’ below). However it appears that many do not know about these options and do not access them. Therefore we recommend increasing education about, and access to, these mitigation options, especially in regional, rural and remote areas (Recommendation 8.2). We also recommend technical amendments so that certain driver licence sanctions cannot be imposed on young people who commit non-traffic offences (Recommendation 8.3).
- 0.36 If driver licence sanctions are not effective, civil enforcement measures such as seizing property and garnisheeing wages can be imposed on those who do not pay. Finally, the SDRO can impose a community service order (CSO). In the event of non-compliance the person can be imprisoned. In NSW, the SDRO has been given the power to impose these sanctions even though they involve deprivation of liberty. As a general rule in democratic societies, such sanctions can only be imposed by a judicial officer in open court in the presence of the person likely to be affected by the sanction. Although used very infrequently, the present arrangements in relation to CSOs appear to be contrary to basic principles of natural justice and procedural fairness. Therefore we recommend the abolition of imprisonment for non-compliance with a CSO imposed in these circumstances; CSOs should only be imposed by a Local Court, on application, after a hearing (Recommendation 8.4).
- 0.37 A further issue concerns the relevance of penalty notice offences to a court faced with the task of sentencing a person for another offence. A penalty notice does not involve a conviction and, arguably, if paid, there should be no further consequences for the recipient. However, sometimes a person’s penalty notice history is placed before a court, such as where there is a history of similar offences demonstrating a clear pattern of behaviour that goes to the person’s character or prospects of rehabilitation (or other matters of relevance for the purposes of s 21A *Crimes (Sentencing Procedure) Act 1999* (NSW)). An example would be a series of penalty notices issued by a food hygiene agency showing a history of deliberate disobedience to health and safety laws. We recommend that it be possible for a penalty notice history to be presented to a sentencing court but with guidelines governing the situations where this is appropriate (Recommendation 8.5.)

Mitigation measures

- 0.38 Mitigation measures are designed to assist people who have difficulty paying their penalty notices, or have no realistic prospect of doing so. People on government benefits can sign up to a time-to-pay arrangement so they can pay their debt by instalments. Time-to-pay arrangements are governed by guidelines that are not presently made public. We recommend that there be publicly available guidelines governing time-to-pay arrangements and that their operation be monitored (Recommendation 9.1). We also recommend that these payment arrangements be made available to apprentices, trainees, and people who experience unavoidable financial hardship (Recommendation 9.2).
- 0.39 Work and development orders (WDOs) allow people who cannot pay a financial penalty to deal with their fine or penalty notice debt through work, education or treatment. They are available to people who have cognitive or mental health impairments, who are homeless, or who are experiencing acute economic hardship. The WDO scheme has been positively evaluated by the AGJ and provides benefits such as reduced reoffending, reduced costs to government, reduced stress and hopelessness among participants, as well as the positive engagement of participants with constructive activities. We strongly support the roll-out of WDOs, especially their extension into regional areas, and recommend that the regional network of WDO support teams now being established be enabled to provide advice, not only about WDOs, but also about other mitigation measures (Recommendation 9.3).
- 0.40 Further, we recommend a relaxation of the test for admission to the WDO scheme on the basis of acute economic hardship to allow people to apply where they have the support of a practitioner or organisation for a WDO and are in receipt of eligible Centrelink benefits (Recommendation 9.4). We also recommend the extension of WDOs so that they are available to prisoners who meet the eligibility criteria (Recommendation 9.5). This will allow prisoners to engage in constructive activities while in custody that will have the added benefit of reducing their debt and assisting their reintegration into the community on release. We further recommend the inclusion of Centrelink Mutual Obligation Activities within the scheme (Recommendation 9.6).
- 0.41 The *Fines Act* provides that the SDRO can write off penalty notice debt where a person is unable to pay because of financial, medical or personal circumstances. The pursuit of penalty notice debt from people who cannot pay is futile, causes additional hardship, and wastes resources. It is presently very difficult to make a write-off application, not least because the guidelines that govern applications are not public. We recommend that the guidelines governing write-off applications be made public and that the *Fines Act* be amended to authorise this (Recommendation 9.7).
- 0.42 Presently, when a penalty notice debt is written off, it can be reinstated if another offence is committed within five years. This period is disproportionate to similar good behaviour periods available to the courts and reportedly deters legitimate write-off applications. We recommend that there be no good behaviour period, except in cases where the SDRO decides that such a period is justified by the seriousness of the offending and its likely deterrent effect. We recommend that the

maximum good behaviour period be two years for adults and six months for children and young people (Recommendation 9.8).

- 0.43 There has been a cap on the number of hours that can be served for a WDO of 300 hours for adults and 100 hours for children and young people. The evaluation of the WDO program by the AGJ recommended the removal of this cap. However, we are concerned that there is a potential for WDOs to be extended in a way that could be too onerous. Consequently we recommend that the cap on hours for WDOs be retained but with the possibility of extension where that would not be unduly onerous (Recommendation 9.9).
- 0.44 There is no cap on the length of time-to-pay arrangements. In this inquiry we were told of cases where vulnerable people on government benefits in very difficult circumstances were given time-to-pay arrangements lasting potentially for several decades. We find it undesirable that vulnerable people should be required to make payments for very long periods without their circumstances being recognised and consideration being given to writing off their debts, at least in part. We therefore recommend a two-year cap on time-to-pay arrangements (Recommendation 9.9).
- 0.45 At the end of the capped period for time-to-pay arrangements and WDOs the SDRO should automatically consider, without requiring an application, writing off the debts of people who are subject to WDOs and time-to-pay arrangements. The write-off guidelines should provide that the successful completion of the time-to-pay period or the WDO should be given significant weight, along with other factors, in making the relevant decision (Recommendation 9.9).
- 0.46 The Hardship Review Board reviews decisions of the SDRO. However the Board deals with very few cases, and there is little information about the way the Board operates and the grounds on which it will review SDRO decisions. We recommend the provision of further information for the public about these matters (Recommendation 9.10).

Criminal Infringement Notices

- 0.47 Criminal Infringement Notices (CINs) are penalty notices issued by police for minor criminal offences. The question of which offences are suitable to be dealt with by way of a CIN can be a controversial one. We recommend that there be guidelines to govern this issue, and that the guidelines proposed in Chapter 3 of this report be adopted used for this purpose (Recommendation 10.1).
- 0.48 Particular concerns were raised during this inquiry about the net-widening effect of CINs, especially in relation to the offences of offensive language and offensive conduct. The problems identified with offensive language were: the indeterminacy of the test for offensiveness; the change in community standards in relation to offensive language; the frequent use of swear words in popular culture; the net-widening effect of the offence, especially in its impact on Aboriginal communities and where it is used as part of a 'trifecta' (three notices issued, for example, for an original offence, offensive language, and offensive conduct.) We were also told that this offence has a particularly detrimental effect on the reputation of the justice system because those who issue the notices (in common with many other people) use the same 'offensive' language for which penalty notices are issued.

- 0.49 We recommend that there be a further inquiry into the abolition of the offence of offensive language with consideration being given, at the same time, to what might be encompassed within the offence of offensive conduct. If abolition of offensive language is not ultimately recommended, that inquiry should determine what action should be taken to deal with the problems identified with this offence (Recommendation 10.3). If these offences are retained, the issue of CINS for these offences should be subject to mandatory review by a senior police officer (Recommendation 10.2).

Part Four Vulnerable people

- 0.50 Part Four deals with the impact of penalty notices on vulnerable people, including people on low incomes (Chapter 11); children and young people (Chapter 12); people with cognitive and mental health impairments (Chapter 13); homeless people (Chapter 14); people living in regional, rural and remote areas (Chapter 15); Aboriginal people and Torres Strait Islanders (Chapter 16); and people in custody (Chapter 17). Each chapter provides background information about the impact of penalty notices on the group under discussion. It sets out the ways in which the present penalty notice system accommodates, or fails to accommodate, the needs of that group. Finally each chapter sets out the ways in which the recommendations of this report respond to the specific needs of that group. We make additional recommendations where necessary.
- 0.51 In relation to children and young people, we recommend that penalty notices not be imposed on a person under the age of 14 years (Recommendation 12.1). This coincides with the practice of many enforcement agencies and with the common law presumption of criminal responsibility. However, we recommend that it be possible to administer cautions to children aged 10 to 14 years because of their educative role (Recommendation 12.1). To ensure greater consistency and fairness, we also recommend that the guidelines provide that penalty levels for children and young people should be set at 25% of the adult rate. The guidelines should recognise exceptions for offences only committed by children and young people (where penalty levels already accommodate their needs); offences not likely to be committed by children and young people; and serious traffic offences. Enforcement costs should be set at half the adult rate for this group (Recommendation 12.2).
- 0.52 In relation to people with cognitive and mental health impairments, we recommend new, more inclusive, definitions of cognitive and mental health impairment that are derived from our reference on people with cognitive and mental health impairment in the criminal justice system (Recommendation 13.1). We also recommend that the SDRO establish and publicise a system whereby a person with a cognitive or mental health impairment, or his or her guardian, may apply for the person to be identified as eligible for automatic withdrawal of penalty notices (Recommendation 13.2). This system would apply to people whose impairment is a contributing factor to offending, or reduces their responsibility for offending, and is unlikely to improve. It will deal with those few people who repeatedly offend, for example by travelling on trains without a ticket; who cannot control their offending behaviour; and who are repeatedly issued with penalty notices that they do not have the resources to pay. Imposing and enforcing penalty notices against these people is ineffective as a sanction, and creates pointless administrative cost.

- 0.53 Debt, including penalty notice debt, is a very significant problem for people in custody. It may be a barrier to reintegration into the community on release and appears likely to lead to reoffending in some cases. While we received proposals that essentially involved writing off the debt of prisoners, we instead recommend options that reward prisoners for making positive contributions to society and their own rehabilitation. In addition to our recommendation that the WDO scheme be extended to people in custody (Recommendation 9.5) we recommend that prisoners in prison-based employment be entitled, on top of the small payment they receive for their work, to a credit against their penalty notice debt. We also recommend that the three-month moratorium on enforcement of penalty notice debt post-release be extended to six months. Consideration should be given to extending this period further (Recommendation 17.4). We further recommend that imprisonment and its consequences be a factor to be taken into account when deciding whether to write off a penalty notice debt (Recommendation 17.1). Taking into account the significant levels of penalty notice and fine debt amongst prisoners, and the many people in custody who have cognitive or mental health impairments, we recommend that the SDRO establish a specialist unit to provide advice and assistance to this group (Recommendation 17.2).

Part Five Maintaining the integrity and fairness of the penalty notice system

- 0.54 A reliably fair, consistent and effective penalty notice system is important to NSW. In 2009/10 the SDRO collected \$214.9 million dollars on behalf of state government agencies, which helped to fund the activities of those agencies. A person in NSW is far more likely to have contact with the penalty notice system than any other part of the criminal justice system. Public confidence in the system is therefore a significant issue. In particular there should be awareness and confidence that the system is focused on fairness and justice, not revenue raising.
- 0.55 Further, because a penalty notice imposes a single, inflexible, penalty on all recipients, for some sections of the community they can exacerbate social problems, provide an impetus to reoffending, and create significant costs for those agencies that provide help for vulnerable people with penalty notice debt. Balancing efficiency with fairness to vulnerable people is a significant challenge.
- 0.56 We recommend that some limited institutional support be provided to ensure that the system is fair, transparent, effective, and responsive to the needs of those who use it. It will assist in achieving these aims to have an oversight agency to rationalise policy; improve some of the guidelines that support the system; ensure consistency; support best practice across the whole of government; monitor the system and its standards; retain efficiency and cost-effectiveness; and avoid importing the complexity and expense of the court system.
- 0.57 To carry out this role we recommend the establishment of a Penalty Notice Oversight Agency (PNOA) (Recommendation 18.1). Taking into account the nature of its role and the important issue of cost, we have concluded that the PNOA should be a modest unit located in the AGJ (Recommendation 18.4).
- 0.58 The functions of the PNOA will be to:

- provide policy advice to the Government, through the Attorney General, on the penalty notice system
- develop whole-of-government guidelines for setting penalty notice offences and amounts and for key aspects of issuing and enforcing penalty notices
- provide advice to Government in relation to new penalty notice offences and amounts proposed by issuing agencies
- review existing penalty notice offences and amounts
- work with issuing agencies to support and disseminate best practice, and
- monitor and report publicly on issuing agencies' compliance with the legislation and guidelines.

0.59 We anticipate that the PNOA will generally operate in a collaborative and consultative manner. Where new or revised penalty notices offences are proposed the PNOA will scrutinise the proposal to check for compliance with relevant guidelines and provide any necessary advice and assistance to the relevant department or agency. It is proposed that the minister responsible for the legislative or regulatory amendments would need to obtain a certificate of compliance with the guidelines from the PNOA. If the proposal is not compliant the offence must go to Cabinet for consideration (Recommendation 18.2).

0.60 Many of the current inconsistencies in the penalty notice system have arisen because there has not been a whole-of-government perspective applied to penalty notices. The proposed PNOA will provide that perspective so that any departures from guidelines designed to keep the penalty notice system fair and consistent will be subject to careful consideration by the Government, with advice from the Attorney General and the relevant minister. The proposed PNOA will also conduct a review of existing penalty notices to update them and ensure consistency with guidelines (Recommendation 18.3).

0.61 One of the most persistent issues raised in this inquiry was the response of the system to vulnerable people who have difficulty paying penalty notices. To assist the SDRO in this regard, we recommend that it establish an advisory committee of key stakeholders to provide advice on ways to improve and develop its activities in relation to vulnerable people (Recommendation 18.5).

Recommendations

Chapter 2 – Regulating penalty notices		page
2.1	The <i>Fines Act 1996</i> (NSW) should be reviewed to: (a) distinguish court fines and penalty notices, and (b) improve its clarity and accessibility.	37
2.2	(1) The powers in the <i>Fines Act 1996</i> (NSW) to issue guidelines relating to penalty notices should be consolidated and rationalised. (2) The power to issue guidelines should be vested in the Attorney General and, where relevant, should require consultation with the Minister for Finance and Services. (3) The proposed Penalty Notice Oversight Agency should support the Attorney General in the development of these guidelines. (4) Provision should be made in the <i>Fines Act 1996</i> (NSW) for the issue of guidelines in relation to internal review.	42
Chapter 3 - Guidelines for creating penalty notice offences		page
3.1	The Government should adopt guidelines regulating which offences should be penalty notice offences.	509
3.2	The proposed guidelines on penalty notice offences should be based on principles of responsive regulation. They should emphasise that: (a) penalty notice offences are part of the criminal justice system and their creation should be informed by considerations of fairness and justice, and (b) revenue raising is not a relevant consideration in relation to the creation of penalty notice offences.	54
3.3	(1) The proposed guidelines on penalty notice offences should require consideration of the impact of the proposed penalty notice offence on vulnerable people. (2) Where a penalty notice offence is likely to affect vulnerable people adversely, the following issues should be considered (a) whether there are more appropriate alternatives to a penalty notice offence (b) whether there are ways in which the impact on vulnerable people can be ameliorated.	57
3.4	(1) Where penalty notice offences contain a mental element, defence or proviso, the proposed guidelines on penalty notice offences should provide that: (a) any mental element, defence or proviso should be clear and simple to assess from the context of the offence (b) issuing agencies should (i) clearly state in their public documentation what constitutes offending behaviour and the right to go to court (ii) provide officers with special training and internal operational guidelines before they may issue such penalty notices (iii) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency. (2) The proposed Penalty Notice Oversight Agency should report publicly on the operation of penalty notice offences containing a mental element, defence or proviso.	62
3.5	(1) The proposed guidelines on penalty notice offences should provide that, where an offence requires an issuing officer to make a judgment based on community standards, issuing agencies must: (a) clearly state in their public documentation what constitutes offending behaviour and the right to go to court (b) provide officers with special training and internal operational guidelines before they may issue	64

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	such penalty notices	
	(c) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency.	
	(2) The proposed Penalty Notice Oversight Agency should report publicly on the operation of penalty notice offences requiring an enforcing officer to make a judgment based on community standards.	
3.6	The proposed guidelines on penalty notice offences should provide that penalty notices are suitable for minor offences.	67
3.7	The proposed guidelines on penalty notice offences should provide that penalty notices are not suitable for offences involving violence.	69
3.8	The proposed guidelines on penalty notice offences should provide that penalty notices are not suitable for indictable offences.	70
3.9	The proposed guidelines on penalty notice offences should not limit penalty notice offences to offences that attract low maximum penalties.	72
3.10	(1) The proposed guidelines on penalty notice offences should provide that:	75
	(a) an offence where imprisonment is an available sentencing option can qualify as a penalty notice offence if there is a demonstrated public interest in dealing with breaches involving lower levels of seriousness by way of penalty notice	
	(b) issuing agencies must	
	(i) provide officers with special training and internal operational guidelines before they may issue such penalty notices	
	(ii) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency.	
	(2) The proposed Penalty Notice Oversight Agency should report publicly on the operation of penalty notice offences for which imprisonment is an available sentencing option.	
3.11	The proposed guidelines on penalty notice offences should not limit penalty notice offences to high volume offences.	78
3.12	(1) The imposition of multiple penalties for continuing offences should be dealt with in the legislation prescribing the offence.	83
	(2) The proposed guidelines on penalty notice offences should provide that continuing offences require that:	
	(a) careful consideration be given to whether it is appropriate for multiple penalty notices to be issued and, if so, whether it is appropriate that there be an escalation in the penalty for a continuing breach, or whether continuing infringements should instead be referred to a court	
	(b) relevant provisions state clearly when an offence is a continuing offence for which multiple penalty notices can be issued	
	(c) relevant provisions state clearly the increasing penalties that apply.	

Chapter 4 - Guidelines for penalty notice amounts

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4.1	The Government should adopt guidelines regulating the setting of penalty notice offences and their adjustment over time.	91
4.2	The proposed guidelines on penalty notice amounts should provide that the penalty notice amount should reflect the nature and seriousness of the offence.	96
4.3	The proposed guidelines on penalty notice amounts should provide that penalty notice amounts should be consistent for comparable penalty notice offences.	100
4.4	The proposed guidelines on penalty notice amounts should provide that penalty notice amounts should be set at a level designed to deter offending, but be considerably lower than a court might generally be expected to impose for the offence.	104
4.5	The proposed guidelines on penalty notice amounts should provide that	108

- (a) a penalty notice amount should not exceed 25% of the maximum court fine for that offence
 - (b) only in exceptional circumstances involving demonstrated public interest may a penalty notice amount be up to 50% of the maximum court fine, for example where
 - (i) the harm caused by the offence is likely to be particularly severe
 - (ii) there is a need to provide effective deterrence because the offender stands to make a profit from the activity, or
 - (iii) the great majority of offences are dealt with by way of penalty notices, so that the maximum court penalty is less significant as a comparator.
- 4.6 The proposed guidelines on penalty notice amounts should provide that the pattern of fines previously imposed by the courts, where that information is available, is a relevant factor to be taken into account when setting penalty notice amounts. 111
- 4.7 The proposed guidelines on penalty notice amounts should provide that, where penalty notice offences can be committed by both natural and corporate persons, higher penalty notice amounts should apply to corporations. 118
- 4.8 The proposed guidelines on penalty notice amounts should provide that the impact of the penalty amount on vulnerable people should be taken into consideration. 119

Chapter 5 - Official cautions		page
5.1	The <i>Fines Act 1996</i> (NSW) s 19A should be amended to provide that, in every case where a penalty notice offence is committed, the appropriate officer must consider whether it is appropriate to issue an official caution instead of a penalty notice.	134
5.2	<ul style="list-style-type: none"> (1) The Attorney General's Caution Guidelines should be amended to include a statement of principle reinforcing the need to reduce the involvement of vulnerable people in the penalty notice system. (2) All agencies that issue penalty notices should ensure that issuing officers receive training that covers s 19A of the <i>Fines Act 1996</i> (NSW) and the Attorney General's Caution Guidelines (or their own internal guidelines), and has a particular focus on working with vulnerable people. (3) All issuing agencies should report periodically to the proposed Penalty Notice Oversight Agency on the system they have in place to ensure that all issuing officers are adequately trained to issue cautions and work with vulnerable people. (4) The proposed Penalty Notice Oversight Agency should <ul style="list-style-type: none"> (a) report periodically on whether or not issuing agencies are meeting their training obligations, and (b) disseminate information to issuing agencies about best practice in cautions training. 	137
5.3	<ul style="list-style-type: none"> (1) Section 19A of the <i>Fines Act 1996</i> (NSW) should be amended to provide that, where an issuing agency issues its own guidelines, the agency should publish those guidelines, including on the agency's website. (2) The proposed Penalty Notice Oversight Agency should <ul style="list-style-type: none"> (a) monitor agency-specific caution guidelines for consistency with the <i>Fines Act 1996</i> (NSW) and the Attorney General's Caution Guidelines, and (b) make recommendations, and take other measures where necessary, to improve issuing agencies' caution guidelines. 	139
5.4	<ul style="list-style-type: none"> (1) Where a caution is issued, as opposed to an informal warning, it should be issued in writing. (2) Issuing agencies should be required to collect the minimum data currently recommended under the Attorney General's Caution Guidelines in a form that can be analysed. That is the: <ul style="list-style-type: none"> (a) date of the caution (b) name of the officer who gave the caution (c) offence for which the caution was given (d) name and address of the person given the caution, and (e) date, place and approximate time that the offence was alleged to have been committed. (3) Issuing agencies should report periodically to the proposed Penalty Notice Oversight Agency on the 	144

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- number of cautions and penalty notices, by offence, that it issues.
- (4) Issuing agencies should implement policies to ensure compliance with the relevant caution guidelines as well as measures to monitor compliance.
 - (5) Issuing agencies should report periodically to the proposed Penalty Notice Oversight Agency on these policies and measures.
 - (6) The proposed Penalty Notice Oversight Agency, in consultation with issuing agencies, should further develop methods to measure compliance with the relevant caution guidelines. Particular attention should be given to their effectiveness in ensuring the use of cautions for vulnerable people.
 - (7) The proposed Penalty Notice Oversight Agency should report periodically on issuing agencies' compliance with s19A of the *Fines Act 1996* (NSW) and the relevant caution guidelines.
- 5.5 Section 19A of the *Fines Act 1996* (NSW) should be amended to provide that, unless it develops its own consistent guidelines, the NSW Police Force is covered by the Attorney General's Cautions Guidelines. 147

Chapter 6 - Issuing a penalty notice		page
6.1	<p>(1) The <i>Fines Act 1996</i> (NSW) should be amended to provide that all penalty notices, as issued to the recipient, should:</p> <ol style="list-style-type: none">(a) provide enough information to enable that person to identify the alleged offending behaviour(b) specify the legislative provisions alleged to have been breached: a law part code is not sufficient for this purpose, and(c) contain information about the possibility of court election. <p>(2) Regulations under the <i>Fines Act 1996</i> (NSW) should provide that all penalty notices should include a telephone number and website for</p> <ol style="list-style-type: none">(a) the issuing agency or the State Debt Recovery Office, whichever is relevant, and(b) LawAccess NSW. <p>(3) Issuing agencies should include the following information in full on a penalty notice:</p> <ol style="list-style-type: none">(a) a comprehensive list of payment options, including the option of payment in cash(b) information about the availability of time to pay options(c) information about the consequences of court election, and(d) information about the right to have a penalty notice reviewed. <p>Alternatively, this information may be provided in short form, together with details of where to obtain further information.</p>	159
6.2	The <i>Fines Act 1996</i> (NSW) should be amended to allow issuing agencies to serve penalty notices and subsequent notices (including reminder notices and enforcement notices) electronically where the penalty notice recipient has provided consent in advance.	166
6.3	<p>(1) Where legislation prescribes penalty notice offences, it should set time limits for service of penalty notices. Time limits should take into account the need of the penalty notice recipient to recollect and respond to the alleged offence.</p> <p>(2) When issuing agencies set time limits for penalty notice offences within their jurisdiction, they should consider whether it is appropriate to permit exceptions to those limits, the circumstances in which any exceptions should be permitted, and the consequences of exceeding time limits.</p>	169
6.4	<p>Issuing agencies that engage private contractors to issue penalty notices should ensure that:</p> <ol style="list-style-type: none">(a) the final decision to issue, or not to issue, a penalty notice is taken by an employee of the issuing agency and not by a private contractor(b) accountability for the conduct of issuing officers remains at all times with the government agency(c) issuing officers are, at all times, subject to the control and direction of the issuing agency(d) issuing officers employed by private contractors are adequately trained to carry out work under the contract(e) training is provided on the elements and standard of proof required for the offences, as well as the relevant caution guidelines	173

- (f) the performance of contractors, including issuing officers, is monitored, and
 - (g) the performance of issuing officers is never assessed by the number of penalty notices issued, nor should there be perverse incentives such as quotas or targets.
- 6.5 (1) The Attorney General's Caution Guidelines should be amended to require issuing officers to consider whether the issue of multiple penalty notices in response to a single set of circumstances would unfairly or disproportionately punish a person in a way that does not reflect the totality, seriousness or circumstances of the offending behaviour. 179
- (2) Section 24E(2) of the *Fines Act 1996* (NSW) should be amended to provide that an issuing agency must withdraw one or more penalty notices where it finds that multiple penalty notices have been issued in relation to a single set of circumstances, and that this unfairly punishes the recipient in a way that does not reflect the totality, seriousness and circumstances of the offending behaviour.
- 6.6 If legislation provides for discretion to withdraw a penalty notice in favour of prosecution, this discretion should only be available 182
- (a) in respect of serious offences where the nature and gravity of the offence was not apparent at the time of issuing a penalty notice, and
 - (b) subject to a time limit of 28 days.

Chapter 7 - Internal review

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- 7.1 (1) The State Debt Recovery Office Review Guidelines should be reviewed and amended 194
- (a) to achieve consistency with the *Fines Act 1996* (NSW) and the Attorney General's Internal Review Guidelines
 - (b) to reflect more effectively the right of penalty notice recipients to make an application for internal review.
- (2) All agencies that conduct internal review should
- (a) use the Attorney General's Internal Review Guidelines or develop and use guidelines that are consistent with the Attorney General's Internal Review Guidelines
 - (b) make publicly available the guidelines that they use, including on their website
 - (c) report periodically to the proposed Penalty Notice Oversight Agency on their use of each of the review grounds under ss 24E(2) and (3) of the *Fines Act 1996* (NSW).
- (3) The proposed Penalty Notice Oversight Agency should
- (a) monitor the published guidelines of agencies that conduct their own internal reviews to ensure consistency with the *Fines Act 1996* (NSW) and the Attorney General's Internal Review Guidelines
 - (b) monitor compliance by reviewing agencies with the provisions of ss 24E(2) and (3) of the *Fines Act 1996* (NSW)
 - (c) make recommendations, and take other measures as appropriate, to improve agency practice in reviewing penalty notices
 - (d) report periodically on its findings.
- 7.2 Section 24E(2)(d) of the *Fines Act 1996* (NSW) and the Attorney General's Internal Review Guidelines should be amended to provide that a penalty notice must be withdrawn if the person to whom it was issued has an intellectual disability, a mental illness, a cognitive impairment or is homeless, which was a contributing factor to the commission of an offence or reduced the person's responsibility for the offending behaviour. 199
- 7.3 Section 24E(2)(d) of the *Fines Act* and Attorney General's Internal Review Guidelines should be amended to require withdrawal of a penalty notice where a person has a severe substance dependence, as defined in s 5 of the *Drug and Alcohol Treatment Act 2007* (NSW), which was a contributing factor or reduced the responsibility of the person for the offending behaviour. 203
- 7.4 All agencies that carry out internal review of penalty notices should ensure that reviewing officers receive training about the impact of penalty notices on vulnerable people. 206
- 7.5 The Attorney General's Internal Review Guidelines should be reviewed and updated to explain and clarify the circumstances in which an agency may legitimately decline to conduct internal review under s 24B of 208

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	the <i>Fines Act 1996</i> (NSW).	
7.6	The internal review provisions in Part 3 Division 2A of the <i>Fines Act 1996</i> (NSW) should be amended to clarify that they apply to the NSW Police Force.	212
7.7	<ol style="list-style-type: none"> (1) The Attorney General's Internal Review Guidelines and the State Debt Recovery Office Review Guidelines should be revised to minimise, so far as possible, the requirements for documentary proof including to allow for the acceptance of information from practitioners providing services to applicants. (2) The Attorney General's Internal Review Guidelines should be reviewed and updated to include examples of acceptable supporting evidence in an application for internal review. (3) The State Debt Recovery Office should further develop memoranda of understanding with government departments and agencies and should extend this approach to non-government organisations. One function of such agreements should be the facilitation of internal review. (4) All agencies that conduct, or are otherwise engaged in, internal review should raise public awareness about the availability of internal review. (5) All agencies that conduct, or are otherwise engaged in, internal review should train reviewers to provide an effective service to people with cognitive and mental health impairments. Training should cover the impact of cognitive and mental health impairments on a person's capacity to understand and avoid offending behaviour, as well as capacity to pursue internal review. 	218
7.8	<ol style="list-style-type: none"> (1) The <i>Fines Act 1996</i> (NSW) should be reviewed and amended to simplify the time limits governing court election and internal review. (2) Section 24F(3) of the <i>Fines Act 1996</i> (NSW) should be repealed and s 36(2) of the <i>Fines Act 1996</i> (NSW) should be amended to allow an applicant the opportunity to make a court election, regardless of whether any payment towards the penalty notice has been made. (3) Section 24I of the <i>Fines Act 1996</i> (NSW) should be amended so that, if a person elects to have a matter dealt with by a court while a review is in progress, the review is not terminated on the making of that election. 	224

Chapter 8 - Enforcement

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8.1	<ol style="list-style-type: none"> (1) The State Debt Recovery Office should develop and make public a fee-waiver policy. (2) The fee-waiver policy should provide for waiver of annulment fees for a person in receipt of an eligible Centrelink benefit (as defined by the Director of the State Debt Recovery Office) who makes a reasonable and genuine application. 	230
8.2	<ol style="list-style-type: none"> (1) The State Debt Recovery Office, Centrelink, and Roads and Maritime Services should make arrangements to enable people to apply for time to pay at Centrelink and Roads and Maritime Services offices. (2) The State Debt Recovery Office should extend, develop, and increase the frequency of its licence restoration activities, especially in rural, regional and remote areas and in relation to Aboriginal and Torres Strait Islander communities. (3) The proposed regional network of work and development order support teams should raise stakeholder awareness about the full range of fine mitigation measures available to facilitate licence restoration. 	236
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- 8.5 (1) The *Fines Act 1996* (NSW) should be amended to provide that a penalty notice or Criminal Infringement Notice may be referred to in any report provided to a court for sentencing. 252
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	(4) The proposed Penalty Notice Oversight Agency should monitor the operation of the time-to-pay guidelines.	
	(5) The State Debt Recovery Office should report periodically on the operation of the time-to-pay guidelines as required by the proposed Penalty Notice Oversight Agency.	
	(6) The proposed Penalty Notice Oversight Agency should report publicly on the operation of the time-to-pay guidelines.	
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	(5) The State Debt Recovery Office should report periodically on the operation of the write off guidelines	

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- as required by the proposed Penalty Notice Oversight Agency.
- (6) The proposed Penalty Notice Oversight Agency should report publicly on the operation of the write-off guidelines.
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 - (b) a discretion to impose a good behaviour period only in cases where it is justified by the seriousness of the offending and its likely deterrent effect
 - (c) that the maximum good behaviour period should be two years for adults and six months for children and young people under the age of 18 years.
- 9.9 (1) The cap on hours in the Attorney General's Work and Development Order Guidelines should be retained. 283
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 - (c) such an arrangement does not impose unduly onerous obligations on the participant.
- (3) There should be a two-year cap on time-to-pay arrangements.
- (4) At the end of the capped period for time-to-pay and work and development orders, the State Debt Recovery Office should automatically consider, without requiring any application, whether any debt should be written off.
- (5) The write-off guidelines should prescribe the grounds on which the State Debt Recovery Office should write off debts at the end of the capped period for time to pay or work and development orders.
- (6) The write-off guidelines should provide that successful completion of the capped period for a work and development order or time-to-pay arrangement should be relevant and given particular weight in considering whether it is appropriate to write off a penalty notice debt. Other relevant considerations should include:
- (a) the person's likely future capacity to pay the debt
 - (b) any disability, mental illness or cognitive impairment
 - (c) homelessness, and
 - (d) any further penalty notices incurred.
- 9.10 (1) The Hardship Review Board should review and update its procedures to provide: 285
- (a) information about the basis on which its decision will be made, including the guidelines that will be applied
 - (b) information about how to make an application, including the documentation that is needed to support an application
 - (c) clear and simple application forms.
- (2) Information about the Hardship Review Board's procedures should be publicly available, including on its website and the State Debt Recovery Office website.
- (3) The State Debt Recovery Office, in reporting periodically as required by the proposed Penalty Notice Oversight Agency, should include information about the operation of the Hardship Review Board.
- (4) The proposed Penalty Notice Oversight Agency should, in monitoring and reporting on the operation of the penalty notice system, take into consideration the operation of the Hardship Review Board.

Chapter 10 - Criminal Infringement Notices

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- 10.2 Review by a senior police officer of Criminal Infringement Notices issued for offensive language and offensive conduct should be mandatory and should not depend on application. 306

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 - (b) If not, what action should be taken to deal with the problems identified with this offence?
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Chapter 12 - Children and young people

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- 12.1 (1) Section 53 of the *Fines Act 1996* (NSW) should be amended to provide that Part 3 of the Act, except the cautions provisions contained in Division 1A, does not apply to a person younger than 14 years at the time of the offending behaviour. 333
- (2) The Attorney General's Caution Guidelines should be amended in accordance with (1).
- 12.2 (1) The guidelines on penalty amounts should provide that offending by children and young people should attract a penalty at 25% of the adult rate, except where the offence is: 338
- (a) only committed by children and young people, in which case the penalty level should take into account the special circumstances of children and young people
 - (b) one not likely to be committed by children and young people, in which case a special rate is not required, or
 - (c) a serious traffic offence.
- (2) All enforcement costs imposed on children and young people should be set at half the adult rate.

Chapter 13 - People with mental health and cognitive impairments

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- 13.1 All penalty notice guidelines should adopt the terms 'mental health impairment' and 'cognitive impairment', and define them as follows: 351
- (a) 'Cognitive impairment' means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following:
 - (i) intellectual disability
 - (ii) borderline intellectual functioning
 - (iii) dementias
 - (iv) acquired brain injury
 - (v) drug or alcohol related brain damage
 - (vi) autism spectrum disorders.
 - (b) 'Mental health impairment' means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent. Such mental health impairment may arise from, but is not limited to, the following:
 - (i) anxiety disorders
 - (ii) affective disorders
 - (iii) psychoses
 - (iv) severe personality disorders
 - (v) substance induced mental disorders.
- 13.2 The State Debt Recovery Office should establish and publicise a system whereby: 361
- (a) a person, or his or her legal guardian, may apply for that person to be identified as eligible for automatic withdrawal of any penalty notice on the grounds that he or she
 - (i) has a mental health or cognitive impairment
 - (ii) the impairment is unlikely to improve in the foreseeable future, and
 - (iii) the impairment is a contributing factor to the commission of the offence or reduces the person's

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responsibility for the offending behaviour.

- (b) the State Debt Recovery Office may, upon determination that a person is eligible for automatic withdrawal of any penalty notice on the grounds set out in (a), withdraw any outstanding or future penalty notices without further application.
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18.3	<p>The Penalty Notice Oversight Agency should conduct a review of existing penalty notices in order to</p> <ul style="list-style-type: none"> (1) update them and remove obsolete offences (2) ensure consistency across the penalty notice system, particularly in penalty amounts set for like offences, and (3) ensure consistency of existing offences with the proposed guidelines for penalty notice offences and penalty notice amounts. 	416
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Part One

Introduction

1. Introduction

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Terms of reference

- 1.1 In a letter to the Commission received on 5 December 2008, the Attorney General, the Hon John Hatzistergos MP, asked the Commission to inquire into and report on the laws relating to the use of penalty notices in NSW. The terms of reference require us to have particular regard to:
1. whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate
 2. the consistency of current penalty amounts for the same or similar offences
 3. the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices
 4. the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time
 5. whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so: (a) whether penalty amounts for children and young people should be set at a rate different to adults; (b) whether children and young people should be subject to a shorter conditional “good behaviour” period following a write-off of their fines; and (c) whether the licence sanction scheme under the *Fines Act 1996* (NSW) should apply to children and young people
 6. whether penalty notices should be issued to people with an intellectual disability or cognitive impairment, and
 7. any related matter.
- 1.2 The terms of reference exclude from this inquiry a review of amendments of offences under road transport legislation administered by the Minister for Roads:

While the Commission may consider penalty notice offences under road transport legislation administered by the Minister for Roads, the Commission need not consider any potential amendments to these offences as these offences have already been subject to an extensive review.

The nature and history of penalty notices

1.3 A penalty notice gives the recipient a choice between paying a fine for an alleged infringement of the law, or going to court.¹ Penalty notices in NSW are presently governed by the *Fines Act 1996* (NSW) (*Fines Act*). Section 20 of that Act defines a penalty notice as follows:

- (1) A penalty notice is a notice referred to in subsection (2) to the effect that the person to whom it is directed has committed a specified offence and that, if the person does not wish to have the matter dealt with by a court, the person may pay the specified amount for the offence to a specified person within a specified time.

The vast majority of those who receive a penalty notice do not elect to go to court. Of the 2.7 million penalty notices issued during the 2010/2011 financial year, only 28,214 recipients (1.04%) elected to contest them in court.²

1.4 Part 3 of the *Fines Act* governs penalty notices. It deals with the determination of whether to give an official caution or a penalty notice; the issuing of penalty notices and penalty reminder notices; internal review and annulment of penalty notices.³ The provisions of Part 4 of the *Fines Act*, which deal with enforcement of fines and fine mitigation, generally apply to penalty notices. The *Fines Act* also established the State Debt Recovery Office (SDRO)⁴ for the purpose of managing the overall process of penalty notice and fine enforcement and co-ordinating the other agencies involved in the process.⁵

1.5 Penalty notices may now be issued in relation to a very wide range of offences. However, the first penalty notice provisions related to parking offences⁶ and were introduced to address the difficulties encountered by the courts in dealing with a large number of such offences. In 1961, the penalty notice scheme was extended to some offences under the *Motor Traffic Act 1909* (NSW) such as driving in excess of certain speed limits and driving without a licence. This was done at a time when the

1 *Fines Act 1996* (NSW) s 20.

2 Email correspondence from Mr Gregory Frearson, Assistant Director (Operations), State Debt Recovery Office to Mr Ani Luzung (Legal Officer) NSW Law Reform Commission, 13 January 2012.

3. *Fines Act 1996* (NSW) s 19.

4. The SDRO is the fines division of the NSW Office of State Revenue, which is part of the Department of Finance and Services.

5. *Fines Act 1996* (NSW) pt 8. See NSW, *Parliamentary Debates*, Legislative Council, 14 November 1996, 5977 (J Shaw).

6. *Transport Act 1930* (NSW) s 265 provided that regulations may provide for the infliction and collection by prescribed officers of penalties for minor offences against the *Metropolitan Traffic Act 1900* (NSW), the *Motor Traffic Act 1909* (NSW), the *Motor Tax Management Act 1914* (NSW) and the *Transport Act 1930* (NSW). Subsequently, the *Minor Traffic Offences Regulations 1954* (NSW) introduced the first provisions that allowed for the imposition, by notice, of modified penalties for various parking offences.

road toll in NSW had dramatically increased and the government decided that the time of traffic police could be better spent patrolling rather than preparing breach reports and attending court. It was noted that a penalty notice system would save the time spent by motorists in attending court, reduce the costs of issuing and serving summons, and help relieve court congestion.⁷

- 1.6 The offences for which penalty notices may be issued gradually grew beyond parking and driving offences so that by 1983, there were ten statutory provisions authorising the use of penalty notices to deal with offences relating to traffic, maritime services, forestry, and fisheries.⁸
- 1.7 In 1996, Parliament adopted the *Fines Act*. At its inception, the Act contained 43 statutory provisions authorising the use of penalty notices.⁹ Since then, the list has grown to 110 statutory provisions, creating more than 7,000 offences that may be enforced by way of penalty notice.¹⁰ Penalty notice offences now arise in such diverse areas as occupational health and safety,¹¹ the building industry,¹² protection of the environment,¹³ national parks and wildlife,¹⁴ native vegetation,¹⁵ residential parks,¹⁶ prevention of cruelty to animals,¹⁷ water management,¹⁸ animal diseases,¹⁹ electricity supply,²⁰ passenger transport,²¹ rail safety,²² ports and maritime administration,²³ fair trading,²⁴ registration of interests in goods,²⁵ gaming machines,²⁶ pawnbrokers and second-hand dealers,²⁷ veterinary practice,²⁸ fitness services,²⁹ and assisted reproductive technology,³⁰ among others.

7. NSW, *Parliamentary Debates*, Legislative Assembly, 23 November 1960, 2316 (J McMahon).

8. *Justices Act 1902* (NSW) s 100I.

9. *Fines Act 1996* (NSW) sch 1.

10. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Appendix A.

11. *Occupational Health and Safety Act 2000* (NSW) s 108.

12. *Building Professionals Act 2005* (NSW) s 92.

13. *Protection of the Environment Operations Act 1997* (NSW) s 224.

14. *National Parks and Wildlife Act 1974* (NSW) s 160.

15. *Native Vegetation Act 2003* (NSW) s 43.

16. *Residential Parks Act 1998* (NSW) s 149.

17. *Prevention of Cruelty to Animals Act 1979* (NSW) s 33E.

18. *Water Management Act 2000* (NSW) s 365.

19. *Animal Diseases (Emergency Outbreaks) Act 1991* (NSW) s 71A.

20. *Electricity Supply Act 1995* (NSW) s 103A.

21. *Passenger Transport Act 1990* (NSW) s 59.

22. *Rail Safety Act 2008* (NSW) s 139.

23. *Ports and Maritime Administration Act 1995* (NSW) s 100.

24. *Fair Trading Act 1987* (NSW) s 67.

25. *Registration of Interests in Goods Act 1986* (NSW) s 19A.

26. *Gaming Machines Act 2001* (NSW) s 203.

27. *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 26.

28. *Veterinary Practice Act 2003* (NSW) s 101.

29. *Fitness Services (Pre-paid Fees) Act 2000* (NSW) s 16.

30. *Assisted Reproductive Technology Act 2007* (NSW) s 64.

1.8 The number of penalty notices has continued to increase. In the six-year period 2003/04 – 2008/09, 16,097,633 penalty notices were issued, with a face value of approximately \$2.4 billion.³¹ During the 2009/10 financial year, the SDRO:

- processed over 2.8 million penalty notices³² to the value of more than \$491 million
- issued 876,782 enforcement orders with a total value of \$266 million,
- collected \$182.5 million for the Crown and \$137.3 million on behalf of other organisations in penalty notice payments
- collected \$110 million for the Crown and \$56.4 million on behalf of other organisations through enforcement orders, and
- collected \$27.7 million from clients in fees and miscellaneous revenue.³³

1.9 In 2002 legislation was passed amending the *Criminal Procedure Act 1986* (NSW) to authorise police officers in 12 local area commands, for a 12-month trial period, to issue Criminal Infringement Notices (CINs) for certain prescribed offences by adults.³⁴ The purpose of CINs was to provide police with a quick and efficient way of dealing with minor criminal matters. Police may issue a CIN and the recipient may pay the penalty, in which case they are not liable to any further criminal proceedings or sanctions. Police save the time that would otherwise be involved in arresting and charging the recipient, preparing for court and attending at court. Courts also save the costs of dealing with minor offences.³⁵

1.10 The offences and the amounts prescribed for the CINs trial were as follows:

- common assault (\$400)
- larceny or shoplifting, where the property or amount does not exceed \$300 (\$300)
- obtaining money etc by wilful false representation (\$300)
- goods in custody (\$350)
- offensive conduct (\$200)
- offensive language (\$150)
- obstructing traffic (\$200), and
- unauthorised entry of vehicle or boat (\$250).³⁶

Subsequently some offences were removed and some added to this list of CINs.³⁷

31. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Tables 1.1, 12.

32. Of which 1.2 million carried demerit points.

33. NSW Office of State Revenue, NSW Treasury, *Annual Report 2009-10* (2010) 26-27.

34. *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (NSW) sch 1.

35. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) i.

36. *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (NSW) sch 3[2].

Reviews of penalty notices

- 1.11 In April 2005, following a review, the Ombudsman reported that the trial of the CINs scheme had generally been successful in providing the police with a further option in dealing with minor offences and alleviating the workload of the Local Courts.³⁸ Some minor changes to the scheme were implemented as a result: for example, common assault was withdrawn from the list of offences.³⁹ All the other offences prescribed for the purposes of the trial,⁴⁰ and the application of the scheme to those aged 18 years and older,⁴¹ were maintained.
- 1.12 The legislation extending the power of the police to use CINs across the State included a requirement that the Ombudsman conduct a review of the operation of CINs ‘in so far the as those provisions impact on Aboriginal and Torres Strait Islander communities’.⁴² The Ombudsman completed this second review in August 2009.⁴³ The resulting report provides useful data concerning the use of CINs following their statewide implementation, particularly in relation to the effects of the CINs on Aboriginal communities. The report highlights a number of concerns, such as the potential net-widening effects of CINs, and the disproportionate issuing of CINs to Aboriginal people. These issues are discussed in more detail below, especially in chapters 10 and 16.
- 1.13 In the course of its 2006 review of community-based sentencing options for remote rural areas and for disadvantaged populations,⁴⁴ the Committee on Law and Justice of the NSW Legislative Council received a considerable number of submissions concerning issues relating to driver licence or vehicle registration suspension or cancellation arising from failure to pay fines and penalty notices. While the Committee noted that this matter was beyond the scope of its inquiry, it considered it useful to document the problems encountered by people in rural areas when driver licences are suspended or cancelled due to non-payment of fines and penalties. It recommended that the Government undertake a multi-agency project to examine issues relating to fine default and driver licences.⁴⁵
- 1.14 Subsequently, the Attorney General asked the NSW Sentencing Council to investigate the effectiveness of fines as a sentencing option, and the consequences for those who do not pay fines. In an interim report published in 2006, the

37. See also Chapter 10.

38. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) vi, 95. The review was required pursuant to the *Criminal Procedure Act 1986* (NSW) s 344.

39. *Police Powers Legislation Amendment Act 2006* (NSW) sch 4.4[2].

40. *Criminal Procedure Regulation 2005* (NSW) sch 2.

41. *Criminal Procedure Act 1986* (NSW) s 335.

42. *Criminal Procedure Act 1986* (NSW) s 344A.

43. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009).

44. Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006).

45. Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) Recommendation 49.

Sentencing Council identified a number of potential reform options in relation to penalty notices.⁴⁶

1.15 In 2008, Parliament passed the *Fines Amendment Act 2008* (NSW) and the *Fines Further Amendment Act 2008* (NSW), which implemented some of the recommendations made by the Sentencing Council and by a cross-agency working group on fines and penalty notices that was formed in response to the Sentencing Council's interim report.⁴⁷ These Acts introduced amendments which provided for:

- the power to issue an official caution as an alternative to issuing a penalty notice⁴⁸
- work and development orders (WDOs), allowing certain classes of people to satisfy all or part of the penalty amount by undertaking unpaid work for an approved organisation, or by participating in certain courses or treatment⁴⁹
- improvements in methods of payment, including periodic deductions from Centrelink payments,⁵⁰ and
- procedures for internal review by an agency of its decision to issue a penalty notice.⁵¹

1.16 In the second reading speech on the *Fines Further Amendment Bill 2008* (NSW), the Attorney General announced the government's intention to ask the Law Reform Commission to examine the need for further reforms of the penalty notice system.⁵²

1.17 WDOs were established as a two-year pilot program. In 2011 the program was positively evaluated and other aspects of the 2008 amendments were reviewed.⁵³ The WDO scheme was found to be an effective and appropriate response to offending by vulnerable people and it is currently being expanded and developed.⁵⁴

46. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) Part 3.

47. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11969 (J Hatzistergos).

48. *Fines Act 1996* (NSW) ss 19A-19B. These provisions and the Attorney General's Caution Guidelines (NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996*) commenced on 31 March 2010. Prior to the adoption of these provisions, the Roads and Traffic Authority (now part of Roads and Maritime Services) already had the power to issue formal warnings for traffic offences: *Road Transport (General) Act 2005* (NSW) s 105. Most agencies authorised to issue penalty notices did not have such statutory power but some of them were nevertheless giving warnings or cautions informally instead of issuing penalty notices in certain cases: NSW Office of State Revenue, State Debt Recovery Office, *Preliminary Submission 1*.

49. *Fines Act 1996* (NSW) ss 99A-99J. A two-year trial of Work and Development Orders commenced in September 2009.

50. *Fines Act 1996* (NSW) ss 100-101.

51. *Fines Act 1996* (NSW) ss 24A-24J, inserted by *Fines Further Amendment Act 2008* (NSW) sch 1 [10]. These provisions and the Attorney General's Internal Review Guidelines (NSW Department of Justice and Attorney General, *Internal Review Guidelines Under the Fines Act 1996*) commenced on 31 March 2010.

52. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11970 (J Hatzistergos).

53. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

54. See further Chapter 9.

- 1.18 There have been a number of other reviews of penalty notice schemes, or infringement schemes, in other jurisdictions. In 1995 the first comprehensive study of infringements in Victoria identified the essential features of a model infringement statute, with a recommendation for national uniformity. In our 1996 report on sentencing, we supported the Victorian call for uniform legislation.⁵⁵ We suggested that this could be achieved either by the introduction of a single Infringement Act, or by amending the *Fines Act* to prohibit the issue of infringement notices other than in accordance with its provisions.⁵⁶ The majority of the Commissioners also supported the expansion of infringement notices to offences which are traditionally regarded as more substantively criminal, rather than regulatory, in nature.⁵⁷
- 1.19 The Australian Law Reform Commission (ALRC), in its 2002 report *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, supported uniformity across federal infringement notice schemes.⁵⁸ It recommended the development of a model federal scheme to be applied when considering the enforcement of offences, and certain non-criminal contraventions of law (such as requirements to provide information to a regulator), by way of infringement notice. It identified the key elements of its model federal infringement scheme and recommended that its provisions be contained in a Regulatory Contraventions Statute.⁵⁹
- 1.20 In 2005, the Law Commission of New Zealand published Study Paper 16 as part of a review of the infringement offence system undertaken by the Ministry of Justice.⁶⁰ The Study Paper covers similar issues to those that are examined in this report, including those relating to the criteria for identifying infringement offences and setting of penalty amounts.

This inquiry

- 1.21 The Commission received the terms of reference in December 2008. We conducted preliminary consultations and received preliminary submissions from fifteen individuals and organisations.⁶¹ Details of over 7000 penalty notice offences in NSW were collected.

55. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) Recommendation 15.

56. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.48].

57. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.48]-[3.51]. Two of the six Commissioners on the Division considered that the infringement notice system should not be expanded, on the ground that it carries too great a risk of abuse by authorities and may simply become a vehicle of oppression for particular groups in society, such as young people and Aboriginal people.

58. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.48].

59. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.47]-[12.113].

60. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005).

61. See Appendix A.

- 1.22 Consultation Paper 10 (CP 10) was issued in September 2010.⁶² We received a total of 45 submissions;⁶³ these were analysed for their content and to identify any gaps in the responses to CP 10.
- 1.23 The Commission conducted an extensive consultation process.⁶⁴ We held 30 formal consultation meetings of various types with more than 170 stakeholders. Fourteen of these meetings were round tables, where representatives from key stakeholder groups were present. We met several times with representatives from the NSW Office of State Revenue and the State Debt Recovery Office. Our research and preliminary consultations demonstrated that different issues arise in relation to penalty notices in regional, rural and remote areas. We therefore visited Kempsey, Lismore and Wollongong, where we talked to representatives of Aboriginal communities, courts, police, non-government organisations, lawyers from Legal Aid NSW and private practice, magistrates and others.
- 1.24 Submissions and consultations emphasised the situation of vulnerable people and the many problems these groups confront with penalty notices. It was therefore important to consult about these issues and, where we could, to talk directly to members of these groups, as well as to those who represent and work with them in relation to penalty notices. While we were not able to talk directly to members of all groups, we were able to talk with people with intellectual disabilities, prisoners, Aboriginal people, and homeless people. We were also able to benefit from observing meetings of the Work and Development Order Monitoring Committee.⁶⁵ In addition to the consultation meetings we have significantly benefited from many informal conversations and discussions with experts and stakeholders.
- 1.25 We thank those who provided us with written submissions, and acknowledge the commitment of resources involved in doing so. Busy people travelled long distances to meet us, and/or gave up many hours of their time. People provided us with supplementary written material after our consultations, gave us access to data, and made themselves available for follow up discussion. We express our sincere thanks to them all. In particular we are grateful to those people who were prepared to talk to us about their own, sometimes difficult, experiences of dealing with penalty notices and penalty notice debt.

Key issues

The reach and importance of penalty notices in NSW

- 1.26 If a person has contact with the criminal justice system in NSW, that contact is more likely to be by a penalty notice than by court attendance. In 2009/10, the SDRO issued approximately 2,832,000 penalty notices with a total value of \$491,253,000.⁶⁶ The population of NSW in June 2009 was 7,124,600.⁶⁷ Even

62. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010).

63. See Appendix A.

64. See Appendix B.

65. See further Chapter 9.

66. NSW Office of State Revenue, NSW Treasury, *Annual Report 2009-10* (2010) 27.

allowing for the fact that some people will have received multiple penalty notices it is probable that a substantial proportion of the NSW population received a penalty notice in this one-year period. In 2009, the NSW Local Court imposed 116,915 penalties, of which 53,543 were fines.⁶⁸ Many more people therefore received a fine by way of a penalty notice than from the state's busiest court.

- 1.27 Professor Richard Fox's study of the Victorian penalty notice system in 1995 reported that:

For every *one* offence for which a charge was brought to trial in the Supreme Court or County Court of Victoria in 1991, *forty five* more came before the Magistrates' Court and a further *three hundred and thirty seven* were handled administratively by way of an 'on-the-spot ticket'.⁶⁹

- 1.28 Penalty notices are therefore the most frequent point of direct contact with the justice system. The quality of the penalty notice system is significant to both the general population and to government. It has been argued that respect for the legal system depends on perceptions of its procedural and substantive fairness.⁷⁰ The procedural and substantive fairness of the penalty notice system is clearly important, particularly given its reach. We do not know whether the many people who receive penalty notices generalise their judgments about its qualities to the justice system. If they do, this means that the quality of the penalty notice system is of even greater significance.

The strengths and weaknesses of penalty notices

- 1.29 Penalty notices were introduced and expanded in scope because of their significant advantages.⁷¹ Many of these advantages concern their cost benefits. They save considerable time and money for the agencies that issue them, for courts that avoid lengthy lists of minor offences, and for recipients who do not have to take time off work to attend court or pay court or legal costs. The penalty is immediate and certain and is usually significantly lower than the maximum penalty available for the offence if it were to be dealt with by a court. Penalty notice recipients also avoid having a conviction recorded.
- 1.30 However penalty notices also have disadvantages.⁷² The ease with which they are issued and their revenue-raising capacity could for some organisations, fuel a

67. Australian Bureau of Statistics, *Regional Population Growth, Australia 2009-10* (2011).

68. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2009* (2010) 27.

69. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 1 (footnotes omitted).

70. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [14.7]; T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 95; T R Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law and Society Review* 103, 104; R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 186.

71. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.28]-[3.30].

72. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.31]-[3.38]; NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 11; NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.49].

tendency for penalty notice offences to proliferate and be issued when they should not be, or when a warning or caution may be more appropriate (the ‘net-widening’ effect). Those who receive a penalty notice may elect to go to court and contest it but most do not. It may be the case that even those who believe that they are not guilty pay the penalty because they are apprehensive about courts or wish to avoid the expense of going to court. The avenues for independent review of a penalty notice are limited and the penalty is fixed and cannot be tailored to the circumstances of the recipient. Members of some groups, for example those who have an intellectual disability, a mental illness, or are homeless, may be particularly susceptible to receiving penalty notices and may also be ill-equipped to pay a monetary penalty.

The nature of penalty notices and principles relevant to their enforcement

- 1.31 While all offences dealt with by way of penalty notice could be described as ‘criminal offences’ most are of a minor nature. They involve conduct appropriately dealt with by way of a monetary penalty. Some jurisdictions have chosen to designate these offences not as crimes but as infringements, contraventions, or regulatory offences.⁷³ Penalty notice offences are often also high volume offences for which enforcement through the courts would attract high overall costs for issuing or prosecuting agencies. There are thus reasons of both principle and pragmatism for dealing with them by way of penalty notice.⁷⁴
- 1.32 Many penalty notice offences involve conduct that is not generally thought of as highly culpable. For instance, few people are likely to think of themselves as engaging in criminal activity when they park illegally, or smoke a cigarette on a railway platform. However, recently and more controversially, some offences that historically were dealt with by police and courts are now enforced by way of penalty notice. As indicated above, Criminal Infringement Notices (CINs) were introduced into NSW in 2002 on a trial basis and extended throughout the State in 2008. CINs are available in respect of offences such as theft of goods valued at less than \$300, possession of stolen goods of the same value, offensive language and offensive behaviour.⁷⁵
- 1.33 There is no bright-line distinction between offences that are clearly criminal offences and offences that are infringements or regulatory offences. Indeed the line is arguably becoming increasingly blurred. The seriousness of the offence is one indicator of the suitability of an offence to be dealt with by way of a penalty notice. Penalty notices are most frequently used for offences that would otherwise attract a small fine. In CP 10 we identified 1,803 offences attracting a penalty of \$20 to \$200.

73. *Criminal Code 1899* (Qld) s 3(1) provides ‘Offences are of 2 kinds, namely, criminal offences and regulatory offences.’ See R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 259-260.

74. For an extended discussion of the nature of penalties and of the criminal/civil distinction see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) ch 2.

75. *Criminal Procedure Regulation 2010* (NSW) sch 3.

Most penalty notice offences have a penalty amount of less than \$600.⁷⁶ However we also identified 79 penalty notice amounts of between \$5,000 and \$10,000.⁷⁷

- 1.34 One purpose of imposing a fine is to punish the recipient, but perhaps the most important aim is to deter offending.⁷⁸ The deterrent effect may be general, in aiming to discourage the population at large from infringing the law. Alternatively it may be specific, deterring the individual recipient from repeating the same offence. The prominence of deterrence as the aim of penalty notice offences raises questions about whether fines are effective as a deterrent, which offences are suitable to be dealt with by way of a penalty notice, and the level of penalty that is appropriate. These issues will be discussed throughout this report.
- 1.35 In summary, penalty notice offences are (mostly) minor offences involving (mostly) small amounts, and people may think of (most of) them as infringements rather than crimes. However, they still involve a financial penalty imposed on people by the state. As other reviews of penalty notices have pointed out, it is important to keep this in mind, so that the safeguards to which individuals should be entitled when they are punished by the state are not eroded.⁷⁹ Principles that should govern regulatory regimes, such as fairness, proportionality, consistency and transparency are equally important for the use of penalty notices and their enforcement.⁸⁰ These principles are referred to, directly or by implication, in our terms of reference; were relied upon by the ALRC in its review of federal civil and administrative penalties;⁸¹ and are fundamental to the UK's principles of good regulation.⁸² They informed CP 10 and will inform the discussion and recommendations in this report.
- 1.36 For example questions concerning consistency, fairness and proportionality are raised by the current penalties for offensive language and behaviour that range from \$100 to \$400, depending not on the seriousness of the conduct but on the location in which the offence is committed. The penalty is \$100 in Parramatta Park Trust land;⁸³ on a public passenger vehicle (such as a bus or a ferry) the penalty is \$300;⁸⁴ on any train or railway area the penalty is \$400.⁸⁵ Penalty notice amounts for offensive language in parks vary from \$100 to \$300, again depending on the park in which the offence is committed.⁸⁶ In some parks, offensive language or behaviour is not subject to a penalty notice under the laws concerning that park.⁸⁷

76. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.17].

77. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.9.

78. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.2]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [25.9]-[25.13].

79. C Howard, *Strict Responsibility* (1963) 72-73.

80. See also Better Regulation Task Force (UK), *Principles of Good Regulation* (1998).

81. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [3.122].

82. Better Regulation Task Force (UK), *Principles of Good Regulation* (1998).

83. *Parramatta Park Trust Regulation 2007* (NSW) cl 23(1)(b), 23(1)(c), sch 1.

84. *Passenger Transport Regulation 2007* (NSW) cl 49(a), 49(b), sch 3 pt 2.

85. *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a), 12(1)(b), sch 1 pt 3.

86. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.5.

87. For example, there is no similar offence for offensive language or behaviour under the *Western Sydney Parklands Regulation 2007* (NSW).

- 1.37 Other penalties raise issues of proportionality. For example, the Legislation Review Committee of Parliament suggested that the penalty notice amounts for certain offences under the *Sydney Olympic Park Regulation 2001* (NSW) were excessive in the circumstances,⁸⁸ such as the penalty notice amount of \$200 for operating a motorised model aircraft, boat or car within the park.⁸⁹
- 1.38 The transparency of the penalty notice system is a concern raised often, because of the frequently occurring tension between transparency on the one hand, and cheapness and expeditious resolution on the other.

Transparency – the privatising effect of penalty notices

- 1.39 Court proceedings have the disadvantage of being time consuming and expensive but they are conducted according to publicly observable rules and procedures and can be appealed. While penalty notices are inexpensive, informal and convenient the public nature of law enforcement is sacrificed to some extent. Penalty notices have a privatising effect.
- 1.40 Penalty notices are issued by many different bodies such as local councils, state government departments and other agencies. The decisions that they make when issuing penalty notices are unlikely to be reviewed. Individual issuing officers have significant discretionary power, for example, in deciding whether to issue a penalty notice or give an informal warning or caution.⁹⁰ While this exercise of discretion may be reviewed by the defendant making an election to go to court, this rarely happens in practice. The Attorney General's Department has issued publicly available guidelines on cautions under the *Fines Act*,⁹¹ but we raise questions about the effectiveness of these guidelines in Chapter 5.
- 1.41 Issuing agencies may review whether a penalty notice has been issued appropriately, or they may refer this task to the SDRO. While the Attorney General's Department has issued publicly available guidelines for internal review, they are advisory only.⁹²
- 1.42 The SDRO also makes a number of key decisions in relation to enforcement of penalty notice amounts. For example, applications to have penalty notice amounts written off may be made, but the basis on which such decisions are taken is not subject to guidelines. Indeed s 120 of the *Fines Act* provides that, although the Minister may issue guidelines on the exercise of functions under the Act and is

88. Legislation Review Committee, Parliament of NSW, *Legislation Review Digest*, No 1 of 2005, 18 February 2005, 68.

89. Now in *Sydney Olympic Park Authority Regulation 2007* (NSW) cl 4(w).

90. The Sentencing Council noted the reduction in public scrutiny consequent on offences being dealt with by way of penalty notices and the 'consequent potential for discrimination, corruption, and arbitrary and negligent use of penalty notices.' NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.31].

91. NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996*. http://www.lpcldr.lawlink.nsw.gov.au/lpcldr/lpcldr_policytabledocs.html#Caution_Guidelines_a

92. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996*.

required to make those guidelines public, there is a specific provision that the guidelines on writing off unpaid fines do not have to be made public.⁹³

- 1.43 The Hardship Review Board is the final source of appeal in the penalty notice system. The basis on which appeals may be made to the Board, and the basis on which it will make its decisions, is provided on its website only in very general indicative terms.⁹⁴
- 1.44 It is important to note that the *Fines Act*, the guidelines issued under it, and the activities of agencies enforcing penalty notices, must balance competing pressures. On the one hand there is a pressure to provide procedures that are quick, inexpensive and efficient, while on the other hand there is a need to be fair, and transparent. Responding to concerns about transparency by reintroducing all of the protections of the criminal justice system would remove many of the advantages of penalty notices.
- 1.45 These tensions are also inherent in the role of the SDRO, the agency that processes penalty notices and collects fines. Is the SDRO a debt collection agency, in which case the values of efficiency and cost-effectiveness might be expected to predominate in its operations? Or is the SDRO part of the criminal justice system, in which case the values of fairness and transparency would be more important? The answer would appear to be that the SDRO is both an agency that collects debts for the state, and is also part of the criminal justice system. It must collect money efficiently and also act in accordance with the obligations of a democratic state towards people in the justice system, abiding by the principles referred to above. This may sometimes be a difficult balance to achieve.

Impact of penalty notices on vulnerable people

- 1.46 The impact of penalty notices on vulnerable people has been considered repeatedly in previous reviews.⁹⁵ These reviews have highlighted a number of problems that vulnerable people have with the penalty notice system.
- 1.47 The first of these problems derives from poverty, the disproportionate impact of financial sanctions on people on low incomes, and the inability of some people to pay the amounts owing.⁹⁶ Penalty notices impose only one type of penalty, a fixed

93. *Fines Act 1996* (NSW) s 120.

94. See further Chapter 9.

95. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.33]-[3.38]; NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.45]; R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) [1.1.4]; Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006); S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008); NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

96. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006); S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008); NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

monetary amount. They differ from court-imposed fines, where the court must take into account the defendant's means to pay.⁹⁷ They may be unwelcome and inconvenient for people with a reasonable income but for people who live in poverty, for various reasons, penalties have a disproportionate impact.⁹⁸

- 1.48 Children and young people are one group who receive penalty notices and often do not have the means to pay them.⁹⁹ If they are fortunate, their parents may assist them but the deterrent effect is then lost unless parents substitute their own, more appropriate, sanctions. Not all parents have the resources to assist. It would appear that young people are particularly vulnerable to penalty notice offences, especially transport related offences. Stakeholders consulted for this inquiry reinforced the arguments of previous reviews, that some young people on low incomes commit transport related offences because of inability to afford both living expenses and transport costs.¹⁰⁰
- 1.49 Those who live in long-term poverty, such as people who are homeless, or who have a disability that affects their capacity to work, also struggle with monetary penalties.¹⁰¹ Prisoners commonly have penalty notice debts, sometimes for considerable amounts, and have very few, if any, resources to repay their debts.¹⁰²
- 1.50 People who have complex and multiple needs were mentioned by many stakeholders as a group who have difficulties paying monetary penalties. Many people will have multiple forms of disadvantage. For example, a person who has nowhere to live, has poor mental and physical health, and depends on Centrelink benefits for daily necessities is likely to accord payment of penalty notices a very low priority. In such cases penalty notices may well be neglected, and enforcement costs will compound the debt problem for that person.
- 1.51 For some people penalty notice debt accrues to such a level that they feel that they have no hope of ever being able to repay it.¹⁰³ The deterrent effect of fines has no effect for these people. For example, we heard in consultation about a homeless person who travelled on trains to stay warm and safe, who accumulated \$110,000 of penalties for travelling without a ticket; of people who contemplated or committed

97. *Fines Act 1996* (NSW) s 6.

98 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.33]-[3.38]; Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006); S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008); NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

99. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) ch 6; and below at Chapter 12.

100. See for example S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 3.

101. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 3; Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 8.

102. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [7.12]-[7.17] and Chapter 17.

103. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 10, Case Study.

further offences to pay off penalty related debt because they could see no other way to get free of it; of a parent trying to find ways of dealing with the debt of her teenage son with an intellectual disability who rides trains but loses, forgets or does not buy tickets.

- 1.52 Some people repeatedly commit penalty notice offences, perhaps because they cannot understand why certain conduct is wrong, cannot control their impulse to offend or must conduct more of their lives in public where they are susceptible to being apprehended and penalised.¹⁰⁴ The Homeless Persons' Legal Centre, in *Not Such a Fine Thing!* reflected its experience with clients receiving penalties for activities that would be legal if done in a private residence, such as drinking alcohol, and homeless clients sleeping in their cars who were issued parking tickets that they could not pay and which made them vulnerable to losing any driver licence that they may have held.¹⁰⁵
- 1.53 Particular problems arise in relation to withdrawal of driver licences as a sanction for non-payment of penalty notices. Almost two thirds of licence suspensions in NSW are for fine and penalty defaults rather than a result of demerit points.¹⁰⁶ Both Aboriginal and non-Aboriginal people living in rural, regional and remote communities reported (to this inquiry and to earlier reviews) serious issues arising from this sanction.¹⁰⁷ Similar problems were reported in consultations for residents in areas of western Sydney that are not well served by public transport.
- 1.54 In these areas, access to a vehicle is necessary in order to work and access basic services such as doctors, hospitals, supermarkets, government offices, and lawyers. Where public transport is very infrequent or does not exist, those who have had their licence removed are faced with difficult choices and may decide to drive without a licence.¹⁰⁸ If they do this on multiple occasions and are caught they are likely to be disqualified from driving. If they then drive while disqualified they may be imprisoned. This was commonly referred to in consultations as the 'slippery slope' leading to people being imprisoned as an indirect result of non-payment of penalty notices. Over the past ten years, the number of Aboriginal people sentenced to imprisonment where their principal offence was driving while licence disqualified or suspended has increased by 35%.¹⁰⁹
- 1.55 Courts have many sentencing options available to them including, for example, requiring an offender to enter into a bond without imposing a fine. A court

104. Homeless Person Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 8; S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 3; NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 14.

105. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 8.

106. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 14.

107. M Spiers Williams and R Gilbert, *Reducing the Unintended Impacts of Fines*, Indigenous Justice Clearinghouse (2011) 4.

108. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 14.

109. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 15.

appearance provides an opportunity to make the punishment respond to the situation of the offender. As Fox's 1995 review of penalty notices pointed out:

Infringement notice procedures lend themselves to automation and computerisation. On the other hand this advantage is bought at too high a price in equity terms if it prevents special circumstances of a mitigating nature being considered other than by demanding a full hearing in open court. Mechanisms for bringing mitigating factors to official attention need to be given a legislative foundation.¹¹⁰

It is indeed possible for vulnerable people to elect to go to court instead of paying a penalty. Shopfront Youth Legal Centre felt so strongly about this that it submitted that we should consider making court attendance the primary response to penalty notice offences for young recipients. Its reason was that its clients fared better in court, where they were likely to receive a more lenient or appropriate penalty.¹¹¹ However lawyers who represent vulnerable clients report their extreme unwillingness to go to court because they find the experience stressful, intimidating and frightening; they fear that the penalty will be increased; and they are afraid of incurring costs.¹¹² Additionally, they may fear that the court will record a conviction, which will give them a criminal record or make their record worse.¹¹³ This fear may be very significant for people who have immigration issues, for example.

- 1.56 As we noted earlier, following the Sentencing Council's report in 2006, a number of changes to the penalty notice system were introduced, many of which responded to the needs of vulnerable people.¹¹⁴ Support by way of legislation and guidelines was provided for the issuing of cautions instead of penalty notices in appropriate cases. Internal review of the issuing of penalty notices was made possible. Arrangements for time to pay and payment direct from Centrelink benefits were introduced. A pilot of work and development orders (WDOs) was introduced to allow vulnerable people to pay off their fines through work, treatment and education.¹¹⁵ It was apparent from consultations and submissions to this inquiry that these changes have been beneficial. In consultations stakeholders were particularly enthusiastic about the WDO pilot, which is currently being rolled out across NSW.¹¹⁶
- 1.57 While significant steps have been taken to make the penalty notice system responsive to the situation of vulnerable people, it is apparent that further steps are needed. What those steps should be is a topic dealt with throughout this report and especially in Part Four.

110. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 288.

111. The Shopfront Youth Legal Centre, *Submission PN33*, 5.

112. Hopeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 24; S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 6.

113. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 5.

114. *Fines Further Amendment Act 2008* (NSW), the effect of which is summarised in NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 15-16.

115. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 15-16.

116. See further Chapter 9.

Net-widening

- 1.58 The potential for net-widening has been generally recognised as a problem with penalty notices. In our 1996 report on sentencing we argued that the ease with which penalty notices may be issued carries the risk that they will be used when a caution would ordinarily be given, or when the person issuing the caution is not sure that an offence has been committed but issues a notice anyway.¹¹⁷ Other inquiries have also consistently referred to the potential for net-widening as a possible disadvantage of penalty notices.¹¹⁸ The privatising effect of penalty notices, referred to above, may support any tendency to net-widening because decisions to issue a notice are unlikely to be subjected to a review.
- 1.59 In CP 10 we noted concerns about net-widening in the context of CINs. The Ombudsman's report into the impact of CINs on Aboriginal communities, while not finding clear and definitive evidence of net-widening, did find sufficient evidence to raise concerns. The Ombudsman noted growth in the use of CINs for offensive language and offensive conduct, particularly in relation to Aboriginal people. However, there was also evidence of a decrease in the number of these cases going to court, and wide divergence in the use of CINs in different Local Area Commands.¹¹⁹ In CP 10 we asked for submissions about the potential net-widening effect of CINs. Net-widening is also relevant to the use of cautions. Both of these issues are dealt with in Chapter 5 (cautions) and Chapter 10 (CINs).

Regulatory theory and penalty notices

- 1.60 As we explained in CP 10 penalty notices play a regulatory role in relation to a significant number of disparate activities in NSW including, for example, transportation, fishing, food preparation, recreation, environmental regulation, driving and parking. Given that penalty notices play such an important regulatory role, this inquiry provides an opportunity to apply regulatory theory to the penalty notice regime in NSW and to see if it provides insights that will assist in improving the system.
- 1.61 The theory of 'responsive regulation' is of particular utility in analysing the penalty notice system in two main ways. First, it can be applied to questions of whether penalty notices are playing an appropriate and effective role as part of the wider system of regulation in any area of endeavour. Second, it can be applied to the system of enforcement of penalty notices, to see whether that system is effective.
- 1.62 'Responsiveness' in responsive regulation means that the form and nature of regulation should be diverse and tailored to the context in which it applies, in order

117. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 76.

118. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.10]; NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.31]; R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 289-290; New South Wales Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010).

119. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) [6.7] discussed in New South Wales Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) ch 8.

to be effective in resolving public problems.¹²⁰ Further, according to this theory, effective regulation should be structured as a pyramid. At the base should be low level and minimally intrusive forms of regulation; in the middle, less frequently used but more coercive methods; at the top, serious sanctions.¹²¹ These serious sanctions are held in reserve and very rarely used. The regulator should always have access to this 'big stick' but should use it infrequently and only in cases where other 'softer' sanctions have proved ineffective.¹²²

- 1.63 The idea of responsiveness in regulation had resonance with issuing agencies in consultations. These agencies spoke of the importance of understanding context when establishing penalty notice offences, setting penalty notice amounts and enforcing penalty notices. For example, in relation to the establishment of penalty notice offences, issuing agencies stressed the need to understand the nature and seriousness of the harm caused by offending behaviour, and the importance of specialist knowledge in gauging that harm and in translating it into an appropriate penalty. Some agencies reported their careful consideration of the relativities of harm between different offences in a particular area of activity and the way that these relativities were built into penalty levels. In relation to penalty notice amounts, other agencies explained and justified unusually high penalties of several thousand dollars because of the nature of the prohibited activity, its potential for harm and the assumed deterrent effect of depriving the recipient of the profits of that activity.
- 1.64 Many examples were given of responsiveness in the context of enforcement. The SDRO refers applications for internal review (of whether a penalty notice should have been issued) to the issuing agency because of the specialised knowledge of that agency. In consultations we heard examples of penalty notices being withdrawn because the issuing council knew that parking signs at a particular location had been knocked over, or because the relevant government agency knew that certain batches of life jackets had been sold when already beyond their safe-use date.
- 1.65 One of the important themes raised in CP 10, and in this chapter, is the need for penalties to be consistent. Inconsistencies may lead to unfair outcomes and a lack of respect for the penalty notice system. However it is also important to consider how consistency can be ensured without creating a homogeneity that sacrifices responsiveness. Responsive regulation is not the enemy of consistency, but it reminds us to be aware that it can go too far - that effectiveness may be sacrificed on the altar of consistency.¹²³
- 1.66 The idea of a pyramid of regulatory responses has resonance in the context of penalty notices. It confirms the enforcement approach taken to penalty notices in NSW, which involves incremental escalation from relatively benign and educative first steps involving reminders with extra time to pay, followed by demands for payment with additional enforcements costs, followed by driver licence sanctions

120. I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 4.

121. I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 35-36.

122. I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 39.

123. J Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 29.

and ultimately more punitive sanctions such as garnisheeing wages or imposition of community service orders.

- 1.67 Responsive regulation also prompts us to consider the place of penalty notices in relation to other elements of regulatory systems. Penalty notices often sit at the bottom of the pyramid and are seen as the first and most benign response to offending behaviour: the next step is likely to involve court attendance, with associated escalation of penalties. The ensuing steps up the pyramid vary with context, but may include more severe charges, withdrawal of licences or removal of permission to trade. We will suggest that it may sometimes be desirable to re-think the place of penalty notices, and to move them further up the regulatory pyramid. More educative and persuasive steps such as warnings and cautions should sometimes be at the bottom of the pyramid. These ideas will be pursued further in Chapter 5.
- 1.68 Much of the theory of responsive regulation is developed and applied in contexts where most actors are rational and open to education and assistance, persuasion and deterrence - for example where regulation is applied to corporations.¹²⁴ Individuals who receive penalty notices may also have the same qualities. They may be educated by warnings and cautions issued under penalty notice schemes, may pay (at some point on the enforcement pyramid) in response to escalating enforcement measures, and be deterred from future offending by the imposition of a penalty. But these considerations may be ineffective, or may be overridden by countervailing factors for some people. To take two examples given in consultations: children and young people seeking to escape from violent and abusive homes are unlikely to worry about putting on their bike helmet when they leave;¹²⁵ homeless people are more likely to focus on their immediate needs to find shelter, stay safe and deal with health issues rather than to prioritise paying their penalty notice debts.
- 1.69 However, responsive regulation can assist in understanding how to respond to such individual circumstances. John Braithwaite, a leading proponent of this theory, asserts that responsiveness should apply to the circumstances of a regulated individual. The regulatory pyramid should be firm but forgiving so that, when an individual shows that he or she is taking steps to change his or her behaviour, regulators should de-escalate their responses down the pyramid.¹²⁶ One example of this in the context of penalty notices would be where a recipient agrees to discharge a penalty notice debt by periodical payments. If the penalty notice recipient complies with these payments for a short period of time, his or her driver licence (removed earlier in the pyramid of regulatory responses to non-payment) is restored. If the method of repayment is reliable (for example by direct debit from social security payments) the licence can be restored the following day. A further example is provided by WDOs, where the programs and activities that people agree to undertake are structured to be responsive to their situation and needs, and are put together by non-government organisations working with the individuals

124. See, for example, B Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28 *Sydney Law Review* 689.

125. Riding a bicycle without a helmet attracts a penalty of \$59. *Road Rules 2008* (NSW) cl 256(1).

126. J Braithwaite, *Restorative Justice and Responsive Regulation* (2002), 31.

concerned. When a recipient complies with the program the penalty notice debt is reduced by prescribed amounts.

- 1.70 However, responsiveness in the penalty notice system is limited. The nature of the system militates against it. Penalty notices were introduced to provide an efficient and inexpensive way of dealing with minor offences in lieu of a court-imposed fine. For people for whom fines are not an appropriate penalty, escalation up the enforcement pyramid is inevitable. These are the people who are considered in Part Four of this report, dealing with vulnerable groups. Although responsiveness to individual circumstances in enforcement of penalty notices is improving, we argue that it could be further developed.

The structure of this report

- 1.71 This report is divided into five parts. Part One contains introductory and background material to the penalty notice system. It consists of this chapter which describes the background to this inquiry, the history and development of penalty notices and key overarching issues relevant to the whole report. Chapter 2 first provides an introduction to the practical operation of the penalty notice system for the reader who is not already familiar with it. It then deals with the ways in which the penalty notice system is regulated by the *Fines Act* and associated guidelines.
- 1.72 Part Two deals with one of the major concerns that lies behind this inquiry - the inconsistencies in the penalty notice system. Chapter 3 considers whether there should be principles to guide the creation of penalty notice offences, recommends that there should be guidelines for this purpose, and considers the matters that should be included in such guidelines. Chapter 4 considers whether there should be principles to guide the setting of penalty notice amounts, recommends guidelines, and makes further recommendations as to the matters that should be included in them.
- 1.73 Part Three deals with issuing, reviewing and enforcing penalty notices. It takes a sequential approach, and therefore begins with the matters that should be considered before issuing a penalty notice (Chapter 5). It then considers the issuing of penalty notices (Chapter 6) and their review (Chapter 7). Chapter 8 deals with the enforcement of penalty notices and Chapter 9 with the mitigation options that are available.
- 1.74 Part Four deals with the issues that arise for vulnerable people in relation to penalty notices. Each chapter provides a resource for the reader by first identifying the impact of penalty notices on the relevant group; describing how the present system accommodates their needs; and setting out the recommendations made in this report to improve the penalty notice system for each group. Where necessary, additional recommendations are made. The vulnerable groups considered are people on low incomes (Chapter 11), children and young people (Chapter 12), people with cognitive and mental health impairments (Chapter 13), homeless people (Chapter 14), people in regional, rural and remote areas (Chapter 15), Aboriginal people and Torres Strait Islanders (Chapter 16), and people in custody (Chapter 17).

- 1.75 Part Five consists of only one chapter. Chapter 18 considers what measures should be taken to maintain the future integrity and fairness of penalty notices in NSW, so that the present system achieves best practice, and maintains its consistency, fairness and integrity.

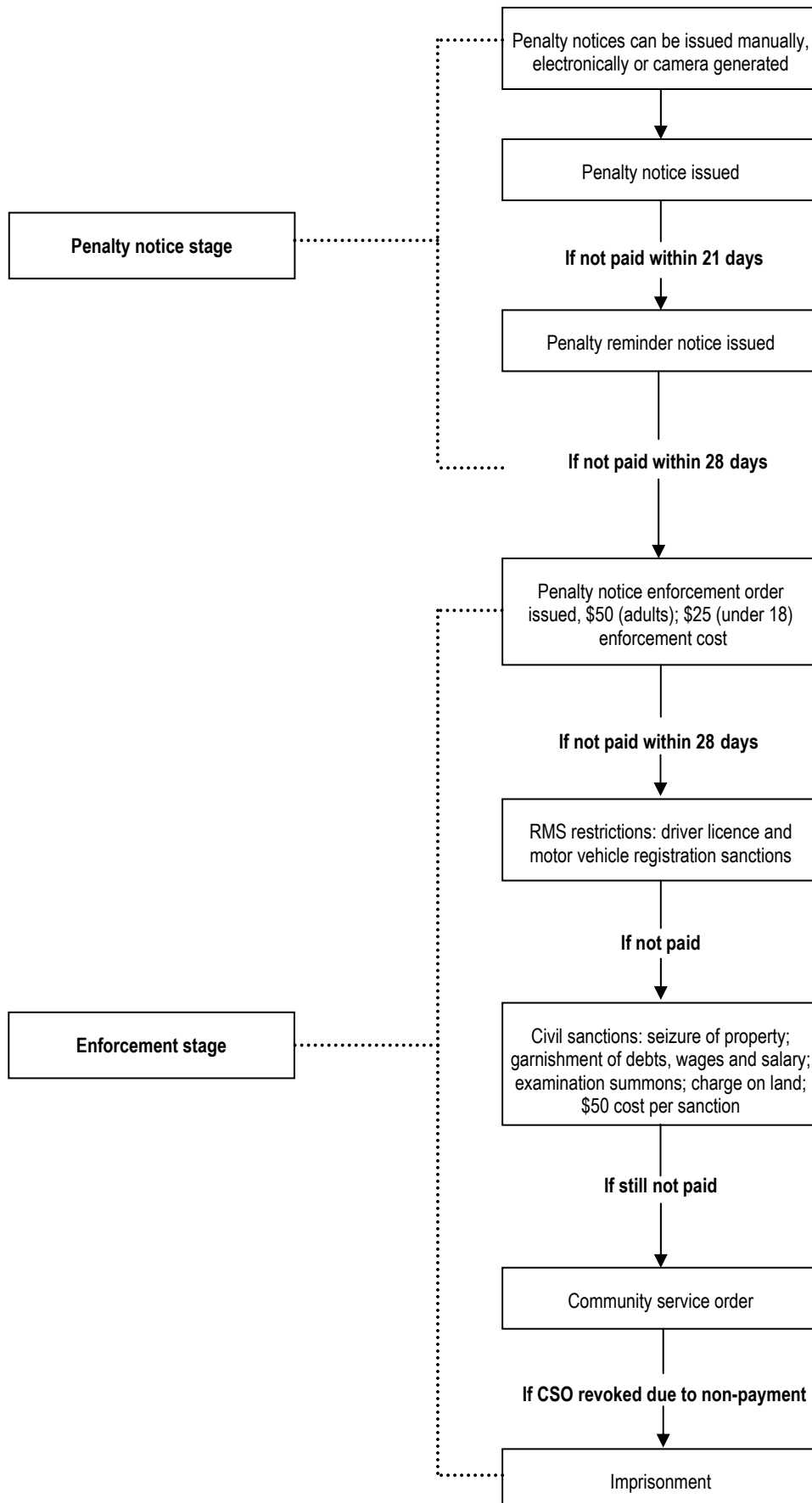
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Introduction

- 2.1 In order to assist the reader who is not already familiar with penalty notices, this chapter first explains the relevant provisions of the *Fines Act 1996* (NSW) (*Fines Act*) and its associated guidelines. We adopt the approach of following the pathway of a penalty notice, from the initial decision about whether or not to issue it, through the several steps of enforcing the notice if the penalty is not paid. This pathway approach is also taken in Part Three of this report that deals with issuing, reviewing and enforcing penalty notices. To further assist understanding, a ‘route map’ is provided at Figure 2.1.
- 2.2 Second, this chapter deals with the way in which penalty notices are regulated. Rather than focusing on the content of the legal provisions relating to penalty notices it deals with the form that the law and associated regulations should take. Penalty notices in NSW are presently governed by the *Fines Act*, but it has been suggested that dealing with both court-imposed fines and penalty notices in the one Act has disadvantages and that it would be preferable for there to be a separate stand-alone statute dealing specifically with penalty notices. An associated issue conveniently dealt with in this chapter is the question of whether penalty notices should instead be called ‘infringement notices’, with consequent implications for the name of any stand-alone Act.

Figure 2.1: Penalty notice lifecycle



- 2.3 In addition to the *Fines Act*, key parts of the system of issuing and enforcing penalty notices are governed by guidelines. For example there are guidelines concerning when a caution should be given instead of a penalty notice, or when a penalty should be written off. Some of these guidelines are publicly available, and some are not.
- 2.4 Issues raised during consultations about the guidelines include:
- Are the guidelines complied with in practice?
 - Is it appropriate for guidelines to be applied but not made public?
 - Should the guidelines be advisory or enforceable?
 - Should the guidelines continue in their present form or should they be in the form of statutory rules or regulations?

Issuing and enforcing a penalty notice: an outline of the process

Issuing penalty notices

- 2.5 The *Fines Act* sets out the process for issuing penalty notices. The Act provides that a penalty notice is to be issued in accordance with the statute under which the offence is created,¹ by a person who is authorised to issue the notice.²
- 2.6 An authorised person, or ‘appropriate officer’, includes: a person authorised by the parent statute to issue that kind of penalty notice; an authorised employee of the NSW Office of State Revenue (OSR); and a person authorised under the regulations to issue that kind of penalty notice or all penalty notices.³ They may include State Government employees, such as police officers and transit officers, local government employees, such as council parking rangers, and other non-government officers, such as employees of universities.
- 2.7 A penalty notice cannot be issued unless there is an allegation that a person has committed an offence under a law for which a penalty notice can be given. The circumstances in which a penalty notice may be issued in respect of a specific offence are dictated by the terms of the statutory provision under which the offence is created. The *Work Health and Safety Act 2011* (NSW), for example, provides that an authorised officer may issue a penalty notice to a person ‘if it appears to the officer that person has committed an offence’ under the Act or the regulations pursuant to that Act.⁴ Some policies developed by enforcement agencies require that the issuing officer be certain that there is sufficient evidence to prove the commission of the offence by the penalty notice recipient such that the matter can

1. *Fines Act 1996* (NSW) s 21.

2. *Fines Act 1996* (NSW) s 22.

3. *Fines Act 1996* (NSW) s 22(2).

4. *Work Health and Safety Act 2011* (NSW) s 243.

be successfully prosecuted if the person chooses to contest the penalty notice in a court.⁵

Warnings and cautions

- 2.8 All agencies have discretion about whether or not to issue a penalty notice. The *Fines Act* contains provisions which empower those who are authorised to issue penalty notices to serve an ‘official caution’ instead of a penalty notice ‘if it is appropriate to give an official caution in the circumstances’.⁶ These provisions give all issuing officers discretion to proceed either by way of caution or by penalty notice, depending on the circumstances. The exercise of this discretion is directed by guidelines formulated by the Attorney General.⁷ In making a decision to issue an official caution, the appropriate officer (other than a police officer) must have regard to the Attorney General’s Caution Guidelines, or to the guidelines issued by the relevant agency provided these are consistent with the Attorney General’s Caution Guidelines.⁸ The Attorney General’s Caution Guidelines take into account factors such as the nature and seriousness of the offence, public interest considerations and the circumstances of the penalty notice recipient. Cautions are dealt with further in Chapter 5.

Review of decisions to issue a penalty notice

- 2.9 If a penalty notice has been issued and the recipient believes that it should not have been issued, there are two ways in which it can be challenged. One is by electing to go to court (see below); the second is to request an internal review.
- 2.10 If requested, the issuing agency or the State Debt Recovery Office (SDRO) must conduct an internal review of a decision to issue a penalty notice.⁹ If the SDRO conducts the review it will refer the matter back to the issuing agency in many cases because of the local or expert knowledge of that agency.
- 2.11 On completion of its review, a reviewing agency can confirm the decision to issue a penalty notice or withdraw the penalty notice. It must withdraw a penalty notice if it finds that:
- the penalty notice was issued contrary to law
 - the issue of the penalty notice involved a mistake of identity
 - the penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence

5. See, for example, NSW Food Authority, *Compliance and Enforcement Policy* (May 2011) 14; NSW Office of Fair Trading, *Penalty Notice Manual* (2007) [8.2].

6. *Fines Act 1996* (NSW) ss 19A, 19B, inserted by *Fines Further Amendment Act 2008* (NSW) sch 1[8]. These provisions and the Attorney General’s Caution Guidelines commenced on 31 March 2010.

7. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996*.

8. *Fines Act 1996* (NSW) s 19A(2).

9. *Fines Act 1996* (NSW) s 24C.

- the person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless, to
 - (i) understand that the person's conduct constituted an offence, or to
 - (ii) control such conduct; or
 - an official caution should have been given instead of a penalty notice.¹⁰
- 2.12 A reviewing agency may withdraw a penalty notice on a ground other than those described above.¹¹ Other grounds on which a penalty notice must be withdrawn can be prescribed by regulations.¹²
- 2.13 As with cautions, the Attorney General has approved guidelines on internal review.¹³ The guidelines are advisory only. Internal review is considered in more detail in Chapter 8.

Court election

- 2.14 A person who is alleged to have committed a penalty notice offence has the right to elect to have the matter dealt with by a court.¹⁴ An election to have the matter dealt with by a court may not be made later than 90 days after the penalty notice was served.¹⁵
- 2.15 Very few people elect to go to court. Of the 2.7 million penalty notices issued during the financial year 2010/11, 1.04% (28,214) of notices were elected to be contested in court.¹⁶ The reasons for this are canvassed in Chapter 1.

Enforcing a penalty notice

- 2.16 The SDRO was created by the *Fines Act* in 1996 to manage the overall process of fine enforcement, to co-ordinate the other agencies involved in the scheme, to establish performance management standards and to create an audit trail for the system.¹⁷ In April 2002, the SDRO was transferred from the Attorney General's Department (as it then was)¹⁸ to the OSR in NSW Treasury. The OSR and the SDRO are now part of the Department of Finance and Services.

10. *Fines Act 1996* (NSW) ss 24E(2)(a)-(e).

11. *Fines Act 1996* (NSW) ss 24E(3).

12. *Fines Act 1996* (NSW) s 24E(2)(f).

13. *Fines Act 1996* (NSW) s 24A; NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996*.

14. *Fines Act 1996* (NSW) s 23A(1)

15. *Fines Act 1996* (NSW) s 23A(2).

16. Email correspondence from Mr Gregory Frearson, Assistant Director (Operations), State Debt Recovery Office to Mr Ani Luzung (Legal Officer) NSW Law Reform Commission, 13 January 2012.

17. NSW, *Parliamentary Debates*, Legislative Council, 14 November 1996, 5977 (J Shaw).

18. Now the NSW Department of Attorney General and Justice.

- 2.17 Where a penalty notice is issued, and no application for review or court election has been made, and it is not paid by the due date, the SDRO sends out a penalty reminder notice allowing a further 28 days in which to pay the full amount. Although the reminder notice may be served personally, it is almost always sent by post to the recipient's last known address.
- 2.18 If a person's financial circumstances prevent the person from paying the penalty notice in full, he or she may pay the amount due in instalments, without incurring additional costs, provided that the full amount is paid by the due date.¹⁹
- 2.19 If the amount owing remains unpaid following the penalty reminder notice, and no court election has been made, the SDRO may issue a penalty notice enforcement order.²⁰ A penalty notice enforcement order requires the person in default to pay the penalty notice amount, plus enforcement costs of \$50, by a specified date.²¹
- 2.20 An application for time to pay, or for a work and development order (WDO), may only be made after a penalty enforcement order is issued. However, in order to expedite these applications, amendments to the *Fines Act* now allow the SDRO to issue a penalty notice enforcement order earlier than usual so that it can then accept an application for time-to-pay arrangements or issue a WDO, in which case enforcement costs do not apply.²²
- 2.21 If the person in default does not comply with the penalty notice enforcement order by the due date, the SDRO may direct Roads and Maritime Services (RMS)²³ to take various enforcement actions, namely:
- suspension or cancellation of the person's driver licence
 - cancellation of the person's vehicle registration, or
 - suspension of the person's dealings with RMS including, for example: renewal of driver licence; registration of a vehicle; issue of number plates; booking driver licence tests.²⁴
- 2.22 A number of problems have been identified with licence sanctions as a method of enforcement, in particular their discriminatory impact in areas not well served by public transport, especially rural regional and remote areas where vehicles are needed to access essential services. These issues are considered in Chapters 9, 15 and 16.
- 2.23 If the penalty notice enforcement order remains unpaid after RMS restrictions, the SDRO may issue an order in respect of the person in default:

19. *Fines Act 1996* (NSW) s 33(2).

20. *Fines Act 1996* (NSW) s 42(1).

21. *Fines Act 1996* (NSW) s 43,44.

22. *Fines Act 1996* (NSW) ss 42(1AA)-(1BB). But note, the person is no longer entitled to make an election to go to court: s 42(1CC).

23. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

24. *Fines Act 1996* (NSW) ss 65-68.

- for the seizure by the Sheriff of his or her property
- garnisheeing his or her wages or salary
- requiring court attendance for an examination of his or her financial circumstances, or
- placing a charge on his or her property.²⁵

An additional \$50 enforcement cost is added to the unpaid debt for each order made.

- 2.24 Where a person in default has not paid the amount in the penalty notice enforcement order and where civil action has been, or is likely to be, unsuccessful, the SDRO may issue a community service order (CSO).²⁶ Decisions of the SDRO to make a CSO, or to revoke a CSO, are not reviewable.²⁷ The SDRO has the power to commit a person in default to a correctional centre, if he or she fails to comply with a CSO.²⁸ These issues are considered further in Chapter 8.

Time to pay

- 2.25 Section 100 of the *Fines Act* allows a person to apply to the SDRO for an extension of time to pay, or to pay by instalments. Applications for time to pay can only be made after a penalty notice enforcement order has been issued, and before a CSO has been issued. However, where the person is in receipt of a government benefit the application can be made before the penalty notice enforcement order is made.²⁹
- 2.26 The SDRO can issue a penalty notice enforcement order before such an order is due, in order to allow the person to lodge an application for time to pay, or to pay by instalments. If the application is received prior to the due date of the penalty notice enforcement order, no further enforcement action will be taken and no enforcement costs will be imposed. Applications for time to pay can be made over the telephone in some cases, or by filling out a dedicated form.³⁰ Payments can be deducted directly from the person's eligible Centrelink benefit via Centrepay.³¹
- 2.27 The SDRO reports that it has internal guidelines for determining applications for time to pay. Currently, these guidelines are not publicly available.

Applications for write off

- 2.28 Section 101 of the *Fines Act* gives a person the right to apply to the SDRO, after a penalty notice enforcement order has been made, and before a CSO is issued, to

25. *Fines Act 1996* (NSW) ss 71-77.

26. *Fines Act 1996* (NSW) s 78.

27. *Fines Act 1996* (NSW) ss 85(1), 86(9).

28. *Fines Act 1996* (NSW) ss 87-97.

29. *Fines Act 1996* (NSW) s 100(1A).

30. NSW Office of State Revenue, *Applying to Pay: Enforcement Orders by Instalments* <http://www.sdro.nsw.gov.au/payments/pay_by_instalment.html>

31. *Fines Act 1996* (NSW) s 100(3A).

have the penalty notice written off. The SDRO has the power to write off part or all of the penalty notice, either on application by the person in default or at its own discretion, if it is satisfied that, due to financial, medical and/or personal circumstances, the penalty notice cannot be paid and a CSO is not appropriate.³² Guidelines may be made for writing off unpaid penalty notices (amongst other things).³³ However, although the Minister is required to make public the guidelines made in respect of the *Fines Act*, there is an explicit exception for guidelines on writing off unpaid fines.³⁴

- 2.29 The basis on which applications for write off may be made is explained on the SDRO website.³⁵ The SDRO document explains that an applicant for write off has to show that he or she has constant problems with money, or a serious problem with health or home life. The problems must be so severe that the debt cannot be paid now or in the future. The applicant must document this situation, show that he or she has no possessions that could be sold to pay the penalty notice enforcement order and that he or she cannot do community service instead of paying the amount owing.
- 2.30 The write off of an unpaid penalty notice is conditional. The SDRO can recommence enforcement action at any time within five years of a write off, if the person receives a further enforcement order or if the SDRO is satisfied that the fine defaulter now has the means to pay and enforcement action is likely to be successful.³⁶ Write offs are considered below in Chapter 9.

Annulment

- 2.31 In certain circumstances an application may be made for a penalty notice enforcement order to be annulled. The grounds for application for annulment, broadly speaking, concern circumstances in which the applicant did not know about the notice or was prevented from responding to it. The *Fines Act* provides that the SDRO must annul a penalty notice enforcement order where the applicant was not aware that a penalty notice had been issued and he or she makes application in reasonable time; if the applicant was hindered from taking action in relation to the penalty notice by accident, illness, misadventure or other cause; or if the penalty notice was returned undelivered to its sender and the enforcement notice was served at a different address.³⁷ Additionally, if doubt has arisen as to the person's liability, or if the application should be granted for another reason, the SDRO may annul that enforcement order.³⁸ Annulment is considered further in Chapter 8.

32. *Fines Act 1996* (NSW) s 101(1A).

33. *Fines Act 1996* (NSW) s 120(1)(a).

34. *Fines Act 1996* (NSW) s 120(2).

35. NSW Office of State Revenue, *How to Postpone or Write Off an Enforced Fine* <http://www.sdرو.nsw.gov.au/lib/docs/forms/sfs_eo_002.pdf>

36. *Fines Act 1996* (NSW) s 101(4).

37. *Fines Act 1996* (NSW) s 49(1)(a).

38. *Fines Act 1996* (NSW) s 49(1)(b).

Work and development orders

- 2.32 The *Fines Act* allows eligible people to apply to the SDRO for a WDO, under which they may pay off their penalty notice debt by performing unpaid work with an approved organisation, or by undertaking a particular course or treatment.³⁹
- 2.33 WDOs are available to people who have a mental illness, intellectual disability or cognitive impairment; people who are homeless; and people who are experiencing severe economic hardship.⁴⁰ They are available for both adults and children.⁴¹ Guidance on who is eligible to apply for a WDO is provided in guidelines issued by the Attorney General under s 99I of the *Fines Act* (Attorney General's WDO Guidelines), to which the SDRO must have regard when exercising its functions in respect of WDOs.
- 2.34 The SDRO may only issue a WDO if a fine enforcement order has been issued, the person is not subject to a community service order and the application satisfies all of the statutory requirements.⁴² However, it is possible for a WDO to be made in anticipation of a penalty notice enforcement order.⁴³ Under the Attorney General's WDO Guidelines, a person may apply for a penalty notice enforcement order at any time in the process, for the purpose of then applying for a WDO. In these circumstances, enforcement costs are not added.⁴⁴
- 2.35 WDOs were initially established as a pilot program. In 2011 they were evaluated, and found to be an effective and appropriate response to offending by vulnerable people.⁴⁵ They are currently being expanded and developed.

Hardship Review Board

- 2.36 The Hardship Review Board was established in 2004 to review certain decisions of the SDRO. The Board comprises delegates from the Department of Justice and Attorney General, NSW Treasury and the Chief Commissioner of State Revenue.
- 2.37 Specifically, the Hardship Review Board may review an SDRO decision in relation to:
- WDOs
 - time-to-pay arrangements, and
 - applications to write off, in whole or in part, a fine or penalty notice.⁴⁶

39. See further Chapter 9.

40. *Fines Act 1996* (NSW) s 99B(1)(b).

41. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [4].

42. *Fines Act 1996* (NSW) s 99B(1).

43. *Fines Act 1996* (NSW) s 99B(3).

44. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [4].

45. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

- 2.38 The SDRO may suspend, or be required to suspend, enforcement action while the Hardship Review Board is reviewing a matter.⁴⁷

A NSW Penalty Notices Act?

Separation of fines and penalties legislation?

- 2.39 One reform option canvassed in CP 10 was the adoption of a stand-alone statute in relation to the penalty notice system. Such a statute would be the dedicated repository of the principles, rules and procedures governing penalty notices, operating in parallel to the legislation applicable to fines. There are a number of arguments in favour of such a change:
- it would provide greater clarity and easier access to the law
 - it would recognise the importance of the penalty notice system and its significant impact on the community, and
 - it could clarify relevant ministerial responsibilities.⁴⁸
- 2.40 The *Fines Act* presently governs not just court-imposed fines but also penalty notices, and it uses the terms ‘fines’ and ‘penalties’ in a way that is often interchangeable. Both terms refer to monetary penalties for offences, but while a fine is imposed by a court, a penalty under a penalty notice is incurred through an administrative process. Because the *Fines Act* contains provisions applying to both fines and penalty notices, it sometimes uses the term ‘fine’ to include the amounts arising under penalty notices. For example, the term ‘fine defaulter’ is defined, for the purposes of Part 4 of the Act (which is titled ‘Fine enforcement action’), to include someone who has defaulted on a penalty notice.⁴⁹ Without a careful examination of the definitions contained in the *Fines Act*, it is easy to fall into the trap of assuming that certain provisions apply only to fines and not to penalty notices.
- 2.41 Responsibility for the administration of the *Fines Act* vests in the Minister for Finance and Services, as Minister responsible for the SDRO, which is located in the OSR.⁵⁰ While the collection of amounts under penalty notices is properly the responsibility of the Minister for Finance and Services, the issuance of penalty notices and ancillary matters (such as the power of issuing officers to give formal cautions and the review and annulment of penalty notices) should arguably be

46. *Fines Act 1996* (NSW) s 101B(1). Applications to write off a fine or penalty notice in part were permitted by amendments introduced by the *Fines Further Amendment Act 2008* (NSW).

47. *Fines Act 1996* (NSW) s 101B(4)-(5).

48. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [1.44]-[1.47].

49. *Fines Act 1996* (NSW) s 57.

50. The Attorney General is responsible for the following sections of the *Fines Act*: pt 2, div 1 and 2 (fines imposed by courts); s 13 (referral from a court for a fine enforcement order), s 120 (guidelines on exercise of functions under this Act in so far as it relates to registrars of the courts and the Sheriff); and s 123 (remission of fines or other penalties). The remainder of the Act, including the provisions on penalty notices are under the responsibility of the Minister for Finance and Services: *Allocation of the Administration of Acts* (NSW) (11 January 2012).

subject to independent management and scrutiny by the Attorney General, as minister responsible for the justice system. The dual nature of the penalty notice enforcement system, on the one hand part of the criminal justice system and on the other constituting the means of collecting revenue, is referred to in Chapter 1. A new statute on penalty notices could clarify the delineation of the ministerial responsibilities.

2.42 However, there are also reasons for locating the rules that apply to both fines and penalties in one statute:

- fines and penalty notices are each monetary penalties for an infringement of a criminal or regulatory law
- the enforcement mechanisms of the *Fines Act*⁵¹ apply to both fines and penalty notices
- the two systems interact, particularly when the recipient of a penalty notice elects to have the matter dealt with by a court, and
- frequently a penalty notice amount is set by reference to the maximum fine.

Submissions and consultations

2.43 There were 45 submissions received in response to CP 10. Fifteen submissions responded to the question: Should there be a stand-alone statute dealing with penalty notices? Of these, 11 were in favour of such a change.

2.44 The reasons given for supporting a stand-alone statute were similar to those suggested in CP 10. The need for improved clarity and access to law was mentioned in several submissions.⁵² For example the NSW Land and Property Management Authority said

... a new Act (possibly called an 'Infringements Act' as is the case in Victoria) would assist in providing greater clarity, lessen the confusion and provide easier access to the law on penalty notices.⁵³

Clarity was emphasised because of the need for people to be able to access and understand the statute more easily.⁵⁴ So, for example, the Homeless Persons' Legal Service argued that the new statute should be 'written in plain English and structured so that the rights of, and options available to, penalty notice recipients may be easily identified and understood.'⁵⁵ The need for clarity and accessibility

51. *Fines Act 1996* (NSW) pt 4.

52. Holroyd City Council, *Submission PN10*, 1; Legal Aid NSW, *Submission PN11*, 5; NSW Land and Property Management Authority, *Submission PN17*, 1; Redfern Legal Centre, *Submission PN26*, 1-2; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9; see also Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN42*, 4; NSW Department of Community Services, *Submission PN36*, 2.

53. NSW Land and Property Management Authority, *Submission PN17*, 1.

54. NSW Land and Property Management Authority, *Submission PN17*, 1; Redfern Legal Centre, *Submission PN26*, 2; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9; Law Society of NSW, *Submission PN31*, 2.

55. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.

was also mentioned in consultations, especially by agencies providing legal advice to vulnerable people.

- 2.45 The impact of penalty notices on the community was also mentioned by community-based legal services in consultations. Several reported that providing advice on penalty notices constitutes a significant part of their workload: one said that 15% of its work was related to penalty notices. Three such agencies have produced a guide to assist those people who receive penalty notices and need help to navigate the system.⁵⁶
- 2.46 The need to clarify ministerial responsibility was mentioned in two submissions.⁵⁷
- 2.47 Two submissions argued that a stand-alone statute should extend beyond the matters contained in the present *Fines Act* to include provisions in relation to the establishment of penalty notice offences and the setting of penalty notice amounts,⁵⁸ or at least guidelines to promote consistency in penalties.⁵⁹ However there was also support for penalty notice offences remaining in their respective statutes.⁶⁰ Indeed if all offences were to be consolidated into one statute this would involve an order of change not contemplated in CP 10. The motive behind the support for moving the offence provisions into a new piece of legislation was the desire for consistency and fairness in relation to the administration of the penalty notice scheme. These issues are dealt with in chapters 3 and 4.
- 2.48 Two submissions opposed the idea of transferring the penalty system to a stand-alone statute, expressing support for the present system and a concern about increasing 'red tape'.⁶¹

Commission's conclusions

- 2.49 On balance, the Commission is not persuaded of the need for a stand-alone statute dealing with penalty notices. The arguments in support of such a change were not strong, and some of that support was motivated by the desire to achieve greater consistency between penalty notices. The issue of consistency is important and is dealt with elsewhere in this report.⁶²
- 2.50 Further, court fines and penalties may differ, but they are strongly related and share enforcement procedures. Separating their administration into two separate Acts would have cost implications. Stakeholders were concerned, for example, about the necessity of making changes to their print and electronic documentation in relation to penalties. It seems unlikely that the costs would be offset by the benefits of such a change. Additionally, penalty notices are part of the criminal justice system, since

56. Inner City Legal Centre, Redfern Legal Centre and Legal Aid NSW, *Fined Out* (3rd ed, 2011).

57. Holroyd City Council, *Submission PN10*, 1; NSW Land and Property Management Authority, *Submission PN17*, 1.

58. Holroyd City Council, *Submission PN10*, 1; Local Government and Shires Associations of NSW, *Submission PN16*, 2.

59. NSW Department of Community Services, *Submission PN36*, 2.

60. NSW Food Authority, *Submission PN9*, 1.

61. NSW Maritime, *Submission PN2*, 1; Transport NSW, *Submission PN30*, 1.

62. See further Chapter 4.

they involve the imposition of a financial penalty by the state. The rights and protections to which people are entitled are very similar. It is therefore appropriate that enforcement of fines and penalties be considered together. Detaching penalty notices from fines runs the risk that considerations of fairness and justice could have less significance for penalty notices over time, and the commercial imperatives of debt collection could gain too much purchase.

- 2.51 However we note the comments in submissions and in consultations concerning the potential for confusion created by certain provisions of the *Fines Act*, especially the difficulties that arise in understanding which provisions relate to court fines and which to penalty notices. We also note the criticisms that have been identified concerning the clarity and accessibility of the *Fines Act*. That is a matter of some consequence for the significant percentage of the population that is affected by penalty notices each year in NSW; some of these people will find it necessary to access and understand this legislation without the benefit of legal advice. This is a particular consideration for vulnerable people who are considered in Part Four of this report.

Recommendation 2.1

The *Fines Act* 1996 (NSW) should be reviewed to:

- (a) distinguish court fines and penalty notices, and
- (b) improve its clarity and accessibility.

Should penalty notices be called infringement notices?

- 2.52 In CP 10 we suggested that the term ‘penalty notice’ should be changed to ‘infringement notice’. If this approach were adopted, CP 10 envisaged that the system might be known as the ‘infringements system’, and any new stand-alone Act entitled the *Infringements Act*.⁶³ The term ‘penalty notice’ focuses on the means by which the recipient is made aware of an offence that he or she is alleged to have committed. The term ‘infringement’ focuses on the nature of the offences that the system regulates. Such a label would arguably better articulate the nature and purpose of the system, which is to deal with offences that are generally minor in nature, ideally by a process that operates administratively rather than judicially. In CP 10 we therefore asked whether the terminology should be changed from penalty notice to infringement notice.⁶⁴

Consultations and submissions

- 2.53 Eight submissions responded to this question. Five were in favour of the change.⁶⁵ The reasons given in these submissions for supporting the change were

63. This approach has been taken in Victoria through the *Infringements Act 2006* (Vic).

64. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 1.2.

65. NSW Food Authority, *Submission PN9*, 1; Holroyd City Council, *Submission PN10*, 1-2; Legal Aid NSW, *Submission PN11*, 5; The Law Society of NSW, *Submission PN31*, 2; The Shopfront Youth Legal Centre, *Submission PN33*, 1.

- some people already use the term ‘infringements’
- ‘infringements’ better describes the nature and purpose of the system, and
- the word ‘penalty’ may imply that there has been a finding of guilt.

2.54 Only two submissions expressed opposition to change. The reasons for opposition were the direct and indirect costs to make all the necessary changes to the legislation, the documents, training materials and records of issuing authorities, as well as the SDRO records.⁶⁶ The SDRO expressed the view that the term penalty is more meaningful to the recipients of penalty notices.⁶⁷

Commission’s conclusions

2.55 In the absence of strong support or compelling arguments in favour, and taking into account its potential costs, we are not persuaded that changing the name of penalty notices to ‘infringement notices’ (with associated changes) is desirable. Accordingly we make no recommendation in this regard. We are of the view that the problems in the use of interchangeable and inconsistent expression that currently exist could be solved by the kind of revision recommended above at Recommendation 2.1.

Penalty Notice Guidelines

Introduction

2.56 The provisions of the *Fines Act* that govern penalty notices are amplified by guidelines. These guide a number of decisions made by enforcement officers in issuing penalty notices, agencies in reviewing penalty notices, and the SDRO in taking enforcement action or mitigating fines or penalty notices. The *Fines Act* provides the power to make these guidelines in a number of sections.

2.57 Section 120 provides that the Minister may issue guidelines, consistent with the Act and regulations, on a number of enforcement matters, including with respect to the exercise by the SDRO of its functions under the Act, including

- writing off unpaid fines
- issuing fine enforcement orders
- issuing CSOs, and
- taking other enforcement action under the Act.

2.58 Section 120 also provides for the Minister to issue guidelines to govern court registrars exercising functions under the *Fines Act*, including in relation to time to pay; the exercise by the RMS, the sheriff and other persons of their functions in

66. NSW Maritime, *Submission PN2*, 1.

67. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 1.

connection with enforcement action; the exercise by the Commissioner of Corrective Services of functions in relation to intensive correction orders.

- 2.59 The Minister is required to make public the guidelines under this section; however there is an explicit exception to this requirement for guidelines on writing off unpaid fines.⁶⁸
- 2.60 The administration of s 120 is split between the Minister for Finance and Services and the Attorney General. The Attorney General is responsible for s 120 in so far as it relates to registrars of the courts and the sheriff. The Minister for Finance and Services is responsible for the remainder.⁶⁹
- 2.61 The Minister has exercised the power under s 120 to issue guidelines, but these guidelines concern or include material relating to writing off fines, and are covered by the exception in s 120.
- 2.62 Section 19A of the *Fines Act* provides for the Attorney General to issue guidelines in relation to the issuing of cautions. Issuing officers making a decision about cautioning must have regard to these guidelines.⁷⁰ These must be published in the Gazette and made available on the SDRO website. Agencies may develop their own guidelines, consistent with the Attorney General's guidelines, for use instead.
- 2.63 Section 99I of the *Fines Act* provides that the Attorney General in consultation with the Treasurer⁷¹ may issue guidelines with respect to WDOs and the SDRO is to have regard to those guidelines in the exercise of its functions in relation to WDOs. There is no specific requirement to publish these, but they are made available on the 'Lawlink' website.
- 2.64 The Attorney General has issued guidelines relating to the exercise of powers by issuing agencies concerning internal review (dealt with in Part 3 Division 2A of the *Fines Act*). The Attorney General's Internal Review Guidelines cover agencies that have not adopted the SDRO guidelines, or do not have their own consistent guidelines. There is no specific power to issue these. There is a provision in s 24A(4) for regulations to be made with respect to applications for internal review, but no guideline-making power comparable to that in s 19A for cautions guidelines. The Attorney General's Internal Review Guidelines were created after a consultative process and appear to have been widely adopted.⁷² Agencies may comply with them, or make consistent guidelines, or delegate internal review to the SDRO (which uses its own guidelines and these guidelines together.) It is not clear what steps may be taken if agencies do none of these things.

68. *Fines Act 1996* (NSW) s 120(2).

69. *Allocation of the Administration of Acts* (NSW) (2012).

70. *Fines Act 1996* (NSW) s 19A(2).

71. Section 99I of the *Fines Act* refers to the Treasurer. However the Minister for Finance and Services is now responsible for SDRO.

72. See the discussion in Chapter 7; see also NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 29-30.

Issues and problems

- 2.65 A number of issues were raised in submissions and consultations concerning the regulation of the penalty notice system and the operation of the guidelines. Where these relate to particular guidelines, for example guidelines on cautions or writing off penalty amounts, they are discussed in Part Three of this report in conjunction with the discussion of the relevant issuing and enforcement activities. Some more general issues arise, and are considered here.
- 2.66 First, as noted above there is a range of decision makers who may issue guidelines, including two different Ministers, the SDRO and issuing agencies themselves. As we have seen, some guidelines are issued under the power in s 120 to issue guidelines in relation to enforcement activities; others are issued under specific legislative provisions; yet others are administrative in nature. There is a question about whether the guidelines-issuing powers relating to penalty notices in the *Fines Act* should be consolidated and rationalised and the gap in relation to internal review guidelines should be filled.
- 2.67 The second issue concerns transparency. The guidelines made by the Attorney General's Department in relation to cautions, internal review and WDOs are publicly available. However SDRO guidelines in relation to time to pay and the writing off of penalty amounts are not public; guidelines concerning applications to the Hardship Review Board are not published; agency-specific guidelines relating to cautions and internal review may or may not be published. This impedes those who wish to assert their rights under the Act, and is contrary to open, transparent and modern government practice.
- 2.68 The *Government Information (Public Access) Act 2009* (NSW) (GIPA) requires agencies to proactively publish 'policy documents'⁷³ which includes any 'document containing interpretations, rules, guidelines, statements of policy, practices or precedents.'⁷⁴ This would appear to apply to all internal guidelines, apart from those covered by a specific statutory exception (in this case the guidelines related to write-off applications.)
- 2.69 A related point concerns the way in which guidelines are developed. The Attorney General's guidelines relating to cautions, internal review and WDOs were developed after a consultative process with relevant stakeholders. As well as contributing to the quality of the guidelines, such consultation is likely to have an impact on the engagement of key stakeholders with them, and to assist compliance. However other guidelines, such as those relating to time-to-pay and write-off applications, are internal documents of the SDRO. Their content and the method by which they were created is unknown.
- 2.70 Consistency of application is also an issue. Some guidelines apply across a number of issuing and enforcement agencies. In this case, it may be difficult to ensure that agencies are aware of the relevant guidelines and apply them consistently. A recent evaluation that included the Attorney General's Cautions Guidelines for example, has indicated that 15% of all issuing agencies either do not issue cautions (eight

73. *Government Information (Public Access) Act 2009* (NSW) ss 6, 18(c).

74. *Government Information (Public Access) Act 2009* (NSW) s 23(a).

agencies) or do not have regard to guidelines (four agencies).⁷⁵ We have also been given examples in consultation and submissions of cases where issue or enforcement would appear to have been undertaken inconsistently with the guidelines.

- 2.71 Some stakeholders in consultation suggested that a different form of regulation of the penalty notice system should be adopted, and that regulations should be made under the *Fines Act* rather than administrative guidelines, to improve consistency and enforceability.

Commission's conclusions

- 2.72 Appropriate regulation of the penalty notice system involves a tension between protecting the rights of those who are issued with penalty notices, and the need to maintain a simple, accessible and inexpensive system for dealing with penalty notice offences. It is undesirable to increase regulation to such an extent that the drawbacks of the court system are replicated in the penalty notice system. Nevertheless penalty notices do involve the state imposing a financial penalty on the population, and there are consequent obligations of transparency, fairness, proportionality and consistency that apply in such circumstances. A simple and inexpensive system is not inconsistent with transparency or ease of use.
- 2.73 The method of regulating penalty notices that has been adopted, essentially the making of guidelines under the *Fines Act*, appears to be the most appropriate method. Guidelines are flexible, adaptable to context, open to input from stakeholders and easier to negotiate than other forms of regulation. The guidelines on cautions, internal review and WDOs, published in 2010, appear to have been largely successful. They have been in operation for less than two years, but a recent evaluation demonstrates that they have been widely adopted and have general approval.⁷⁶ We are not inclined to depart from guidelines in favour of any other method of regulation at this point.
- 2.74 However, a weakness of guidelines is that they are not necessarily public documents unless a decision is made to make them so. Unless they are publicly available they cannot be scrutinised for compliance and consistency with the legislation and with other guidelines. Guidelines that are not publicly available do not comply with the requirement for mandatory proactive publication of guidelines in GIPA. As we shall see in subsequent chapters, many issuing organisations are assiduous in their compliance with the *Fines Act*, the relevant guidelines and obligations under legislation such as GIPA. Nevertheless compliance is, as yet, somewhat uneven. The wide range of different organisations involved in the penalty notice system means that there is ongoing risk that inconsistency will continue, or develop further.

75. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 81.

76. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

- 2.75 In Part Three of this report we therefore make a number of recommendations relating to the penalty notice guidelines, to ensure that they are publicly available. We also recommend, for the reasons set out above and for other reasons explained throughout this report, that there be an agency to oversee the penalty notice system.⁷⁷ We recommend that this agency have a role in developing and monitoring the penalty notice guidelines.
- 2.76 We recommend below that the guidelines-issuing powers relating to penalty notices in the *Fines Act* should be consolidated and rationalised. The power to issue guidelines should be with the Attorney General, where appropriate in consultation with the Minister for Finance and Services. The proposed Penalty Notice Oversight Agency should assist the Attorney General in the development of guidelines in relation to penalty notices. We note in this context the strong stakeholder support for the consultative approach adopted in formulating the existing guidelines on cautions, internal review and WDOs. The gap in the guidelines-issuing power in relation to internal review should be filled.

Recommendation 2.2

- (1) The powers in the *Fines Act 1996* (NSW) to issue guidelines relating to penalty notices should be consolidated and rationalised.
- (2) The power to issue guidelines should be vested in the Attorney General and, where relevant, should require consultation with the Minister for Finance and Services.
- (3) The proposed Penalty Notice Oversight Agency should support the Attorney General in the development of these guidelines.
- (4) Provision should be made in the *Fines Act 1996* (NSW) for the issue of guidelines in relation to internal review.

77. See Chapter 18.

Part Two

Regulating penalty notices

3. Guidelines for creating penalty notice offences

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Introduction

- 3.1 Penalty notice offences are contained in numerous statutes, administered by various government and regulatory agencies, each concerned with their own sphere of responsibility. From a limited number of parking offences, at the inception of the scheme in the middle of last century, the scope of offences dealt with by penalty notices has expanded to over 7000 offences, covering diverse subject matters,

contexts and locations.¹ However most penalty notices still concern transport or vehicle related offences, with the issuers primarily being the police, local councils, Rail Corporation New South Wales (RailCorp) and the Roads and Maritime Services.²

- 3.2 The penalty notice system has expanded over the years in a fragmented and *ad hoc* manner. A diverse range of agencies is responsible for regulating and administering penalties, with no overarching guidelines to inform them when they are proposing new penalty notices, reviewing existing penalties, or considering whether it is appropriate to deal with an offence by way of a penalty notice or by court attendance. Such decisions may raise complex problems. For example, when deciding whether an offence is suitable for enforcement by way of a penalty notice a number of issues arise. Should penalty notices be used for offences with a fault or mental element (that is, those that require proof of intent or culpability, dependent upon wilful, reckless or negligent conduct) or should they be confined to offences of absolute or strict liability? Are offences for which imprisonment is an option appropriate for enforcement by penalty notice?
- 3.3 The lack of guidance about these matters potentially creates problems of inconsistency and unfairness in the system. There is also the possibility that, in the absence of guidance, agencies will promote a penalty notice system that is motivated by institutional imperatives (for example the desire to raise money for improved services by way of penalty notice revenue) or that they will give more weight to bureaucratic imperatives (such as ease of administration) rather than to the values that are appropriate for the use of penalty notices.³
- 3.4 The penalty notice system has obvious benefits, which are reviewed in Chapter 1, such as its ease of administration, prompt nature, and cost effectiveness. However issues of consistency and fairness are also important, especially if the penalty notice system is to retain the respect of the public. The terms of reference asked us to have particular regard to the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notice, and this issue is the focus of this chapter.
- 3.5 Also raised in our terms of reference, and relevant to fairness and consistency, are differences in the penalty amounts for the same or comparable offences and the question of whether penalty amounts reflect the objective seriousness of the offence. These issues are discussed in Chapter 4.
- 3.6 One reason for inconsistencies in the penalty notice system is, arguably, that there is no central coordinating agency to oversee, monitor and guide the penalty notice

1. See generally NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) ch 1; R Fox, *Criminal Justice On the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 31. The 'penalty notice' system for motor traffic offences in NSW initially appeared in 1961.

2. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.16]. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

3. Discussed in Chapter 1.

system. The issue of whether such a central coordinating agency should be created, and if so, what form it should take, is discussed in Chapter 18.

Should there be guidelines relating to which offences are suitable for penalty notices?

- 3.7 Penalty notice offences are contained in many different Acts and Regulations. Numerous government departments and agencies administer offences that lie within their area of responsibility. At present, no clear set of criteria exists to guide agencies in the process of creating, amending or repealing penalty notice offences or when setting or increasing their amounts.⁴ This has been the case since the inception of penalty notice offences half a century ago. Each agency therefore operates largely independently, developing proposals for new penalty notice offences and for fixing penalty amounts.
- 3.8 Government action is, of course, required to create or amend statutory offences or regulations relating to penalty notices. The required processes may assist in securing consistency across the system. Some issuing agencies described in consultations the helpful role of Parliamentary Counsel in referring them to comparable offences or penalty levels in other statutes, among other things. Nevertheless there are no overarching principles that assist agencies and support consistency in the penalty notice system overall. The NSW Land and Property Management Authority (LPMA)⁵ described the present system as a ‘fragmented approach’ with each agency and its minister effectively determining the penalty notices applying to their particular legislation.⁶
- 3.9 Unlike NSW, a number of other neighbouring jurisdictions, such as Victoria,⁷ South Australia,⁸ the Commonwealth⁹ and New Zealand¹⁰ do have guidelines or directions

4. In the absence of a discrete process for penalty notices, the usual process for the development of legislation applies. See further on how penalty notices are currently created in NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [2.3]-[2.22].

5. The NSW Land and Property Management Authority was abolished under a 2011 restructure. Its former business divisions have been relocated in new departments.

6. NSW Land and Property Management Authority, *Submission PN17*, 1.

7. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006).

8. *Expiation of Offences Act 1996* (SA) s 5(3)(b) prescribes that if the maximum fine is expressed in a dollar amount, the expiation fee should not exceed \$315 or 25% of the maximum fine, whichever is the lesser amount.

9. The Commonwealth guidelines provide: ‘An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective...An infringement notice scheme should only apply to strict or absolute liability offences’. Commonwealth Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 58.

10. The New Zealand Cabinet approved Infringement Guidelines in March 2008 stating: ‘The Government seeks to ensure that infringement schemes are fair, equitable, consistent and a proportionate means of encouraging compliance with the law...These guidelines provide a framework for the development of infringement schemes to ensure cross-government consistency and to manage the future growth of the infringements system’. They apply to infringement schemes under all legislation, although exceptions can be made to meet specific circumstances of a particular infringement scheme: Ministry of Justice, *Infringement Guidelines*:

that their regulatory agencies must consider when developing legislative proposals for creating penalty notice offences, or for setting penalty notice amounts. Victoria has introduced one of the more comprehensive legislative and administrative systems for regulating its infringements system.

- 3.10 In Victoria, the *Infringements Act 2006* (Vic) introduced a revised infringements system that was designed to address longstanding issues in that jurisdiction concerning the inconsistency of the law and practices across the different issuing agencies. Specifically, the Act sought to improve the administration and management of the infringements system by:
- creating guidelines outlining practices and processes for managing infringements
 - establishing consistent procedures for issuing and enforcing infringements notices
 - enhancing data collection, and
 - providing for better monitoring of the system through a central oversight body.¹¹

Submissions and consultations

- 3.11 As noted above, our terms of reference asked us to have particular regard to the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notice. Consequently in CP 10 we asked the broad question of whether principles should be formally adopted for the purpose of assessing which offences may be enforced by penalty notice.¹²
- 3.12 The significant inconsistencies in the nature of penalty notice offences that exist across government and other regulatory agencies were acknowledged in many of the submissions that we received in response to CP 10. They were similarly acknowledged in our consultations. There was substantial acceptance of the desirability of adopting general principles or guidelines for the purpose of assessing which offences may be enforced by penalty notice.¹³ Submissions noted the need for consistency across the penalty notice system.¹⁴ The Illawarra Legal Centre

Introduction (2008). See also NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.12].

11. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2190 (R Hulls).
12. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 2.1.
13. The Law Society of NSW, *Submission PN31*, 2; The Shopfront Youth Legal Centre, *Submission PN33*, 1; NSW Department of Community Services, *Submission PN36*, 2; NSW Industry and Investment, *Submission PN37*, 1; Office of the State Revenue, State Debt Recovery Office, *Submission PN41*, 1; Legal Aid NSW, *Submission PN11*, 5; NSW Ombudsman, *Submission PN25*, 5; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9; NSW Maritime, *Submission PN2*, 1; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1. NSW, Police Portfolio, *Submission PN44*, 1 commented that the broad criteria suggested in Chapter 3 of CP 10 for identification of appropriate offences as penalty notice offences appeared reasonable. Consultations included Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.
14. The Shopfront Youth Legal Centre, *Submission PN33*, 1,7; The Law Society of NSW, *Submission PN31*, 5; Transport NSW, *Submission PN30*, 1; NSW Department of Local Government, *Submission PN23*, 1; Holroyd City Council, *Submission PN10*, 1, 10; Sydney

asserted that inconsistencies create unfairness,¹⁵ while the NSW Department of Community Services¹⁶ (Community Services) warned that the inconsistencies do affect public confidence in the system.¹⁷ Other submissions referred to the pressing need for principles arising from the sheer volume of penalty notices, coupled with the significant number of agencies involved in their enforcement.¹⁸ A set of principles, it was suggested, would ensure ‘consistency, equity and clarity’ in the penalty notice system¹⁹ providing ‘an integrated and co-ordinated policy framework across all agencies’.²⁰

- 3.13 Most agencies also submitted that these principles or guidelines, although created to achieve consistency, should not be prescriptive but flexible, to cover the broad range of contexts in which penalty notices are used.²¹ It was argued that a process ensuring consistency should not be an over-regulated one,²² but should create a flexible system that ensures an appropriate balance between uniformity of approach,²³ while also allowing for local circumstances and individual agency priorities.²⁴
- 3.14 Community Services suggested that this flexibility in determining a clear set of principles for penalty notices should also accommodate any future regulatory streamlining initiatives that may be undertaken nationally.²⁵ There was independent support in one consultation for this approach, it being observed that an important future issue for any new centralised agency would be the consistency of penalty notices, not just across NSW agencies, but also across the states and territories of Australia.

Olympic Park Authority, *Submission PN6*, 1; NSW Department of Local Government, *Submission PN23*, 1, 3; NSW Department of Planning, *Submission PN7*, 1, 3, 5-6; Local Government and Shires Associations of NSW, *Submission PN16*, 1-2; NSW Land and Property Management Authority, *Submission PN17*, 1; NSW Department of Community Services, *Submission PN36*, 1; NSW Food Authority, *Submission PN9*, 6; NSW Maritime, *Submission PN2*, 1; Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9, 18. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1, 6 while acknowledging the need to improve consistency between penalty amounts in different legislation, in contrast to most submissions and consultations, submitted that the existing penalty notice system was operating well.

15. Illawarra Legal Centre, *Submission PN27*, 7.
16. Now known as the NSW Department of Family and Community Services.
17. NSW Department of Community Services, *Submission PN36*, 1.
18. Holroyd City Council, *Submission PN10*, 2.
19. The Shopfront Youth Legal Centre, *Submission PN33*, 1; NSW Department of Community Services, *Submission PN36*, 2.
20. NSW Land and Property Management Authority, *Submission PN 17*, 1.
21. Also see NSW Food Authority, *Submission PN9*, 1, 3, 6; Sydney Olympic Park Authority, *Submission PN6*, 1; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1, 6. NSW Department of Planning, *Submission PN7*, 1, 3-5 also noted that given the variation in the nature and seriousness of harm caused by penalty notice offences, it saw practical difficulties in prescribing or defining the nature of offences suitable for a penalty notice.
22. NSW Department of Planning, *Submission PN7*, 1, 3, 5.
23. NSW Food Authority, *Submission PN9*, 1.
24. Sydney Olympic Park Authority, *Submission PN6*, 1.
25. NSW Department of Community Services, *Submission PN36*, 2.

- 3.15 However, Transport NSW²⁶ did not support the establishment of strict criteria to determine whether an offence is enforced by penalty notice, stating ‘in our view the policy behind the enactment of offences as those to which penalty notices will apply...should remain with agencies...having the administration of the particular legislation’.²⁷ Notwithstanding this view, it supported the introduction of whole-of-government guidelines to assist agencies with developing, implementing and administering a penalty notice regime within particular legislation.²⁸
- 3.16 Generally the discussions in consultations for this inquiry provided strong endorsement for reform of the penalty notice system, to alleviate inconsistencies in the nature of penalty notices offences across government agencies.²⁹

Commission’s conclusions

- 3.17 We were asked by our terms of reference to have regard to the formulation of principles or guidelines for determining which offences are suitable for enforcement by penalty notice. Such guidelines have been used in comparable jurisdictions, in particular Victoria and New Zealand, to address concerns of inconsistency and unfairness in the development of penalty notice offences similar to those discussed above.
- 3.18 We agree with the strong stakeholder support that exists in NSW for the adoption of guidelines to direct the diverse range of regulatory agencies in determining which, of a wide variety of offences, should be penalty notice offences and which should be offences dealt with by the courts. Consistent with that proposition, the same need for guidance arises when agencies review and update existing penalty notice offences. Guidelines would assist in preventing inconsistencies, and hence unfairness, in the creation and application of penalty notices across the whole of government and, as a consequence, we support their introduction and use.

Recommendation 3.1

The Government should adopt guidelines regulating which offences should be penalty notice offences.

What should be the content of such guidelines?

- 3.19 In CP 10 we asked, if principles or guidelines are established to oversee the penalty notice system in NSW,³⁰ what should be the content of those principles or

26. Now known as Transport for NSW.

27. Transport NSW, *Submission PN30*, 1.

28. Transport NSW, *Submission PN30*, 1, 2.

29. Including Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011; Transport Roundtable Meeting, *Consultation PN23*, Sydney NSW, 18 March 2011; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

30. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 2.1.

guidelines?³¹ Drawing on NSW law and examples from other jurisdictions, we asked for feedback on the content of guidelines that might provide assistance concerning which offences are, and which offences are not, suitable to be penalty notice offences.³² Characteristics of offences that might make them appropriate for penalty notices were proposed, as follows:

- offences that are easy to establish, such as strict or absolute liability offences
- offences that are minor in nature
- offences that attract low penalties
- high-volume offences
- regulatory offences; and
- continuing offences.

3.20 Characteristics of offences that might make them unsuitable for enforcement by penalty notice, due to their seriousness, were also proposed for consideration including:

- offences where imprisonment is a sentencing option
- offences involving victims of violence, and
- indictable offences.

Below we note the response of submissions and consultations to these criteria, and state our conclusions.

3.21 We also asked whether there are any principles, other than those mentioned above, that should be adopted for the purpose of assessing whether an offence may be appropriately included in the penalty notice system?³³ Submissions and consultations offered two important issues for inclusion in the guidelines:

- the role of penalty notices in the criminal justice system, and
- the impact of penalty notices on vulnerable people.³⁴

These two issues are dealt with first, and are followed by a consideration of the other matters listed above.

31. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Questions 3.1-3.11.

32. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) ch 3 includes discussion on the Commonwealth, Victorian and New Zealand guidelines, which contain principles about the types of offences that may be considered for treatment as penalty notice offences.

33. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.11.

34. See also Part Four.

Penalty notices are part of the criminal justice system, not the financial system

- 3.22 Concern was expressed by many stakeholders that the penalty notice system is primarily a mechanism for revenue raising and that, as a consequence, it is not guided by principles of responsible regulation, including fairness and justice. Some submissions and consultations asserted that the rationale of a penalty notice system should be diversion from court, rather than revenue raising by the government, and that this should be clearly stated in the adoption of any guiding principles that underpin the penalty notice system.³⁵
- 3.23 For example, the Homeless Persons' Legal Service (HPLS) suggested that the principles should include a statement that 'agencies... be required to abstain from establishing any kind of quota system for the issuing of penalty notices'.³⁶ Furthermore, the HPLS suggested that where the revenue from penalty notices is returned to the agency, it should be required to demonstrate that the revenue raised does not form part of the agency's annual budget, and is surplus to the agency's budgetary requirements.³⁷ The HPLS argued that including this as a principle would help to pull penalty notices out of the gravitational force of revenue raising, and anchor them solidly to the criminal justice system. NSW Maritime³⁸ likewise suggested that an 'overarching principle or guideline'³⁹ could be that the aim of the penalty notice system is to 'increase awareness, promote public and environmental safety, and provide for specific and general deterrence, and not simply to "revenue raise"'.⁴⁰
- 3.24 The suggestion that penalty notices are used as source of revenue raising has wide currency. It was mentioned in many consultations as a criticism of the penalty notice system, and a reason for a suggested lack of public respect for the system. There was a particular suspicion as to the existence of enforcement targets for particular offences. It is interesting to note, in this context, that the NSW Government recently removed a quarter⁴¹ of the state's most financially lucrative fixed speed cameras on the basis that they had no significant road safety benefit.⁴² The NSW Minister for Roads observed when announcing this, that the cameras had been used primarily for revenue raising purposes.⁴³ In the United Kingdom, a recent paper by the Ministry of Justice acknowledged the positive impact of dispensing with law

35. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 10; NSW Maritime, *Submission PN2*, 6.

36. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 10.

37. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 10.

38. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

39. NSW Maritime, *Submission PN2*, 6.

40. NSW Maritime, *Submission PN2*, 6.

41. R Haynes, 'Speedy End to Cameras', *The Daily Telegraph* (Sydney), 28 July 2011, 1.

42. Audit Office of New South Wales, *Improving Road Safety: Speed Cameras*, Performance Audit (2011) 20.

43. D Gay, 'Report Finds Speed Cameras are an Effective Road Safety tool: Ineffective Cameras to be Removed' (Media release, 27 July 2011).

enforcement based on targets and of returning an appropriate discretion to enforcing officers.⁴⁴

- 3.25 At present, revenue collected by the State Debt Recovery Office (SDRO) from penalty notice offences goes to two different sources. Penalty notice amounts collected for the Crown⁴⁵ are paid into consolidated revenue, with the SDRO receiving an amount in its annual budget to process their recovery. On the other hand, the amounts collected by the SDRO on behalf of its 'commercial clients'⁴⁶ go back to those clients, less a processing fee retained by the SDRO.⁴⁷
- 3.26 Of the Crown revenue raised from penalty notices for 2009-10, by far the largest proportion was raised from traffic and motor vehicle offences.⁴⁸ Revenue collected by the SDRO on behalf of their 'commercial' clients represented just under half⁴⁹ of the total value of all penalties issued pursuant to penalty notices in the same time period. Conversely, revenue collected for the Crown as part of consolidated revenue represented just over half⁵⁰ in the same time period. The relevant amounts are detailed in Table 3.1.

Table 3.1 Number and face value of penalty notices: 2005-06 to 2009-10

Financial Year	Commercial		Crown		Total No PNs	Total value
	No of PNs (,000)	Face value \$m	No of PNs (,000)	Face value \$m	(,000)	\$m
2009-10	1617	214.872	1215	276.381	2832	491.253
2008-09	1539	196.741	1281	258.711	2820	455.452
2007-08	1502	187.886	1387	265.827	2889	453.713
2006-07	1492	182.180	1122	215.701	2614	397.881
2005-06	1441	176.958	1044	191.970	2485	368.928

Source: NSW Office of State Revenue, NSW Treasury, *Annual Report 2009-10* (2010) 27.

- 3.27 In consultations, the issuing agencies had strong responses to allegations of revenue raising. Some stated that they receive no revenue from penalty notices. Others pointed out that the revenue they raise through penalty notices is minimal

44. United Kingdom, Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972 (2010) 64.

45. See generally delineation of 'Crown client' categories by infringement type in NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 1.2.

46. Penalty notice offences pertaining to trust lands, train offences and the environment are covered as 'General Client' under the 'Commercial client' category in NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 1.2.

47. Information supplied by Mr Gregory Frearson, Assistant Director (Operations), NSW State Recovery Office, cited in NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [1.42].

48. NSW Office of State Revenue, NSW Treasury, *Annual Report 2009-10* (2010) 27.

49. Varying between 41% and 48% in the five financial years from 2005-06 to 2009-10.

50. Varying between 52% and 59% in the five financial years from 2005-06 to 2009-10.

and does not compensate for the costs incurred. They asserted that issuing penalty notices was all about effective regulation - principally compliance and deterrence.⁵¹ It was clear from consultations that some issuing agencies had put a great deal of time and resources into the creation of a penalty notice regime that was principled, based on carefully considered metrics of seriousness/harm, and backed by extensive internal guidelines, training and the use of cautions and review. They were understandably unimpressed by allegations that the system was simply a revenue raising exercise.

- 3.28 The Victorian Guidelines, introduced under s 5 *Infringements Act 2006* (Vic), do not discuss, or prohibit, 'quotas' or 'revenue raising'. Rather they contain a positive statement about the role of infringement notices in the criminal justice system:

In the State of Victoria, infringements are used to address the effect of minor law breaking with minimum recourse to the machinery of the formal criminal justice system and, as a result, often without the stigma associated with criminal judicial processes, including that of having a criminal conviction.⁵²

The Guidelines later reinforce this statement with language emphasising 'fairness' in the system.⁵³

Commission's conclusions

- 3.29 Whether an offence should be made a penalty notice offence should, like other criminal offences, be based on principles of responsive regulation, especially fairness and justice. This emphasis recognises, as discussed in Chapter 1, that penalty notices are part of the criminal justice system. No decisions about what offences should be enforced by way of penalty notices, about penalty amounts or about issuing and enforcement of penalty notices, should be motivated by revenue raising.
- 3.30 Further, we agree with the suggestion by stakeholders that the rationale of a penalty notice system, as a court diversion for criminal behaviour rather than a revenue raising exercise by the government, should be clearly stated in guidelines. Revenue raising should not be a relevant consideration in creating or issuing penalty notices. A guideline to this effect would raise public confidence in, and respect for, the penalty notice system. It would assist in clarifying for everyone, both government agencies and the public, the purpose of a penalty notice offence. It would also help remove the present taint of 'revenue raising' from the penalty notice system.

Recommendation 3.2

The proposed guidelines on penalty notice offences should be based on principles of responsive regulation. They should emphasise that:

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51. Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.
52. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 1.
53. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 1 states 'this Act aims to provide...a fairer system'. At 2 the Guidelines further state 'the principles upon which the Act is based [include]...the balancing of fairness...with compliance and system efficiency...'.

- (a) penalty notice offences are part of the criminal justice system and their creation should be informed by considerations of fairness and justice, and
- (b) revenue raising is not a relevant consideration in relation to the creation of penalty notice offences.

Vulnerable people

- 3.31 Many submissions and consultations identified concerns in relation to the increase in recent years in the number of penalty notice offences, and the extension of penalty notices to offences traditionally dealt with by the courts. An unintended outcome of the proliferation of penalty notices, it was pointed out, has been its detrimental impact on vulnerable groups of people.⁵⁴ The HPLS explained:

Stemming this rapid expansion [in penalty notices] will reduce the number of vulnerable people caught up in the penalty notice system and will arguably have a greater impact on reducing disadvantage than other measures designed to mitigate the harsh financial impact of penalty notices *after* the penalty notice has been issued...⁵⁵

- 3.32 These submissions, together with consultations, called for formal recognition of the disproportionate impact that penalty notices have on vulnerable people compared with other community members,⁵⁶ and expressed a hope that such recognition might curb their *ad hoc* growth. Both the Law Society of NSW (Law Society) and the Shopfront Youth Legal Centre (Shopfront) argued that it is important when creating penalty notice offences to consider the demographics of people to whom they are likely to be issued.⁵⁷ UnitingCare Burnside suggested that a consistent approach that was based on assessment of the risk of harm or danger, and the age of the penalty notice recipient, would reduce the number of inconsistencies in the system.⁵⁸

- 3.33 The HPLS recommended that a set of principles be established providing clear guidance as to the identification of offences that could be enforced by way of penalty notice, and that these principles should be given statutory backing.⁵⁹ It reasoned that a more considered and targeted approach to the regulation of unacceptable behaviour would go some way to preventing the disproportionate 'netting' of vulnerable people through the operation of the penalty notice system.⁶⁰ This submission, together with others, suggested that such principles should require regulators and issuing agencies to focus on:

54. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.

55. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.

56. The Law Society of NSW, *Submission PN 31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 5; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9-10; UnitingCare Burnside, *Submission PN12*, 4.

57. The Law Society of NSW, *Submission PN 31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 5

58. UnitingCare Burnside, *Submission PN12*, 4.

59. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.

60. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9-10.

- 'the seriousness of the offence relative to other offences'⁶¹
- the 'risk of harm or danger' to others or the offender by committing the offence⁶²
- 'the demographics of people who are likely to be issued with penalty notices for particular types of offences',⁶³ especially 'whether vulnerable people are more likely to be apprehended for the proposed offence'⁶⁴
- 'strategies for minimising any identified negative impact of the penalty notice on vulnerable groups'⁶⁵
- 'the age of the offender',⁶⁶ and
- 'whether regulation of the behaviour in question may be adequately dealt with other than by the creation of an offence enforceable by penalty notice'.⁶⁷

3.34 However, one submission pointed to the difficulty in practice for enforcement officers if they must determine a person's apparent economic status, social disadvantage or other vulnerability before deciding to issue a penalty notice. It was suggested that certain kinds of offences are better dealt with by way of non-financial penalty, for example, confiscation of property, or banning a person from a facility if he or she has been causing damage or a nuisance there.⁶⁸

3.35 The Attorney General's Caution Guidelines and Internal Review Guidelines offer some direction for agencies involved in enforcement of penalty notices in relation to vulnerable groups, in particular people with cognitive impairments, mental illness, or people who are homeless.⁶⁹ However, these guidelines deal with the exercise of discretion at the enforcement stage in relation to issuing cautions,⁷⁰ and the procedures for internal review of penalty notices.⁷¹ They do not require a consideration of the situation of vulnerable people at the time of deciding whether or not a penalty notice is the appropriate method of regulating the activity in question.

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61. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.
62. UnitingCare Burnside, *Submission PN12*, 4. Interestingly, 'not involv[ing] risks to public safety' and 'the lower end of the scale of seriousness' are two of the deciding matters: NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996* [4.7] (a) and (f).
63. The Law Society of NSW, *Submission PN 31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 5.
64. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.
65. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.
66. UnitingCare Burnside, *Submission PN12*, 4.
67. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 9.
68. Sydney Olympic Park Authority, *Submission PN6*, 2.
69. Although the Department of Attorney General and Justice, *Caution Guidelines under the Fines Act 1996* [4.7] also extends the discretion to issue a caution to low levels of harm behaviour (a) and (f); a person under 18 years (d), and a person with a special infirmity or in very poor physical health (e).
70. NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996*. They do not apply to police officers or issuing officers of agencies that have issued their own guidelines for the use of cautions.
71. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act*.

- 3.36 The Victorian Guidelines require attention to this matter.⁷² The ‘principles’ that inform the legislation provide that attention should be given to the impact of infringement notices on vulnerable people.⁷³ Further, when establishing the need for a new infringement notice, agencies are provided with a ‘checklist’ that requires the agency to consider, among other things:

Will the proposal adversely affect fairness and rights within the community? (This is particularly important in relation to the impact on vulnerable members of the community).⁷⁴

Commission’s conclusions

- 3.37 The weight of submissions and consultations, together with the example of the Victorian Guidelines, persuades us that it is appropriate for the impact on vulnerable people to be taken into account in NSW when the creation of new penalty notice offences is contemplated, or when an existing offence is reviewed.

Recommendation 3.3

- (1) The proposed guidelines on penalty notice offences should require consideration of the impact of the proposed penalty notice offence on vulnerable people.
- (2) Where a penalty notice offence is likely to affect vulnerable people adversely, the following issues should be considered
 - (a) whether there are more appropriate alternatives to a penalty notice offence
 - (b) whether there are ways in which the impact on vulnerable people can be ameliorated.

Beyond strict and absolute liability offences?

- 3.38 Strict and absolute liability offences are generally considered suitable candidates to be penalty notice offences since they do not require proof of *mens rea*. Where the offence is one of absolute liability it is complete upon proof that the act of the offender constituted a voluntary act. If it is one of strict liability, however, the prosecuting authority will need to negative any issue as to whether the person was acting under an honest but reasonable mistake of fact. The particular issue that arises for consideration is whether penalty notice offences should extend beyond strict and absolute liability offences to those offences that require an exercise of discretion or judgment by the enforcing officer. Such discretion or judgment may concern, for example, whether the person’s act was done with the necessary intent, or was done recklessly (where that is an element of the offence) or whether the person had a reasonable excuse or defence (other than a denial of having

72. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 2, Annexure A, 11.

73. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 2.

74. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) Annexure A, 11.

committed the physical act). If penalty notices do extend to such offences, then a question arises whether additional conditions should apply.⁷⁵

- 3.39 Sometimes offences with a fault element, offences with a defence, or offences that contain exceptions, provisos, excuses or qualifications, can be factually complicated, and administratively difficult, costly and time-consuming to establish. They are, on one view, not appropriate for enforcement by penalty notice or, if appropriate, are only so with safeguards. Because of these considerations, both the New Zealand⁷⁶ and the Commonwealth⁷⁷ Guidelines state that penalty notices should be confined to strict or absolute liability offences.
- 3.40 However, the element of fault, or mental element in an offence (for example offences that require proof of intent or culpability, including wilful, reckless or negligent conduct), the availability of a defence (such as reasonable excuse), or offences that contain provisos may, despite these characteristics, be relatively straightforward to assess. As long as an enforcement officer can assess, on the spot, the fault element, defence or proviso easily from the context of the offence, it might still be appropriate to qualify as a penalty notice offence.
- 3.41 Some penalty notice offences that include a fault element, defence or proviso already exist in NSW. Examples include offences requiring 'intent', such as that committed by a person who applies a thermal stimulus (such as hot wires) to the leg of an animal with the intention of causing tissue damage and the development of scar tissue around tendons and ligaments of the leg.⁷⁸ There are also other current penalty notice offences that have a 'wilful or negligent' fault element, for example, the offence of wilfully or negligently wasting or misusing water from a public water supply, or causing any such water to be wasted.⁷⁹ An example of a current penalty notice offence containing an exception, defence or excuse is found under the *Passenger Transport Act 1990* (NSW) s 59, *Passenger Transport Regulation 2007* (NSW) cl 58, to the effect that a passenger must not, without reasonable excuse, throw any thing in or from a public passenger vehicle.
- 3.42 Unlike the New Zealand and Commonwealth Guidelines, the Victorian Guidelines allow 'offences which are more complex than strict liability offences',⁸⁰ including those that contain an exception, proviso, excuse or qualification, to be made infringeable. However, those guidelines note:

- a) ...The agency's issuing documentation, and other publicly provided information, must clearly and accurately set out the offending behaviour,

75. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.2.

76. An infringement offence scheme should 'involve actions or omissions that involve straightforward issues of fact' and 'only apply to strict or absolute liability offences', New Zealand, Ministry of Justice, *Guidelines for New Infringement Schemes* (2008) [22]-[25].

77. Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 58 which states 'an infringement notice scheme should only apply to strict or absolute liability offences'.

78. *Prevention of Cruelty to Animals Act 1979* (NSW) s 21A, s 33E; *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) cl 23, sch 3.

79. *Local Government Act 1993* (NSW) s 637, s 679; *Local Government (General) Regulation 2005* (NSW) pt 12, sch 12.

80. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12.

and the rights of the person, including the right to have the matter determined in court;

- b) Only certain categories of trained officers should be able to issue infringement notices for the more serious offences;
- c) The agency should provide operational guidelines and training for issuing officers prior to any offences coming into effect, and proof of this would be the basis for an offence meeting (b) above;
- d) The operating guidelines would need to be publicly disclosable to the extent that they inform the community of what constitutes wrongdoing;
- e) The guidelines must include an option to give formal and informal warnings (unless a case can be made that this is inappropriate for a particular offence, e.g. drink driving offences where prosecutorial discretion is rarely exercised); and
- f) The agency must also report annually on such offences.⁸¹

Submissions and consultations

3.43 In CP 10 we asked whether penalty notices should only be used for offences where it is easy and practical for issuing officers to apply the law and assess whether the offence has been committed. If so, we asked whether they should also apply to offences that contain a fault element and/or defences.⁸²

3.44 Some submissions asserted that penalty notice offences should be confined to offences where it is easy and practical for enforcement officers to apply the law and assess whether an offence has been committed.⁸³ Some went further, saying that penalty notices should only apply to strict and absolute liability offences.⁸⁴

3.45 Legal Aid NSW (Legal Aid) argued that narrowing the reach of penalty notice offences would minimise the risk that penalty notices would be issued mistakenly:

This should be achieved by excluding from the penalty notice scheme any offences that are not strict and absolute liability offences, as well as any type of offence that is complicated and difficult to establish, or that requires an understanding of complex legal concepts.⁸⁵

If penalty notices were to apply to offences with a fault element and to offences for which defences are available, then Legal Aid would favour the use of protective

81. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12.

82. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Questions 3.1, 3.1(2).

83. NSW Office of the State Revenue, State Debt Recovery Office, *Submission PN41*, 3; Holroyd City Council, *Submission PN10*, 4.

84. Legal Aid NSW, *Submission PN11*, 6. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 11 was not in favour of penalty notice offences that contain a fault element. Transport NSW, *Submission PN30*, 3 was against any 'requirement that enforcement officers are to take into account any technical legal defence that may be available to an offender or otherwise expected to apply 'the law' (whatever that may be in a particular case) when issuing a penalty notice'.

85. Legal Aid NSW, *Submission PN11*, 6.

guidelines such as the Victorian Guidelines.⁸⁶ The guidelines would require the issuing agency to have a good reason to include such offences within the penalty notice system.⁸⁷

- 3.46 Other submissions considered that penalty notices should not be limited to strict and absolute liability offences,⁸⁸ but should extend to more complicated factual and legal circumstances, so long as they operate subject to certain safeguards. Some thought that any fault element should be clear cut and relatively simple to assess.⁸⁹ If not, it was argued that referring the matter to a court may be more appropriate.⁹⁰
- 3.47 A number of submissions supported the use of penalty notices to cover offences that require a judgment by the issuing officer as to the existence of a fault element and/or as to the possible existence of a defence, as long as the officer was experienced, well trained in the role,⁹¹ and working within clear operational guidelines.⁹² The NSW Department of Local Government⁹³ submitted that training of officers would ensure they 'have the necessary skills and resources to undertake their duties in a safe, fair, transparent, consistent and accountable manner'.⁹⁴ The Department supported the development of standardised training for local government officers, to be co-ordinated by a centralised body in consultation with relevant agencies. At present, the Department noted that training varies greatly from council to council.⁹⁵
- 3.48 Some other safeguards were suggested if offences other than strict or absolute liability offences were to be included in penalty notice offences. For example it was suggested that there should be a requirement that the issuing officer first give

86. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12.

87. Legal Aid NSW, *Submission PN11*, 6.

88. G Henson, *Submission PN5*, 1; NSW Department of Planning, *Submission PN7*, 2, 4; NSW Food Authority, *Submission PN9*, 2; NSW Industry and Investment, *Submission PN37*, 2; Holroyd City Council, *Submission PN10*, 4; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 2-3; Illawarra Legal Centre, *Submission PN27*, 6; NSW Police Portfolio, *Submission PN44*, 1.

89. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 3; NSW Land and Property Management Authority, *Submission PN17*, 2. Consultations agreed on penalty notices with a mental element in less serious cases, for example, Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

90. NSW Land and Property Management Authority, *Submission PN17*, 2.

91. NSW Police Portfolio, *Submission PN44*, 1; NSW Maritime, *Submission PN2*, 3; NSW Food Authority, *Submission PN9*, 2; Holroyd City Council, *Submission PN10*, 4-5; NSW Land and Property Management Authority, *Submission PN17*, 2-3; Illawarra Legal Centre, *Submission PN27*, 6; The Law Society of NSW, *Submission PN31*, 3; The Shopfront Youth Legal Centre, *Submission PN33*, 2.

92. NSW Department of Planning, *Submission PN7*, 2, 4; NSW Food Authority, *Submission PN9*, 2; Illawarra Legal Centre, *Submission PN27*, 6; The Law Society of NSW, *Submission PN 31*, 3; The Shopfront Youth Legal Centre, *Submission PN33*, 2; NSW Maritime, *Submission PN2*, 3. Consultations agreed; for example, Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011. Some agencies already have internal written manuals to guide the discretion of officers in issuing penalty notices.

93. Now the Division of Local Government, Department of Premier and Cabinet.

94. NSW Department of Local Government, *Submission PN23*, 2.

95. NSW Department of Local Government, *Submission PN23*, 2.

consideration to a warning or caution instead of issuing a penalty notice,⁹⁶ and that accessible review procedures should be made available.⁹⁷ The NSW Food Authority further proposed that each agency should have a policy, in complex cases, of not issuing a penalty notice immediately, but requiring an officer to discuss the matter with a senior enforcement officer before issuing the penalty notice.⁹⁸ Another submission supported penalty notices covering offences with a mental element or subject to a defence, so long as the option existed to have the matter dealt with by a court as an alternative.⁹⁹

- 3.49 The Law Society, while acknowledging that enforcement officers might have difficulty in assessing offences with a fault or mental element, noted that the risk of a conviction for a minor offence, merely because it has a fault element and/or was subject to a potential defence, would be worse for an offender than if it were dealt with by way of a penalty notice.¹⁰⁰ Shopfront agreed. It observed that if penalty notices were restricted to strict and absolute liability offences, then people accused of trivial offences with a fault element would be denied the opportunity to be dealt with by penalty notice without acquiring a conviction. 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).¹⁰¹

Commission's conclusions

- 3.50 We accept that there are potential problems in extending penalty notice offences beyond strict and absolute liability offences, particularly because of the difficulty of assessing whether or not such an offence has been committed. However the potential problems need to be weighed against the benefits of making such offences penalty notice offences. These include benefits to those offenders who may wish to avoid the need to go to court, as well as to issuing agencies and to the courts in having these cases determined without the need for any court attendance or for the documentation and processing that would otherwise be involved. The benefits are especially persuasive in relation to offences that are minor in nature but nevertheless involve judgments about the offender's mental state (for example, throwing litter from a bus without reasonable excuse). We are satisfied on balance that penalty notice offences need not be confined to strict and absolute liability offences, although clearly there need to be some limits on the kinds of offence that should qualify.

96. Illawarra Legal Centre, *Submission PN27*, 6; The Law Society of NSW, *Submission PN31*, 3; The Shopfront Youth Legal Centre, *Submission PN33*, 2. The Law Society of NSW and Shopfront further submitted that enforcement officers should consider warnings and cautions for all penalty notice offences, not just those with a fault element and/or defence.

97. Illawarra Legal Centre, *Submission PN27*, 6.

98. NSW Food Authority, *Submission PN9*, 2. This is the approach the Food Authority takes, as many of the cases it investigates where penalty notices can be issued are, by their nature, preceded by complex and time-consuming investigations. NSW Industry and Investment *Submission PN37*, 2 agreed, saying that although they issue penalty notices in complex factual and legal circumstances these notices are not issued 'on the spot', as there is a need for sufficient proof of each element of the specific offence and an opportunity for the alleged offender to provide a defence or show mitigating facts.

99. G Henson, *Submission PN5*, 1.

100. The Law Society of NSW, *Submission PN31*, 3.

101. The Shopfront Youth Legal Centre, *Submission PN33*, 2.

- 3.51 Following the example of other jurisdictions, and in line with the arguments presented in many submissions and consultations, we support the establishment of guidelines that will set standards in relation to the offences that should be capable of being dealt with by way of penalty notice. These recommendations are in line with the Victorian Guidelines.
- 3.52 Where penalty notice offences extend to offences containing a mental element, defence or proviso, issuing agencies should publish material that will assist the public to understand what constitutes offending behaviour.¹⁰²
- 3.53 Because of the challenges involved in issuing penalty notices for these offences we recommend that issuing officers must have special training before they are authorised to issue penalty notices and that there should be internal operational guidelines to assist them. Such guidelines should also contain information about the use of warnings and cautions, instead of penalty notices, in appropriate cases.
- 3.54 We also recommend that agencies report periodically to the proposed Penalty Notice Oversight Agency (PNOA); the implementation of these guidelines and the use of such penalty notices should be monitored by the PNOA. An important concern that arises in relation to penalty notices for offences involving a mental element is that they be appropriately issued, in a way that takes into account the relevant mental element of the offence. Monitoring should ensure that penalty notices for these offences are issued appropriately and, if problems or concerns arise, should support improvements in practice.

Recommendation 3.4

- (1) Where penalty notice offences contain a mental element, defence or proviso, the proposed guidelines on penalty notice offences should provide that:
- (a) any mental element, defence or proviso should be clear and simple to assess from the context of the offence
 - (b) issuing agencies should
 - (i) clearly state in their public documentation what constitutes offending behaviour and the right to go to court
 - (ii) provide officers with special training and internal operational guidelines before they may issue such penalty notices
 - (iii) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency.
- (2) The proposed Penalty Notice Oversight Agency should report publicly on the operation of penalty notice offences containing a mental element, defence or proviso.

102. Under the *Government Information (Public Access) Act 2009* (NSW) ss 6, 18, 23, agencies are required to proactively publish 'policy documents' which include any 'document containing interpretations, rules, guidelines, statements of policy, practices or precedents'.

Community standards

- 3.55 Some offences, although not containing a fault element or defence, may require an enforcement officer to exercise judgment in relation to a matter involving community standards where there may be room for considerable subjective judgment. In CP 10 we asked whether offences that require judgment in relation to matters involving community standards, for example 'offensiveness', are suitable for penalty notices.¹⁰³

Submissions and consultations

- 3.56 The issue raised most frequently in submissions and consultations in this context was the use of Criminal Infringement Notices (CINs) for the offences of offensive language and offensive conduct. A decision as to whether particular language or conduct is offensive requires a determination that the language or conduct would cause offence in the mind of a 'reasonable person',¹⁰⁴ that is, in accordance with current community standards. It was argued in consultations that this test is too subjective and difficult for an enforcement officer to determine, especially in relation to offensive language, by reason of the need to consider the context in which the words were uttered. It is also noted that, in relation to each of the offences of offensive conduct and offensive language, it is a sufficient defence to a prosecution if a defendant establishes that he or she had a 'reasonable excuse' for the conduct or language.¹⁰⁵
- 3.57 Although support existed for the continued use of a community standards test serious concerns were expressed in relation to the continued use of 'offensive language' offences, by reason of the perceived biased and unfair treatment in its application to vulnerable people and their use of expressions that are regularly encountered in television, films and novels. Offensive language and its implications for CINs are considered in detail in Chapter 10.
- 3.58 However, there remains to be considered the more general issue of whether penalty notice offences should include those that require the exercise of a judgment dependent on community standards and, if so, whether guidelines should be framed to assist in these judgments.
- 3.59 The problems that have been identified with penalty notice offences that require a judgment based on community standards include:
- the potential indeterminacy of the offence and the risk of inconsistent application or misuse
 - the fact that community values change over time
 - the fact that the Australian community is not homogenous, which raises a question as to which part of the community is the reference point; and

103. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.3.

104. *Worcester v Smith* [1951] VLR 316, 318. See also *Inglis v Fish* [1961] VR 607, 610; *Re Marland* [1963] 1 DCR (NSW) 224.

105. *Summary Offences Act 1988* (NSW) s 4(3) and s 4A(2).

- 'community standards' must be perceived to be fair and reasonable, both in the way they are defined and the way they are applied, to ensure continued public confidence in, and respect for, the penalty notice system.

Commission's conclusions

- 3.60 While many submissions and consultations identified problems with the use of CINs for offensive language, there were few that reported them in relation to the use of CINs for offensive conduct, which also requires the exercise of a judgment based on community standards. It may be the case that the problem identified with the use of CINs for offensive language is not that it requires the exercise of a judgment based on community standards, but that it is being applied in a way that stakeholders find inappropriate. Indeed the argument from stakeholders in consultations was that the police do understand community standards, and that police know that in many contexts the use of certain swear words is not offensive, and indeed they use these words themselves when dealing with offenders and in conversations between themselves. The difficulty raised seems not to be a failure of police understanding of community standards, but that police are not applying community standards or exercising a sufficient discretion in deciding whether to issue a CIN or to give a caution or warning.
- 3.61 There are elements of penalty notice offences, other than offensiveness, that call upon judgments based on community standards, such as a requirement to make a judgment in relation to 'reasonableness' that is embodied, for example, in a defence of reasonable excuse.
- 3.62 On balance, therefore, we recommend that penalty notices should be permitted where there is a requirement that an enforcing officer make a judgment based on community standards. However, because of the difficulties and dangers attendant upon doing so, guidelines (similar to those in Recommendation 3.4 above) should govern the operation of such offences. Only defined categories of trained officers should issue them. Operational guidelines should be made, specific to these offences and responding to the practical context in which the penalty notices will be issued. The relevant issuing agency must ensure clarity in its public documentation about what constitutes the offending behaviour subject to the penalty notice, and what rights the penalty notice recipient has, including the right to go to court.
- 3.63 In addition, in relation to CINs for offensive language and offensive conduct, NSW Police standard operating procedures should emphasise the need to give specific consideration to the circumstances in which the conduct or language is used and to give careful consideration to whether a caution or warning is a sufficient response.

Recommendation 3.5

- (1) The proposed guidelines on penalty notice offences should provide that, where an offence requires an issuing officer to make a judgment based on community standards, issuing agencies must:
 - (a) clearly state in their public documentation what constitutes offending behaviour and the right to go to court
 - (b) provide officers with special training and internal operational guidelines before they may issue such penalty notices

(c) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency.

(2) The proposed Penalty Notice Oversight Agency should report publicly on the operation of penalty notice offences requiring an enforcing officer to make a judgment based on community standards.

Offences that are minor in nature

3.64 Penalty notices in NSW were originally introduced in the middle of last century as an administratively fast and simple solution for enforcing ‘minor offences’, such as parking breaches.¹⁰⁶ They have since expanded significantly in number and type, but the basic concept that penalty notices should be used for minor offences remains. Consequently, in CP 10 we asked whether the concept of ‘minor offence’ should be included in the criteria in any new guidelines for determining whether an offence is suitable to be a penalty notice offence. If so, the issue that arises is how the term ‘minor offence’ should be defined.¹⁰⁷

3.65 The term ‘minor offence’ is widely used. The Commonwealth and Victorian Guidelines provide that an infringement notice scheme may be employed for minor offences.¹⁰⁸ The Victorian Guidelines do not define ‘minor offence’. The Commonwealth Guidelines explain that an infringement notice scheme ‘should only apply to minor offences with strict or absolute liability, and where a high volume of contraventions is expected’.¹⁰⁹ There are statutory definitions for, or references to, ‘minor offence’ in other Australian jurisdictions. These definitions are specific to the context in which they are found.¹¹⁰ For example, subject to certain exceptions, s 8 of the *Bail Act 1978* (NSW) provides an accused charged with an offence with a right to be released on bail for ‘minor offences’, and lists the following offences to which it applies:

- all offences not punishable by a sentence of imprisonment (except in default of payment of a fine)
- all offences under the *Summary Offences Act 1988* (NSW) that are punishable by a sentence of imprisonment
- all offences punishable summarily and prescribed by the *Bail Regulation 2008* (NSW), and
- all offences where the accused is appearing on breach of a good behaviour bond or because his or her community service order is to be altered.

106. See also NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [1.4]-[1.8].

107. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.4.

108. Commonwealth Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 58; Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 10.

109. Commonwealth Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 58.

110. For example, *Crimes Act 1914* (Cth) s 17B and *Justices Act* (NT) s 120.

Submissions and consultations

- 3.66 Most submissions supported the idea that the fact that the offence is a 'minor offence' should be a relevant criterion in any list of principles or guidelines.¹¹¹ However submissions acknowledged that no single criterion should be determinative of the suitability of an offence to be dealt with by way of a penalty notice¹¹² and, furthermore, that any definition of 'minor offence' would need to have a 'flexible interpretation'.¹¹³
- 3.67 The submissions were not consistent concerning the definition of 'minor offence'. Most submissions thought it should be defined as an offence capable of being dealt with summarily,¹¹⁴ which carries a fine only as the maximum penalty applicable if the matter were to go to court,¹¹⁵ and not a sentence of imprisonment.¹¹⁶ Some would accept a penalty notice where an offence attracted a penalty of imprisonment for six months or less.¹¹⁷ Holroyd City Council alternatively suggested the definition of 'minor offence' should be based on the level of actual harm being comparatively minor.¹¹⁸ The Law Society and Shopfront thought minor offences of resisting or obstructing an enforcement officer (which may involve some physical force or verbal threats) might be suitable for penalty notices.¹¹⁹ Some consultations, however, raised the issue of a potential conflict of interest in the use of a penalty notice where the victim of assault or threat was also the enforcement officer. Such a case, they suggested, should not be a penalty notice offence, but should rather go to court for determination.
- 3.68 In contrast, although generally supporting the criterion that the offence be a 'minor offence', the NSW Department of Planning¹²⁰ considered it would be difficult to define such an offence, and ultimately would not be necessary.¹²¹ Rather, the question of whether an offence is a penalty notice offence should be examined on a

111. NSW Maritime, *Submission PN2*, 4-5; The Law Society of NSW, *Submission PN 31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 3; Legal Aid NSW, *Submission PN11*, 6; NSW Department of Planning, *Submission PN7*, 4-5; NSW Food Authority, *Submission PN9*, 3; Holroyd City Council, *Submission PN10*, 5; NSW Industry and Investment, *Submission PN37*, 2; NSW Land and Property Management Authority, *Submission PN17*, 3.

112. Transport NSW, *Submission PN30*, 2; NSW Industry and Investment, *Submission PN37*, 2.

113. NSW Food Authority, *Submission PN9*, 3 stating that one reason for this is 'that some Acts allow for the application of national codes and regulatory schemes. The Food Act does both and contain[s] enforcement provisions which necessarily are general in nature'.

114. The Law Society of NSW, *Submission PN31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 3; Legal Aid NSW, *Submission PN11*, 6.

115. NSW Maritime, *Submission PN2*, 4; The Law Society of NSW, *Submission PN31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 3; NSW Land and Property Management Authority, *Submission PN17*, 3.

116. NSW Maritime, *Submission PN2*, 4; Legal Aid NSW, *Submission PN11*, 6; Transport NSW, *Submission PN30*, 2.

117. The Law Society of NSW, *Submission PN31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 3.

118. Holroyd City Council, *Submission PN10*, 5.

119. The Law Society of NSW, *Submission PN 31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 3.

120. Now known as the NSW Department of Planning and Infrastructure.

121. NSW Department of Planning, *Submission PN7*, 2, 4-5.

case-by-case legislative basis.¹²² NSW Industry and Investment¹²³ agreed that it would be difficult to define ‘minor’:

With respect to fisheries offences, it is a complex issue to seek to define a particular offence as ‘minor’. For example, possession of a specified number of prohibited size fish of one species such as sea mullet may be considered minor but possession of the same number of prohibited size fish of a species such as abalone, lobster or groper may be considered more significant.¹²⁴

- 3.69 Finally, one submission suggested that it would be unhelpful to classify a penalty notice offence as ‘minor’ as this might detract from the importance of enforcing contraventions of the offence in a regulatory scheme. However, a criterion might instead be framed to take into account ‘the relative seriousness of the offence in the particular regulatory regime’, among a number of other criteria, including the quantum of the contraventions of that offence.¹²⁵

Commission’s conclusions

- 3.70 The first question to consider is whether the term ‘minor offence’ should be included as a guideline. Our view is that the term ‘minor offence’ should be included. On its own, the expression ‘minor offence’ may not provide much assistance. However, it adds meaning in the context of a list of criteria as to what constitutes a penalty notice offence by conveying the message that penalty notices are unsuitable for serious offences. It makes it clear that they have been selected as suitable for penalty notices by reason of an acceptance that they do not require the same legal and procedural safeguards as are required for the more serious offences that must be determined by the courts. We are supported in this view by the fact that most submissions considered that the criterion of ‘minor offence’ should be one criterion among others in any list of principles or guidelines.¹²⁶
- 3.71 There was no consistency in submissions as to what a definition of ‘minor offence’ should be. We accept that the expression ‘minor offence’ is not capable of exhaustive definition and that any judgments about whether to include a given offence as a penalty notice offence should be made taking into account the context of the particular type of offending behaviour and its potential consequences.

Recommendation 3.6

The proposed guidelines on penalty notice offences should provide that penalty notices are suitable for minor offences.

122. NSW Department of Planning, *Submission PN7*, 5.

123. Now known as the NSW Department of Trade and Investment, Regional Infrastructure and Services (NSW Trade and Investment).

124. NSW Industry and Investment, *Submission PN37*, 2.

125. Transport NSW, *Submission PN30*, 2.

126. NSW Maritime, *Submission PN2*, 4-5; The Law Society of NSW, *Submission PN 31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 3; Legal Aid NSW, *Submission PN11*, 6; NSW Department of Planning, *Submission PN7*, 4-5; NSW Food Authority, *Submission PN9*, 3; Holroyd City Council, *Submission PN10*, 5; NSW Industry and Investment, *Submission PN37*, 2; NSW Land and Property Management Authority, *Submission PN17*, 3.

Violent offences

- 3.72 Some criminal offences are regarded as not suitable for enforcement by penalty notice because of their seriousness, for example offences involving the occasioning of personal violence.
- 3.73 For example, the CINs scheme was originally applied to the offence of common assault but this was removed on the recommendation of the Ombudsman, following a trial rollout of the scheme.¹²⁷ On a practical level, CINs were seen to be ineffective as a punishment, as over half of those issued for common assault during the trial period had not been paid.¹²⁸
- 3.74 On a jurisprudential level, offences of violence are generally regarded as serious offences that need to be investigated and punished within the evidentiary and procedural protections of the court system. The seriousness of an assault potentially warrants a greater degree of investigation of the facts surrounding the incident and the mental states of those involved, rather than that which is involved in the issue of a cursory on-the-spot fine. Justice in such cases, it was concluded by the Ombudsman, should not be left to the administrative discretion of an enforcement officer.¹²⁹
- 3.75 Where the offence involves violence to a victim the Victorian Guidelines provide a presumption that it should not be treated as an infringement offence. The Guidelines assert that such offences require a court hearing because:
- the rights of, and impact on, the victim should be considered, and the alleged offender should be required to acknowledge and atone for the harm caused by the criminal act, or be provided with the opportunity to respond to all allegations.¹³⁰
- 3.76 In CP 10 we asked whether any circumstances exist under which an offence involving violence to a victim could be a penalty notice offence.¹³¹

Submissions and consultations

- 3.77 Most submissions strongly agreed that offences involving violence to victims should not be penalty notice offences and should be dealt with through the courts.¹³² The

127. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) Recommendation 13.

128. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 116 noted 'as at November 2003, 129 (58 per cent) of the 221 CINs for common assault issued during the trial had not been paid, with 79 of these referred...for enforcement action'.

129. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 116-117. See also NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.25]-[3.27].

130. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 13.

131. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.5.

132. NSW Maritime, *Submission PN2*, 4; G Henson, *Submission PN5*, 2; Holroyd City Council, *Submission PN10*, 6; Legal Aid NSW, *Submission PN11*, 6; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 4.

reasons given included the need for the court to assess a violent offence properly in order to determine the correct sentence for the perpetrator, and to address the concept of restorative justice for the victim.¹³³ The certainty of a court ruling would assist in the determination of compensation entitlements under the *Victims Support and Rehabilitation Act 1996* (NSW).¹³⁴ Importantly the Chief Magistrate further observed that:

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.¹³⁵

- 3.78 NSW Industry and Investment noted that it had recently excluded the offence of threatening, abusing or assaulting a fisheries officer¹³⁶ from its penalty notice scheme, when a fisheries management regulation was remade in 2010.¹³⁷

Commission's conclusions

- 3.79 The Commission considers that offences involving violence are not suitable for enforcement by penalty notice, for the reasons outlined in the submissions as discussed above. In particular, it is not appropriate for offences of violence to be dealt with in way that privatises these offences and removes them from public scrutiny and the supervision of the courts. This argument is of particular force in relation to domestic violence offences. The Commission recommends that the guidelines reflect the lack of support for including offences of violence in the penalty notices scheme.

Recommendation 3.7

The proposed guidelines on penalty notice offences should provide that penalty notices are not suitable for offences involving violence.

Indictable offences

- 3.80 Indictable offences are serious offences that potentially attract sentences of imprisonment, and are therefore not generally regarded as suitable for enforcement by penalty notice. They are distinguished from summary offences, which are only tried before a magistrate.¹³⁸ However there is a 'hybrid' category of indictable

133. Legal Aid NSW, *Submission PN11*, 6; NSW Land and Property Management Authority, *Submission PN17*, 3.

134. NSW Land and Property Management Authority, *Submission PN17*, 3; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 4.

135. G Henson, *Submission PN5*, 2.

136. *Fisheries Management Act 1994* (NSW) s 247(2).

137. NSW Industry and Investment, *Submission PN37*, 2 cited the *Fisheries Management (General) Regulation 2010* (NSW) remade on 1 September 2010.

138. *Azzopardi v The Queen* (2001) 205 CLR 50 [2]; *BHP v Dagi* [1996] 2 VR 117, 152; *Adams v The Queen* (1995) 66 SASR 284, 299.

offences that are triable summarily. These are dealt with by a magistrate unless the prosecution or accused elect to have the matter heard before a jury.¹³⁹

- 3.81 The Victorian Guidelines provide that indictable offences are generally not suitable for treatment as infringement offences since 'it has already been decided that an offence requires a full court process to determine guilt and sentencing'.¹⁴⁰

Submissions and consultations

- 3.82 In CP 10 we noted our provisional view that indictable offences, including those that may be tried summarily, are not suitable for enforcement by penalty notice.¹⁴¹ No submissions or consultations disagreed.

Commission's conclusions

- 3.83 Our view has not changed. Indictable offences, including indictable offences triable summarily, are not suitable for enforcement by penalty notices because of the nature of those offences and the consequent need for their determination to be subject to the legal and procedural safeguards of the judicial system. The guidelines should reflect this.

Recommendation 3.8

The proposed guidelines on penalty notice offences should provide that penalty notices are not suitable for indictable offences.

Offences that attract low penalties

- 3.84 Many penalty notice offences in NSW attract relatively low maximum fines, if imposed by a court (under \$1000).¹⁴² The penalty amounts for these offences reflect the fact that the offences are minor or of a regulatory nature. However, some penalty notice offences exist for which substantial maximum fines are available if imposed by a court. For these offences the penalty notice amounts can also be substantial, amounting to several thousand dollars.¹⁴³

139. *Criminal Procedure Act 1986* (NSW) s 258-273, sch 1. See also *Crimes Act 1900* (NSW) s 475B, which provides that certain complex dishonesty offences, at the election of the accused, can be heard by a Supreme Court judge sitting without a jury.

140. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 13.

141. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [3.35].

142. For example, *Summary Offences Act 1988* (NSW) s 11: possession of liquor in a public place by a person under the age of 18 years, maximum penalty, \$20; *Transport Administration (General) Regulation 2005* (NSW) cl 6(1)(b) standing or parking a vehicle on RailCorp, Sydney Ferries or STA land, where there is no sign permitting the standing or parking of vehicles, maximum penalty is 2 penalty units, currently \$220.

143. For example, *Security Industry Act 1997* (NSW) s 7(2), *Security Industry Regulation 2007* (NSW) sch 2: carrying on a security activity without a licence, penalty notice amount, \$5,500. *Electricity (Consumer Safety) Act 2004* (NSW) s 36, *Electricity (Consumer Safety) Regulation 2006* (NSW) sch 3: disturbing or interfering with the site of a serious electrical accident before it has been inspected by an authorised officer, penalty notice amount \$10,000; *Property, Stock and Business Agents Act 2002* (NSW) s 66(1)(a), *Property, Stock and Business Agents Regulation 2003*

- 3.85 The existence of a ‘low penalty’ is not specifically included as a criterion in the Victorian Guidelines;¹⁴⁴ while the Commonwealth Guidelines only refers to ‘low penalty’ once and do not define the term.¹⁴⁵ The Australian Law Reform Commission (ALRC), in its Report 95, used the concept of ‘low penalty’ as one characteristic of the strict and absolute liability offences that should be the subject of penalty notices. The ALRC argued that infringement notices schemes are only suitable for high-volume, low penalty criminal offences of strict or absolute liability.¹⁴⁶ It did not define the concept of ‘low penalty’ in its report.¹⁴⁷
- 3.86 In CP 10 we asked whether the concept of ‘low penalty’ should be among the criteria in any guidelines determining whether an offence may be treated as a penalty notice offence. If so, we asked how ‘low penalty’ should be defined?¹⁴⁸

Submissions and consultations

- 3.87 No strong support was demonstrated for using the concept of ‘low penalty’ as a criterion for determining if an offence is suitable to be a penalty notice offence. Two submissions were of the opinion that it could be used,¹⁴⁹ so long as ‘flexibility’ was maintained.¹⁵⁰ They suggested that the term ‘low penalty’ should be defined as one involving a comparatively low maximum court-imposed fine,¹⁵¹ or alternatively as one that is subject to an upper monetary cap, expressed as a percentage of the fine that a court would be able to impose.¹⁵²
- 3.88 Two submissions had serious concerns about the use of ‘low penalty’ as a criterion. Sometimes the penalty notices that are available to an agency will need to range from low to high penalties in a deliberately graduated enforcement approach. A criterion such as ‘low penalty’, it was suggested, could limit the regulator’s compliance strategies.¹⁵³ Transport NSW submitted that it was unhelpful to classify penalty notice offences as offences that are subject to a ‘low penalty’, because such

(NSW) sch 15: seller of residential property or rural land making a bid at their own auction, penalty notice amount \$2,200.

144. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006).

145. Commonwealth Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.

146. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.42].

147. Instead the ALRC noted with approval a recommendation made by the Senate Standing Committee for the Scrutiny of Bills that the general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) is a reasonable maximum: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.42], citing Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 285.

148. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.6.

149. Holroyd City Council, *Submission PN10*, 6; NSW Land and Property Management Authority, *Submission PN17*, 3-4.

150. NSW Land and Property Management Authority, *Submission PN17*, 3-4.

151. Holroyd City Council, *Submission PN10*, 6.

152. NSW Land and Property Management Authority, *Submission PN17*, 3-4.

153. NSW Food Authority, *Submission PN9*, 3; Transport NSW, *Submission PN30*, 2.

a label might detract from the objective importance of enforcing contraventions of the particular offence in a regulatory regime.¹⁵⁴

- 3.89 Other submissions suggested that criteria such as ‘minor offence’¹⁵⁵ or ‘regulatory offence’¹⁵⁶ would be preferable.

Commission’s conclusions

- 3.90 We consider that using a criterion of ‘low penalty’ in the penalty notice guidelines would not add materially to other criteria such as ‘a minor offence’. We also note that, although there are some penalty notice offences for which a substantial penalty is available, there are generally good reasons for this. They include the need to deter or punish harmful behaviour, such as creating serious environmental hazards or committing workplace safety or commercial breaches. It may be that some companies or individuals would judge it worth the risk of offending if the commercial advantage were much greater than any potential penalty. The availability of a higher penalty amount might be justified to deter such behaviour, without the need to resort to a formal court-based prosecution.
- 3.91 We are persuaded by the arguments of the issuing agencies that have given careful consideration to the nature of the offences for which they are responsible, and to the use of penalty notices according to a graduated enforcement approach.

Recommendation 3.9

The proposed guidelines on penalty notice offences should not limit penalty notice offences to offences that attract low maximum penalties.

Imprisonment is an option

- 3.92 There are currently more than 400 offences in NSW that are enforceable by penalty notice, but for which imprisonment is an option where the relevant law enforcement agency decides to deal with the matter through the court, or where the offender elects to have the matter dealt with in that way.¹⁵⁷
- 3.93 In Victoria, the Guidelines provide that offences where imprisonment is a sentencing option may only be considered as infringement offences where:
- the magistrate can convert a sentence of imprisonment to a fine; and
 - the relevant agency can demonstrate a strong public interest case for such offence being treated as an infringement offence.¹⁵⁸

154. Transport NSW, *Submission PN30*, 2.

155. Legal Aid NSW, *Submission PN11*, 6; NSW Maritime, *Submission PN2*, 5.

156. NSW Maritime, *Submission PN2*, 5.

157. For example, *Explosives Act 2003* (NSW) s 8(1)(a), *Explosives Regulation 2005* (NSW) sch 2, negligently handling explosives in circumstances likely to endanger lives; *Liquor Act 2007* (NSW) s 117(1), *Liquor Regulation 2008* (NSW) sch 2, sale of liquor to a minor.

158. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 13 and also satisfy the requirements in the Guidelines at 12 [2.1] A (a)-(f).

3.94 The Victorian Guidelines also state that criminal offences involving imprisonment as a mandatory sentencing option are not suitable for enforcement by penalty notice.¹⁵⁹

3.95 In CP 10 we asked whether offences where a sentence of imprisonment is a possible court imposed sanction should be considered for treatment as penalty notice offences. If so, under what circumstances should this occur?¹⁶⁰

Submissions and consultations

3.96 Only three submissions considered that offences where imprisonment is a possible court-imposed sanction should be incapable of being dealt with by way of a penalty notice.¹⁶¹

3.97 Most submissions supported the introduction of guidelines that would permit penalty notices to be used for offences involving imprisonment as a possible court-imposed sanction, providing certain safeguards were in place.¹⁶² One submission noted that many summary offences are currently punishable by fine or sentence of imprisonment or both. As was pointed out, where the objective seriousness of the offending is low, first time offenders almost ‘universally’ receive a penalty other than imprisonment, even though it is an option. For example, ‘the summary offence of possessing a prohibited drug involving a small quantity of the drug is one that may be suitable for disposition in an alternative arena to the court system in many, if not most, cases’.¹⁶³

3.98 The NSW Department of Environment, Climate Change and Water (DECCW)¹⁶⁴ cited many sections of the *National Parks and Wildlife Act 1974* (NSW) that are punishable by imprisonment, but where enforcement officers can and do issue penalty notices.¹⁶⁵ It noted that the test should turn on the seriousness of the breach, rather than on whether imprisonment is available for the most serious breaches of the relevant offence. For example, a penalty notice might be appropriate for a person possessing one protected animal in breach of the Act, where he or she was not aware that it is protected, but a penalty notice would not be suitable for a sophisticated international trader in protected fauna.¹⁶⁶ NSW

159. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 13.

160. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.7.

161. NSW Maritime, *Submission PN2*, 5; Transport NSW, *Submission PN30*, 2; Holroyd City Council, *Submission PN10*, 6: notwithstanding over 400 penalty notice offences currently exist where a court may impose a term of imprisonment.

162. G Henson, *Submission PN5*, 2-3; NSW Police Portfolio, *Submission PN44*, 1-2; Legal Aid NSW, *Submission PN11*, 7; NSW Industry and Investment, *Submission PN37*, 3; NSW Land and Property Management Authority, *Submission PN17*, 4; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 4; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 3-4; The Shopfront Youth Legal Centre, *Submission PN33*, 4.

163. G Henson, *Submission PN5*, 2-3.

164. In April 2011 most of the functions of the Department of Environment, Climate Change and Water were transferred to the new Office of Environment and Heritage (a division of the NSW Department of Premier and Cabinet). The Office of Water is now part of the Department of Primary Industries.

165. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 3. Including ss 45, 57(1), 57(2), 58Q(1), 58R, 86(4), 90J, 98, 101, 110, 112G, 117(1), 118, 118A, 118C and 118D of the *National Parks and Wildlife Act 1974* (NSW).

166. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 4.

Industry and Investment agreed. It argued that penalty notices should be available for offences attracting a term of imprisonment, because the severity of a specific offence can vary widely from insignificant to very significant. For example, there is an enormous difference between the illegal removal of several opals by an individual, compared with the illegal extraction of hundreds of tonnes of coal by a company already engaged in coal production, yet both of these activities constitute offences under s 5 of the *Mining Act 1992* (NSW).¹⁶⁷

- 3.99 The NSW Police Portfolio (NSW Police) warned that to remove their present ability to issue penalty notices for such offences would again place many lower level offences back before the courts.¹⁶⁸ Shopfront concurred. Mindful of the impact of penalty notices on impoverished and disadvantaged members of the public, Shopfront argued that, 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'. It observed that many summary offences (such as soliciting, or being in custody of a knife in a public place), which carry a potential sentence of imprisonment but for which imprisonment is very rarely imposed by a court, can be dealt with appropriately by way of penalty notice.¹⁶⁹
- 3.100 However, there was also strong support for the introduction of safeguards in any system that allows the use of penalty notices for offences where imprisonment is a court-imposed option, such as the requirements provided in the Victorian Guidelines.¹⁷⁰ The LPMA¹⁷¹ and the NSW Young Lawyers, Criminal Law Committee¹⁷² considered that only in the limited circumstances outlined in the Victorian Guidelines should offences that carry imprisonment as a possible court-imposed option be available as a penalty notice offence.¹⁷³ The limited circumstances identified¹⁷⁴ were: where a magistrate can convert a sentence of imprisonment to a fine; or where the agency can demonstrate a strong public interest case for treating the offence as a penalty notice offence.¹⁷⁵
- 3.101 However, Legal Aid submitted that there should be three safeguards. First, that the offence is one of strict or absolute liability; second, that a fine is already an available sentencing option; and third, that the offence does not involve dishonesty, violence or injury to a victim.¹⁷⁶
- 3.102 Although agreeing it was acceptable for there to be both sanctions of imprisonment and penalty notices available for the same offence, the NSW Department of

167. NSW Industry and Investment, *Submission PN37*, 3.

168. NSW Police Portfolio, *Submission PN44*, 1-2.

169. The Shopfront Youth Legal Centre, *Submission PN33*, 4.

170. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12-13, 2.1A (a)-(f). See para 3.42.

171. NSW Land and Property Management Authority, *Submission PN17*, 4.

172. NSW Young Lawyers Criminal Law Committee, *Submission PN29*, 4.

173. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 13 referring to the requirements of 2.1A (a)-(f).

174. NSW Young Lawyers Criminal Law Committee, *Submission PN29*, 4 referring to NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [3.43].

175. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12-13.

176. Legal Aid NSW, *Submission PN11*, 7.

Planning considered that each offence should be examined on an individual statutory basis, rather than by way of formulating an overall principle.¹⁷⁷ This is because of the large variation in the seriousness of offences that could be dealt with by penalty notice or imprisonment under different legislative regimes.¹⁷⁸

Commission's conclusions

- 3.103 We agree that there are circumstances where it is appropriate for imprisonment to be an available sentencing option for an offence dealt with by a court, but where less serious breaches are appropriate for a penalty notice. We note in particular the arguments of DECCW cited above.¹⁷⁹
- 3.104 The fact that an offence may attract a sentence of imprisonment, at its most serious levels, should not be a reason to automatically exclude it from being a penalty notice offence for minor breaches. This should be acknowledged in the guidelines, which should also contain safeguards against penalty notices being issued inappropriately for serious breaches that should be considered by a court.
- 3.105 We have drawn attention earlier to the Victorian Guidelines, which exclude offences that attract a mandatory sentence of imprisonment as qualifying for the issue of a penalty notice. There are very few circumstances that will attract a mandatory sentence of imprisonment in NSW and we do not see it as necessary to adopt this guideline.

Recommendation 3.10

- (1) The proposed guidelines on penalty notice offences should provide that:
- (a) an offence where imprisonment is an available sentencing option can qualify as a penalty notice offence if there is a demonstrated public interest in dealing with breaches involving lower levels of seriousness by way of penalty notice
 - (b) issuing agencies must
 - (i) provide officers with special training and internal operational guidelines before they may issue such penalty notices
 - (ii) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency.
- (2) The proposed Penalty Notice Oversight Agency should report publicly on the operation of penalty notice offences for which imprisonment is an available sentencing option.

177. NSW Department of Planning, *Submission PN7*, 5.

178. NSW Department of Planning, *Submission PN7*, 5.

179. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 3-4.

High volume offences

- 3.106 A commonly perceived characteristic of offences for which penalty notices have been issued is that they are 'high volume'; that is, they occur quite frequently.¹⁸⁰ In CP 10 we asked whether this characteristic should be raised to a guideline. If so, how should it be defined?¹⁸¹
- 3.107 Many penalty notice offences in NSW would share this high volume characteristic. Among the top ten most frequently recorded penalty notice offences in NSW in the last five years are:¹⁸² exceeding the speed limit;¹⁸³ parking for longer than permitted;¹⁸⁴ disobeying a no stopping sign;¹⁸⁵ and travelling on a train without a ticket.¹⁸⁶ Nine of the top 10 offences involve conduct while driving or parking a motor vehicle.¹⁸⁷
- 3.108 On the other hand, there are numerous penalty notice offences that cannot be considered high volume in nature. The SDRO recorded approximately 4500 offences for which not a single penalty notice had been issued in the five-year period between 2004 and late 2009.¹⁸⁸ Examples include, falsely stating or representing the year of manufacture of motor vehicle;¹⁸⁹ securing a vessel to a navigation buoy;¹⁹⁰ and possessing fishing gear for taking fish from prohibited waters.¹⁹¹ A further 4800 penalty notice offences were enforced at least once in the five year period covered by the SDRO data, but more than 800 of those were enforced only once. Examples of these offences include: failure by taxi-cab driver to return lost property;¹⁹² and conveying goods, without reasonable excuse, in an escalator or lift while in a public area on railway premises.¹⁹³
- 3.109 The use of penalty notices for comparatively low-volume offences may still be desirable to deter the offending and to give any offender an option to deal with the

180. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.41]. See also NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 118.

181. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.8.

182. This list is based on a database provided to the Commission by the SDRO consisting of around 4800 penalty notice offences that have been enforced by way of a penalty notice at least once from 2004 until October 2009. The total number of penalty notices issued for the top 10 offences in the last five years is 7,885,653 penalty notices, being 52% of the total number of penalty notices for all categories (15,297,072) issued in the period.

183. *Road Rules 2008* (NSW) cl 20; *Road Transport (General) Regulation 2005* (NSW) sch 3.

184. *Road Rules 2008* (NSW) cl 205.

185. *Road Rules 2008* (NSW) cl 167.

186. *Passenger Transport Regulation 2007* (NSW) cl 74.

187. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 3.3.

188. It must be noted that some of the offences in the SDRO database may have ceased to be offences enforceable by penalty notice in the relevant period. Further, some of the offences in the database may have been newly created in the time period.

189. *Motor Dealers Act 1974* (NSW) s 47(1)(b), *Motor Dealers Regulation 2010* (NSW) sch 2.

190. *Management of Waters and Waterside Lands Regulations - NSW* (NSW) cl 21(2)(b), sch 5.

191. *Fisheries Management Act 1994* (NSW) s 25(1)(b), *Fisheries Management (General) Regulation 2010* (NSW) sch 7.

192. *Passenger Transport Regulation 2007* (NSW) cl 42, sch 3.

193. *Rail Safety (Offences) Regulation 2008* (NSW) cl 33(1)(c), sch 1.

minor offence without going to court, with the resultant benefits of cost and time savings for both the offender and the enforcement agency.

- 3.110 In addition, the adoption of ‘high volume’ offending as a criterion could mean that a newly-created offence could not be enforced by penalty notice until sufficient time had elapsed for it to become ‘high volume’. The Commonwealth Guidelines, which do use the criterion of ‘high volume’ among others, deal with this by adopting the phrase ‘where a high volume of contraventions is expected’.¹⁹⁴ The use of ‘high volume’ as a criterion would assume that agencies proposing any new penalty notice offences could predict, from past experience or rational conjecture, that potential offences might be likely to involve a high number of transgressions.
- 3.111 In CP 10 we asked whether the criteria for determining whether an offence may be treated as a penalty notice offence should include a requirement that it be one that is likely to attract a high volume of offending.¹⁹⁵

Submissions and consultations

- 3.112 Submissions were strongly against including ‘high volume’ as a criterion for determining whether or not an offence is to be a penalty notice offence.¹⁹⁶ They argued that low-volume offences should not be excluded from consideration as a penalty notice.¹⁹⁷ One warned that a ‘high-volume’ criterion is a ‘flawed and narrow perspective’ since the fact that penalty notices are not being issued for an offence may show that the mere threat of the penalty notice works as a successful deterrent.¹⁹⁸
- 3.113 Several submissions commented on the deterrent value of penalty notices, whether of low or high volume.¹⁹⁹ NSW Maritime observed that, under its legislation, there are many offences for which penalty notices are rarely, if ever, issued. Nevertheless, these penalty notices offences, ‘demonstrated as such by way of signage, presents an obvious deterrent value that is effective and is an important tool in promoting public safety’.²⁰⁰ DECCW noted that, of the 6098 penalty notices issued in the 2009/10 financial year for offences under the *National Parks and Wildlife Regulations 2009* (NSW), more than 78% were for ‘parking a vehicle in a

194. Commonwealth Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 58.

195. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.8.

196. NSW Maritime, *Submission PN2*, 5; Sydney Olympic Park Authority, *Submission PN6*, 2; NSW Department of Planning, *Submission PN7*, 5; Holroyd City Council, *Submission PN10*, 6; NSW Land and Property Management Authority, *Submission PN17*, 4; NSW Food Authority, *Submission PN9*, 3; Legal Aid NSW, *Submission PN11*, 7; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 4.

197. NSW Industry and Investment, *Submission PN37*, 3. Transport NSW, *Submission PN30*, 2 merely observed that a number of criteria may be relevant in determining the nature of a penalty notice offence, including high volume. However, ‘no one criterion is in itself determinative’ of a penalty notice.

198. Sydney Olympic Park Authority, *Submission PN6*, 2.

199. Legal Aid NSW, *Submission PN11*, 7; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 4; NSW Food Authority, *Submission PN9*, 3.

200. NSW Maritime, *Submission PN2*, 5.

park without displaying a valid entry pass'.²⁰¹ However, the Department argued that prevalence should not be a relevant criterion in determining which offences should be punishable by way of penalty notice.²⁰² It observed that deterrence is still required for certain offences that might have a significant impact, but have low prevalence. The use of penalty notices in relation to such offences is appropriate as a regulatory tool to deter offending without the need to go to court.²⁰³

Commission's conclusions

- 3.114 In the absence of any support, and in view of the arguments presented against using 'high volume' we are not minded to include such a requirement in the guidelines. Low-volume penalty notice offences can serve as a useful deterrent in support of public safety.

Recommendation 3.11

The proposed guidelines on penalty notice offences should not limit penalty notice offences to high volume offences.

Regulatory offences

- 3.115 Many of the offences covered by the penalty notice system could be described as regulatory in nature.²⁰⁴ Like 'minor' offending, no settled definition of the concept of 'regulatory offence' currently exists.²⁰⁵ The Canadian Law Reform Commission offered a checklist for determining what is a regulatory offence. Such an offence:
- usually does not require proof of a 'guilty mind'
 - does not involve 'reprehensible' conduct
 - deals with misconduct in a specialist subject area, such as environment protection or workplace safety, rather than the general criminal law, and
 - is more likely to have a lighter penalty.²⁰⁶
- 3.116 In NSW, a large number of environmental, occupational health and safety, and fair trading offences are subject to penalty notices and are readily described as 'regulatory offences'. These offences tend to be enforced by specialist regulators charged with ensuring compliance with legislative regimes that have significant policy imperatives. The use of penalty notices in this context forms part of a cost-effective enforcement approach. They can be subject to high penalties. Examples of these offences include: ownership of a motor vehicle that emits excessive air

201. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 2.

202. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 4.

203. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 4.

204. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.43].

205. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [3.52] cites Queensland and Northern Territory recognition of a 'regulatory offence' as a class of crime, although neither defines its meaning: *Criminal Code* (Qld) s 3(1); *Criminal Code* (NT) s 3(1).

206. Law Reform Commission of Canada, *Studies in Strict Liability* (1974) 205-209.

impurities when it is used;²⁰⁷ pollution of any waters;²⁰⁸ and failure of an employer to allow a health and safety representative access to information on hazards to employees at the workplace.²⁰⁹

- 3.117 The idea of the Canadian Law Reform Commission, that regulatory offences do not involve ‘reprehensible conduct’, links to an issue raised in consultations. The view was put to us that there are some penalty notice offences that would be commonly regarded as involving wrongdoing, but where the stigma of a criminal conviction would be regarded as inappropriate. For example, Shopfront argued in favour of offences that are not strict or absolute liability offences being suitable to be penalty notice offences because of the injustice of exposing the population (perhaps especially young people) to the risk of conviction for offences that may be trivial.²¹⁰
- 3.118 A conviction may be avoided if the offence is one for which a penalty notice can be issued, and the recipient of the penalty notice pays the penalty rather than electing to go to court. Avoiding the stigma of a conviction may be an important factor in the decision as to whether to pay the penalty or elect to go to court. The question arises as to whether the stigma that attaches to a criminal conviction should be a relevant consideration when deciding whether or not an offence should be a penalty notice offence.
- 3.119 In *He Kaw Teh v The Queen*,²¹¹ the High Court held that the relative stigma carried by an offender following conviction is a factor, among others, to be considered in determining whether an offence can be interpreted to be one of absolute or strict liability, or whether a mental element should be inferred. In that case Justice Brennan (quoting Lord Reid) referred to ‘the public scandal of convicting on a serious charge persons who are in no way blameworthy’.²¹²
- 3.120 Although the context is different, the same issue of stigma may be relevant to less serious offences, when a decision is raised as to whether an offence should be a penalty notice offence. Is it appropriate for such an offence to be inevitably attached to the stigma of criminal conviction?
- 3.121 In this context we note the provision of the Victorian Guidelines:

In the State of Victoria, infringements are used to address the effect of minor law breaking with minimum recourse to the machinery of the formal criminal justice system and, as a result, often without *the stigma associated with criminal judicial processes, including that of having a criminal conviction*.²¹³

207. *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW) cl 16(1), *Protection of the Environment Operations (General) Regulation 2009* (NSW) sch 6.

208. *Protection of the Environment Operations Act 1997* (NSW) s 120, *Protection of the Environment Operations (General) Regulation 2009* (NSW) sch 6.

209. *Work Health and Safety Act 2011* (NSW) s 70(1)(c)(i); *Work Health and Safety Regulation 2011* (NSW) sch 18(A).

210. The Shopfront Youth Legal Centre, *Submission PN33*, 2.

211. *He Kaw Teh v The Queen* (1985) 157 CLR 523.

212. *Sweet v Parsley* [1970] AC 132, 1; see *He Kaw Teh v The Queen* (1985) 157 CLR 523, 565.

213 Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006), 1 (emphasis added).

- 3.122 In CP 10 we asked whether the requirement that an offence be of a regulatory nature should be among the criteria considered for determining whether an offence should be a penalty notice offence. If so, how should 'regulatory offence' be defined?²¹⁴

Submissions and consultations

- 3.123 There were few submissions on this question and they were divided. Each recognised the problem of accurately defining 'regulatory offence'²¹⁵ and each had its own solution. NSW Maritime submitted that 'regulatory offence' should be given a legislative definition.²¹⁶ It supported the use of a definition based on an observation of Justice Dawson in *He Kaw Teh v The Queen*:

Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour.²¹⁷

- 3.124 Both the NSW Food Authority²¹⁸ and Legal Aid²¹⁹ supported the use of the 'regulatory offence' concept as a criterion for the guidelines in determining if an offence should be a penalty notice offence, and generally supporting the Canadian Law Reform Commission's definition.²²⁰
- 3.125 Holroyd City Council however submitted that the 'regulatory offence' concept should not be used because the term could 'cause confusion when offences prescribed under regulations to primary legislation are enforced'.²²¹ Shopfront also had reservations about using the 'regulatory offence' concept as a criterion. It suggested that the term would be difficult to apply in practice as a selection criterion when penalty notice offences presently exist which go beyond 'regulatory' and are truly considered criminal offences because of the disregard for public safety involved in their commission, such as drink driving or dangerous driving.²²²

Commission's conclusions

- 3.126 A clear and comprehensive definition of 'regulatory offence' is difficult to achieve. Many penalty notice offences presently exist in NSW which clearly do not fit within the somewhat hazy boundaries of a 'regulatory offence'. We consider that the use of a 'regulatory offence' criterion for determining whether an offence is a penalty notice offence will potentially cause more confusion than clarity. Those offences that are currently capable of being characterised as regulatory in nature would seem to

214. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.9.

215. Legal Aid NSW, *Submission PN11*, 7; NSW Food Authority, *Submission PN9*, 2, 3-4; NSW Maritime, *Submission PN2*, 5; Holroyd City Council, *Submission PN10*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 4.

216. NSW Maritime, *Submission PN2*, 5.

217. *He Kaw Teh v The Queen* (1985) 157 CLR 523, 595.

218. NSW Food Authority, *Submission PN9*, 3-4.

219. Legal Aid NSW, *Submission PN11*, 7.

220. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [3.54]-[3.57].

221. Holroyd City Council, *Submission PN10*, 7.

222. The Shopfront Youth Legal Centre, *Submission PN33*, 4.

qualify for penalty notice treatment by reference to the other criteria considered in this chapter.

Continuing offences

- 3.127 In CP 10 we asked whether multiple penalty notices should be issued in relation to conduct amounting to a continuing offence. If not, how should the penalty notice amount be determined for continuing offences?²²³
- 3.128 The following provides an example of a continuing offence. It is an offence *not* to comply with an order to demolish a building erected without development consent for which the maximum (court imposed) penalty is a fine of \$1,100,000 and \$110,000 every day the offence continues. This offence can be dealt with by a penalty notice of \$1500 for an individual, or \$3000 for a corporation.²²⁴ If an inspector revisits a site with the illegal structure still standing day after day, can he or she issue a new penalty notice for a continuing offence, attracting additional penalty amounts?
- 3.129 Recognising the difficulties involved, some statutes have begun to prescribe when an offence is a continuing offence, rather than leaving this assessment to the discretion of the enforcement officer. In some cases, the relevant Act prescribes penalty amounts that increase for each period (for example, for each week) during which the offence continues. For example, different penalty notice amounts are prescribed for the offence of failing to give the Fire Commissioner an annual fire statement, ranging from \$500 (up to a week overdue), to \$2000 (four weeks or subsequent weeks overdue).²²⁵
- 3.130 Under another model, a maximum fine is prescribed for the first day of the offence and for each day thereafter, while the breach continues, a separate fine is imposed in addition to the initial fine. For example, having more than one cigarette vending machine in contravention of s 12(2) of the *Public Health (Tobacco) Act 2008* (NSW) gives rise, under s 52(1)(b) of the Act, to a maximum penalty in respect of a corporation of up to \$22,000 for each day the offence continues, in addition to an original penalty of up to \$55,000.

Submissions and consultations

- 3.131 Most submissions responding to this question supported the availability of multiple penalty notices for misconduct amounting to a continuing offence, so long as the particular statute was clear on when an offence is a continuing offence for which multiple penalty notices can be issued,²²⁶ and so long as the statute provides details

223. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.10.

224. *Environmental Planning and Assessment Act 1979* (NSW) ss 121B(1) order No 2, 125(1), 126(1), *Environmental Planning and Assessment Regulation 2000* (NSW) sch 5.

225. *Environmental Planning and Assessment Act 1979* (NSW) s 125(2), *Environmental Planning and Assessment Regulation 2000* (NSW) cl 177(1), sch 5.

226. Legal Aid NSW, *Submission PN11*, 7; NSW Industry and Investment, *Submission PN37*, 3; NSW Department of Planning, *Submission PN7*, 5; Holroyd City Council, *Submission PN10*, 7; NSW Land and Property Management Authority, *Submission PN 17*, 5; Transport NSW, *Submission PN30*, 2-3; Office of the State Revenue, State Debt Recovery Office, *Submission PN41*, 4.

of the increasing amount.²²⁷ Statutory clarity on the nature and amount of multiple penalty notices would help avoid confusion by the enforcement officer and penalty notice recipient.²²⁸ The submissions suggested²²⁹ that such clarity should be achieved in the drafting of the relevant Act, rather than the introduction of broad guidelines that would not be sufficiently determinative of what amounts to a continuing offence to be of any practical use.

- 3.132 The LPMA supported the availability and use of multiple penalty notices, because this can assist to remove the commercial advantage that can be derived from a continuing breach. It gave the example of the illegal mooring of boats to jetties for successive days without payment of fees. A penalty notice should, if submitted, be issued for every day at the same amount while this illegal act continues, as it represents a daily loss of revenue for the issuer. If the penalty notice recipient considers the collective amount is exorbitant, he or she always has the option of electing to have the matter heard in court.²³⁰ Holroyd City Council considered that multiple penalty notices should be capable of issue in increasing amounts, strictly in accordance with any regulations, where multiple contraventions cause a cumulative harm.²³¹ It cited the example of an owner/driver of a heavy vehicle leaving that vehicle on the side of the road in a built up area for weeks on end.²³²
- 3.133 A few submissions had reservations about multiple penalty notices being available for continuing offences.²³³ NSW Maritime considered that if the original penalty notice did not remedy the breach then a continuing offence, being of increased seriousness, should be dealt with by a court.²³⁴ In general, the NSW Food Authority supported a graded, or scaled, approach to enforcement, in which the severity of the penalty escalates over the period that the breach is continued, rather than one involving the issue of multiple penalty notices, which could potentially lead to confusion, and administrative and resource burdens.²³⁵

Commission's conclusions

- 3.134 We agree that there may be circumstances where multiple penalty notices for a continuing offence will be appropriate and that, in relation to some offences, this could include escalating penalty notice amounts where the offence is ongoing. However, we do not consider that this can be dealt with by way of a general rule. It is more appropriate that specific provision be included in the legislation prescribing the offence, where the nature of the offending, its consequences, and the measures that are appropriate to deter or to ameliorate harm, can be considered.

227. Holroyd City Council, *Submission PN10*, 7.

228. Office of the State Revenue, State Debt Recovery Office, *Submission PN41*, 4. Legal Aid NSW, *Submission PN11*, 7 said this assessment should not be left to an issuing officer.

229. NSW Department of Planning, *Submission PN7*, 5 specifically raised this point, while noting that it would be difficult to set a penalty notice amount for continuing offences.

230. NSW Land and Property Management Authority, *Submission PN17*, 5.

231. Holroyd City Council, *Submission PN10*, 7-8.

232. Holroyd City Council, *Submission PN10*, 7.

233. NSW Maritime, *Submission PN2*, 6; NSW Food Authority, *Submission PN9*, 4.

234. NSW Maritime, *Submission PN2*, 6.

235. NSW Food Authority, *Submission PN9*, 4.

3.135 However, we do consider that it could be useful for guidance to be provided to agencies relating to the use of penalty notices in circumstances where a continuing offence is prescribed. The proposed guidelines might usefully provide that, where a continuing offence is prescribed:

- careful consideration should be given to whether or not it is appropriate for multiple penalty notices to be issued and, if so, whether there should be an escalating penalty for continuing breach, or whether continuing infringement should instead be referred to a court
- relevant provisions should be unambiguous about when an offence is a continuing offence for which multiple penalty notices can be issued, and
- relevant provisions should state clearly the increasing penalties that apply.

Recommendation 3.12

- (1) The imposition of multiple penalties for continuing offences should be dealt with in the legislation prescribing the offence.
- (2) The proposed guidelines on penalty notice offences should provide that continuing offences require that:
 - (a) careful consideration be given to whether it is appropriate for multiple penalty notices to be issued and, if so, whether it is appropriate that there be an escalation in the penalty for a continuing breach, or whether continuing infringements should instead be referred to a court
 - (b) relevant provisions state clearly when an offence is a continuing offence for which multiple penalty notices can be issued
 - (c) relevant provisions state clearly the increasing penalties that apply.

4. Guidelines for penalty notice amounts

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Introduction

- 4.1 This chapter discusses whether, and if so what, overarching principles should guide the process of setting penalty notice amounts, and their adjustment over time, to ensure consistency and fairness across the penalty notice system in NSW. We also examine two issues specifically referred to in the terms of reference: whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate; and the consistency of current penalty notice amounts for the same or similar offences.

Principles to guide the setting of penalty notice amounts

- 4.2 The present approach to setting penalty notice amounts is fragmented and penalty notice amounts are inconsistent and arguably unfair. As explained in Consultation Paper 10 (CP 10),¹ all government departments and other agencies propose penalty notice amounts for offences arising under legislation within their sphere of administration, with final approval being given by Parliament.²
- 4.3 The inconsistencies and unfairness described in this chapter are not necessarily the product of any fault or neglect on the part of any particular agency. We note that many of the issuing agencies that were consulted for this reference demonstrated their meticulous attention to the penalty notice system for which they are responsible, including to the setting of penalty amounts. They provided us with details of regulatory regimes that take into account issues of fault, levels of harm, the context of offending, changes in industry practice, and internal relativities between offences.
- 4.4 The problem of inconsistency appears to have arisen because each department independently establishes a regulatory regime for penalty notices. Approaches and traditions also differ from one agency to another. Some agencies have a policy of setting the amount as a percentage of the maximum fine applicable to the offence,³ but others take a different approach. A number of issuing agencies have developed internal guidelines for the appropriate issue of penalty notices but those guidelines may not contain a mechanism to be applied in proposing appropriate penalty notice amounts.⁴
- 4.5 The expertise of issuing agencies is quite correctly of central importance when setting appropriate penalty notice amounts. Nevertheless it may also be desirable for an external and objective perspective to be brought to bear on this issue. Some agencies do ensure such an external perspective, for example by conducting consultations and analysing comparable offences.
- 4.6 Some agencies examine comparable levels in other Australian jurisdictions before making recommendations to government on penalty notice amounts.⁵ Further, in limited cases, penalty notice amounts have been prescribed as part of the development of a national scheme. For example, penalties under the *Energy and Utilities Administration Regulation 2006* (NSW) were fixed by reference to Queensland and Victorian legislation then in force.⁶ Inter-jurisdictional consistency is desirable, and likely to become of increasing importance.⁷

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1. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) ch 2.
 2. Many penalty amounts are prescribed in regulations which may be approved by the Executive Council.
 3. NSW Office of Fair Trading, *Preliminary Submission PPN13*; NSW Department of Local Government, *Preliminary Submission PPN15*; NSW Department of the Arts, Sport and Recreation, *Preliminary Submission PPN14*.
 4. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.3].
 5. Such as the NSW Department of Planning (now known as the NSW Department of Planning and Infrastructure). NSW Department of Planning, *Preliminary Submission PPN11*, 1.
 6. NSW Department of Water and Energy, *Preliminary Submission PPN12*, 2. In mid-2009 this Department was abolished and two new agencies established. Currently, the NSW Office of

- 4.7 No concerted attempt has so far been made in NSW to coordinate penalty notice amounts or to systematise the way amounts are set. There are currently no overarching principles or guidelines regulating and balancing penalty notice amounts. The Sentencing Council has observed that this has led ‘to considerable differences between offences which do not seem to be justified by the differences in their objective seriousness’.⁸
- 4.8 Inconsistencies can be seen to exist with regard to penalty notice amounts for the same or similar offences, depending on which authority issues the penalty notice. The penalty notice amounts for many offences committed on public transport are not consistent across the different transport services administered by the Rail Corporation NSW (RailCorp), the State Transit Authority of NSW, and Sydney Ferries, among others. For example, spitting, littering and fare evasion on trains will result in *higher* penalty notice amounts than those that apply when such offences are committed on buses and ferries.⁹ Placing feet up on the seat on a train will result in a *lower* penalty notice amount than applies when the offence is committed on buses and ferries.¹⁰ Furthermore, penalty notice amounts for fare evasion on trains differentiate between adults (\$200) and juveniles (\$50), although no distinction is made for the same offence on buses and ferries.¹¹ Conversely, the offence of smoking on buses and ferries distinguishes between passengers (\$300) and bus drivers and ferry masters (\$200), yet the same offence on trains makes no such distinction.¹²
- 4.9 Even if some disparities in penalty notice amounts can be justified by reference to unidentified special circumstances applicable to each form of transport, not all disparities would appear to fall into this category. Take the example of a person guilty of ‘offensive language’. A penalty notice issued for this offence by a Transit Officer under the *Rail Safety (Offences) Regulation 2008* (NSW) attracts a penalty of \$400.¹³ If, however, the penalty notice is issued by the police under the criminal infringement notices scheme, the maximum penalty is \$200.¹⁴

Water is part of the Department of Primary Industries, NSW Department of Trade and Investment, Regional Infrastructure and Services (NSW Trade and Investment). Energy responsibilities are currently with the Division of Resources and Energy, NSW Trade and Investment.

7. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.48] Recommendation 12-8.
8. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.20].
9. *Rail Safety (Offences) Regulation 2008* (NSW) cls 4(1), 57(2) (\$200 for adults, \$50 under 18 years), cl 12(1)(c) (\$400), cl 37(1)(a) (\$200), sch 1 pt 3; *Passenger Transport Regulation 2007* (NSW) cl 74(1) (\$100), cl 49(e) (\$300), cl 57(a) (\$150), sch 3 pt 2. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.4.
10. *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(2) (\$100), sch 1 pt 3; *Passenger Transport Regulation 2007* (NSW) cl 49(d) (\$300), sch 3 pt 2.
11. *Rail Safety (Offences) Regulation 2008* (NSW) cls 4(1), 57(2), sch 1 pt 3; *Passenger Transport Regulation 2007* (NSW) cl 74(1), sch 3 pt 2.
12. *Rail Safety (Offences) Regulation 2008* (NSW) cl 14(1), sch 1 pt 3; *Passenger Transport Regulation 2007* (NSW) cls 50, 36(1)(a), 215, sch 3 pt 2.
13. *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a), sch 1.
14. *Summary Offences Act 1988* (NSW) s 4(1); *Criminal Procedure Act 1986* (NSW) ss 336-337; *Criminal Procedure Regulation 2010* (NSW) cl 106, sch 3.

- 4.10 Penalty notice amounts for a whole range of offences committed in parks differ depending on the park in which the offence is committed. For example, it is less expensive to commit the offences of littering, offensive language or behaviour, or camping in the Royal Botanic Gardens in the centre of Sydney, than in more remote National Parks.¹⁵ Sometimes disparities have been justified by special considerations relating to a particular location or activity. For example, the relatively harsh penalty for removing plants from Centennial Park compared with that applicable to similar conduct in other parklands¹⁶ has been justified by reference to the special heritage aspects of Centennial Park.¹⁷ However, most inconsistencies appear to have no discernable justification.
- 4.11 Some industry statutes that make provision for similar offences sharing similar objectives give rise to different penalty notice amounts. For example, operating without a licence or registration attracts a penalty of \$500 under the *Veterinary Practice Act 2003* (NSW), whereas the penalty is \$5500 under the *Motor Dealer's Act 1974* (NSW).¹⁸
- 4.12 Some penalty notice amounts do not seem to be proportional to the nature and seriousness of the offence. For example, a minor public transport offence, such as offensive language or spitting on a railway platform attracts a penalty of \$400,¹⁹ whereas the public safety offence of driving through a red light or tailgating attracts the lower amount of \$353.²⁰
- 4.13 Apart from the inconsistencies identified above, which represent only a selection of those that we have observed, penalty notice amounts are, in almost all cases, less than the maximum fine that could be imposed for the offence by a court. However, while the maximum fine that a court can impose is almost always expressed in multiples of penalty units, the amount payable upon issue of a penalty notice is almost always expressed as a fixed-dollar amount. This means that the penalty notice amounts do not automatically increase when the penalty unit sum (for the maximum fine) is increased. Increases to penalty notice amounts will only be made, therefore, when the provisions are reviewed by the agency responsible for the administration of the relevant legislation.
- 4.14 Further, there is no cross-government review mechanism for adding or removing penalty notice offences or for altering penalty notice amounts. This may be a

15. *National Parks and Wildlife Regulation 2009* (NSW) cls 10, 11(1)(a)-(c), 13(1), sch 2; *Royal Botanic Gardens and Domain Trust Regulation 2008* (NSW) cls 7(1), 8(1)(c), 15, sch 1.

16. \$500 under the *Centennial Park and Moore Park Trust Regulation 2009* (NSW) cl 16(b), compared with \$150 under *Parramatta Park Trust Regulation 2007* (NSW) cl 15(b), \$165 under *Sydney Cricket Ground and Sydney Football Stadium By-law 2009* (NSW) cl 12(1)(g), and \$200 under *Sydney Olympic Park Authority Regulation 2007* (NSW) cl 4(f).

17. Legislation Review Committee, Parliament of NSW, *Legislation Review Digest*, No 1 of 2006, 27 February 2006, 50.

18. *Veterinary Practice Act 2003* (NSW) ss 9(1), 12, 13(1), 14(1), *Veterinary Practice Regulation 2006* (NSW) sch 3; *Motor Dealers Act 1974* (NSW) s 9, *Motor Dealers Regulation 2010* (NSW) sch 2.

19. *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1), sch 1.

20. Except a motor vehicle proceeding through a red traffic light in a school zone (which is a higher amount of \$441) or a toll booth (which is a lower amount of \$147): *Road Rules 2008* (NSW) r 59(1), r 126, *Road Transport (General) Regulation 2005* (NSW) s 170, sch 3.

problem, for example, where they have become irrelevant or outmoded as a compliance tool.²¹

- 4.15 The dynamics described above have led inevitably to unfairness for individuals and groups, especially vulnerable people. Without a whole-of-government mechanism for review, external scrutiny of the individual issuing agencies is reduced, with the potential, as the Sentencing Council warned several years ago, ‘for the development of discriminatory, unfair and negligent or corrupt practices, particularly where net widening is occurring’.²² Discrimination can also potentially arise from the strict liability nature of most penalty notice offences, which do not allow tailoring of penalties to the objective seriousness of the particular offence and to the personal circumstances of the penalty notice recipient, including his or her capacity to pay.²³ Ensuring that the penalty notice amount is set at the right level is therefore of particular importance – indeed it is more important than it is for court-imposed fines where judicial scrutiny and discretion are exercised.
- 4.16 As discussed in Chapter 1, public respect for the legal system, and ultimately public compliance with the law, depends on a number of factors, one of which is its perceived fairness. In this context, it is important to remember that significantly more residents of NSW will have contact with the legal system by way of penalty notices than will appear in court. It is particularly important, therefore, that the penalty notice system, which is a large and expanding part of our criminal justice system, is understood by the public to be fair and consistent. Public confidence in the penalty notice system requires comprehensible and transparent rules and procedures that produce fair and consistent penalty notice amounts.
- 4.17 The issue that arises in this chapter is whether there should be overarching principles that could be applied to the setting of penalty notice amounts that would assist in creating a system of penalty notices in NSW that is transparently consistent, and fair.
- 4.18 In CP 10, we asked the preliminary question of whether principles should be established to guide the setting of penalty notice amounts and their adjustment over time.²⁴

Submissions and consultations

- 4.19 It is not surprising, given the matters discussed above, that submissions and consultations strongly supported general principles being established to oversee the setting of penalty notice amounts and their adjustment over time.²⁵ Stakeholders

21. See also NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) x-xi.

22. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) x.

23. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) xi.

24. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.1.

25. NSW Maritime, *Submission PN2*, 6; NSW Department of Planning, *Submission PN7*, 2, 5; NSW Food Authority, *Submission PN9*, 4; Holroyd City Council, *Submission PN10*, 8; Legal Aid NSW, *Submission PN11*, 8; UnitingCare Burnside, *Submission PN12*, 4; Local Government and Shires Associations of NSW, *Submission PN16*, 2; NSW Land and Property Management Authority,

agreed that co-ordinating and standardising penalty notice amounts through such principles would ensure the entire penalty notice system is integrated, consistent across legislation, and more predictable and transparent in setting and adjusting amounts than at present. However, several submissions cautioned that the principles must be sufficiently flexible to respond to the vast range of legislation that now utilises penalty notices.²⁶

Commission's conclusions

- 4.20 The setting of penalty notice amounts has so far proceeded in an *ad hoc* manner without systematic guiding principles. This uncoordinated approach has resulted in much inconsistency across the penalty notice system. Although we were impressed by the attention given by a number of government agencies to setting penalty notice amounts, we are satisfied that there is a need for a more principled and, in particular, a more co-ordinated, statewide approach.
- 4.21 We consider that overarching principles should be created and applied to guide the setting of penalty notice amounts and their adjustment over time. In this regard we are persuaded in particular by the need to maintain public confidence in, and respect for, the penalty notice system, and for the justice system as a whole.
- 4.22 However consistency and fairness should not mean rigidity and inability to respond to context. The knowledge and expertise of regulating agencies of the contexts in which offences take place is important. There should be a balance between ensuring consistency in setting and adjusting penalty notice amounts, and reserving to individual agencies the capacity to respond appropriately to the offences under their administration. To take one example, above we noted that operating without a licence or registration is \$500 under the *Veterinary Practice Act 2003* (NSW), whereas it is \$5500 under the *Motor Dealers Act 1974* (NSW).²⁷ We were told in consultation that the justification for the high penalty imposed on unlicensed motor dealers was to deprive the penalty notice recipient of the profits of the sale of the vehicle. Otherwise unscrupulous dealers might sell potentially unsafe vehicles and

Submission PN17, 5; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6; NSW Department of Local Government, *Submission PN23*, 2; NSW Ombudsman, *Submission PN25*, 5; Illawarra Legal Centre, *Submission PN27*, 6; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 11-12; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 2; Transport NSW, *Submission PN30*, 1-2; The Law Society of NSW, *Submission PN31*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 5; NSW Department of Community Services, *Submission PN36*, 2; NSW Industry and Investment, *Submission PN37*, 1, 3; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 5; People with a Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011; Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011.

26. Transport NSW, *Submission PN30*, 2; NSW Industry and Investment, *Submission PN37*, 3; NSW Department of Local Government, *Submission PN23*, 2; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6.

27. *Veterinary Practice Act 2003* (NSW) ss 9(1), 12, 13(1), 14(1), *Veterinary Practice Regulation 2006* (NSW) sch 3; *Motor Dealers Act 1974* (NSW) s 9, *Motor Dealers Regulation 2010* (NSW) sch 2.

accept the risk of a penalty as a cost of business: in which event the penalty would have no deterrent effect.

- 4.23 We therefore recommend the creation of guidelines governing the setting of penalty notice amounts. The nature and content of these guidelines is considered in the rest of this chapter. It is important to note at this juncture that, as with the guidelines proposed in Chapter 3, what is envisaged are principles that will allow flexibility and responsiveness to context, not a formula that must be followed rigidly. The institutional arrangements for setting these guidelines and applying them is considered in Chapter 18.

Recommendation 4.1

The Government should adopt guidelines regulating the setting of penalty notice offences and their adjustment over time.

Guidelines for NSW

- 4.24 Other jurisdictions, in particular, Victoria,²⁸ South Australia²⁹ and New Zealand³⁰ have developed guiding principles for setting penalty notice amounts to ensure consistency and fairness across government agencies. In CP 10 we describe these guiding principles,³¹ and use them as a template to suggest guidelines that might be useful in NSW.
- 4.25 We outlined the following options:³²
- (1) **Maximum amount:** The penalty notice amount should not exceed a specified maximum amount that applies to all penalty notice offences, except where it can be demonstrated that the particular offence requires a higher penalty for deterrence purposes.
 - (2) **Deterrence and court diversion:** The level of penalty should be set at an amount that would deter offending but still be considerably lower than a person would receive if he or she elected to go to court to deal with the matter. This principle of setting an amount balanced to encourage payment of the penalty rather than going to court could be implemented by prescribing that:
 - (a) as a general rule, a penalty notice amount should not exceed a certain percentage of the maximum fine

28. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12.

29. *Expiation of Offences Act 1996* (SA) s 5(3)(b) prescribes that if the maximum fine is expressed in a dollar amount, the expiation fee should not exceed \$315 or 25% of the maximum fine, whichever is the lesser amount.

30. New Zealand Ministry of Justice, *Infringement Guidelines* (2008).

31. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.8]-[4.13].

32. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.14].

- (b) a penalty notice amount should be lower than the average of any related fines previously imposed by the courts for the same or a similar offence, if such information is available.
- (3) **Proportionality:** In setting the penalty notice amount, 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.
- (4) **Consistency:** In setting the penalty notice amount consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences.
- (5) **Corporations:** For offences that can be committed by both natural and corporate persons, the penalty notice amounts for corporations should be set higher than those for natural persons.
- 4.26 We then sought submissions and engaged in consultations on whether some, or all, of these principles should be adopted in NSW, and invited any suggestions as to how they might work in practice. We also asked whether there are other principles that should be adopted.

Proportionality of amount to the nature and seriousness of the offence

- 4.27 In CP 10 we asked whether a principle should be established that agencies, when setting a penalty notice amount, must consider the proportionality of any amount to the nature and seriousness of the offence, including the harms to be prevented.³³
- 4.28 Both fairness and public confidence in the penalty notice system are jeopardised if proportionality between the penalty notice amount and the offence is not sustained. The Victorian Guidelines recognised this link and expressly identified the need for proportionality, stating: ‘maintenance of proportionality between the relatively minor, clear-cut nature of infringement offences and the penalty they attract reinforces a sense of fairness in the system’.³⁴ Our terms of reference likewise recognise the value of a proportional balance between the amount and offence, when they expressly asked us to examine ‘whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate’.
- 4.29 On any reasonable view, penalty notice amounts ought to be determined by reference to the nature of the act constituting the offence, its prevalence, its seriousness in terms of the potential harm it might cause, and the moral culpability of a penalty notice recipient. For example, in CP 10 the NSW Department of Environment and Climate Change³⁵ noted that the seriousness and nature of the offence was identified as the ‘primary policy consideration’ in fixing the penalty

33. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.6.

34. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) Annexure A, 10.

35. Later known as the NSW Department of Environment, Climate Change and Water. However, in April 2011 most of the functions of the Department of Environment, Climate Change and Water were transferred to the new Office of Environment and Heritage (a division of the NSW Department of Premier and Cabinet). The Office of Water is now part of the Department of Primary Industries, NSW Trade and Investment.

notice amount.³⁶ An application of this principle is seen in two offences administered by the department: driving into a park without a valid entry pass attracts a penalty of \$100;³⁷ whereas, using land as a waste facility without lawful authority attracts a penalty of \$5,000 for corporations.³⁸

- 4.30 However, in some cases, penalty notice amounts do not seem to reflect the seriousness of an offence viewed by reference to these factors. In CP 10 and in following submissions and consultations, a number of government and non-government agencies provided examples of penalty notice amounts that appear disproportionate to the seriousness of the offence. UnitingCare Burnside noted that penalty notice amounts for offences that do not involve a significant harm to the self or others are often similar to penalty notice amounts for harmful behaviours. It gave the example of the penalty notice amount for travelling on a train without a ticket, which is similar in amount to the potentially harmful offence of speeding.³⁹
- 4.31 In a similar vein, in one of our recent consultations it was observed that if someone is caught smoking a tobacco cigarette on a railway platform he or she would be given an on-the-spot penalty notice of \$300 by a RailCorp Transit Officer.⁴⁰ On the other hand, if caught by police smoking cannabis on the street next to the railway station, that person may receive a police caution.⁴¹
- 4.32 Likewise, the Homeless Persons' Legal Service (HPLS) expressed concern about the disparity in the size of penalties imposed for different offences, and the comparative unfairness among different penalty notice systems.⁴² In a submission to CP 10, the HPLS provided a table of discrepancies between rail offences and road safety offences by way of example. It submitted that:
- The absurdity of treating rail offences as being more serious than many road safety offences, as reflected in the penalty amounts, is compounded by the fact that homeless and other vulnerable people are more likely to receive penalty notices for rail offences, but have less capacity to pay.⁴³
- 4.33 However, in some cases, penalty notice amounts need to be high in circumstances where the 'disincentive effect' of a penalty notice amount may be minimal due to 'a potentially significant financial benefit from the illegal behaviour'.⁴⁴ This reflects the view that a penalty notice amount must exceed the benefits the recipient derives

36. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.43]; NSW Department of Environment and Climate Change, *Preliminary Submission PPN2*, 2.

37. *National Parks and Wildlife Regulation 2009* (NSW) cl 7(1)(c), sch 2.

38. *Protection of the Environment Operations Act 1997* (NSW) s 144(1), *Protection of the Environment Operations (General) Regulation 2009* (NSW) cls 80, 82, sch 6.

39. UnitingCare Burnside *Submission PN12*, 4.

40. NSW Transport CityRail, *Fines*
<http://www.cityrail.info/travelling_with/conditions_of_travel/fines>.

41. The Cannabis Cautioning Scheme commenced in April 2000. Cautions provide telephone numbers for the Alcohol and Drug Information Service (ADIS): NSW Police Force, *Cannabis Cautioning Scheme*
<http://www.police.nsw.gov.au/community_issues/drugs/cannabis_cautioning_scheme>.

42. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 11-12.

43. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 12.

44. NSW Department of Water and Energy, *Preliminary Submission PPN12*, 1.

from the illegal activity.⁴⁵ In this context, in a preliminary submission the NSW Office of Fair Trading expressed concern that some of the penalty notice amounts in the legislation it administers are not commensurate with the objective seriousness of the offence, not as being excessive, but as being too low to deter the offending behaviour.⁴⁶ It argued that penalty notice amounts presently exist that may not be substantial enough to deter the offending conduct because the profits to be made from the contravention of the legislation outweigh the penalty. It cited the following two examples:

- false representation to a seller or buyer of real estate, which attracts a penalty of \$2200 even though a substantial sales commission may result from the false representation
- unlicensed motor dealing, for which the penalty notice amount is \$5500 but substantial profits can be made from such a business.⁴⁷

Submissions and consultations

4.34 Submissions and consultations overwhelmingly supported the creation of a formal 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.⁴⁸ One submission observed that the potential seriousness of the harm or danger should be the primary policy consideration in determining any penalty amount.⁴⁹ Another agreed, stating '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'.⁵⁰ Another cautioned that the absence of proportionality between the penalty amount and the seriousness of offence encourages public disrespect for the law.⁵¹

4.35 Other stakeholders refined this general approach adding that, to be effective, a penalty notice amount must reflect the objective seriousness of the offence and the comparative seriousness of any range of proposed offences.⁵² Scope for different

45. G Rusche and O Kirchheimer, *Punishment and Social Structure* (1968) 169.

46. NSW Office of Fair Trading, *Preliminary Submission PPN13*, 3. Now known as NSW Fair Trading.

47. NSW Office of Fair Trading, *Preliminary Submission PPN13*, 3.

48. NSW Maritime, *Submission PN2*, 6, 8; Sydney Olympic Park Authority, *Submission PN6*, 1; NSW Department of Planning, *Submission PN7*, 2, 6; Holroyd City Council, *Submission PN10*, 10; Legal Aid NSW, *Submission PN11*, 9; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3; Uniting Care Burnside, *Submission PN12*, 4; Local Government and Shires Associations of NSW, *Submission PN16*, 1; NSW Land and Property Management Authority, *Submission PN17*, 7; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 7; Illawarra Legal Centre, *Submission PN27*, 7; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 11-12; Transport NSW, *Submission PN30*, 2; The Law Society of NSW, *Submission PN31*, 5; The Shopfront Youth Legal Centre, *Submission PN33*, 7; NSW Department of Community Services, *Submission PN36*, 2; NSW Industry and Investment, *Submission PN37*, 4; NSW Police Portfolio, *Submission PN44*, 2; People with a Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011.

49. NSW Land and Property Management Authority, *Submission PN17*, 7.

50. The Shopfront Youth Legal Centre, *Submission PN33*, 7.

51. Illawarra Legal Centre, *Submission PN27*, 7.

52. NSW Police Portfolio, *Submission PN44*, 2.

penalty amounts should be available to reflect the different level of risk of actual or potential harm for the same or a similar offence committed in different places and times.⁵³ For example, an offence committed in the city on a normal working day may have a less harmful consequence than the same offence committed during a major international sporting event at Sydney Olympic Park.⁵⁴

- 4.36 NSW Maritime⁵⁵ explained that it currently applies this proposed principle to the maritime legislation by a standardised five-tier penalty notice system rated objectively from least serious to most serious offences. In addition, as the safety regulator for vessels, it also has an administrative policy of dividing offences into categories: 'Safety, Environmental and Non-Safety', with the latter objectively less serious than the former two. As such, NSW Maritime has traditionally allocated lower penalty notice amounts to 'non safety' related offences (for example, failure to affix a registration label, \$100) as opposed to offences that have more serious safety or environmental consequences (for example, creating a wash in a no-wash zone, \$500).⁵⁶
- 4.37 However, although The Law Society of NSW (Law Society) agreed with a principle that consideration should be given to the proportionality of the amount of the penalty to the nature and seriousness of the offence, it added a qualification in relation to vulnerable people:

The harm sought to be prevented through the penalty notice should be considered against the broader harm that the policing and penalising of disadvantaged and marginalised groups can have in increasing their social exclusion, financial disadvantage and stress.⁵⁷

The HPLS, also being concerned about the unfair impact of penalty notice amounts on vulnerable people, recommended a 'points system' to determine the comparative seriousness of penalty notice offences.⁵⁸

Commission's conclusions

- 4.38 We support the creation of a principle that government agencies, when setting a penalty notice amount, should consider the proportionality of any amount to the nature and seriousness of the offence, including the harms to be prevented. This principle is fundamental to the setting of penalties in the criminal justice system and it would be remarkable if it did not also apply to penalty notice offences. Both fairness and public confidence in the penalty notice system are jeopardised if proportionality between the penalty notice amount and the nature and seriousness of the offence is not sustained.

53. Sydney Olympic Park Authority, *Submission PN6*, 1.

54. Sydney Olympic Park Authority, *Submission PN6*, 1.

55. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

56. NSW Maritime, *Submission PN2*, 6, 8.

57. The Law Society of NSW, *Submission PN31*, 5.

58. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 12-13. The NSW Food Authority, *Submission PN9*, 6 similarly believed that no principle should be entertained unless a clear and transparent mechanism was created through which the nature and seriousness of the offence was accounted for within the penalty notice system.

- 4.39 There was strong support from submissions for this approach, including for the reason that it is the approach already adopted by some regulators when setting penalty notice amounts. Submissions also demonstrated that failure to comply with this principle is a significant cause of criticism of the penalty notice system. However, it is notable that the examples provided do not necessarily involve inconsistencies in the penalty notice system of any one regulator; rather they reveal inconsistencies between different agencies. This provides further support to the idea that providing for consistency across the penalty notice system is an important next step.
- 4.40 However, in drawing attention through this principle to the centrality of the harm caused by offending, we also recognise the point made by Law Society that harm may be caused to disadvantaged and marginalised groups through the issuing of penalty notices.⁵⁹ These important issues are dealt with in detail in Part Four of this report.

Recommendation 4.2

The proposed guidelines on penalty notice amounts should provide that the penalty notice amount should reflect the nature and seriousness of the offence.

Consistency in amounts for comparable offences

- 4.41 As discussed in Chapter 1, together with fairness, proportionality and transparency, a cornerstone of a best practice regulatory system is consistency.⁶⁰ Consistency in penalty notice amounts assists fairer outcomes for penalty notice recipients and, by doing so, encourages public support and respect for the penalty notice system. The Victorian Guidelines emphasise the important link between the worth of 'consistency' and public respect for the law:

Consistency of approach is crucial to retaining public understanding of, confidence in, and compliance with, the penalty enforcement system.⁶¹

- 4.42 Our terms of reference highlight the centrality of consistency to the penalty notice system, directing us to have particular regard to 'the consistency of current penalty notice amounts for the same or similar offences'. In CP 10, we discovered numerous instances of apparent inconsistencies in penalty notice amounts for comparable offences in areas extending from offensive language or behaviour, public transport offences, parkland offences, to industry offences.
- 4.43 Penalty notice amounts for offensive language or behaviour currently range from \$100 to \$400 depending on the location in which the offence is committed. For example, the penalty is \$100 in Parramatta Park Trust land,⁶² whereas, on a public

59. The Law Society of NSW, *Submission PN31*, 5.

60. Chapter 1 [1.35], [1.65].

61. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) Annexure A, 10.

62. *Parramatta Park Trust Regulation 2007* (NSW) cl 23(1)(b)-(c), sch 1.

passenger vehicle, such as a bus or a ferry, the penalty is \$300⁶³ and, on any train or railway area, the penalty is \$400.⁶⁴ Examples of penalty notice amounts for many offences committed on public transport that are not consistent across the different transport services were provided in CP 10.⁶⁵

- 4.44 Penalty notice amounts for a whole range of offences committed in parks differ depending on the park in which the offence is committed. For example, with respect to offences committed in the six parklands illustrated in CP 10,⁶⁶ penalty notice amounts for offensive language or behaviour vary from \$100 to \$300 depending on the park in which the offence is committed.⁶⁷ In one park, however, offensive language or behaviour does not constitute a park-specific offence at all.⁶⁸ Some disparities in penalty notice amounts have been justified by special considerations relating to a particular location or activity. A minor offence, such as bathing in a lake or pond, that has a relatively low penalty (\$75-\$95) in other parklands, has a penalty of \$200 in Sydney Olympic Park, which appears unreasonable by comparison.⁶⁹ A consistent approach to determining penalty notice amounts for offences within and between parklands may need to be developed.
- 4.45 Inconsistencies between penalty notice amounts in various industry statutes for similar types of offences may sometimes be justified by differing circumstances, imperatives and objectives. However, this is not always the case. Many industry statutes for offences that share similar public safety objectives give rise to different penalty notice amounts without an obvious reason.⁷⁰ For example, carrying on a business without a licence in the tow truck industry incurs a penalty notice amount of \$2200,⁷¹ whereas the same type of offence in the security industry incurs a penalty notice amount of \$5500.⁷² Alternatively, threats and intimidation against Forestry Commission officers in the discharge of their legislative duties incurs a penalty notice amount of \$500;⁷³ whereas threats and intimidation against any person in order to prevent compliance with tow truck industry legislation attracts a penalty notice amount of \$2200.⁷⁴ An individual handling explosives or pesticides in such a way as to cause harm to another or damage to property incurs a penalty

63. *Passenger Transport Regulation 2007* (NSW) cl 49(a)-(b), sch 3 pt 2.

64. *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a)-(b), sch 1 pt 3.

65. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.4.

66. Being: National Parks, Parramatta Park, Centennial Park/Moore Park, Western Sydney Parkland, Sydney Olympic Park and Royal Botanic Gardens: NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.5.

67. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.4. In particular, *National Parks and Wildlife Regulation 2009* (NSW) cl 13(1), sch 2 (\$300) and *Parramatta Park Trust Regulation 2007* (NSW) cl 23(b), sch 1 (\$100).

68. There is no similar offence for offensive language or behaviour under the *Western Sydney Parklands Regulation 2007* (NSW).

69. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.5: *Parramatta Park Trust Regulation 2007* (NSW) cl 17(d), sch 1; *Centennial Park and Moore Park Trust Regulation 2009* (NSW) cl 18(b), sch 1; *Sydney Olympic Park Authority Regulation 2007* (NSW) cl 4(s), sch 1; *Royal Botanic Gardens and Domain Trust Regulation 2008* (NSW) cl 10(i), sch 1.

70. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Tables 4.6-4.10.

71. *Tow Truck Industry Act 1998* (NSW) s 15, *Tow Truck Industry Regulation 2008* (NSW) sch 1.

72. *Security Industry Act 1997* (NSW) s 7(2), *Security Industry Regulation 2007* (NSW) sch 2.

73. *Forestry Act 1916* (NSW) s 44(1)(a), *Forestry Regulation 2009* (NSW) sch 3.

74. *Tow Truck Industry Act 1998* (NSW) s 64(2), *Tow Truck Industry Regulation 2008* (NSW) sch 1.

notice amount of \$1000 under the *Explosives Act 2003* (NSW)⁷⁵ and \$400 under the *Pesticides Act 1999* (NSW) respectively.⁷⁶

- 4.46 In CP 10 we asked whether there should 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.⁷⁷

Submissions and consultations

- 4.47 Submissions were decisively in favour of a guiding principle that, when setting a penalty notice amount, consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences.⁷⁸ The HPLS highlighted the problem of the lack of overall consistency and coherence in the penalty notice system as underlying many of the issues examined in CP 10.⁷⁹ It commented that providing legal assistance to people with multiple penalty notices is made more challenging by the lack of consistency between them.⁸⁰ The NSW Land and Property Management Authority⁸¹ (LPMA) commented that a ‘fragmented approach [exists] in the way separate agencies develop legislative proposals for new infringement notices’ and that ‘inconsistencies exist’.⁸² The LPMA believed the inconsistencies in the amount of penalty notices are because each agency and its minister largely determine the penalty notice offence and its amount applying to their particular legislation.⁸³ As many have observed, the penalty amount for an offence committed on one mode of public transport should be the same as the penalty amount for the same offence committed on another mode of public transport.⁸⁴

- 4.48 It was also submitted that the adoption of principles would:

- ensure that a new penalty notice structure is internally consistent⁸⁵
- reduce confusion and demonstrate fairness in the penalty notice system⁸⁶

75. *Explosives Act 2003* (NSW) s 8(1), *Explosives Regulation 2005* (NSW) sch 2. .

76. *Pesticides Act 1999* (NSW) ss 10(1), 11(1), *Pesticides Regulation 2009* (NSW) sch 2.

77. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.7.

78. NSW Maritime, *Submission PN2*, 8; NSW Department of Planning, *Submission PN7*, 2, 6; NSW Food Authority, *Submission PN9*, 6; Holroyd City Council, *Submission PN10*, 10; Legal Aid NSW, *Submission PN11*, 9; NSW Land and Property Management Authority, *Submission PN17*, 7; Illawarra Legal Centre, *Submission PN27*, 7; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3; UnitingCare Burnside, *Submission PN12*, 4; The Law Society of NSW, *Submission PN31*, 5; The Shopfront Youth Legal Centre, *Submission PN33*, 7; NSW Department of Community Services, *Submission PN36*, 2; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 4.

79. Homeless Persons’ Legal Service; Public Interest Advocacy Centre Ltd, *Submission PN28*, 9, 11-12, 18.

80. Homeless Persons’ Legal Service; Public Interest Advocacy Centre Ltd, *Submission PN28*, 18.

81. The NSW Land and Property Management Authority was abolished under a 2011 restructure. Its former business divisions have been relocated in new departments.

82. NSW Land and Property Management Authority, *Submission PN17*, 1.

83. NSW Land and Property Management Authority, *Submission PN17*, 1.

84. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 4.

85. UnitingCare Burnside, *Submission PN12*, 4.

86. Illawarra Legal Centre, *Submission PN27*, 7.

- increase public respect for and compliance with the law⁸⁷
 - ensure that the punishment is commensurate with the seriousness of the offence across government agencies.⁸⁸
- 4.49 However, one submission commented that despite the validity of this principle, in practice it might be hard to find comparable offences across statutes, each of which may have a different focus.⁸⁹ Other submissions, while supporting the proposed principle, cautioned for case-by-case flexibility and warned against prescriptive standards⁹⁰ and overregulation.⁹¹ Because penalty notices cover so many potentially different situations for each offence and agency, some stakeholders argued for the importance of all agencies retaining a broad based discretion on penalty notice amounts. The Sydney Olympic Park argued that consistency must be tempered with flexibility to allow for local circumstances and individual agency priorities.⁹²
- 4.50 Holroyd City Council considered that the proposed principle must operate in parallel with the previously mentioned principle of the ‘proportionality of amount to the nature and seriousness of the offence, including the harms sought to be prevented’.⁹³
- 4.51 The HPLS, while in general accord with the proposed principle, recommended a slightly different approach. It submitted that penalty notice amounts should be based on an assessment of the seriousness of the offence and this assessment should be made on the basis of a single set of principles. A questionnaire based on these principles could be developed with the answers generating ‘points’. These points could then form the basis for determining the penalty notice amount for the particular offence.⁹⁴

Commission’s conclusions

- 4.52 Consistency in penalty notice amounts supports fair outcomes and is important to the maintenance of public support and respect for the penalty notice system. The importance of the principle of consistency was reflected in submissions. They provided strong support for a guiding principle that, when setting penalty notice amounts, consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences.
- 4.53 As some agencies pointed out, the range of penalty notices and agencies is vast. There may be differences between contexts that are relevant, that should be taken

87. Illawarra Legal Centre, *Submission PN27*, 7.

88. NSW Trustee and Guardian, *Submission PN14*, 4: ‘smoking on a train or the covered area of a railway platform [which] attracts a fine of \$400 whereas failure to comply with a police direction carries a \$200 fine. Both fines are significant amounts for people on Centrelink benefits but the first seems to bear little resemblance to the objective seriousness of the offence’.

89. NSW Land and Property Management Authority, *Submission PN17*, 7.

90. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6.

91. NSW Department of Planning, *Submission PN7*, 1, 3, 5-6.

92. Sydney Olympic Park Authority, *Submission PN6*, 1.

93. Holroyd City Council, *Submission PN10*, 10.

94. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 12.

into account, and that may work against consistency. As we observe in Chapter 1, 'responsive regulation is not the enemy of consistency, but it reminds us to be aware that it can go too far – that effectiveness may be sacrificed on the altar of consistency'.⁹⁵ However, what is envisaged in the recommendations in this chapter are guidelines, not prescriptions. The guidelines leave ample room for responsiveness to context. Further, the guidelines must all be considered together. For example, it may be that compliance with another guideline, such as the need for deterrence in a specific context, will justify departure from consistency in some exceptional cases.

- 4.54 Nevertheless we do not believe that the priorities of individual agencies should take precedence over consistency. The divergent approaches of individual agencies have produced the present situation of inconsistency analysed in CP 10 and in this report, which open up the penalty notice system to strong criticism. At stake is the consistency, and thus the perceived fairness and justice, of the criminal justice system. The path towards greater consistency will no doubt require individual agencies to make changes that will not always be comfortable, but which will be necessary to ensure the fairness of the penalty notice system and maintain public respect for it.

Recommendation 4.3

The proposed guidelines on penalty notice amounts should provide that penalty notice amounts should be consistent for comparable penalty notice offences.

Penalty amount to deter offending but lower than the fine a court would impose

- 4.55 An important purpose of a penalty notice system is to divert less serious offences away from an overstretched court system. The rationale is inherently practical: to achieve ease of administration and cost effectiveness for everyone involved when punishing high-volume but minor criminal behaviour. In order to achieve this practical outcome, as the Victorian Guidelines explain, the level of the penalty must be set at a significantly lower level than the penalty available if the matter were to go to court in order to maintain the 'bargain' in the system.⁹⁶
- 4.56 What is the 'bargain' in this arrangement? From the point of view of the penalty notice recipient, there is a disadvantage in the forfeiture of some of the procedural protections associated with the criminal justice system, such as the presumption of innocence, the rules of procedure and evidence, and the relevance of mitigating factors that might reduce the penalty. The incentive in the 'bargain' is the reduction of the penalty, the avoidance of the cost and stress associated with going to court, and the avoidance of the risk of a criminal conviction. From the point of view of enforcement agencies, the incentive in accepting the lower penalty amount is being

95. Chapter 1 [1.65].

96. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) Annexure A, 14.

relieved of the financial and time costs of prosecuting the offence, including proving the elements of the offence, in court.

- 4.57 While a lower penalty reflects part of this ‘bargain’, penalty notice amounts still need to fulfil the objective of deterring offending. As the NSW Department of Environment and Climate Change pointed out in its preliminary submission, penalty notice amounts need to be high enough to deter offending but not so high as to induce the recipient to elect to have the court assess the penalty.⁹⁷ This is the fine policy balance to be struck in setting penalty notice amounts - successfully to achieve both criminal deterrence and court diversion.
- 4.58 The tension between deterring the offending behaviour while still creating a disincentive for the penalty notice recipient to proceed to court requires a careful assessment of the level of discount appropriate to a penalty notice amount. The incentives for the recipient mentioned above, such as the inconvenience and stress of going to court, the incurring of professional and/or court costs, and the risk of suffering a conviction, should be factored into any calculation of the amount, to discourage court-election by the penalty notice recipient. Despite these factors, a high penalty notice amount may encourage a recipient to elect to have the matter dealt with by a court, regardless of the potential liabilities mentioned above.⁹⁸
- 4.59 NSW does not presently have guidelines to assist in achieving this balanced approach. In CP 10 we sought submissions on whether a principle should be adopted in NSW that the level of a penalty should be set at an amount that would deter offending, but be considerably lower than the penalty a person would receive if he or she elected to go to court to deal with the matter.⁹⁹

Submissions and consultations

- 4.60 Most submissions were in favour of such a guiding principle. Submissions supported the aim of discouraging unnecessary court election and resultant court congestion,¹⁰⁰ while improving the ease of administration and cost effectiveness of processing minor criminal offences.¹⁰¹ As one stakeholder argued, the amount should be set high enough to deter offending conduct but not so high as to

97. NSW Department of Environment and Climate Change, *Preliminary Submission*, 2. See also Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) Annexure A, 14: ‘Part of the incentive underpinning the system is that the level of penalty is set at an amount lower than a person might expect to receive were the matter to go to court’.

98. Legislation Review Committee, Parliament of NSW, *Legislation Review Digest*, No 1 of 2006, 27 February 2006, 52, regarding certain penalty notice amounts under a regulation: ‘The Committee is also concerned that the penalty notice amounts may undermine the purpose of a penalty notice scheme by providing little incentive for offenders not to contest any penalty in court’.

99. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.3.

100. NSW Maritime, *Submission PN2*, 7; Sydney Olympic Park Authority, *Submission PN6*, 1; NSW Police Portfolio, *Submission PN44*, 2; NSW Food Authority, *Submission PN9*, 5; Holroyd City Council, *Submission PN10*, 9; Legal Aid NSW, *Submission PN11*, 8; NSW Land and Property Management Authority, *Submission PN17*, 6; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3; NSW Industry and Investment, *Submission PN37*, 4; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6.

101. NSW Maritime, *Submission PN2*, 7.

encourage court election, which is more costly and time consuming.¹⁰² The NSW Department of Environment, Climate Change and Water (DECCW)¹⁰³ explained:

The reason is that if the penalty notice amount is set too high, then many more offenders would potentially choose to court elect, and the penalty notice would risk failing to achieve its objective of being an efficient, quick and cheap resolution to an offence. This would decrease the effectiveness of the penalty notice system and undermine its objectives.¹⁰⁴

- 4.61 However, NSW Industry and Investment¹⁰⁵ noted that even if the court-imposed fine was lower in value to the penalty notice amount, or even if no court fine resulted from attending court, court diversion could still work on the basis of other economic factors, such as the legal costs of going to court, loss of the penalty notice recipient's salary, and potential court costs.¹⁰⁶
- 4.62 The LPMA gave an example of the difficult issues that may arise in setting a penalty notice amount at a level that effectively deters, especially when a profit is to be made from the activity in question. Under its water licensing regime, any pumps installed are metered. However, illegal portable pumps used by individuals for irrigation of their crops are unmetered and outside the scheme. The potential value of the crops being illegally watered exceeds the present penalty notice amount, so there is no incentive to refrain from offending.¹⁰⁷
- 4.63 The NSW Police Force generally supported a court diversion/offence deterrence principle, although it suggested tinkering with the wording of Question 4.3 in CP 10 from '*considerably lower* than the penalty a court would impose' to '*lesser proportion*', to maintain the fine balance between court diversion and deterrence.¹⁰⁸ One submission queried whether *certainty* of punishment (for example, such as arises from speed cameras, random breath testing, and railway ticket barriers) is a stronger deterrent than *severity* of the potential penalty (penalty amounts versus court-imposed fines).¹⁰⁹
- 4.64 A few submissions neither supported nor opposed a guiding principle on the court diversion/deterrence balance. Rather, these submissions instead drew attention to the situation of vulnerable and disadvantaged people within the current system and argued that a guiding principle of court diversion/deterrence would not work for this group.¹¹⁰ They stressed that, in the context of vulnerable people the concept of

102. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 7.

103. In April 2011 most of the functions of the Department of Environment, Climate Change and Water were transferred to the new Office of Environment and Heritage (a division of the NSW Department of Premier and Cabinet). The Office of Water is now part of the Department of Primary Industries, NSW Trade and Investment.

104. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 7.

105. Now known as the NSW Department of Trade and Investment, Regional Infrastructure and Services (NSW Trade and Investment).

106. NSW Industry and Investment, *Submission PN37*, 4.

107. NSW Land and Property Management Authority, *Submission PN17*, 7.

108. *NSW Police Portfolio*, *Submission PN44*, 2 (emphasis added).

109. The Shopfront Youth Legal Centre, *Submission PN33*, 6: 'For those who are able to exercise some meaningful choice over their behaviour, measures that increase the likelihood of detection...are more likely to deter offending than high fine amounts'.

110. The Law Society of NSW, *Submission PN31*, 5; The Shopfront Youth Legal Centre, *Submission PN33*, 6; Illawarra Legal Centre, *Submission PN27*, 6.

deterrence is 'flawed'¹¹¹ and 'confused'.¹¹² Evidence of this is found in the thousands of dollars of unpaid penalty notices accumulated by this group.¹¹³ One submission observed that vulnerable people exercise little meaningful choice over their behaviour.¹¹⁴ Another noted that people who might be 'deterred' by a financial penalty do not commonly commit offences such as fare evasion anyway.¹¹⁵ A third submission reiterated that, for vulnerable people who do not have the capacity to pay, a penalty notice does not act as a deterrent, but rather is likely to result in a cumulative burden.¹¹⁶ In consultations, we were told that even if there was some initial deterrent effect for vulnerable people, the effect would disappear as their debt burden rises to a level where they feel no hope that they will ever be able to pay off their debt. Some vulnerable people are even unaware of the extent of their penalty notice debts, what they relate to, and the consequences of not paying, or being able to pay, those debts.¹¹⁷

- 4.65 The conclusion reached in these submissions was that, if the social reasons underlying some offending (such as 'survival offences' like sleeping on trains because it might be safer for homeless people) are not addressed, then the deterrence effect of a higher penalty amount will simply not work.¹¹⁸ Furthermore, it was submitted that courts frequently give vulnerable and disadvantaged people a 'better result' than the penalty amount because, given the circumstances of this group, the penalty notice amounts are excessive and unfair, taking into account the principles of proportionality and capacity to pay.¹¹⁹ These submissions concluded that the court diversion/deterrence balance is meaningless for vulnerable and disadvantaged people, and hence its use as a guiding principle for this group is unsuitable.

Commission's conclusions

- 4.66 The majority of stakeholders supported a guiding principle that a penalty notice amount should be deliberately set at a discounted level, considerably lower than the fine a recipient would expect to receive for the same offence if the matter were heard in court, but still high enough to deter offending. As noted in one submission, such a guiding principle would support two underlying aims of the penalty notice system, being its cost effectiveness and ease of administration.¹²⁰ It also would assist in maintaining the fine balance between supporting the public policy goal of cost savings through court diversion for the many minor offences needing to be processed, while still encouraging another important public policy goal of crime deterrence. This principle would not inhibit the exercise of discretion, or the use of lesser options, in the case of disadvantaged or vulnerable people.

111. The Law Society of NSW, *Submission PN31*, 5.

112. The Shopfront Youth Legal Centre, *Submission PN33*, 6.

113. The Shopfront Youth Legal Centre, *Submission PN33*, 6.

114. The Shopfront Youth Legal Centre, *Submission PN33*, 6.

115. The Law Society of NSW, *Submission PN31*, 5.

116. Illawarra Legal Centre, *Submission PN27*, 6.

117. Illawarra Legal Centre, *Submission PN27*, 6.

118. The Shopfront Youth Legal Centre, *Submission PN33*, 6.

119. The Shopfront Youth Legal Centre, *Submission PN33*, 6.

120. NSW Maritime, *Submission PN2*, 7.

Recommendation 4.4

The proposed guidelines on penalty notice amounts should provide that penalty notice amounts should be set at a level designed to deter offending, but be considerably lower than a court might generally be expected to impose for the offence.

Penalty amounts should not exceed a certain percentage of the maximum fine

- 4.67 The principle that penalty notice amounts should be set at a level that would deter offending, but be considerably lower than a court might be expected to impose for the same offence is an important and useful, but very general, principle. It is unlikely, on its own, to provide government agencies with clarity, or to improve greater consistency in penalty notice amounts. In CP 10 we therefore asked whether the setting of penalty notice amounts should be further defined or limited in two ways.
- 4.68 First we asked whether relevant guidelines should specify that the penalty notice amount must not exceed a fixed percentage of the maximum court fine. A number of further questions flowed from this question.
- If so, what is the appropriate percentage?
 - Should it be possible to exceed the prescribed percentage in special cases?
 - What would constitute a special case?
 - Should there be a defined upper percentage for these special cases?¹²¹
- 4.69 The Victorian Policy and its associated guidelines provide that, ‘an infringement penalty should generally be approximately no more than 20-25% of the maximum penalty for the offence *and* be demonstrated to be lower than the average of any related fines previously imposed by the Courts’.¹²² However, the Policy also provides that a proportion of up to 50% of the maximum fine can be considered where there are strong and justifiable public interest grounds. The desirability of using the average court fine as a measure for NSW is discussed below.
- 4.70 South Australia also prescribes, by statute rather than in guidelines, that the infringement amount or expiation fee should not exceed 25% of the maximum fine.¹²³ By contrast, the New Zealand Guidelines simply provide that ‘the fee should generally be *considerably* less than the statutory maximum available to the court following a successful summary prosecution’.¹²⁴

121. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.4.

122. Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 4 (emphasis added).

123. *Expiation of Offences Act 1996* (SA) s 5(3)(b).

124. New Zealand Ministry of Justice, *Infringement Guidelines* (2008) [28]-[31] (emphasis added).

- 4.71 Currently in NSW, penalty notice amounts range from less than 1% to 100% of the maximum fine.¹²⁵ A number of government departments have adopted a policy of fixing penalty notice amounts as a percentage of the maximum fine that a court could impose. For example, taking the advice of Parliamentary Counsel's Office, the NSW Office of Fair Trading, the NSW Department of Local Government,¹²⁶ and the NSW Department of the Arts, Sport and Recreation,¹²⁷ adopted a policy of setting penalty notice amounts at 10% of the maximum fine.¹²⁸ However, the informal policy of fixing amounts at 10% of the maximum fine is not followed universally. A wide range in the ratio between the penalty notice amount and the maximum fine is evident in practice.¹²⁹ For example, a penalty notice amount of \$1000 applies to the offences of carrying on a taxi-cab or private hire vehicle service without a licence or accreditation,¹³⁰ while the maximum fine which could be imposed by the court for the same offences is \$110,000. This represents a ratio of 0.9 % of the penalty notice amount in relation to the maximum fine. Conversely, a penalty notice amount of \$100 for travelling on a public passenger vehicle, for example a bus or ferry,¹³¹ without a valid ticket represents 18% of the maximum fine of \$550 for the same offence in court.¹³²
- 4.72 As CP 10 observed, although penalty notice amounts range from less than 1% to 100% of the maximum fine, more than 90% of the approximately 6,800 penalty notice offences surveyed provided a penalty set at 25% of the maximum fine or less.¹³³ Consequently, a principle providing that penalty notice amounts should not exceed 25% of the maximum fine would cover 90% of recent penalty notice amounts.
- 4.73 However, there are arguments against setting a maximum ratio between penalty notice amounts and maximum court fines. In a 2005 review of the infringement system, the New Zealand Law Commission argued that problems exist with applying a set percentage across infringement systems as this 'fails to take account of the varying purposes of the different regimes' as well as the proportion of offending and the level of seriousness of the different infringement notice offences, and the percentage of offences within an offence category that is dealt with by

125. See also NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Table 4.1, Figure 4.1, Annexure 4A.

126. Now Division of Local Government, Department of Premier and Cabinet.

127. Now Sports and Recreation, part of the Office of Communities, a division of the NSW Department of Education and Communities.

128. NSW Office of Fair Trading, *Preliminary Submission PPN13*, 2; NSW Department of Local Government, *Preliminary Submission PPN15*; NSW Department of the Arts, Sport and Recreation, *Preliminary Submission PPN14*.

129. For examples of the ration of penalty notice amount in relation to the maximum fine, see NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Annexure 4A.

130. *Passenger Transport Act 1990* (NSW) s 30(1)(a)-(b), s 37(1)(a)-(b), *Passenger Transport Regulation 2007* (NSW) sch 3 .

131. *Passenger Transport Act 1990* (NSW) s 3 Definitions.

132. *Passenger Transport Act 1990* (NSW) s 63(2)(v); *Passenger Transport Regulation 2007* (NSW) cl 74(1), sch 3.

133. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [4.33] Figure 4.2, Table 4.2. The survey in CP 10 is based on the database provided by the State Debt Recovery Office as at December 2009.

infringement notice.¹³⁴ On the latter point, the review argued that if, say, 90% of offences within an offence category are dealt with by infringement notice, the infringement fee should be closer to the maximum fine than if only a low percentage of offences within an offence category were dealt with by infringement notice. The review concluded that the approach of setting infringement fees as a percentage of the maximum fine 'would produce only a spurious appearance of consistency'.¹³⁵

- 4.74 A possible solution to the concerns identified by the New Zealand Law Commission is to allow exceptions to the recommended percentage in special cases. The Victorian Guidelines, noted above, provide an example of this approach.¹³⁶

Submissions and consultations

- 4.75 Submissions generally supported a principle that a penalty notice amount should not exceed a proportion of the maximum court fine for the offence.¹³⁷ There was no consistency about what such a percentage might be, although there was some support for a percentage ranging from 10%¹³⁸ to 20-25%.¹³⁹ The Shopfront Youth Legal Centre (Shopfront) made the important point that the maximum court fine is reserved for the worst type of case, and that most penalty notices will be issued for cases that fall far short of this category.¹⁴⁰
- 4.76 Some were opposed to setting a maximum percentage of the court fine as a limit for the penalty amount. They felt it would be too difficult in practice to quantify the amounts involved.¹⁴¹ DECCW cautioned that any principles on setting penalty notice amounts and their adjustment over time, including this one, should only be a guideline, and not a prescriptive standard, in order to maintain flexibility in dealing with offences on a case-by-case basis.¹⁴² The NSW Department of Planning¹⁴³ agreed it would be too difficult and unnecessarily prescriptive.¹⁴⁴ Shopfront

134. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005) [134].

135. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005) [135].

136. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) Annexure A, 14.

137. Holroyd City Council, *Submission PN10*, 9; NSW Land and Property Management Authority, *Submission PN17*, 6; Legal Aid NSW, *Submission PN11*, 8; NSW Maritime, *Submission PN2*, 7-8; The Law Society of NSW, *Submission PN31*, 5; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6-7; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3; The Shopfront Youth Legal Centre, *Submission PN33*, 7.

138. NSW Land and Property Management Authority, *Submission PN17*, 6 noted 'that presently under the *Crown Lands Act 1989* and the *Biofuels Act 2007*, penalty notice amounts are set at 10% of the maximum fine imposed by a court'.

139. Legal Aid NSW, *Submission PN11*, 8: 25%; Holroyd City Council, *Submission PN10*, 9: 20-25%; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3: 20-25%; NSW Food Authority, *Submission PN9*, 5: 25% and 'be demonstrated to be lower than the average of any related fines previously imposed by the Courts'. NSW Land and Property Management Authority, *Submission PN17*, 7 agreed that 'the amount should not go beyond a recommended percentage, (for example they should not exceed 25%)'.

140. The Shopfront Youth Legal Centre, *Submission PN33*, 7.

141. NSW Department of Planning, *Submission PN7*, 6; Transport NSW, *Submission PN30*, 2.

142. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6.

143. Now known as the NSW Department of Planning and Infrastructure.

144. NSW Department of Planning, *Submission PN7*, 6.

concurred that setting a percentage was somewhat arbitrary, but that ‘in most cases the prescribed penalty should only be a small percentage of the maximum’.¹⁴⁵

- 4.77 Most submissions did not comment on whether or not it should be possible to depart from the prescribed percentage. One noted that it might be important to do so in exceptional cases where a lower amount would not be an effective deterrent.¹⁴⁶

Commission’s conclusions

- 4.78 There was general support in the submissions for a principle that a penalty amount should not exceed a proportion of the maximum court fine. We recommend that such a principle be included in guidelines. The Commission takes into account the concerns of those stakeholders who argued that such a guideline would be unnecessarily prescriptive and limiting. However the principle can be expressed in a way that provides for flexibility and responsiveness to exceptional circumstances. Nonetheless, once it is accepted that a principle of this nature should be promulgated, it is not possible to escape from the necessity to define what that percentage should be.

- 4.79 We recommend that the percentage be set at a maximum of 25%, for the following reasons. There is support in submissions for setting the level at 25%. It would require the least amendment to existing penalty notice amounts, 90% of which are presently in the 25% range. There is precedent in other jurisdictions for setting the percentage at 25%. A lower level may prompt many requests to depart from the guideline because of exceptional circumstances.

- 4.80 We are concerned that providing a guideline of 25% may create an inflationary tendency and have the effect of pushing up penalty amounts. This is not our intention. We would expect that the majority of penalty notice amounts would be considerably lower than 25% of the maximum fine that can be imposed by a court. The figure of 25% is to be regarded as a ceiling – a level appropriate for the most serious of penalty notice offences. It should not become the norm. All regulatory agencies, including the proposed Penalty Notice Oversight Agency (PNOA),¹⁴⁷ should beware of this guideline creating any inflationary tendency in penalty amounts.

- 4.81 We are also mindful of the concerns of stakeholders that the penalty notice system should be flexible and responsive to the many different circumstances to which penalty notices respond. With this in mind, we recommend that it should be possible to exceed the prescribed maximum up to 50% of the maximum court fine, but only where there are strong and justifiable public interest grounds, such as those provided for in Victoria, being:

- the harm occasioned by the commission of the offence is particularly severe

145. The Shopfront Youth Legal Centre, *Submission PN33*, 7.

146. NSW Food Authority, *Submission PN9*, 4.

147. See Chapter 18.

- there is a need to provide effective deterrence where the offender stands to make a profit from the offending activity, and
- where most offences are dealt with by way of penalty notices, so that the court penalty ceases to be as significant as a comparator.

Recommendation 4.5

The proposed guidelines on penalty notice amounts should provide that

- (a) a penalty notice amount should not exceed 25% of the maximum court fine for that offence
- (b) only in exceptional circumstances involving demonstrated public interest may a penalty notice amount be up to 50% of the maximum court fine, for example where
 - (i) the harm caused by the offence is likely to be particularly severe
 - (ii) there is a need to provide effective deterrence because the offender stands to make a profit from the activity, or
 - (iii) the great majority of offences are dealt with by way of penalty notices, so that the maximum court penalty is less significant as a comparator.

Penalty amount lower than the average of fines previously imposed by the courts

- 4.82 A further question in CP 10 was whether to provide that the penalty amount should be lower than the average of fines imposed by courts for the particular offence or similar offences.¹⁴⁸
- 4.83 In ensuring that a penalty notice amount is set at a discounted rate for those recipients who choose not to go to court, the maximum fine set by the statute is one possible comparator. A second possible comparator would be provided by the fines that are actually imposed by courts for the same or similar offences. This is arguably a more accurate means of ensuring that the penalty notice amount is appropriately discounted, since courts rarely impose the maximum penalty.
- 4.84 The comparison between penalty notice amounts and court fines actually imposed can be revealing. Statistics relating to the offence of travelling on a train without a valid ticket illustrate that, in some cases, the penalty notice amount is more, and sometimes considerably more, than the fine and costs that penalty notice recipients were ordered to pay. The maximum fine for this offence is \$550 and the penalty notice amount is \$200.¹⁴⁹ Between August 2003 and March 2006, 2763 people were issued with a penalty notice for this offence and elected to have the matter heard by the court. In 43% of these cases the court ordered that the relevant charge be dismissed under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). In the remaining 57% of cases defendants were fined an average amount of \$100,

148. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.5.

149. *Rail Safety (Offences) Regulation 2003* (NSW) cl 5(1)(a)-b), sch 1.

with 80% of fines being between \$50 and \$200.¹⁵⁰ In each case, the defendant would also have been ordered to pay court costs of \$78. Thus, many of those fined would have paid an average fine, plus costs, of \$178, or \$22 less than the penalty notice amount. If courts regularly impose lower penalties than the penalty notice amount, the diversionary goal of penalty notices is undermined and the penalty is arguably unfair.

- 4.85 In some cases there are practical barriers to using average court fines as a comparator. Information about the fines previously imposed by courts can be obtained from the NSW Judicial Commission's Sentencing Information System (SIS), which contains sentencing statistics for offences dealt with in the Supreme, District, Local and Children's Courts. However, this information may not always be available. For example, information will not exist for newly created offences for which there are no comparable offences. Alternatively, the available sample may be too small to have any statistical significance. In such situations, the government agency proposing to fix a penalty notice amount could not demonstrate that the amount is lower than the average fines imposed by courts for the same or similar offences.

Submissions and consultations

- 4.86 Submissions were divided on whether a principle should exist that a penalty notice amount 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.¹⁵¹ Those against this principle focussed on its impracticality — compliance would be too difficult and unnecessarily prescriptive,¹⁵² if not impossible.¹⁵³ One submission commented that courts, in many cases, enforce through measures apart from fines; such as good behaviour bonds, intervention programs and plans, and orders for professional costs. This diversity of court enforcement measures would make it difficult to calculate any 'average' of fines.¹⁵⁴ Another observed that in their experience where a penalty notice recipient elects to go to court and the offence is proved, 'the court usually imposes a fine identical or similar (rounded up or down) to the value of the original penalty notices. Court costs are then usually awarded against the offending party'.¹⁵⁵
- 4.87 However, the NSW Food Authority concurred that this principle could operate effectively, provided that statistically relevant information on the average of court-

150. These statistics were provided by the Judicial Commission of New South Wales and published in S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 6.

151. NSW Maritime, *Submission PN2*, 8; NSW Department of Planning, *Submission PN7*, 6; NSW Food Authority, *Submission PN9*, 6; Holroyd City Council, *Submission PN10* 9-10; Legal Aid NSW, *Submission PN11*, 8; NSW Land and Property Management Authority, *Submission PN17*, 7; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 7.

152. NSW Department of Planning, *Submission PN7*, 6.

153. NSW Maritime, *Submission PN2*, 8.

154. NSW Maritime, *Submission PN2*, 8. NSW Land and Property Management Authority, *Submission PN17*, 7 agreed.

155. Holroyd City Council, *Submission PN10*, 9-10.

imposed fines, for the same or similar offence, was available.¹⁵⁶ Legal Aid NSW strongly supported the principle. It considered that any body established to oversee the penalty notice scheme should re-examine the court statistics on a regular basis to ensure adherence to this principle.¹⁵⁷

- 4.88 Shopfront, while giving its qualified support to the proposed principle, reasoned that a court average of fines previously imposed might not always be a good indicator of the ‘correctness’ of the penalty notice amount, because of the inherently different nature and circumstances of individuals who court-elect from those who pay the penalty amount:

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.¹⁵⁸

- 4.89 This dynamic may well be present in relation to the example provided above of travelling on a train without a ticket. Consultations suggest that a proportion of those who go to court elect to do so because they cannot afford to pay a penalty notice or because of some other circumstance relevant to their offending. They may, for example, be vulnerable in any of the ways discussed in Part Four of this report and therefore be entitled to a lower fine or a different type of sentence.

Commission’s conclusions

- 4.90 Using the maximum court fine as a benchmark for setting penalty amounts has limitations, because that maximum is reserved for the most serious of offences and is therefore not appropriate for minor offending that has historically been dealt with by the issue of a penalty notice. The average penalty imposed by the courts may provide a better indication of the approach of courts to the relevant offence, against which a penalty notice amount may be offset to take into account the ‘bargain’ inherent in penalty notices.
- 4.91 In some cases the average of fines imposed by a court may not be the best measure, as averages can be distorted by a few very high or very low fines, especially if the total number of offences is low. The median fine may provide a better indicator in such cases. We note the concerns of some stakeholders that other factors may also affect the level of court fines. We also note the reservations of some stakeholders, in particular concerning the practical problem that data on average court fines will not always be available.
- 4.92 Nevertheless, where information is available about the pattern of court fines it should be weighed in the balance, together with the outcomes suggested by other guidelines and information about the offence. Guidelines should provide that information about the pattern of fines previously imposed by courts should be taken

156. NSW Food Authority, *Submission PN9*, 6.

157. Legal Aid NSW, *Submission PN11*, 8.

158. The Shopfront Youth Legal Centre, *Submission PN33*, 7 (emphasis added).

into account when setting penalty notice amounts, where it is appropriate to do so and the information is available.

Recommendation 4.6

The proposed guidelines on penalty notice amounts should provide that the pattern of fines previously imposed by the courts, where that information is available, is a relevant factor to be taken into account when setting penalty notice amounts.

Maximum amount

- 4.93 In CP 10 we asked whether a maximum amount should be set for penalty notices. We also sought submissions on whether it should be permissible to exceed the maximum amount, in particular on the ground of public interest.¹⁵⁹
- 4.94 The principles for setting infringement amounts in the Victorian, New Zealand and South Australian guidelines advise a maximum amount, being:
- 12 penalty units for individuals and 60 penalty units for corporations in Victoria¹⁶⁰
 - \$1000 in New Zealand,¹⁶¹ and
 - \$315 or 25% of the maximum fine for the offence (whichever is the lesser) in South Australia.¹⁶²
- 4.95 Setting a maximum amount would underscore the nature of penalty notice offences, as generally minor criminal offences that can be dealt with more efficiently through a penalties regime, and that do not require attention from a court. A maximum amount would remind agencies that penalties should generally be set at a level that reflects this minor offending while still encouraging compliance with the law. The setting of a maximum amount would discourage the use of penalty notices for serious offences that should be dealt with through the courts.
- 4.96 If such a maximum penalty were to be adopted in NSW, one important issue is what the maximum amount should be.¹⁶³ It is useful to note that presently most penalty notice offences in NSW carry penalties that range from \$20 to \$1200. In CP 10 we surveyed around 6800 penalty notice offences from a list of offences provided by the Judicial Commission and found that 90% of penalty notice amounts do not

159. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.2(2).

160. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 14. One penalty unit is \$122.14 in the 2011-12 financial year, as fixed by the Treasurer under the *Monetary Units Act 2004* (Vic) s 5(2)-(3).

161. New Zealand Ministry of Justice, *Infringement Guidelines* (2008) [28]-[31].

162. *Expiation of Offences Act 1996* (SA) s 5(3)(b).

163. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.2(1). CP 10 further considers whether the concepts of 'minor offence' and 'low penalty' should be among the criteria for assessing whether an offence may be enforced by penalty notice and, if so, how should these terms be defined: [3.25]-[3.30], [3.36]-[3.41].

exceed \$1600.¹⁶⁴ The largest group is comprised of penalty notice amounts that range from \$400 to \$600 (1852 offences), followed very closely by those in the \$20 to \$200 range (1803 offences), and then the \$200 to \$400 range (1334 offences). Beyond \$1600, the largest group consists of 213 offences that attract penalty notice amounts in the \$2000 to \$3000 range. These include some serious offences, for example, a corporation harming threatened species¹⁶⁵ or a person making an illegal seller's bid at auction.¹⁶⁶

- 4.97 A counter-argument against establishing a maximum amount is that it might be too difficult to designate an amount that would be appropriate for the thousands of penalty notice offences, which vary in their nature and seriousness, and in the harm they seek to prevent. One response to this would be to allow a maximum to be exceeded in appropriate cases. In CP 10 we sought submissions on whether it should be permissible to exceed the maximum amount and, if so, in what circumstances.¹⁶⁷
- 4.98 Victoria and New Zealand allow the setting of amounts *above* the maximum amount on specified grounds. The ground for departing from the maximum, common to both jurisdictions, is that a higher level is needed in order to deter the offending.¹⁶⁸ However, the New Zealand guidelines provide that this higher amount should still be less than the statutory maximum available to a court. In Victoria, public interest is also a ground for allowing an infringement penalty to be set higher than the recommended maximum amount.¹⁶⁹ In CP 10 we sought submissions on whether a public interest exception should be adopted in NSW. If so, we asked how public interest should be defined or characterised; and whether there are examples to illustrate its application.¹⁷⁰
- 4.99 Another issue relating to the setting of a maximum amount is whether there should be different amounts for individuals and corporations, as in Victoria.¹⁷¹ We discuss this issue below under a separate heading.

Submissions and consultations

- 4.100 Submissions were divided on whether there should be a specified maximum amount, and on what any maximum amount should be.¹⁷²

164. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Figure 4.1 and Table 4.1.

165. *National Parks and Wildlife Act 1974* (NSW), s 118A; *National Parks and Wildlife Regulation 2009* (NSW) sch 2 (penalty notice amount of \$1000 to \$3000).

166. *Property, Stock and Business Agents Act 2002* (NSW) s 66(1); *Property, Stock and Business Agents Regulation 2003* (NSW) sch 15 (penalty notice amount of \$2200).

167. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.2 and 4.2(a)

168. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 14: 'A deterrent level of penalty can be determined taking into account factors such as consequences of offence, risk or opportunity cost'.

169. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 14.

170. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.2(2)(b).

171. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.3.

- 4.101 Some submissions supported the idea of a maximum amount without further specification.¹⁷³ The LPMA commented that the amount should be sufficient to deter an offence but not be so high as to encourage an election to go to court.¹⁷⁴ Shopfront argued that the variety of penalty offences is too great to determine one maximum, but that the principle of maxima is a good idea. They suggested that perhaps different maximum amounts should exist, depending on the class of offence. For example, it was suggested that environmental, workplace and corporate regulatory offences could, and should, carry higher maximum amounts for penalty notice offences.¹⁷⁵
- 4.102 Some submissions, which supported the adoption of a maximum amount as a guiding principle, suggested that it should be a specified amount (for example, \$1500) across all penalty notices.¹⁷⁶ However, another submission disagreed with a maximum amount across all penalty notices as being 'problematic' and preferred the approach of using a maximum percentage of the court-imposed fine for each prescribed penalty notice amount.¹⁷⁷ Yet another submission thought both types of calculation could be used. That is, the maximum amount could be set as 12 penalty units for an individual recipient and 60 penalty units for a corporation;¹⁷⁸ or the average imposed by courts in recent years for that offence, whichever is lower.¹⁷⁹
- 4.103 Other submissions argued that a preferable approach would be to adopt the South Australian and Victorian schemes, using a limit of 20-25% (South Australia) and 25% (Victoria) of the maximum court-imposed fine;¹⁸⁰ rather than by way of a general principle that the penalty notice amount be 'considerably lower' than the penalty a court would impose.¹⁸¹ Some stakeholders considered that even an upper limit based on a percentage of a maximum court imposed fine would be too prescriptive and limiting. The NSW Food Authority noted that sometimes the set maximum amounts for certain offences can be very high, and be amounts over which a state agency has little control. This is the case with Council of Australian Governments (COAG) agreed industry codes, such as the Food Standards Code.¹⁸²
- 4.104 NSW Young Lawyers commented that setting a maximum sum preserves the position of penalty notices as an intermediate response in the scale of enforcement options where higher penalties are needed to establish deterrence, or for more

172. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.2(1).

173. NSW Land and Property Management Authority, *Submission PN17*, 5-6; NSW Industry and Investment, *Submission PN37*, 3-4; The Law Society of NSW, *Submission PN31*, 5; The Shopfront Youth Legal Centre, *Submission PN33*, 5-6.

174. NSW Land and Property Management Authority, *Submission PN17*, 5-6.

175. The Shopfront Youth Legal Centre, *Submission PN33*, 5-6.

176. NSW Maritime, *Submission PN2*, 7 which is their current highest available penalty notice.

177. Holroyd City Council, *Submission PN10*, 8.

178. Currently, \$1320 for an individual or \$6600 for a corporation based on *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 where one penalty unit equals \$110.

179. Legal Aid NSW, *Submission PN11*, 8.

180. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 2-3; NSW Police Portfolio, *Submission PN44*, 2.

181. NSW Police Portfolio, *Submission PN44*, 2.

182. NSW Food Authority, *Submission PN9*, 4-5.

serious offences, an issuing agency would have the option of commencing formal court proceedings.¹⁸³

- 4.105 The HPLS, while supporting the idea in principle, offered another way of calculating the maximum amount. Rather than a static amount or a percentage, HPLS suggested that the amount be set as a proportion of the recipient's income (giving the example of the Finnish 'day fine' system),¹⁸⁴ or by introducing a concession rate for Centrelink recipients and low-income earners.¹⁸⁵ However another submission thought the 'day fine' system was not practical for Australian conditions.¹⁸⁶ A 'day fine' system would raise privacy concerns, and be administratively complicated and expensive to implement. It would need to involve state and federal jurisdictions taking into account taxable incomes, assets and liabilities. This would mitigate the purported advantages of the present penalty notice system, which are cost-effectiveness and relative ease of administration.
- 4.106 Other submissions were against any criterion at all, saying that it would be too difficult, inflexible, and unnecessarily prescriptive to designate a maximum amount that would be appropriate for the thousands of penalty notice offences across NSW.¹⁸⁷ Environmental offences often have high maximum penalty notice amounts, and DECCW commented that the financial benefits of non-compliance might easily outweigh the maximum penalty amount for an environmental penalty recipient. These penalty notices offences would thus lose their deterrence objective. The DECCW could then no longer use penalty notices as a practical enforcement tool, forcing it to initiate more costly and time consuming court prosecutions.¹⁸⁸
- 4.107 Nearly all submissions agreed¹⁸⁹ that if a maximum amount were to be set, it should be permissible to exceed it in some cases.¹⁹⁰ NSW Maritime suggested that the court should deal with these cases.¹⁹¹
- 4.108 Several submissions suggested that the grounds for exceeding the maximum amount should be based on the need to deter offending.¹⁹² It was also suggested

183. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3.

184. Under a 'day fine' system, which operates in different versions mainly in Northern Europe (Finland, Sweden, Denmark, and Germany) and Latin America (including the Dominican Republic, Colombia, Venezuela and Argentina), a fine is calculated on a formula based on the fine recipient's net income. Day fines have been used in these countries for many decades: E Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, National Institute of Justice (2010) 3-5.

185. Homeless Persons' Legal Service, Public Interest advocacy Centre Ltd, *Submission PN28*, 13-14.

186. The Shopfront Youth Legal Centre, *Submission PN33*, 8.

187. NSW Department of Planning, *Submission PN7*, 6; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 5-6; Transport NSW, *Submission PN30*, 2.

188. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 5-6.

189. The Shopfront Youth Legal Centre, *Submission PN33*, 5-6 saw little point in allowing for exceptions to the maximum amount.

190. NSW Maritime, *Submission PN2*, 7; NSW Food Authority, *Submission PN9*, 5; Holroyd City Council, *Submission PN10*, 8-9; Legal Aid NSW, *Submission PN11*, 8; The Law Society of NSW, *Submission PN31*, 5; NSW Police Portfolio, *Submission PN44*, 2.

191. NSW Maritime, *Submission PN2*, 7.

192. NSW Food Authority, *Submission PN9*, 5; Holroyd City Council, *Submission PN10*, 8-9; Legal Aid NSW, *Submission PN11*, 8.

that the circumstances would need to be exceptional, and that it would be necessary to establish that a lesser amount would not deter offending, or that the penalty notice amount is disproportionate to the seriousness of the harm sought to be prevented.¹⁹³ These circumstances would be more likely to exist in continuing offences and high volume offences causing cumulative harm to the public,¹⁹⁴ such as environmental offences.

- 4.109 Only one submission expressed a view as to whether ‘public interest’ should be reason to exceed the maximum amount in some cases, and it argued against such a ground.¹⁹⁵
- 4.110 There was general agreement in the submissions that the maximum amount (whatever it is), should be higher for corporations than individuals. This issue is discussed below.

Commission’s conclusions

- 4.111 As noted above, opinion among stakeholders was divided on whether a specified maximum amount applicable for all penalty notices should be set, and, if so, what this maximum amount should be. However, nearly all submissions accepted that, if a maximum amount were to be set, it should be permissible for higher penalties to be available for some offences.
- 4.112 The Commission’s view is that no generally applicable maximum amount for penalty notice offences should be prescribed. One prescribed maximum across all offences across all relevant laws would be unnecessarily rigid and limiting for the wide range of offences that the penalty notice system regulates. A generally applicable maximum may also lead to upwards penalty drift. Additionally, it would be necessary to adjust the specified amount regularly to keep pace with inflation. Better approaches to securing an appropriate penalty level exist and are discussed below.

Higher amounts for corporations

- 4.113 Many penalty notice provisions set separate, higher penalty notice amounts for corporations than for individuals. In some cases, these follow the lead set in relation to the maximum court fine where a separate amount is specified for corporate penalty notice recipients. For example, a number of offences under the *Security Industry Act 1997* (NSW) attract maximum fines of \$11,000 for individuals and \$22,000 for corporations,¹⁹⁶ and penalty notice amounts of \$1100 for individuals and \$2200 for corporations.¹⁹⁷
- 4.114 However, in other cases the penalty notice provisions set higher rates for corporate penalty notice recipients even though no such distinction is made in relation to the

193. NSW Food Authority, *Submission PN9*, 5.

194. Holroyd City Council, *Submission PN10*, 8-9.

195. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.2(b); Legal Aid NSW, *Submission PN11*, 8.

196. *Security Industry Act 1997* (NSW) s 29A(2), s 39(1).

197. *Security Industry Regulation 2007* (NSW) sch 2.

maximum court fine available. For example, a range of offences under the *Stock (Chemical Residues) Act 1975* (NSW) attract a maximum fine of \$11,000 for the offence,¹⁹⁸ while the penalty notice provisions stipulate amounts of \$550 for individuals and \$1100 for corporations.¹⁹⁹

- 4.115 In further cases, higher maximum court fines are set for corporations than for individuals, yet the penalty notice provisions do not distinguish between corporations and individuals. For example, provisions of the *Fisheries Management Act 1994* (NSW) establish maximum fines of \$22,000 for individuals and \$55,000 for corporations,²⁰⁰ yet these offences attract penalty notice amounts of \$300 for both individuals and corporations.²⁰¹
- 4.116 It has been suggested that higher penalty notice amounts for corporations can be justified on the grounds that a corporation is more likely to have committed the offence 'in the course of commercial operations, which makes the conduct objectively more serious'.²⁰² It has also been suggested that a corporation is 'also likely to have greater financial capacity than an individual' to pay the penalty.²⁰³
- 4.117 In CP 10, we asked should a principle be established 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?²⁰⁴

Submissions and consultations

- 4.118 All submissions responding to this issue strongly supported a general principle that corporations should pay higher penalty amounts than individuals for the same offence.²⁰⁵ It was also submitted that statutory authorities should be covered by this principle.²⁰⁶ Corporations generally have a greater financial capacity to pay larger penalty amounts than individuals, and must be accountable beyond their shareholders to the wider community for their actions.²⁰⁷ The NSW Food Authority and LPMA also commented that corporations have more sophisticated commercial dealings and a greater financial capacity.²⁰⁸ Offences are potentially more serious with corporations; and through their status, corporations have greater obligations to

198. *Stock (Chemical Residues) Act 1975* (NSW) s 12C, s 12D(1)-(2).

199. *Stock (Chemical Residues) Regulation 2010* (NSW) sch 1.

200. *Fisheries Management Act 1994* (NSW) ss 122(4), 122A(3).

201. *Fisheries Management (General) Regulation 2010* (NSW) sch 7.

202. NSW Department of Environment and Climate Change, *Preliminary Submission PPN2*, 2.

203. NSW Department of Environment and Climate Change, *Preliminary Submission PPN*, 2.

204. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.8.

205. NSW Maritime, *Submission PN2*, 7, 9; NSW Department of Planning, *Submission PN7*, 2, 6; NSW Food Authority, *Submission PN9*, 5-6; Holroyd City Council, *Submission PN10*, 9; Legal Aid NSW, *Submission PN11*, 8-9; NSW Land and Property Management Authority, *Submission PN17*, 5-6; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3; The Law Society of NSW, *Submission PN31*, 5-6; The Shopfront Youth Legal Centre, *Submission PN33*, 8.

206. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3.

207. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3.

208. NSW Food Authority, *Submission PN9*, 5; NSW Land and Property Management Authority, *Submission PN17*, 6.

the public as a good role model.²⁰⁹ Higher amounts are needed to deter corporations from engaging in unlawful behaviour especially where commercial benefits accrue from the offending conduct. The Holroyd City Council observed that corporations are more likely to commit offences because of the financial benefits that may arise,²¹⁰ for example from environmental breaches.²¹¹

- 4.119 Unfortunately little guidance was given by stakeholders on how to set these amounts. The NSW Food Authority suggested the penalty notice amounts could reflect the same ratio as the maximum court imposed fines for corporations and individuals.²¹² The DECCW considered that although a general principle should be established that corporations pay higher penalty amounts than individuals for the same offence, no prescriptive guidelines should be set, to allow issuing agencies flexibility in dealing with the many different types of offences on a case-by-case basis.²¹³

Commission's conclusions

- 4.120 After considering stakeholder responses, we agree that a general principle should be established that corporations and statutory authorities pay higher penalty amounts than individuals for the same offence. Several reasons underline our position. Corporations generally have greater financial capacity to pay higher penalties than individuals. Offences committed in the course of commercial operations often make the offending conduct objectively more serious than individual misconduct, such as where industries pollute the environment in the course of their business. Higher penalties for corporations provide a stronger deterrent from any temptation to breach regulations for greater commercial benefits. Finally, corporations and statutory authorities should set a high standard to the wider community through ethical governance, including compliance with the law.
- 4.121 In the absence of feedback it is difficult to prescribe a guideline that would set the level of such higher penalty. Corporations are not all alike. The penalties that are appropriate to an offence generally or frequently committed by small businesses may be quite different to the penalty that is appropriate for a large national (or international) corporation. Where there are differential penalties imposed for court ordered fines, these differentials may provide valuable guidance about appropriate differentials for penalty notices. However, as we described above, this is not always the case. Where no assistance is to be found from fines differentials, other guidelines proposed in this chapter, such as the need to take into account the level of harm and the need for deterrence, together with the expertise of the regulating agency, will assist in setting an appropriate penalty level for corporations.

209. NSW Food Authority, *Submission PN9*, 5; NSW Land and Property Management Authority, *Submission PN17*, 6.

210. Holroyd City Council, *Submission PN10*, 9.

211. NSW Maritime, *Submission PN2*, 7.

212. The NSW Food Authority, *Submission PN9*, 6.

213. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 6.

Recommendation 4.7

The proposed guidelines on penalty notice amounts should provide that, where penalty notice offences can be committed by both natural and corporate persons, higher penalty notice amounts should apply to corporations.

Any other principles?

- 4.122 In CP 10 we sought submissions on whether any more principles, beyond those already raised in this chapter, should be adopted for the purpose of setting penalty notice amounts.²¹⁴
- 4.123 Most submissions that responded to this question did not believe any further issues should be raised as potential general principles in relation to penalty notice amounts.²¹⁵ However, the issue of vulnerable people was raised.

Vulnerable people

- 4.124 As was the case in relation to many of the questions asked for the purposes of this inquiry, several submissions and consultations raised the issue of vulnerable people on limited incomes as an important consideration in the setting of penalty notice amounts.²¹⁶ They argued that some types of offences clearly fall into 'offences of poverty' compared with 'middle class' offences. Examples of offences of poverty and disadvantage given by stakeholders included railway-ticketing offences, offensive language, disobeying a police direction. It was argued that high penalty amounts are unlikely to deter these offences and will worsen the financial hardship for these groups.²¹⁷
- 4.125 The Law Society felt that any principles dealing with setting penalty notice amounts should consider the demographics of people who are most likely to be issued with penalty notices.²¹⁸ The HPLS also had a similar suggestion. When an agency determines a penalty notice amount, it should not just consider the relationship between the penalty notice amount and the gravity of the offence, but should also consider the relationship between the penalty notice amount and penalty notice recipient's income.²¹⁹
- 4.126 Shopfront also argued that a penalty must be proportional to the circumstances of the offence, the penalty notice recipient, and to the capacity of a vulnerable recipient to pay the penalty amount.²²⁰ It reasoned that if the penalty notice amount

214. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 4.9.

215. NSW Maritime, *Submission PN2*, 9; NSW Food Authority, *Submission PN9*, 6; Legal Aid NSW, *Submission PN11*, 9.

216. The Law Society of NSW, *Submission PN31*, 3-6; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 13-14; Homeless Persons' Legal Service, *Submission PN42*, 3-4; The Shopfront Youth Legal Centre, *Submission PN33*, 6, 8.

217. The Shopfront Youth Legal Centre, *Submission PN33*, 6, 8.

218. The Law Society of NSW, *Submission PN31*, 6.

219. The Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 13-14.

220. The Shopfront Youth Legal Centre, *Submission PN33*, 6, 8.

is too great (or too low) for that individual person, the punishment and deterrence effect is virtually meaningless. Consequently, the demographics of people who receive penalty notices for certain types of offences should play a role in setting penalty notice amounts.²²¹ Thus, it concluded that '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'.²²²

Commission's conclusions

- 4.127 The difficulty with these arguments is that people who commit offences are not homogenous. Having reviewed the list of penalty notice offences, we have not been able to find offences that are only committed by vulnerable people. If a penalty notice amount is set by reference to the situation of vulnerable people, those who are not vulnerable will also receive a lower penalty. This may be acceptable if the offence is committed mostly by vulnerable people, we may decide that the benefit of appropriate penalties for the majority of vulnerable penalty notice recipients outweighs the detriment of a light penalty for more fortunate recipients. There are certain offences, for example those involving camping or residing in parks, which will be most often committed by people who are homeless even though they may also be committed by others from time to time.
- 4.128 However in many cases a lower penalty may be undesirable because it will have an impact on deterrence. Travelling on a train without a ticket was raised repeatedly in consultations as an offence committed by vulnerable people. However, if penalty amounts for this offence were set at a low level because this is an offence of poverty, middle-class commuters who choose not to buy a railway ticket (because, for example, they think they can get away with offending), will also receive a low penalty. The deterrent effect for commuters generally would be reduced.
- 4.129 We accept that the impact of penalty notices on vulnerable people is an important issue. The penalty notice system should certainly take into account the situation of vulnerable people at the stage of issuing and enforcing penalty notices. These issues are dealt with extensively in Part Three and especially Part Four of this report. At the stage of setting a penalty notice amount, the impact of the offence on vulnerable people will often not be relevant, or be determinative, for the reasons given above. Nevertheless it is our view that it is a factor that should be weighed in the balance together with other relevant matters for some offences.

Recommendation 4.8

The proposed guidelines on penalty notice amounts should provide that the impact of the penalty amount on vulnerable people should be taken into consideration.

221. The Shopfront Youth Legal Centre, *Submission PN33*, 8.

222. The Shopfront Youth Legal Centre, *Submission PN33*, 8.

Part Three

**Issuing, reviewing
and enforcing
penalty notices**

5. Official cautions

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Cautions – aims and objectives

- 5.1 In its interim report on fines and penalty notices, the Sentencing Council noted the absence of a legislative provision clarifying the power of issuing agencies to make use of a caution or warning in place of a penalty notice.¹ A power to caution was introduced in the 2008 amendments to the *Fines Act 1996* (NSW) (*Fines Act*).² In this chapter our focus is on cautions administered under section 19A of the *Fines Act*. However, in this context we also mention warnings.
- 5.2 By ‘warning’ we mean an informal verbal message delivered by an officer authorised to issue penalty notices (an issuing officer). For example a RailCorp Transit Officer may ask a passenger on a train to take his or her feet off the seat. By a ‘caution’ we mean a caution issued under s 19A of the *Fines Act*. In practice it may be difficult to distinguish between warnings and cautions because cautions under s 19A are issued in many different forms. Sometimes what an issuing agency calls a caution may consist of on-the-spot verbal education and a requirement to

1. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) x.

2. See *Fines Act 1996* (NSW) s 19A. The relevant provisions are discussed below.

stop the conduct. Other cautions are provided in writing. The form a caution takes depends very much on context and the practice of the issuing agency.³

5.3 The need for a power to caution arises from a number of issues highlighted in Chapter 1 of this report, including:

- preventing vulnerable people from becoming entangled in the penalty notice system
- using persuasion and education as a first resort in appropriate cases
- avoiding net widening, and
- maintaining respect for the justice system through proportionate and fair responses to regulatory offences.

5.4 The receipt of a caution, rather than a penalty notice, may be of particular importance for some people. While financial sanctions are 'generally regarded as one of the more flexible, humane and less costly of the unsupervised sanctions available'⁴ for some people, penalty notices may not be a benign or low-level regulatory response. Reports by both the Law and Justice Foundation and the Sentencing Council indicate that socio-economic disadvantage is closely associated with a range of legal, credit and debt problems.⁵

5.5 Penalty notices have the potential to 'drive the defaulter into a debt trap, into secondary offending, and into a general deterioration of their prospects for rehabilitation'.⁶ Moreover, debt arising from unpaid penalty notices can have long term social and economic implications as it 'reduces access to housing, credit, and employment; it also limits possibilities for improving one's educational or occupational situation'.⁷ Issues of literacy and numeracy, and other legal, social and financial problems, mean that some people are poorly placed or are unlikely to contest their penalty notices.⁸ Enforcement action, such as driver licence

3. For an example of other cautioning practice, see *Criminal Justice Act 2003* (UK) pt 3, which authorises the use of 'conditional cautions'. The conditions attached to such cautions have the object of rehabilitation or reparation. See also the *Young Offenders Act 1997* (NSW) pts 3, 4.

4. A Freiberg and S Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (1999) 159.

5. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008); C Coumarelos, Z Wei and A Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation of New South Wales (2006). The Sentencing Council reported that 'members of disadvantaged groups are especially susceptible to incurring fines and even more so in the case of "on the spot" fines or penalty notices imposed by transit officers and police', see NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.52] and generally [2.50] – [2.108].

6. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.122].

7. K Beckett and A Harris, 'On Cash Conviction: Monetary Sanctions as Misguided Policy' (2011) 10(3) *Criminology and Public Policy* 509, 517.

8. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.51]; S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 4-6.

suspension, may result in secondary offending by this group and a ‘slippery slope’ ultimately resulting in imprisonment.⁹

- 5.6 In its submission to this inquiry the Law Society of NSW (Law Society) raised questions about the discriminatory effect of penalty notice offences and whether they may sometimes be used to ‘police abnormality, poverty and social disadvantage’¹⁰ and contribute to social exclusion.¹¹ Legal Aid NSW (Legal Aid) noted the same dynamics¹² and Redfern Legal Centre referred to the ‘marginalising, and in some cases criminalising, effect of debt on people’.¹³
- 5.7 A caution avoids the issue of a penalty and responds to the offending behaviour through education and persuasion. Responsive regulation, discussed in Chapter 1, supports early identification of those cases where education and/or persuasion, rather than punishment, would be a more effective response. The use of both warnings and cautions allows issuing officers to encourage compliance by using the least restrictive measure called for in the circumstances of a particular case. A warning or a caution may be particularly appropriate, for example, where the offence is at the very minor end of a scale of offending, or where the person has a vulnerability, such as homelessness or mental illness, that impairs the ability to comply with or understand the relevant regulations or legislation.
- 5.8 Warnings and cautions may also help to alleviate concerns about net widening. For the issuing officer, a penalty notice may be a quick and simple response to offending behaviour. This may encourage the issuing of a penalty notice even in cases of doubt or when another course would be wiser, because the offence is seen as relatively minor and the likelihood of later scrutiny by a court is small. Cautions provide another option for issuing officers. If used appropriately, cautions may prevent penalty notices from being issued in a way that draws people inappropriately into the criminal justice system.
- 5.9 Inflexible or disproportionate application of financial sanctions can also lead to a loss of public confidence in the fairness of the penalty notice system.¹⁴ As Fox explains:

the ease of administration has undermined the willingness of police and other law enforcers to exercise their discretion to issue verbal or written warnings instead of a ticket. Penalising more and more citizens each year may not be the best means of securing the consensus of the community in relation to observing codes of conduct aimed at maximising general safety and convenience ...¹⁵

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9. Homeless Persons’ Legal Service and Public Interest Advocacy Centre *Not Such a Fine Thing! Options for the Reform of the Management of Fines Matters in NSW* (2006) 19-22; Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [9.60] – [9.79].
10. The Law Society of NSW, *Submission PN31*, 4.
11. The Law Society of NSW, *Submission PN31*, 14.
12. Legal Aid NSW, *Submission PN11*, 1.
13. Redfern Legal Centre, *Submission PN26*, 10.
14. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) [6.11.10]-[6.11.12].
15. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) [6.11.8].

There is also a perception that some penalty notices are used simply as a revenue raising exercise.¹⁶ This perception affects the community's respect for the penalty notice system. Appropriate use of warnings and cautions may assist in changing perceptions and thus increasing respect for the penalty notice system.

Legal framework

5.10 The Sentencing Council considered that the penalty notice system would be

enhanced by the development of guidelines and a model code of conduct for issuing officers, which would permit greater discretion in, and guidance for, the use of a warning or a caution in those cases where that would be more appropriate than the issue of a penalty notice.¹⁷

In 2008, provisions were introduced into the *Fines Act* giving issuing officers discretion to give an official caution instead of issuing a penalty notice, in appropriate cases. Those provisions also authorised cautions guidelines to be issued by the Attorney General.

Fines Act

5.11 Section 19A of the *Fines Act* provides:

- (1) An appropriate officer may give a person an official caution instead of issuing a penalty notice if the appropriate officer believes:
 - (a) on reasonable grounds that the person has committed an offence under a statutory provision for which a penalty notice may be issued (a penalty notice offence), and
 - (b) that it is appropriate to give an official caution in the circumstances.

5.12 Section 19A(2) provides that, in making a decision to give an official caution, an issuing officer must have regard to the official cautions guidelines issued by the Attorney General (Attorney General's Caution Guidelines).¹⁸ However, officers of the NSW Police Force (NSW Police) are specifically exempted from this requirement. Section 19(3) allows agencies authorised to issue penalty notices (issuing agencies) to issue their own guidelines 'that are consistent with the guidelines issued by the Attorney General'. The section requires that the Attorney General's Caution Guidelines, but not agency specific guidelines, be made public in the Government Gazette and on the website of the State Debt Recovery Office (SDRO).¹⁹

16. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) [6.11.2], [6.11.10], [8.3.1], [8.5.1], [8.5.3], [9.3.1], [10.2.4].

17. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.123].

18. NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996*.

19. We would take the view, however, that such guidelines would be policy documents that are subject to a proactive requirement to publish under the *Government Information (Public Access) Act 2009* (NSW); see Chapter 2 [2.68], [2.74].

- 5.13 These provisions were introduced with reforms to the *Fines Act* designed, amongst other things, to ‘divert vulnerable groups out of the fine and penalty notice system and provide them with meaningful and effective non-monetary sanctions’.²⁰ They commenced in March 2010. Prior to the adoption of these provisions, some issuing agencies had established the practice of allowing their issuing officers to give warnings or cautions.²¹ Part of the reason for introducing the cautions provisions was ‘to endorse and formalise this practice’.²²

Guidelines

- 5.14 The Attorney General’s Caution Guidelines were issued in March 2010 and were developed in consultation with a working group of stakeholders.²³
- 5.15 Consistent with the *Fines Act*, the Attorney General’s Caution Guidelines provide that a caution may be given if:
- (a) the issuing officer has reasonable grounds to believe that an offence has been committed
 - (b) the offence is one for which a penalty notice may be issued, and
 - (c) the issuing officer believes it is appropriate to give a caution in the circumstances.²⁴
- 5.16 The matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice are as follows:
- (a) The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public
 - (b) The officer has reasonable grounds to believe that the person has a mental illness or intellectual disability
 - (c) The officer has reasonable grounds to believe that the person is homeless
 - (d) The officer has reasonable grounds to believe that the person is under 18
 - (e) The officer has reasonable grounds to believe that the person has a special infirmity or is in very poor physical health

20. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11,968 (J Hatzistergos).

21. Among these agencies were the NSW Food Authority and the NSW Office of Fair Trading: See NSW Food Authority, *Compliance & Enforcement Policy* (2006) [5.1.2]; NSW Office of Fair Trading, *Formal Caution Manual* (2003).

22. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11,968 (J Hatzistergos).

23. Stakeholders included the NSW Department of Justice and Attorney General (now NSW Department of Attorney General and Justice), State Debt Recovery Office, Road and Transport Authority (now Roads and Maritime Services), Department of Local Government (now Division of Local Government, Department of Premier and Cabinet), NSW Police Force, RailCorp, Legal Aid NSW, the Australian Institute of Local Government Rangers and the Homeless Persons’ Legal Service: see NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 21.

24. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [4.1].

- (f) The offending behaviour is at the lower end of the scale of seriousness for that offence or is minor in nature. For example, where there are signs prohibiting eating and drinking in a train carriage, and a person is observed eating a meal in a sensible and tidy manner
 - (g) The person claims on reasonable grounds that they did not knowingly or deliberately commit the offence
 - (h) The person admits the offending behaviour and shows remorse; the person is cooperative and/or complies with a request to stop the offending conduct. For example, a person stops in a no parking zone for longer than the required time but does not leave the vehicle unattended and agrees to move the vehicle when directed
 - (i) There are other reasonable grounds for giving a caution in all the circumstances of the case. For example, the offence was committed because of a medical or other serious emergency, or the person is a visitor from interstate or overseas and was not aware that their conduct constituted an offence.²⁵
- 5.17 The Attorney General's Caution Guidelines provide that the presence of one or more of these factors does not mean that the officer is obliged to issue an official caution. All the circumstances of the case should be taken into account to determine whether a caution is an appropriate and reasonable response to the offence.²⁶
- 5.18 Agencies may make their own caution guidelines consistent with those issued by the Attorney General. Many have done so, tailoring the Attorney General's Caution Guidelines to their own operational context.
- 5.19 Agency specific guidelines have advantages. As the NSW Department of Planning²⁷ submitted, tailored and detailed guidelines allow the agency to respond to the context of offending.²⁸ For example, some agencies issue many penalty notices to individuals in face-to-face encounters and a caution is likely to take the form of verbal information about the offence and a caution not to repeat it. Other agencies are more likely to deal more often with businesses and may generally use written methods of issuing a caution more frequently. Agency-specific guidelines have the potential to support the use of cautions by providing a resource for issuing officers tailored to the nature and context of their duties.

Evaluating the cautions provisions

- 5.20 The regulatory framework of the *Fines Act* and Attorney General's Caution Guidelines is generally accepted as effective and useful. In its evaluation of the 2008 amendments to the *Fines Act* (the AGJ evaluation), the Department of Attorney General and Justice reported that 60 out of 62 surveyed respondents

25. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [4.7].

26. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [4.8].

27. Now NSW Department of Planning and Infrastructure.

28. NSW Department of Planning, *Submission PN7*, 6.

(96.8%) found the Attorney General's Caution Guidelines helpful.²⁹ The SDRO submitted that the

discretionary use of 'cautions' as opposed to the issue of a penalty notice is a positive thing and anecdotal feedback suggests that this has an immediate impact on changing behaviour.³⁰

- 5.21 Submissions to this reference were also generally positive in their assessment of the Attorney General's Caution Guidelines, indicating that they are a 'step in the right direction', 'a welcome measure' and 'a good step forward'.³¹ Respondents to a survey carried out for the AGJ evaluation stated that they 'provide a solid base for adjudication policy', 'reinforce officer discretion' and are 'helpful in the fact that they are independent'.³² The AGJ evaluation noted that the reforms 'appear to have contributed to the objective of ensuring that officers exercise discretion and issue cautions instead of penalty notices where appropriate'.³³
- 5.22 Three issues relating to the Attorney General's Caution Guidelines that were raised with this inquiry, and with the AGJ evaluation, are:
- compliance with the guidelines
 - identifying and cautioning vulnerable people, and
 - the transparency of agency guidelines.

Compliance

- 5.23 First, compliance with the guidelines appears to be uneven. Eight issuing agencies reported to the AGJ evaluation that they do not issue cautions at all, while four reported they do not have regard to the Attorney General's Caution Guidelines.³⁴ These agencies are in a minority (15.6% of responding agencies) and there appears to be a particular problem of compliance for some local councils.³⁵

29. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 22.

30. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 22.

31. NSW Food Authority, *Submission PN9*, 6; Holroyd City Council, *Submission PN10*, 11; Legal Aid NSW, *Submission PN11*, 9; NSW Land and Property Management Authority, *Submission PN17*, 8; NSW Ombudsman, *Submission PN25*, 3; Redfern Legal Centre, *Submission PN26*, 2; Illawarra Legal Centre, *Submission PN27*, 7; The Law Society of NSW, *Submission PN31*, 6; The Shopfront Youth Legal Centre, *Submission PN33*, 89; Youth Justice Coalition, *Submission PN34*, 7; NSW Office of State Revenue, State Debt Recovery, *Submission PN41*, 6-7.

32. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 90.

33. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 22.

34. NSW Department of Attorney General and Justice *A Fairer Fine System for Disadvantaged People* (2011) 81.

35. Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011. The AGJ evaluation indicated that six of the eight respondents who indicated that they do not issue cautions were local councils (Redfern Waterloo Authority, Camden Council, Cobar Shire Council, Gwydir Shire Council, Tamworth Regional Council, Nambucca Shire Council) while two of the three who indicated that they do not have regard to the Attorney General's Caution Guidelines were local councils (Singleton Council and an anonymous council): see NSW Attorney General

- 5.24 Submissions and consultations demonstrated that some issuing agencies have clear and carefully considered policies relating to cautions, which are readily available on their websites. These policies are supported by training materials and protocols for issuing officers. However, stakeholders also reported their strong impression that other agencies are far less effective in their compliance with the provisions of s 19A and the Attorney General's Caution Guidelines. In this respect there were repeated complaints from stakeholders concerning penalty notices issued in relation to offences on railways.
- 5.25 Submissions and consultations also argued that the continued issuing of penalty notices to vulnerable people demonstrated that not all agencies are complying with the letter or spirit of the Attorney General's Caution Guidelines.

Identifying and cautioning vulnerable people

- 5.26 The Attorney General's Caution Guidelines place emphasis on the use of cautions in relation to vulnerable people. In Part Four of this report we provide evidence of the disproportionate issuing of penalty notices to vulnerable people and the impacts of penalty notice debt on them. Effective use of cautioning is of particular importance for these groups. Penalty notices may create a debt trap, produce secondary offending, and even create a 'slippery slope' that may ultimately result in imprisonment.³⁶ Legal Aid made the following comments about penalty notice debt:

For people already experiencing great disadvantage, the consequences of these accumulated debts can be far-reaching and can have a detrimental effect far exceeding their intended purpose. For example, such debt can impact upon the security of a person's housing situation, the person's ability to service other debt, and the person's capacity to maintain employment and stable family relationships. In some cases, accumulated debt can lead to further criminal offending and even imprisonment.³⁷

Redfern Legal Centre noted the same dynamics.³⁸

- 5.27 One specific problem identified in this regard was a reluctance to issue repeated cautions to vulnerable people. Shopfront Youth Legal Centre (Shopfront) said that issuing officers are particularly reluctant to issue repeated cautions, even where, due to that person's particular vulnerability, it may be appropriate to do so.³⁹ Currently, the Attorney General's Caution Guidelines state that:

In deciding whether to issue a caution, it may be relevant to consider whether the person has been issued with a caution for the same or similar offence

and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 22. See also Youth Justice Coalition, *Submission PN34*, 7.

36. Homeless Persons' Legal Service and Public Interest Advocacy Centre *Not Such a Fine Thing! Options for the Reform of the Management of Fines Matters in NSW* (2006) 19-22; Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [9.60] – [9.79].

37. Legal Aid NSW, *Submission PN11*, 1.

38. Redfern Legal Centre, *Submission PN26*, 10.

39. The Shopfront Youth Legal Centre, *Submission PN33*, 19.

before. However, the fact that someone has been issued with a caution previously does not mean that they cannot be given another caution.⁴⁰

- 5.28 Shopfront submitted that, despite this provision, ‘issuing officers will generally be reluctant to continue issuing cautions to the same offender’⁴¹ and that many vulnerable people, particularly those with cognitive or mental health impairments, will continue to incur penalties. This is an unfortunate interpretation as, in many cases, it is precisely the ‘repeat offenders’ that the Attorney General’s Caution Guidelines are intended to protect. Some people who lack capacity, particularly those with mental health and cognitive impairment, may not fully understand that certain conduct constitutes offending behaviour. Similarly, other vulnerable groups, such as homeless people, may not be able to avoid or prevent the behaviour constituting the offence.
- 5.29 Stakeholders also indicated that a difficulty in relation to issuing cautions to vulnerable people is one of identification. Often a person’s vulnerability or disadvantage will not be obvious in a brief face-to-face encounter. We were told in consultation that many vulnerable people wish to disguise their disadvantage and may go to great lengths to do so. People with mental health and cognitive impairments were described as wearing a ‘cloak of competence’ and it was argued that, in many cases, there will be little or no external indication of a person’s vulnerability.⁴² In this context, it can be very difficult for an issuing officer to be certain that the offender is a person for whom a caution, rather than a penalty notice, would be an appropriate response.

Transparency

- 5.30 The caution guidelines used by some departments are easy to find on departmental websites or through the use of internet search engines. However, other agencies do not appear to make their guidelines publicly available. This may create problems if an individual, with or without legal advice and assistance, wishes to apply for internal review of the issue of a penalty notice, arguing that a caution should be substituted.⁴³ There is no means of checking whether or not such guidelines are consistent with the Attorney General’s Caution Guidelines or have been complied with in any individual case. In consultations, stakeholders expressed concerns that some agency guidelines are not consistent with the Attorney General’s guidelines, despite the requirements of the *Fines Act*.⁴⁴ The same concern was also expressed to the AGJ evaluation.⁴⁵

40. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [4.10].

41. The Shopfront Youth Legal Centre, *Submission PN33*, 19.

42. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011.

43. See Chapter 7.

44. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*,

Options for reform

5.31 In consultations for this reference stakeholders made a number of suggestions to improve the use of cautions in accordance with s 19A and the Attorney General's Cautions Guidelines, including to:

- (1) increase the legal obligations of issuing officers in relation to the use of cautions
- (2) increase training for issuing officers in the appropriate use of cautions, especially in relation to vulnerable people
- (3) improve the transparency of agency-specific cautions guidelines, and
- (4) monitor the use of cautions.

Each of these suggestions is examined in turn below.

(1) Strengthening legal obligations

5.32 Several suggestions were made to this inquiry to amend the *Fines Act* or Fines Regulations to strengthen the legal obligations on issuing agencies in s19A of the *Fines Act* and the Attorney General's Guidelines:

▪ **Include the Attorney General's Cautions Guidelines in the *Fines Regulation 2010 (NSW)***

It was argued that agencies may be more assiduous in issuing cautions, and in ensuring that their own guidelines are consistent with them, if required to do so by regulation.

▪ **Impose stronger obligations on issuing officers under the *Fines Act***

Section 19A(2) of the *Fines Act* presently provides that an officer '*must have regard to the applicable guidelines*'.⁴⁶ It would be possible, for example, to make this obligation more onerous by providing that the officer *must comply* with the applicable guidelines.⁴⁷

▪ **Amend s 19A of the *Fines Act***

Some stakeholders were in favour of amending the *Fines Act* to require issuing officers to consider whether an official caution is appropriate in every case when a penalty notice offence is committed.⁴⁸

Sydney NSW, 14 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011; Transport Roundtable Meeting, *Consultation PN23*, Sydney NSW, 18 March 2011; Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011.

45. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 24.

46. Emphasis added.

47. Legal Aid NSW, *Submission PN11*, 9; Redfern Legal Centre, *Submission PN26*, 2; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, Youth Justice Coalition, *Submission PN34*, 7-8.

48. Legal Aid NSW, *Submission PN11*, 9; Redfern Legal Centre, *Submission PN26*, 2; Illawarra Legal Centre, *Submission PN27*, 7; The Law Society of NSW, *Submission PN31*, 3; The Shopfront Youth Legal Centre, *Submission PN33*, 2; Youth Justice Coalition, *Submission PN34*, 7-8.

- 5.33 Legal Aid submitted that the attorney General's Caution Guidelines grant too much discretion to issuing officers and that the lack of an explicit requirement for officers to employ the guidelines leads to inconsistency in their application.⁴⁹ Redfern Legal Centre recommended that there should be a legal obligation on issuing agencies to comply with the statutory provisions and Attorney General's Caution Guidelines.⁵⁰
- 5.34 The Law Society expressed the view that, when dealing with young people, penalty notices should be used as a measure of last resort after cautions and warnings.⁵¹ Both Legal Aid and Illawarra Legal Centre agreed, submitting that the Attorney General's Caution Guidelines should require that issuing officers first exhaust other options such as cautions and warnings before issuing a penalty notice, especially for less serious offences and where the recipient is a vulnerable person.⁵² The Youth Justice Coalition suggested that this requirement should be contained in the *Fines Act*, which currently provides that an officer *may* issue a caution.⁵³ The Homeless Persons' Legal Service (HPLS) submitted that the *Fines Act* ought to be amended to provide for the mandatory issue of cautions where the issuing officer has reasonable grounds to believe that a person is homeless, or has a mental or cognitive impairment⁵⁴ and that a liberal approach to issuing official cautions should be adopted. However, the SDRO asserted that a mandatory requirement to consider a caution 'should not be so definitive as to override or negate [the] discretion available to the enforcement officer at the time of detecting an offence'.⁵⁵
- 5.35 In relation to a requirement to consider a caution before issuing a penalty notice, the AGJ evaluation concluded that, although the approach may have merit, it would be premature to recommend change at this time.⁵⁶ The evaluation pointed out that the legislative cautioning scheme has been in operation for less than two years, and concluded other options should be considered before further changes to the *Fines Act* are made.⁵⁷

Commission's conclusions

- 5.36 As the AGJ evaluation pointed out, the cautions regime in s 19A and the Attorney General's Caution Guidelines are relatively new. They have been in place for just over two years and have only very recently been evaluated. Issuing agencies need time to respond to that evaluation and to revise existing practices where necessary. While there is some evidence that a minority of agencies are not complying with the legislation and Attorney General's Caution Guidelines, the majority appear to comply and to have expressed support for the present regulatory framework.

49. Legal Aid NSW, *Submission PN11*, 9.

50. Redfern Legal Centre, *Submission PN26*, 2.

51. The Law Society of NSW, *Submission PN31*, 9.

52. Legal Aid NSW, *Submission PN11*, 9; Illawarra Legal Centre, *Submission PN27*, 7.

53. *Fines Act 1996* (NSW) s 19A(1) Youth Justice Coalition, *Submission PN34*, 7-8.

54. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 16-17, Homeless Persons' Legal Service, *Submission PN42*, 9.

55. NSW Office of State Revenue, State Debt Recovery, *Submission PN41*, 7.

56. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 25.

57. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Table 1.

- 5.37 However, amending s 19A to require issuing officers to consider whether an official caution is appropriate in every case where they propose to issue a penalty notice would make the statute reflect good practice for issuing officers. A requirement to consider a caution in every case does not limit the discretion of issuing officers. On consideration, the issuing officer may decide that a penalty notice is the appropriate course of action. The proposed requirement is that a caution be considered, not that a caution be issued. This exercise of discretion is one that should be routine for issuing officers, given the provision of s 19A and the relevant caution guidelines.
- 5.38 Accordingly we consider that s19A should be amended to provide that, in every case where a penalty notice offence is committed, the appropriate officer must consider whether it is appropriate to issue an official caution instead of a penalty notice.
- 5.39 We also note that the issuing of penalty notices, and the issuing of cautions as an alternative, gives rise to opportunities for corrupt practices. Issuing agencies therefore need effective audit practices to guard against such problems and to detect them when they do arise.

Recommendation 5.1

The *Fines Act 1996* (NSW) s 19A should be amended to provide that, in every case where a penalty notice offence is committed, the appropriate officer must consider whether it is appropriate to issue an official caution instead of a penalty notice.

(2) Training issuing officers, especially in relation to vulnerable people

- 5.40 One of the most frequent submissions we received in relation to official cautions concerned the need for increased training of issuing officers about their obligations under s 19A and the Attorney General's Caution Guidelines.⁵⁸ The AGJ evaluation also expressed the view that such training is necessary to ensure proper implementation of s 19A and the Attorney General's Guidelines.⁵⁹
- 5.41 Nineteen out of 62 issuing agencies reported to the AGJ evaluation that they have not delivered such training to their issuing officers.⁶⁰ Representing nearly 30% of respondents, this is a significant shortfall. At the most basic level, some issuing agencies appear to need to alert their officers to their legal obligations under the *Fines Act* and to the existence of the guidelines. The NSW Department of Local Government brought to our attention the problem of inconsistent officer training

58. Legal Aid NSW, *Submission PN11*, 10, NSW Land and Property Management Authority, *Submission PN17*, 8; NSW Department of Local Government, *Submission PN23*, 2; Redfern Legal Centre, *Submission PN26*, 2, Illawarra Legal Centre, *Submission PN27*, 7, The Law Society of NSW, *Submission PN31*, 6.

59. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 23.

60. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 82.

programs by different councils and suggested the development of standardised training for issuing officers.⁶¹

- 5.42 Submissions argued that there is a particular need to heighten issuing officers' awareness of the impact of penalty notices on vulnerable people and of the application of the guidelines to vulnerable people.⁶² A wide range of vulnerable groups was mentioned. The Youth Justice Coalition submitted that:

Proper training on working with young people, including raising awareness of the specific issues of young people from diverse cultural backgrounds and those from socially disadvantaged backgrounds, will ensure that issuing officers are able to adopt appropriate measures when dealing with young people.⁶³

Training was also suggested in relation to homeless people, people from non-English speaking backgrounds and people with mental health and cognitive impairments.⁶⁴ The Law Society supported, amongst other things, training about racial discrimination, poverty and social disadvantage.⁶⁵

- 5.43 Submissions supported training to assist issuing officers to deal with the challenges of identifying such vulnerable individuals.⁶⁶ We were told that rail transit officers, for example, often find it difficult to determine whether a person has a mental illness or intellectual disability because the symptoms of these conditions may not be obvious, particularly during a brief interaction, and the individual may wish to conceal his or her impairment.⁶⁷ RailCorp has sought assistance from HPLS and the Public Interest Advocacy Centre (PIAC) with regards to its training program.⁶⁸ Legal Aid submitted that training by psychiatrists, psychologists and other disability and mental health workers would further support issuing officers.⁶⁹
- 5.44 The Law Society submitted that training sessions should educate issuing officers about handling conflict, including different communication and de-escalation techniques, should cover how to treat vulnerable people with respect and should

61. NSW Department of Local Government, *Submission PN23*, 2.

62. See NSW Food Authority, *Submission PN9*, 2; Legal Aid NSW, *Submission PN11*, 10; NSW Land and Property Management Authority, *Submission PN17*, 14; NSW Department of Local Government, *Submission PN23*, 2; Redfern Legal Centre, *Submission PN26*, 2; The Law Society of NSW, *Submission PN31*, 3, 6; The Shopfront Youth Legal Centre, *Submission PN33*, 2; Youth Justice Coalition, *Submission PN34*, 7, 8.

63. Youth Justice Coalition, *Submission PN34*, 7.

64. Youth Justice Coalition, *Submission PN34*, 7.

65. The Law Society of NSW, *Submission PN31*, 12.

66. Submissions also indicated that training should be ongoing, interactive, comprehensive and should incorporate vulnerable people as trainers wherever possible: NSW Land and Property Management Authority, *Submission PN17*, 3; Redfern Legal Centre, *Submission PN26*, 7, 9; Youth Justice Coalition, *Submission PN34*, 7.

67. Transport Roundtable Meeting, *Consultation PN23*, Sydney NSW, 18 March 2011.

68. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; People with Mental Health and Cognitive Impairment Roundtable meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Transport Roundtable Meeting, *Consultation PN23*, Sydney NSW, 18 March 2011.

69. Legal Aid NSW, *Submission PN45*, 27.

incorporate basic human rights principles such as dignity, non-discrimination, equality and social inclusion:

Training should not only look at how to best interact with people with mental illness and cognitive impairment, but also (a) to make law enforcement officers more aware and reflective of their policing of public space, disadvantaged areas and of people with disability and other disadvantaged and marginalised groups, and (b) the effect that issuing penalty notices can have on the life course and social exclusion of people with mental illness and cognitive impairment.⁷⁰

- 5.45 The AGJ evaluation made a number of relevant recommendations. First, it supported amendment of the Attorney General's Caution Guidelines to include a statement of principle reinforcing the need to limit the entanglement of vulnerable people in the penalty notice system.⁷¹ Such a statement would reinforce the purpose of the Attorney General's Caution Guidelines, provide a measure of context for issuing officers and assist them in determining when a caution is an appropriate response to offending behaviour. Second, the AGJ recommended that issuing agencies deliver comprehensive training to their issuing officers, with a particular focus on working with vulnerable people.⁷² Although the AGJ recommended that issuing agencies should be responsible for training their officers it considered that there may be a role for any central body having oversight of the penalty notice system to assist with training materials to promote consistency.⁷³

Commission's conclusions

- 5.46 We agree that training of issuing officers in the use of cautions is essential to the effective implementation of s 19A *Fines Act* and the Attorney General's Caution Guidelines. We note that many issuing agencies recognise this and have already implemented training programs. Nevertheless, there remains a need for some agencies to instigate or improve training.
- 5.47 In view of the data provided by the AGJ evaluation and the strength of the submissions on this point, we recommend that all agencies that issue penalty notices should ensure that issuing officers receive training that covers s 19A *Fines Act* and the Attorney General's Caution Guidelines (or the agency's own guidelines). Such training should also have a particular focus on working with vulnerable people.
- 5.48 Further, we support the recommendation of the AGJ evaluation that the Attorney General's Caution Guidelines should be amended to include a statement of principle reinforcing the need to limit the entanglement of vulnerable people in the penalty notice system.

70. The Law Society of NSW, *Submission PN31*, 14.

71. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 6.3(2).

72. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 6.3(6).

73. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 23.

- 5.49 Although some submissions suggested centralised training, we agree with the AGJ evaluation that this role should continue to be carried out by issuing agencies. They are best placed to understand the operational contexts in which officers carry out their duties and to adapt training to respond to their regulatory and jurisdictional needs.
- 5.50 Although training should be agency-specific, the fact that a substantial minority of agencies are not carrying out training persuades us that there is a role for the proposed Penalty Notice Oversight Agency (PNOA), discussed further in Chapter 18 of this report. We recommend that issuing agencies should report periodically to the PNOA on the systems they have in place to ensure that issuing officers are adequately trained to issue cautions and work with vulnerable people. The PNOA should work with agencies in an advisory capacity, making recommendations to improve agency practices where this is necessary. The PNOA should report periodically on whether agencies are meeting their training obligations in this area.
- 5.51 The AGJ evaluation suggested that the PNOA may wish to assist with training materials.⁷⁴ We see it as beyond the capacity of the PNOA to produce training materials. However, we support the use of the PNOA in disseminating examples of best practice or other material produced by agencies that will support improvements in training standards.

Recommendation 5.2

- (1) The Attorney General's Cautions Guidelines should be amended to include a statement of principle reinforcing the need to reduce the involvement of vulnerable people in the penalty notice system.
- (2) All agencies that issue penalty notices should ensure that issuing officers receive training that covers s 19A of the *Fines Act 1996* (NSW) and the Attorney General's Cautions Guidelines (or their own internal guidelines), and has a particular focus on working with vulnerable people.
- (3) All issuing agencies should report periodically to the proposed Penalty Notice Oversight Agency on the system they have in place to ensure that all issuing officers are adequately trained to issue cautions and work with vulnerable people.
- (4) The proposed Penalty Notice Oversight Agency should
 - (a) report periodically on whether or not issuing agencies are meeting their training obligations, and
 - (b) disseminate information to issuing agencies about best practice in cautions training.

74. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 23.

(3) Transparency of agency-specific cautions guidelines

- 5.52 Context is important to the cautions practice of issuing agencies. NSW Maritime,⁷⁵ for example, explained that it will generally issue a penalty notice only after a full investigation. Even then, it may use a lesser response such as a prevention notice or clean up notice, instead of a penalty notice. In some cases a more serious response, such as detention of a vessel or court prosecution, is warranted. Issuing officers follow established processes and guidelines to determine the appropriate and proportionate response in all the circumstances.⁷⁶
- 5.53 Similarly, the NSW Food Authority adopts a ‘graduated and proportionate’ approach, which allows for progressive escalation of enforcement measures. This commences with:
- milder measures, such as verbal warnings but then progressing to more severe measures (eg prosecution) should the milder measures not address the issue of concern. While advocating a graduated approach to the application of enforcement provisions, it is important to note that this policy does not prevent the Authority from applying more severe provisions in the first instance (eg prohibition order), should serious legislative breaches be encountered ... this policy should be interpreted as a framework for providing a graduated but proportionate response to legislative noncompliance.⁷⁷
- 5.54 According to the NSW Food Authority, rather than issuing an on-the-spot penalty notice, issuing officers are encouraged to first give further consideration to the facts and the elements of the offence. The issuing officer is encouraged to consult with a specially trained or senior enforcement officer and to only issue a penalty notice with the agency’s approval. This is seen as providing the appropriate check and balance for the complex and time consuming investigations comprising the NSW Food Authority’s supervisory activities.⁷⁸ Notably, the Authority’s *Compliance and Enforcement Policy* also expressly incorporates the *Fines Act* provisions, the Attorney General’s Caution Guidelines and the Attorney General’s Internal Review Guidelines.⁷⁹
- 5.55 Section 19A of the *Fines Act* and the Attorney General’s Caution Guidelines are not intended to impose a uniform method of operation across all bodies authorised to issue penalty notices. They have been developed in recognition of the need for context and leaving open the possibility of agency-specific caution guidelines, as long as these are consistent with the Attorney General’s Caution Guidelines.
- 5.56 The AGJ evaluation found that 12 agencies use their own guidelines to govern the issuing of cautions, while 32 use a combination of internal guidelines and the Attorney General’s Caution Guidelines.⁸⁰ Those agencies that rely on their own

75. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

76. NSW Maritime, *Compliance Framework* (2011).

77. NSW Food Authority *Compliance and Enforcement Policy*, 2.

78. NSW Food Authority *Compliance and Enforcement Policy*, 2.

79. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996*, NSW Food Authority *Compliance and Enforcement Policy*, 14-16.

80. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 23.

guidelines indicated that they were consistent with the Attorney General's Caution Guidelines. However, notwithstanding the requirements of the *Fines Act*, one local council reported to the AGJ its belief that, 'not all councils follow guidelines or even the legislation when it comes to enforcement'.⁸¹

- 5.57 Currently, there is no requirement that agencies make their internal guidelines available to the public. There are no monitoring processes in place to verify the consistency of internal policies with the Attorney General's Caution Guidelines. In light of the potential for variation, the AGJ evaluation recommended that all agency-specific caution guidelines be reviewed for consistency with the Attorney General's Caution Guidelines,⁸² this review to be conducted either by the AGJ or any agency set up to monitor the penalty notice system.

Commission's conclusions

- 5.58 We note that some issuing agencies already adhere to carefully adapted internal regimes governing the use of cautions. However, there is presently no specific requirement that such guidelines be made public. We recommend that s 19A(3) of the *Fines Act* be amended to provide that, where the relevant issuing agency issues guidelines that are consistent with the Attorney General's Caution Guidelines, the agency be required to publish those guidelines, including on the agency's website.
- 5.59 We also support the recommendation of the AGJ evaluation that issuing agencies' caution guidelines be reviewed for consistency with the Attorney General's Caution Guidelines, and this that task be carried out by the proposed PNOA.

Recommendation 5.3

- (1) Section 19A of the *Fines Act 1996* (NSW) should be amended to provide that, where an issuing agency issues its own guidelines, the agency should publish those guidelines, including on the agency's website.
- (2) The proposed Penalty Notice Oversight Agency should
 - (a) monitor agency-specific caution guidelines for consistency with the *Fines Act 1996* (NSW) and the Attorney General's Caution Guidelines, and
 - (b) make recommendations, and take other measures where necessary, to improve issuing agencies' caution guidelines.

81. See response of Tumut Shire Council, response to AGJ survey on cautions and internal review: NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 24; see also Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011.

82. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 6.3(4).

(4) Written cautions, records of cautions and monitoring the use of cautions

- 5.60 For cautions to operate as an effective diversionary measure for vulnerable people, and to be widely accepted as a legitimate primary response to low-level offending, it is important that issuing officers exercise their discretion to use them in appropriate cases. There is presently no method of monitoring the issue of cautions to ascertain if the provisions of s 19A and the Attorney General's Caution Guidelines are being used appropriately.
- 5.61 There was general agreement in submissions and consultations that agencies need to embed the use of cautions into their organisational culture. Recording and monitoring individual issuing officers' use of cautions were suggested as desirable ways to encourage greater compliance with the requirements of the cautions regime. This approach was recommended by the AGJ evaluation⁸³ and echoed in several submissions to this reference.⁸⁴
- 5.62 The Attorney General's Caution Guidelines presently provide that 'where practical, the fact that a caution has been given to a person should be recorded'⁸⁵ noting that the method used will vary from agency to agency.⁸⁶ However, where such records are kept, the Attorney General's Caution Guidelines provide that they should include, if practical, the following details:
- (a) the date of the caution
 - (b) the name of the officer who gave the caution
 - (c) the offence for which the caution was given
 - (d) the name and address of the person given the caution, and
 - (e) the date, place and approximate time that the offence was alleged to have been committed.⁸⁷

The Attorney General's Caution Guidelines do not include a requirement to issue the caution in writing. A written caution may have a range of benefits that improve the effectiveness of the process, and may assist in recording the issue of caution.

- 5.63 Some issuing agencies do issue cautions in writing. For example, the NSW Fair Trading⁸⁸ *Formal Caution Manual* requires that an official caution set out:

83. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 6.3(7).

84. See Legal Aid NSW, *Submission PN11*, 10; NSW Ombudsman, *Submission PN25*, 4, 9, Redfern Legal Centre; *Submission PN26*, 2; Illawarra Legal Centre, *Submission PN27*, 7; Youth Justice Coalition, *Submission PN34*, 8.

85. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [6.1].

86. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [6.2].

87. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [6.3].

88. Now NSW Fair Trading, Department of Finance and Services.

- a brief reference to the relevant law
 - the maximum penalty for the offence
 - any action taken by the person to correct the problem
 - a warning statement that NSW Fair Trading does not propose to take any further action in relation to the matter but the person concerned must take immediate steps to ensure compliance with the law, or that the person is warned that the agency will consider further action if no action is taken to correct the offending conduct
 - further information to assist the person comply with fair trading laws, and
 - a requirement of acknowledgment of receipt by the person concerned of the formal caution.⁸⁹
- 5.64 The NSW Food Authority *Compliance and Enforcement Policy* states that there is a greater likelihood that the recipient will perceive a written caution as more serious than a verbal warning which is prone to misinterpretation or which may be quickly forgotten.⁹⁰ In this way, formal notification has stronger deterrent potential.
- 5.65 Where a caution is sent to an individual or a business by mail it is not difficult to incorporate the matters set out in the Attorney General's Caution Guidelines and other relevant material. However, it is more difficult to do so where on-the-spot cautions or penalty notices are issued. For example, many city rangers working for local councils use electronic handheld devices that print out notices and provide for data to be uploaded to a computer system,⁹¹ and other agencies rely on SDRO standard 'penalty notice' booklets. These instruments and computer systems may not presently provide issuing officers with the option to issue a written caution instead of a penalty notice, and may not provide a system for recording the caution and any data associated with it.
- 5.66 This issue could probably be resolved without too much difficulty. As early as 1991, it was suggested that standard penalty notice forms used by agencies that issue face-to-face cautions be redesigned to incorporate a check-box allowing the issuing officer to use the notice for the purposes of issuing a formal caution.⁹² In this way, the same form can be used for two purposes and the issuing officer would be reminded of his or her caution power.⁹³ Some stakeholders to this reference supported this approach, proposing that a section be added in the penalty notice that states that an official caution be issued instead of a penalty notice and the

89. NSW Fair Trading, *Formal Caution Manual: Guideline and Sample Letters* (2003) 5–10.

90. See NSW Food Authority *Compliance and Enforcement Policy*, 11.

91. Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011.

92. S Ireland, 'Use of a Citation Notice by Police as an Alternative to Arrest and Charge' (Paper presented at the Seventh Annual Conference of the ANZ Society of Criminology, University of Melbourne, 2-4 November 1991).

93. S Ireland, 'Use of a Citation Notice by Police as an Alternative to Arrest and Charge' (Paper presented to the Seventh Annual Conference of the ANZ Society of Criminology, University of Melbourne, 2-4 November 1991).

reasons for doing so.⁹⁴ The appropriate method of issuing a written caution that would fit into each agency's processes would need to be carefully considered.

- 5.67 One issue that arises as an impediment to the issue of a caution instead of a penalty notice in a face-to-face situation is that bystanders expect action to be taken, and to be seen to be taken. This, it was said, creates pressure on issuing officers to issue a penalty notice instead of a caution, even in situations where the alleged offender may be entitled to a caution under the Attorney General's Caution Guidelines.⁹⁵ If cautions were issued in writing, in such cases a written caution could be issued, observers would see action taken, and there may also be some educational and deterrent effect on the offender.
- 5.68 Stakeholders also proposed that data should be collected on the circumstances of officers' decisions to issue a caution or penalty notice, the number of cautions and penalty notices issued by officers and the offences for which they were issued. Some submissions also promoted the need for monitoring to include demographic data, particularly regarding the issue of cautions to young people and other vulnerable groups.⁹⁶ This may raise some operational difficulties. It may also raise some concerns regarding privacy, though the NSW Ombudsman considered that these could be simply addressed, for example by 'removing individual identifying information before any examination or analysis of data takes place'.⁹⁷ It was also suggested that statistical records of the agency's activity should be compiled and included in its annual report.⁹⁸
- 5.69 Records of issue can be used to monitor and review cautioning practice and to detect and remedy any problems or deficiencies. Issuing officers are more likely to issue cautions when they see them as important to the agency and to the performance of their role. The Attorney General's Caution Guidelines are unlikely to be effective in the absence of appropriate leadership from issuing agencies, including policies, performance measures and other methods appropriate to the nature and culture of the issuing organisation.
- 5.70 The level of compliance with the requirement to keep records about caution issue is unclear. In practice, for many agencies that issue on-the-spot cautions, recording data about the number of cautions issued, to whom they are issued and the

94. Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable, *Consultation PN13*, Sydney NSW, 14 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW 23 February 2011; Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011; Parramatta City Council, *Consultation PN29*, Parramatta NSW, 28 April 2011.

95. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; People with Mental Health and Cognitive Impairments Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Vulnerable People Roundtable, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable, *Consultation PN13*, Sydney NSW, 14 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011; Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011.

96. NSW Ombudsman, *Submission PN25*, 4, Illawarra Legal Centre, *Submission PN27*, 7; Youth Justice Coalition, *Submission PN34*, 8.

97. NSW Ombudsman, *Submission PN25*, 4.

98. NSW Ombudsman, *Submission PN25*, 4.

offences for which they are issued may involve redesigning forms and changing procedures and computer software.

- 5.71 If it were to be collected and analysed, the data envisaged by the Attorney General's Caution Guidelines would give a reasonable picture of the level of use of cautions. This might allow an agency to identify trends or patterns in relation to individual issuing officers, or teams, and target training or spread best practice. It would not necessarily provide a clear picture of whether an agency is complying with the Attorney General's Caution Guidelines. Demographic data may be needed for this.
- 5.72 While some issuing agencies are clearly assiduous in following the Attorney General's Caution Guidelines and developing their own best practice, others would appear to have room to improve. The AGJ evaluation suggested that if this inquiry were to recommend an agency to oversee the penalty notice system, it could be given the responsibility to monitor agency compliance with the *Fines Act* and the Attorney General's Caution Guidelines.⁹⁹ The proposed PNOA could monitor the implementation by agencies of cautions guidelines, including monitoring the number of cautions issued across all agencies.¹⁰⁰

Commission's conclusions

- 5.73 We recommend that the Attorney General's Caution Guidelines be amended to require that all cautions be issued in written form. For some agencies this recommendation will present no difficulty, because it represents their current practice. Other agencies will need to amend their documentation or device software in order to comply.
- 5.74 We note that there are many situations where a verbal warning may be an appropriate primary response, providing an educational and deterrent effect. In the example given above, for a passenger who puts his or her feet on the seat of a train, a verbal warning will frequently be the appropriate response. A written caution constitutes a second level response, and a penalty notice a third level. In making this recommendation in favour of written cautions we do not intend in any way to discourage the giving of informal verbal warnings in appropriate cases.
- 5.75 Agencies will need to consider how best to generate written cautions in accordance with their current processes and systems. It may be a question of amending an existing form, or of producing a new clear caution form. Agencies should consider the form of the caution carefully to ensure that it conveys the information required.
- 5.76 The issue of cautions should be recorded and be available for analysis. In our view, the minimum information prescribed in the current Attorney General's Caution Guidelines should be collected by all agencies in respect of cautions (as it would be in respect of penalty notices). This information should be provided to the PNOA.

99. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 23.

100. Youth Justice Coalition, *Submission PN34*, 8.

- 5.77 We recommend that all issuing agencies should have policies and processes in place to ensure that cautions are issued in accordance with the Attorney General's Cautions Guidelines. Further, all issuing agencies should report periodically to the proposed PNOA concerning these policies and processes.
- 5.78 Measuring compliance with the Attorney General's Cautions Guidelines, and in particular measuring whether adequate consideration is being given to issuing cautions to vulnerable people, is a challenge. It may require collection of a range of demographic data that is difficult to collect. We consider that the PNOA should, in consultation with issuing agencies, give further consideration to the means by which compliance could be measured, and the practicality of collecting the necessary data.

Recommendation 5.4

- (1) Where a caution is issued, as opposed to an informal warning, it should be issued in writing.
- (2) Issuing agencies should be required to collect the minimum data currently recommended under the Attorney General's Cautions Guidelines in a form that can be analysed. That is the:
 - (a) date of the caution
 - (b) name of the officer who gave the caution
 - (c) offence for which the caution was given
 - (d) name and address of the person given the caution, and
 - (e) date, place and approximate time that the offence was alleged to have been committed.
- (3) Issuing agencies should report periodically to the proposed Penalty Notice Oversight Agency on the number of cautions and penalty notices, by offence, that it issues.
- (4) Issuing agencies should implement policies to ensure compliance with the relevant caution guidelines as well as measures to monitor compliance.
- (5) Issuing agencies should report periodically to the proposed Penalty Notice Oversight Agency on these policies and measures.
- (6) The proposed Penalty Notice Oversight Agency, in consultation with issuing agencies, should further develop methods to measure compliance with the relevant caution guidelines. Particular attention should be given to their effectiveness in ensuring the use of cautions for vulnerable people.
- (7) The proposed Penalty Notice Oversight Agency should report periodically on issuing agencies' compliance with s19A of the *Fines Act 1996* (NSW) and the relevant caution guidelines.

Application of the Attorney General's Caution Guidelines to NSW Police Force

- 5.79 The issue of cautions, penalty notices and criminal infringement notices makes up a substantial portion of the work of NSW Police officers. Most penalty notice offences can be acted upon by police as well as the responsible issuing agency. Some agencies such as NSW Maritime rely heavily upon, or work in partnership with, police to carry out their regulatory compliance and enforcement activities.¹⁰¹
- 5.80 Police penalty notice powers are very broad and have high impact. For example, in 2009-10, NSW Police carried out 'Operation Vision,' a campaign focusing on Sydney's metropolitan rail network. For six weeks officers took an active role in addressing 'antisocial behaviour on trains, on and around railway stations and commuter car parks, rail bus interchanges and pedestrian malls'.¹⁰² Cautioning for offences on railways was a significant element of this operation. In that time, NSW Police reported that officers
- patrolled 11,399 trains, checked the bona fides of 645 taxi drivers and patrolled 427 buses. They conducted 1,167 person searches and 525 drug searches. They issued 2,482 rail cautions, 57 cannabis cautions, located 15 knives and made 365 arrests including 33 for breach of bail and 19 for outstanding warrants.¹⁰³
- 5.81 Notwithstanding the breadth of their activities under the penalty notice system, s 19A(2) of the *Fines Act* exempts police officers from the requirement to have regard to the applicable guidelines on official cautions when deciding whether or not to issue cautions. NSW Police was expressly excluded from the cautions guidelines regime because they already have the common law power to issue cautions.¹⁰⁴ Police discretion to issue warnings and cautions stems from their broad common law power to discharge functions necessarily incidental to their role as conservators of the peace.¹⁰⁵
- 5.82 In exercising their powers, police officers are guided by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), the Police Commissioner's Statement of Professional Conduct,¹⁰⁶ the Statement of Values,¹⁰⁷ the Code of Conduct and Ethics,¹⁰⁸ the NSW Police Handbook¹⁰⁹ and the Code of

101. NSW Maritime, *Compliance Framework* (2011).

102. NSW Police Force, *Annual Report 2009-10* (2010) 6.

103. NSW Police Force, *Annual Report 2009-10* (2010) 6.

104. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11968–11973 (J Hatzistergos). *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s107(2) which provides that, in relation to the powers relating to arrest, 'nothing in this part affects the power of a police officer to issue a warning or a caution or a penalty notice to a person'.

105. S Morrison and M Burdon, *The Role of Police in the Diversion of Minor Alcohol and Drug-Related Offenders*, Final Report, Commonwealth Department of Health and Aged Care (1999) 14; *Enver v R* (1906) 3 CLR 969.

106. NSW Police Force, *Annual Report* (2006) 6.

107. NSW Police Force, *Standards of Professional Conduct* (2006) 4.

108. NSW Police Force, *Standards of Professional Conduct* (2006) 5-10.

109. NSW Police Force, *Handbook* (2011).

Practice for CRIME.¹¹⁰ However, while these documents provide extensive guidance on the full range of police powers and procedures, they offer minimal guidance as to when, and under what circumstances, an officer should issue a caution instead of a penalty notice. Section 107(2) LEPRA preserves the power of a police officer to issue a warning or caution and the NSW Code of Practice for CRIME states that police may issue a caution as an alternative to arrest.¹¹¹ Further, police officers are authorised to issue official cautions under the *Young Offenders Act 1997 (NSW)*.¹¹²

- 5.83 The combined effect of these legal instruments is that police officers have a considerable discretion to issue warnings and cautions with little formal or publicly available guidance as to how it should be exercised.

Submissions and consultations

- 5.84 While we did not ask a question specifically about whether police should be covered by the Attorney General's Cautions Guidelines, stakeholders raised this issue in submissions and consultations. Legal Aid and the Youth Justice Coalition argued that the guidelines should be made applicable to NSW Police to ensure consistency across issuing agencies and to 'provide another measured and responsible ground for review'.¹¹³ The Youth Justice Coalition commented that:

It seems unfair that one young person may be given a caution by a transit officer for being on a railway platform without a ticket, while another receives a \$50 fine [sic] from a police officer for the same offence. The law needs to be certain for all young people and not discriminate according to the issuing agency.¹¹⁴

- 5.85 On the other hand, the Minister of Police argued that officers should not be subject to the general caution regime as 'current guidelines and practices are sufficient'.¹¹⁵ We heard that s 19A of the *Fines Act* was never intended to apply to police officers because they regularly issue cautions under their common law power to discharge functions necessarily incidental to their role as conservators of the peace.¹¹⁶
- 5.86 A concern arises that the Attorney General's Caution Guidelines could fetter the well-trained discretion of police officers. Not all agencies have their level of understanding of criminal law principles and cautioning practice. Furthermore, police officers potentially have to make decisions in high pressure circumstances that may involve violent conduct, and it could add to their burden if they have to take into account the Attorney General's Caution Guidelines.

110. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2011).

111. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2011) 15.

112. *Young Offenders Act 1997 (NSW)* pt 4.

113. Legal Aid NSW, *Submission PN11*, 9; Youth Justice Coalition, *Submission PN34*, 10.

114. Youth Justice Coalition, *Submission PN34*, 10.

115. Police Portfolio, *Submission PN44*, 2.

116. See *Evener v R* (1906) 3 CLR 969, 975-976. *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* s 107(2) preserves the power of a police officer to issue a warning or caution.

Commission's conclusions

- 5.87 On balance we consider that NSW Police should be covered by the provision of s 19A and the Attorney General's Caution Guidelines. We take this view for a number of reasons.
- 5.88 First, while police officers have a well-established discretion to issue cautions, the existing law, regulations and practice guidelines applying to police do not appear to provide substantive guidance for police in the specific context of the use of cautions as an alternative to penalty notices.
- 5.89 Second, there does not appear to be any conflict or inconsistency that might cause problems for police between existing police policy and practice and the Attorney General's Caution Guidelines. Indeed, this is not surprising as the Attorney General's Caution Guidelines were developed in close consultation with a working group that included NSW Police. NSW Police was instrumental in this task, in large part because of its long-term experience of issuing cautions.
- 5.90 Third, the Attorney General's Caution Guidelines are facilitative. They assist issuing agencies to identify the situations in which it is appropriate to issue cautions. Section 19A of the *Fines Act* does not affect the powers of the issuing agency to take any other action they would otherwise be permitted to take in respect of the offence¹¹⁷ and would not fetter the police officers in making an appropriate response to criminal behaviour.
- 5.91 Finally, agencies are permitted to create their own dedicated guidelines that are tailored to their particular needs as long as these are consistent with the Attorney General's Caution Guidelines. Accordingly, if NSW Police considers that the Attorney General's Caution Guidelines are overly generic or are unsuited to its operations in certain circumstances, it is free to develop a more carefully adapted document to guide the discretion of issuing officers. Indeed, given the extensive experience of police in cautioning, any cautioning guidelines by NSW Police would be of great utility in assisting less experienced agencies and developing best practice standards in this important area.

Recommendation 5.5

Section 19A of the *Fines Act 1996* (NSW) should be amended to provide that, unless it develops its own consistent guidelines, the NSW Police Force is covered by the Attorney General's Caution Guidelines.

117. *Fines Act 1996* (NSW) s 19B; New South Wales, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11,968–11,973 (J Hatzistergos).

6. Issuing a penalty notice

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- 6.1 This chapter deals with a number of issues relating to the issue of penalty notices. First, we discuss the form of penalty notices and the information that should be provided on their face. A number of submissions to this reference argued that more information is required to improve the functionality of the penalty notice system, to increase its operational fairness, transparency and accountability. We were told that the information currently provided does not supply penalty notice recipients with adequate knowledge about the nature of the offence and the tools they need to respond appropriately. A number of deficiencies were identified, including sufficient details about the offence, information about obtaining legal advice and contact details for further assistance, as well as the need for adequate timeframes for issuing, serving and responding to the penalty notice. Second, we consider what, if any, limits should be placed on the number or value of penalty notices issued out of

a single set of circumstances. Finally, we consider when a penalty notice should be withdrawn in favour of court proceedings.

What information should be provided in a penalty notice?

The importance of information on penalty notices

- 6.2 Access to information is a significant aspect of fairness.¹ Procedural justice scholars emphasise the effects and importance of the ‘perceived fairness’ of regulatory processes,² arguing that where regulation is not, or does not appear to be, fair there is a greater risk of non-compliance.³ Professor Fox argues that, without the confidence and support of the people being regulated and the broader society, the regulatory and penalty scheme will lose legitimacy and fail to achieve its objectives. The degree of transparency within a regulatory system can also have an impact on public confidence in the function and efficacy of that regime.⁴ In the context of penalty notices, public acceptance promotes the efficiency of the regulatory system by encouraging recipients to take the timely and cost-effective option of paying the amount owing, rather than seeking a review or contesting the matter in court.⁵
- 6.3 At the most basic level, it is important that penalty notices contain the information necessary for people to understand the offence with which they have been charged and how to respond appropriately. The Australian Law Reform Commission (ALRC), in its 2002 report on federal penalties stated:
- It is fundamental that persons have easy access to legislation, to information provided by the regulator about how a penalty scheme may operate, and, where appropriate, have access to the regulator in order to obtain that information.⁶
- 6.4 The ALRC also noted that a number of groups require special consideration to enable proper access to the penalty notice system; for example, people from culturally and linguistically diverse backgrounds, Aboriginal people and Torres Strait Islanders, people with a disability and young people.⁷

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1. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) 575. See, for example, Access to Justice Advisory Committee, Parliament of Australia, *Access to Justice: An Action Plan* (1994) ch 6.
 2. T Makkai and J Braithwaite, ‘Procedural Justice and Regulatory Compliance’ (1996) 20(1) *Law and Human Behaviour* 83, 84.
 3. For example, GST compliance. See J Gilmour, ‘Taxing Times Need a Lender of Last Resort’, *The Sydney Morning Herald*, 26 May 2001, 50.
 4. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) [6.11.8]-[6.11.11].
 5. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) [6.9.4]-[6.9.5].
 6. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) 575.
 7. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) 575.

The form of penalty notices in NSW

- 6.5 The basic form of any penalty notice is prescribed by its authorising legislation. There are 117 statutory provisions, creating over 7000 offences that may be enforced by way of penalty notice.⁸ Consequently, there is a high degree of variability in the information that penalty notices contain and the manner in which they are issued. For example, a person found littering may expect to receive a handwritten on-the-spot penalty notice, while a person caught speeding may be detected by a camera and receive an electronically processed penalty notice in the post, sometimes with a photograph included. A small business in breach of industry regulations, such as a restaurant found to have fallen short of health and safety standards, is likely to receive a penalty notice only after a standard investigation process and discussions with the relevant regulatory body.
- 6.6 Given the degree of diversity, it is unsurprising that agencies use different penalty notice forms. Many use the standardised, pre-printed General Penalty Notice booklets prepared by the State Debt Recovery Office (SDRO); others such as the NSW Police Force (NSW Police) and most local government authorities use their own internally developed forms. Most agencies dealing with traffic-related offences rely on automated, electronic devices to detect and issue a penalty notice, whether hand-held (in the case of city rangers or traffic police) or permanent (such as speed cameras).
- 6.7 The *Fines Act 1996* (NSW) (*Fines Act*) does not prescribe what information should be provided on a penalty notice. However, s 20(1) provides that a penalty notice is one that sets out that the recipient
- has committed a specified offence and that, if the person does not wish to have the matter dealt with by a court, the person may pay the specified amount for the offence to a specified person within a specified time.
- 6.8 Currently, there is no requirement in the *Fines Act* or any other legislation that penalty notices specify the date and place that the alleged breach occurred, although this information is generally included. Similarly, there is no statutory requirement that the penalty notice contain information about a person's right to request internal review by the issuing agency, or the various payment options available for people who are experiencing financial hardship. While this information is sometimes provided, in many cases it is not.
- 6.9 In Consultation Paper 10 (CP 10), we raised the following questions:
- (1) What details should a penalty notice contain?
 - (2) Should these details be legislatively required? If so, should the *Fines Act* 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?⁹

8. See Appendix C.

9. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 5.9.

Submissions and consultations

- 6.10 Some submissions argued that the present level of information provided on penalty notices is adequate and appropriate. The SDRO considered that the prescribed details for penalty notices should be kept to the current minimum requirements. Given the significant operational and jurisdictional differences between issuing agencies, the SDRO was concerned to preserve a necessary measure of flexibility in the penalty notice system, and it expressed the view that ‘notices should be a case of substance over form’.¹⁰
- 6.11 NSW Police also opposed additional information on penalty notices due to ‘significant administrative, practical and operational difficulties’ that this would create.¹¹ We heard in consultation that there is simply no room for additional information on the standard penalty notice forms used by NSW Police; carrying comprehensive penalty notices would not be practicable for patrolling officers on duty.
- 6.12 Some stakeholders indicated that those who receive penalty notices do not always find them easy to understand, and that recipients need more information from notices. At a round table consultation, some issuing agencies submitted that some people find penalty notice forms confusing.¹² The Homeless Persons’ Legal Service (HPLS) submitted that the lack of consistency across different issuing agencies creates practical problems for their clients, producing ‘confusion among vulnerable people as to the nature of the document they have received and their available options’.¹³ There was some support for a legislative requirement in the *Fines Act*, or in the relevant authorising legislation, prescribing the details to be contained in a penalty notice.¹⁴
- 6.13 Submissions and consultations suggested that further information is required in relation to:
- the offence
 - court election
 - legal and other advice
 - payment options and mitigation, and
 - right to review.
- 6.14 Each of these matters is dealt with in turn below.

10. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 9.

11. Police Portfolio, *Submission PN44*, 2.

12. Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

13. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 18.

14. NSW Food Authority, *Submission PN9*, 8; Legal Aid NSW, *Submission PN11*, 13; The Law Society of NSW, *Submission PN31*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 11. Redfern Legal Centre also supported a legislative requirement for these details but did not consider it necessary for the *Fines Act NSW (1996)* to set out the specific form that penalty notices should take, see Redfern Legal Centre, *Submission PN26*, 5.

Information about the offence

- 6.15 The view expressed in submissions was that the description of the alleged offence on penalty notices is sometimes too brief and too cryptic. This view was shared by penalty notice recipients, their representatives and some issuing agencies. Two problems identified were inadequate information about:
- the facts of the offence, and
 - the law or regulation allegedly contravened.
- 6.16 The Law Society of NSW (Law Society) considered that ‘it is particularly important for people with poor memory recall or who may be distressed at the time of the offence that the penalty notice contains some details of the offence’.¹⁵ If these cannot be contained in the penalty notice itself, the Law Society suggested that ‘there should be easy and accessible procedures for obtaining the details of the offence which do not require having to take the matter to court’.¹⁶ Some issuing agencies have such an arrangement. For example, recipients of penalty infringement notices for illegal parking issued by Parramatta City Council may obtain copies of the ranger’s photographs on payment of a fee.¹⁷ The Illawarra Legal Centre recommended that the relevant details of the facts surrounding the issuing of a penalty notice be recorded and provided to the recipient of the penalty notice, and that this documentation should accompany the penalty notice.¹⁸ Some submissions suggested that the penalty notice should include the name and place of duty of the issuing officer, or at least the name of the issuing agency,¹⁹ to enable the recipient to make enquiries and obtain any further information about the facts and laws relating to the offence.
- 6.17 Issuing agencies also expressed some concerns about the lack of information in penalty notices. The NSW Food Authority submitted that the ‘Description of Offence’ on Part A of its standard ‘General Penalty Notice’ is made available to the SDRO, but not to the recipient of the notice, so that penalty notice recipients do not receive a description of the facts surrounding the offence.²⁰ Further, in the Authority’s experience, the space for details of the offence on that part of the form going to the alleged offender is ‘inadequate to describe some factual situations leading to an offence’,²¹ which ‘may raise concerns regarding transparency’.²² Similarly, NSW Department of Planning²³ submitted that Part C of its ‘General Penalty Notice’ should include a section for setting out the circumstances of the offence, not simply a section for the ‘Short Title of Offence’.²⁴

15. The Law Society of NSW, *Submission PN31*, 7.

16. The Law Society of NSW, *Submission PN31*, 7.

17. Parramatta City Council, *Parking Enforcement Policy: Policy 307* (2010).

18. Illawarra Legal Centre, *Submission PN27*, 8.

19. The Shopfront Youth Legal Centre, *Submission PN33*, 11; NSW Food Authority, *Submission PN9*, 7; Legal Aid NSW, *Submission PN11*, 12.

20. NSW Food Authority, *Submission PN9*, 8.

21. NSW Food Authority, *Submission PN9*, 8.

22. NSW Food Authority, *Submission PN9*, 8.

23. Now NSW Department of Planning and Infrastructure.

24. NSW Department of Planning, *Submission PN7*, 6.

- 6.18 As well as concerns about information relating to the facts of the offence, service providers were concerned that many penalty notices provide insufficient information about the law allegedly contravened to allow recipients, or their legal representatives, to identify the relevant offence in issue. Currently most penalty notices only contain the 'law part code', which is a numerical identifier for each recorded offence. There is a facility within the LawAccess NSW (LawAccess) Network to link the code to the relevant legislation. However, it is unlikely that people in NSW, other than a very limited group, will know what a law part code is or how to access the system that will allow them to translate it into a statutory provision. The Shopfront Youth Legal Centre (Shopfront) criticised the use of the code as having 'meaning for the issuing authority but not for the recipient'.²⁵
- 6.19 A number of submissions argued that a penalty notice should include the name of the offence, the legislation and section number (or regulation and clause) under which the alleged offence arises or is created.²⁶ Legal Aid NSW (Legal Aid) said that it is not uncommon for the relevant legislation to be omitted from penalty notices and that, 'without these details, it is often difficult for the recipient of the penalty notice or a legal advisor to locate the relevant law, particularly when the offence is of a type that is contained within a number of different Acts'.²⁷

Court election

- 6.20 Service providers representing vulnerable groups were particularly concerned about poor levels of information currently provided on penalty notices about court election. They reported that, in many cases, court election results in a better outcome for the client.²⁸ Shopfront made the following comments in this regard:

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.²⁹

- 6.21 The HPLS submitted that penalty notice forms produced by the SDRO generally provide information about court election, often including a tear-off court election form; however a number of agency-specific forms do not. Some forms refer recipients to the SDRO website to download the court election form. The HPLS argued that it is 'unrealistic to expect that people experiencing homelessness will have regular access to the Internet and that they would be able to download the

25. The Shopfront Youth Legal Centre, *Submission PN33*, 11.

26. Legal Aid NSW, *Submission PN11*, 13; The Shopfront Youth Legal Centre, *Submission PN33*, 11; NSW Food Authority, *Submission PN9*, 7; Matthew Bennett, *Submission PN40*, 1.

27. Legal Aid NSW, *Submission PN11*, 13.

28. The Shopfront Youth Legal Centre, *Submission PN33*, 6; NSW Department of Community Services, *Submission PN36*, 10; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

29. The Shopfront Youth Legal Centre, *Submission PN33*, 6

relevant form in time to elect to go to court'.³⁰ The HPLS considered that, as in Victoria, penalty notice forms should always clearly identify the court election option and provide an appropriate application form.³¹

- 6.22 Some submissions suggested that the penalty notice should include information about the consequences of electing to go to court. Legal Aid suggested that a penalty notice should explain that electing to go to court carries the risk of criminal conviction, 'and that this is a risk even when the person has a good chance of having the actual penalty reduced due to extenuating circumstances, and might outweigh the financial advantage of court election'.³² In addition to a potential criminal record, conviction for certain offences can have long-term consequences for overseas travel to high-security destinations and may restrict a person's future employment opportunities.³³ Legal Aid further considered that all penalty notices should alert potential applicants that 'electing to go to court carries the risk that professional costs could be awarded against the client'. In the experience of Legal Aid, this is a particular risk if the penalty notice has been issued by an agency that engages solicitors to represent it in penalty notice cases.³⁴
- 6.23 NSW Industry and Investment³⁵ submitted that clear information explaining the consequences of court election would help to reduce the number and frequency of unnecessary court elections.³⁶ The Department made the following comments:

For a number of years, a significant number of people who have 'court elected' penalty notices issued by the Department's Fisheries Branch have expressed surprise that they have subsequently received a court attendance notice. Many of those people have then sought to pay the penalty notice amount rather than attend court but the system operates to prevent that. It would be better to ensure that people served with a penalty notice receive clear information about what court election means. Many of the customers of the NSW Department of Investment and Industry do not use computers so simply having that information on a website is not sufficient.³⁷

Legal and other advice

- 6.24 While many people will not require any assistance to deal with a penalty notice, some people will need help to understand the notice and their options in responding to it. For example, some people will need to know how to access information in plain English about penalty notices and their options in response. The issuing agency, or the SDRO, may be the most appropriate source of this information. For example, the SDRO has a great deal of well-presented, useful information on its website. Some issuing agencies also have good web-based resources. However, the recipient of a penalty notice may need some direction concerning how to find this information.

30. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 18.

31. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 19.

32. Legal Aid NSW, *Submission PN11*, 13.

33. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011.

34. Legal Aid NSW, *Submission PN11*, 13.

35. Now the NSW Department of Trade and Investment, Regional Infrastructure and Services.

36. NSW Industry and Investment, *Submission PN37*, 5.

37. NSW Industry and Investment, *Submission PN37*, 5-6.

6.25 Some people will need more than information, and will require advice. Penalty notices issued in NSW do not contain the contact details for a source of independent information and advice regarding the recipient's rights. It was submitted that, in Victoria, penalty notices provide contact details for Legal Aid in 12 languages and that a similar approach should be taken in NSW.³⁸

6.26 Submissions from organisations representing vulnerable people argued that all penalty notices should provide contact details for independent information and legal advice. The HPLS noted the importance of detailed penalty notices:

The content of the penalty notice itself will often be the only opportunity for recipients to find out about their rights. The format and readability of the penalty notice (its layout, font size, the language employed, the use of translations) will determine whether the information supplied is accessible to people who may have limited English literacy skills, have a cognitive impairment or who are affected by drugs or alcohol. If the penalty notice does not contain sufficient information about a recipient's rights and it is not accessible, recipients of penalty notices are effectively prevented from asserting their rights.³⁹

6.27 Suggested sources of information and advice were LawAccess and Legal Aid.⁴⁰ LawAccess has considerable information on penalty notices on its website and provides legal information, referrals and in some cases, advice, for people who have a legal problem in NSW.⁴¹ Legal Aid is a well known legal service and, jointly with Redfern Legal Centre and Innercity Legal Centre, produces *Fined Out* a publication with comprehensive plain language information about fines and penalty notices.⁴²

Payment options and mitigation

6.28 A number of submissions indicated that there is a need for better information about how a recipient may pay the amount owing on his or her penalty notice.⁴³ The HPLS said:

It is easy to form the mistaken impression that payment may only be made by credit card or via the Internet, and this may lead to the penalty notice being ignored. No information is supplied about the option of time-to-pay or payment in instalments, or the process for applying for these options'.⁴⁴

6.29 The HPLS and Legal Aid submitted that all penalty notices should include brief information about all payment and mitigation options currently available. This should include information about all options for payment (cash, EFTPOS, credit card, cheque) as well as the availability of voluntary enforcement, work and development

38. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 19.

39. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 17.

40. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 18; Redfern Legal Centre, *Submission PN26*, 4, The Shopfront Youth Legal Centre, *Submission PN33*, 11.

41. Law Access, *About Us*

<http://info.lawaccess.nsw.gov.au/lawaccess/lawaccess.nsf/pages/about_us>.

42. Innercity Legal Centre, Redfern Legal Centre, Legal Aid NSW, *Fined Out* (3rd ed, 2011).

43. NSW Food Authority, *Submission PN9*, 7.

44. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 19.

orders, payment by instalment and write offs.⁴⁵ Illawarra Legal Centre also submitted that penalty notices should be updated to reflect the new options available to offenders, including electing to undertake a work and development order (WDO) in lieu of paying the fine.⁴⁶ Both the HPLS and Redfern Legal Centre recommended that all penalty notices should list the grounds for a write-off determination or mitigation of the penalty notice by the SDRO.⁴⁷ While all penalty notices spell out to some extent the consequences of not taking some kind of action on the penalty notice, both the Law Society and the HPLS submitted that a penalty notice should specify what the further consequences are if payment is not made.⁴⁸

Right to review

- 6.30 The *Fines Act* does not require notices to contain information on the recipients' right to review. The HPLS pointed out that, even in penalty notice forms produced by the SDRO, no information is supplied regarding the grounds for review or withdrawal of the penalty notice.⁴⁹ Similarly, most forms produced by issuing agencies do not provide this information. In contrast to penalty notices, penalty reminder notices must inform the recipient of the steps to be taken for seeking a review.⁵⁰ As Matthew Bennett wrote in his submission, 'one is not advised of the ... review option unless one ignores the original notice'.⁵¹
- 6.31 The majority of submissions responding to this question recommended that penalty notices should be updated to include a clear explanation of options available to the recipient, including information about the right to request a review.⁵² NSW Maritime⁵³ submitted that a penalty notice should inform the recipient of the right to have an administrative review of the penalty notice in addition to a court election option.⁵⁴
- 6.32 The HPLS highlighted the fact that many vulnerable people do not realise they have rights under the *Fines Act*. Often the only way they will learn about this is from the penalty notice itself.⁵⁵ The HPLS pointed out that the penalty notices issued in

45. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 17-20; Legal Aid NSW, *Submission PN11*, 13.

46. Illawarra Legal Centre, *Submission PN27*, 8.

47. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 18; Redfern Legal Centre, *Submission PN26*, 4.

48. The Law Society of NSW, *Submission PN31*, 7; Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 18.

49. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 18-19.

50. *Fines Act 1996* (NSW) s 27(1)(a1).

51. Matthew Bennett, *Submission PN40*, 1.

52. Legal Aid NSW, *Submission PN11*, 12; NSW Food Authority, *Submission PN9*, 7; The Law Society of NSW, *Submission PN31*, 7; Redfern Legal Centre, *Submission PN26*, 4; Illawarra Legal Centre *PN27*, 8; The Shopfront Youth Legal Centre, *Submission PN33*, 11; Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 18.

53. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

54. This information is already provided on NSW Maritime penalty notices: NSW Maritime, *Submission PN2*, 12.

55. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 18-19.

Victoria clearly identify the right to request a review, and that it is the first piece of information supplied on the reverse side of the first of four pages of the penalty notice. In particular, the Victorian notices contain 'explicit reference to people in 'special circumstances' being able to seek review'.⁵⁶

Commission's conclusions

- 6.33 We are of the view that there is certain basic information that must be included on all penalty notices because its provision is fundamental to ensuring fairness and transparency.
- 6.34 The first requirement is sufficient information about the facts of the offence to allow a person receiving a penalty notice to identify the alleged offending behaviour. The second is sufficient information to identify the nature of the alleged offence. A law part code is not sufficient identification of the offence. A person who receives a penalty notice should not need to access expert help in order to know which law they are alleged to have contravened.
- 6.35 The third essential is provision of information about the possibility of court election. The fourth is information about where to go for help. While many people will not require any assistance to deal with a penalty notice, some people will need assistance to understand the notice and their options in dealing with it. Providing access to such assistance may have associated costs at the outset, but is likely to prevent more costly problems from eventuating at a later stage should the recipient act on the basis of a misunderstanding. Many people will simply need to know where to go for access to plain English information about penalty notices and their options. Such resources already exist. We recommend that all penalty notices contain information about the telephone number and website of the issuing agency, or the SDRO, and of LawAccess.
- 6.36 We recommend that the following information be clearly set out on a penalty notice:
- A comprehensive list of payment options including the option of payment in cash
 - Information about the availability of time to pay options
 - Information about the consequences of court election
 - Information about the right to have a penalty notice reviewed.

However, in recognition of the practical constraints on some issuing agencies we would consider it sufficient for such information to be provided about these items in short form, accompanied by advice as to where further information can be obtained.

56. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 18-19.

Recommendation 6.1

- (1) The *Fines Act 1996* (NSW) should be amended to provide that all penalty notices, as issued to the recipient, should:
- (a) provide enough information to enable that person to identify the alleged offending behaviour
 - (b) specify the legislative provisions alleged to have been breached: a law part code is not sufficient for this purpose, and
 - (c) contain information about the possibility of court election.
- (2) Regulations under the *Fines Act 1996* (NSW) should provide that all penalty notices should include a telephone number and website for
- (a) the issuing agency or the State Debt Recovery Office, whichever is relevant, and
 - (b) LawAccess NSW.
- (3) Issuing agencies should include the following information in full on a penalty notice:
- (a) a comprehensive list of payment options, including the option of payment in cash
 - (b) information about the availability of time to pay options
 - (c) information about the consequences of court election, and
 - (d) information about the right to have a penalty notice reviewed.
- Alternatively, this information may be provided in short form, together with details of where to obtain further information.

What is the appropriate period of time in which to respond to a penalty notice?

- 6.37 The *Fines Act* does not stipulate a maximum or minimum time period by which a penalty must be paid: it simply states that ‘the full amount payable under a penalty notice is to be paid within the time required by the notice’.⁵⁷ As penalty notice offences are regulated under a number of different Acts by various issuing agencies, there is some variation in the initial period allowed for payment. Nonetheless, in practice, recipients are given 21 days before the SDRO issues a penalty reminder notice. The reminder notice allows a further 28 days to pay. The offender thus has 49 days in total before the SDRO takes steps to enforce the penalty.
- 6.38 Fixed timeframes provide certainty and are necessary for the effective operation of the penalty notice system. During 2008-09, approximately 2.8 million penalty notices were issued in NSW.⁵⁸ In order to process this high volume of penalty notices, the SDRO relies heavily on automated systems, many of which are

57. *Fines Act 1996* (NSW) s 23(1A).

58. NSW Office of State Revenue, NSW Treasury, *Annual Report 2008-2009* (2009) Table 1.1.

triggered by regular and predetermined deadlines.⁵⁹ The SDRO successfully recovers approximately 75% of penalty notices issued in a given year. It may be inferred that, in the great majority of cases, the timeframe currently allowed is appropriate.

- 6.39 In an earlier report, this Commission criticised a general 28-day time limit for the payment of fines.⁶⁰ However, there are differences between fines and penalty notices, the latter being found generally in areas where there are large numbers of minor offences that have to be handled with expediency. Nevertheless, the time allowed for payment of penalty notices must balance the need for efficiency with the need for flexibility and fairness, especially in relation to people on low incomes or those who may have other legitimate reasons to need extra time to deal with the notice or pay the amount owing.
- 6.40 In CP 10, the Commission asked what would be an appropriate timeframe to respond to a penalty notice. Should it be the current practice of 21 days or should it be longer?⁶¹

Submissions and consultations

- 6.41 A number of submissions regarded the initial 21-day period for payment as adequate and opposed the provision of a longer period because:
- The timeframe allowed in NSW is already generous in comparison with other jurisdictions⁶²
 - In most cases, 21 days is a sufficient timeframe for payment⁶³
 - The penalty reminder notice allows a further 28 days to respond⁶⁴
 - Provisions allowing alternate methods of satisfying a penalty notice are currently in place,⁶⁵ and
 - Since people generally wait until the enforcement stage to act,⁶⁶ a longer period 'would unnecessarily protract the resolution of matters'.⁶⁷
- 6.42 However, we also received submissions in favour of moving to a longer period for payment.⁶⁸ Shopfront and the HPLS recommended an extension of the initial

59. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 33.

60. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.8].

61. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 5.11.

62. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 33.

63. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 10.

64. NSW Food Authority, *Submission PN9*, 8.

65. Holroyd City Council, *Submission PN10*, 14.

66. Transport Roundtable Meeting, *Consultation PN23*, Sydney NSW, 18 March 2011.

67. NSW Department of Planning, *Submission PN7*, 7.

68. Legal Aid NSW, *Submission PN11*, 14; Illawarra Legal Centre, *Submission PN27*, 8; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 20; The Law Society of NSW, *Submission PN31*, 8; The Shopfront Youth Legal Centre, *Submission PN33*, 12.

payment period from 21 days to 28 days,⁶⁹ which would bring NSW in line with Victoria.⁷⁰ The Illawarra Legal Centre recommended a significant change to three months.⁷¹

- 6.43 We heard that, for people who cannot afford to pay their penalty notices, the issues involved are more complex than simply income shortfalls. Homeless people, people with mental health and cognitive impairments, young people and people in custody must contend with a range of challenges that are unlikely to be resolved or ameliorated simply by an extension of the time allowed to pay their penalty notices.⁷² These concerns, considered in Part Four of this report, include issues of access to food and stable housing, personal safety, mental illness, drug addiction, poor financial management skills, limited education and work opportunities. As one participant in the AGJ evaluation said

I would worry about how to pay it off every day. I had lots of other costs too: I was going without food, so the fines were the least of my worries really. But it still really stressed me out – I couldn't borrow or earn to pay it off, so what the hell was I going to do?⁷³

- 6.44 According to Shopfront and Legal Aid, for many people it is impossible to pay the fine in full within 21 days and for some it is impossible to do so even within 49 days.⁷⁴ It was mentioned in one consultation that penalty notice recipients residing in regional, rural and remote areas may have difficulty accessing legal assistance, in addition to their financial constraints. This problem was mentioned especially in relation to Aboriginal people. Some towns do not have an Aboriginal Legal Service or other sources of legal advice, and the need to travel a significant distance for this assistance may be an obstacle to responding to the notice within the given timeframe.⁷⁵
- 6.45 Given the challenges facing many vulnerable people, the HPLS submitted:

69. The Shopfront Youth Legal Centre, *Submission PN33*, 11, 12; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 20.

70. *Infringements Act 2006* (Vic) s 14.

71. Illawarra Legal Centre, *Submission PN27*, 8.

72. Corrective Services NSW, Women's Advisory Council, *Submission PN20*; Corrective Services NSW, *Submission PN24*; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*; The Shopfront Youth Legal Centre, *Submission PN33*; Children's Court of NSW, *Submission PN35*; Justice Action, *Submission PN38*; Women in Prison Advocacy Network, *Submission PN39*; Aboriginal Legal Service, *Consultation PN7*, Redfern NSW, 2 February 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

73. Institute for Innovation in Business and Social Research, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People In NSW*, University of Wollongong (2011) 5.

74. The Shopfront Youth Legal Centre, *Submission PN33*, 11-12; Legal Aid NSW, *Submission PN11*, 14.

75. Aboriginal Legal Service, *Consultation PN7*, Redfern NSW, 2 February 2011.

The length of time allowed for responding to a penalty notice and a reminder notice should be increased from 21 days to 28 days. The State Debt Recovery Office should have the discretion to extend the time limit without enforcement costs where the penalty notice recipient is homeless, has a mental illness, intellectual disability or cognitive impairment, a special infirmity or is in poor physical health.⁷⁶

Commission's conclusions

- 6.46 We are not persuaded that the present time periods should be extended. Penalty notice recipients presently have a total of seven weeks before any enforcement costs are incurred. Any extension of time would apply not only to vulnerable people but across the entire penalty notice system and would impact on its efficiency.
- 6.47 It is important that the penalty notice system respond to the needs of vulnerable people. We note in this context that time to pay arrangements can be made before any fine enforcement action is taken, as well as afterwards. WDOs, which allow qualified persons to pay off penalty notice debts through non-monetary contributions, are now to be rolled out across NSW. WDOs also can be made available before fine enforcement action is taken. Further, we recommend in Chapter 8 that the SDRO develop and publish a fee waiver policy so that where an applicant has a particular vulnerability that has created legitimate difficulties in paying or seeking assistance the SDRO should be able to waive enforcement fees.⁷⁷ These provisions, together with other recommendations in this report designed to ameliorate the situation of vulnerable people, should deal with the concerns identified by stakeholders in relation to time limits for payment.

Serving a penalty notice

- 6.48 Another issue raised by the Sentencing Council in its interim report on fines and penalty notices was the absence of any requirement for the SDRO or the issuing agency to confirm service of the original penalty notice, or any subsequent correspondence, including a penalty reminder notice.⁷⁸ In practice, most penalty notices are served personally, attached to a vehicle or sent via ordinary post. However, the *Fines Act* does not contain any requirements about how an original penalty notice must be served or requiring confirmation of service.⁷⁹
- 6.49 Each relevant parent Act generally allows authorised officials to serve a penalty notice on an individual, either in person (on the spot) or by post some time after the event, if it appears that the person has committed an offence. The mode of service depends in a large part on the nature of the offence being regulated, the manner of detection and the issuing agency's internal policies and processes. Penalty notices in respect of camera-detected traffic offences, for example, are posted to the

76. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 20.

77. Recommendation 8.1.

78. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.82].

79. It does, however, set out the methods of service for a penalty reminder notice. In relation to postal service, it goes on to provide that service is deemed to have taken place seven days after it has been posted, *Fines Act 1996* (NSW) ss 28, 29.

registered owner of the vehicle involved in the commission of the offence within a short time after the offence. Penalty notices issued for riding a train without a valid travel pass are likely to be handwritten and served on the spot.

- 6.50 The *Fines Act* deems service of a penalty notice to have taken place where it was posted to the offender's recently reported address, even if it is returned as undelivered to the SDRO or issuing agency.⁸⁰ The Act also allows for both a penalty reminder notice⁸¹ and enforcement order⁸² to be sent to the person's 'recently reported address' unless the appropriate officer or SDRO has 'received some other evidence that the penalty notice was not served on the person'.⁸³ This is to prevent alleged offenders from deferring payment of a fine until proceedings for the offence become statute barred.
- 6.51 While the *Fines Act* is silent with respect to service of the original penalty notice, it does make provision for uniform service of a penalty reminder notice. According to the SDRO, all penalty reminder notices are served via ordinary post.⁸⁴ However, the Act provides a measure of flexibility regarding the range of available service options. All penalty reminder notices must be served on the person at the relevant address for service⁸⁵ in one of the following ways:
- (a) personally
 - (b) by post
 - (c) by means of a document exchange
 - (d) by facsimile transmission or other electronic transmission, or
 - (e) by any other manner prescribed by the regulations.⁸⁶
- 6.52 Further, the *Fines Act* provides for the annulment of enforcement orders where there was irregular service. This includes situations where:
- the offender was not aware that a penalty notice had been issued until the enforcement order was served,⁸⁷ and
 - the penalty notice and/or reminder notice was returned as being undelivered to its sender after being sent to the person at the person's recently reported address and notice of the enforcement order was served on the person at a different address.⁸⁸

80. *Fines Act 1996* (NSW) s 126A.

81. *Fines Act 1996* (NSW) s 126A(1)

82. *Fines Act 1996* (NSW) s 126A(2).

83. *Fines Act 1996* (NSW) s 126A(1), (2).

84. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 8.

85. *Fines Act 1996* (NSW) s 28(2).

86. Note, however, that the *Fines Regulation 2010* (NSW) does not provide for any other means of service.

87. *Fines Act 1996* (NSW) s 49(1)(a)(i).

88. *Fines Act 1996* (NSW) s 49(1)(a)iii).

- 6.53 Unlike NSW, the legislation governing infringement notices in other jurisdictions does specify the ways in which original penalty notices are to be served, albeit without limiting the ability of an enforcement agency to make different arrangements. For example, the *Infringements Act 2006* (Vic) provides that an infringement notice may be served either personally, by post or, where a vehicle is involved in the alleged offence, by affixing the notice on that vehicle; or in any other manner specified in the statute under which the infringement notice is issued.⁸⁹ Unless evidence to the contrary is adduced, service by post is deemed to have occurred 14 days after the date of the notice to 'provide certainty for enforcement agencies as to when certain actions may be taken'.⁹⁰ The Act also deems a notice to have been served even if it is returned to the agency as undelivered⁹¹ so as to enable the enforcement agency to continue enforcement 'in the event that a person opportunistically returns an infringement notice in the hope of avoiding his or her fine'.⁹² However, a notice served on a person less than 28 days before the due date for payment of the penalty notice is invalid⁹³ and this acts as a safeguard against delays in service of notices by issuing agencies.⁹⁴
- 6.54 In Queensland, the *State Penalties Enforcement Act 1999* (Qld) also provides for the manner in which infringement notices may be served in that state, and makes specific provisions when dealing with offences involving vehicles.⁹⁵ In addition, it makes it an offence for a person, other than the person who owns or is in charge of the vehicle, to tamper with a penalty notice that has been affixed to a vehicle.⁹⁶
- 6.55 In CP 10, we asked the following questions:
- (1) 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?
 - (2) Is it feasible to require the SDRO or the issuing agency to confirm service of the penalty notice or subsequent correspondence?⁹⁷

Are current service provisions adequate?

- 6.56 While there were submissions that viewed the present service provisions as adequate,⁹⁸ a number of stakeholders said that it would be desirable to have

89. *Infringements Act 2006* (Vic) s 12.

90. Explanatory Memorandum, *Infringements (Consequential and Other Amendments) Bill* cl 8.

91. *Infringements Act 2006* (Vic) s 163A.

92. *Victoria Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1296 (R Hulls).

93. *Infringements Act 2006* (Vic) s 12(3).

94. Explanatory Memorandum, *Infringements (Consequential and Other Amendments) Bill* cl 8.

95. *State Penalties Enforcement Act 1999* (Qld) s 13-14.

96. *State Penalties Enforcement Act 1999* (Qld) s 14(5).

97. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Questions 5.5-5.6.

98. NSW Maritime, *Submission PN2*, 10; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 8.

uniform service provisions.⁹⁹ Submissions in support of uniform provisions indicated that it would be useful for clarity and consistency to have a centralised procedural provision in a single Act rather than a dispersed set of provisions set out in numerous pieces of legislation. Holroyd City Council suggested the inclusion of similar provisions to those contained in the *Infringements Act 2006* (Vic), to discourage avoidance of penalty notices.¹⁰⁰

Should the *Fines Act* require confirmation of service?

- 6.57 A number of submissions were opposed to the imposition of a legislative requirement for either the SDRO or the issuing agency to confirm service of a penalty notice. The main reason given was impracticality, given the volume of penalty notices issued.¹⁰¹ NSW Maritime expressed the view that it was also unnecessary, given that disputed service is already subject to the annulment mechanism contained in the *Fines Act*.¹⁰²
- 6.58 There was, however, some limited support for such a requirement.¹⁰³ Shopfront supported a requirement of signed acknowledgement by the recipient in cases of personal service, and an affidavit of service where this acknowledgement is refused or where another method of service is used, in order to confirm the steps taken to effect service.¹⁰⁴
- 6.59 The SDRO opposed the imposition of a requirement of acknowledgement of service, but suggested that, if it were to be introduced, two preconditions would be required to make it possible in practice. These preconditions were first, provision in the *Fines Act* for electronic service and second, the introduction of ‘additional, adequate and enforceable penalties’ for failing to maintain current personal information with relevant agencies.¹⁰⁵ As noted above, the *Fines Act* does not provide for electronic service. However, reg 3.8 of the *Uniform Civil Procedure Rules 2005* (NSW) does allow it but ‘only with the consent of the other party’.

Commission’s conclusions

- 6.60 We are not persuaded of the need for a provision in the *Fines Act* setting out the manner in which an issuing agency must issue a penalty notice. There are requirements in relation to service of a penalty reminder notice. The support for such a change was not strong and there was little support for the argument that current service provisions are problematic.

99. NSW Food Authority, *Submission PN9*, 7; Holroyd City Council, *Submission PN10*, 12; NSW Land and Property Management Authority, *Submission PN17*, 9; The Shopfront Youth Legal Centre, *Submission PN33*, 10.

100. Holroyd City Council, *Submission PN10*, 12. See *Infringements Act 2006* (Vic) ss 162-163.

101. NSW Maritime, *Submission PN2*, 10; NSW Food Authority, *Submission PN9*, 7; Holroyd City Council, *Submission PN10*, 13; NSW Land and Property Management Authority, *Submission PN17*, 9; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 9.

102. See *Fines Act 1996* (NSW) pt 2 div 5.

103. The Law Society of NSW, *Submission PN31*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 10; Legal Aid NSW, *Submission PN11*, 11.

104. The Shopfront Youth Legal Centre, *Submission PN33*, 10.

105. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 9.

- 6.61 Similarly, we are not persuaded that there is any compelling reason to require confirmation of service. On the contrary, given the volume of penalty notices issued every year, this would appear an impractical and unduly onerous requirement on issuing agencies.
- 6.62 There are clear efficiency benefits, in certain circumstances, of allowing electronic service of penalty notices. While not suitable as the primary source of service or for every recipient, there are no doubt some people who would prefer to receive their penalty notices and related documentation electronically. We therefore support the SDRO's suggestion to allow electronic service where the recipient consents, as provided in the *Uniform Civil Procedure Rules 2005* (NSW).

Recommendation 6.2

The *Fines Act 1996* (NSW) should be amended to allow issuing agencies to serve penalty notices and subsequent notices (including reminder notices and enforcement notices) electronically where the penalty notice recipient has provided consent in advance.

Statute of limitations for issuing a penalty notice

- 6.63 One of the principal justifications for the inclusion of an offence within the penalty notice scheme is that it can, and should, be dealt with swiftly. Accordingly, a penalty notice should generally be issued within a relatively short period of time after the offence. Where it is not issued on the spot an issue arises as to the time limit within which an enforcement agency should serve a penalty notice.
- 6.64 In its report on federal penalties, the ALRC suggested that an appropriate time limit is one year from the date of the breach of the statutory provision.¹⁰⁶ Any longer would undermine the policy that penalty notices provide a timely and cost-effective alternative to court proceedings. However, many federal offences involve proceedings against businesses or other agencies or apply in context such as taxation, where records are (or should be) kept. In the context of NSW there are arguments that an outer limit of one year is too long. Section 179 *Criminal Procedure Act 1986* (NSW), for example, prescribes that proceedings for a summary offence must be commenced within six months unless another timeframe has been specified for the offence.
- 6.65 A long timeframe would also raise concerns about fairness. To decide whether they wish to contest the matter or pay the amount owing, recipients need to receive a penalty notice within a time frame that allows them to remember the alleged offence and assemble reliable evidence. Fairness would suggest that a penalty notice should be issued soon after the date of the offence so that the circumstances of the event are fresh in the mind of the alleged offender. This is particularly so where a notice is generated automatically. For example a speeding or traffic offence detected by camera, because there may be no events that mark the offence in the

106. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) Recommendation 12.5(h).

memory of the alleged offender and allow them to recall the incident to which the notice applies.

6.66 In CP 10, we asked the following questions:

- (1) Should the *Fines Act* 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?
- (2) If the penalty notice is served after this time has elapsed, should the *Fines Act* provide that the penalty notice is invalid?
- (3) 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?¹⁰⁷

Should the *Fines Act* prescribe a period of time for service of a penalty notice?

6.67 Stakeholders expressed strong support for the introduction of a prescribed maximum time period between commission of the alleged offence and service of a penalty notice.¹⁰⁸ However, the suggested time period varied widely, including periods of 28 days,¹⁰⁹ 42 days,¹¹⁰ three months,¹¹¹ six months¹¹² and twelve months.¹¹³ Two submissions expressed opposition to the 12-month limit suggested by the ALRC.¹¹⁴

6.68 The SDRO, while acknowledging that prompt service furthers the educative aim of penalty notices, opposed the introduction of a general prescribed time period because of the need for investigation in relation to a significant number of offences and the complications likely to arise in cases where liability needs to be transferred (for example from the registered owner of a vehicle to the driver.)¹¹⁵ The NSW Department of Planning also opposed any general time limit, submitting that all agencies should formulate their own guidelines covering the time period for service of penalty notices.¹¹⁶ The NSW Industry and Investment proposed that a time limit

107. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Questions 5.7-5.8.

108. NSW Maritime, *Submission PN2*, 11; NSW Food Authority, *Submission PN9*, 7; Holroyd City Council, *Submission PN10*, 13; Legal Aid NSW, *Submission PN11*, 12; NSW Land and Property Management Authority, *Submission PN17*, 10; The Law Society of NSW, *Submission PN31*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 10.

109. Holroyd City Council, *Submission PN10*, 13; Legal Aid NSW, *Submission PN11*, 12.

110. NSW Maritime, *Submission PN2*, 11.

111. The Shopfront Youth Legal Centre, *Submission PN33*, 10. Note that The Law Society of NSW suggested a time period of three-six months: The Law Society of NSW, *Submission PN31*, 7.

112. NSW Land and Property Management Authority, *Submission PN17*, 10.

113. NSW Food Authority, *Submission PN9*, 7.

114. The Law Society of NSW, *Submission PN31*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 10. See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) 464, Recommendation 12.5(h).

115. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 9.

116. NSW Department of Planning, *Submission PN7*, 6.

for service should be prescribed in the legislation that creates the individual offences instead of introducing a time period applicable to all penalty notices.¹¹⁷

- 6.69 Support for time limits was expressed subject to exceptions in some submissions. NSW Maritime proposed that agencies should retain the discretion to operate outside the time limit if appropriate.¹¹⁸ Similarly, the NSW Food Authority saw a need to provide for extensions of the limitation to allow flexibility for complex cases.¹¹⁹ Legal Aid feared that police might issue a court attendance notice instead of a penalty notice where the time period has expired, and suggested that this should only occur where justified by the offence.¹²⁰ The NSW Land and Property Management Authority¹²¹ (LPMA) highlighted that the issuing agency may only become aware of a regulatory breach several months after it has been committed and, as such, the time period should only commence when the public authority becomes aware of the offence.¹²²

Should the *Fines Act* provide that a penalty notice is invalid after the expiration of the time limit for service?

- 6.70 Submissions differed in their approaches to penalty notices served outside of a stipulated time period. While some supported the invalidation¹²³ or unenforceability¹²⁴ of any such penalty notice, others submitted that issuing agencies should have the discretion to extend the time period if appropriate¹²⁵ or the capacity to seek an extension.¹²⁶

Should issuing agencies formulate guidelines governing the time period in which a penalty notice should be served?

- 6.71 The LPMA suggested that individual agencies should have the ability to specify an alternate time period where they see the prescribed general time limit as inadequate.¹²⁷ Other submissions supported the mandatory development of timeline guidelines, either generally¹²⁸ or in the absence of a legislatively-prescribed time limit.¹²⁹ As mentioned above, the Department of Planning opposed any general time

117. NSW Industry and Investment, *Submission PN37*, 5.

118. NSW Maritime, *Submission PN2*, 11.

119. NSW Food Authority, *Submission PN9*, 7.

120. Legal Aid NSW, *Submission PN11*, 12.

121. The NSW Land and Property Management Authority was abolished under the NSW Government restructure announced in April 2011 and its former business divisions transferred to new departments.

122. NSW Land and Property Management Authority, *Submission PN17*, 10.

123. Holroyd City Council, *Submission PN10*, 13.

124. NSW Land and Property Management Authority, *Submission PN17*, 10.

125. NSW Maritime, *Submission PN2*, 11.

126. NSW Food Authority, *Submission PN9*, 7.

127. NSW Land and Property Management Authority, *Submission PN17*, 10.

128. The Shopfront Youth Legal Centre, *Submission PN33*, 10.

129. NSW Food Authority, *Submission PN9*, 7; Legal Aid NSW, *Submission PN11*, 12.

limit but believed that all agencies should formulate their own guidelines covering the time period for service of penalty notices.¹³⁰

Commission's conclusions

- 6.72 There was a limited number of submissions and consultations on this issue, and their approach was not consistent. We support a limitation period for service of a penalty notice. Notices should not be served when the recipient's memories of the incident might reasonably have faded and the capacity to apply for review or defend the notice, if the recipient chooses to do so, is reduced. The public's perception of the fairness of the penalty notice system may be affected by unreasonably tardy service.
- 6.73 Stakeholders to this reference supported the introduction of a time limit for service. However, the contexts in which penalty notices are issued vary significantly. The different contexts in which penalty notices are issued make it unsurprising that there was no consistency amongst stakeholders about what the time limit should be.
- 6.74 We consider that any attempt to impose a single time limit, to be applied to all offences, would be impractical because of the diversity of the contexts in which penalty notices are issued. The need for time limits to be reasonable and responsive to the context of the offences regulated suggests that they should be imposed in the legislation that creates the penalty notice offence.
- 6.75 We support the proposal put forward by NSW Industry and Investment, namely that appropriate provision for time limits should be made in the legislation that creates penalty notice offences. Such time limits should take into account the needs of the regulator, and fairness to the alleged offender. The nature of the offence and the relationship between the offender and the issuing agency may also be relevant.
- 6.76 We further recommend that, when issuing agencies set time limits for offences within their jurisdiction, they should consider whether
- it is appropriate to permit exceptions to those limits
 - the circumstances in which any exceptions should be permitted, and
 - the consequences of exceeding time limits.

Recommendation 6.3

- (1) Where legislation prescribes penalty notice offences, it should set time limits for service of penalty notices. Time limits should take into account the need of the penalty notice recipient to recollect and respond to the alleged offence.
- (2) When issuing agencies set time limits for penalty notice offences within their jurisdiction, they should consider whether it is appropriate to permit exceptions to those limits, the circumstances in which any

130. NSW Department of Planning, *Submission PN7*, 6.

exceptions should be permitted, and the consequences of exceeding time limits.

Using private contractors to issue and enforce penalty notices

- 6.77 Some government agencies are authorised to engage the services of private organisations for the purposes of enforcing the laws for which they are responsible, including issuing penalty notices. It is not uncommon for government agencies to find it cost effective to outsource services rather than create new positions within their structure.¹³¹
- 6.78 An example of the use of private contractors, including for issuing penalty notices, is provided by the *Sydney Harbour Foreshore Authority Act 1998* (NSW.) Private contractors are allowed to act as rangers, and have the power to issue penalty notices for offences under the Act and its regulations.¹³² Offences include, for example, conducting commercial activities (such as weddings or busking) within properties administered by the Authority without its permission. The Act provides that these private contractors are subject to the control and direction of the Chief Executive Officer of the Authority while they are exercising the functions of a ranger.¹³³
- 6.79 In CP 10, we asked the following questions:
- (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?¹³⁴

Submissions and consultations

- 6.80 A number of stakeholders considered that government agencies should not be able to engage private contractors to issue penalty notices on behalf of the issuing agencies.¹³⁵ Shopfront made the following comments:

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,

131. R Verspaandonk, 'Outsourcing: For and Against' (2001) *Current Issues Brief* No18, Parliamentary Library, Parliament of Australia, 5-6.

132. *Sydney Harbour Foreshore Authority Act 1998* (NSW) s 32; *Sydney Harbour Foreshore Authority Regulation 2011* (NSW).

133. *Sydney Harbour Foreshore Authority Act 1998* (NSW) s 32(1A).

134. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10, (2010) Question 5.2.

135. Redfern Legal Centre, *Submission PN26*, 2; The Law Society of NSW, *Submission PN31*, 6; The Shopfront Youth Legal Centre, *Submission PN33*, 9.

these security guards do not always have the necessary skills to handle young people sensitively and appropriately.¹³⁶

- 6.81 Redfern Legal Centre expressed concerns about private companies making impartial decisions about the punishment of individual offenders.¹³⁷ The Law Society and Shopfront both noted that the actions and decisions of private contractors would not fall under the jurisdiction of the Ombudsman and would therefore not be subject to independent review.¹³⁸
- 6.82 However, the majority of stakeholders considered that government agencies should be able to engage the services of private organisations to issue penalty notices,¹³⁹ particularly where it would be administratively expedient, where the issuing agency has insufficient resources to carry out this function internally, and where the costs of engaging additional staff would be prohibitive.¹⁴⁰ The SDRO made the observation that government agencies and statutory authorities ‘regularly contract services to external providers under detailed contractual arrangements’ and considered that similar arrangements could be made with respect to the issuing of penalty notices, provided that accountability for quality remained with the responsible agency.¹⁴¹
- 6.83 Two agencies indicated that they already engage the services of external issuing officers in some capacity. NSW Maritime only extends its power to NSW Police;¹⁴² NSW Industry and Investment relies on private contractors to detect and report on certain offences.¹⁴³ Importantly, these private contractors are not authorised to issue penalty notices; this is done by departmental officers who exercise their discretion based on the content of the contractors’ reports. The NSW Industry and Investment submitted that ‘this system has operated effectively with no problems’.¹⁴⁴ Similarly, Holroyd City Council commented on the successful use of private contractors in clearly delineated precincts, such as those controlled by the Sydney Harbour Foreshore Authority, the Sydney Cricket Ground Trust and various university campuses.¹⁴⁵
- 6.84 No submission was in favour of unqualified or unchecked use of private contractors. Holroyd City Council expressed particular concern about contractual arrangements creating perverse incentives for the issuing contractor. According to the Council, it would be contrary to the public interest for issuing agencies to engage private contractors and evaluate their performance according to the number and ratio of

136. The Shopfront Youth Legal Centre, *Submission PN33*, 9.

137. Redfern Legal Centre, *Submission PN26*, 2.

138. The Law Society of NSW, *Submission PN31*, 6; The Shopfront Youth Legal Centre, *Submission PN33*, 9.

139. NSW Food Authority, *Submission PN9*, 6; NSW Land and Property Management Authority, *Submission PN17*, 8; Holroyd City Council, *Submission PN10*, 11; Sydney Olympic Park Authority, *Submission PN6*, 1-2; Legal Aid NSW, *Submission PN11*, 10; NSW Industry and Investment, *Submission PN37*, 4-5.

140. NSW Food Authority, *Submission PN9*, 6; NSW Land and Property Management Authority, *Submission PN17*, 8; NSW Industry and Investment, *Submission PN37*, 4-5.

141. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 7.

142. NSW Maritime, *Submission PN2*, 9.

143. NSW Industry and Investment, *Submission PN37*, 4.

144. NSW Industry and Investment, *Submission PN37*, 4.

145. Holroyd City Council, *Submission PN10*, 11.

penalty notices that they issue over a set period of time.¹⁴⁶ Further, it considered that the use of contractors over 'significant areas' (rather than clearly demarcated areas such as Sydney Harbour Foreshore, Sydney Cricket Ground or various university grounds) could undermine public perceptions of the penalty notice system.¹⁴⁷

- 6.85 The majority of submissions supporting the use of private contractors considered it necessary to impose a range of safeguards to ensure the accountability of the responsible agency. The Food Authority, for example, submitted that the use of private contractors should only occur in 'very limited circumstances',¹⁴⁸ although it did not indicate what those circumstances should be. The LPMA considered that the exercise of such a power should be 'subject to the control and direction of the relevant agency'.¹⁴⁹
- 6.86 A number of stakeholders called for strict requirements regarding officer training and accreditation in the penalty notices scheme, as well as ongoing supervision of the contract to ensure compliance with its provisions.¹⁵⁰ NSW Industry and Investment said that, in addition to the training provided to in-house issuing officers, private contractors should be required to undergo specialist training relating to the elements and standards of proof required for the offences involved.¹⁵¹ Legal Aid considered that private contractors should be bound by the same legislation and guidelines that apply to in-house issuing officers,¹⁵² while the Sydney Olympic Park Authority argued in favour of a code of conduct to be used in setting and clarifying the appropriate standards required of contracted officers.¹⁵³
- 6.87 No submission put forward direct evidence of problems with the use of contractors to enforce penalty notice debts. However two submissions expressed grave concerns about enforcement activities by private contractors on the basis of their experience with private contractors used to enforce civil debt.¹⁵⁴ These submissions argued that enforcement of penalty notice debt is too serious a function to outsource to private contractors, that government control over this function is important, and that the consequences can be severe for debtors who experience bad enforcement practices.¹⁵⁵ We note these concerns. However it was not envisaged by CP 10 that the enforcement activities presently carried out by the SDRO should be carried out by private contractors.

146. Holroyd City Council, *Submission PN10*, 11.

147. Holroyd City Council, *Submission PN10*, 11.

148. NSW Food Authority, *Submission PN9*, 6.

149. NSW Land and Property Management Authority, *Submission PN17*, 8.

150. Sydney Olympic Park Authority, *Submission PN6*, 1-2; Legal Aid NSW, *Submission PN11*, 10; NSW Food Authority, *Submission PN9*, 6; NSW Industry and Investment, *Submission PN37*, 4-5.

151. NSW Industry and Investment, *Submission PN37*, 4-5.

152. Legal Aid NSW, *Submission PN11*, 10.

153. Sydney Olympic Park Authority, *Submission PN6*, 1-2.

154. The Shopfront Youth Legal Centre, *Submission PN33*, 9 referred to problems of civil debt enforcement revealed by the Australian Competition and Consumer Commission: see, Australian Competition and Consumer Commission, *Debt Collection Practices in Australia: Summary of Stakeholder Consultation* (2009). See also Redfern Legal Centre, *Submission PN26*, 3.

155. Redfern Legal Centre, *Submission PN26*, 3.

Commission's conclusions

- 6.88 We note that there is presently no evidence of a problem with the use of private contractors to issue penalty notices, and that issuing agencies appear to have given careful consideration to the way in which such contractors are used. We recommend that government agencies should continue to be able to engage the services of private organisations to issue penalty notices subject to suitable safeguards.
- 6.89 Private organisations should only be used where they have the requisite skills and are accountable to the regulating agency. The experience of existing agencies, and the concerns expressed to us in submissions and consultations suggest the following principles:
- the final decision to issue, or not to issue, a notice should be taken by an employee of the issuing agency and not by a contractor
 - accountability for the conduct of those who issue notices should remain at all times with the government agency
 - staff who issue notices should, at all times, be subject to the control and direction of the issuing agency
 - all individuals employed by private contractors who issue penalty notices must be adequately trained to carry out work under the contract
 - if private contractors are to issue penalty notices, training must include the elements and standard of proof required for the offences involved, and the relevant cautions guidelines
 - the performance of contractors must be monitored, and
 - there should never be perverse incentives, such as quotas or targets: the performance of contracted officers should not be assessed by the number of penalty notices issued.

Recommendation 6.4

Issuing agencies that engage private contractors to issue penalty notices should ensure that:

- (a) the final decision to issue, or not to issue, a penalty notice is taken by an employee of the issuing agency and not by a private contractor
- (b) accountability for the conduct of issuing officers remains at all times with the government agency
- (c) issuing officers are, at all times, subject to the control and direction of the issuing agency
- (d) issuing officers employed by private contractors are adequately trained to carry out work under the contract
- (e) training is provided on the elements and standard of proof required for the offences, as well as the relevant caution guidelines
- (f) the performance of contractors, including issuing officers, is monitored, and

(g) the performance of issuing officers is never assessed by the number of penalty notices issued, nor should there be perverse incentives such as quotas or targets.

Limits on the number and value of penalty notices that may be issued at one time

- 6.90 Penalty notice amounts are determined on the basis that the penalty notice recipient commits a single offence. The penalty amount reflects, among other things, the seriousness of that offence.¹⁵⁶ However, a person may receive multiple penalty notices for different offences on the one occasion. Where this occurs, the aggregate penalty amount can be out of proportion to the seriousness of offending behaviour.¹⁵⁷ As Legal Aid explained, multiple penalty notices can result in 'instantaneous and in many cases insurmountable level of debt'.¹⁵⁸
- 6.91 The following case study illustrates the nature of the nature of the problem.

Case study

Fifteen year-old Peter was given a motorised mountain bike as a gift. Peter did not know what the engine capacity of the motor was, nor the maximum output in watts of his bicycle. Shortly after he received the bike, Peter and a friend rode their bikes to the local shops. They were stopped by police, who issued four penalty notices to Peter for:

- using an unregistered cycle on the road
- riding on the footpath
- being an unlicensed rider, and
- not wearing a helmet.

The penalty notices amounted to \$1659. Legal Aid wrote to the SDRO asking that the penalty notices be withdrawn and that Peter be cautioned instead. The SDRO refused the request, providing no reasons for its decision.¹⁵⁹

- 6.92 While the *Fines Act* provides that applicants may seek internal review,¹⁶⁰ to have their matter heard by a court,¹⁶¹ or to have their penalty notice written off,¹⁶² these provisions only arise after the penalty notice or notices have already been issued. It would improve the efficacy of the penalty notice system and reduce adverse downstream consequences to recipients if unwarranted or excessive penalty notices could be prevented at the outset. It is also apparent from the case study

156. New Zealand Ministry of Justice, *Increasing the Effectiveness of the Infringement System*, Cabinet Policy Committee Paper (2006) [16].

157. New Zealand Ministry of Justice, *Increasing the Effectiveness of the Infringement System*, Cabinet Policy Committee Paper (2006) [16].

158. Legal Aid NSW, *Submission PN11*, 10; The Law Society of NSW, *Submission PN31*, 6.

159. Legal Aid NSW, *Submission PN 11*, 11.

160. *Fines Act 1996* (NSW) s 24A.

161. *Fines Act 1996* (NSW) s 23A.

162. *Fines Act 1996* (NSW) s 101.

above that internal review is not always successful in dealing with excessive penalties.

- 6.93 One submission to this reference argued that the totality principle is relevant in this regard.¹⁶³ This common law principle, not unrelated to the principle of proportionality,¹⁶⁴ applies to judicial officers in setting a penalty in respect of multiple offences. It requires that the aggregate punishment imposed on a person be ‘just and appropriate’ given the totality of his or her offence.¹⁶⁵ The principle, often referred to as a ‘limitation upon excess’,¹⁶⁶ is designed to prevent a court imposing a ‘crushing sentence’.¹⁶⁷ A crushing sentence has been described as one that
- will induce a feeling of hopelessness¹⁶⁸
 - destroys prospects for rehabilitation and reform¹⁶⁹
 - is so discouraging that it puts at risk any incentive that the offender might have to apply him or herself to rehabilitation,¹⁷⁰ and
 - is ‘so crushing as to manifest covert error’.¹⁷¹
- 6.94 In *Johnson v R*, the High Court held that, in cases involving multiple offences, ‘the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces’. Instead, it must ‘look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences’.¹⁷² Although, in most cases, a court will make a downward adjustment as a result of applying this principle, the reverse can also be true.¹⁷³ According to the Judicial Commission, the court’s task ‘is to ensure that the overall sentence is neither too harsh nor too lenient’.¹⁷⁴
- 6.95 The totality principle is also relevant to court-imposed fines,¹⁷⁵ although it may have less force in this context.¹⁷⁶ Unlike a term of imprisonment, fines cannot be made ‘concurrent’; however, it has been suggested that,¹⁷⁷ where a sentencing judge

163. Youth Justice Coalition, *Submission PN34*, 8-9.

164. *R v MMK* [2006] NSWCCA 272 (5 September 2006) [11].

165. See D A Thomas, *Principles of Sentencing* (1979) 56-57.

166. *R v Patison* [2003] NSWCCA 171 (15 July 2003), Giles JA, 58.

167. *R v MAK* [2006] NSWCCA 381 (30 November 2006) [17].

168. *R v MAK* [2006] NSWCCA 381 (30 November 2006) [17].

169. *R v MAK* [2006] NSWCCA 381 (30 November 2006) [17].

170. *R v Folbigg* [2005] NSWCCA 23 (17 February 2005) [186].

171. *R v Folbigg* [2005] NSWCCA 23 (17 February 2005) [187].

172. See *Johnson v The Queen* (2004) 78 ALJR 616 [18].

173. *R v KM* [2004] NSWCCA 65 (18 March 2005) [55] cited with approval in *Vaovasa v The Queen* [2007] NSWCCA 253 (28 August 2007) [18]. The totality principle is routinely relied upon by the Crown in appeals against inadequacy of sentence. But mostly, the principle is invoked at first instance in the words of McHugh J in *Postiglione v The Queen* (1997) 189 CLR 295, 308.

174. Judicial Commission of New South Wales, ‘Concurrent and Consecutive Sentences: Sentencing Procedures for Imprisonment’, *Sentencing Bench Book* [8-200].

175. *Camilleri’s Stock Feeds Pty Ltd v Environment Protection Authority* (1993) NSWLR 683, 704; *R v Brown* (1982) 5 A Crim R 404, 407.

176. *R v Sgroi* (1989) 40 A Crim R 197, 203.

177. *EPA v Barnes* [2006] NSWCCA 246 (17 August 2006) [50].

believes that the totality principle requires an adjustment, the amount of each fine could be altered.¹⁷⁸

6.96 Although the totality principle applies to determinations of penalties by a judicial officer, it was suggested that it should be applied in the context of penalty notices. The Youth Justice Coalition argued that often what starts as a minor offence quickly escalates to a total penalty that is disproportionate to the objective seriousness of the offending behaviour. In many cases, particularly for vulnerable people, the final amount will be manifestly excessive, as in the case study above.¹⁷⁹ Stakeholders in consultation emphasised the need for a ‘happy medium’, so that vulnerable people are not punished too harshly but, at the same time, unacceptable behaviour does not go unacknowledged and unpunished.¹⁸⁰ In this context, the totality principle could provide a meaningful safeguard against overly harsh aggregate sum penalties.

6.97 In CP 10, we asked the following questions:

- (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* 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?¹⁸¹

Submissions and consultations

6.98 Some stakeholders disagreed that a limit should be placed on the number or value of penalty notices that can be issued in respect of one incident or occasion. It was said that such a limit:

- would be unduly restrictive since this should be left to the discretion of the issuing officer¹⁸²
- could be seen as a ‘free pass’ and encourage further offending where the upper limit has been reached¹⁸³
- may interfere with an officer’s ability to deal effectively with repeat offenders or to respond to offending that is of a more serious nature than usual¹⁸⁴

178. *Johnson v The Queen* (2004) 78 ALJR 616, 623 [18].

179. Youth Justice Coalition, *Submission PN34*, 8. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 17.

180. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

181. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 5.3.

182. NSW Department of Planning, *Submission PN7*, 7; NSW Food Authority, *Submission PN9*, 7; NSW Department of Local Government, *Submission PN23*, 3; NSW Land and Property Management Authority, *Submission PN17*, 9.

183. Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011. See also comments about the need to preserve public confidence in the administration of justice and the court’s resistance to any suggestion of a ‘discount’ in sentencing: *R v MAK* [2006] NSWCCA 381 (30 November 2006) [18]; *R v Harris* [2007] NSWCCA 130 (1 May 2007) [46]; *R v Knight* [2005] 253 (27 July 2005) [112]; *R v Wheeler* [2000] NSWCCA 34 (16 February 2000) [36].

- could lead to more matters being heard before a court,¹⁸⁵ and
- is unnecessary given the right to court election¹⁸⁶ and other rights of review.¹⁸⁷

6.99 However, the majority of submissions to this reference expressed support for such a limit,¹⁸⁸ with some agencies indicating that they have already developed and implemented limitation policies to govern the exercise of discretion where multiple penalty notices apply.¹⁸⁹ Redfern Legal Centre preferred a limit on the total value of penalty notices (rather than the number of notices) that can be issued, as this would provide reasonable restraint on the potential aggregate debt while also allowing an issuing agency to maintain a record of a person's penalty notice history.¹⁹⁰ A limit on the value or number of penalty notices would be consistent with the totality principle as it would

recognise and mitigate the shortcomings of the penalty notice system compared to the more holistic approach taken by the judiciary in sentencing offenders guilty of multiple charges arising from the same incident.¹⁹¹

6.100 Stakeholders representing vulnerable groups were particularly concerned about the use of secondary notices as punishment for an emotional response to the issue of a primary penalty notice, for example where a person swears in response to being issued with a penalty notice.¹⁹²

6.101 While there was support for agency-specific guidelines,¹⁹³ the majority of stakeholders preferred a legislative limit to the number of penalty notices that may be issued at once,¹⁹⁴ either through the *Fines Act*¹⁹⁵ or through relevant parent

184. NSW Department of Local Government, *Submission PN23*, 3.

185. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 7-8.

186. NSW Land and Property Management Authority, *Submission PN17*, 9.

187. NSW Department of Local Government, *Submission PN23*, 3.

188. NSW Maritime, *Submission PN2*, 10; Holroyd City Council, *Submission PN10*, 12; Legal Aid NSW, *Submission PN11*, 10; Redfern Legal Centre, *Submission PN26*, 3; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 17; The Law Society of NSW, *Submission PN31*, 6; The Shopfront Youth Legal Centre, *Submission PN33*, 9; Youth Justice Coalition, *Submission PN34*, 8-9; NSW Industry and Investment, *Submission PN37*, 5; Police Portfolio, *Submission PN44*, 2.

189. NSW Maritime, *Submission PN2*, 10; NSW Industry and Investment, *Submission PN37*, 5.

190. Redfern Legal Centre, *Submission PN26*, 3.

191. Redfern Legal Centre, *Submission PN26*, 3.

192. The Law Society of NSW, *Submission PN31*, 6; Aboriginal Legal Service, *Consultation PN7*, Redfern NSW, 2 February 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

193. NSW Maritime, *Submission PN2*, 10; Holroyd City Council, *Submission PN10*, 12. NSW Food Authority, *Submission PN9*, 7; Legal Aid NSW, *Submission PN11*, 11.

194. Legal Aid NSW, *Submission PN11*, 11; Redfern Legal Centre, *Submission PN26*, 3; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 17; Youth Justice Coalition, *Submission PN34*, 9.

195. Legal Aid NSW, *Submission PN11*, 11; Redfern Legal Centre, *Submission PN26*, 3.

legislation.¹⁹⁶ Although there was no clear consensus as to the best way to impose an appropriate limit, the following options were suggested:

- amending the *Fines Act* to include a prohibition on multiple penalty notices if to do so would ‘unfairly punish a person numerous times for the same conduct in a way that does not reflect the seriousness of the offence or the circumstances of the offence’.¹⁹⁷
- amending the *Fines Act* to mandate a maximum number of penalty units that may be issued in respect of one incident, with an exception provided for serious offences, such as those relating to public safety.¹⁹⁸
- imposing a limit on the number or value of penalty notices that may be issued in the relevant legislation or regulation.¹⁹⁹
- developing agency-specific guidelines to ‘assist in the exercise of discretion and appropriate escalation of enforcement action’.²⁰⁰

6.102 While Legal Aid submitted that ‘some broad legislative guidance in this area is required’, it recognised the value of allowing issuing agencies to develop guidelines outlining the appropriate approach in relation to specific offences or categories of offence, having regard to this broad principle.²⁰¹ Similarly, there were submissions that issuing agencies would be best placed to determine the objective seriousness in ‘unique areas of regulation’,²⁰² and would be best placed to ‘assist in the exercise of the discretion and appropriate escalation of enforcement action’.²⁰³

Commission’s conclusions

- 6.103 Taking into account the range of views expressed in relation to this question, on balance we are of the view that more is needed to prevent officers from issuing multiple penalty notices in a way that unfairly or disproportionately punishes recipients and thereby undermines public respect for the penalty notice system.
- 6.104 Imposing limits on the number or amount of penalty notices that can be imposed does not appear to us to respond to the nature of the problem, which is one of proportionality involving a consideration of whether the total penalty imposed is proportionate to the seriousness of the offending behaviour. Such limits may create their own problems in circumstances where the offending behaviour is serious and multiple penalty notices are an appropriate response.
- 6.105 Instead we recommend that the totality principle be taken into account by issuing officers when considering whether to issue a penalty notice or a caution, and during

196. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 17.

197. Legal Aid NSW, *Submission PN11*, 11.

198. Redfern Legal Centre, *Submission PN26*, 3.

199. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 17.

200. NSW Food Authority, *Submission PN9*, 7.

201. Legal Aid NSW, *Submission PN11*, 11.

202. NSW Maritime, *Submission PN2*, 10.

203. NSW Food Authority, *Submission PN9*, 7.

internal review. This principle should apply at two points: it should apply to a decision to issue a penalty notice or a caution and to internal reviews.

- 6.106 We recommend that the Attorney General's Caution Guidelines²⁰⁴ be revised to include a requirement that issuing officers consider whether or not issuing multiple penalty notices will unfairly punish the recipient in a way that does not reflect the totality, seriousness and circumstances of the offending behaviour. If multiple penalty notices would be a disproportionate response to the seriousness of the offending behaviour, a caution should be issued for one or more of the offences.
- 6.107 In relation to internal review, we consider that s 24E(2) *Fines Act* should be amended to provide that an issuing agency must withdraw a penalty notice if it finds that one or more penalty notices have been issued in relation to a single incident, and that this unfairly punishes the recipient in a way that does not reflect the totality, seriousness and circumstances of the offending behaviour.
- 6.108 It could be argued that s 24E(2)(e) *Fines Act*, which provides for mandatory withdrawal where 'an official caution should have been given instead of a penalty notice', already allows for such an approach. However, it does not appear that the provision has been interpreted this way in practice.²⁰⁵ We consider that an express ground is warranted to reinforce the importance of proportionality as a central principle in the penalty notice system. This approach should serve to limit the need for the recipient to seek a review, or to elect to have the matter heard in court.
- 6.109 Such an amendment would not prevent a reviewing agency from issuing one or more formal cautions in appropriate cases. The capacity to have a mixture of penalty notices and cautions for lesser offences arising out of the one incident could be compared to the 'Form1 procedure' whereby a sentencing court can take into account other admitted offences when dealing with a particular offence, so as to 'clear the record'.

Recommendation 6.5

- (1) The Attorney General's Caution Guidelines should be amended to require issuing officers to consider whether the issue of multiple penalty notices in response to a single set of circumstances would unfairly or disproportionately punish a person in a way that does not reflect the totality, seriousness or circumstances of the offending behaviour.
- (2) Section 24E(2) of the *Fines Act* 1996 (NSW) should be amended to provide that an issuing agency must withdraw one or more penalty notices where it finds that multiple penalty notices have been issued in relation to a single set of circumstances, and that this unfairly punishes the recipient in a way that does not reflect the totality, seriousness and circumstances of the offending behaviour.

204. NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996*.

205. See Chapter 7.

Withdrawing a penalty notice

- 6.110 The *Water Management Act 2000* (NSW) (*Water Management Act*) provides that a penalty notice may be withdrawn up to 28 days after it has been served, and that further proceedings for the offence may take place as if the penalty notice had never been served.²⁰⁶ Any penalty amount that has already been paid by the offender is to be refunded.²⁰⁷ This provision caters for situations where, for example, investigations subsequent to the issue of a penalty notice demonstrate a more serious environmental offence that should be pursued in court rather than via a penalty notice.
- 6.111 However, there is potential for the power to withdraw a penalty notice and prosecute for the offence to be misused. For example, such a power could be used more as a matter of the agency's convenience and flexibility, rather than to cater for exceptional cases where the nature of the breach may not be immediately evident. Unconstrained withdrawal powers could also encourage poor investigative practices, as issuing officers would know that a hastily issued penalty notice could be subsequently withdrawn and prosecution would not be precluded. Further, as one stakeholder pointed out, withdrawing a penalty notice in favour of prosecution could open the door for inconsistent decision making, could be the catalyst for a perception of corrupt behaviour or could even mask corrupt behaviours.²⁰⁸ Also, a person who receives a penalty notice may justifiably believe that a final decision has been made concerning the way in which an infringement will be dealt with, and that it will not be followed by prosecution in court for the offence.
- 6.112 There is a potentially interesting relationship between these provisions of the *Water Management Act* and s 24H of the *Fines Act*. Section 24H is located in Part 3 Division 2A of the *Fines Act* which deals with internal review of penalty notices. Section 24H(1) provides that nothing in Division 2A limits the power of an issuing agency to withdraw a penalty notice on its own motion.²⁰⁹ Section 24H(2) provides that, if a reviewing agency withdraws a penalty notice after the amount due has been paid, no person is liable to further proceedings for the offence.²¹⁰ It seems possible that a person could be issued with a penalty notice under s 365 of the *Water Management Act*, and pay it, and subsequently for the Ministerial Corporation to withdraw that penalty notice within the 28 day time frame in favour of prosecution. There may then arise an interesting point as to which piece of legislation takes precedence.

206. *Water Management Act 2000* (NSW) s 365(7).

207. *Water Management Act 2000* (NSW) s 365(7).

208. Holroyd City Council *Submission PN10*, 12.

209. *Fines Act 1996* (NSW) s 24H(1).

210 See also *Fines Act 1996* (NSW) s23(2) which provides that payment of the full amount under a penalty notice results in there being 'no further liability for further proceedings for the offence to which the notice relates'. A note appended to s 23 states that 'payment generally does not have the effect of an admission of any liability in relation to the events out of which the offence arose'. In relation to CINs, *Criminal Procedure Act 1986* (NSW) s 338 provides that 'no person is liable to any further proceedings for the alleged offence' and that 'payment of a penalty under this Part is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence'.

- 6.113 In CP 10, we were concerned with the more general legal policy issue of the balance between three competing interests. First, there is the desire of some issuing agencies to be able to withdraw a penalty notice in favour of prosecution. Second, there is the interest of an individual in certainty and reliability. Third, there is the interest of the public in avoiding corruption, or the appearance of corruption, in issuing penalty notices. We asked whether the power to withdraw a penalty notice should only be available in limited circumstances on specific policy grounds and, if so, what those grounds should be.²¹¹

Submissions and consultations

- 6.114 Of the limited number of submissions on this issue, the majority of stakeholders agreed that the power to withdraw a penalty notice in favour of a prosecution through the court system should only be available in exceptional circumstances²¹² and based on 'public policy grounds'.²¹³ The main ground identified was where 'new information or evidence comes to light'²¹⁴ or where the offence was more serious than it appeared at first instance.²¹⁵
- 6.115 Submissions suggested that the withdrawal power could operate in two possible ways. First, through guiding principles implemented in the statute creating the offence.²¹⁶ Second, through the development of guidelines to assist decision makers in the proper use of their discretion.²¹⁷ There was support for a time limit on the use of any withdrawal power, with 28 days nominated as an appropriate length of time.²¹⁸

Commission's conclusions

- 6.116 In accordance with the tenor of submissions, we do not support a broad discretion to withdraw penalty notices in favour of prosecution. If a discretion to withdraw a penalty notice in favour of prosecution is to be adopted in legislation prescribing penalty notice offences, it should only be available in respect of serious offences where the nature and gravity of the offence was not apparent at the time of issuing a penalty notice. There should be a strict time limit applying to the period when the power is available. A period of 28 days appears to be appropriate for this purpose.
- 6.117 The reasons for this conclusion are that recipients should be able to regard their punishment as final. The use of withdrawal powers in this way can open the door to

211. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 5.4.

212. NSW Department of Planning, *Submission PN7*, 6; NSW Food Authority, *Submission PN9*, 7; Legal Aid NSW, *Submission PN11*, 11; NSW Land and Property Management Authority, *Submission PN17*, 9; The Law Society of NSW, *Submission PN31*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 9.

213. The Shopfront Youth Legal Centre, *Submission PN33*, 9.

214. NSW Maritime, *Submission PN2*, 10.

215. NSW Food Authority, *Submission PN9*, 7; Holroyd City Council, *Submission PN10*, 12.

216. NSW Department of Planning, *Submission PN7*, 6.

217. NSW Land and Property Management Authority, *Submission PN17*, 9; The Law Society of NSW, *Submission PN31*, 7; The Shopfront Youth Legal Centre, *Submission PN33*, 9.

218. Holroyd City Council, *Submission PN10*, 12.

inconsistent decision making, corrupt practices, and careless investigative practices.

Recommendation 6.6

If legislation provides for discretion to withdraw a penalty notice in favour of prosecution, this discretion should only be available

- (a) in respect of serious offences where the nature and gravity of the offence was not apparent at the time of issuing a penalty notice, and
- (b) subject to a time limit of 28 days.

7. Internal review

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Internal review – aims and objectives

- 7.2 In its 2006 interim report on fines and penalty notices, the Sentencing Council expressed concern about the absence of a clear legislative power to review the

decision to issue a penalty notice.¹ Until the 2008 amendments to the *Fines Act* 1996 (NSW) (*Fines Act*), review of penalty notices (not involving court election) was conducted by the State Debt Recovery Office (SDRO) and the agencies that had issued the penalty notice (reviewing agencies) on an *ad hoc* basis and according to guidelines that were not publicly available.²

- 7.3 It is inevitable that, from time to time, an error will be made in issuing a penalty notice, or a decision to issue will be made that is less than optimal. Internal review is a safeguard that ‘allows the client the opportunity to present extenuating circumstances that existed but were not apparent at the time of the detected offence’.³ As one submission argued, because the penalty notice system is not structured to extract relevant information from penalty notice recipients at the time of the offence, ‘the interests of justice demand that a withdrawal remain possible’.⁴ This is particularly relevant to some vulnerable people because:

Identification of those people suffering a mental illness or cognitive impairment hinges on the specific training and experience of the field officer ... It is inevitable that at times, such a person will be issued a penalty notice. The use of internal review ... would be a suitable mechanism to have the matter finalised in a manner satisfactory to all parties.⁵

- 7.4 The power to withdraw a penalty notice after internal review provides reviewing agencies with an effective way of responding quickly and easily to substantive changes in facts or circumstances.⁶ It has the potential to save private and public resources as it is a ‘viable administrative alternative to having the matter heard in Court’,⁷ prevents the escalation of enforcement costs where a penalty notice should not have been issued, and reduces ‘wasteful enforcement efforts on debts that are unlikely to ever be recovered’.⁸
- 7.5 This chapter examines the way in which the decision to issue a penalty notice is reviewed by the SDRO and other reviewing agencies, and the effectiveness of current internal review processes in achieving their legislative objectives.

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1. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006).
 2. The former Attorney General described the legislative amendments introducing the internal review provisions into the *Fines Act* as a ‘formalised version of the existing processes that the State Debt Recovery Office undertakes when a person writes to challenge a penalty notice’: NSW, *Parliamentary Debates*, Legislative Council, 27 November 2010, 11971 (J Hatzistergos).
 3. NSW State Debt Recovery Office, response to survey on cautions and internal review, February 2011, NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.
 4. Redfern Legal Centre, *Submission PN26*, 4.
 5. Holroyd City Council, *Submission PN10*, 19; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.
 6. NSW Maritime, *Submission PN2*, 10.
 7. NSW State Debt Recovery Office response to survey on cautions and internal review, February 2011, NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.
 8. Redfern Legal Centre, *Submission PN26*, 15.

Legal framework

- 7.6 The *Fines Further Amendment Act 2008* (NSW) (*Fines Further Amendment Act*) introduced internal review as one of a number of measures aimed at achieving greater flexibility and early intervention to ‘divert vulnerable groups out of the fine and penalty notice system’.⁹ These provisions became effective in March 2010 and are contained in Part 3 Division 2A *Fines Act*. The legislation is supplemented by guidelines.

The internal review provisions of the *Fines Act*

- 7.7 The *Fines Act* provides that an application may be made by or on behalf of any person for a review of the decision to issue a penalty notice.¹⁰ The application must be in writing to the issuing agency or the SDRO (if the penalty notice is payable to the SDRO)¹¹ and must include the grounds on which the review is sought (including supporting evidence).¹² The application may be made at any time until the due date specified in the penalty reminder notice, even if the whole or part of the amount payable has already been paid.¹³
- 7.8 Once it has received an application, the agency is required to carry out a review,¹⁴ which must be carried out by a person who was not involved in the decision to issue the penalty notice.¹⁵ However, the agency need not conduct a review if it has notified the applicant in writing, within 10 days of receiving the application, that it has decided not to conduct a review and gives reasons for that decision,¹⁶ or where a review of the decision has already been conducted.¹⁷ Even where it decides not to conduct an internal review, an agency may take ‘such other action as it sees fit’, including withdrawing the penalty notice.¹⁸
- 7.9 After reviewing a decision, the reviewing agency may confirm the decision to issue the penalty notice or may withdraw it.¹⁹ Under s 24E(2), the agency *must* withdraw the notice where the following grounds are made out:
- (a) The penalty notice was issued contrary to law
 - (b) The issue of the penalty notice involved a mistake of identity

9. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11969 (J Hatzistergos).

10. *Fines Act 1996* (NSW) s 24A(1).

11. *Fines Act 1996* (NSW) s 24A(2)(a).

12. *Fines Act 1996* (NSW) s 24A(2)(b).

13. *Fines Act 1996* (NSW) s S24A(3).

14. *Fines Act 1996* (NSW) s24C(1).

15. *Fines Act 1996* (NSW) s 24C(2).

16. *Fines Act 1996* (NSW) s 24B(1)(a)

17. *Fines Act 1996* (NSW) s 24B(1)(b). Section 24B(1)(c) sets out that the agency need not conduct a review in ‘such other circumstances as may be prescribed by the regulations’ but the regulations are silent on this point.

18. *Fines Act 1996* (NSW) s24B(2).

19. *Fines Act 1996* (NSW) s 24E(1).

- (c) The penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence
- (d) The person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless:
 - (i) to understand that the person's conduct constituted an offence, or
 - (ii) to control such conduct
- (e) an official caution should have been given instead of a penalty notice, having regard to the relevant guidelines under s19A
- (f) any other ground prescribed by the regulations.²⁰

7.10 Under s 24E(3), a reviewing agency *may*, at its discretion, decide to withdraw a penalty notice on a ground other than those specified in s 24E(2). A reviewing agency may also decide to review and/or withdraw a penalty notice on its own motion.²¹

7.11 If the penalty notice is reviewed and confirmed, the reviewing agency must serve a penalty reminder notice,²² which replaces any previous penalty notice in respect of the offence.²³ On the other hand, if the penalty notice is withdrawn, the reviewing agency may give an official caution where it considers it appropriate to do so.²⁴ A decision to withdraw a penalty notice is taken also to withdraw any penalty reminder notice²⁵ and any amounts that have been paid are repayable to the applicant.²⁶

The scope of the review provisions in s 24E

7.12 One of the concerns that caused the introduction of internal review was the need to divert vulnerable people out of the penalty notice system as early as possible.²⁷ Four types of vulnerability are specifically mentioned in s 24E(2)(d): intellectual disability, mental illness, cognitive impairment and homelessness. However these characteristics are only relevant under this provision where they impinge directly on the offending behaviour. So, for example, it is not sufficient for penalty notice recipients with a mental illness to demonstrate that they have such an illness: they must also show that they did not understand that the conduct constituted an offence or that they were unable to control such conduct.

7.13 Although s 24E(2)(c) provides for review on the basis of exceptional circumstances these must be 'relating to the offence'. The Attorney General's Internal Review

20. *Fines Regulation 2010* (NSW) does not provide for any further grounds requiring withdrawal of a penalty notice.

21. *Fines Act 1996* (NSW) s 24H.

22. *Fines Act 1996* (NSW) s 24F(1).

23. *Fines Act 1996* (NSW) s24F(2).

24. *Fines Act 1996* (NSW) s 24G(1).

25. *Fines Act 1996* (NSW) s 24G(2)(a).

26. *Fines Act 1996* (NSW) s24G(2)(b)(ii).

27. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11969 (J Hatzistergos).

Guidelines²⁸ (discussed below) provide examples of situations where an unexpected event beyond the person's control caused the offending behaviour, for example where a person parked for longer than entitled because his or her vehicle broke down or because of a medical emergency.²⁹

- 7.14 Thus most of the mandatory grounds for internal review are not 'diversionary' in that the reviewing agency cannot take into account the applicant's circumstances in order to decide whether it is worthwhile, fair, or reasonable to pursue the penalty. However one of the mandatory grounds does make such a diversionary approach possible. Section 24E(2)(e) provides that a penalty notice must be withdrawn where an official caution should have been given instead of a penalty notice, having regard to the relevant (cautions) guidelines under s 19A.
- 7.15 The Attorney General's Caution Guidelines list matters to be taken into account when deciding whether a caution is appropriate. These include factors such as the seriousness of the offence, homelessness, mental illness, intellectual disability, age, and physical infirmity.³⁰ Thus characteristics of the offender may be relevant under s 24E(2)(e) even if no nexus is proved between the characteristic in question and the offending behaviour. Where a person has such a characteristic, a penalty notice could be withdrawn and the offender cautioned instead. For example, a homeless person riding a train without a ticket to stay safe and warm could be cautioned, even if he or she had some (limited and perhaps unpalatable) choices and knew that travelling without a ticket was an offence. Section 24E(2)(e) provides (at least in theory) an opportunity to revisit the decision to issue a penalty notice, and to caution instead in appropriate cases.
- 7.16 Further, s 24E(3) provides that a reviewing agency may, at its discretion, decide to withdraw a penalty notice on a ground other than those specified in subsection (2). This obviously gives an issuing agency a very broad discretion, and could allow diversion out of the penalty notice system for a vulnerable person if, for some reason, the provisions of s 24E(2) did not apply. The Attorney General's Internal Review Guidelines say very little about s 24E(3), beyond noting that an issuing agency has the discretion to withdraw a penalty notice on its own motion and on any ground it sees fit.³¹
- 7.17 Taken together, the provisions of s 24E(2) and s 24E(3) provide agencies with a broad discretion to withdraw a penalty notice on practical or compassionate grounds that do not necessarily require a nexus with offending. For example, in relation to the example of the homeless person above, the agency could withdraw the penalty notice on the basis that pursuing a penalty is inappropriate and unlikely to succeed.

28. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996*.

29. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996*, 8-9.

30. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [4.7].

31. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [5.1].

Internal review guidelines

- 7.18 Three different types of guidelines govern internal review – those issued by the Attorney General, the SDRO and individual agencies. In a survey of issuing agencies conducted by the Department of Attorney General and Justice (AGJ evaluation), 20 agencies indicated that they use their own review guidelines, 12 indicated that they use the Attorney General's Internal Review Guidelines and 20 use the SDRO Review Guidelines (either alone or in combination).³²

Attorney General's Guidelines

- 7.19 The *Fines Act* provides a power to make guidelines in relation to cautions,³³ but there is no parallel power in relation to internal review in Part 3 Division 2A.³⁴ Nevertheless the Attorney General has issued, and made publicly available, the Attorney General's Internal Review Guidelines.³⁵ These were created in consultation with a working group made up of issuing agencies and organisations representing people who receive penalty notices.³⁶ They do not apply where the agency has issued its own internal review guidelines, but agency guidelines must not be inconsistent with the Attorney General's Internal Review Guidelines.³⁷
- 7.20 The Attorney General's Internal Review Guidelines provide that applications may be made on behalf of a person, for example by his or her carer, guardian, parent or advocate.³⁸ Applications must be in writing and must include 'the grounds on which review is sought' and 'appropriate supporting evidence'.³⁹ In making their determination, reviewing officers must ensure that their discretionary powers are exercised in good faith and consistently with the *Fines Act* provisions and the Attorney General's Internal Review Guidelines.⁴⁰ Further, applications must be determined 'with reference to the written application and, wherever possible, to any statement or other information provided by the applicant, such as medical, psychological or case worker reports'.⁴¹ In addition to the grounds upon which the review has been made, the reviewing officer must have regard to whether, given the person's application:

32. NSW State Debt Recovery Office, response to survey on cautions and internal review, February 2011, NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.

33. *Fines Act 1996* (NSW) s 19A(3).

34. Although *Fines Act 1996* (NSW) s 24A provides a regulation making power.

35. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* (2010).

36. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 29.

37. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [1.1].

38. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [3.2].

39. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [3.3].

40. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [4.9].

41. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [4.10].

- prosecution of the offence would be likely to be successful, and/or
- it is appropriate to continue the enforcement process.⁴²

7.21 The Attorney General's Internal Review Guidelines assist in the interpretation of s 24E(2) of the *Fines Act*. The grounds for mandatory withdrawal of a penalty notice are explained and examples of situations in which a penalty notice might be withdrawn, or where it would not be proper to withdraw, are provided. For instance, s 24E(2)(d) deals with applications for review by people who have an intellectual disability, mental illness, cognitive impairment or are homeless. These terms are defined⁴³ and examples are given of situations where a penalty notice might be withdrawn, such as where a person with an intellectual disability does not understand that they have to buy a platform ticket even if they are not going to travel on a train.⁴⁴

SDRO Guidelines

7.22 Many agencies delegate the task of internal review to the SDRO. While the Attorney General's Internal Review Guidelines do not apply if an agency has adopted its own guidelines,⁴⁵ in practice the SDRO uses both its own and the Attorney General's Internal Review Guidelines.⁴⁶ The SDRO Review Guidelines⁴⁷ are publicly available, including on the SDRO website.⁴⁸ They explain the nature of internal review and also set out some matters that will, or will not, be regarded as relevant in relation to a number of commonly occurring offences.

7.23 The SDRO Review Guidelines state that internal review will be carried out where 'there may be extenuating or exceptional circumstances' that a person believes justifies 'reconsideration of the matter without the need to go to court, which were not evident to the reporting officer at the time [of issuing the penalty notice]'.⁴⁹ The SDRO emphasises that its guidelines are not prescriptive or exhaustive; they do not 'guarantee that leniency will be afforded as every case must be considered on its own merits'.⁵⁰

7.24 Where the SDRO conducts internal reviews on behalf of issuing agencies it will generally refer the matter back to the issuing agency, which may be in possession of further information about the alleged offence and may be better able to respond to the application with knowledge of local conditions. One stakeholder in

42. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [4.11].

43. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [5.12] – [5.22].

44. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [5.13].

45. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [1.1].

46. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.

47. NSW State Debt Recovery Office, *Review Guidelines* (2010).

48. NSW Office of State Revenue, State Debt Recovery Office, *Publications: SDRO Review Guidelines* <<http://www.sdرو.nsw.gov.au/publications.html>>.

49. NSW State Debt Recovery Office, *Review Guidelines* (2010) 1.

50. NSW State Debt Recovery Office, *Review Guidelines* (2010) 1.

consultation expressed concern that the issuing agency retains a 'veto' power in any decisions following internal review. However, a number of stakeholders emphasised that internal review is an important mechanism for identifying institutional shortfalls. The process of review encourages agencies to reflect on their internal policies and procedures, allowing them an opportunity to modify or improve their issuing practices where systemic or structural weaknesses are identified.⁵¹

- 7.25 Moreover, the SDRO will not always have the necessary expertise, skills or training to determine whether or not the issue of a particular penalty notice was appropriate in all the circumstances.⁵² Therefore the involvement of the issuing agency may be necessary, although there are advantages in this being done at arm's length.⁵³ Many issuing agencies pointed out that they do not do their own internal reviews because they prefer those reviews to be independent, and to be seen to be so.

Agency Guidelines

- 7.26 In response to a survey conducted as part of the AGJ evaluation, 40.8% of agency respondents indicated that they conduct their own internal reviews.⁵⁴ Some agencies have developed detailed procedures for internal review. For example, we consulted with Parramatta City Council, which has a Parking Infringement Review Panel (PIRP).⁵⁵ Established to create a new approach to parking infringements, the PIRP consists of five members of the public, who are paid a small honorarium to cover their sitting expenses. Two members of the public and a council officer sit as a panel to review parking notices. An example of a case where a parking ticket was withdrawn involved a person who was responding to a medical emergency. The Council reported that its PIRP had resulted in:

- a small but measurable reduction in attacks on officers, both verbal at the site of the infringement, and in writing in response to a ticket
- a reduction in the number of phone calls involving complaints
- fewer escalating complaints, and
- a slight reduction in the number of people electing to have their matter heard before a court.

The Council also refers matters to the SDRO, so that clients may make a choice about their preferred course of review.

- 7.27 Many other issuing agencies also have well developed and publicly available procedures, policies and guidelines relating to internal review. However, there are some agencies whose approach to internal review is unclear because the guidelines they use are not publicly available. There is an obvious problem of

51. Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

52. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

53. NSW Fair Trading, *Consultation PN9*, Sydney NSW, 4 February 2011.

54. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 84.

55. Parramatta City Council, *Consultation PN29*, Parramatta NSW, 28 April 2011.

transparency where information is not available to applicants about the basis on which review of their penalty notice will be carried out.

The effectiveness of the internal review procedures

Evaluation of internal review

- 7.28 Issuing agencies indicated to the AGJ evaluation that the internal review reforms have been a positive development⁵⁶ and that the amendments are operating effectively.⁵⁷ The SDRO stated that it routinely exercises its discretion to withdraw a penalty notice, whether through a ‘no action’ response, by downgrading a penalty notice to a caution, or by consulting with the issuing agency on a case-by-case basis.⁵⁸ Similarly, the NSW Food Authority has incorporated the Attorney General’s Internal Review Guidelines into its compliance and enforcement policy and some reviews have already been completed.⁵⁹ Respondents to the AGJ evaluation were overwhelmingly favourable in their assessment of the Attorney General’s Internal Review Guidelines, with almost 90% describing them as ‘helpful’.⁶⁰
- 7.29 Notwithstanding these positive developments, it appears that some agencies are not complying with their legal requirements to conduct internal review. Five agencies reported to the AGJ evaluation that their agency does not review penalty notices at all,⁶¹ despite the legislative requirement to do so.⁶² Consultations for this inquiry revealed that there are some agencies that are unaware of the existence of Part 3 Division 2A or the Attorney General’s Internal Review Guidelines.
- 7.30 Moreover, no information is presently available on how the various grounds for review under s 24E are being used. The AGJ evaluation reported that the SDRO cannot presently disaggregate the data on reviews to show how the grounds are being used.⁶³ However improvements are being made to enable better management of the information in the future.
- 7.31 While there are some excellent and innovative internal review programs, it appears that not all agencies are complying with their obligations under the *Fines Act* and the Attorney General’s Internal Review Guidelines. If internal review operates effectively, costs may be saved later in the system by reducing the number of

56. See for example, Homeless Persons’ Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 27; Youth Justice Coalition, *Submission PN34*, 9; Legal Aid NSW, *Submission PN11*, 13.

57. NSW Maritime, *Submission PN2*, 12; Holroyd City Council, *Submission PN10*, 14; NSW Department of Local Government, *Submission PN23*, 3.

58. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 8.

59. NSW Food Authority, *Submission PN9*, 8.

60. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.

61. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 84.

62. *Fines Act 1996* (NSW) ss 24A–J.

63. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.

people who elect to have their matter considered by a court. More generally, effective and responsive internal reviews will allow reviewing agencies to identify early those cases where prosecution of a penalty notice is inappropriate and/or unlikely to be successful. There are significant costs to be saved by responding to such cases early and before they proceed to enforcement.

The SDRO Guidelines

- 7.32 As noted above, 20 agencies indicated to the AGJ evaluation that they use their own review guidelines; 12 use the Attorney General's Internal Review Guidelines and 20 use the SDRO Review Guidelines (either alone or in combination).⁶⁴ The SDRO Review Guidelines therefore continue to have an important role in the system for the internal review of penalty notices in NSW.
- 7.33 However, the SDRO Review Guidelines were the subject of some critical comment, with submissions to this reference indicating that:
- There are discrepancies between the SDRO Review Guidelines and the Attorney General's Internal Review Guidelines.⁶⁵
 - Some elements of the guidelines may be misleading. The SDRO Review Guidelines, while providing a catalogue of common offences and grounds for review, do not address all the circumstances in which a penalty notice must be withdrawn. Providing a selective table of common claims can lead to confusion as to the kinds of applications that will be considered and may dissuade some applicants from submitting a legitimate case for review.⁶⁶
 - Despite the provisions of s 24E(2)(d) of the *Fines Act* there is no reference in the SDRO Review Guidelines to intellectual disability, cognitive impairment or homelessness.⁶⁷
- 7.34 The AGJ evaluation recommended that the SDRO Review Guidelines be amended to better reflect the right of a penalty notice recipient to make an application for internal review and the grounds on which a penalty notice must be withdrawn under the *Fines Act*.⁶⁸

Monitoring internal review?

- 7.35 The NSW Ombudsman, in his submission to this inquiry, raised the need for improved information about review options, the desirability of ongoing monitoring of internal review and of agencies reporting this data in annual reports.⁶⁹ The AGJ evaluation similarly concluded that publicity and monitoring of internal review is desirable, recommending that the internal review system be 'monitored and publicly

64. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 30.

65. Matthew Bennett, *Submission PN40*, 3.

66. Homeless Persons Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 28.

67. Homeless Persons Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 28.

68. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 8.

69. NSW Ombudsman, *Submission PN24*.

reported upon'.⁷⁰ While information on the number of requests for review received by the SDRO each year are published in the annual report for the Office of State Revenue (OSR),⁷¹ it would improve transparency and support the development of public policy if more detailed information on internal review were made available.⁷²

- 7.36 The AGJ evaluation noted the requirement in Victoria that agencies report every six months to the Infringement System Oversight Unit (ISOU), about the numbers, types and outcomes of internal review applications.⁷³ This information is then published in the ISOU's annual report.⁷⁴ The AGJ evaluation supported the introduction of a similar monitoring system for NSW.⁷⁵

Commission's conclusions

- 7.37 We note that internal review provisions of the *Fines Act* and the Attorney General's Internal Review Guidelines have only been in operation for a comparatively short period of time. These provisions appear to have been generally successful. Nevertheless there are a number of ways in which internal review could be improved.
- 7.38 We support the recommendation of the AGJ evaluation that the SDRO Review Guidelines be reviewed and amended to better reflect the right of a penalty notice recipient to make an application for internal review and the grounds on which a penalty notice must be withdrawn under the *Fines Act*.
- 7.39 Further, we recommend that all agency guidelines should be publicly available, consistent with the Attorney General's Internal Review Guidelines, and should be scrutinised for consistency. Fairness and transparency require that all agencies that conduct their own internal reviews do so according to guidelines that are publicly available. The *Fines Act* should be amended to require all issuing agencies to publish their internal review guidelines, including on their website. The proposed Penalty Notice Oversight Agency (PNOA), discussed in Chapter 18 of this report, should monitor these guidelines to ensure consistency with the *Fines Act* and the Attorney General's Internal Review Guidelines.
- 7.40 We agree with the AGJ evaluation that monitoring of agencies' compliance with the internal review provision of the *Fines Act* would be desirable. Currently, there is very little information about agencies' use of the internal review provisions under Part 3 Division 2A, in particular their capacity to ensure the appropriate diversion of vulnerable people from the penalty notice system. Accordingly, we recommend that

70. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 15.

71. Formerly part of NSW Treasury, now part of NSW Finance and Services.

72. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 36.

73. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 36; Victoria Department of Justice, *Attorney-General's Annual Report on the Infringements System 2009-2010* (2011) 9-10.

74. Victoria Department of Justice, *Attorney-General's Annual Report on the Infringements System 2009-2010* (2010).

75. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 36.

the proposed PNOA monitor compliance with the internal review provisions of the *Fines Act*, including the use of each the grounds under s 24E(2) and (3). The PNOA should make recommendations, and take other measures as appropriate, to improve agency practice in reviewing penalty notices. It should report periodically on its findings in relation to internal review.

- 7.41 Those agencies that have not been conducting internal review in compliance with their obligations under the *Fines Act* should do so, and should prepare and publish their guidelines. This failure to comply, albeit by a small number of agencies, fortifies our recommendation in favour of monitoring.

Recommendation 7.1

(1) The State Debt Recovery Office Review Guidelines should be reviewed and amended

- (a) to achieve consistency with the *Fines Act 1996* (NSW) and the Attorney General's Internal Review Guidelines
- (b) to reflect more effectively the right of penalty notice recipients to make an application for internal review.

(2) All agencies that conduct internal review should

- (a) use the Attorney General's Internal Review Guidelines or develop and use guidelines that are consistent with the Attorney General's Internal Review Guidelines
- (b) make publicly available the guidelines that they use, including on their website
- (c) report periodically to the proposed Penalty Notice Oversight Agency on their use of each of the review grounds under ss 24E(2) and (3) of the *Fines Act 1996* (NSW).

(3) The proposed Penalty Notice Oversight Agency should

- (a) monitor the published guidelines of agencies that conduct their own internal reviews to ensure consistency with the *Fines Act 1996* (NSW) and the Attorney General's Internal Review Guidelines
- (b) monitor compliance by reviewing agencies with the provisions of ss 24E(2) and (3) of the *Fines Act 1996* (NSW)
- (c) make recommendations, and take other measures as appropriate, to improve agency practice in reviewing penalty notices
- (d) report periodically on its findings.

Internal review and its application to vulnerable people

- 7.42 During the course of this inquiry it was suggested that the internal review provisions of s 24E of the *Fines Act* should be more responsive to the needs of vulnerable people. One of the aims of the 2008 amendment to the *Fines Act* was to ensure that vulnerable people are diverted out of the system early, in recognition of the

disproportionate impact of financial penalties on some vulnerable people and the severe consequences that may attend their inability to pay.

- 7.43 Particular concerns arise in relation to people with cognitive and mental health impairments. A number of recent studies from Australia and overseas have found a strong correlation between mental health, cognitive impairments and debt. According to the Bulk Debt Negotiation Project, health problems, including mental illness, are the most common indicator of disadvantage.⁷⁶ In the United Kingdom, the Legal Service Research Centre found that the strongest predictors of debt were 'being in receipt of benefits and long-term illness or disability'.⁷⁷ People with cognitive impairment⁷⁸ long-term illness or disability are also significantly more susceptible to debt, particularly long-term rather than short-term debt.⁷⁹
- 7.44 A research project into the experience of debt problems in Victoria, *Courting Debt*, reported that over one third of participants to the study had experienced a form of mental illness, including depression or anxiety. Several of these respondents indicated these were pre-existing problems related to other difficulties they were experiencing, while others said their mounting debts exacerbated their stress and anxiety.⁸⁰ This is consistent with findings from a 2006 study into legal and advice agencies in London, which reported that

There is evidence that justiciable problems cause, or are accompanied by, considerable stress, anxiety, and physical and mental health problems leaving clients with little energy for solving their problems.⁸¹

Submissions and consultations for this inquiry confirmed that these issues are also relevant for NSW.

- 7.45 Three suggested changes to the internal review provisions that respond to concerns about vulnerable people are considered below.

(1) The nexus between vulnerability and offending

- 7.46 Section 24E(2)(d) of the *Fines Act* provides that a penalty notice may be withdrawn if the person to whom the penalty notice was issued is unable, because he or she has an intellectual disability, a mental illness, a cognitive impairment or is homeless,

76. A total of 193 clients (47% of all clients represented) reported experiencing some form of health problem, including mental illness. A total of 81 clients (41.97%) received a Disability Support Pension, indicating that the problems were long term. A total of 109 clients (26.59%) had a mental illness; 47 of these (43.11%) were in receipt of a Disability Support Pension: D Nelthorpe and K Digney, *The Bulk Debt Negotiation Project: Client Profiles and Project Outcomes*, West Heidelberg Community Legal Service (2011) 10.

77. N Balmer et al, 'Worried Sick: The Experience of Debt Problems and their Relationship with Health, Illness and Disability' (2006) 5(1) *Social Policy and Society* 39, 47.

78. A Gray, S Forell, and S Clarke, *Cognitive Impairment, Legal Need and Access to Justice*, Law and Justice Foundation of New South Wales (2009) 10.

79. N Balmer et al, 'Worried Sick: The Experience of Debt Problems and their Relationship with Health, Illness and Disability' (2006) 5(1) *Social Policy and Society* 39, 47.

80. L Schetzer, *Courting Debt: The Legal Needs of People Facing Civil Consumer Debt Problems*, Department of Justice (2008).

81. R Moorhead and M Robinson, *A Trouble Shared: Legal Problem Clusters in Solicitors' and Advice Agencies*, Research Unit, Department for Constitutional Affairs (2006) 89.

to understand that his or her conduct constituted an offence, or to control such conduct. The provision therefore requires that there be a nexus between the person's vulnerability or impairment and the offending behaviour. It is not sufficient that a person have one of these conditions. Applicants must be able to demonstrate that their condition or situation affected them in such a way that they could not understand that what they did constituted an offence, or that they were unable to control such conduct. We note in this context that many people who are issued with penalty notices have complex and/or multiple problems: for example they may experience financial hardship as well as having a mental illness.

- 7.47 The Attorney General's Internal Review Guidelines provide definitions of intellectual disability, cognitive impairment, mental illness and homelessness and practical examples of situations where a penalty notice may be withdrawn for members of these groups.⁸² All demonstrate a nexus between the person's condition or situation and the offending behaviour. The approach of the *Fines Act* and these the Attorney General's Internal Review Guidelines is consistent with that adopted in Victoria.⁸³
- 7.48 The SDRO Review Guidelines refer to 'vulnerable people – mental incapacity' as a ground for review but provide no definitions to clarify the meaning of 'mental incapacity'.⁸⁴ However, the SDRO uses these in conjunction with the Attorney General's Internal Review Guidelines. In this context it is interesting to note that SDRO Review Guidelines, while brief and limited in their reach, appear to be less stringent regarding the standard of impairment required for a successful internal review application. They provide that a person can ask for a review if he or she has a 'diagnosed mental health condition' that was 'a contributing factor or lessens the responsibility of the person for a penalty notice'.⁸⁵ This is a lower threshold than that required by the *Fines Act* and the Attorney General's Internal Review Guidelines.

Submissions and consultations

- 7.49 It was argued that the requirement in s 24E(2)(d) that proof of a nexus between the person's mental health or cognitive impairment and the offending behaviour creates too stringent a test. We heard in submissions and consultations that it is difficult for people in this category, or their advocates or support workers, to make a successful application for internal review.⁸⁶ The current test requires that expert evidence

82. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [5.12]-[5.22].

83. The *Infringements Act 2006 (Vic)* recognises 'mental illness or disability, disorder, disease or illness' as 'special circumstances' for the purposes of internal review. Under s 3, a person who can demonstrate that, due to the presence of one of these conditions, he or she was either unable to understand that the targeted conduct was unlawful, or was unable to control his or her offending, should be entitled to seek a review of the decision to issue the infringement notice. The Victorian legislation provides no definitions for 'mental or intellectual disability, disorder, disease or illness'. However, the ISOU has indicated that it would include 'diagnosed intellectual disability and acquired brain injury as well as diagnosed mental illnesses such as Alzheimer's disease, bipolar disorder, dementia, schizophrenia, anxiety, depression and other related conditions'. See: Victoria Infringement System Oversight Unit, *The Internal Review Provisions: Internal Review under the Infringements Act 2006 (Vic)*, Department of Justice (2008) [5.21].

84. Cf definitions in NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [5.12]-[5.22].

85. NSW State Debt Recovery Office, *Review Guidelines* (2010).

86. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney

demonstrate that the applicant was not able to control or was not able to understand the conduct making up the offending behaviour. Demonstrating the nexus may be difficult.

- 7.50 Proving causation also presents some practical difficulties. Stakeholders representing people with mental illness indicated that not all clinical diagnoses impede a person's cognitive capacities or ability to comprehend and abide by legal and social standards, or may not do so all the time.⁸⁷ An example given was that of bipolar disorder. While a recognised mental illness, people who have this condition are, in the main, able to understand and control their behaviour. During periods of wellness, according to some mental health practitioners, people with such mental illnesses ought to be held to the same standards of behaviour as the broader community. When they are unwell, they may not be able to control their behaviour to conform with the law.
- 7.51 Cognitive or intellectual disability also varies according to the type and degree of a person's impairment. We were told, for example, that people with borderline intellectual functioning or acquired brain injury may have the capacity necessary to understand and control the conduct constituting certain offences, such as not smoking on a train platform, but may have difficulty with others, such as the requirement to vote.⁸⁸
- 7.52 Further, collecting and submitting the evidence needed for an internal review requires advocacy and assistance, and access to such resources is limited.⁸⁹
- 7.53 One option to solve the problem is to lower the threshold test for capacity, shifting the focus away from inability to understand or control the offending behaviour, to a test with a less causative focus. A lower threshold, such as that used in the SDRO Review Guidelines, would allow for greater flexibility and acknowledgement of fluctuating capacity.
- 7.54 A second option is to provide for an automatic right of withdrawal for applicants who are homeless, or who have a mental health or cognitive impairment. Redfern Legal Centre submitted that the Attorney General's Internal Review Guidelines should be amended so that intellectual disability, mental illness, cognitive impairment and homelessness should be sufficient, without more, to require withdrawal of a penalty notice.⁹⁰ A number of stakeholders in consultations agreed with this approach, arguing that there would be no need for internal review for people with such

NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011.

87. NSW Trustee and Guardian, *Submission PN14*, 6-7; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011.

88. Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011.

89. The Shopfront Youth Legal Centre, *Submission PN33*, 22; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

90. Redfern Legal Centre, *Submission PN26*, 13.

impairments; this group of penalty notice recipients is typically so disadvantaged and vulnerable that they should be entitled to an automatic withdrawal of their penalty notice without the need for any further consideration of causation.⁹¹

- 7.55 It was also argued that cases involving people with mental health and cognitive impairments, and people who are homeless, consume a great many resources with no corresponding gain in terms of deterrent effect or collected penalties. Many stakeholders argued that it is uneconomical for the SDRO to pursue penalty notices involving people with mental health and cognitive impairments; such cases are typically unproductive, resource intensive and time consuming.⁹²
- 7.56 At the same time, we heard from other clinical practitioners and disability rights groups that automatic withdrawal on the basis of these disabilities would be discriminatory, arbitrary and marginalising.⁹³ There was a concern that the removal of a nexus between the person's impairment and the offending behaviour could be perceived by the broader public as a 'get out of jail free' card⁹⁴ or a way of 'escaping' or avoiding the application of the law.⁹⁵
- 7.57 There was also concern that an automatic right of withdrawal would set perverse incentives and remove the educative value of the penalty notice scheme. With appropriate sanctions and support, including the use of warnings and cautions, some people could be assisted to understand, and then address and reduce, their offending and antisocial behaviour.⁹⁶ It was argued that, by removing the nexus, the purpose of the internal review provisions could be undermined or abused by people who, notwithstanding their particular impairment, have the capacity both to understand and control their behaviour and therefore ought to be held liable for the ensuing penalty notice.⁹⁷ For this reason, we heard from reviewing agencies that a case-by-case investigation is an appropriate response to applications for internal review from people with such impairments. To remove the nexus for all categories of mental health and cognitive impairment would give rise to concerns

91. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW < 14 February 2011.

92. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011.

93. NSW Trustee and Guardian, *Submission PN14*, 8; Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011.

94. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011

95. Disability Advisory Council of NSW, *Consultation PN30*, Sydney NSW, 8 June 2011.

96. NSW Trustee and Guardian, *Submission PN14*, 6-7; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011.

97. Holroyd City Council drew a parallel with the Mobility Parking Scheme, submitting that over 48,000 Mobility Parking Scheme Permit Cards were revoked in NSW as a result of improper use. See Holroyd City Council, *Submission PN10*, 19-20.

about systems abuse; to do so on a selective basis risks arbitrariness and discrimination.

Commission's conclusions

- 7.58 The present test in s 24E(2)(d) is narrow. Its requirement to demonstrate a direct causal link between a person's disability or homelessness and his or her understanding or capacity to control offending may create difficult problems of proof for applicants, and may also require the reviewing agency to make assessments that require expert information.
- 7.59 We are persuaded by the arguments above, that it is not appropriate to dispense altogether with the nexus between the offending and the person's impairment. We do, however, recommend that the nexus should be made easier to prove than that in the *Fines Act*. The SDR0 Review Guidelines presently require a person to demonstrate that her or his condition was 'a contributing factor or lessens the responsibility of the person for the penalty notice'. This test maintains the requirement of a nexus between the offending and the person's disability, but it is not as difficult to establish or as onerous to prove. It better captures the range of circumstances that might contribute to a person's offending behaviour. Section 24E(2)(d) should therefore be amended to incorporate this test and consequent changes to the Attorney General's Internal Review Guidelines should also be made.
- 7.60 Further, we note that, while the standard required by s 24E(2)(d) may be difficult to meet, it should be possible for many people with disabilities to apply for a penalty notice to be withdrawn under s 24E(2)(e) (that an official caution should have been given instead of a penalty notice) or under s 24E(3). This provision gives issuing agencies a broad discretion to withdraw. In our view that discretion should be utilised in appropriate cases, including where pursuit of a penalty would be fruitless, or where strict enforcement of the penalty would be unjust.

Recommendation 7.2

Section 24E(2)(d) of the *Fines Act 1996* (NSW) and the Attorney General's Internal Review Guidelines should be amended to provide that a penalty notice must be withdrawn if the person to whom it was issued has an intellectual disability, a mental illness, a cognitive impairment or is homeless, which was a contributing factor to the commission of an offence or reduced the person's responsibility for the offending behaviour.

(2) Should substance abuse be a ground for internal review?

- 7.61 The *Fines Act* does not currently provide for substance abuse to be a ground for compulsory withdrawal of a penalty notice. In contrast, s 3 of the *Infringements Act 2006* (Vic) provides that:

A serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) where the serious addiction results in the person being unable: to understand

that conduct constitutes an offence; or to control conduct which constitutes an offence.⁹⁸

- 7.62 In Consultation Paper 10 (CP 10), we asked whether the *Fines Act* should provide a similar right of review.⁹⁹
- 7.63 Our focus here is on substance abuse disorders, which are distinguished from casual use or intoxication. A substance abuse disorder involves the abuse of, and dependence on, drugs, alcohol and/or other substances, to the extent that a person's functioning is affected.¹⁰⁰ Substance abuse has been characterised as an indicator of disadvantage¹⁰¹ and as a causal factor of social exclusion and debt.¹⁰² People with substance abuse disorders often experience a range of other forms of disadvantage, including mental illness and/or cognitive impairment¹⁰³ and homelessness. They often have a range of complex legal needs, in part due to low levels of financial literacy, difficulty managing income and attending to outstanding and compounding debts.
- 7.64 The National Bulk Debt Negotiation Project, for example, recently worked with a group of 410 clients with outstanding and unmanageable debt owing to a range of private creditors. The Project recorded the different types of vulnerability experienced by the clients, looking at a range of 'indicators of disadvantage'. These include poor physical health, mental illness, homelessness, substance abuse, domestic violence, and gambling. Of the participating clients, it was found that 82.35% were experiencing problematic use of alcohol or drugs.¹⁰⁴
- 7.65 Similarly, the Law and Justice Foundation, in its report, *No Home, No Justice?* found that

mental illness, abuse of alcohol and other drugs and histories of trauma and abuse are common in some sectors of the homeless population, particularly street-based homeless people.¹⁰⁵

In their study of 201 homeless people in inner-city Sydney, Hodder *et al* found that more than 70% of the sample aged 18-44 years had some type of substance abuse disorder.¹⁰⁶

98. Legal Aid NSW, *Submission PN11*, 28.

99. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.15.

100. T Butler and S Allnutt, *Mental Illness Among New South Wales Prisoners*, NSW Corrections Health Service (2003) 17, 30.

101. D Nelthorpe and K Digney, *The Bulk Debt Negotiation Project: Client Profiles and Project Outcomes*, West Heidelberg Community Legal Service (2011) 6.

102. D Nelthorpe and K Digney, *The Bulk Debt Negotiation Project: Client Profiles and Project Outcomes*, West Heidelberg Community Legal Service (2011) 9.

103 T Butler and S Allnutt, *Mental Illness Among New South Wales Prisoners*, NSW Corrections Health Service (2003) 2, 45, 49.

104. D Nelthorpe and K Digney, *The Bulk Debt Negotiation Project: Client Profiles and Project Outcomes*, West Heidelberg Community Legal Service (2011) 14.

105. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) xviii.

106. T Hodder, M Teesson and N Buhrich, *Down and Out in Sydney: Prevalence of Mental Disorders, Disability and Health Service Use Among Homeless People in Inner Sydney* (1998) 25.

- 7.66 The AGJ evaluation found a strong correlation between substance abuse and penalty notices, contributing both to the accumulation of penalty notices and the ability to pay them off.¹⁰⁷ According to a study into the work and development order (WDO) pilot program,¹⁰⁸ ‘untreated or poorly managed mental illness, behavioural disorders and substance abuse are not uncommon among people who are homeless or in acute financial hardship’ and can ‘easily lead to a person being confused, acting anti-socially and taking risks due to feeling invincible or self-destructive. Poor choices under these conditions can lead to fines’.¹⁰⁹
- 7.67 The study found that WDO service providers supplied direct drug and alcohol treatment to 41.7% of clients, and referred 31.7% to other providers for this treatment. One service provider interviewed for the study expressed the view that, ‘most if not all of these guys’ fine debt is a product of their alcohol and drug addictions’.¹¹⁰
- 7.68 The range of competing priorities facing a person with serious substance abuse problems means that, in practice, it can be very difficult for the SDRO or issuing agency successfully to recover unpaid penalty notices from such offenders. People with substance abuse disorders typically place penalty notices low on their list of priorities. Alcohol and other drug dependence issues can override all other concerns; for people with such addictions, penalty notices are ‘almost nowhere on the radar’.¹¹¹ According to one respondent:

You wake up and your first priority, your only priority, is to score. After that, your priority is to line up the next score. When that’s your life, who gives a f*** about a fine? Money on a fine is just a shot you won’t be getting. It’s nothing. It doesn’t exist. Only the drugs exist.¹¹²

Submissions and consultations

- 7.69 There was general support for recognising substance abuse as a ground for internal review. Some submissions were in favour of extending the grounds for withdrawal following internal review to include people with serious substance addiction.¹¹³ A number of reasons for such an extension were provided. Corrective Services NSW

107. Institute for Innovation in Business and Social Research, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People In NSW*, University of Wollongong (2011) 15.

108. The WDO pilot is now being extended throughout NSW, see NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 54. For further discussion of WDOs, see Chapter 9 [9.31] – [9.74].

109. Institute for Innovation in Business and Social Research, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People In NSW*, University of Wollongong (2011) 8.

110. Institute for Innovation in Business and Social Research, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People In NSW*, University of Wollongong (2011) 16.

111. Institute for Innovation in Business and Social Research, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People In NSW*, University of Wollongong (2011) 6.

112. Institute for Innovation in Business and Social Research, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People In NSW*, University of Wollongong (2011) 6.

113. Illawarra Legal Centre, *Submission PN27*, 20; The Law Society of NSW, *Submission PN31*, 15.

supported the extension 'on the basis that the penalty notice will most likely have very little, if any, deterrent effect, nor will it necessarily result in the payment of any of the penalties'.¹¹⁴

- 7.70 Some submissions expressed support for this approach on the basis of the connection between substance abuse and mental illness.¹¹⁵ Shopfront Youth Legal Centre (Shopfront) submitted that serious substance abuse problems often have their origins in trauma such as child abuse, sexual assault or serious physical injury.¹¹⁶

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.¹¹⁷

- 7.71 The NSW Land and Property Management Authority¹¹⁸ (LPMA) suggested that consideration should be given to postponing enforcement of penalty notices against persons with a serious substance addiction 'if that person is taking action to address that addiction'.¹¹⁹ It submitted that a withdrawal of the penalty notice could occur after the successful completion of an addiction program.¹²⁰
- 7.72 Other submissions took the approach that internal review for people with serious substance addiction requires an evaluation of the individual's situation, rather than automatic withdrawal on proof of a serious addiction. Both Corrective Services NSW¹²¹ and NSW Trustee and Guardian (NSWTG)¹²² preferred this approach.
- 7.73 Both Holroyd City Council and NSWTG expressed the view that only people with long-term serious substance addiction should be included in any expansion of the withdrawal option, and people temporarily affected by drug use should not qualify for withdrawal.¹²³ Legal Aid NSW (Legal Aid) suggested the adoption of the definition of 'severe substance dependence' found in the *Drug and Alcohol Treatment Act 2007* (NSW),¹²⁴ which means that the person :

- (a) has a tolerance to a substance, and
- (b) shows withdrawal symptoms when the person stops using, or reduces the level of use of, the substance, and

114. Corrective Services NSW, *Submission PN24*, 11.

115. Redfern Legal Centre, *Submission PN26*, 15; The Shopfront Youth Legal Centre, *Submission PN33*, 23.

116. The Shopfront Youth Legal Centre, *Submission PN33*, 23.

117. The Shopfront Youth Legal Centre, *Submission PN33*, 23.

118. The NSW Land and Property Management Authority (LPMA) was abolished under the NSW Government restructure announced in April 2011 and its former business divisions transferred to new departments.

119. NSW Land and Property Management Authority, *Submission PN17*, 14.

120. NSW Land and Property Management Authority, *Submission PN17*, 14.

121. Corrective Services NSW, *Submission PN24*, 11.

122. NSW Trustee and Guardian, *Submission PN14*, 10.

123. Holroyd City Council, *Submission PN10*, 22; NSW Trustee and Guardian, *Submission PN14*, 11.

124. Legal Aid NSW, *Submission PN11*, 28.

- (c) has lost the capacity to make decisions about his or her substance use and personal welfare due primarily to his or her dependence on the substance.¹²⁵

Commission's conclusions

- 7.74 On the basis of strong support from submissions, we recommend that s 24E(2)(d) of the *Fines Act* be extended to recognise people with a severe substance dependence. The definition of severe substance dependence in s 5 of the *Drug and Alcohol Treatment Act 2007* (NSW), as proposed by Legal Aid, provides an appropriate standard.
- 7.75 We note that the addition of severe substance dependence in this way does not entitle an applicant with such a dependence to an automatic right of withdrawal of a penalty notice. The recommendation below, read together with the amendments proposed above, would require an applicant to establish not only severe substance dependence, but also that this condition was a contributing factor to a person's offending or reduced their responsibility for the offence. This is consistent with the approach taken for other vulnerable groups mentioned in s 24E(2)(d) of the *Fines Act*.
- 7.76 Accordingly, we recommend that the Attorney General's Internal Review Guidelines, and other relevant internal review guidelines, be amended in line with these changes.

Recommendation 7.3

Section 24E(2)(d) of the *Fines Act* and Attorney General's Internal Review Guidelines should be amended to require withdrawal of a penalty notice where a person has a severe substance dependence, as defined in s 5 of the *Drug and Alcohol Treatment Act 2007* (NSW), which was a contributing factor or reduced the responsibility of the person for the offending behaviour.

(3) Should the 'exceptional circumstances' ground for review be relaxed?

- 7.77 Section 24E(2)(c) *Fines Act* provides that the reviewing agency must withdraw a penalty notice where 'the penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence'. The legislation does not define 'exceptional circumstances' but, as discussed above, the Attorney General's Internal Review Guidelines make it plain that the provision requires a nexus with the offence, so that exceptional circumstances are only relevant where they reduce the person's culpability at the time of the offence. For example, the Attorney General's Internal Review Guidelines refer to the exceptional circumstance of a faulty vehicle (such as a broken down car) causing a parking infringement, or other defective machinery (such as lack of an operative ticket vending machine or station attendant at a train station) leading to travel without a ticket. A similar approach is taken in the SDRO Review Guidelines.

¹²⁵. *Drug and Alcohol Treatment Act 2007* (NSW) s 5.

7.78 We received a number of submissions arguing that the power to withdraw a penalty notice in ‘exceptional circumstances’ should be more general, allowing the reviewing officer to look beyond the circumstances relating to the offence to examine those relating to the applicant.

Submissions and consultations

7.79 A number of stakeholders supported the inclusion of ‘exceptional circumstances’ as a general ground for withdrawal of a penalty notice.¹²⁶ It was said that such a power is important because it would

- allow more categories of vulnerable people to be considered for internal review¹²⁷
- allow the circumstances of the penalty notice recipient to be taken into account more broadly¹²⁸
- give the SDRO more discretion for exercising its powers on a compassionate basis.¹²⁹

7.80 We heard in consultations that the internal review provisions do not go far enough to divert vulnerable people out of the penalty notice system. Service-providers working with disadvantaged people said that many applicants who are homeless, in prison, under the age of 18, who are in poor physical or mental health, or who have a cognitive impairment, fail in their applications for internal review despite extensive evidence of their financial hardship and consequent inability to pay.¹³⁰ The following case study is illustrative:

Case study

Belinda is in severe financial hardship and debt: one of her bank accounts is overdrawn by \$88 and the other is in credit by \$18. Belinda has a \$10,000 Centrelink debt and has been bankrupt since 2003, relying on the disability support pension as her income. She lives in a housing commission unit, has diabetes, osteoporosis, asthma, fatigue, sleep apnoea, chest pain and has difficulty walking.

Belinda was issued a penalty notice as a result of driving with an expired licence. She sought withdrawal of the penalty notice on the basis that

126. Homeless Persons Legal Service, *Submission PN28*, 29; Illawarra Legal Centre, *Submission PN27*, 20; The Law Society of NSW, *Submission PN31*, 15; The Shopfront Youth Legal Centre, *Submission PN33*, 23; Redfern Legal Centre, *Submission PN26*, 15, Legal Aid NSW, *Submission PN11*, 29; NSW Industry and Investment, *Submission PN41*, 17.

127. The Shopfront Youth Legal Centre, *Submission PN33*, 9.

128. Homeless Persons Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 9.

129. Redfern Legal Centre, *Submission PN26*, 15.

130. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

she had not received a renewal notification from the RTA¹³¹ and due to her financial hardship.

Belinda's application was rejected on the following grounds:

- the SDRO cannot cancel or offer leniency for the offence in the current circumstances
- the penalty notice was issued legally
- failure to receive renewal notification does not negate a driver's obligation to renew his or her driver licence
- the SDRO does not have authority to waive a penalty or fine due to an individual's financial hardship.¹³²

- 7.81 Service providers working with vulnerable groups argued that internal review should be used to assist vulnerable people in disentangling themselves from the penalty notice system. It is the first opportunity to identify those cases where enforcement of a penalty notice would, due to the applicant's exceptional circumstances, be unjust, disproportionate or excessively punitive.

Options for reform

- 7.82 One suggestion for reform was to expand the scope of 'exceptional circumstances' currently provided in s 24E(2)(c) *Fines Act*. Legal Aid submitted that the requirement to withdraw a penalty notice on exceptional grounds should not be limited to an examination of the circumstances relevant to the offence but should also consider exceptional circumstances relevant to the applicant. That is, internal review should be concerned to identify not only whether *imposition* of the penalty was justified but also whether *enforcement* of the penalty is appropriate.¹³³ Redfern Legal Centre similarly supported the availability of a 'catch-all' provision as it would provide a safeguard for those situations where the decision-maker considers there to be sound practical reasons for withdrawal but feels constrained by the terms of the relevant legislation.¹³⁴ This could be achieved either by expanding the scope of s 24E(2)(c) to provide for a more general ground of 'exceptional circumstances', through the development of the Attorney General's Internal Review Guidelines or by developing appropriate regulations under s 24E(2)(f) *Fines Act*.
- 7.83 There is already the power to withdraw a penalty notice, whether on compassionate grounds or in response to practical considerations, within the current provisions of the *Fines Act*. As noted above, s 24E(2)(e) allows for the withdrawal of a penalty notice where a caution should have been issued. Further, s 24E(3) provides the reviewing agency with a very broad discretion to withdraw a penalty on grounds not specified in s 24E(2).
- 7.84 However, stakeholders have indicated that, in practice, the internal review provisions are narrowly construed and fail to identify and divert cases where the

131. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

132. Redfern Legal Centre, *Submission PN26*, 5. See also Legal Aid NSW, *Submission PN11*, 13.

133. Legal Aid NSW, *Submission PN11*, 29.

134. Redfern Legal Centre, *Submission PN26*, 15.

applicant has no capacity to pay his or her debt.¹³⁵ It would appear that, notwithstanding its broad discretion under s 24E(3), the SDRO presently confines itself to an examination of whether the nexus requirement was satisfied and whether the penalty notice was appropriately issued, as opposed to whether or not enforcement would be appropriate in all the circumstances.

Commission's conclusions

- 7.85 On balance we are not persuaded of the need to expand the provisions of s24E(2)(c). A provision making the exceptional circumstances of the offender relevant, without any reference to a relationship between those circumstances and the offence, would appear to be unnecessary. The *Fines Act* already allows for such considerations in s 24E(2)(e), and s 24E(3).
- 7.86 These existing powers should be used where, due to exceptional circumstances pertaining to the applicant, withdrawal of a penalty notice would be appropriate. Internal review was introduced, in part, to facilitate the identification and forgiveness of those cases where, due to the totality of a person's circumstances, enforcement would be uneconomical and unjust.
- 7.87 We note the suggestion in consultations and submissions, that these provisions are not being used in the way we have envisioned. Earlier in this chapter we recommend the monitoring of the grounds on which internal review is sought and granted. This will clarify the extent to which ss 24E(2)(e) and 24E(3) are currently being used and identify those agencies that are not making full use of their powers.
- 7.88 Diversion of vulnerable people under s 24E(3) or s 24E(2)(e) relies on the judgment of issuing agencies in exercising discretion. These agencies will no doubt be expert in the problems caused by contravention of law in the areas they regulate. However, they may have limited understanding of the problems created by imposing a monetary penalty, and subsequent enforcement consequences, on vulnerable people. We consider training would be beneficial in this regard. Some issuing agencies already provide training in partnership with non-government organisations in relation to the use of cautions; we encourage the extension and expansion of such programs to those officers carrying out internal review. We note that, for some vulnerable people, internal review may provide an opportunity for referral to appropriate services that may assist them, including in preventing reoffending. It may also provide the opportunity for sufficient information to be given to limit the risk of reoffending.

Recommendation 7.4

All agencies that carry out internal review of penalty notices should ensure that reviewing officers receive training about the impact of penalty notices on vulnerable people.

135. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

Discretion not to conduct internal review

- 7.89 Section 24B of the *Fines Act* provides that an agency does not have to conduct a review if a review has already been conducted or it notifies the applicant of this decision within 10 days of receiving the application and gives reasons for its decision.¹³⁶
- 7.90 In consultations, we heard that the SDRO receives some spurious claims for internal review, or applications where it is clear that there are no grounds for the application. For example, applications are submitted under pseudonyms such as 'Daffy Duck' and 'Mickey Mouse'. Carrying out a review in such cases, which would require the SDRO to contact the issuing agency and investigate the circumstances of the alleged offence, would obviously be a waste of time and resources in such cases.
- 7.91 At the same time, there is a concern that reviewing agencies could use s 24B in order to avoid exercising their review obligations under the *Fines Act*. Legal Aid submitted that reviewing agencies routinely exercise their discretion under s 24B, generally through standard letters informing the applicant that his or her matter will not be subject to an internal review because it is 'more appropriately dealt with by the Courts'.¹³⁷ The Ombudsman also emphasised the importance of ensuring that issuing agencies appropriately exercise their discretion to withdraw penalty notices that have been inappropriately issued.¹³⁸
- 7.92 The AGJ evaluation considered this issue and recommended that the Attorney General's Internal Review Guidelines be amended to set out all circumstances in which an agency is not required to conduct an internal review.¹³⁹

Commission's conclusions

- 7.93 Issuing agencies have a legitimate concern not to waste resources by reviewing matters that are clearly unmeritorious, or that have already been the subject of review. Applicants also have a legitimate interest in having a review carried out appropriately, or knowing why this has not happened. These competing interests are best reconciled by making clear information available to reviewing agencies and potential applicants as to the grounds on which an agency may decline to conduct a review. We support the recommendation of the AGJ evaluation that the Attorney General's Internal Review Guidelines be reviewed and updated to explain and clarify the circumstances where an agency may legitimately decline to conduct internal review.

136. Note that this section also allows an agency to decline to review in any other circumstances set out in the regulation. This provision was to allow agencies to retain current review practices in relation to some penalty notices. However no agencies to date have applied for this exemption.

137. NSW Legal Aid, *Submission PN11*, 13.

138. NSW Ombudsman, *Submission PN25*, 1.

139. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 10.

Recommendation 7.5

The Attorney General's Internal Review Guidelines should be reviewed and updated to explain and clarify the circumstances in which an agency may legitimately decline to conduct internal review under s 24B of the *Fines Act 1996* (NSW).

Application of guidelines to the NSW Police Force

- 7.94 The issue of warnings, cautions, penalty notices and Criminal Infringement Notices (CINs) makes up a substantial portion of the work of the NSW Police Force (NSW Police). While NSW Police is expressly excluded from the penalty notices cautions scheme,¹⁴⁰ there is no parallel provision in Part 3 Division 2A of the *Fines Act* which governs internal review. Similarly, both the Attorney General's Internal Review Guidelines and the SDRO Review Guidelines are silent in this regard. However, s 340 *Criminal Procedure Act 1986* (NSW) provides that 'a senior police officer may at any time withdraw a penalty notice issued by a police officer'.
- 7.95 The question of whether NSW Police should be governed by the internal review provisions of the *Fines Act* was raised during the Ombudsman's review into the use of CINs in Aboriginal communities. In that context, NSW Police argued that the internal review provisions contained in the *Fines Act* are overly prescriptive and would unduly fetter officers' discretion. Further, police officers are guided by the *Criminal Procedure Act* and *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), as well as the Police Commissioner's Statement of Professional Conduct,¹⁴¹ the Statement of Values,¹⁴² the Code of Conduct and Ethics,¹⁴³ the NSW Police Handbook¹⁴⁴ and the Code of Practice for CRIME¹⁴⁵ and standard operating procedures.
- 7.96 However none of these documents provides express guidance on the use of internal review for penalty notice offences. The *Criminal Procedure Act*, for example, empowers a senior police officer to withdraw a penalty notice issued by police, but is silent as to the grounds on which this may be done. NSW Police submitted that senior officers ought to be allowed to bring their vast experience into the decision-making process so that each matter can be considered on its merits. In relation to CINs, NSW Police submitted to the Ombudsman that these are not 'purely administrative' issues; they are criminal matters and therefore should be dealt with in the same manner as any other criminal review.¹⁴⁶

140. *Fines Act 1996* (NSW) s 19A(2); see discussion in Chapter 5.

141. NSW Police Force, *Annual Report* (2006) 6.

142. NSW Police Force, *Standards of Professional Conduct* (2006) 4.

143. NSW Police Force, *Standards of Professional Conduct* (2006) 5-10.

144. NSW Police Force, *Handbook* (2011).

145. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2011).

146. NSW Police Force Submission to NSW Ombudsman, 17 February 2009, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 137.

- 7.97 The Ombudsman found, notwithstanding existing police discretion to withdraw a penalty notice, that the existing review process was inadequate in a number of respects. As a result, it was ‘very uncommon for CINs to be withdrawn as a result of mitigating information or extenuating circumstances’.¹⁴⁷ The Ombudsman considered these poor review outcomes to run counter to the aims underpinning the internal review processes, ‘particularly in cases where the penalty notice recipient has diminished capacity to understand the consequences of his or her conduct or to control it’.¹⁴⁸
- 7.98 One area of particular concern was the lack of publicly available policies providing guidance for people who may wish to seek a review of a penalty notice issued by a police officer. In this regard, the Ombudsman made the following comments:
- if there are compelling reasons why the NSW Police Force wishes its review processes to remain separate from the scheme being implemented for other agencies, we are of the view that current police procedures should be reviewed and updated to ensure that they are consistent with the internal review processes outlined in the *Fines Further Amendment Act*.¹⁴⁹
- 7.99 This approach was strongly supported by the Department of Justice and Attorney General (as it then was),¹⁵⁰ which further suggested the development of guidelines to be incorporated into the NSW Police Standard Operating Procedures, as well as appropriate training for the senior reviewing officers.¹⁵¹ The Ombudsman recommended that the Attorney General consider making amendments to the *Criminal Procedure Act* and the *Fines Act* to make the police use of CINs subject to the review processes outlined in the *Fines Further Amendment Act*. It was said that this approach would
- promote consistency in the way penalty notices are issued and reviewed, and ensure that there are no significant gaps in the regulatory framework that has been developed to ensure the penalty notice system is as fair, transparent and accountable as possible.¹⁵²
- 7.100 The Ombudsman considered that the proposed amendments would not fetter police discretion or restrict the availability of existing options. Under the proposed reforms, NSW Police would still be able to consider each case on its merits. At the same time, improved processes would ensure that applications for review are given appropriate consideration. They would also ‘increase transparency, promote

147. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 136.

148. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 136.

149. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 137.

150. Now the Department of Attorney General and Justice.

151. Mr Laurie Glanfield Director General, Department of Attorney General and Justice 14 January 2009, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 137.

152. Department of Justice and Attorney General response to Draft Report, 16 July 2009, cited in NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 137.

fairness and consistency in review decision-making, and provide police with more – not fewer – options on how to respond’.¹⁵³

Submissions and consultations

- 7.101 We heard that, notwithstanding the lack of any express legislative exemptions, the SDRO generally refrains from reviewing or withdrawing penalty notices issued by a police officer, regardless of the grounds set out in the application. It is widely assumed that Part 3 Division 2A *Fines Act* does not apply to police. The following case study is illustrative:

Case study

Katherine is a Legal Aid client of Aboriginal background who suffers from extreme financial disadvantage. She was comforting a friend who had received some bad news about a family member and had accompanied her to the train station. Given she had no intention of boarding the train, but wanted to stay with her friend until her train arrived, she sought and was granted permission from RailCorp staff to enter through the ticket barriers.

While waiting on the platform, police officers asked Katherine for her ticket. Despite explaining her circumstances (which were also confirmed by her friend), she was issued with a \$400 penalty notice for being on a platform without a valid ticket.

Legal Aid assisted Katherine in seeking an internal review of the penalty notice by the SDRO, providing details of her personal circumstances, the fact that RailCorp had given her permission to accompany her friend to the platform, and enclosing a statutory declaration from her friend confirming these circumstances. Despite this, the SDRO confirmed that the penalty notice had been lawfully issued, and informed Legal Aid that penalty notices issued by NSW Police were not able to be withdrawn by the SDRO regardless of the circumstances.¹⁵⁴

- 7.102 A number of submissions argued that Part 3 Division 2A of the *Fines Act* and Attorney General’s Internal Review Guidelines should be amended to include NSW Police within their ambit.¹⁵⁵ Legal Aid, for example, submitted that, ‘in many cases the police exercise the same functions as other issuing authorities in relation to penalty notices’.¹⁵⁶ Therefore, ‘for the sake of consistency the process should be applicable to all issuers of penalty notices’.¹⁵⁷ The Youth Justice Coalition voiced concerns about the ability of young people to seek a review of penalty notices issued for public transport offences.¹⁵⁸ It argued that young people should be

153. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 138.

154. Legal Aid NSW, *Submission PN11*, 10.

155. Youth Justice Coalition, *Submission PN34*, 10; Redfern Legal Centre, *Submission PN26*, 14; Legal Aid NSW, *Submission PN11*, 13.

156. Legal Aid NSW, *Submission PN11*, 13.

157. Legal Aid NSW, *Submission PN11*, 13.

158. Youth Justice Coalition, *Submission PN34*, 10.

subject to the same internal review guidelines ‘irrespective of who issues the penalty notice’.¹⁵⁹

- 7.103 In contrast, the Minister for Police submitted that ‘current guidelines and practices are sufficient’ for the purposes of internal review.¹⁶⁰ The Minister submitted that decisions relating to whether or not to issue a penalty notice depend in large part on ‘the level of skill and training of the issuing officer’. In this context, ‘police officers are substantially better trained than other officers who are authorised to issue penalty notices’.¹⁶¹ These arguments apply equally to issues of internal review.
- 7.104 A concern also arises that the Attorney General’s Internal Review Guidelines would fetter the well-trained discretion of police officers. Not all agencies have the equal understanding or experience of criminal law principles. Further, officers must frequently make decisions in high pressure circumstances that may involve violent conduct, and may prefer to have access to the full range of criminal justice responses without the additional burden of considering the Attorney General’s Internal Review Guidelines.

Commission’s conclusions

- 7.105 We note the submission from NSW Police Portfolio, arguing that the operational situation in which officers may issue penalty notices may sometimes be different from that of other issuing officers, and that police have considerable training and experience in relation to issuing warnings, cautions and penalty notices. Nevertheless, there is a need for transparency and consistency in the penalty notice system including in relation to penalty notices and CINs issued and reviewed by NSW Police. The grounds on which internal review of a penalty notice issued by police, and the procedures whereby a person may apply for such a review, should be publicly accessible and consistent with reviews by other agencies. Cases such as those in the case study above should be caught by internal review carried out by NSW Police. It is not in anyone’s interests for Katherine to elect to have her matter heard in court.
- 7.106 We consider therefore that the Part 3 Division 2A of the *Fines Act* should be amended to clarify that it applies to NSW Police. Similar recommendations have been made with respect to s 19A *Fines Act* and the Attorney General’s Caution Guidelines.¹⁶² As is the case with all agency-specific guidelines, NSW Police should publish its guidelines on its website. NSW Police may also wish to include its guidelines in the standard operating procedures. Similarly, as is the case with other agency-specific guidelines, police guidelines should respond to the functions and circumstances of police work. However, the guidelines should be consistent with the provisions of the *Fines Act* and the Attorney General’s Internal Review Guidelines.

159. Youth Justice Coalition, *Submission PN34*, 10.

160. NSW Police Portfolio, *Submission PN44*, 2.

161. NSW Police Portfolio, *Submission PN44*, 1.

162. Recommendation 5.5.

Recommendation 7.6

The internal review provisions in Part 3 Division 2A of the *Fines Act 1996* (NSW) should be amended to clarify that they apply to the NSW Police Force.

Promoting and simplifying the application process

- 7.107 We heard that internal review is currently inaccessible to many applicants, either because the right to apply for review is not well known or because the process involved is too onerous.

(1) Raising awareness about internal review

- 7.108 Concerns were raised that the availability of internal review, and the grounds on which it may be sought, are not sufficiently well known amongst many penalty notice recipients, particularly those from vulnerable backgrounds.¹⁶³ It was suggested to the AGJ evaluation that the 2008 amendments had not resulted in a substantial increase in the number of applications for internal review. The SDRO reported that, although it processed 204,608 applications for review in the 12 months following the commencement of the amendments to the *Fines Act*, there was not a substantial increase in the number of applications received.¹⁶⁴
- 7.109 Information about internal review can be found on the SDRO website,¹⁶⁵ the LawAccess NSW website¹⁶⁶ and through resources such as *Fined Out*¹⁶⁷ and the Fines Kit,¹⁶⁸ both of which are in wide circulation through community legal centres and other outreach services. The SDRO indicates that, in the month of March 2011, 84% of callers reached an operator within two minutes and that the SDRO handles over one million calls per year. Further, it runs a number of outreach programs, sending a number of officers into rural and regional areas, particularly Aboriginal communities to assist people in addressing outstanding fines and penalty notices.¹⁶⁹

163. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN 11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

164. NSW Department of Attorney General and Justice *A Fairer Fine System for Disadvantaged People* (2011) 30.

165. NSW Office of State Revenue, State Debt Recovery Office, *Your Options: Request a Review* <http://www.sdرو.nsw.gov.au/your_options/request_a_review.html>.

166. Law Access, *Asking for a Review: Penalty Notice or Reminder Notice* <http://www.lawlink.nsw.gov.au/lawlink/LawAccess/ll_lawassist.nsf/pages/lawassist_review_fine>.

167. Innercity Legal Centre, Redfern Legal Centre, Legal Aid NSW, *Fined Out* (3rd ed, 2011).

168. Shopfront Youth Legal Centre, *Fines Kit* (2009).

169. Stakeholders in regional areas were favourable in their reviews of driver licence reinstatement programs: see Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

- 7.110 Despite this, we heard that many people experience difficulty accessing the SDRO to find out more information about internal review¹⁷⁰ and that more is needed of issuing agencies to properly promote the right to internal review. The AGJ evaluation noted that, while the SDRO already publicises the right to seek internal review on penalty notices, on penalty reminder notices, in publications and on its website, there is scope for further awareness-raising about internal review. The evaluation recommended that awareness raising be carried out by the SDRO, AGJ, Legal Aid or the proposed PNOA.¹⁷¹
- 7.111 The Homeless Persons Legal Service (HPLS) recommended that the SDRO introduce a community education campaign to ensure that people better understand their rights and obligations under the penalty notice system. Such a campaign should include ‘an outreach program providing information to penalty notice recipients and to advocates in community-based organisations that work with people affected by the penalty notice system’.¹⁷² The HPLS indicated that, to be effective, any community outreach work should be done in partnership with service providers.

(2) Relaxing the administrative requirements

- 7.112 A number of stakeholders indicated that current requirements for internal review are so onerous as to make them practically inaccessible to many vulnerable people. Section 24A of the *Fines Act* provides that an application for internal review must be in writing. It must include the mailing address of the applicant, the grounds on which review is sought as well as appropriate supporting evidence.¹⁷³
- 7.113 The SDRO Review Guidelines are more prescriptive in this respect and itemise the documentation required in any application for review. For example, for rail offences the SDRO sets out that where the person has a diagnosed mental health condition, that was a ‘contributing factor’ or that ‘lessens the responsibility of the person for the penalty notice’, he or she must provide a ‘detailed report on official letterhead from a medical practitioner, Agency or Government department setting out the history of mental health issues’.¹⁷⁴ Similarly, cases involving a pre-existing medical condition or a medical emergency require evidence of the fact on a letterhead from a ‘Medical

170. Homeless Persons’ Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

171. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 16.

172. Homeless Persons Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 29.

173. *Fines Act 1996* (NSW) s 24A(2).

174. NSW State Debt Recovery Office, *Review Guidelines* (2010) 23.

Authority'.¹⁷⁵ Where a person committed a rail offence due to a fear for personal safety, the SDRO states that he or she must provide:

- an event number from a police report confirming the claim
- contemporaneous notation of the safety issue by the reporting officer
- any other documentary evidence that is sufficient proof.¹⁷⁶

7.114 In Victoria, documentary evidence is not necessarily required for a successful application for internal review. The Victorian Internal Review Information Paper states that an application based on 'special circumstances' *may* be supported by a current statement from a 'practitioner who has provided a medical or welfare service to the applicant'.¹⁷⁷ In this context, 'practitioner' is broadly construed, encompassing a caseworker, case manager, social worker, general practitioner, psychiatrist or psychologist and accredited drug treatment agency.

7.115 Further, where the application involves an unchanging disability, statements over 12 months old and Declarations of Eligibility for Intellectual Disability Services are both considered sufficient supporting documentation.¹⁷⁸ The issuing agency also has the discretion to waive the requirement for a practitioner's certificate where the person is already known to the agency, or where the written request makes it clear that special circumstances apply.¹⁷⁹

7.116 The Victorian Infringements Oversight Unit indicates that, in all cases, reviewing agencies are required to 'bear in mind the primary goal of the special circumstances provisions: to identify cases in which enforcement action would be inappropriate'.¹⁸⁰

7.117 Submissions and consultations raised concerns that the current review process in NSW is unreasonable and onerous for many people. Corrective Services NSW submitted that one of the primary problems in seeking review is that 'many offenders do not understand what is happening when they are issued a penalty notice, cannot read the information, and simply throw the 'piece of paper' away'.¹⁸¹

175. NSW State Debt Recovery Office, *Review Guidelines* (2010) 24.

176. NSW State Debt Recovery Office, *Review Guidelines* (2010) 24.

177. Victoria Infringements System Oversight Unit, Department of Justice *The Internal Review Provisions: Internal Reviews under the Infringements Act 2006 (Vic)* (2008) [5.22].

178. Victoria Infringements System Oversight Unit, Department of Justice, *The Internal Review Provisions: Internal Reviews Under the Infringements Act 2006 (Vic)* (2008) [5.22].

179. Victoria Infringements System Oversight Unit, Department of Justice, *The Internal Review Provisions: Internal Reviews Under the Infringements Act 2006 (Vic)* (2008) [5.22].

180. Victoria Infringements System Oversight Unit, Department of Justice, *The Internal Review Provisions: Internal Reviews Under the Infringements Act 2006 (Vic)* (2008) [5.22].

181. Corrective Services NSW, *Submission PN24*, 10; Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

7.118 NSWTG submitted that

the present system for review of penalty notices is cumbersome, costly and complex, presenting as too difficult for people with mental illness or cognitive issues to engage in, without assistance. Such processes are too complicated for even those with minor deficits in cognition.¹⁸²

Often, clients do not seek assistance until after the matter has escalated to crisis point, when options are limited.¹⁸³ In the experience of NSWTG, appeal and review options are severely limited or inaccessible to vulnerable people with disabilities,¹⁸⁴ and meaningful engagement with the process requires a high level of practical support. However, 'not all offenders have a financial manager or advocate who can assist in this process'.¹⁸⁵

7.119 Redfern Legal Centre argued that 'relying on written submissions places an unfair burden on vulnerable people who may have difficulties recalling being issued with a penalty notice or fine, have no ability to lodge an application for review or have no awareness of the way in which a review may be sought'.¹⁸⁶ The HPLS likewise noted that:

A person who is homeless or has a mental illness, intellectual disability or cognitive impairment is less likely than other people to be aware of, or have the resources to pursue, their right to internal review within the time allowed before the penalty notices are referred to the SDRO for enforcement. It is usually only with intensive legal support, which may not be available due to scarce resources in the community legal sector, that a recipient in these circumstances will be able to make an application for internal review'.¹⁸⁷

Options for reform

7.120 A number of measures are already in train, or were suggested, to deal with these problems. One approach is the development of inter-agency collaborative arrangements. For example, SDRO is presently working on memoranda of understanding with Corrective Services NSW and NSWTG, whose clients are frequently also SDRO clients. Corrective Services NSW spoke favourably of its data exchange arrangements with the SDRO, describing the communication as a very effective cooperative arrangement.¹⁸⁸

7.121 It was also suggested that, as in Victoria, SDRO and other reviewing agencies should accept evidence from reliable professionals or agencies working with an applicant without the need for documentary evidence. Holroyd City Council suggested that initiating an internal review of a penalty notice could be done via a third party verbal request from 'persons employed in a professional capacity who

182. NSW Trustee and Guardian, *Submission PN14*, 10.

183. NSW Trustee and Guardian, *Submission PN14*, 10.

184. NSW Trustee and Guardian, *Submission PN14*, 4.

185. NSW Trustee and Guardian, *Submission PN14*, 4.

186. Redfern Legal Centre, *Submission PN26*, 14.

187. Homeless Persons' Legal Service, *Submission PN42*, 9.

188. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

would be reasonably expected to be persons of good character'.¹⁸⁹ NSWTG argued that no review process should be required where a person's support agency 'is able to demonstrate that the client was affected by mental illness or cognitive impairment, to the extent that they neither understood the import of the offence, nor the effect of the consequence of the offence'.¹⁹⁰ NSWTG submitted that the SDRO should develop an application form that allows a professional to provide information on the applicant's condition without the need for separate documentation.¹⁹¹ This approach would replicate the approach taken in Victoria, described above.

- 7.122 Further, without dealing with the issue prescriptively or exhaustively, the AGJ evaluation recommended that the Attorney General's Internal Review Guidelines should be reviewed to provide some examples of what might constitute appropriate supporting evidence.¹⁹²
- 7.123 Redfern Legal Centre recommended that the SDRO keep a record of a vulnerable person's history of withdrawals. Should a penalty notice or fine be issued to a vulnerable person, the SDRO could cross-check the penalty or fine against existing records and, in appropriate cases, withdraw the penalty notice without the need for further action by the recipient.¹⁹³ This suggestions raises a number of issues, including those of privacy, and is considered further in Chapter 13.
- 7.124 Simplified review procedures were also supported. The Law Society of NSW (Law Society) suggested greater use of plain English documentation.¹⁹⁴ Improving SDRO resources to provide assistance to vulnerable people was also suggested, including: 'a more user-friendly system that enables online and telephone applications',¹⁹⁵ training customer service officers to assist people with mental illness and cognitive impairment;¹⁹⁶ an SDRO advice line,¹⁹⁷ adequately staffed;¹⁹⁸ and a simplified application form.¹⁹⁹
- 7.125 Further provision of resources of advice and assistance to vulnerable people was also supported. The Law Society submitted that SDRO should fund projects providing legal representation, advocacy and support services to people in highly-policed areas and to particularly vulnerable groups.²⁰⁰ Corrective Services NSW pointed out that the review provisions are 'highly effective' where an individual with a mental health or cognitive impairment has such support.²⁰¹

189. Holroyd City Council, *Submission PN10*, 21.

190. NSW Trustee and Guardian, *Submission PN14*, 12.

191. NSW Trustee and Guardian, *Submission PN14*, 12.

192. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 9.

193. Redfern Legal Centre, *Submission PN26*, 14.

194. The Law Society of NSW, *Submission PN31*, 14.

195. Legal Aid NSW, *Submission PN11*, 28.

196. Legal Aid NSW, *Submission PN11*, 28.

197. NSW Trustee and Guardian, *Submission PN14*, 10.

198. The Law Society of NSW, *Submission PN31*, 14.

199. NSW Trustee and Guardian, *Submission PN14*, 10.

200. The Law Society of NSW, *Submission PN31*, 14.

201. Corrective Services NSW, *Submission PN24*, 10.

- 7.126 More outreach by the SDRO to vulnerable populations to support review and fine mitigation measures was suggested. Legal Aid submitted that, in addition to participating in regular ‘Fines Days’ at prisons and in regional areas, the SDRO should establish a face-to-face client service centre, staffed by client service officers with specialist training in cognitive and mental health issues.²⁰² Legal Aid pointed out that NSW TG operates such client service centres in the Sydney CBD and at Parramatta.

Commission’s conclusions

- 7.127 We note that there are already a number of initiatives to facilitate community understanding of internal review and to simplify the application process. It was apparent during this inquiry that the SDRO has generally very strong and positive relationships with issuing agencies. The SDRO is also developing relationships, particularly via memoranda of understanding, with some agencies whose clients frequently have problems with fines and penalties. These initiatives could fruitfully be further developed, so that relationships are built with other agencies that assist clients with internal review and penalty notice issues. One function of these relationships could be to develop effective ways to provide information to groups to whom the internal review provision may be especially relevant.
- 7.128 The SDRO outreach activities have also been well received and could beneficially be further funded and developed.
- 7.129 The AGJ evaluation asserted that there is scope for further awareness raising activities by the SDRO, the AGJ, Legal Aid and the proposed PNOA about internal review, amongst other things. It is not proposed that the PNOA will have awareness raising and outreach as part of its functions. However in monitoring internal review it may provide information to assist agencies to be more effective in carrying out internal review and provide information to support best practice.
- 7.130 We note in this context Recommendation 7.4 above, that those who carry out internal reviews should be trained in dealing with people with cognitive and mental health impairments. Understanding the impact of these disabilities, and of other vulnerabilities, on the capacity of individuals to understand and pursue internal review should assist the processing of these applications and the development of improved organisational systems and responses.
- 7.131 We support the approach taken in Victoria, where the requirements for documentary evidence for applications for internal review have been considerably simplified. The Attorney General’s Internal Review Guidelines and the SDRO Review Guidelines should be expressed in plain English. They should also be revised to reduce and minimise, so far as possible, the requirements for documentary proof including to allow for the acceptance of information provided by practitioners providing services to applicants
- 7.132 Finally, we agree with the recommendations of the AGJ evaluation that the Attorney General’s Internal Review Guidelines should be reviewed and updated to provide

202. Legal Aid NSW, *Submission PN11*, 28.

examples of the kind of supporting evidence that would be considered relevant and appropriate to an application for internal review. Any revision should support greater consistency while also allowing flexibility to account for the distinctive circumstances and jurisdictions of the different issuing agencies. This process should be carried out in consultation with the SDRO, service providers and issuing agencies.

Recommendation 7.7

- (1) The Attorney General's Internal Review Guidelines and the State Debt Recovery Office Review Guidelines should be revised to minimise, so far as possible, the requirements for documentary proof including to allow for the acceptance of information from practitioners providing services to applicants.
- (2) The Attorney General's Internal Review Guidelines should be reviewed and updated to include examples of acceptable supporting evidence in an application for internal review.
- (3) The State Debt Recovery Office should further develop memoranda of understanding with government departments and agencies and should extend this approach to non-government organisations. One function of such agreements should be the facilitation of internal review.
- (4) All agencies that conduct, or are otherwise engaged in, internal review should raise public awareness about the availability of internal review.
- (5) All agencies that conduct, or are otherwise engaged in, internal review should train reviewers to provide an effective service to people with cognitive and mental health impairments. Training should cover the impact of cognitive and mental health impairments on a person's capacity to understand and avoid offending behaviour, as well as capacity to pursue internal review.

Extending the timeframe for application for internal review

- 7.133 An application for a review can be made at any time before the due date in the penalty reminder notice, and may be made even if the penalty notice amount has been partially or fully paid.²⁰³ Currently, the time allowed to pay a penalty notice is 21 days. After this time, a reminder notice will be issued, allowing a further 28 days until the commencement of enforcement proceedings. This means that, in practice, a person has a total of 49 days from the time of receiving a penalty notice to either pay the amount owing or seek internal review.
- 7.134 The SDRO reports that current NSW time limits are generous in comparison to other states.²⁰⁴ As noted above, the SDRO processed 2.8 million penalty notices and 204,608 applications for internal review in 2010. Given the scale of this administrative burden, the SDRO submits that time limits and a high degree of

203. *Fines Act 1996* (NSW) s 24A(3).

204. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 33.

automation are essential to the ongoing timeliness and functioning of the penalty notice system.²⁰⁵

- 7.135 Participants in this reference, on the whole, did not challenge the need for time limits to the efficacy of the internal review process. However, the Commission heard in submissions and consultations that, for some vulnerable people, the current timeframe is inadequate. A number of stakeholders argued that, to be effective, the period allowed to seek internal review ought to be extended.

Submissions and consultations

- 7.136 Legal Aid expressed concern about the fact that an internal review can only be conducted up to the due date for payment, arguing that ‘it is not reasonable to expect a person at extreme disadvantage to be able to address complex issues that warrant a review within the time frame leading up to payment’.²⁰⁶ Legal Aid suggested that it should be possible to conduct an internal review at any stage, including after the due date for payment and at the enforcement stage.²⁰⁷
- 7.137 While acknowledging that a person may be able to apply for an annulment and trigger an internal review at a later stage, Legal Aid stated that this is not ideal:

A person may not have grounds for an annulment and yet still be someone who would, but for the time limit, fall within the internal review guidelines. An annulment application is also a more cumbersome and costly process than the internal review process.²⁰⁸

- 7.138 The Attorney General’s Internal Review Guidelines provide that a reviewing agency may request additional information from an applicant, and that the review may be conducted without that information if that information is not provided within 14 days.²⁰⁹ Legal Aid submitted that this time frame should be extended because it is ‘unreasonable to expect people with mental health issues or cognitive impairments to be so organised as to be likely to meet the 14-day limit’.²¹⁰ Alternatively Legal Aid suggested amending this provision to enable the timeframe to be extended on request.²¹¹ A similar point was made by HPLS, which said:

The length of time allowed for responding to a penalty notice and a reminder notice should be increased from 21 days to 28 days. The SDRO should have the discretion to extend the time limit without enforcement costs where the penalty notice recipient is homeless, has a mental illness, intellectual disability or cognitive impairment, a special infirmity or is in poor physical health.²¹²

205. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 33.

206. Legal Aid NSW, *Submission PN11*, 13.

207. Legal Aid NSW, *Submission PN11*, 13.

208. Legal Aid NSW, *Submission PN11*, 13.

209. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996*, [4.12].

210. Redfern Legal Centre, *Submission PN26*, 14.

211. See for example *Infringements Act 2006* (Vic) s 23; Legal Aid NSW, *Submission PN11*, 27-28.

212. Homeless Persons Legal Service, Public Interest Advocacy Centre, *Submission PN28*, 7.

7.139 These proposals were not supported by the AGJ evaluation.²¹³

Commission's conclusions

7.140 The volume of applications that the SDRO receives annually means that a high level of automation, based on clear timelines, is essential to the ongoing function of the penalty notice system. We consider that the seven-week period currently allowed is sufficient for a person to respond to a penalty notice. To extend the period allowed considerably beyond this point would cause unreasonable delay in the penalty notice system and undermine its function as a quick and efficient way to process low level offending. We consider that the other mitigation mechanisms considered in this chapter are better suited to lessen the adverse impact of penalty notices on vulnerable people.

Court election and internal review

7.141 The introduction of the *Fines Further Amendment Act* has had a number of consequences for penalty notice recipients who, upon receiving an unfavourable review outcome, wish to make a court election. These changes have been described as 'confusing' and 'overly restrictive'.²¹⁴ As a result of the ambiguity surrounding these processes, the AGJ evaluation recommended a review and simplification of the provisions in the *Fines Act* governing the relationship between internal review and court election.²¹⁵

7.142 There were two main areas of concern. The first relates to the time limits allowed for a penalty notice recipient to submit a court election after receiving an unfavourable review outcome. The second relates to the cancellation of an internal review application upon court election.

(1) Time to submit a court election after an unfavourable review

7.143 Prior to the 2008 amendments to the *Fines Act*, if a person applied for an internal review and was unsuccessful, it was the practice of the SDRO to allow that person a further 21 days to either pay or alternatively, to elect to have the matter heard in court, even if the due date of the penalty reminder notice had passed. One of the consequences of the amendments under the *Fines Further Amendment Act* is that additional time to make a court election is no longer granted following internal review.²¹⁶

7.144 Under the *Fines Act*, the amount of time a person now has to elect to have a penalty notice matter heard in court varies. Section 36(1) of the *Fines Act* provides

213. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 32.

214. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 35.

215. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 14.

216. Legal Aid NSW, *Submission PN45*, 1.

that a person may court-elect by serving a written statement on the appropriate officer; this statement must be served even after part or all of the penalty notice has been paid.²¹⁷ Section 36(2) sets out two different timeframes for court election, depending on whether or not any payment has been made:

- under s 36(2)(a), if no payment has been made, a person has until the due date in the penalty reminder notice to make a court election, and
- under s 36(2)(b), if some part of the amount owing has been paid, a person has 90 days to make a court election.

7.145 If the reviewing agency confirms the decision to issue a penalty notice, it must serve a penalty reminder notice on the person.²¹⁸ This new penalty reminder notice is said to replace any previous penalty reminder notice in respect of the offence.²¹⁹ Importantly, s 24F(3) provides that the time for serving a statement to court elect under s 36(2)(a) continues to be the time specified in the first penalty reminder notice. In practice, this means that if no amount under the penalty notice has been paid, the person must court-elect before the due date for payment specified in the *original* penalty reminder notice.

7.146 This means that, where a person has made no payment towards his or her penalty notice, he or she will generally have 49 days to make a court election. In contrast, a person who makes some payment towards the amount owing will have up to 90 days to make the same election. This has significant consequences for penalty notice recipients who delay seeking internal review, whether because they are seeking advice or otherwise. Where a person waits until after the receiving the reminder notice to act, he or she will in most instances lose the opportunity to have the matter considered in court. However, even where there is no delay, many applicants will be out of time to make a court election.

7.147 Further complicating the time frames is the length of time allowed to agencies in conducting internal review: 42 days to notify the applicant of the outcome of a review or 56 days if the agency has requested additional information.²²⁰ This means that, where a person has applied for internal review *without* making a payment towards the amount owing, and the agency has sought further information, he or she may be out of time to make a court election even before the outcome of the review is made known. This is problematic because, in general, applicants who are contesting the propriety of a penalty notice are unlikely to make the payment that would entitle them to the extra 41 days that would be afforded to a person under s 36(2)(b). In such circumstances, an applicant who had made some payment towards the penalty notice would still be in time to make a court election.

7.148 Given the deadlines for court election, some applicants may choose to pursue that option while an application for internal review is still on foot. However, such an approach introduces a different procedural setback, discussed below.

217. *Fines Act 1996* (NSW) s 36(2).

218. *Fines Act 1996* (NSW) s 24F(1).

219. *Fines Act 1996* (NSW) s 24F(2).

220. *Fines Act 1996* (NSW) s 24E(4).

Submissions and consultations

7.149 The annulment process, discussed further in Chapter 8, currently provides some recourse in situations when a person has been unable to make a court election earlier.²²¹ However, annulment applications involve further fees. Legal Aid submitted that:

it is not reasonable to expect people who are disadvantaged to engage in a process which has a filing fee, requires a submission and lacks certainty of outcome. There is no real disadvantage to issuing authorities in allowing more time for a person to elect to have the matter heard in court.²²²

7.150 Further,

Given the confusing time limits, the vagaries of the review process, the limited options for review and a lack of an appeal process, and considering the broader scope a court has to deal with the fine, in many cases it would be advisable to elect to have the matter heard in court at first instance rather than seek an internal review. This arguably defeats the purpose of having an internal review process at all.²²³

7.151 Legal Aid suggested that the legislation be amended

to extend and clarify the time limit to make a court election, particularly in circumstances where the person who has been issued the penalty notice is a disadvantaged member of the community. The option to elect to have the matter heard in court should be automatically available in cases where someone has in good faith applied for a review, even if this is outside the 90 days set out in section 36 of the Act.²²⁴

7.152 According to the SDRO and NSW Office of State Revenue (OSR), s 24F(3) of the *Fines Act* was originally introduced to prevent penalty notice recipients using court-election as a 'delaying tactic' after receiving an unfavourable review outcome. The provision was intended to address concerns that that some applicants were electing to have their matters heard in court, based not on the merits of their case, but as a way of deferring making a payment on the amount owing.

7.153 However as a result of the complaints about this amendment, both the SDRO and OSR have expressed support for amending s 36(2) to allow an applicant the opportunity to make a court election after an unsuccessful review. This extension of time would apply to all unsuccessful applicants, regardless of whether or not they had made any payment towards the penalty notice amount.²²⁵ The agencies supported the repeal of s 24F(3) and amendment of s 36(2) to allow time to court-elect after a review, regardless of whether payment has been made. The AGJ evaluation agreed with this proposal.²²⁶

221. Chapter 8 [8.9]-[8.18].

222. Legal Aid NSW, *Submission PN45*, 2.

223. Legal Aid NSW, *Submission PN45*, 2.

224. Legal Aid NSW, *Submission PN45*, 2.

225. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 34.

226. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 34.

(2) Cancelling internal review upon making a court election

- 7.154 The AGJ evaluation noted further concerns around s 24I of the *Fines Act*, inserted as part of the *Fines Further Amendment Act*. That section provides that if a person elects to have a matter dealt with by a court while a review is in progress, the review is terminated once that election is made. The SDRO reports that, prior to these amendments, it would conduct a review even where a client had also submitted application for court election. Where the result was unfavourable, the SDRO would extend the opportunity to press the court election although, in most instances, clients would be satisfied and would not press their right to make a court election.²²⁷
- 7.155 The SDRO said that this arrangement was generally considered to be a fair and effective practice but that, with the introduction of s 24I, this is no longer possible. This means that, even where the outcome of the review is likely to be favourable to the applicant, once a court application is made, the SDRO is no longer able to determine the matter. This is problematic not only for applicants who, due to the tight deadlines discussed above, opt to run concurrent applications for review and court election. It also raises concerns for those instances where an applicant has mistakenly filled in the wrong application form.
- 7.156 In consultation with the OSR and SDRO, two options for reform were raised:
- allowing an automatic review prior to court election and
 - allowing the withdrawal of court election and a return to either the review process or the payment of the fine.
- 7.157 Ultimately, both suggestions were rejected as impractical. The first because, in practice, most people do not provide sufficient information in their court elections to allow a review to be carried out. The second was said to give rise to an open-ended process that could waste resources by sending challenges back and forth between the different mechanisms.
- 7.158 The AJG evaluation recommended that s 24I be amended to provide that court election is no barrier to having the SDRO conduct internal review.²²⁸ The evaluation noted that ‘this amendment would be consistent with the overall objectives of achieving fairness and flexibility in the fine system’.²²⁹

Commission’s conclusions

- 7.159 The complexity of the above discussion demonstrates the need for simplification of the current provisions governing the intersection between court election and internal review.
- 7.160 Determining the time limits for making a court election on the basis of whether or not a payment has been made towards an outstanding penalty notice is arbitrary,

227. NSW Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 34.

228. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 13.

229. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 35.

confusing and has the potential to work injustice. We support the SDRO's suggestion to repeal s 24F(3) and amend s 36(2) *Fines Act* to allow an applicant the opportunity to make a court election after an unsuccessful review. This extension of time should apply to all unsuccessful applicants, regardless of whether or not they have made any payment towards the penalty notice amount. Further, we agree that s 24I should be amended to provide that court election is no barrier to having the SDRO conduct internal review.

- 7.161 Finally, given the confusion surrounding the time limits governing the intersection between internal review and court election, we support the recommendation by the AGJ evaluation that there be a review of the *Fines Act* to simplify and consolidate the provisions governing internal review and court election.²³⁰

Recommendation 7.8

- (1) The *Fines Act 1996* (NSW) should be reviewed and amended to simplify the time limits governing court election and internal review.
- (2) Section 24F(3) of the *Fines Act 1996* (NSW) should be repealed and s 36(2) of the *Fines Act 1996* (NSW) should be amended to allow an applicant the opportunity to make a court election, regardless of whether any payment towards the penalty notice has been made.
- (3) Section 24I of the *Fines Act 1996* (NSW) should be amended so that, if a person elects to have a matter dealt with by a court while a review is in progress, the review is not terminated on the making of that election.

230. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 14.

8. Enforcement

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Introduction

- 8.1 This chapter deals with enforcement of penalty notice amounts. Enforcement measures ensure that the integrity of the penalty notice system is maintained through providing effective sanctions against non-compliance. According to the second reading speech at the introduction of the *Fines Act* 1996 (NSW) (*Fines Act*), the application of enforcement measures must: be equitable to ensure that some people do not avoid the effects of sanctions; maximise the collection of monies to the state; and provide for people who have difficulty in making repayments.¹ The enforcement process was outlined in Chapter 2. As an aid to memory we include below a diagram of the penalty notice life cycle, including the enforcement stage that is the focus of this chapter.
- 8.2 The enforcement stage commences once a Penalty Notice Enforcement Order (PNEO) has been issued. A PNEO is issued if a penalty notice has not been paid 28 days after a reminder notice has been issued.² A cost of \$50 (or \$25 for children)

1. NSW, *Parliamentary Debates*, Legislative Council, 14 November 1996, 5978-5979 (J Shaw).

2. *Fines Act* 1996 (NSW) s 42.

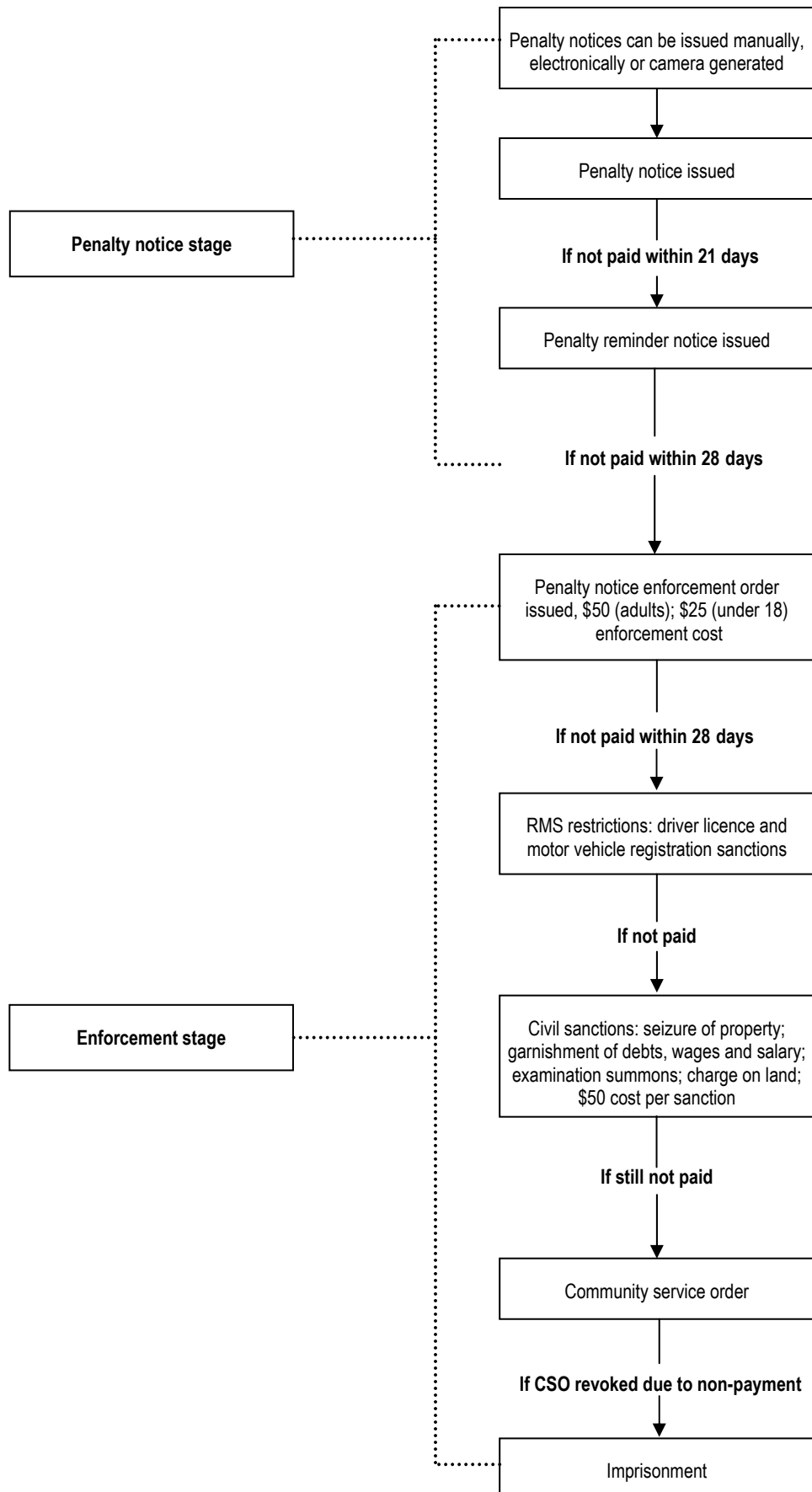
is incurred at this point.³ A significant number of penalty notices reach this stage: the NSW Office of State Revenue (OSR) has reported that the State Debt Recovery Office (SDRO) processed 2.8 million penalty notices in 2009-2010, to the value of \$491 million. Of those, 876,782 penalty notices (or about 31%) worth \$266 million, were referred for enforcement.⁴

- 8.3 It is possible to apply for a PNEO to be annulled if there was good reason why a person did not respond to the notice, for example because he or she was unwell. This is the first issue dealt with in this chapter.
- 8.4 If payment is not made in response to a PNEO, the enforcement process next involves the imposition of driver licence sanctions.
- 8.5 If payment is not made as a result of these sanctions, further 'civil sanctions' may be applied, such as garnisheeing of wages and seizing property.
- 8.6 Should these not secure payment it is possible for the SDRO to impose a community service order (CSO) on the defaulter. If the CSO is breached the SDRO can revoke it and impose a sentence of imprisonment.
- 8.7 The final issue dealt with in this chapter is whether or not a person's penalty notice record can be provided to a court that is sentencing that person for an offence.
- 8.8 The enforcement processes described in this chapter work alongside a number of 'fine mitigation' measures allowing those who have difficulty paying their penalties to be granted time to pay, to engage in a work and development order (WDO) or to have their fines written off. These issues are dealt with in the next chapter.

3. *Fines Regulation 2010* (NSW) cl 4(1)(a).

4. NSW Office of State Revenue, *Annual Report 2009-10* (2010), 26. The cost to collect \$100 in fines that year was \$11.70, 12.

Figure 8.1: Penalty notice lifecycle



Annulment

- 8.9 An application for annulment is the only option to secure review of a penalty notice, by the SDRO or by a court, after a PNEO has been issued.
- 8.10 Section 49(1) of the *Fines Act* provides that the SDRO *must* annul a PNEO in certain circumstances:
- first, if a person was not aware that a penalty notice had been issued until the enforcement order was served, and applies for annulment within a reasonable time⁵
 - second, if a person was hindered from taking action in relation to the penalty notice by accident, illness, misadventure or other cause,⁶ or
 - third, if the penalty notice and/or the penalty reminder notice was returned undelivered to its sender and the enforcement notice was served at a different address.⁷
- 8.11 The SDRO *may* annul the enforcement order if:
- a question or doubt has arisen as to the person's liability and that person had no previous opportunity to obtain a review of that liability, or
 - it is satisfied, having regard to the circumstances of the case, that there is other just cause why the application to annul should be granted.⁸
- 8.12 Section 49 deals with annulment of an enforcement order, not a penalty notice. However, s 49A provides that, before it annuls a PNEO, if the SDRO has reason to suspect that the penalty notice should be withdrawn on any of the internal review grounds (in s 24E), it is to seek internal review of the penalty notice. Thus the annulment application may trigger a review of both the PNEO and the penalty notice, and as a result the penalty notice may be withdrawn and the PNEO annulled.
- 8.13 However, if internal review is not requested or is not successful but one of the grounds for annulment in s 49(1) is made out and the SDRO annuls the PNEO, the matter must go to court.⁹ If the person does not dispute the penalty notice, he or she may pay the penalty to the SDRO at the time of the annulment application,¹⁰ although it is difficult to understand why a person would apply for annulment if that person did not wish to challenge the penalty notice, given the fees involved.
- 8.14 A PNEO attracts enforcement costs of \$50. A fee of \$50 is also charged when an application is made to the SDRO to annul each PNEO.¹¹ The fee for annulment

5. *Fines Act 1996* (NSW) s 49(1)(a)(i).

6. *Fines Act 1996* (NSW) s 49(1)(a)(ii).

7. *Fines Act 1996* (NSW) s 49(1)(a)(iii).

8. *Fines Act 1996* (NSW) s 49(1)(b).

9. *Fines Act 1996* (NSW) s 49(3).

10. *Fines Act 1996* (NSW) s 49(3).

11. *Fines Regulation 2010* (NSW) cl 5.

applications was raised as an issue for this inquiry because it may cause hardship for people on low incomes. A separate fee must be paid for each application and a person with several PNEOs may have to pay several fees. If that person goes to court as a result of several annulment applications he or she may be required to attend at several courts.

- 8.15 Clause 6 of the *Fines Regulation 2010* (NSW) (*Fines Regulation*) provides that the SDRO may waive, postpone or refund all or part of any enforcement cost or application fee, including annulment fees. The application form for annulment asks for the \$50 annulment fee and explains that, unless an error has been made, this fee is not refundable.¹² However, the form also permits an application for a waiver of the fee. For such a waiver application a statement of financial circumstances must be submitted, which requires detailed information about income, expenditure, assets and liabilities, including evidence relating to all bank accounts.¹³ No information is provided as to what level of poverty must be proved in order to qualify for fee waiver, or whether other factors, such as homelessness, might be relevant.
- 8.16 The Homeless Persons' Legal Service (HPLS) raised the issue of annulment fees in its submission, stating that vulnerable people such as the homeless are 'more likely to accumulate enforcement costs followed by the imposition of annulment fees'.¹⁴ The HPLS recommended that annulment fees be waived where a penalty notice recipient can produce a Centrelink pension card or health care card.¹⁵ Redfern Legal Centre also expressed concern about the impact of annulment costs on vulnerable people.¹⁶ The Sentencing Council has also proposed that annulment fees be waived in the case of offenders who can produce a Centrelink pension card or health care card.¹⁷
- 8.17 The difficulty appears to be that, although the SDRO has the power to waive fees and this is brought to the attention of applicants, the application process is onerous and no information is available about the grounds on which a waiver application will be decided. This problem is not confined to fees for annulment applications but is relevant to all enforcement costs or application fees imposed by the SDRO.

Commission's conclusions

- 8.18 The Commission supports the recommendations of the Sentencing Council and the submissions of legal service providers that the SDRO should, as a matter of policy, use its powers to waive fees under cl 6 of the *Fines Regulation* in the case of annulment applications by people who are in receipt of Centrelink benefits. However, this review in respect of annulment fees raises the more general issue of the simplicity and transparency of applications for waiver of any enforcement costs

12. NSW Office of State Revenue, State Debt Recovery Office, *Having Your Enforced Fine Decided in Court* (2011) <http://www.sdرو.nsw.gov.au/lib/docs/forms/sfs_eo_003.pdf>.

13. NSW Office of State Revenue, State Debt Recovery Office, *Statement of Financial Circumstances* (2010) <<http://www.sdرو.nsw.gov.au/lib/docs/forms/sdr006.pdf>>.

14. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 15.

15. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 15.

16. Redfern Legal Centre, *Submission PN26*, 11.

17. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.131].

and fees. We recommend that this issue be addressed by the SDRO through the development of a general, publicly accessible, fee waiver policy. Attention should be given in such a review to providing for waiver for those who are in receipt of means-tested Centrelink benefits.

Recommendation 8.1

- (1) The State Debt Recovery Office should develop and make public a fee-waiver policy.
- (2) The fee-waiver policy should provide for waiver of annulment fees for a person in receipt of an eligible Centrelink benefit (as defined by the Director of the State Debt Recovery Office) who makes a reasonable and genuine application.

Driver licence sanctions

Issues relating to driver licence sanctions

- 8.19 Sections 65-70 of the *Fines Act* provide for the imposition of driver licence sanctions. Driver licence sanctions may be taken against a fine defaulter if he or she has not paid a fine as required by a fine enforcement order, or if time to pay repayments have not been met.¹⁸ Suspension of a driver licence is the first enforcement measure. Once suspended, if a penalty notice debt remains unpaid for a further six months, Roads and Maritime Services (RMS)¹⁹ must cancel the licence upon the SDRO's direction.²⁰ If the fine defaulter does not hold a licence that is in force, the RMS may cancel the registration of all or any motor vehicles of which a fine defaulter is the registered operator (and must do so if directed by the SDRO.)²¹
- 8.20 If the driver licence or vehicle registration of the fine defaulter has already been suspended or cancelled, or these measures are not available against the fine defaulter (for instance if he or she does not have a licence or own a car), dealings with the RMS may be suspended. This means that the RMS must refuse to issue driver licences or number plates, or to provide other services as set out in s 68 of the *Fines Act*.
- 8.21 Under the *Road Transport (Driver Licencing) Act 1998* (NSW), a person whose driver licence is suspended under s 66 of the *Fines Act* is liable to 30 penalty units or imprisonment for 18 months, or both, if that person drives on a road with a suspended or cancelled licence. For a second or subsequent offence, the driver may be liable to 50 penalty units or imprisonment for two years, or both.²² The driver may also be disqualified for three months for a first offence, or for two years for

18. *Fines Act 1996* (NSW) s 65.

19. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

20. *Fines Act 1996* (NSW) s 66(2).

21. *Fines Act 1996* (NSW) s 67.

22. *Road Transport (Driver Licencing) Act 1998* (NSW) s 25A(3A).

second or subsequent offences.²³ If that person then drives while disqualified he or she may receive a maximum penalty of 20 penalty units or imprisonment for 18 months, or both. This increases to 50 penalty units or imprisonment for two years, or both, in the case of a second or subsequent offence.²⁴

8.22 The principle underlying licence sanctions is that:

If the state is to grant a privilege (ie the right to drive on state roads) then members of the public who are in default of an undertaking to the Crown (ie payment of a fine) can have that privilege removed.²⁵

8.23 For most people, licence sanctions are a highly effective enforcement method.²⁶ The Audit Office of NSW found that RMS sanctions were more effective than other enforcement mechanisms, and their application led to a recovery rate of 51.4% of fines and penalties.²⁷

8.24 Licence sanctions may also encourage people to engage with WDOs or sign up for time to pay. One mental health nurse interviewed as part of an evaluation of the 2008 amendments to the *Fines Act* by the Department of Attorney General and Justice (AGJ evaluation), said:

Engaging around half of our clients in treatment is really hard...When I say 'I could help you get your licence back', all of a sudden we've got engagement...the WDO is the most concrete and effective way of getting compliance with treatment we've seen.²⁸

8.25 However, driver licence sanctions may impact harshly upon vulnerable people. These impacts were reported by the NSW Sentencing Council in its Interim Report, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, and were also outlined in Consultation Paper 10 (CP 10).²⁹ Two issues of concern are the practical and economic effects of licence sanctions and the increased risk of secondary offending.

8.26 The suspension or cancellation of a driver licence may hinder a fine recipient's ability to keep his or her job, or to seek work, where possession of a valid licence is essential. Thus licence sanctions may aggravate the financial hardship that some people experience and which may be the main cause of their failure to pay the fine in the first place.³⁰ The Sentencing Council has reported that some people who cannot find alternative transport feel that they have to choose between breaking the

23. *Road Transport (Driver Licencing) Act 1998* (NSW) s 25A(10).

24. *Road Transport (Driver Licencing) Act 1998* (NSW) s 25A(1).

25. See NSW, *Parliamentary Debates*, Legislative Council, 14 November 1996, 5978 (J Shaw).

26. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) [3.2].

27. Audit Office of New South Wales, *State Debt Recovery Office: Collecting Outstanding Fines and Penalties*, 2002, 14.

28. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 44; Institute for Innovation in Business and Social Research, University of Wollongong, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People in NSW* (2011) 23.

29. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [5.64]-[5.68].

30. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [5.19]-[5.24].

law by driving without a valid licence, or losing their job or Centrelink payments.³¹ This 'secondary offending' can lead to an 'accelerating and excessive interaction with the criminal justice system through further driving offences, escalating to drive while disqualified offences... and eventually to imprisonment.'³²

8.27 Stakeholders pointed out that although we no longer imprison people in NSW for non-payment of fines, the application of licence sanctions has the effect that some fine defaulters are incarcerated for secondary offending. People who rely on being able to drive in order to work or to access essential services may drive unlicensed. If they are apprehended they may be disqualified. If they then drive while disqualified and are apprehended they may be imprisoned, especially if they offend more than once. This process was referred to in consultations as the 'slippery slope'. People who commit relatively trivial penalty notice offences for which they do not pay the penalty may thus be ultimately incarcerated.

8.28 Research by the University of Wollongong for the AGJ evaluation outlined the stress and sense of hopelessness that can result from having a licence suspended:

It was very stressful the whole time. It only takes one copper to ask to see your licence, and you're done for driving while suspended. Every morning and afternoon I'd be looking over my shoulder. But what else could I do?³³

The impacts are heightened in rural and remote areas where the absence of reliable public transport means people need to drive to go to work or school, to do grocery shopping, to visit health professionals, or to attend compulsory Job Network or Centrelink interviews.

8.29 The AGJ evaluation of the WDO scheme points to the cost to government of secondary offending and makes the following observations:

- over the past 10 years, 9074 people have been imprisoned where their principal offence was drive while licence disqualified or suspended
- of those concerned, 2353 were indigenous people and 6711 non-indigenous
- almost two-thirds of licence suspensions are for fine default
- consequently, it is likely that a significant proportion of people in gaol for driving while disqualified offences had their licence suspended for fine default, and
- the cost of incarceration is estimated at \$270 per person per day.³⁴

31. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [5.36]-[5.38]; Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [9.61]-[9.63]. For further discussion of the impact on vulnerable groups, see especially Chapters 15 and 16.

32. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [5.25].

33. Institute for Innovation in Business and Social Research, University of Wollongong, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People in NSW* (2011) 11.

34. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 47.

- 8.30 Although the *Fines Act* contains detailed rules concerning licence restoration,³⁵ in summary it can be said that licence sanctions continue until the penalty is paid, is written off, or the person commits to a fine-mitigation measure, such as a time-to-pay arrangement or a WDO.
- 8.31 A number of measures may mitigate the effect of driver licence sanctions. If a person enrolls in a time-to-pay arrangement (discussed below) he or she can regain their licence. Licence restrictions will not be imposed if the time-to-pay application is received promptly. Restrictions that were already in place can be lifted if the fine defaulter pays six instalments in accordance with the extension of time,³⁶ or at the SDRO's discretion.³⁷ In practice, restrictions may be lifted much earlier than this,³⁸ though they may be recommenced if a payment is missed.³⁹ The circumstances in which the SDRO may lift licence sanctions early are described by the SDRO as when:
- the health or safety of someone is dependent on you being able to drive
 - your medical circumstances require you to drive
 - your employment or prospective employment is contingent on you being able to drive
 - you live in an indigenous community, or
 - you live in a remote location.⁴⁰
- 8.32 If a person engages in a WDO, then driver licence sanctions are suspended. The WDO guidelines clarify that 'when a WDO is in force, any driver licence or vehicle sanction or other enforcement action imposed on that person's licence due to fine default is to be lifted'.⁴¹
- 8.33 In order to lessen the impact of driver licence sanctions, the SDRO has undertaken licence restoration programs in some regional centres and Aboriginal communities. SDRO representatives visit and work with individuals to determine his or her penalty notice debts, sign him or her up for time to pay arrangements and thereby restore his or her licence. However, the SDRO cannot restore licences where the applicant also has a court-imposed disqualification. In future, in addition to time to pay arrangements, WDOs will be an available option leading to licence restoration for those who are eligible. (WDOs, including the future expansion of this program, are dealt with in Chapter 9.)

35. See especially *Fines Act 1996* (NSW) pt 4, div 3.

36. *Fines Act 1996* (NSW) s 65(4A).

37. *Fines Act 1996* (NSW) s 65(5).

38. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011; NSW Office of State Revenue, State Debt Recovery Office, *Consultation PN27*, Sydney NSW, 4 April 2011.

39. *Fines Act 1996* (NSW) s 65(4B).

40. NSW Office of State Revenue, State Debt Recovery Office, *How to Lift RTA Restrictions* <http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_001.pdf>.

41. *Fines Act 1996* (NSW) s 99B(7); NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [9].

Submissions and consultations

- 8.34 Despite initiatives to reduce the detrimental impacts of licence sanctions, they continue to have a serious impact upon vulnerable people, particularly on people living in regional areas. In consultations we heard that in some Aboriginal communities there are very few people who still have a driver licence and the burden of providing for the essential transport needs of the community is severe.
- 8.35 In CP 10 we asked whether driver licence sanctions should be used in relation to offenders below the age of 18, particularly for non-traffic offences. Submissions highlighted the problems created by these sanctions in hindering the ability of young people to attend education, training and work commitments.⁴² However, consultations and submissions revealed clearly that the scope of these problems is not confined to young people. Legal Aid NSW highlighted the problems faced by ex-prisoners with unpaid fines who may lose their licence, and thus have increased difficulty in looking for work after release.⁴³ The Council of Social Service of NSW identified low-income households; people in rural areas; people caring for a person with a disability; and Aboriginal communities as groups upon whom these sanctions have a 'great impact'.⁴⁴ Shopfront Youth Legal Centre submitted that the imposition of licence sanctions on Aboriginal people for the non-payment of Criminal Infringement Notices (CINs) is 'inappropriate', worsening hardship rather than encouraging payment.⁴⁵ Consultations in regional areas in particular highlighted the discriminatory effect that licence sanctions have in areas with little public transport,⁴⁶ or with few alternative drivers.⁴⁷
- 8.36 We were told in consultations that the SDRO licence restoration program has been very well received in rural and regional areas. However, those consulted were of the view that SDRO visits happened too rarely⁴⁸ and that it would be desirable for the SDRO to return every six months.⁴⁹ Further, it was put to us that, for some Aboriginal people, going to the RMS to obtain a licence and being turned away as a result of penalty notice debts may make them feel so 'shamed' that they are unlikely to return, and may prefer to drive anyway, even without a valid licence.⁵⁰
- 8.37 The Sentencing Council has remarked on the need for physical access to the SDRO's services.⁵¹ Increasing the capacity of people to sign up to time to pay, for example by allowing them to sign up at their local RMS or Centrelink office, could

42. Legal Aid NSW, *Submission PN11*, 21; NSW, Juvenile Justice, *Submission PN15*, 4; Illawarra Legal Centre, *Submission PN27*, 17; Youth Justice Coalition, *Submission PN34*, 20-21; Children's Court of NSW, *Submission PN35*, 4; NSW Department of Community Services, *Submission PN36*, 8.

43. Legal Aid NSW, *Submission PN11*, 16-17.

44. Council of Social Service of NSW, *Submission PN21*, 2.

45. The Shopfront Youth Legal Centre, *Submission PN33*, 25.

46. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

47. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011.

48. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

49. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011.

50. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

51. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.36].

increase the number of people having their licences restored. The SDRO in its submission also proposed enabling people to sign up to time to pay at Centrelink offices.⁵²

8.38 Some submissions expressed support for licence sanctions. For instance, Holroyd City Council held that licence and vehicle registration sanctions, including to young people over the age of 16, were appropriate once all other avenues, such as time to pay, were exhausted.⁵³ The NSW Department of Education and Training said that licence sanctions were an ‘effective way of securing compliance with penalty notices’.⁵⁴

8.39 The SDRO submitted that

driver licence and vehicle registration sanctions are the most effective enforcement tools...holding a driver licence is a privilege coveted by most young people so the threat of losing that privilege, through sanctions, provides a high incentive to maintain safe driving practices and a law abiding ethic.⁵⁵

8.40 The Sentencing Council also proposed the suspension of a licence or of vehicle registration for a period relative to the fine or penalty quantum arguing that this would serve to ‘reduce the double jeopardy of having both a fine or penalty which continues even though there is the additional licence or vehicle sanction in place’. This proposal was also supported by Professor Richard Fox in his review of infringements in Victoria.⁵⁶ However, some of these concerns have been ameliorated by the availability of time to pay arrangements and the proposed roll-out of WDOs.

Commission’s conclusions

8.41 Driver licence sanctions are undoubtedly effective in securing payment of penalty notice debts by people who can afford to pay. However, these sanctions can also cause disproportionate harm, especially for people who live in rural, regional and remote areas and those who need to drive to or for work. The incidence of secondary offending, and the evidence provided in consultations and submissions concerning people who are imprisoned as a result of secondary offending, is of particular concern.

8.42 A number of fine mitigation options are now available for people who wish to restore their licences. These are mentioned above and discussed in more detail in the next chapter.

8.43 Where time-to-pay arrangements are not appropriate, WDOs provide a further option that will be of particular utility for eligible people. We welcome the

52. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 18.

53. Holroyd City Council, *Submission PN10*, 17.

54. NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 4.

55. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 13.

56. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 11 citing R Fox, *Infringement Notices: Time for Reform? Trends and Issues in Crime and Criminal Justice* 50, Australian Institute of Criminology, (1995), 5.

Government's initiative to roll out the WDO pilot across NSW and to establish a regional network of WDO support teams.

- 8.44 Finally, fines can be written off in appropriate cases, and we also make recommendations to facilitate writing off penalty notice debt in the following chapter.
- 8.45 These fine mitigation options were established relatively recently and, in the case of WDOs, are being expanded and developed, including in their reach into regional areas. The most appropriate future course of action to ameliorate the impact of licence sanctions therefore appears to lie in ensuring that people are aware of, and can access, these fine mitigation options. Our recommendations focus on improving access to fine mitigation measures. First, we recommend that it should be possible for applicants to learn about, and to access, time to pay arrangements at both Centrelink and RMS offices. Second we recommend that the SDRO should be funded to extend its well-regarded licence restoration programs so that these can be delivered in more locations and with greater frequency.
- 8.46 In the following chapter we support the further expansion of WDOs. In recognition of the particular problems caused by driver licence sanctions in rural, regional and remote areas, we recommend that the regional network of WDO support teams be provided with the skills and resources not only to promote WDOs, but also to provide information, educational material and referrals in relation to time-to-pay and write-off of penalties.

Recommendation 8.2

- (1) The State Debt Recovery Office, Centrelink, and Roads and Maritime Services should make arrangements to enable people to apply for time to pay at Centrelink and Roads and Maritime Services offices.
- (2) The State Debt Recovery Office should extend, develop, and increase the frequency of its licence restoration activities, especially in rural, regional and remote areas and in relation to Aboriginal and Torres Strait Islander communities.
- (3) The proposed regional network of work and development order support teams should raise stakeholder awareness about the full range of fine mitigation measures available to facilitate licence restoration.

Should s 65(3) of the *Fines Act* be interpreted as preventing young people with penalty notice debt from obtaining a driver licence?

- 8.47 The issues that arise in relation to young people and penalty notices are dealt with in greater depth in Chapter 12. However, a particular issue is raised in relation to young people and driver licence sanctions.
- 8.48 Section 65(3) of the *Fines Act* provides, in summary, that enforcement action with respect to a fine defaulter's driver licence is not to be taken if the offence occurred while the fine defaulter was under the age of 18 years and the offence is not a traffic offence. Consequently, children and young people aged under 18 who have a licence and commit non-traffic penalty notice offences cannot have action taken against their licence. However, the SDRO interprets the section to mean that RMS

sanctions of a type other than removal of a licence *may* be taken against young people. They may, for example, have all dealings with the RMS suspended, which means they cannot obtain a driver licence if they do not already have one, and may have other limitations placed upon them.⁵⁷ This interpretation of the provision appears to be arbitrary and harsh in its effect.

Submissions and consultations

- 8.49 In CP 10, we asked whether driver licence and registration sanctions should be applied to young people under the age of 18 years for non-traffic offences.⁵⁸ In response to this question, many submissions were critical of the current interpretation of s 65(3) which permits RMS sanctions to be applied for non-traffic offences to young people who do not already have a licence.
- 8.50 The Youth Justice Coalition submitted that such an interpretation of s 65(3) is problematic because it undermines the intention of that section: that licence restrictions for young people should be limited to traffic offences.⁵⁹ Other submissions also raised concerns about the impact of this section upon the employment opportunities of young people⁶⁰ because many jobs require a licence.⁶¹ Preventing young people from obtaining their licences may also heighten the risk of secondary offending.⁶²
- 8.51 The Illawarra Legal Centre pointed to the limited financial resources of young people to pay for the penalty notices,⁶³ and other agencies consulted mentioned that these sanctions only add to the difficulties in obtaining a licence faced by young people from families on low incomes because of the large number of supervised driving hours required⁶⁴ and the cost of paying for a driving instructor.⁶⁵

Commission's conclusions

- 8.52 The current interpretation of the law appears to be arbitrary in its effect.⁶⁶ There does not appear to be a principled reason why licence sanctions should be applied to young persons for non-traffic offences depending on the chance of whether or not they have already obtained their licence.

We therefore recommend that s 65(3) of the *Fines Act* be revised so that the exemption from driver licence sanctions for fine defaulters under the age of 18 for

57. *Fines Act 1996* (NSW) s 68(2).

58. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [6.9].

59. Youth Justice Coalition, *Submission PN34*, 23.

60. UnitingCare Burnside, *Submission PN12*, 7.

61. Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

62. Children's Court of NSW, *Submission PN35*, 4.

63. Illawarra Legal Centre, *Submission PN27*, 17-18.

64. For more information about obtaining a licence, see NSW Transport, Roads and Maritime Services, *Learner Licence* <<http://www.rta.nsw.gov.au/licensing/gettingallicence/car/learners/index.html>>.

65. Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011.

66. For more discussion of fairness and consistency see Chapter 1 [1.45].

non-traffic offences expressly applies to all sanctions, including the RMS functions set out in s 68.

Recommendation 8.3

The *Fines Act 1996* (NSW) should be amended to provide that no enforcement action may be taken under s 68 if the offence was not a traffic offence and the fine defaulter was under the age of 18 years at the time of the offence.

Civil enforcement measures

8.53 If a penalty notice enforcement order is still unpaid after RMS restrictions have been applied, the SDRO may add a \$50 enforcement cost and issue an order:

- for the seizure of property by the Sheriff
- to garnishee the wages or salary of the fine defaulter
- requiring the fine defaulter to attend court for an examination of his or her financial circumstances, or
- placing a charge on the fine defaulter's property.⁶⁷

If these enforcement procedures have failed and a person has still not paid, a CSO may be made.

8.54 Civil enforcement measures are infrequently used. The Sentencing Council reported that in the period 2004-2005:

- 21,435 property seizure orders were made
- 769 garnishee orders were made
- no charges on land were imposed, and
- 17 CSOs were issued, two of which were completed and one of which was breached.⁶⁸

8.55 The SDRO has informed the Commission that since 2003, a total of 1027 CSOs have been issued. Most were voluntary – in other words the client sought a CSO as the most appropriate way to deal with their penalty notice debt. However, since 2010 when WDOs were introduced, no CSOs have been issued because WDOs have proved to be more effective.

67. *Fines Act 1996* (NSW) ss 71-77.

68. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.19]-[4.20], [4.33]. No information is given as to what happened to the people who breached their CSOs.

Order to seize property

- 8.56 The first civil enforcement mechanism available to the SDRO is an order to seize the property of a fine defaulter.⁶⁹ The Sheriff executes this order.⁷⁰ Property seizure orders can be actioned for 12 months.⁷¹ The Sentencing Council reported that the value of a property is recorded as the amount reached at auction rather than what the defaulter actually paid for it. The Council was of the view that :

a replacement value should be attributed to the goods seized by the Sheriff's Office, which might be set off against the fine or penalty instead of the significantly reduced amount that might be expected to be received at auction.⁷²

- 8.57 In its 2002 Performance Audit Report of the SDRO, the Audit Office of NSW noted that property seizure is a relatively ineffective enforcement method. Fifty-one per cent of fines were recovered upon the application of licence sanctions in comparison to the 6.1% of fines recovered after an order to seize property had been issued.⁷³ The report highlighted that locating people in order to serve an order can be very difficult, and the Sheriff's Office locates only 20% of defaulters in the first instance.⁷⁴
- 8.58 The threat of orders to seize property may act as an inducement to pay debts. For example, the AGJ evaluation cited one woman who reported that she ate badly in order to pay off her debt because of a fear that her goods would be seized and her children would be traumatised by this experience.⁷⁵

Order to garnishee wages

- 8.59 If the SDRO is satisfied that civil enforcement action is authorised, it may make an order that all debts due and accruing to a fine defaulter from any person specified in the order are attached for the purposes of satisfying the fine.⁷⁶ This includes an order to attach the wage or salary of the fine defaulter.⁷⁷ The order operates as a garnishee order made by the Local Court under Part 8 of the *Civil Procedure Act 2005* (NSW).

69. *Fines Act 1996* (NSW) s 72(1).

70. *Fines Act 1996* (NSW) s 72(3).

71. *Fines Act 1996* (NSW) s 72(8).

72. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.25]-[4.28].

73. Audit Office of New South Wales, *State Debt Recovery Office: Collecting Outstanding Fines and Penalties* (2002) 14.

74. Audit Office of New South Wales, *State Debt Recovery Office: Collecting Outstanding Fines and Penalties* (2002) 20.

75. Institute for Innovation in Business and Social Research, University of Wollongong, *Now I Can Move On: The Impact of Accumulated Fine Debt and the Work and Development Order Scheme on Disadvantaged People in NSW* (2011) [2.3.2].

76. *Fines Act 1996* (NSW) s 73(2). Civil action is authorised under pt 4, div 4 if driver licence sanctions are not available, or were made and the penalty was not paid: s 71.

77. *Fines Act 1996* (NSW) s 73(1).

Registration of the fine enforcement order as charge on land

- 8.60 If the fine defaulter's debt exceeds \$1000, the SDRO may apply to the Registrar General for registration of a fine enforcement order in relation to any land owned by the fine defaulter.⁷⁸ Once this order is registered, a charge on that land is created. This prevents the fine defaulter from selling that property until the outstanding enforcement order amount is paid.⁷⁹

Examination of fine defaulter

- 8.61 The SDRO has the power to issue an examination summons, which directs the fine defaulter to attend before the Director or other SDRO officer, or before a specified officer of a court.⁸⁰ The fine defaulter may be orally examined as to their 'property and other means of satisfying the fine and generally as to the fine defaulter's financial circumstances', and may be required to produce documents to show their true financial circumstances.⁸¹
- 8.62 If a person issued with an examination summons fails to attend that examination, the SDRO may issue a warrant for his or her apprehension, for that person to be brought before the SDRO or a specified officer of a court. If a person who is issued with an examination summons under this section fails to attend, refuses to give evidence, gives false information, or fails to produce documents required, the SDRO may report the matter to the Supreme Court or District Court for determination. The court may deal with the matter as if it were a contempt of that court.⁸² Both courts may punish contempt of court with imprisonment or a fine. In the District Court the fine may not exceed 20 penalty units and imprisonment may not exceed 28 days.⁸³ The Supreme Court Rules specify no such limitations.⁸⁴

Community service orders

- 8.63 The SDRO has the power to impose a community service order (CSO) on a fine defaulter where that person has failed to pay a fine and other enforcement procedures have also failed.⁸⁵ In the case of a CSO imposed by the SDRO,⁸⁶ the number of hours to be served is calculated according to a prescribed rate of one hour for each \$15 penalty amount, subject to a limit for each CSO of 300 hours in the case of an adult and 100 hours in the case of child.⁸⁷ However, the SDRO must

78. *Fines Act 1996* (NSW) s 74(1)-(2).

79. *Fines Act 1996* (NSW) s 74(5).

80. *Fines Act 1996* (NSW) ss 75(1), (3)(a).

81. *Fines Act 1996* (NSW) ss 75(3)(b)-(c).

82. *Fines Act 1996* (NSW) ss 75(7)-(9).

83. *District Court Act 1973* (NSW) s 199(7).

84. *Supreme Court Rules 1970* (NSW) r 13(1).

85. *Fines Act 1996* (NSW) s 78.

86. *Fines Act 1996* (NSW) s 79(1).

87. *Fines Act 1996* (NSW) s 81.

not make a CSO 'if satisfied that the person is not capable of performing work under an order or is otherwise not suitable to be engaged in such work'.⁸⁸

8.64 Currently, CSOs are only available when civil enforcement action has not been, or is not likely to be, successful in satisfying the fine.⁸⁹ Some stakeholders have called for the wider availability of CSOs, and at an earlier stage. The NSW Department of Community Services (Community Services)⁹⁰ argued that young people should be able to access CSOs earlier in the fine enforcement process.⁹¹ The HPLS argued that allowing people to enter community service arrangements at an earlier stage would alleviate the crippling impact of fines on low-income earners.⁹² However, this report was written before WDOs became a permanent feature of the *Fines Act*.

8.65 WDOs are likely to be more appealing than CSOs for those who qualify since the rates at which penalty notice debt is worked off are more generous. In its submission, the HPLS acknowledged that, to some extent, WDOs have replaced CSOs but continued to call for CSOs to be made available more widely on the basis that

only certain groups of people are eligible for WDOs and that even if the recipient is eligible, the making of a WDO is dependent on there being available an eligible organisation to support the application or an appropriate course of treatment.⁹³

We note in this regard that on the information provided to us by the SDRO, WDOs have, in effect, replaced CSOs. We also note our recommendations in Chapter 9 regarding the further extension of WDOs.

8.66 It is a concern that, despite the seriousness of a CSO, they may be made administratively by the SDRO. Further, a CSO can be made in the absence of, and without notice to, the fine defaulter⁹⁴ so that the person so sentenced may not be given an opportunity to be heard. The *Fines Act* also permits the SDRO to revoke a CSO where the fine defaulter has failed, without reasonable excuse, to comply with the order⁹⁵ or where the person is not suitable for or capable of performing the work.⁹⁶ Notice of the revocation must be given to the defaulter,⁹⁷ and an opportunity is also provided for the defaulter to apply in writing to the SDRO for a review of the revocation.⁹⁸ This is probably the case because one of the consequences of revocation is to trigger the power of the SDRO to order imprisonment (see further

88. *Fines Act 1996* (NSW) s 79(3).

89. *Fines Act 1996* (NSW) s 78.

90. Now NSW Department of Family and Community Services.

91. NSW Department of Community Services, *Submission PN36*, 9.

92. Homeless Persons' Advocacy Centre, Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006)10.

93. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 14.

94. *Fines Act 1996* (NSW) s 79(4).

95. *Fines Act 1996* (NSW) s 86(1).

96. *Fines Act 1996* (NSW) s 86(3).

97. *Fines Act 1996* (NSW) s 86(5).

98. *Fines Act 1996* (NSW) s 86(6).

below.) Provisions relating to the duration, extension and revocation of court ordered CSOs⁹⁹ are imported into the *Fines Act* through s 79.¹⁰⁰

- 8.67 The procedures for making and revoking a CSO for enforcement under the *Fines Act* differ in some respects from those applicable to a court-imposed CSO. Court-imposed CSOs, like all sentencing dispositions, must generally be made when the offender is present (or voluntarily absent) and consequently has the right to be heard. Legislation expressly provides that a Local Court may not impose a CSO (among other penalties) if the offender is absent.¹⁰¹ This is also the case at common law with respect to convictions for indictable offences. The High Court has held that one common basis for demonstrating that practical injustice and unfairness has occurred is where an individual has lost the opportunity to make submissions to the decision maker in opposition to a proposed course.¹⁰² This principle was applied to sentencing by the NSW Court of Criminal Appeal in *Weir v The Queen*, in which the court confirmed that an offender is 'entitled to procedural fairness during criminal proceedings, including proceedings on sentence'.¹⁰³
- 8.68 In Victoria, a court must make a decision about a community work permit (CWP), which is the equivalent of a CSO. If a person does not pay a fine, the Infringements Court deals with the matter and may issue an infringement warrant. Once arrested, the person may be released on a CWP.¹⁰⁴ If that person fails, without reasonable excuse, to comply with a CWP or any condition of such a permit, that person is guilty of an offence.¹⁰⁵ A summons or a warrant may be issued.¹⁰⁶ If the court finds the infringement offender guilty of the offence, it may impose a fine not exceeding 10 penalty units and vary, confirm or cancel the CWP.¹⁰⁷ Failure to comply with a CWP is also a ground on which a court may order imprisonment.¹⁰⁸
- 8.69 The issue that arises for consideration is whether it is lawful and appropriate in NSW that a government department should make a CSO, or whether such an order is more appropriately the province of a judicial officer, in a court proceeding, where the person who is subject to the sentence is given the opportunity to make representations. The same issues arise in relation to an order for imprisonment by the SDRO for breach of a CSO under s 87 of the *Fines Act*. These issues are dealt with together, below.

99. *Crimes (Administration of Sentences) Act 1999* (NSW) ss 10, 114, 115.

100. *Fines Act 1996* (NSW) ss 79(6), (7).

101. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25(1)(d).

102. *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1; [2003] HCA 6 [34], [36].

103. *Weir v The Queen* [2011] NSWCCA 123 (6 June 2011) [64]. See also *R v Tocknell* (Unreported, NSW Court of Criminal Appeal 28 May 1998).

104. State Government Victoria, *Fines: Arrest* <<http://online.fines.vic.gov.au/fines/Content.aspx?page=51&s=1&l=107-51>>.

105. *Infringements Act 2006* (Vic) s 56(1).

106. *Infringements Act 2006* (Vic) s 156(3).

107. *Infringements Act 2006* (Vic) s 156(4).

108. *Infringements Act 2006* (Vic) ss 158-160.

CSOs and imprisonment

- 8.70 Imprisonment for fine default effectively ceased in NSW following the introduction of the *Fines Act* in 1996. Prior to that time, the *Justices Act 1902* (NSW) made provision for authorised justices to issue warrants of commitment for imprisonment, in the event of default in relation to a conviction or order (including an order to enforce a penalty notice) that a ‘fine, penalty, costs or other amount of money be paid’.¹⁰⁹
- 8.71 In 1987, Jamie Partlic, a young man imprisoned for fine default, was assaulted and left with permanent brain damage.¹¹⁰ After that assault, the NSW Government, in an attempt to deal with the problem, announced a moratorium on action relating to warrants of commitment. A further moratorium was announced in 1994. Legislative amendments were also enacted in 1987 and 1994 introducing options such as driver licence suspension for traffic and parking offences¹¹¹ and also allowing for authorised justices, in certain circumstances, to order alternative sanctions, including CSOs,¹¹² periodic detention,¹¹³ and civil enforcement.¹¹⁴ However, after some initial success in reducing the level of imprisonment for fine default, by the mid-1990s the level of imprisonment for fine default had risen to the levels that had previously existed in the mid-1980s.¹¹⁵
- 8.72 The *Fines Act* still provides that imprisonment may occur as a result of fine default. However, the enforcement process is entirely managed by the SDRO. If a CSO is breached, the SDRO can revoke it and impose a sentence of imprisonment.¹¹⁶ The period of detention for breach of a CSO is calculated according to a prescribed rate of one day for each \$120 owing, up to a total of three months in respect of each period of detention.¹¹⁷ Once committed, however, a fine defaulter may apply to the Commissioner of Corrective Services to serve the period of detention by way of an intensive correction order.¹¹⁸ The SDRO advises, however, that this final sanction – for breach of a CSO – has not been used since the enactment of the *Fines Act* in 1996.
- 8.73 As noted above, in Victoria only a court may imprison a person for failure to comply with a CWP. If, among other things, an infringement offender does not consent to a CWP or fails to comply with the permit or a condition of the permit, that person is to

109. *Justices Act 1902* (NSW) s 87.

110. A G Muir, *Report of the Inquiry into the Central Industrial Prison*, Department of Corrective Services (1988).

111. *Justices (Penalty Defaults) Amendment Act 1987* (NSW).

112. *Justices Act 1902* (NSW) s 89C.

113. *Justices Act 1902* (NSW) s 89D.

114. *Justices Act 1902* (NSW) s 89E.

115. R Jochelson, *Fine Default: Enforcing Fine Payment*, NSW Bureau of Crime Statistics and Research, Legislative Evaluation Series (1995) 3-4.

116. *Fines Act 1996* (NSW) s 87.

117. *Fines Act 1996* (NSW) s 90.

118. *Fines Act 1996* (NSW) s 89. An intensive correction order is an order of imprisonment served by intensive correction in the community under the supervision of Corrective Services NSW, rather than in full-time custody in a correctional centre.

be bought before the court.¹¹⁹ The court may order that he or she be imprisoned for a period of one day in respect of each penalty unit or part of a penalty unit.¹²⁰ However, a number of other options are available to the court if it is satisfied that the offender has a mental or intellectual impairment, disorder, disease or illness; other special circumstances apply; or if imprisonment would be excessive, disproportionate or unduly harsh.¹²¹

Is imprisonment appropriate for non-payment?

8.74 Penalty notices are usually only available for minor offences.¹²² Indeed offences are often designated as penalty notice offences because imprisonment is not an appropriate penalty.¹²³ It is not an offence to fail to pay a fine or penalty notice amount. Consequently, the imprisonment of a person for failing to pay a penalty notice amount gives rise to two key issues of principle:

- whether failure to pay a fine for an offence that did not itself attract imprisonment should ever result in a custodial option or a CSO, and
- whether it should be possible to be imprisoned or required to perform community service for a failure to do something, where such a failure is not itself an offence.

8.75 It has been argued many times that the minor nature of penalty notice offences means that imprisonment should not be imposed for defaulting on payment. In its report on the regulation of federal civil and administrative penalties, the Australian Law Reform Commission (ALRC) was 'strongly of the view' that imprisonment should not be imposed for non-payment of a civil penalty. The ALRC argued that 'if imprisonment is possible, the offence should be criminal with the defendant having all the procedural protections of criminal offences',¹²⁴ and recommended that 'imprisonment in default of payment of a fine or other monetary penalty should not be available, unless failure to pay is held by a court to be contempt of court'.¹²⁵ Professor Richard Fox has argued that monetary penalties should only be recoverable by civil enforcement and 'non-payment of an infringement penalty should not be punishable by imprisonment'.¹²⁶

119. *Infringements Act 2006* (Vic) ss 158-159.

120. *Infringements Act 2006* (Vic) s 160(1).

121. *Infringements Act 2006* (Vic) s 160(2)-(3).

122. See Chapter 3 [3.64]-[3.71].

123. Criminal Infringement Notices are an exception to this general rule. See Chapter 10.

124. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [2.50].

125. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [31.22].

126. R Fox, *Infringement Notices: Time for Reform?* Trends and Issues in Crime and Criminal Justice 50, Australian Institute of Criminology (1995) [11.7.2].

8.76 The New Zealand Law Commission has also recommended that penalty offences be restricted to offending that is not so serious as to justify imprisonment.¹²⁷ New Zealand's guidelines on infringement amounts align with this recommendation:

29. As the imposition of a penalty for a breach involves a transfer of the judicial function to the executive, it is very important that the penalty should not result in:

- a criminal conviction, even when liability is contested in a Court; or
- a term of imprisonment.

30. Where an offence may warrant a more serious penalty, or different treatment e.g. court proceedings, then a separate offence provision should be established in the primary legislation.¹²⁸

8.77 Further support against imposing imprisonment for non-payment is also found in the Council of Europe's Recommendation No R (92) 17, which states that

custody should be avoided as far as possible in cases of inability to pay, in view of the fact that the original offence was considered insufficiently serious for imprisonment or because such a penalty was inappropriate for other reasons.¹²⁹

8.78 An argument may be made that a penalty of imprisonment is required for fine default because of its deterrent effect. However, that deterrent could conceivably be retained by amending Divisions 5 and 6 of Part 4 of the *Fines Act* to allow a court, rather than the SDRO, to make the appropriate orders, along the lines of the approach taken in s 15A of the *Crimes Act 1914* (Cth).

The legality and propriety of such orders being made by the SDRO

8.79 There is a constitutional requirement that federal offenders may only be sentenced by a court exercising federal judicial power.¹³⁰ Following the enactment of the *Fines Act* (and other fines regimes in other Australian jurisdictions), the Commonwealth made amendments to section 15A of the *Crimes Act 1914* (Cth).

8.80 Section 15A provides for 'the enforcement or recovery of a fine imposed on an offender... convicted in the State or Territory of an offence against a law of the Commonwealth'. The relevant provisions state that if a law of a state or territory requires or permits a person or authority other than a court to impose a penalty, including community service or imprisonment of a person who failed to pay a fine, the law applies as if it did not require or permit the person or authority to take that action but instead as if it allowed any person to apply to a court of summary jurisdiction of the state for an order imposing the penalty, and allowed for that court

127. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005) 55.

128. New Zealand Ministry of Justice, *Guidelines for New Infringement Scheme* (2008).

129. *Council of Europe, Recommendation No R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing*: B7ii, cited in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [31.20].

130. Commonwealth, *Parliamentary Debates*, Senate, 1 April 1998, 1685 (I Campbell).

to make the order.¹³¹ In other words, the SDRO cannot impose a CSO or imprison a person for failure to pay a fine incurred through committing an offence against the Commonwealth – only a court may do so.

8.81 Two questions arise:

- whether a state can invest an administrative body such as the SDRO with state judicial power, and
- whether a state should invest an administrative body with judicial power that extends to the imposition of a sentence of the kind that can be imposed by a court, subject to the provisions and requirements of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

This does not involve a question of investing administrative functions in courts that can exercise federal judicial power.¹³²

8.82 It seems to be the case that there is no formal ‘separation of powers’ in NSW, at least with respect to the exercise of state judicial powers.¹³³ For example, members of the High Court appear to have accepted that a state may invest state judicial power in a foreign court.¹³⁴ However, investing state judicial power in a Federal court infringes the implied restriction in Chapter III of the *Constitution* (Cth).¹³⁵

8.83 The answer to the first question seems to be that a state can invest an administrative body with state judicial power. This leaves the question of whether it is desirable to do so.

8.84 CSOs and imprisonment involve, in one case, a requirement to work without payment, and in the other, the deprivation of liberty. As a general rule in democratic societies, these sanctions can only be imposed by a judicial officer, in open court, after a fair hearing, and in the presence of the party likely to be affected by the sanction. This is no doubt why, in the case of federal offences and in Victoria, the power to impose such a penalty, including CSOs or imprisonment, can only be exercised by a court. However infrequently these powers may be used, the arguments in favour of their being exercised only by a court are strong. Any arguments about the impost of this work on already busy courts does not weigh heavily in the balance against the arguments of natural justice, procedural fairness and transparency.

Commission’s conclusions

8.85 A number of options are available to deal with the issues identified above. First, the provisions of the *Fines Act* relating to the use of CSOs and imprisonment as sanctions in the case of fine defaults could be removed and these penalties made

131. *Crimes Act 1914* (Cth) ss 1AA-1AB.

132. See *Kable v DPP* (1996) 189 CLR 51.

133. See Advisory Committee to the Constitutional Commission, Parliament of Australia, *Report* (1987) 68.

134. See *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 [107].

135. See *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

no longer available for non-payment of penalty notice amounts. This argument has some merit, especially as the power to imprison has not been used for some time, and CSOs appear to be no longer in use following the introduction of WDOs. On the other hand, it could be argued that the threat of imprisonment may be of some utility in inducing those who do have the funds to pay, even if the threat is a hollow one. Further, until WDOs are more widely available there may be some remaining utility in preserving CSOs. It is also possible that a person may not be eligible for a WDO but be suitable for a CSO.

- 8.86 The second option would be to give the power to order a CSO or to imprison for fine default to a court rather than the SDRO. This option would restore the basic democratic requirement of a public hearing, in which the defaulter has a right to be heard, before these sanctions are imposed. However, although the NSW Government can instruct a government department not to operationalise its power to imprison, it cannot so instruct a court. If this option were adopted, imprisonment for fine default would effectively be revived.
- 8.87 A third option would be to repeal the provisions of the *Fines Act* that empower the SDRO to commit a fine defaulter who is in breach of a CSO to a correctional centre, and to amend the provisions of the *Fines Act* relating to CSOs to allow a court, rather than the SDRO, to make the appropriate orders. The arguments of principle against using imprisonment for fine default are strong. There may remain some marginal utility in retaining CSOs. While giving this role to Local Courts would increase their workload, in view of the very small number of CSOs that are likely to be made this should not create an unreasonable impost, even on an already busy court.
- 8.88 We are of the view that the third option should be adopted. The power to imprison for fine default is not used, for good reason, and it should be repealed. The power to order a CSO has some utility and should be retained. However, it is a power that should be exercised by a court after a public hearing. The Local Court would appear to be the most appropriate court to make such orders.
- 8.89 Consideration should be given to the powers available to the Local Court when dealing with an application for a CSO, including provisions allowing the court, instead of ordering a CSO, to order other fine enforcement and fine mitigation options available under the *Fines Act*, including writing off all or part of a penalty notice debt.

Recommendation 8.4

- (1) Part 4 Division 6 of the *Fines Act 1996* (NSW) should be repealed to remove the possibility of imprisonment as a sanction for breach of a community service order under that Act.
- (2) Part 4 Division 5 of the *Fines Act 1996* (NSW) should be amended to
 - (a) remove the power of the State Debt Recovery Office to make a community service order, and
 - (b) substitute a provision to allow the State Debt Recovery Office to apply to the Local Court for an order imposing a community service order, and

(c) empower that court to make the order after a hearing.

Penalty notices and court proceedings

- 8.90 In CP 10 we asked whether information about penalty notice history should be provided to courts for the purpose of determining sentence for any offence. In the Ombudsman's review of CINs it was said that information about CINs is presented to courts for sentencing purposes in later criminal proceedings. The fact sheets prepared by the NSW Police Force for the courts sometimes contain information about the defendant's CIN records appended to the 'Criminal History – Bail Report'.¹³⁶ Other penalty notice issuing agencies, such as Maritime NSW, informed the Commission that they sometimes provide this information to courts.¹³⁷
- 8.91 The development of the penalty notice system in NSW was underpinned by the philosophy that payment of a penalty notice is not tantamount to an admission of guilt. For example, in the second reading speech for the *Crimes Legislation Amendment (Penalty Notice Offences) Bill 2002* (NSW), the then Minister for Police said that one of the advantages of a CIN was that 'payment of the fixed penalty results in the offender acquiring neither a conviction nor a record. The offender can avoid the social stigma and legal disabilities that attach to prosecution and conviction in a criminal court.' He went on to say that: 'The penalty notice will not form part of the person's current criminal history. The NSW Police Service will keep a record of the penalty notice issued in order to ensure that notices are not issued inappropriately.'¹³⁸
- 8.92 Section 23(2) of the *Fines Act* provides that payment of the full amount under a penalty notice results in there being 'no further liability for further proceedings for the offence to which the notice relates'.¹³⁹ A note is appended to s 23 in the following terms: 'payment generally does not have the effect of an admission of any liability in relation to the events out of which the offence arose.'
- 8.93 If a PNEO is issued and payment is made, s 45(3) of the *Fines Act* provides that the payment 'is not an admission of liability for the purpose of and does not in any way affect or prejudice any civil claim, action or proceeding arising out of the same occurrence'. Further, s 338 of the *Criminal Procedure Act 1986* (NSW), which deals with CINs, provides that if a penalty is paid, 'no person is liable to any further proceedings for the alleged offence' and that 'payment of a penalty under this Part is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.'
- 8.94 However, the *Fines Act* does not contain a provision akin to s 33(3) of the *Infringements Act 2006* (Vic), which provides that 'the payment of an infringement

136. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 102-121.

137. NSW Maritime, *Submission PN2*, 12.

138. NSW, *Parliamentary Debates*, Legislative Council, 18 June 2002, 3202 (M Costa).

139. *Fines Act 1996* (NSW) s 23(2).

penalty must not be referred to in any report provided to a court for the purpose of determining sentence for any offence’.

Arguments in favour of penalty notice history being relevant to sentencing

- 8.95 The Commission received 15 responses in relation to this issue. Nine submissions, including from the Chief Magistrate of the Local Court and a number of issuing agencies, were in favour of information about penalty notice histories being provided to sentencing courts.¹⁴⁰
- 8.96 An argument in favour of making penalty notice history available is that this information is important to allow the court to respond appropriately to the particular penalty notice recipient. The Chief Magistrate argued that there is potential for uneven treatment of penalty notice recipients as, if a person court-elects and is found guilty, the offence will be recorded on their criminal record and considered in the event of sentencing for any subsequent offence; whereas if the penalty notice is paid, this will not appear on the individual’s criminal record.¹⁴¹ The Chief Magistrate also noted that the information may be relevant in relation to character or the need for specific deterrence: the Court may be led into error if the relevant history is not available to them.¹⁴²
- 8.97 It could also be argued that a court is capable of allocating appropriate weight to a penalty notice history. A judicial officer can take into consideration that the issuing agency has never been put to proof of the offence and may be assumed to know that vulnerable defendants sometimes pay a penalty because they fear going to court, and others pay because of the cost of going to court or for convenience. The SDRO submitted that information about a penalty notice history should be provided to the court ‘where there is a history of recidivist behaviour’. However it noted doubts about whether this could be considered a ‘record of previous convictions’ for sentencing purposes.¹⁴³
- 8.98 Maritime NSW submitted that it may provide information about a penalty notice history to the courts in appropriate cases.¹⁴⁴ The NSW Food Authority argued that ‘while payment of a penalty notice is not an admission to the “facts” of an offence, it is an admission that an offence has been committed’. The Food Authority submitted that the use of history was particularly important as often food businesses may not have prior convictions and therefore

the graded compliance history (for example, from warning letter, to Penalty Notice, and to prosecution) of a food business is particularly relevant to a Court

140. NSW Maritime, *Submission PN2*, 12; G Henson, *Submission PN5*, 4-5; NSW Department of Planning, *Submission PN7*, 6; NSW Food Authority, *Submission PN9*, 8; NSW Land and Property Management Authority, *Submission PN17*, 10; NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 8; Transport NSW, *Submission PN30*, 3; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 11; Police Portfolio, *Submission PN44*, 2.

141. G Henson, *Submission PN5*, 4.

142. G Henson, *Submission PN5*, 5.

143. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 11.

144. NSW Maritime, *Submission PN2*, 12.

in determining issues of prior knowledge, business practices and conduct relating to the overall, objective seriousness of the offence.¹⁴⁵

- 8.99 The NSW Land and Property Management Authority (LPMA), NSW Department of Environment, Climate Change and Water (DECCW),¹⁴⁶ the NSW Department of Planning,¹⁴⁷ and Transport NSW¹⁴⁸ all argued that courts should have access to these histories.¹⁴⁹ The LPMA¹⁵⁰ said that without a penalty notice history, ‘the court would have to regard the offender as a first time offender, which may not be the case.’¹⁵¹
- 8.100 It could also be argued that regulatory agencies may be more inclined to issue a court attendance notice, rather than a penalty notice, if a previous record of infringements could not be put before a court dealing with a repeat offender. DECCW submitted that the defendant would have the opportunity in court to explain that the motive for paying a penalty notice was expedience, for example, rather than an admission of guilt.¹⁵²
- 8.101 The Police Portfolio was opposed to ‘the suggestion that information on Criminal Infringement Notices should not be appended to court records for sentencing purposes’.¹⁵³

Arguments against penalty notice history being relevant to sentencing

- 8.102 The first argument against allowing penalty notice history to be used for sentencing purposes is that to do so would be a breach of the ‘bargain’ that penalty notices embody – that bargain being that the state is not put to the challenge and expense of proof of minor offences and in return the alleged offender avoids a conviction as well as the expense of court proceedings.¹⁵⁴ The HPLS was ‘strongly opposed to the courts being provided with any kind of information or evidence about a defendant’s penalty notice history.’ The HPLS viewed the prosecution placing this evidence before the court as a breach of the ‘trade off’ which penalty notices provide in allowing offences to be disposed of cheaply and efficiently, but without being heard in a court.’ The HPLS argued that it was:

145. NSW Food Authority, *Submission PN9*, 8.

146. In April 2011 most of the functions of the Department of Environment, Climate Change and Water were transferred to the new Office of Environment and Heritage (a division of the NSW Department of Premier and Cabinet). The Office of Water is now part of the Department of Primary Industries, NSW Trade and Investment.

147. Now NSW Department of Planning and Infrastructure.

148. Now Transport for NSW.

149. NSW Land and Property Management Authority, *Submission PN17*, 10; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 8; NSW Department of Planning, *Submission PN7*, 6; Transport NSW, *Submission PN30*, 3.

150. The NSW Land and Property Management Authority was abolished under the NSW Government restructure announced in April 2011 and its former business divisions transferred to new departments.

151. NSW Land and Property Management Authority, *Submission PN17*, 10.

152. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 8.

153. Police Portfolio, *Submission PN44*, 2.

154. See Chapter 1; Victoria Department of Justice, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006).

not fair to expect a defendant to respond to evidence about their penalty notice history when they have in good faith paid their penalty notices in the expectation that the matter had been disposed of once and for all. It is also unfair to ask the court to draw any conclusions regarding a defendant's non-payment of penalty notices, as the reasons for non-payment are so varied.¹⁵⁵

- 8.103 This argument was repeated in essence in a number of submissions. For example, Community Services submitted that payment of a penalty notice amount is not an admission of liability, and therefore it was not 'appropriate for evidence of the penalty notice to be used in the sentencing process for any other offence.' It argued that incentives were needed for the penalty notice system to work effectively and for people to be diverted from courts. One of these incentives is 'providing that payment of the penalty notice expiates the offence.'¹⁵⁶ Similar points were made by the Shopfront Youth Legal Centre.¹⁵⁷
- 8.104 The Law Society's submission to the Ombudsman's inquiry into CINs argued that introducing the history of CINs prejudices the offender. The Law Society submitted that an offender's criminal history influences a magistrate or judge, and 'without an admission of guilt, it can be of no relevance to the court. Production of the CIN history would be prejudicial to the offender as to his or her character.'¹⁵⁸
- 8.105 In its 2006 report, the Sentencing Council pointed out that marginalised members of the community cannot afford to contest a penalty notice.¹⁵⁹ In its submission to this inquiry the HPLS raised similar concerns:
- People who are homeless are more likely to commit certain types of penalty notice offences...Their visibility also makes them more likely to come to the attention of enforcement officers. They are also less likely to pay off their debt...As a consequence, people experiencing homelessness who have been charged with a criminal offence are more likely than other defendants to go before the courts with a 'chequered' penalty notice history, and this may lead the court to impose more severe penalties for unrelated offences.¹⁶⁰
- 8.106 Many individuals who are not vulnerable may pay a penalty notice because it is more convenient to do so rather than as an admission of guilt, on the basis that the matter is trivial and they do not thereby acquire a conviction.¹⁶¹ If individuals did effectively acquire a conviction – or at least a record of offending – they may be more inclined to challenge a penalty notice through court election.
- 8.107 Both Legal Aid NSW and Community Services submitted, without exploring in detail, the argument that driving offences might form an exception, and that information about strict liability traffic offences could be provided to the court when the

155. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 22.

156. NSW Department of Community Services, *Submission PN36*, 11.

157. The Shopfront Youth Legal Centre, *Submission PN33*, 13.

158. The Law Society of NSW, cited in NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) [9.2].

159. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.100].

160. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 22.

161. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.100].

defendant is in court for driving offences.¹⁶² However, we note the submission of the SDRO that it could not always guarantee the accuracy of penalty notice histories: for instance a car owner may not be personally liable for offences listed against their vehicle registration, as responsibility will have been transferred to the driver of the vehicle in some cases.¹⁶³ 'Cleaning' penalty notice records before they are presented to a court may be costly and difficult.

Commission's conclusions

- 8.108 On balance we are persuaded by the arguments in favour of making a penalty notice history available, in appropriate cases, to a court sentencing an offender. In most cases a penalty notice history will not be relevant. However, a practice has arisen of placing the penalty notice history before a sentencing court in some cases, and this practice should be regularised.
- 8.109 In some situations it may be important that the court has the penalty notice history, such as where it shows a clear pattern of behaviour that may go to character, or may be relevant to the prospects of rehabilitation. For example, a food supplier may have received numerous penalty notices in relation to hygiene offences before a prosecution for a food hygiene offence is brought. Only penalty notices of a like nature should be placed before a sentencing court. For example, a history of speeding offences should not be presented to a court sentencing for a food hygiene offence. A history of warnings or cautions should not be placed before a court.
- 8.110 Bearing in mind the issues canvassed above, it is appropriate that there be clear guidelines about the situations in which a penalty notice history should be presented to a sentencing court. We therefore recommend that such guidelines be developed by the proposed Penalty Notice Oversight Agency, in consultation with relevant stakeholders.
- 8.111 Consideration may also need to be given to the inclusion of an appropriate provision in the *Crimes (Sentencing Procedure) Act 1999* (NSW). When presented with a penalty notice history courts should allocate appropriate weight to that history, taking into consideration that the prosecution has not been put to proof; that payment does not give rise to a conviction; and that penalty notice recipients may have many reasons, some unrelated to guilt, for paying a penalty notice.

Recommendation 8.5

- (1) The *Fines Act 1996* (NSW) should be amended to provide that a penalty notice or Criminal Infringement Notice may be referred to in any report provided to a court for sentencing.
- (2) The proposed Penalty Notice Oversight Agency, in consultation with key stakeholders, should develop guidelines setting out when a penalty notice history may be presented to a sentencing court.

162. NSW Department of Community Services, *Submission PN36*, 11; Legal Aid NSW, *Submission PN11*, 18.

163. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 11.

9. Mitigation measures

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Introduction

- 9.1 This chapter deals with the fine mitigation measures in the *Fines Act 1996* (NSW) (*Fines Act*) designed to assist people to pay their penalty notice amounts. Time-to-pay arrangements allow those with unpaid penalties to apply for an extension of time to pay or to pay by instalments. Work and development orders (WDOs) allow eligible people to work off their penalty notice debts through non-financial means such as work, treatment or education. Further, in certain circumstances it is possible for applications to be made to have penalty notice amounts written off. Decisions of the State Debt Recovery Office (SDRO) concerning these fine mitigation measures may be reviewed by the Hardship Review Board (HRB). These fine mitigation measures and their review by the HRB are dealt with sequentially below.

Time to pay

- 9.2 An arrangement for time to pay a fine may be made after a fine enforcement order is made.¹ However, where a person is in receipt of a Centrelink benefit, time-to-pay arrangements may be made before a fine enforcement order is made.² Time-to-pay involves two options to assist those who have difficulty in paying penalty notices within the required time by one payment: an extension of time to pay and payment by instalments.³
- 9.3 A guide produced by the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) for debt collectors encourages flexibility amongst creditors. ‘When debtors act promptly and responsibly, and collectors are flexible, fair and realistic, the need for collection activity will be greatly reduced’.⁴ Time to pay serves several objectives: effective debt collection for SDRO, time-frames for payment that accommodate the needs of people on low incomes, and avoidance of default and consequent enforcement costs. A 2011 evaluation by the Department of Attorney General and Justice (AGJ evaluation) found that time-to-pay arrangements have been highly successful in meeting these objectives.⁵
- 9.4 Time to pay has enabled the recovery of substantial amounts of money from people who may otherwise have defaulted. Between July 2009 and April 2011, 26,683 penalty notices were referred to the SDRO for time to pay, primarily through Centrepay. In that period of time, \$1.6 million was recovered, with a further \$5.9 million placed under management, through these payments.⁶
- 9.5 In Consultation Paper 10 (CP 10) we asked whether the time-to-pay system and the Centrepay program could be improved.⁷ Three concerns were raised in submissions and consultations in response to this question:
- the availability of information about time to pay
 - limitations on access to time to pay prior to enforcement costs, and
 - the appropriate length of time-to-pay arrangements.

1. *Fines Act 1996* (NSW) s 100(1).

2. *Fines Act 1996* (NSW) s 100(2).

3. *Fines Act 1996* (NSW) s 100(3).

4. Australian Securities and Investments Commission, *Regulatory Guide 96: Debt Collection Guideline for Collectors and Creditors* (2005).

5. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 19.

6. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 18-19.

7. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010), Question 5.11, Question 7.16(1),(2).

The availability of information about time to pay

- 9.6 In response to a review by the NSW Ombudsman, the SDRO reported that it has internal guidelines for determining time-to-pay applications but these guidelines are currently not publicly available. The SDRO argued that this is appropriate because:

This [time-to-pay guidelines] relates to in-house training for staff and guidance in decision making as opposed to public information. Each individual circumstance must be treated on its own merits and the SDRO does not support the concept of 'one size fits all'.⁸

- 9.7 Despite this argument, the Ombudsman concluded that:

guidelines about time-to-pay arrangements would provide fine recipients and advocates with greater assistance when completing time-to-pay applications...and ensure greater predictability, consistency and transparency.⁹

- 9.8 The NSW Sentencing Council has also argued for the development of clear guidelines about financial hardship and other factors that the SDRO considers when processing time-to-pay applications.¹⁰

Submissions and consultations

- 9.9 The limited information available about time to pay may mean that individuals, their legal representatives, and others assisting them, struggle to determine whether or not they are eligible. In consultation, representatives of clients with penalty notice debt said that they experience difficulty in deciding whether or not making an application is a good use of their limited time and resources.
- 9.10 One homeless man said in a consultation that he now had a time-to-pay arrangement but that he had been unaware of time to pay until recently: had he been aware of it he could have paid off his penalty debt and had his driver licence reinstated much earlier. Another homeless man in the same consultation described the penalty notice system as an 'electronic prison', and said that in his experience it was very difficult to access information about it. He proposed that the SDRO run forums and information sessions for homeless people and promote information more widely.¹¹
- 9.11 NSW Industry and Investment¹² submitted that the time-to-pay options should be more transparent.¹³ We were also told in consultation that guidelines should be made public, and that service providers should be consulted when these guidelines are being developed.¹⁴

8. State Debt Recovery Office submission (3 February 2009), cited in NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 120.

9. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 120.

10. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) xv.

11. Homeless Persons Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011.

12. Now NSW Department of Trade and Investment, Regional Infrastructure and Services.

13. NSW Industry and Investment, *Submission PN37*, 6.

14. Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

Commission's conclusions

- 9.12 We consider that providing publicly available guidelines for time to pay would enhance fairness, consistency and transparency in the penalty notice system, and assist applicants and their advocates to make better decisions about when an application is, or is not, appropriate. We note that a 2002 report by the Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, recommended that government agencies develop and publish guidelines about the way that prosecutorial discretion is exercised.¹⁵
- 9.13 The model for developing penalty notice guidelines adopted by the Department of Attorney General and Justice (AGJ), using an advisory committee of stakeholders, is an effective and accepted model.
- 9.14 *Fines Act* Part 3, Division 8, Sub-division 2 should be amended, using as a model the existing provision in s 99I relating to WDO guidelines. It should require that the Attorney General, in consultation with the Minister for Finance and Services, issue guidelines on time to pay and that the SDRO have regard to those guidelines in the exercise of any of its functions.¹⁶
- 9.15 Consistently with recommendations in this part of our report, we recommend that the proposed Penalty Notice Oversight Agency (PNOA) should monitor the operation of these guidelines.

Recommendation 9.1

- (1) The *Fines Act 1996* (NSW) should be amended to provide that the Attorney General, in consultation with the Minister for Finance and Services, should issue guidelines on time to pay.
- (2) The proposed Penalty Notice Oversight Agency should, in consultation with the State Debt Recovery Office and key stakeholders, develop time-to-pay guidelines.
- (3) The time-to-pay guidelines should be publicly available, including on the State Debt Recovery Office website.
- (4) The proposed Penalty Notice Oversight Agency should monitor the operation of the time-to-pay guidelines.
- (5) The State Debt Recovery Office should report periodically on the operation of the time-to-pay guidelines as required by the proposed Penalty Notice Oversight Agency.
- (6) The proposed Penalty Notice Oversight Agency should report publicly on the operation of the time-to-pay guidelines.

15. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002), Recommendation 10.1.

16. See *Fines Act 1996* (NSW) s 99I.

Should time-to-pay arrangements be more widely available?

- 9.16 Since the *Fines Act* was amended in 2008, recipients of government benefits have been able to apply for what is called ‘voluntary enforcement’ and consequently be given time to pay prior to enforcement costs being incurred.¹⁷ Voluntary enforcement engages the person in paying their penalty as early as possible and in a way that responds to their financial situation. It is currently only available to recipients of government benefits who are able to organise payment through Centrepay, a direct bill-paying service that makes deductions from Centrelink payments.¹⁸ Other people who earn very low incomes but are not in receipt of government benefits incur a \$50 enforcement fee prior to accessing time to pay.¹⁹
- 9.17 Section 100(2) of the *Fines Act* allows the SDRO to make an arrangement for time to pay after the issue of a Penalty Notice Enforcement Order (PNEO) if it is satisfied that the application is genuine and it appears expedient to do so. Section 100(3A) provides that ‘in particular the SDRO may allow a person in receipt of a Government benefit to pay the fine in instalments as a regular direct debit from that benefit’.²⁰
- 9.18 There was broad support for the further extension of time-to-pay arrangements to people who are on low incomes but who are not in receipt of Centrelink benefits. The SDRO proposed the expansion of voluntary enforcement to apprentices and trainees, and has also suggested that there may be scope for extending it to other disadvantaged clients.²¹ The AGJ evaluation recommended that the *Fines Act* be amended to enable apprentices and trainees to enter into time-to-pay arrangements and that the issue of broadening time-to-pay arrangements to other disadvantaged clients be further considered.
- 9.19 The Ombudsman, in his 2009 review of the impact of Criminal Infringement Notices (CINs) on Aboriginal and Torres Strait Islander communities, also argued for an extension of time to pay to ‘others on similarly low incomes such as those in paid employment who earn no more than the people receiving Centrelink benefits’, on the basis that it is inequitable to exclude them.²²
- 9.20 Consultations and submissions to this inquiry also supported extending time-to-pay arrangements.²³ Legal Aid NSW (Legal Aid) submitted that ‘clients experiencing acute economic hardship should not be further penalised as a result of limited financial capacity’.²⁴ The NSW Department of Community Services (Community

17. *Fines Act* 1996 (NSW) s 100(1A).

18. *Fines Act* 1996 (NSW) s 100(3A).

19. *Fines Regulation 2010* (NSW) cl 4(1).

20. *Fines Act* 1996 (NSW) s 100(3A).

21. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 19.

22. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009), 121.

23. NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 5; The Shopfront Youth Legal Centre, *Submission PN33*, 12; NSW Department of Community Services, *Submission PN36*, 9; NSW Industry and Investment, *Submission PN37*, 6; Aboriginal Legal Service Providers (greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

24. Legal Aid NSW, *Submission PN11*, 14.

Services)²⁵ and the NSW Department of Education and Training argued for the inclusion of young people in time-to-pay arrangements and that this option should be available from the moment a penalty notice is issued.²⁶ The Shopfront Youth Legal Centre (Shopfront) expressed similar concerns.²⁷

- 9.21 Extending time to pay to those who would not be paying through Centrepay may present practical challenges for the SDRO. Direct debit from benefits is a secure method of payment by instalments and other methods may be less reliable. The SDRO advised the Ombudsman that the default rate for repayments is 2% for Centrepay users as opposed to 40% for people using other arrangements.²⁸
- 9.22 If time-to-pay arrangements are to be extended beyond those on Centrelink benefits to include others who are in financial hardship, a measure of financial hardship must be designed. Such a measure needs to be fair; to identify accurately applicants' income and expenses; and to be administratively manageable, both for the SDRO and clients. This is not an easy task. There are a number of potential sources of guidance, although none appear to provide a template that responds to all of the concerns identified above.
- 9.23 There is already a test for financial hardship in the penalty notice enforcement system. One of the criteria for eligibility for a WDO is 'acute economic hardship'. However this test is very hard to meet and has been subject to criticism.²⁹ It is discussed further below and its amendment is recommended.
- 9.24 Legal Aid employs a means test to assess whether or not an applicant's income and assets are such that they are eligible for a grant of legal aid.³⁰ It is applied to the income and assets of the applicant and any 'financially associated person'.³¹ The test consists of three sub-tests: income, assets, and ability to pay legal costs.³² A legal aid applicant receiving a Centrelink income support payment at the maximum rate satisfies the income test, as does a person whose net assessable income is less than \$318 per week. That 'net assessable income' is determined by adding income from all sources, including Family Tax Benefits A and B, pensions, income, receipts from investments and superannuation; and then subtracting allowable deductions, including income tax, housing costs, child support and child care.³³ The

25. Now NSW Department of Family and Community Services.

26. NSW Department of Community Services, *Submission PN36*, 7; NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 5.

27. The Shopfront Youth Legal Centre, *Submission PN33*, 12.

28. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 15 [3.6].

29. Institute for Innovation in Business and Social Research, University of Wollongong, *Now I Can Move On*, Final Report (2011), 29; NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 102. The report identifies difficulties experienced by clients in finding documentation or information required.

30. Legal Aid NSW, *Policies: Means Test* <<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test>>.

31. Legal Aid NSW, *Policies: Means Test – Whose Means are Considered When Applying the Means Test?* <<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test/7.3.-whose-means-are-considered-when-applying-the-means-test>>.

32. Legal Aid NSW, *Policies: Means Test – Structure* <<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test/7.4.-means-test-structure>>.

33. Legal Aid NSW, *Policies: Means Test – Income Test* <[http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test/7.5.-income-test#7.5.2 All other applicants](http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test/7.5.-income-test#7.5.2>All%20other%20applicants)>.

test is therefore not simple to administer, although its appeal lies in its familiarity and the existing resource of expertise in using it.

- 9.25 The Victorian Infringements System Oversight Unit (ISOU) has produced an information paper on the relevance of financial hardship to infringements (as penalty notices are known in Victoria). The paper provides a list of key factors in assessing financial hardship. One factor is the debtor's capacity to meet reasonable living expenses, such as food, accommodation, medical treatment, transport and essential services. A second factor is the impact on the person of paying the required amount – will payment of a penalty notice leave the person unable to provide him or herself or his or her family with necessities such as food, shelter or medical care? A third factor that is sometimes used is a requirement that the person demonstrate a willingness to pay.³⁴
- 9.26 In Victoria, a person is automatically entitled to be offered a payment plan if he or she is in receipt of a Centrelink Health Care Card, a Centrelink Pensioner Concession Card or a Department of Veterans' Affairs Pensioner Concession Card or Gold Card. Victorian agencies may also, at their discretion, offer a payment plan to people who

may be experiencing unavoidable financial hardship resulting in the person not having the capacity to pay the fine in full within the payment period. Hardship may be recognized, but not limited to circumstances such as where an individual suffers a sudden change in their situation such as loss of employment, a large unexpected expense on an essential item, sudden or long term illness, family violence or similar circumstances.³⁵

- 9.27 Despite differences between the two states, the Victorian Guidelines and the ISOU information paper on financial hardship may be of assistance in developing definitions of hardship for NSW.

Commission's conclusions

- 9.28 We support the recommendation of the AGJ evaluation that time-to-pay arrangements, whether made before or after the issue of a PNEO, be extended to apprentices and trainees.
- 9.29 Further, while acknowledging the difficulties of developing an appropriate test of hardship, the Commission also supports the extension of time-to-pay arrangements, both before and after the issue of a PNEO, to those who can establish financial hardship. Despite the attendant difficulties, it is desirable to make arrangements for those on low incomes to pay their penalty notice amounts by way of a time-to-pay arrangement rather than running the risk of defaulting and incurring enforcement costs. There is the additional concern that defaulting could be the start of the 'slippery slope' referred to in the previous chapter. It would seem inequitable that people who work but are on low incomes should not be able to benefit from time-to-

34. Victoria Infringements System Oversight Unit, Department of Justice, *Financial Hardship: The Relevance of Financial Hardship in Matters Dealt With Under the Infringements Act 2006 (Vic)*, Information Paper (2008) 3 [7-10].

35. *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 5 [4].

pay arrangements before incurring enforcement costs, in situations where there is genuine financial difficulty.

- 9.30 We support the recommendation of the AGJ evaluation that the development of a test for financial hardship be given further attention, both in relation to time-to-pay arrangements and WDOs (considered below). It may be desirable to develop a test of financial hardship that would be appropriate for both purposes.

Recommendation 9.2

- (1) The *Fines Act 1996* (NSW) should be amended to enable apprentices and trainees to enforce voluntarily their penalty notices for the purposes of entering into a time-to-pay arrangement.
- (2) The *Fines Act 1996* (NSW) should be amended to enable people who are experiencing unavoidable financial hardship to enforce voluntarily their penalty notices for the purposes of entering into a time-to-pay arrangement.
- (3) The time-to-pay guidelines should include provisions relating to eligibility for time-to-pay arrangements for apprentices, trainees and people experiencing financial hardship.

Work and development orders

What are WDOs?

- 9.31 Work and development orders were established under the *Fines Further Amendment Act 2008* (NSW) as a pilot fine mitigation program for vulnerable groups to allow members of those groups to address their fine or penalty notice debt through non-financial means. A WDO is defined as an order requiring a person to do one or more of the following things:
- undertake unpaid work for, or on behalf of, an approved organisation (with the agreement of that organisation)
 - undergo medical or mental health treatment in accordance with a health practitioner's treatment plan
 - undertake an educational, vocational or life skills course
 - undergo financial or other counselling
 - undergo drug or alcohol treatment
 - if the person is under 25 years of age, undertake a mentoring program.³⁶
- 9.32 WDOs are available to adults and children³⁷ who have a mental illness, intellectual disability or cognitive impairment; people who are homeless; or people who are

36. *Fines Act 1996* (NSW) s 99A.

37. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [4].

experiencing acute economic hardship.³⁸ They have recently been extended to people with ‘serious addiction to drugs, alcohol or volatile substances’.³⁹

- 9.33 Guidance on who is eligible to apply for a WDO is provided in guidelines issued by the Attorney General under s 99I of the *Fines Act*,⁴⁰ to which the SDRO must have regard when exercising its functions in respect of WDOs. The SDRO may only issue a WDO if a fine enforcement order has been issued; the person is not subject to a community service order (CSO); and the application satisfies all the statutory requirements.⁴¹ However, it is possible for a WDO to be made in anticipation of a fine enforcement order.⁴² The Attorney General’s WDO Guidelines allow a person to apply for an enforcement order at any time for the purpose of applying for a WDO. In these circumstances, enforcement costs are not added.⁴³
- 9.34 Each application for a WDO must be made to the SDRO by or on behalf of the offender, and be supported by an ‘approved person’ or by a health practitioner who is to supervise the offender in complying with the order. The guidelines set out the criteria and process for approval of practitioners and organisations.⁴⁴
- 9.35 The application for a WDO must set out the grounds for requesting the order (including evidence to support claims of acute economic hardship, mental illness, etc), the proposed activities to be carried out under the order, and the time that is proposed to complete those activities.⁴⁵ The application must also specify the value of the activities that are to be undertaken for the purpose of expiating the fines accrued and the nature of any unpaid work to be performed. According to the Attorney General’s WDO Guidelines:
- unpaid work is to be valued at \$30 per hour
 - completion of a medical or mental health treatment, or a drug and alcohol program, is to be valued at \$1000 per month, and
 - an educational, vocational or life skills course is to be valued at \$50 per hour or \$350 per day, with a maximum of three full days per month.⁴⁶
- 9.36 The guidelines also provide caps on the number of hours of work or activities that may be performed under a WDO, consistent with CSOs. An adult may work a maximum of 300 hours and a child 100 hours.⁴⁷

38. *Fines Act 1996* (NSW) s 99B.

39. NSW, *Parliamentary Debates*, Legislative Council, 6 September 2011, 50 (G Pearce).

40. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines*.

41. *Fines Act 1996* (NSW) s 99B(1).

42. *Fines Act 1996* (NSW) s 99B(3).

43. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [4].

44. *Fines Act 1996* (NSW) s 99A; NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [5.1]-[5.3].

45. *Fines Act 1996* (NSW) s 99B.

46. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [6]-[6.5].

- 9.37 A WDO can be varied or revoked by the SDRO either at the request of the offender or on its own motion where, after taking reasonable steps to consult with both the offender and the approved person, the SDRO is satisfied that the person has failed to comply with the order without reasonable excuse.⁴⁸

The development of the WDO scheme

- 9.38 The idea for a non-monetary penalty was originally proposed in the Sentencing Council's 2006 report.⁴⁹ Such an option was regarded as necessary because the existing fine mitigation measures (time to pay and write offs), were not meeting the needs of all vulnerable people. According to the then Attorney General, the existing measures were:

not well adapted to the needs of people who are experiencing acute economic hardship, who are homeless, or who have an intellectual disability, cognitive impairment or mental illness. In many cases, people in those vulnerable groups have little or no capacity to pay their fine debts, so time to pay alone will not assist them. Enforcement action is also unlikely to be effective, given many do not hold driver licenses and many have no assets. And simply writing off the fine or penalty notice is both inappropriate and unlikely to cause, or to maintain, behavioural change.⁵⁰

- 9.39 WDOs were developed by a working group of government and non-government agencies and were introduced in 2008 as a two-year pilot program. A monitoring committee, also composed of government and non-government agencies, oversaw the pilot.⁵¹ WDOs were made permanent in 2011.⁵²
- 9.40 The AGJ evaluated the WDO pilot in May 2011. That evaluation benefited from data from two online surveys: one of agencies that issue penalty notices and one of organisations and practitioners participating in the pilot. Further, the University of Wollongong conducted and analysed interviews with 26 participants and 21 workers from nine organisations administering the WDO scheme. The submissions to this inquiry were also made available to the evaluation and informed its findings and recommendations.
- 9.41 The AGJ evaluation found that WDOs were meeting their objective of providing an 'effective and appropriate response to offending by disadvantaged people'⁵³ as an alternative to a monetary penalty. In 2009-2010, 146 WDO applications were

47. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [6.5].

48. *Fines Act 1996* (NSW) s 99C.

49. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) 112.

50. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11968 (J Hatzistergos).

51. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 39.

52. *Fines Amendment (Work and Development Orders) Regulation 2011* (NSW).

53. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 6, 38.

approved and 84 were either withdrawn or rejected. The 36 WDOs that satisfied their fines did so to the value of \$34,000.⁵⁴

9.42 The AGJ evaluation assessed the benefits of WDOs as being:

- reduced reoffending
- engagement of clients in appropriate activities
- reduction of stress and hopelessness
- promotion of agency and self-efficacy
- building client skills and an incentive to work, and
- a reduction of costs to government relating to enforcement, offending behaviour, welfare dependency, mental health problems and drug and alcohol problems.⁵⁵

9.43 Overall, the evaluation found that WDOs are highly beneficial to individuals while still 'enforcing the importance of accountability to their community'.⁵⁶ For example, one participant remarked that 'I'm not getting away with it – I'm getting something out of it.'⁵⁷ As well as these social benefits, the evaluation also noted:

From an economic perspective, it therefore seems logical and preferable to make a modest investment in a WDO to promote education, treatment and voluntary work, rather than spend time and money attempting to recover unrecoverable debt.⁵⁸

9.44 The positive findings of the AGJ evaluation were reflected in the submissions and consultations in this inquiry.⁵⁹

9.45 The concern most frequently expressed to us during consultations about WDOs was that the pilot, which was seen to be very beneficial and working well, would not be continued. Lawyers and other professionals working with vulnerable people who have penalty notice debt supported WDOs for a number of reasons: lifting the financial burden from disadvantaged clients; addressing the problem of secondary offending; motivating clients to participate in programs that have long-term benefits

54. NSW Office of State Revenue, *Annual Report 2009-10* (2010) 29.

55. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 40-41.

56. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 125.

57. Institute for Innovation in Business and Social Research, University of Wollongong, *Now I Can Move On*, Final Report (2011) 15; NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 147.

58. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 47.

59. See, for example, Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 21; The Law Society of NSW, *Submission PN31*, 9; The Shopfront Youth Legal Centre, *Submission PN33*, 12; UnitingCare Burnside, *Submission PN12*, 5; Illawarra Legal Centre, *Submission PN27*, 8-9; Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011; People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011.

for them; overcoming resistance to participation; and providing an option to overcome the sense of hopelessness around repaying debt.⁶⁰

- 9.46 The WDO pilot is now being extended throughout NSW. The roll-out of the scheme includes the establishment of a regional network of WDO support teams.⁶¹ These teams will promote WDOs and provide information, advice and other support to organisations, health practitioners and eligible individuals. The support teams are to be centrally co-ordinated through the Sydney office of Legal Aid, with small WDO teams based in Coffs Harbour, Dubbo, Nowra and Campbelltown. To ensure engagement with Aboriginal communities, it is proposed that the WDO support teams in Campbelltown, Coffs Harbour and North Western NSW will work with Aboriginal Field Officers, which are currently being established in partnership with the Aboriginal Legal Service. Promotional and educational material is also proposed for organisations, practitioners and eligible individuals.
- 9.47 Three suggestions for improvements to the WDO scheme were made during this inquiry, which are considered below. However, the same issues were also raised in the AGJ evaluation and have been responded to in the roll-out of the WDO scheme. We have taken these changes into account in our recommendations. The concerns raised with the Commission were the need to:
- increase awareness of WDOs
 - relax the eligibility criterion of acute economic hardship, and
 - extend the activities that may be undertaken for a WDO.

Awareness of WDOs

- 9.48 Lack of awareness of the WDO program, both among individuals and organisations that could potentially be approved to provide WDOs, was often raised as a concern. However, in the pilot stage, WDOs were intentionally limited in their reach. The pilot was to be available to 2000 people⁶² and was not provided with funding for promotion and education.⁶³ The AGJ evaluation noted that, although the take up of WDOs has been 'respectable among organisations and health practitioners', there are concerns about the inadequate number of approved organisations, particularly in some regions with very high fine debt. The AGJ evaluation used Mount Druitt as an example. Residents of that area 'have over \$20 million outstanding in enforcement orders and the area suffers from entrenched socio-economic disadvantage', but contains only three approved organisations.⁶⁴ The evaluation

60. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Considering the Impact of CIN More Broadly: Response to the NSW Ombudsman's Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009).

61. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 54.

62. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11968 (J Hatzistergos).

63. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 74.

64. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 73.

also noted the scope to increase the numbers of WDOs in rural and remote areas, particularly in areas with large Aboriginal populations.⁶⁵

- 9.49 Submissions and consultations to this inquiry called for increased community awareness about the WDO scheme because of its beneficial nature. Both the Law Society and Shopfront submitted that WDOs were a positive initiative.⁶⁶ UnitingCare Burnside also submitted that the WDO pilot was ‘a commendable program that supports children and young people to both reduce fines and engage with beneficial programs of support and training’.⁶⁷ Legal Aid submitted that there was ‘limited community awareness of the WDO scheme, possibly due to the lack of targeted community education programs’ and that responsibility for awareness raising has so far fallen to community organisations and organisations such as Legal Aid.⁶⁸
- 9.50 The Illawarra Legal Centre (ILC) submitted that WDOs are a ‘socially useful initiative’ that may lead to ‘positive engagement with work, training and health support beyond the life of the original participation’.⁶⁹ The ILC recommended that increased promotion of WDOs be undertaken as a matter of priority and that the option of a WDO be highlighted on infringement and fine notices.⁷⁰ The ILC also suggested there would be great benefit to the WDO scheme in introducing a funded, community-based facilitator to act ‘as a conduit between potential services, the applicant and the SDRO’.⁷¹ The Youth Justice Coalition noted that there had been no targeted community legal education about WDOs.⁷² The Homeless Persons’ Legal Service (HPLS) was concerned about the need for a ‘champion’ for the WDO scheme, arguing for the need for a senior figure within the criminal justice system to actively promote the scheme.⁷³
- 9.51 The AGJ evaluation recommended:
- That a network of regional WDO support teams be established across NSW to promote the WDO scheme and provide information, advice and other support to organisations, health practitioners and eligible individuals.⁷⁴
- 9.52 Another recommendation was for WDO support teams in regional centres and promotional and educational materials about the WDO scheme.⁷⁵ The AGJ evaluation further recommended that the SDRO carry out awareness raising so that approved organisations and health practitioners are made aware of the simplicity of

65. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 77.

66. The Law Society of NSW, *Submission PN31*, 8; The Shopfront Youth Legal Centre, *Submission PN33*, 12.

67. UnitingCare Burnside, *Submission PN12*, 5.

68. Legal Aid NSW, *Submission PN11*, 16.

69. Illawarra Legal Centre, *Submission PN27*, 11.

70. Illawarra Legal Centre, *Submission PN27*, 11.

71. Illawarra Legal Centre, *Submission PN27*, 9.

72. Youth Justice Coalition, *Submission PN34*, 11.

73. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 21.

74. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 56.

75. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 57.

reporting obligations for WDOs.⁷⁶ Funding has since been provided to facilitate development of a 'self-service portal' by the SDRO to ensure ease of application for WDOs by approved persons and organisations.

Commission's conclusions

- 9.53 The recommendations of the AGJ evaluation deal appropriately with the concerns about awareness of WDOs raised with this inquiry and are supported.
- 9.54 We note in this context that WDOs will not be the most appropriate mitigation measure for all applicants. Some people may be entitled to have penalty notice debt written off and for others a time-to-pay arrangement will be more appropriate. For those with significant debt a combination of mitigation measures may be appropriate. We recommend that the regional network of WDO support teams be provided with the skills and resources to provide information and advice in relation to time to pay and writing off penalties, as well WDOs.

Recommendation 9.3

The recently established regional network of work and development order support teams should provide information in relation to time-to-pay and write off arrangements, as well as in relation to work and development orders.

Who should be eligible for a WDO?

- 9.55 The only criterion of eligibility for the WDO scheme that received negative comment in this inquiry was 'acute economic hardship', which was criticised as being too limited. The WDO guidelines state that a person is in acute economic hardship if:
- (a) meeting their basic needs (namely, the cost of accommodation, food, transport, utilities, phone, medical expenses and care of dependents) and
 - (b) allowing \$40 a fortnight in disposable income,
- would leave them unable to repay their fine at the minimum instalment of \$10 per fortnight.⁷⁷
- 9.56 To claim acute economic hardship, an applicant must submit a statement of financial circumstances dated within three months of the date of application, with supporting documentation, including income statements from Centrelink, payslips, rent receipts or mortgage payments, bank statements, utility accounts and other documents.
- 9.57 The complexity of paperwork required to apply for these measures has led organisations supervising WDOs to call 'acute economic hardship' the most difficult

76. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 50.

77. NSW Department of Justice and Attorney General, *Work and Development (WDO) Guidelines* [4.6].

criterion to meet for WDOs.⁷⁸ The SDRO has said that it finds this definition both time-consuming and subjective, as it requires a judgment about what costs are reasonable for a person.⁷⁹ There was support, particularly from community legal centres, for expanding and simplifying this criterion.⁸⁰

- 9.58 The definition of acute economic hardship was also raised by the AGJ evaluation, which made the following recommendations:
- the definition of acute economic hardship should be taken to be satisfied if the person is in receipt of an eligible Centrelink benefit (as defined by the Director of the SDRO)⁸¹
 - the definition of acute economic hardship be amended, and that it be drawn from, or be based on, an existing arms-length means test.⁸²

Commission's conclusions

- 9.59 Allowing receipt of Centrelink benefits to be sufficient to qualify for acute economic hardship may create some practical difficulties. The ease of proof may mean that this route becomes the most popular way to qualify for a WDO. However, as the AGJ evaluation pointed out, the governor on eligibility will be that a person undertaking a WDO must have the support of an approved organisation or health practitioner. Such organisations or individuals will have their own intake and assessment policies and procedures that will limit those to whom they provide services. They are not paid to support people on WDOs; they have limited resources and are unlikely to support persons who will not benefit from a WDO. Most clients in the pilot came from the existing client base of approved organisations.⁸³
- 9.60 We support the development of a more workable test of economic hardship for WDOs for those not on Centrelink benefits. We note in this context Recommendation 9.1, above, that guidelines relating to time to pay should be developed and should include provisions relating to the assessment of financial hardship. If such guidelines are developed, it may be desirable to use the same standard of financial hardship in relation to both time to pay and WDOs.

78. Institute for Innovation in Business and Social Research, University of Wollongong, *Now I Can Move On*, Final Report (2011) 29, 102; NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 52-53.

79. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 53.

80. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Considering the Impact of CIN More Broadly: Response to the NSW Ombudsman's Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009), 6; The Shopfront Youth Legal Centre, *Submission PN33*, 12.

81. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 54.

82. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 54.

83. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 53.

Recommendation 9.4

- (1) The definition of acute economic hardship for the purposes of work and development orders should be taken to be satisfied if the person is in receipt of an eligible Centrelink benefit (as defined by the Director of the State Debt Recovery Office) and an approved organisation or health practitioner supports the application for the work and development order.
- (2) The definition of economic hardship, as it applies to people applying for a work and development order who are not on Centrelink benefits, should be amended so that it is less stringent and the application process should be simplified.
- (3) When the proposed time-to-pay guidelines are developed, consideration should be given to using the same definition of financial hardship for the purposes of eligibility for a work and development order.

Activities that may be undertaken for a WDO

9.61 The activities that may be undertaken for a WDO are described above at [9.31]. The AGJ evaluation considered whether the WDO scheme should be extended to cover:

- activities undertaken while in prison
- mutual obligation activities, which are those undertaken to receive a Centrelink youth or unemployment benefit
- activities ordered by a court, and
- activities undertaken for an apprenticeship.⁸⁴

Activities undertaken while in prison and mutual obligation activities were raised in the context of this inquiry.

Activities in prison

9.62 In relation to the eligibility of activities undertaken in prison, Legal Aid argued in its submission that 'it is not uncommon for prisoners to leave prison owing thousands of dollars but with no capacity to clear that debt',⁸⁵ and that this may lead to driver licence suspensions, difficulty finding employment, and secondary offending.

9.63 Corrective Services NSW (Corrective Services) pointed out that

accumulated fine-related debt can remain an obstacle to rebuilding their [inmates'] lives and overcoming disadvantage. Similarly debt, including fine-related debt, can hinder former inmates from moving forward with their lives after their release from custody. Without other means to repay their debt, inmates can leave gaol with substantial fine-related debt, adding to the

84. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 55 [8.2.6].

85. Legal Aid NSW, *Submission PN11*, 16.

challenges they face in successfully integrating into the community post release.⁸⁶

Corrective Services supported the inclusion of prisoners in the WDO scheme.⁸⁷ Legal Aid made similar observations, adding that paying off debts via WDOs would lead to a reduced risk of reoffending and return to prison.⁸⁸

- 9.64 Support also came from other stakeholders.⁸⁹ The Youth Justice Coalition noted the culture of passivity in prison and considered that WDOs may assist in overcoming this.⁹⁰ The AGJ evaluation also noted that a WDO 'might be a good opportunity to engage an offender in constructive activities that may promote positive behavioural change'.⁹¹ The Women's Advisory Council and Corrective Services expressed similar views, submitting that 'the opportunity for debt reduction in correctional centres has been restricted by their exclusion' from WDOs.⁹²
- 9.65 However some stakeholders at a roundtable discussion on people in custody and penalty notices conducted for this inquiry expressed reservations about WDOs in the context of prison.⁹³ They argued that people may be, or may feel, coerced into participation. Further, concern was expressed that WDOs could be experienced as punishment, especially if they are confused with community service orders (CSOs), and that prisoners may be concerned that failure to complete a course would expose them to further punishment.
- 9.66 Some participants at the roundtable meeting also argued that available courses are limited and their distribution is uneven.⁹⁴ Nevertheless, Corrective Services expends a considerable sum on prison educational programs that are voluntary but undersubscribed.⁹⁵ Other participants argued that offering WDOs in prisons might have a beneficial effect in countering a culture of passivity in prisons and encourage people to participate in the programs that are on offer. Further, it would clearly be undesirable to deprive all prisoners of the opportunity to pay off their penalty notice debt, if they choose to do so, because the choice of eligible activities may be limited for some.
- 9.67 The AGJ evaluation recommended that provided a prisoner or detainee (whether on remand or otherwise) meets the eligibility criteria for a WDO that person may undertake, or count, voluntary activities undertaken while in prison or on community supervision (that is, under the supervision of probation and parole post-release) for

86. Corrective Services NSW, *Submission PN24*, 1.

87. Corrective Services NSW, *Submission PN24*, 2.

88. Legal Aid NSW, *Submission PN11*, 16-17.

89. Corrective Services NSW, Women's Advisory Council, *Submission PN20*.

90. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 57.

91. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 57 [8.2.6].

92. Corrective Services NSW, Women's Advisory Council, *Submission PN20*, 1; Corrective Services NSW, *Submission PN 24*, 1.

93. Prisoners Roundtable Meeting, *Consultation PN8*, NSW, 3 February 2011.

94. Prisoners Roundtable Meeting, *Consultation PN8*, NSW, 3 February 2011.

95. Prisoners Roundtable Meeting, *Consultation PN8*, NSW, 3 February 2011.

a WDO. We support this recommendation. Chapter 17 deals further with issues relating to prisoners and penalty notices.

Recommendation 9.5

Prisoners and detainees (whether on remand or under sentence) who meet the eligibility criteria for a work and development order should be able to count voluntary activities and work undertaken while in custody or under supervision as eligible activities for a work and development order.

Mutual obligation activities

- 9.68 Centrelink mutual obligation activities are activities undertaken in order to receive a Centrelink youth or unemployment benefit. They have previously been excluded from the WDO scheme. However, the WDO Monitoring Committee submitted to the AGJ evaluation that this policy should be reconsidered because of the limited eligibility for Centrelink benefits; the likelihood that those on benefits will have vulnerabilities in addition to poverty; and because satisfying WDO obligations in addition to mutual obligation activities for Centrelink is likely to set unrealistic targets for this group.⁹⁶
- 9.69 This approach was supported by the HPLS, which submitted that:
- People in receipt of Centrelink benefits and with no ability to pay the mounting debts to the SDRO may be forced to work between 24 and 50 hours per fortnight in order to satisfy their mutual obligation requirements to Centrelink, and anywhere between 10 and 35 hours per month to satisfy their fine debt under a WDO. In addition to these obligations, the recipient will need to satisfy Centrelink's job search requirements, attend Centrelink interviews, and of course meet other family obligations.⁹⁷
- 9.70 The AGJ evaluation considered whether the issue of 'double-dipping' constituted a problem in this respect but concluded that, on balance, it was outweighed by the benefit to the eligible person, particularly young people, because of the added incentive to complete mutual obligation activities which may be of genuine benefit to that person's employment prospects and the contributions he or she can make to the community. These conclusions are fortified by an understanding of the care taken by approved organisations in selecting the clients they support for WDOs.⁹⁸
- 9.71 The AGJ evaluation recommended that mutual obligation activities undertaken for the purposes of Centrelink benefits be eligible activities for a WDO.⁹⁹ On balance we support this recommendation.

96. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 58.

97. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 21.

98. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 58.

99. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 58.

Recommendation 9.6

Mutual obligation activities undertaken for the purposes of Centrelink benefits should be eligible activities for a work and development order.

Regulation of WDOs

- 9.72 The Attorney General's WDO Guidelines provide that the SDRO must have regard to the guidelines in the exercise of its functions relating to WDOs. A monitoring committee of government and non-government agencies, including the SDRO, oversaw the WDO pilot.¹⁰⁰ No concerns were raised in submissions and consultations to this inquiry about the regulation of the WDO scheme.
- 9.73 In the context of a pilot program, regulation in the form of guidelines was clearly appropriate. Guidelines are easily amended and adapted to the lessons learned as the program was put into operation and as the various stakeholders developed an understanding of its practical challenges. During this inquiry, we observed meetings of the WDO Monitoring Committee. It was apparent that the members of the committee had developed good relationships of understanding and trust and that these facilitated the successful development of the program and implementation of the guidelines. In other words, regulation using flexible guidelines in a context of ongoing monitoring by engaged stakeholders was effective. It seems likely to continue to be effective as WDOs are expanded in the future.
- 9.74 If our recommendation in relation to the establishment of a Penalty Notice Oversight Agency (PNOA) is accepted, and that body is given the role of monitoring, maintaining and improving the penalty notice system, careful attention should be given to the relationship between the PNOA and the WDO Monitoring Committee to ensure that the existing effective arrangements continue.

Write offs

- 9.75 The *Fines Act* provides that the SDRO has the power to write off part or all of a fine, either on application by the fine defaulter or at its own discretion, if satisfied that, due to financial, medical and/or personal circumstances, the fine cannot be paid and a CSO is not appropriate.¹⁰¹ In 2009-2010, 78,634 enforcement orders were written off, totalling \$37.8 million.¹⁰² However this figure includes both court-imposed fines and penalty notices, and includes all reasons for writing off a fine debt, including the 2558 enforcement orders to the value of \$1.13 million that were written off because the debtor was deceased.¹⁰³

100. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 39.

101. *Fines Act 1996* (NSW) s 101(1A).

102. NSW Office of State Revenue, *Annual Report 2009-10* (2010) 28.

103. NSW Office of State Revenue, *Annual Report 2009-10* (2010) 28.

9.76 Write offs were introduced as a fair and commercially sensible response to people who have no means of paying their penalty notice debt and may never have the means to do so. The second reading speech for the *Fines Act* pointed out that

financial efficiency requires that at some point in the enforcement cycle a decision is taken regarding the economic sense of continuing attempts to recover a fine or a penalty. In making that decision, a balance must be struck between the cost of enforcement, the capacity of the defaulter to pay the fine or undertake an alternative and the maintenance of the integrity of the fine enforcement system.¹⁰⁴

9.77 In order to achieve this balance, the *Fines Act* provides that to write off an unpaid fine the SDRO must be satisfied the financial, medical or personal circumstances of the fine defaulter mean that:

- not only do they not have sufficient means to pay the fine but also they are not likely to have the means to pay, and
- civil enforcement, such as garnisheeing wages or seizing property, has not been successful or is unlikely to be successful, and
- the person is not suitable for a CSO.¹⁰⁵

9.78 Further, the write off of an unpaid fine is conditional. The SDRO can recommence enforcement action at any time within five years of a write-off if the fine defaulter receives a further fine enforcement order, or the SDRO is satisfied that the fine defaulter now has the means to pay and enforcement action is likely to be successful.¹⁰⁶

9.79 These provisions of the *Fines Act* mean that, almost invariably, those who apply to have fines written off will suffer from multiple forms of disadvantage. The Bulk Debt Negotiation Project, a project aimed at writing off debts owed to commercial entities, also found that debtors have complex and multiple problems, including gambling, mental health problems, ill health, unemployment and homelessness. They may not make their debt problems a priority until they reach crisis point.¹⁰⁷ Consultations for this inquiry confirmed the same profile of people who apply to have penalty notice debt written off.

Guidelines for writing off penalty notice debt

9.80 Section 120 of the *Fines Act* provides for guidelines to be made with respect to a range of activities relating to penalty notices, including the exercise by the SDRO of its functions in writing off unpaid fines. Although s 120 provides that the Minister is to make guidelines under that section public, there is an exception for guidelines on writing off unpaid fines.¹⁰⁸ The reason behind this exception is presumably the

104. NSW, *Parliamentary Debates*, Legislative Council, 14 November 1996, 5978 (J Shaw).

105. *Fines Act 1996* (NSW) s 101(1A).

106. *Fines Act 1996* (NSW) s 101(4).

107. West Heidelberg Community Legal Service, *The Bulk Debt Negotiation Project: Client Profiles and Project Outcomes* (2011) 24.

108. *Fines Act 1996* (NSW) s 120(2).

concern that such guidelines might encourage people who are not deserving of special consideration to make applications for their fines to be written off, with consequent cost to the SDRO (and ultimately to the people ns of NSW.)

- 9.81 Although there are no publicly available guidelines, some information is available to assist those who wish to make write off applications. An SDRO document explains how to postpone or write off an unpaid fine.¹⁰⁹ It sets out the provisions of s 101 dealing with when a person can apply, explains how to apply, what documentary proof should be submitted, and what will happen when an application is made. It explains that the person will need to show that he or she has

constant problems with money, a serious problem with your health or home life. These problems must be so severe that you cannot pay your enforcement order either now or in the future.¹¹⁰

- 9.82 This document also asks applicants to send information that shows their current circumstances; that they do not have any possessions that could be sold to pay the enforcement order; and that they are not able to do community service work. It requests a letter to be written to the director of the SDRO containing the applicant's personal details, enforcement numbers, grounds for the application and current financial situation (including a statement of financial circumstances).¹¹¹

Submissions and consultations

- 9.83 The lack of guidance and information provided by the SDRO about write offs can create problems for applicants and their representatives. The Sentencing Council has noted that the absence of public guidelines is one of several factors that 'result in ongoing disadvantage particularly impacting on marginalised communities'.¹¹²
- 9.84 Community organisations reported that they have found it difficult to decide whether it is worth their while applying for a write off. Several submissions called for greater provision of information regarding the write off application process.¹¹³ Legal Aid submitted that because the guidelines are not available to the public it is difficult for people to know how write off applications are determined. Further, as no reasons are provided for the refusal of a write off application, it is 'very difficult for write-off applicants to know what information will be relevant to include in an application'.¹¹⁴
- 9.85 Redfern Legal Centre (RLC) argued that the present lack of available guidelines leads to uncertainty and said more information regarding the entitlement to seek to have a penalty or fine withdrawn or written off should be available at the point at

109. NSW Office of State Revenue, State Debt Recovery Office, *How to Postpone or Write-off an Enforced Fine* <http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_002.pdf>.

110. NSW Office of State Revenue, State Debt Recovery Office, *How to Postpone or Write-off an Enforced Fine* <http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_002.pdf>.

111. NSW Office of State Revenue, State Debt Recovery Office, *How to Postpone or Write-off an Enforced Fine* <http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_002.pdf>.

112. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) 126.

113. Legal Aid NSW, *Submission PN11*, 17; Redfern Legal Centre, *Submission PN26*, 13; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 25-6; NSW Department of Community Services, *Submission PN36*, 11.

114. Legal Aid NSW, *Submission PN11*, 17.

which the penalty is issued. They also proposed that the Minister should make the write-off guidelines publicly available, saying that this would ‘drastically increase the ability of Community Legal Centres and other advisors to provide accurate advice to clients regarding their prospects’.¹¹⁵

- 9.86 The HPLS suggested that the present legislative exception applying to the publishing of write off guidelines¹¹⁶ should be removed. It recommended that these guidelines be made available in plain English and community languages; printed as leaflets; and made available on the SDRO website.¹¹⁷ The rationale was that this would improve the write off application process both by providing advocates with the necessary information to prepare an application and providing greater transparency in the process.¹¹⁸ The case study below illustrates the problems identified by lawyers acting for vulnerable people.

Case study

Kylie is 24 years old and has \$25,446 outstanding in enforcement orders. The vast majority of these enforcement orders relate to railway offences (not having a valid train ticket) that were incurred during a period when Kylie was a young person and homeless. Kylie also has significant drug and alcohol issues that have led to numerous medical conditions and is also suffering from depression. She is currently being treated for this depression and has been assessed as suitable to receive the Disability Support Pension. She remains vulnerable to homelessness and has recently been released from gaol. Supporting documents from Kylie’s treating psychologist and a youth health service were provided in support of an application for the write off of Kylie’s fines. Despite meeting the requirements under section 101 for a write off, the SDRO refused the application. The letter sent by the SDRO stated that it had ‘reviewed the information supplied and unfortunately was unable to recommend the write-off of your fines’. An SDRO officer indicated during a subsequent phone conversation that the fact that Kylie had incurred fines recently suggested to the SDRO that she was more likely to reoffend.¹¹⁹

Commission’s conclusions

- 9.87 We recommend that guidelines relating to writing off fines should be developed, made public and be easily accessible. Publicly available guidelines will assist potential applicants and their legal and community representatives in determining when it is appropriate to apply for penalty notice debts to be written off. Guidelines may also assist vulnerable people to have debts written off in appropriate cases, thus reducing the impact of enforcement measures. Write off guidelines, together with guidelines on time to pay and WDOs, should assist applicants to decide which is the appropriate mitigation measure in their particular case.

115. Redfern Legal Centre, *Submission PN26*, 13.

116. *Fines Act 1996* (NSW) s 120(2).

117. Homeless Persons’ Legal Service, *Submission PN28*, 25-26.

118. Legal Aid NSW, *Submission PN11*, 17; Redfern Legal Centre, *Submission PN26*, 13.

119. Legal Aid NSW, *Submission PN11*, 17-18.

- 9.88 Public guidelines may increase the number of undeserving applications by people who have the means to pay but who wish to exploit the system. This is presumably the concern that lies behind the exception in s 20 of the *Fines Act*. However, it is suggested that the concern about unmeritorious applications is best met by providing appropriate and clear guidelines, especially concerning the grounds for applying and the evidence required to establish those grounds. This approach is preferable to not releasing relevant information to those who may have a viable case for write off, and who may suffer significant hardship if they are deterred from applying.

Recommendation 9.7

- (1) The exemption in section 120(2) of the *Fines Act 1996* (NSW), which provides that the Minister is not required to make public the guidelines on writing off unpaid fines, should be reversed to contain a requirement that these guidelines be made public.
- (2) The proposed Penalty Notice Oversight Agency should, in consultation with the State Debt Recovery Office and key stakeholders, develop write-off guidelines.
- (3) The write-off guidelines should be publicly available, including on the State Debt Recovery Office website.
- (4) The proposed Penalty Notice Oversight Agency should monitor the operation of the write-off guidelines.
- (5) The State Debt Recovery Office should report periodically on the operation of the write off guidelines as required by the proposed Penalty Notice Oversight Agency.
- (6) The proposed Penalty Notice Oversight Agency should report publicly on the operation of the write off guidelines.

The 'good behaviour' period

- 9.89 Section 101(4) of the *Fines Act* allows the SDRO to reinstate and enforce any part of an unpaid fine that has been written off at any time within five years of the write off if a further fine enforcement order is made against the fine defaulter, or if the SDRO is satisfied that the fine defaulter has sufficient means to pay the fine.¹²⁰
- 9.90 As noted above, people who apply for penalty notice debts to be written off are likely to have complex needs. Stakeholders considered that the likelihood of reoffending was high for this group. The Sentencing Council expressed concerns about this 'good behaviour period' in its 2006 report, noting that

due to the complex issues regarding offending, particularly for people with an intellectual disability or experiencing any other form of disadvantage, it is very likely that further fines and penalties would be incurred with the risk of the original debt being reactivated.¹²¹

120. *Fines Act 1996* (NSW) s 101(4).

121. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.78].

9.91 Organisations that support and assist people with penalty notices may be deterred from making write off applications because they fear they may expend a great deal of time and effort on making a successful application, only for a subsequent minor offence to reinstate the entire debt.¹²² The SDRO told the Commission in consultation that, in practice, it does not usually reinstate penalty notice debts and would, in any event, take into account the nature and circumstances of the reoffending, as well as the circumstances of the applicant.¹²³ However, in the absence of guidelines about write off applications it is not possible for individuals, or the agencies that assist and represent them, to be certain that this is the case.

Options for change

9.92 Options suggested in consultations to resolve this problem were to:

- i) reduce the good behaviour period, for example, to two years
- ii) create incentives within a good behaviour period, such as reduction of the period after a defined offence-free period, or
- iii) remove the good behaviour period entirely.

It would also be possible to allow the SDRO to have a number of options available so that write off could be tailored to the individual case.

9.93 There was strong support for the first option of reducing the good behaviour period. In CP 10, we asked whether a shorter good behaviour period should apply to children and young people following a write off.¹²⁴ Stakeholders pointed out that the current five-year period contrasts with the two-year maximum good behaviour bond that can be imposed by the Children's Court under the *Children (Criminal Proceedings) Act 1987 (NSW)*.¹²⁵ Frequently, the Children's Court imposes a six-month good behaviour bond for minor offences.¹²⁶ Children often receive supervision and support from Juvenile Justice during this time to assist them in complying with this bond. Many submissions called for the good behaviour period to be abolished¹²⁷ or reduced to six months¹²⁸ for children and young people. The five-year period was seen as counterproductive,¹²⁹ unrealistic,¹³⁰ onerous,¹³¹ and setting young people up to fail.¹³²

122. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

123. NSW Office of State Revenue, State Debt Recovery Office *Consultation PN 28*, Sydney, 27 April 2011.

124. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010), Question 6.12.

125. *Children (Criminal Proceedings) Act 1987 (NSW)* s 33(b).

126. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 5; NSW Department of Community Services, *Submission PN36*, 9.

127. Legal Aid NSW, *Submission PN11*, 21; Youth Justice Coalition, *Submission PN34*, 25; Illawarra Legal Centre, *Submission PN27*, 18.

128. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 5; NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission*, PN19, 4; Illawarra Legal Centre, *Submission*, PN27, 18; The Law Society of NSW, *Submission*, PN31, 11; The Shopfront Youth Legal Centre, *Submission*, PN33, 18.

129. Holroyd City Council, *Submission*, PN10, 18.

- 9.94 Submissions also raised substantial concerns about the five-year probationary period for adults.¹³³ Legal Aid submitted that it is ‘futile and punitive to impose a five-year good behaviour period’ where a person has already demonstrated an inability to pay the penalty,¹³⁴ while Community Services noted that the current period is ‘overly burdensome on vulnerable people’.¹³⁵ We note in this context that the maximum period for a good behaviour bond under s 10 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* is two years, and a good behaviour bond following conviction under s 9 of the same Act is limited to five years.
- 9.95 The second option of a reduced period with incentives built in was suggested during consultations.¹³⁶ It was proposed that young people should have a good behaviour period of two years, but if a young person did not receive any fines for six months, that good behaviour period could be shortened to one year. This would provide defaulters, especially young offenders, with a more realistic time-frame and an incentive to avoid offending. Such a short-term goal may be easier to work towards, especially for young offenders.
- 9.96 Some stakeholders were in favour of the third option – removing the good behaviour period altogether – because of the multiple vulnerabilities of the clients who applied for penalty notice debts to be written off. Legal Aid advocated write off procedures constituting a complete, unconditional waiver of the penalty notice debt.¹³⁷ The RLC expressed concerns about reactivation of debt being a disincentive to clients to ‘get their life back on track’ after a successful write off: they fear that if they get a job their fine debt will be reinstated.¹³⁸ In consultations, concerns were raised that a person may achieve a write off of their debts but forget to vote, or commit a minor offence, only to have their whole debt reinstated. Shopfront also argued that write off should be unconditional, especially for those with a mental illness or an intellectual disability.¹³⁹
- 9.97 A disadvantage of this third option is that it may remove the deterrent effect of a good behaviour period. However, doubts were raised in consultations about the effectiveness of deterrence for some applicants, such as those suffering from mental illness or a cognitive impairment. Another relevant consideration is that, while penalty notices are issued for minor offences, the enforcement provisions of the *Fines Act* apply not only to penalty notices but also to court-imposed fines,

130. The Law Society of NSW, *Submission*, PN31, 11; The Shopfront Youth Legal Centre, *Submission*, PN33, 18;

131. The Shopfront Youth Legal Centre, *Submission*, PN33, 18; NSW Department of Community Services, *Submission*, PN36, 9.

132. The Shopfront Youth Legal Centre, *Submission*, PN33, 18; Youth Justice Coalition, *Submission*, PN34, 24.

133. Legal Aid NSW, *Submission* PN11, 17, 26; Redfern Legal Centre, *Submission* PN26, 6; The Shopfront Youth Legal Centre, *Submission* PN33, 12, 22; NSW Department of Community Services, *Submission* PN36, 11.

134. Legal Aid NSW, *Submission* PN11, 17.

135. NSW Department of Community Services, *Submission* PN36, 11.

136. Kempsey Roundtable Meeting, *Consultation* PN14, West Kempsey NSW, 16 February 2011.

137. Legal Aid NSW, *Submission* PN11, 27.

138. Redfern Legal Centre, *Submission* PN26, 13.

139. Shopfront Youth Legal Centre, *Submission* PN33, 22.

including fines for more serious offences dealt with on indictment.¹⁴⁰ The recidivism which the good behaviour period seeks to reduce thus extends to more strictly criminal behaviour. Balanced against this is that debt itself may increase the likelihood of recidivism. For instance, in 2003, Baldry *et al* found that people leaving custody with a debt were more likely to return to prison (50%) than those who had no debt (30%).¹⁴¹ Similarly, the Prison and Debt Project reported that, of the prisoners who had been interviewed for the study, 49% had committed a crime to repay a debt.¹⁴²

Commission's conclusions

- 9.98 The option of removing the good behaviour period for all cases appears to us to be undesirable, especially for those cases where a good behaviour period may have a deterrent effect, or for court-imposed fines where the nature of the offending is more serious. However, a good behaviour period of five years is disproportionate to similar good behaviour periods imposed by courts. We recommend that the maximum good behaviour period for adults be two years, and six months for children and young people. We recommend that, where the grounds for writing off a penalty notice debt in s 101(1A) are made out, there should be a presumption that the debt is written off unconditionally. However, in exceptional cases it should be possible for the SDRO to impose a good behaviour period where this is justified by the seriousness of the offending and the likely deterrent effect.

Recommendation 9.8

Section 101(4) of the *Fines Act* 1996 (NSW) should be amended to provide:

- (a) a presumption that a debt, once written off, cannot be reinstated
- (b) a discretion to impose a good behaviour period only in cases where it is justified by the seriousness of the offending and its likely deterrent effect
- (c) that the maximum good behaviour period should be two years for adults and six months for children and young people under the age of 18 years.

What relationship should write offs bear to other fine mitigation measures?

- 9.99 A significant issue raised in the course of this inquiry concerns the relationship between write off applications and other fine mitigation options, especially time to pay and WDOs. That issue was that poor and otherwise vulnerable people may be committed to lengthy, onerous and unjust time-to-pay and WDO arrangements. It was suggested that a more appropriate and fair response to their situation would be

140. *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 15.

141. E Baldry et al, *Ex-Prisoners and Accommodation: What Bearing Do Different Forms of Housing Have on Social Reintegration?* Australian Housing and Urban Research Institute (2003) 14.

142. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October-1 November 2000) 3.

to place a cap on time-to-pay arrangements and WDOs, and to write off the remainder of their fines on successful completion.

Time-to-pay and write off applications

- 9.100 Some people with significant penalty notice debts and low incomes enter into time-to-pay arrangements extending over many years. We were told of people with time-to-pay arrangements for penalty notice debts which would require them to make payments for 30, 40 or, in one case, 120 years.
- 9.101 To provide a benchmark, a \$400 penalty may take a single person with no children, receiving the Newstart Allowance, 40 weeks to pay if he or she makes a Centrepay payment of \$20 per fortnight out of the allowance of \$486.80 per fortnight.¹⁴³ Despite the low weekly rate and the long repayment period, such repayments can reduce the capacity of people on very low incomes to absorb unexpected expenses,¹⁴⁴ such as doctors' bills, car repairs, or the replacement of whitegoods, especially if their low income levels persist for a long period of time. American researchers Katherine Beckett and Alexes Harris argue that legal debt can reproduce poverty and compel people to choose between competing necessities, such as food, health care and rent.¹⁴⁵
- 9.102 The AGJ evaluation found high levels of stress among some of the people signed up to time-to-pay arrangements:
- It was \$20 off the shopping list each time. So I ate like shit, because I had to have proper food for the kids. But I'd prefer to do that than have the Sheriff at my door and the kids asking 'mum, who's that man, why is he taking our stuff?'.¹⁴⁶
- I don't know what I'm going to be doing when I'm 20, let alone in 2027. Looking at that bit of paper I thought: 'The only thing I really know about my future is that I'm still going to be paying back the government \$10 a fortnight when I'm 100.' 2027 looks like forever.¹⁴⁷
- 9.103 Time to pay over extended periods of time may also reduce compliance with repayment schedules. The Centre for Economic Policy Research has argued that paying off debts over a long period of time can have a negative impact upon compliance and make it less likely that payments are made,¹⁴⁸ and this was also

143. Commonwealth Department of Human Services, Centrelink, *Newstart Allowance – Payment Rates* <http://www.centrelink.gov.au/internet/internet.nsf/payments/newstart_rates.htm>.

144. Homeless, Persons' Advocacy Centre, Public Interest Advocacy Centre, *Not Such a Fine Thing!* (2006) 11.

145. K Beckett and A Harris, 'On Cash and Conviction: Monetary Sanctions as Misguided Policy' (2011) 10(3) *Criminology and Public Policy* 509, 517.

146. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 142.

147. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 144.

148. Centre for Economic Policy Research, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines*, Discussion Paper No 461 (2003) 6-7, citing G Cole, 'Monetary Sanctions: The Problem of Compliance' in J Byrne et al (ed), *Smart Sentencing: The Emergence of Intermediate Sanctions* (Sage, 1992) 145.

asserted in our consultations.¹⁴⁹ Organisations acting for vulnerable people often represent clients with extensive penalty notice debts. Representatives of these organisations expressed concerns that sustaining repayments over a long period of time may present particular difficulties for their clients. In a regional consultation we were told that some people, especially Aboriginal people, could not afford to make payments consistently over two years without this causing economic hardship.¹⁵⁰ At one roundtable meeting we were told of a client who had signed up to a time-to-pay arrangement of \$10 per fortnight, which would satisfy his debt in 120 years.¹⁵¹ One participant at a roundtable meeting commented that time-to-pay can feel like a never-ending battle, and that this may have a substantial impact on mental health and self-esteem.¹⁵²

- 9.104 The RLC provided the following case study of a client enrolled in a time-to-pay arrangement for 49 years.

Case study

Greg is a recovering alcoholic who has served a gaol sentence relating to drug use. He has ongoing treatment in connection to mental health issues. He lives in a boarding house, is on Newstart Allowance. He has approximately \$32,000 of accumulated enforcement orders, dating back to the late 1990s.

Greg contacted RLC because he found out his driver licence had been suspended. He was aware of the total value of his fines, but knew that he had no capacity to repay them.

He decided to take action in order to have his licence reinstated. Accordingly, we advised Greg that although he may be eligible for a write-off of his debt, the fastest way to have his licence reinstated was to enter into an instalment arrangement with the SDRO.

Greg contacted the SDRO, who accepted a payment arrangement of \$25 per fortnight for the next 49 years. Greg was 30 years old at the time he began to make repayments. His licence was reinstated two months later and RLC has not had contact with him since that time.¹⁵³

- 9.105 The suggestion made in consultations and submissions was that time-to-pay periods should be capped to mitigate this type of hardship and, once the cap is reached, the person should have their remaining debt written off. For example, it might be required that payments be made regularly for a prescribed period of time, such as two years, followed by automatic write off.
- 9.106 One difficulty with this idea of a time-to-pay cap, especially if the cap were at the suggested two years, is that it could provide an incentive for some people to pay at the lowest possible level each week, whether this level is appropriate to their income or not. To avoid this effect, repayments would need to be set at an

149. Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

150. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

151. Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

152. Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

153. Redfern Legal Centre, *Submission PN26*, 16.

appropriate level, taking into account the financial circumstances of the payer, regardless of the cap. The burden would fall on the SDRO to require appropriate payment levels, in accordance with time-to-pay guidelines, taking into account evidence as to a person's financial capacity.

- 9.107 Another difficulty is the low total level of repayments that may be secured if a cap is introduced. As indicated above, a time-to-pay arrangement at the level of, say, \$10 per week may represent a significant effort for a person on a Centrelink benefit. However it would only repay \$1040 over two years. Committing people on Centrelink benefits to repay penalty notice debts over 49 years, as in the case study provided above, is unreasonably onerous. Nevertheless, it may be argued that a cap at two years is also not an appropriate response, taking into account that penalties are imposed for offending behaviour.

WDOs and write off applications

- 9.108 Similar concerns were raised in relation to WDOs. WDOs are currently 'capped' at 300 hours for adults and 100 hours for children. These limits are consistent with the current limits for CSOs, and the Attorney General's WDO Guidelines presently provide:

If satisfying the fine debt would require hours of work or activities in excess of these caps, an alternative arrangement may be approved. For instance, a partial write-off or a time to pay may be applied for in conjunction with, or at the conclusion of, the WDO.¹⁵⁴

However, the AGJ evaluation has proposed removing the WDO cap on the grounds that WDOs are voluntary; that some clients had indicated that they wished to undertake WDOs in excess of the cap; and that removing the cap would allow clients maximum flexibility.¹⁵⁵

- 9.109 Removing the WDO cap is likely to have a positive effect for some people: for example a person who has made a commitment to a long-term vocational course may wish both to continue to pursue that course over a longer period of time and pay off his or her debt. However we are concerned that, in the absence of any cap at all, WDOs could become onerous for people with high debt levels. The RLC submitted:

The magnitude of many fine debts is such that CSOs and WDOs would take years to mitigate any significant amount of the debt. It is not appropriate for the SDRO to deny a write-off and take the position that a decade is a suitable amount of time for a person to work off a fine debt. To do so exacerbates, not mitigates, the effect of the fine debt on the life and future prospects of the person... mitigation mechanisms should not be mutually exclusive with withdrawals and write-offs. A hybrid strategy of CSOs/WDOs and write-offs could do much to create the appearance of fairness, from the perspective of the penalised person.¹⁵⁶

154. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [6.5].

155. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 68.

156. Redfern Legal Centre, *Submission PN26*, 6.

- 9.110 It is important to note that a cap on WDO hours would not prevent people from engaging in beneficial activities they wish to pursue. After a WDO is over, it is a matter between a participant and a supporting organisation whether or not they continue working together. A cap would, however, prevent those activities counting towards a penalty notice debt. As WDOs are rolled out more widely, a question arises as to whether some organisations may be deterred from participating in WDOs or taking on clients with high debt levels if they are thereby committed to long-term supervision of a WDO.
- 9.111 A better option may be to reinstate the cap on WDOs but to make it a 'soft' cap. A soft cap would allow some clients to exceed the cap in exceptional circumstances and, after particular scrutiny of the application, to ensure that the obligations imposed are not onerous and that a write off application is not a more appropriate response. What constitutes exceptional circumstances could be elaborated upon by the WDO guidelines.

Commission's conclusions

- 9.112 A number of mitigation options are now available in relation to penalty notice debt and it is desirable for those making and assessing applications, whether for time to pay, WDOs or write offs, to consider the relationship between them. Fine mitigation options such as time to pay and WDOs should not impose an onerous and unreasonable burden on those who are vulnerable.
- 9.113 When deciding the appropriate point to write off a penalty notice debt, there is a balance to be struck between supporting the integrity of the penalty notice system and the cost (to individuals and the state) of pursuing debt. This balance is a particularly difficult one to strike for debtors who are vulnerable for reasons such as long-term poverty and mental health problems. Penalty notices are imposed for offending behaviour and this factor makes the calculation of the appropriate balance different for penalty notices than it is for civil debt. Also relevant to deciding the appropriate balance is that penalty notices are imposed, for the most part, for minor offences. Court-imposed fines, on the other hand, may relate to more serious matters.
- 9.114 We acknowledge the force of the concerns expressed by stakeholders that lengthy time-to-pay arrangements may impose unreasonable burdens on vulnerable people and that it is also possible, although less likely, that WDOs could be extended in a way that becomes onerous. Combining time to pay and WDOs with writing off penalty notice debt is an option that should be employed in appropriate cases to avoid unjust and unduly burdensome impacts on vulnerable people.
- 9.115 However, we are not persuaded that it is appropriate to provide for automatic write-off after reaching a cap of a defined number of years for time to pay or a defined number of hours for WDOs. Such an approach does not appear to provide an appropriate balance between concerns of fairness to the applicant and the need to preserve the integrity of the penalty notice system.
- 9.116 A preferable approach, which we recommend, is to prescribe a period of two years for time-to-pay arrangements, and a period of 300 hours for adults and 100 hours for children for WDOs. This period would be followed by automatic entitlement to

make an application for write-off. Guidelines should govern such applications and should provide that successful completion of the WDO or time-to-pay arrangement counts strongly as a relevant factor, although not the only factor, in making a decision about write off. Other relevant factors should include the likely future capacity of the applicant to pay the debt; any disability, mental illness or cognitive impairment; homelessness; and whether the applicant has incurred any further penalties during the time-to-pay arrangement or WDO.

9.117 The recommended guidelines on time to pay and write off, and the guidelines on WDOs, should deal with the interrelationship between these mitigation options.

9.118 In summary, therefore, we recommend:

Recommendation 9.9

- (1) The cap on hours in the Attorney General's Work and Development Order Guidelines should be retained.
- (2) The Attorney General's Work and Development Order Guidelines should prescribe that the cap may be exceeded where:
 - (a) the person wishes to exceed the cap
 - (b) the approved organisation or practitioner agrees, and
 - (c) such an arrangement does not impose unduly onerous obligations on the participant.
- (3) There should be a two-year cap on time-to-pay arrangements.
- (4) At the end of the capped period for time to pay and work and development orders, the State Debt Recovery Office should automatically consider, without requiring any application, whether any debt should be written off.
- (5) The write off guidelines should prescribe the grounds on which the State Debt Recovery Office should write off debts at the end of the capped period for time to pay or work and development orders.
- (6) The write off guidelines should provide that successful completion of the capped period for a work and development order or time-to-pay arrangement should be relevant and given particular weight in considering whether it is appropriate to write off a penalty notice debt. Other relevant considerations should include:
 - (a) the person's likely future capacity to pay the debt
 - (b) any disability, mental illness or cognitive impairment
 - (c) homelessness, and
 - (d) any further penalty notices incurred.

Hardship Review Board

9.119 The Hardship Review Board was established to review a limited number of SDRO decisions, including:

- work and development orders

- time-to-pay arrangements, and
- applications to write off, in whole or in part, a fine or penalty notice.¹⁵⁷

The SDRO may suspend, or be required to suspend, enforcement action while the HRB is reviewing a matter.¹⁵⁸

- 9.120 The Board consists of the Chief Commissioner of State Revenue, the Secretary of the Treasury, and the Director General of the Attorney General's Department.¹⁵⁹ It deals with only a small number of cases each year: in 2009-2010, it reviewed 27 SDRO decisions, including seven time-to-pay and 12 write off decisions.¹⁶⁰
- 9.121 The purpose of the HRB is to provide administrative review of SDRO decisions. The second reading speech for the *Fines Amendment Bill 2004* (NSW) envisaged that the Board would have a wide discretion to review SDRO decisions.¹⁶¹ Relevant to these decisions would be the applicant's capacity to pay, the likelihood of successful enforcement using civil sanctions, and his or her suitability for a CSO. The second reading speech also suggested that factors such as 'serious economic and social hardship experienced by Aboriginal people or people in remote communities', and whether the applicant had physical or intellectual disabilities, should be considered.¹⁶²
- 9.122 In CP 10 we noted that the HRB handles very few cases and that it is not well known or understood by stakeholders. The Law Society submitted that the HRB process is 'extremely onerous',¹⁶³ while Community Services similarly noted that the HRB process is such that it is unlikely to be used by vulnerable persons without legal or other advocacy support.¹⁶⁴
- 9.123 Little information is available concerning the basis on which an application can be made to the HRB; the evidence required to support an application; or the grounds on which the HRB might take any of the actions described above. Guidelines concerning the basis on which the HRB will exercise its powers presumably exist to assist the Board in its decisions but they are not publicly available.
- 9.124 Some information is available about the activities of the Board on its website but this information is limited. Answers to frequently asked questions are provided¹⁶⁵ but these relate to procedural matters. The application form for review provides some guidance concerning grounds for application and required evidence, in that it names

157. *Fines Act 1996* (NSW) s 101B. Applications to write off a fine or penalty notice in part were permitted by amendments introduced by the *Fines Further Amendment Act 2008* (NSW).

158. *Fines Act 1996* (NSW) s 101B(4), (5).

159. *Fines Act 1996* (NSW) s 101A. A member of the Hardship Review Board may appoint a person to act in the place of the member at meetings of the Board.

160. NSW Office of State Revenue, *Annual Report 2009-10* (2010) 28.

161. NSW, *Parliamentary Debates*, Legislative Assembly, 2 June 2004, 9463 (G West, on behalf of B Debus).

162. NSW, *Parliamentary Debates*, Legislative Assembly, 2 June 2004, 9463 (G West, on behalf of B Debus).

163. The Law Society of NSW, *Submission PN31*, 8.

164. NSW Department of Community Services, *Submission PN36*, 11.

165. Hardship Review Board, *Fines* <http://www.hrb.osr.nsw.gov.au/frequent_questions/fines.html>.

three categories of issues that may be relevant: financial, medical and personal circumstances.¹⁶⁶ The application form explains that the applicant must show that these circumstances prevent them from paying their debt ‘now and in the near future’, and also explains what types of documentary evidence of these circumstances is relevant.

- 9.125 As noted above, the HRB reviews decisions of the SDRO about WDOs, time-to-pay and write off applications. Guidelines about WDOs already exist and, if the recommendations of this inquiry are accepted, guidelines will also be made public concerning time-to-pay and write off applications. These guidelines will assist applicants to the HRB to make informed decisions about whether an application should be made and on what basis it should be made. Nevertheless, beyond these guidelines, applicants need information about the basis on which a decision of the SDRO might be challenged, and the information that will be required to make out a case.

Commission’s conclusions

- 9.126 The penalty notice system is intended to provide a simple and inexpensive way to deal with minor offending. It is obviously not desirable to create a complex and expensive system of appeals in this context. In seeking to improve the penalty notice system it is important to guard against the temptation to create a parallel system of complexity and cost equal to the court system. Nevertheless, when an appeal mechanism such as the HRB has been created, users are entitled to information about the basis on which it will make decisions. Applicants and their advisers need information that will allow them to make informed decisions about whether or not an application should be made.
- 9.127 Some of the concerns of applicants and their advisers will be met by the development of guidelines on time-to-pay and write off applications. Nevertheless, we recommend that guidelines for the HRB should be developed and made public. Consistently with the recommendations above concerning comparable guidelines, these guidelines should be developed in consultation with relevant stakeholders, should be publicly available on the website of the HRB, and should be monitored by the proposed PNOA.

Recommendation 9.10

- (1) The Hardship Review Board should review and update its procedures to provide:
- (a) information about the basis on which its decision will be made, including the guidelines that will be applied
 - (b) information about how to make an application, including the documentation that is needed to support an application
 - (c) clear and simple application forms.

166. Hardship Review Board, *Publications*
<<http://www.hrb.osr.nsw.gov.au/lib/docs/forms/hrb001.pdf>>.

- (2) Information about the Hardship Review Board's procedures should be publicly available, including on its website and the State Debt Recovery Office website .
- (3) The State Debt Recovery Office, in reporting periodically as required by the proposed Penalty Notice Oversight Agency, should include information about the operation of the Hardship Review Board.
- (4) The proposed Penalty Notice Oversight Agency should, in monitoring and reporting on the operation of the penalty notice system, take into consideration the operation of the Hardship Review Board.

10. Criminal Infringement Notices

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Introduction

- 10.1 This chapter deals with Criminal Infringement Notices (CINs). These are penalty notices issued by police, rather than a regulatory agency, for minor criminal offences that were previously dealt with by courts. They represent an extension of the penalty notice system, away from regulatory offences and into policing of minor criminal activities.
- 10.2 The NSW Ombudsman, who reviewed CINs in 2005 and 2009, described the purpose of CINs as follows:
- The primary rationale of the *Penalty Notice Offences Act* was to provide police officers with a speedy alternative to arrest when dealing with relatively minor criminal matters. This would in turn reduce the administrative time taken, as alleged offenders would not be returned to police stations and charged, and police officers would usually not need to prepare for and appear at court. In addition to cutting red tape for police, it was thought the scheme would save the court system the costs of having to deal with these minor offences.¹
- 10.3 The CINs provisions are contained in the *Criminal Procedure Act 1986 (NSW) (CPA)*. The legislation was trialled before full implementation. In 2002 this Act was

1. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) i.

amended² to authorise police officers in 12 local area commands to issue CINs for certain prescribed offences³ for a 12-month trial period. Following the Ombudsman's positive assessment of the trial, the CIN scheme was extended to apply statewide from 1 November 2007.

- 10.4 The term CIN is in general use and we adopt the term in this report. However, CINs are referred to as penalty notices in the *CPA* and are listed as penalty notices for the purposes of the *Fines Act 1996* (NSW) (*Fines Act*).⁴ An important difference between CINs and penalty notices is that CINs may only be issued to people over the age of 18.⁵

Offences

- 10.5 The offences for which a CIN may be issued and the penalty amounts are:
- larceny or shoplifting, where the property or amount does not exceed \$300 (\$300)
 - goods in custody (\$350)
 - offensive conduct (\$200)
 - offensive language (\$150)
 - obstructing traffic (\$200)
 - unauthorised entry of vehicle or boat (\$250), and
 - continuation of intoxicated and disorderly behaviour following move-on direction (\$200).⁶
- 10.6 This list originally included the offences of obtaining money by wilful false representation and common assault.⁷ Wilful false representation was removed from the regulations when it ceased to be an offence under the original legislation.⁸ Common assault was removed after the Ombudsman reported that the perceived seriousness of this offence could be downgraded by issuing a penalty notice when that same offence would, in other circumstances 'warrant punishment by a significantly larger fine and/or a term of imprisonment had the matter been prosecuted in a criminal court'.⁹

2. *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (NSW) sch 1.

3. *Criminal Procedure Act 1986* (NSW) s 333.

4. *Fines Act 1996* (NSW) s 20, sch 1.

5. See *Criminal Procedure Act 1986* (NSW) s 335.

6. *Criminal Procedure Regulation 2010* (NSW) sch 3.

7. *Criminal Procedure Regulation 2000*, repealed by the *Police Powers Legislation Amendment Act 2006* (NSW) sch 4.4[2].

8. This offence was removed from the *Criminal Procedure Regulation 2005* (NSW) sch 3 after it was repealed from the *Crimes Act 1900* (NSW) by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW).

9. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 77.

- 10.7 The offence of ‘continuation of intoxicated and disorderly behaviour following a move on direction’ was introduced in 2011 and provides that it is an offence to be intoxicated and disorderly in the same or another public place, at any time within six hours of being given a move on direction.¹⁰ This offence aims to give the NSW Police Force greater flexibility in addressing ‘alcohol-related violence and antisocial behaviour’.¹¹ The legislation provides that the Ombudsman must prepare a report on this offence as soon as practicable within 12 months of its implementation.¹²

Reviews

- 10.8 The legislation that implemented CINs contained a requirement that the Ombudsman monitor them and report after 12 months.¹³ One of the reasons was a concern about net-widening:

The ease with which penalty notices can be issued makes it open to criticism that notices will be used when a caution or warning without further action would have been more appropriate...the Ombudsman’s review will pay close attention to any net-widening effect of the legislation.¹⁴

- 10.9 In April 2005, the Ombudsman completed his review of the CIN trial.¹⁵ The report found that CINs were generally successful in providing the police with a further option in dealing with minor offences and in alleviating the workload of the Local Court.
- 10.10 The 2007 legislation extending the power of police to use CINs across the entire state included a requirement that the Ombudsman conduct a review of the operation of the CINs ‘in so far as those provisions impact on Aboriginal and Torres Strait Islander communities’.¹⁶ In August 2009, the Ombudsman completed the second report.¹⁷ The review examining the impact of CINs on Aboriginal communities arose at least partly out of concerns raised by the previous review about the number of Aboriginal people being issued with CINs, particularly for offensive conduct and offensive language.¹⁸
- 10.11 The 2009 report provides useful data about the use of CINs following their statewide implementation. It highlights a number of continuing concerns, including the potential net-widening effects¹⁹ of CINs and the disproportionate issue of CINs to Aboriginal people. It also confirmed that one of the most significant advantages of

10. *Summary Offences Act 1988* (NSW) s 9.

11. NSW, *Parliamentary Debates*, Legislative Council, 4 August 2011, 3588-3589 (M Gallacher).

12. *Summary Offences Act 1988* (NSW) s 36(1).

13. *Criminal Procedure Act 1986* (NSW) s 244.

14. NSW, *Parliamentary Debates*, Legislative Council, 18 June 2002, 3203 (M Costa).

15. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005). The review was required pursuant to s 344 of the *Criminal Procedure Act 1986* (NSW).

16. *Criminal Procedure Act 1986* (NSW) s 344A.

17. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009).

18. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009).

19. For a description of net-widening, see Chapter 10 [10.32-10.33].

CINs is a more efficient use of police and court resources. After the first six months of the CIN trial, police estimated savings of up to 267 minutes in processing each 'minor non-violent offence'.²⁰ The first nine months of the CIN trial resulted in 1079 cases being diverted from the Local Court with savings of an estimated 180 hours' hearing time.²¹ The Ombudsman estimated that the police and the Local Court saved \$647,015 for the 12 months of the CIN trial.²²

Guidelines

Should there be formal guidelines for determining whether a particular criminal offence is suitable to be dealt with by way of a CIN?

- 10.12 The list of offences for which a CIN may be issued has changed over time. In this report we have emphasised the importance of consistency and clarity in the penalty notice system and, in Chapter 3, we proposed guidelines to assist decisions about which offences are suitable to be penalty notice offences. It may also be desirable to provide guidelines as to which offences may be eligible for a CIN response. If guidelines are desirable, then a question arises whether the guidelines on penalty notice offences should also apply to CINs, or whether the nature of CINs is so different as to require a separate set of guidelines.
- 10.13 There is an argument that CIN offences have particular characteristics and consequently a separate set of guidelines is required to guide the creation of new CIN offences. This is because CINs:
- are issued for offences that are more criminal than regulatory
 - may only be issued by police,²³ and
 - may only be issued to adults over the age of 18 years.²⁴
- 10.14 In his 2005 report, the Ombudsman proposed a set of principles to assist in determining CIN offences because such principles 'would allow the reasoning for including or excluding a particular offence from the CIN scheme to be articulated, and to form the basis of an explanation that informs the community and the Police'.²⁵ These principles, which have not been implemented, set out the following requirements:
- the offence is relatively minor
-
20. The amount of time saved was calculated on the basis that each CIN took police 50 minutes to process compared to 317 minutes for every charge: NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 93.
21. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 95.
22. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 96.
23. *Criminal Procedure Act 1986* (NSW) s 333.
24. *Criminal Procedure Act 1986* (NSW) s 335.
25. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 118.

- there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN
 - other diversionary options are not available to police to effectively and appropriately deal with the conduct in question
 - a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence
 - specific and general deterrence can be adequately conveyed by police rather than by a court
 - the physical elements of the offence are relatively clear cut
 - the issuing of a CIN for the offence would generally be considered by the community to be a reasonable sanction, having due regard to the seriousness of the offence.²⁶
- 10.15 In Consultation Paper 10 (CP 10) we asked whether there should be formal principles for determining whether a particular criminal offence should be suitable to be dealt with by a CIN. We also asked what these principles should be and whether they should differ from the principles that apply to penalty notices generally.²⁷

Submissions and consultations

- 10.16 Formal principles were seen as beneficial by six submissions.²⁸ For instance, the NSW Trustee and Guardian submitted that a set of principles would ‘provide consistency and ensure that the scheme is only applied to relatively minor offences’.²⁹ Further, the Criminal Law Committee of the NSW Young Lawyers submitted that ‘the introduction of new criminal offences to the scheme is not a trivial matter. Transparent principles should be applied in making any such decision.’³⁰
- 10.17 There was support for application of the Ombudsman’s CIN specific principles.³¹ Legal Aid NSW (Legal Aid) and Shopfront Youth Legal Centre (Shopfront) pointed to the need for CIN-specific principles, such as the Ombudsman’s, in order to place the role of CINs in ‘the broader context of the criminal justice system’³² and in recognition that ‘criminal infringement notices are generally used for offences that

26. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 118.

27. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 8.1.

28. NSW Trustee and Guardian, *Submission PN14*, 11; Legal Aid NSW, *Submission PN11*, 29; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 4; The Shopfront Youth Legal Centre, *Submission PN33*, 23-24; NSW Industry and Investment, *Submission PN37*, 10, 11; Police Portfolio, *Submission PN44*, 3.

29. NSW Trustee and Guardian, *Submission PN14*, 11.

30. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 4.

31. NSW Trustee and Guardian, *Submission PN14*, 11; Legal Aid NSW, *Submission PN11*, 29; The Shopfront Youth Legal Centre, *Submission PN33*, 24; NSW Industry and Investment, *Submission PN37*, 10-11; NSW Industry and Investment, *Submission PN37*, 10-11.

32. Legal Aid NSW, *Submission PN11*, 29.

are more serious (and are more likely to be regarded by the community as “criminal” as opposed to regulatory)’.³³

- 10.18 The NSW Trustee and Guardian agreed with the Ombudsman’s approach, however it supported the identification of guiding principles via a multi-sectoral approach.³⁴ NSW Industry and Investment submitted that both the Ombudsman’s recommendations, and the principles that apply to penalty notices more generally, should also apply to CINs.³⁵ The Criminal Law Committee of the NSW Young Lawyers suggested that there was ‘no need for a separate set of principles as CIN considerations can be incorporated into any set of formal principles for penalty notices’.³⁶
- 10.19 The Police Portfolio submitted that it did not oppose the introduction of formal principles but noted that agreeing to a suitable set of principles would be difficult due to competing interests.³⁷

Which guidelines?

- 10.20 The response to our question about the need for guidelines for CINs was answered affirmatively but without a clear consensus about precisely which guidelines should apply. At the time CP 10 was issued, the guidelines proposed by the Ombudsman were the only model available for NSW. However, we have now developed a set of recommended guidelines for all government departments and agencies in NSW regulating which offences should be made penalty notice offences.³⁸ There was strong stakeholder support for these guidelines to support fairness and consistency in the penalty notice system. It is obviously desirable, in the interests of simplicity and consistency, for the same guidelines to apply to CINs if they are appropriate to the task.
- 10.21 As noted above, there are two provisions of the *CPA* that provide important context for the creation of new CIN offences. CINs may only be issued by police³⁹ to persons over the age of 18.⁴⁰ These provisions will continue to provide guidance for decisions about which offences are appropriate for CINs.
- 10.22 The remaining, and perhaps the most important, difference between CINs offences and penalty notice offences is that CINs are more obviously criminal than regulatory in nature. In deciding whether an offence is suitable to be a CINs offence, therefore, it is important to pay particular attention to the nature and seriousness of the offending behaviour to ensure that it is appropriate to be dealt with by way of a monetary penalty only, and in the absence of routine court scrutiny.

33. The Shopfront Youth Legal Centre, *Submission PN33*, 24.

34. NSW Trustee and Guardian, *Submission PN14*, 11-12.

35. NSW Industry and Investment, *Submission PN37*, 10-11.

36. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 4-5.

37. Police Portfolio, *Submission PN44*, 3.

38. See Chapter 3.

39. *Criminal Procedure Act 1986* (NSW) s 333.

40. *Criminal Procedure Act 1986* (NSW) s 335.

10.23 The guidelines proposed in Chapter 3 of this report appear to do this job well. They provide that penalty notices are suitable for minor offences and are not suitable for indictable offences. Where imprisonment is an available sentencing option, they provide that:

- a public interest in making an offence a penalty notice offence must be demonstrated
- special training must be provided for those issuing such penalty notices
- there must be guidelines for issuing officers, and
- these offences should be monitored by the proposed Penalty Notice Oversight Agency (PNOA).⁴¹

The guidelines also provide that offences involving violence are not suitable to be penalty notice offences. Particular protections are put in place for offences involving a mental element, defence or proviso, and for offences that require a judgment about community standards. There are also provisions for the monitoring of offences that raise particular concerns by the proposed PNOA.

10.24 These guidelines appear to be suitable not only for penalty notices but also for CIN offences. We therefore recommend that the guidelines in Chapter 3 apply to the creation of CINs. Similarly, the proposed guidelines on penalty notice amounts will provide useful guidance in relation to penalty amounts for CINs.

Recommendation 10.1

The proposed guidelines on penalty notice offences and penalty notice amounts should govern Criminal Infringement Notice offences.

Net-widening

The net-widening effect of CINs

10.25 As we noted in Chapter 1, previous reports have referred to the potential net-widening effect of penalty notices.⁴² For instance, the Sentencing Council reported in 2006 that penalty notices ‘may have a net widening effect’, as they ‘may be issued for conduct that could be more appropriately dealt with by a warning or caution and which was previously dealt with on that basis’.⁴³ The Sentencing Council remarked in particular on the ‘large proportion of offenders dealt with by

41. Police will find it easier than other issuing agencies to satisfy the provisions in the guidelines in relation to appropriate training of officers.

42. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [12.10]; NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.31]; R Fox, *Criminal Justice On the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) [11.5]; NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010); NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 76.

43. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.31].

way of notices for offensive language or behaviour which would not stand up in court',⁴⁴ and found that:

The greatest incidence of the use of CINS, in particular, occur with the marginalised sections of the community, ie the homeless, Aboriginal people, the indigent, the mentally and intellectually disabled and the young. The receipt of a further deemed conviction, and consequent exposure to the SDRO sanctions, risk only driving them deeper into a debt trap, secondary offending, and subsequent imprisonment, even though in most cases, because of their disadvantaged state, they had little appreciation of, or ability to control the conduct.⁴⁵

- 10.26 Net-widening was raised as a key concern in the Ombudsman's 2005 report.⁴⁶ The report indicated that there was some evidence of net-widening as a result of CINS, and expressed 'significant concern' about the number of Aboriginal people affected by CINS.⁴⁷ This is particularly the case in relation to offensive language and conduct offences. The Ombudsman 2009 report found that:

CINs are contributing to a significant net increase in legal action taken on offensive language and conduct incidents. That is, some offenders are being diverted from court, but the early data indicates that the decreases in court appearance are being eclipsed by the very high numbers of minor offenders being fined for these offences.⁴⁸

- 10.27 More recent data collected by the Bureau of Crime Statistics and Research (BOCSAR)⁴⁹ about the CIN of offensive language provides further evidence of the net-widening effect of CINS. A statistical analysis performed for the NSW Law Reform Commission reveals that since the statewide introduction of CINS in November 2007, total contacts⁵⁰ in relation to offensive language for all persons (Aboriginal and non-Aboriginal) have increased by 23.35%.⁵¹ This represents an increase of total contacts of 89 per month from the pre-November average of 381 contacts per month.

- 10.28 The number of court attendance notices (CANs) issued to all persons for offensive language has decreased by 10.29% so it appears that CINS are being used instead of CANs to some extent. However, two points should be made. First, the issue of a CIN may have significant detrimental effects for those on low incomes, as we have seen throughout this report. Second, the rate of issue of CINS for offensive

44. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.96].

45. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.100].

46. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 69.

47. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 85.

48. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities*.(2009) 71.

49. NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics: November 2005-October 2010*, ref dg119647, unpublished (2011).

50. Total contacts are defined as the sum of all CANs, Youth Conferences, Caution Young Offenders Acts, CINS, Infringement Notices and Warning – Young Offenders Acts: M Katz, *Statistical Analysis – Offensive Language* (2011).

51. M Katz, *Statistical Analysis – Offensive Language* (2011).

language is increasing more rapidly than the rate of issue of CANs is decreasing. There would thus appear to be an overall net-widening effect of CINs for offensive language.

- 10.29 The effects were similar, although slightly less marked, for Aboriginal people and Torres Strait Islanders. There was an increase in total contacts of 10.32% following the statewide introduction of CINs. This was an increase of nine contacts per month from a pre-November average of 87 contacts per month. CANs issued to Aboriginal people and Torres Strait Islanders decreased by 8.7%, which is seven per month from a pre-November 2007 average of 80 CANs per month. These figures should be read in light of the fact that Aboriginal people and Torres Strait Islanders constitute just over 2% of the total population.

Other jurisdictions

- 10.30 The net-widening effect of penalty notices issued for minor criminal offences has also been found in jurisdictions that have introduced schemes similar to CINs. For instance, the United Kingdom uses Penalty Notices for Disorder (PND) for low-level disorder offences such as behaviour likely to cause harassment, alarm or distress, and disorderly behaviour while drunk. The PND scheme was piloted from 2002 in four police force areas. The early results from the pilot were published by the UK Home Office in 2004, which concluded that:

There have been reductions in cautions and prosecutions for those offences in the two pilot areas, suggesting that many have been diverted to PNDs. The larger number of PNDs indicates a net widening to recipients who would not otherwise have been dealt with by caution or prosecution.⁵²

- 10.31 A similar scheme, the Fixed Penalty Notices (FPNs) for Antisocial Behaviour, was introduced in Scotland in 2004. A 2009 review of this scheme also found evidence of net-widening, as police reported that FPNs were being issued to people who would have previously been warned or ignored by police.⁵³

Effects of net-widening

- 10.32 Net-widening in the context of penalty notices increases the pool of people who are exposed to the penalty notice system, with consequent problems of increasing levels of debt, and secondary offending arising out of fine enforcement measures such as driver licence sanctions.⁵⁴ These problems appear to be particularly acute for Aboriginal people and Torres Strait Islanders. Although CINs may appear to keep Aboriginal people and Torres Strait Islanders out of custody in the short term, there is a risk of secondary offending associated with licence sanctions. This may

52. K Spicer and P Kilsby, *Penalty Notices for Disorder: Early Results from the Pilot*, UK Home Office (2004) 4.

53. B Cavanagh, *A Review of Fixed Penalty Notices (FPNs) for Antisocial Behaviour*, Scottish Government Social Research (2009) 7, 30.

54. See Chapters 8, 15, 16.

mean that entry into the criminal justice system is simply postponed by CINs.⁵⁵ The Ombudsman reported that:

any benefits arising from diverting minor offenders in this way were likely to be eclipsed by the much more pervasive problems associated with fine default, especially with respect to the high number of Aboriginal people who are ineligible to drive or register a vehicle because of sanctions imposed as part of measures to enforce unpaid fines.⁵⁶

10.33 The Department of Justice and Attorney General (as it was then known) noted in 2009 that safeguards against net-widening are less effective for vulnerable people:

At present, there are two theoretical constraints on net-widening. The first is the right of a person who receives a CIN to elect to have the matter heard by the court. While this option may readily be exercised by people who can afford a lawyer and are trustful of the criminal justice system, these characteristics are not commonly shared by people living in Aboriginal communities.

The second constraint on net-widening is the ability to seek an internal review by a senior police officer of the decision to issue a CIN. Again, this option will not readily be exercised by people living on the margins of society, who are mistrustful of police and the criminal justice system.⁵⁷

10.34 Of the large number of Aboriginal people who are issued CINs, few court-elect. Consistent with this concern, the 2009 review found low rates of Aboriginal people seeking court election and internal review:

- only seven of the 895 Aboriginal CIN recipients in the State Debt Recovery Office (SDRO) database (since inception) chose to have the CIN heard by a court
- only four of the 895 recipients had made representation for internal review (and none in the review period since CINs went statewide).⁵⁸

10.35 While recipients are reluctant to seek review, their chances of success may be high. The Ombudsman observed that almost two-thirds of offensive language CINs were issued 'in circumstances where the recipient may have had a sufficient defence if the matter was heard at court'.⁵⁹ In consultations for this inquiry we were told by lawyers representing clients issued with CINs and penalty notices for offensive language that they often tried to persuade clients to court-elect but that they were unwilling to do so and paid their penalty even if they believed that the offence was not made out.

55. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 48.

56. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 49.

57. NSW Department of Justice and Attorney General, response to draft report, 16 July 2009, cited in NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009).

58. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 101-102.

59. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 9.

Offensive language and offensive conduct

10.36 The CIN of offensive language emerged as a significant problem during this inquiry. The offence of offensive conduct was also raised as a problem, but to a much lesser extent. We have demonstrated above that there are particular problems with the net-widening effects of CINs for offensive language. In addition to these net-widening effects there are a number of other problems. Below, we outline the nature of offensive language and conduct offences, then we set out the problems that have been identified with these offences, in addition to the net-widening effects already identified.

10.37 Sections 4 and 4A of the *Summary Offences Act 1988* (NSW) define offensive conduct and offensive language.

4 Offensive conduct

- (1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school.
- (2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.
- (3) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

4A Offensive language

- (1) A person must not use offensive language in or near, or within hearing from, a public place or a school.
- (2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

10.38 These provisions must be read in light of case law, which has established that for language or conduct to be considered offensive the prosecution must prove that it was calculated to wound the feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person.⁶⁰

10.39 There are also provisions prohibiting the use of offensive language in specific locations or contexts and permitting the issue of a penalty notice for the offence in many other statutes.⁶¹

The problem of defining and applying community standards

10.40 The reasonable person test embedded in this rule requires the offensiveness of the language or conduct to be assessed according to community standards. Courts

60. *Worcester v Smith* [1951] VLR 316. See also *Inglis v Fish* [1961] VR 607; *Re Marland* [1963] 1 DCR NSW 224.

61. *Parramatta Park Trust Regulation 2007* (NSW) cls 23(1)(b), 23(1)(c), sch 1; *Passenger Transport Regulation 2007* (NSW) cls 49(a), 49(b), sch 3 pt 2; *Rail Safety (Offences) Regulation 2008* (NSW) cls 12(1)(a), 12(1)(b), sch 1 pt 3.

have said that the reasonable person must not be thin-skinned.⁶² He or she is reasonably tolerant and understanding and reasonably contemporary in his or her reactions, but has some sensitivity to social behaviour and social expectations in public places.⁶³ Regard should be had to society as 'multicultural, partly secular and largely tolerant if not permissive'.⁶⁴

- 10.41 An example of the application of this principle can be found in a recent case where the magistrate held that a reasonable person would not be offended by the use of the word 'prick' due to its common use in the community in everyday conversations.⁶⁵ However, there are limits to the case law. In one 1993 case it was held that:

It is equally erroneous to hold that the common four letter words are necessarily indecent in every context...and to hold that they can never be indecent in any context at all.⁶⁶

- 10.42 It was put to us during consultations that community standards have shifted and offensive language is no longer relevant as an offence,⁶⁷ and one submission argued that only language that amounts to vilification or intimidation should be considered an offence.⁶⁸ We note the frequency with which swear words are used in popular culture. While some people may object to these words, the case for making their use an offence must be weakened considerably by the frequency of their appearance in popular songs, television programs, novels, radio and even in public discourse.⁶⁹ As the Ombudsman observed:

there is no doubt that the language used in these incidents was intemperate and ill mannered. What is in doubt is the present capacity of those words to offend, in the sense that they might wound, anger or outrage the reasonable person. With a popular culture where the same words frequently punctuate movies and late night television, where three songs, heavily featuring the word fuck, have each been in the top 50, with two of them number one, in the Australian music charts during this year, and the music videos for these songs...are played on television on Saturday and Sunday mornings, the capacity of the words to be regarded as offensive as they once were must come into question.⁷⁰

- 10.43 If there is no community consensus as to what language or form of insult is offensive, it is difficult to see how police can legitimately be requested to apply this offence consistently, and how people can be expected to anticipate the criminal justice system's response to their language. The application of community standards in relation to language was raised with us as a problem throughout the consultation process. We adverted to this issue in Chapter 3 in relation to the

62. *Re Marland* [1963] 1 DCR NSW 224.

63. *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991).

64. *Pell v The Council of the Trustees of the National Gallery* [1998] 2 VR 391.

65. *R v Grech* (Unreported, NSW Local Court, Waverly, Magistrate Williams, 3 May 2010).

66. *Hortin v Rowbottom* (1993) 61 SASR 313 (16 September 1993) 385.

67. Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

68. The Shopfront Youth Legal Centre, *Submission PN33*, 3.

69. Even government ministers have been known to use coarse language: see R Olding, 'Minister's TV gaffe starts a Twitstorm', *The Sydney Morning Herald* (14 December 2012) 2.

70. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 76.

creation of new penalty notice offences, where we reported stakeholder concern about the offence of offensive language.

- 10.44 In CP 10 we asked whether penalty notices should be issued for offences that require judgment in relation to matters involving community standards, such as ‘offensiveness’.⁷¹ Stakeholders, including issuing agencies, considered that enforcement officers should not determine community standards. Rather, they saw this as a matter for the courts.⁷² The Law Society of NSW expressed concern that offences that involve judgments about community standards are ‘likely to have a disproportionate impact on vulnerable people’ and submitted that the Ombudsman’s recommendations to minimise net-widening could only go ‘so far’ due to ‘broader issues relating to social exclusion and poverty’.⁷³
- 10.45 On the other hand, some stakeholders supported the use of penalty notices for offences that require a judgment about community standards. According to one submission, such offences are ‘not necessarily better suited to be dealt with in the courts’.⁷⁴ The NSW Department of Environment, Climate Change and Water⁷⁵ argued that ‘the risk of inconsistency is outweighed by the practical and operational desirability of being able to issue penalties for offences relating to community standards’.⁷⁶
- 10.46 Some stakeholders who supported the continued use of penalty notices for offences containing a judgment about community standards saw a need for special measures to be taken in relation to this offence. For instance, the NSW Food Authority recommended a ‘compliance and enforcement policy that provides sufficient guidance on interpretation of legislation and application of enforcement action’.⁷⁷ Holroyd City Council acknowledged that the courts are the best forum to test community standards and saw a need for ‘ongoing training’ on community standards.⁷⁸

Misuse of CINs for offensive language and conduct

- 10.47 Many offensive language offences are directed at police (or other issuing officers for penalty notice offences) in situations where police officers are dealing with another offence or incident: that is, there is no victim other than the issuing officer. During consultations the view was repeatedly expressed that the issue of CINs for offensive language in this context brings the justice system into disrepute, since those who receive CINs for this offence hear those who issue the CIN using the

71. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.3.

72. NSW Maritime, *Submission PN2*, 3-4; NSW Land and Property Management Authority, *Submission PN17*, 3; Legal Aid NSW, *Submission PN11*, 6.

73. The Law Society of NSW, *Submission PN31*, 15.

74. G Henson, *Submission PN5*, 1.

75. In April 2011 most of the functions of the Department of Environment, Climate Change and Water were transferred to the new Office of Environment and Heritage (a division of the NSW Department of Premier and Cabinet). The Office of Water is now part of the Department of Primary Industries, NSW Trade and Investment.

76. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 5.

77. NSW Food Authority, *Submission PN9*, 2.

78. Holroyd City Council, *Submission PN10*, 5.

same language themselves. They therefore adjudge the issue of a CIN to be an exercise in power not an exercise of justice.

- 10.48 In consultation, issuing agencies told us that they considered offensive language and conduct as open to abuse as these offences require a judgment by an issuing officer about an offence committed against him or herself. We were told that this amounted to a conflict of interest – in effect, the victim was issuing the punishment. It was argued that an impartial party, such as a court, should determine the offence.⁷⁹ Stakeholders submitted that offences that involve subjective decision-making about community standards by the enforcement officers should be discarded,⁸⁰ that abusive language depends on the context; and that police officers should expect and be trained to anticipate such language in the course of their work. Shopfront submitted that many of its clients were issued with penalty notices or CINs for offensive language, yet in many of these cases the language allegedly used would not meet the legal test for offensiveness.⁸¹ Shopfront noted that:

We suspect 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...⁸²

- 10.49 A further issue that may arise with CINs issued for offensive language and conduct is that they may escalate matters between police and CIN recipients, leading to more offences being committed overall. A 1997 report published by BOCSAR noted that ‘people charged with offensive behaviour or offensive language are often also charged with a more serious offence as their principal offence’.⁸³ When either of these offences accompanies resist arrest and assault police, it is known as a trifecta.⁸⁴ We were told during consultations that offensive language and offensive conduct can often ‘provoke’ other offences or occur after an issuing officer responds to another offence.⁸⁵ We were also told that being charged with this trifecta was quite common,⁸⁶ and it was alleged that young people are often stopped and provoked by police and then given the trifecta.⁸⁷ We were told that the trifecta is a significant problem for homeless people – in particular in relation to indecent exposure and offensive behaviour. We heard one example of a man who chronically

79. Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

80. Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

81. The Shopfront Youth Legal Centre, *Submission PN33*, 2.

82. The Shopfront Youth Legal Centre, *Submission PN33*, 3.

83. R Jochelson, ‘Aborigines and Public Order Legislation in New South Wales’ (1997), *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research 34, 3.

84. R Jochelson, ‘Aborigines and Public Order Legislation in New South Wales’ (1997), *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research 34, 3.

85. Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

86. Homeless Persons Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011.

87. Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011; Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011.

overslept on trains, and who would get fined at night and in the morning with offensive behaviour, fare evasion, and having his feet on the seat.⁸⁸ The trifecta is problematic because it may in turn increase an individual's total fine debt and increase his or her exposure to the criminal justice system. Moreover, in many situations where offensive language is used it reflects either poor communication skills by the user, or intellectual or mental impairment.

Impact on Aboriginal and Torres Strait Islander communities

- 10.50 Even before the use of CINs for offensive language, the offence of offensive language had a disproportionate impact upon Aboriginal people. The report of the Royal Commission into Aboriginal Deaths in Custody, published in 1991, stated that 'the use of offensive language in circumstances of intervention initiated by police should not normally be an occasion of arrest or charge'.⁸⁹ That report quoted Commissioner Wootten as saying:

It is surely time that police learnt to ignore mere abuse, let alone simple 'bad language'. In this day and age many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people. Maintaining the pretence that they are sensitive persons offended by such language... does nothing for respect for the police. It is particularly ridiculous when offence is taken at the rantings of drunks, as is so often the case. Charges about language just become part of an oppressive mechanism of control of Aboriginals. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others---resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if police were not so easily 'offended'.⁹⁰

- 10.51 Research carried out by BOCSAR in 1997 described the impact of offensive language and conduct offences in rural areas with large Aboriginal populations:

In the high Aboriginal country area this conflict often involves seemingly ritual confrontations between police and Aboriginal people over swearing in public places or at police themselves. Sometimes the person reported for offensive behaviour and/or offensive language seems to have taken the initiative in provoking the confrontation. Sometimes the confrontation occurs when police question or attempt to detain an Aboriginal person in relation to matters unrelated to offensive behaviour or, alternatively, when police attend an altercation or dispute among Aboriginal people or between non-Aboriginal and Aboriginal people. In circumstances where police are called to an incident, charges of offensive behaviour and/or offensive language appear most likely to ensue when police find themselves unable to calm a situation or when they themselves become the subject of abuse.⁹¹

- 10.52 Both the Royal Commission into Aboriginal Deaths in Custody report and the BOCSAR research refer to the frequent connection between offensive language or conduct and other offences. At a consultation with Aboriginal people we were told

88. Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

89. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 [rec 86(1)], citing Commissioner Wootten in his report into the death of David Gundy.

90. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 [21.1.7].

91. R Jochelson, 'Aborigines and Public Order Legislation in New South Wales' (1997), *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research 34, 1, 15.

that offensive language was a significant problem for Aboriginal people⁹² and that it was often the ‘beginning of’ the trifecta.⁹³ There was a perception that Aboriginal people are unfairly targeted and that people only use offensive language as a result of being ‘tailed’ by police.⁹⁴

Options to resolve the identified problems

10.53 Three options to deal with the problems identified above are considered below. The first option involves a number of largely procedural changes aimed at improving the exercise of discretion in issuing CINs for offensive language and conduct. The second option is to remove offensive language and conduct from the CIN scheme so that a court would review these offences. The third option is to abolish one or other, or both, of these offences.

Procedural solutions

10.54 There are a number of measures that could be taken to improve the way CINs are used for offensive language and offensive conduct. They are:

- amending the penalty notices guidelines
- applying the totality principle to penalty notices
- increasing the use of cautions, and
- mandatory review of these CINs by senior officers.

10.55 **Amending the penalty notices guidelines**

In Chapter 3, we make recommendations about offences that require an issuing officer to exercise judgment about a matter of community standards.⁹⁵ We propose that, for such offences, issuing agencies must:

- (a) clearly state, in their public documentation what constitutes offending behaviour and the right to go to court
- (b) provide officers with special training and internal operational guidelines before they may issue such penalty notices, and
- (c) report periodically on these penalty notice offences as required by the proposed Penalty Notice Oversight Agency (PNOA).

We also recommend that the proposed PNOA should report publicly on the operation of penalty notice offences which require an enforcing officer to make a judgment based on community standards.

92. Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

93. Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

94. Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011

95. Recommendation 3.4.

- 10.56 These guidelines should assist in increasing the transparency of offences that require a judgment about community standards, including CIN offences and especially the CINs offences of offensive language and offensive conduct. However, arguably further measures should be taken in relation to offensive language and offensive conduct.
- 10.57 **Applying the totality principle to CINs**
In Chapter 6, we recommend the application of the totality principle to penalty notices. A CIN or penalty notice for offensive language is often one part of a *trifecta*⁹⁶ where a number of penalties are issued for one incident which, together, constitute a disproportionate response to the offending behaviour. Our recommendation is that the *Fines Act* be amended to provide that an issuing agency must withdraw a penalty notice if it finds one or more penalty notices have been issued in relation to a single set of circumstances and that this unfairly punishes a person in a way that does not reflect the totality, seriousness or circumstances of the offending behaviour. We make a similar recommendation in relation to the Attorney General's Caution Guidelines.⁹⁷ We recommend that the Attorney General's Caution Guidelines and Attorney General's Internal Review Guidelines apply to police. Thus all offences involving the 'trifecta' should be reviewed and offensive language CINs withdrawn where the totality principle is offended.
- 10.58 **Increasing the use of cautions**
In Chapter 5 we discuss the importance of official cautions in reducing the net-widening effect of penalty notices. Cautions encourage compliance through education and persuasion rather than through a financial penalty, which may lead to debt, to enforcement measures and possibly secondary offending.⁹⁸
- 10.59 Currently, NSW Police (and thus CINs) are not subject to the *Fines Act* official cautions provisions. Police were expressly excluded from the Attorney General's Caution Guidelines because of their common law powers to warn and caution.⁹⁹ In Chapter 5 we recommend that the Attorney General's Caution Guidelines¹⁰⁰ should apply to police so as to enhance consistency across agencies and to assist transparency of police decision-making.¹⁰¹ We also recommend that these cautions be issued in written form and that all issuing agencies, including police,¹⁰² report periodically to the proposed PNOA concerning compliance with the *Fines Act* and guidelines.¹⁰³ In the alternative, we recommend that a consistent set of cautions guidelines be developed and published by police.¹⁰⁴
- 10.60 In Chapter 5 we list options for amendments to strengthen legal obligations in relation to cautions. One of these involves the amendment of s 19A of the *Fines Act*

96. See Chapter 10 [10.49].

97. See Recommendation 6.5.

98. See Chapter 5 [5.1]-[5.5].

99. See Chapter 5 [5.81].

100. NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996*.

101. See Chapter 5 [5.87].

102. See Chapter 5 [5.55].

103. See Chapter 5 [5.77].

104. See Chapter 5 [5.91].

to require issuing officers to consider whether an official caution is appropriate in every case when a penalty notice offence is committed.¹⁰⁵ We recommend against making this amendment for all penalty notice offences because we consider that the mandate for legislative change is not very strong, and we conclude that legislative change should only be employed if the non-legislative measures we recommend are unsuccessful.

- 10.61 However, the arguments for legislative change may be stronger in relation to offensive language than they are for other penalty notice offences for the reasons set out above, especially the demonstrated net-widening effect of CINs. A provision could be inserted into the *CPA* requiring that a police officer *must* consider whether an official caution is appropriate in all cases of offensive language.¹⁰⁶ We emphasise that issuing a written caution would in no way interfere with the capacity of police to give a verbal warning. Indeed a verbal warning, given in a non-aggressive way, may be the most appropriate way to deal with many occasions of offensive language in particular.
- 10.62 In CP 10 we ask whether official cautions should be available as part of the CIN regime, as recommended by the Ombudsman.¹⁰⁷ While there was no consistency in the way submissions understood cautions, there was support for action to be taken short of issuing a CIN. Official cautions were endorsed by a number of submissions.¹⁰⁸ For example, NSW Young Lawyers said that they would give police greater flexibility in responding to borderline offending or to vulnerable people.¹⁰⁹ The use of official cautions was also seen as beneficial as keeping records may assist in whether to issue further cautions or a CIN in the future.¹¹⁰ Shopfront supported official cautions, but said that, as with the *Young Offenders Act 1997* (NSW), they should only be made available after a person has had access to legal advice and admitted the offence.¹¹¹ However, if giving a person a formal caution is made more cumbersome than issuing a CIN, it is unclear to what extent formal cautions would be taken up by police.
- 10.63 Consistent with its response to the Ombudsman, police remained strongly opposed to formal cautions, stating that police already have common law powers to caution. The police did not want to fetter these powers or to create additional administrative costs.¹¹² However, the Ombudsman indicated that providing this option of a formal caution under the *Fines Act* would not fetter police discretion. Rather, it would provide police with an additional option that could

105. See Chapter 5 [5.37]-[5.38].

106. See Chapter 5 [5.37]-[5.38]; The Law Society of NSW, *Submission PN31*, 3; The Shopfront Youth Legal Centre, *Submission PN33*, 2; Youth Justice Coalition, *Submission PN34*, 7.

107. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 8.3(2).

108. The Shopfront Youth Legal Centre, *Submission PN33*, 24; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 7; The Law Society of NSW, *Submission PN31*, 5; NSW Trustee and Guardian, *Submission PN14*, 11; NSW Industry and Investment, *Submission PN37*, 11; NSW Ombudsman, *Submission PN25*, 9.

109. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 7.

110. NSW Industry and Investment, *Submission PN37*, 11.

111. The Shopfront Youth Legal Centre, *Submission PN33*, 24

112. Police Portfolio, *Submission PN44*, 3.

give CINs warnings some legitimacy...strengthen the evidential value of such warnings and...record them in a way that informs and assists police decision-making in relation to individuals who are repeatedly warned.¹¹³

- 10.64 One possible disadvantage of this option is that, if incorrectly applied, it could replace informal warnings rather than replacing the issue of a CIN, thus having its own net-widening effect.
- 10.65 **Mandatory review of offensive language CINs by senior officers**
Currently under the *CPA* a senior police officer may withdraw a penalty notice at any time.¹¹⁴ In Chapter 7, we note the lack of guidance available to police officers reviewing penalty notice offences and the infrequency with which CINs are withdrawn. We recommend that guidelines for internal review of penalty notices issued by police (including CINs) should be developed, consistent with the Attorney General's Internal Review Guidelines,¹¹⁵ and that these guidelines should be made publicly available.¹¹⁶ We also recommend that issuing agencies report periodically to the proposed PNOA on compliance with each of the internal review grounds.¹¹⁷
- 10.66 However, the internal review process is not automatic and must be requested by the penalty notice recipient. This may not be sufficient to reduce the net-widening effect of offensive language and offensive conduct, especially given the vulnerable populations most affected by these offences. As we have noted above, a very small number of Aboriginal people challenge their penalty notice either through court election or internal review.¹¹⁸
- 10.67 Previous reviews have commented upon the need for appropriate oversight. The 2005 Ombudsman's report recommended 'that senior police officers withdraw those Criminal Infringement Notices that are considered to be an inappropriate response to a particular incident'.¹¹⁹ The Director General of the Department of Attorney General and Justice (AGJ) went further than this and recommended that, in the case of offensive language and conduct, review by a senior officer could become mandatory practice and should not have to be initiated by the recipient.¹²⁰
- 10.68 Shopfront submitted that all CINs issued for offensive language and offensive conduct should be reviewed by a senior police officer or police prosecutor.¹²¹ The Criminal Law Committee of the NSW Young Lawyers supported internal review of CINs by senior police officers to ensure all CINs meet the legal requirements of the

113. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 76.

114. *Criminal Procedure Act 1986* (NSW) s 340(1).

115. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* (NSW).

116. See [7.90].

117. See [7.38].

118. See [10.34].

119. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) vii, rec 7

120. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 72.

121. The Shopfront Youth Legal Centre, *Submission PN33*, 24.

offence but did not clarify whether this should be a mandatory process for all offensive language and conduct offences.¹²²

- 10.69 The Police Portfolio submission on this issue advised that representations for withdrawal are currently reviewed by the issuing officer, as well as a senior officer, who can take into consideration discretionary factors, including mental illness, cognitive impairment or vulnerability generally.¹²³ Review is therefore possible but must be applied for. We have noted the unwillingness of affected persons to apply for review.
- 10.70 If the offences of offensive language and conduct are retained and continue to be the subject of CINs, then we recommend that review of CINs issued for these offences be mandatory. Mandatory review by a senior officer may also deal with the problem of the victim being the prosecutor and the need to bring an objective perspective to the decision to issue a CIN.

Recommendation 10.2

Review by a senior police officer of Criminal Infringement Notices issued for offensive language and offensive conduct should be mandatory and should not depend on application.

Removing offensive language and conduct from the CIN scheme

- 10.71 We discussed earlier the net-widening effect of CINs and, in particular, the evidence of net-widening in relation to offensive language. We also identified as a problem the indeterminacy of offensive language and the difficulty of judging community standards. One response to these problems would be to remove these offences from the list of CINs offences and require a court attendance notice to be issued. This may incline police to issue more cautions and fewer penalty notices.
- 10.72 Courts may be a more appropriate forum for the determination of offensiveness as such a determination requires a judgment to be made about community standards.¹²⁴ Police discretion is not effectively monitored because of the low rates of internal review and court election, particularly by Aboriginal people.¹²⁵ The need for further review is evidenced by a 2005 review of the CINs trial, in which the Ombudsman assessed a sample of the CINs issued for offensive language and found that if a court were to decide these matters it would be unlikely to find the defendant guilty in about 60% of matters.¹²⁶ The ACT Attorney-General's Department,¹²⁷ in recommending against the use of on the spot fines for offensive language incidents in that jurisdiction, made the following argument:

122. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 8.

123. Police Portfolio, *Submission PN44*, 4.

124. See discussion of community standards above [10.40].

125. See [10.34].

126. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 73-76.

127. Now Justice and Community Safety.

In the past the Courts have rejected police interpretations as to what is offensive behaviour. At present a Magistrate, sitting in open Court and subject to media reporting, supplies the community understanding of what behaviour is offensive to the public. It is not in the public interest for the function of determining the boundaries of community tolerance to be transferred to police.¹²⁸

- 10.73 The Director General of the AGJ has called for stronger action to be taken to address both the concerns about net-widening raised in the two Ombudsman reports, and the significant costs to individuals and the Government associated with fine enforcement and secondary offending. The Director General proposed a number of options for consideration by the Ombudsman. These were mandatory review by a senior officer; monitoring of CINs for offensive language and conduct by the Ombudsman; and prohibiting the use of CINs for offensive language and conduct offences, given that police already have an extensive suite of alternative powers to deal with public order offences.¹²⁹
- 10.74 On the other hand, returning these minor offences to the courts would have resource implications, both for individuals and the state. As we reported above, CINs have resulted in more efficient use of police and court resources.¹³⁰ Returning these offences to the courts may also increase the number of CANs being issued to people using offensive language, with associated risk of court costs and criminal conviction.
- 10.75 In CP 10, we asked whether the offences of offensive language and conduct should continue to be among the offences for which CINs may be issued.¹³¹ The removal of offensive language and conduct from the CINs scheme received significant stakeholder support. Legal Aid submitted that determinations of offensiveness in terms of community standards should be left to the court.¹³² Shopfront said that ‘the lack of court scrutiny over these offensive language allegations has... produced significant injustice’.¹³³ Although Shopfront was of the opinion that offensive language and conduct should not be offences at all, it said that dealing with these offences through CINs meant that there was 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, especially given the Ombudsman’s findings that approximately 60% of CINs would most likely have been dismissed by a court.¹³⁴ The Chief Magistrate of the Local Court argued that issuing a CIN may mean that offences are viewed as less serious,¹³⁵ and that being required to answer a charge before a court may have a greater deterrent effect.¹³⁶

128. ACT Law Reform Commission, *Street Offences*, Report 15 (1997) Appendix A.

129. NSW Department of Justice and Attorney General, response to draft report, 16 July 2009, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 72.

130. See [10.11].

131. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 3.3.

132. Legal Aid NSW, *Submission PN11*, 30.

133. The Shopfront Youth Legal Centre, *Submission PN33*, 3.

134. The Shopfront Youth Legal Centre, *Submission PN33*, 24.

135. G Henson, *Submission PN5*, 6.

136. G Henson, *Submission PN5*, 6.

- 10.76 However, there are arguments against this option. The Police Portfolio supported the retention of these offences within the CINs scheme.¹³⁷ They observed that judgment in relation to penalty notice offences is only a problem if the level of skill and training of the issuing officer is poor, and commented that police officers are substantially better trained than other enforcement officers.¹³⁸
- 10.77 Research from Queensland has demonstrated that these offences are rarely challenged in court,¹³⁹ raising the question whether judicial oversight is sufficient to counteract the net-widening effect of these particular offences. A report by the Crime and Misconduct Commission of Queensland (CMCQ)¹⁴⁰ reviewed recently introduced public nuisance offences, which include elements of offensive language and offensive behaviour.¹⁴¹ The report noted that the courts' ability to moderate police discretion in relation to public nuisance is limited in a number of ways, including the fact that little binding precedent is available (as most cases are decided by magistrates), and only a very small percentage of public nuisance matters are contested. The CMCQ concluded, 'the courts have a limited number of opportunities to act as an accountability mechanism regarding the exercise of police discretion'.¹⁴²
- 10.78 An Aboriginal Justice Advisory Council publication from 1999 found that Aboriginal people were unlikely to defend an offensive language or conduct charge. Of those charged, 57.78% plead guilty and a further 29% were convicted *ex parte*. Only 8.9% were defended and 1.3% were dismissed.¹⁴³ This publication also reported that Aboriginal people made up 20% of all people prosecuted for conduct charges in NSW during 1998, at which time Aboriginal people made up 1.8% of the population.¹⁴⁴ In consultations, we were told of the low rate at which offensive language (and conduct) are challenged in court.¹⁴⁵

Abolishing the offences of offensive language and conduct

- 10.79 Some stakeholders were of the view that offensive language is an inherently problematic offence, and that the additional procedural protection of judicial oversight would not overcome its problems. Rather, abolition was preferred by some stakeholders.¹⁴⁶ This option was supported most often in relation to the

137. Police Portfolio, *Submission PN44*, 3.

138. Police Portfolio, *Submission PN44*, 1.

139. Queensland Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008). See also T Walsh, 'Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217.

140. Queensland Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008).

141. *Summary Offences Act 2005* (Qld) s 6.

142. Queensland Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008) 124. It should be noted that despite these findings, the CMCQ recommended that penalty notices be issued for this offence.

143. Aboriginal Justice Advisory Council, 'Policing Public Order: Offensive Language and Behaviour, the Impact on Aboriginal People' (1999), *Aboriginal Justice Issues* No 1 (1999) 6.

144. Aboriginal Justice Advisory Council, 'Policing Public Order: Offensive Language and Behaviour, the Impact on Aboriginal People' (1999), *Aboriginal Justice Issues* No 1 (1999) 6.

145. The Shopfront Youth Legal Centre, *Submission PN33*, 2-3.

146. Chapter 3 [3.55].

offence of offensive language. The arguments in support of this option are set out above. In summary they relate to:

- the indeterminacy of the offence and the risk of its inconsistent application¹⁴⁷
- the fact that language that would once have been offensive is now an everyday matter, and it is no longer supportable to criminalise it
- the disproportionate representation of vulnerable people, particularly Aboriginal people, in the application of this offence
- the fact that frequently it is the victim (usually a police officer) who prosecutes the offence
- the availability of other offences, such as offensive conduct and resisting police, and
- the relatively minimal harm caused by this offence.

10.80 One concern with abolition is that police would not be able to respond appropriately to offensiveness. However, if offensive language were to be removed as an offence, police would retain their ability to charge people with other offences, for example:

- offensive conduct¹⁴⁸
- assault¹⁴⁹
- assault and other actions against a police officer¹⁵⁰
- obscene exposure¹⁵¹
- failure to comply with a direction (move on orders)¹⁵²
- resisting police¹⁵³
- detention of intoxicated persons¹⁵⁴
- possession of liquor by minors¹⁵⁵
- affray,¹⁵⁶ or
- threatening to destroy or damage property.¹⁵⁷

147. Chapter 3 [3.60].

148. *Summary Offences Act 1988* (NSW) s 4(2) sets out that 'A person does not conduct himself or herself in an offensive manner...merely by using offensive language'.

149. *Crimes Act 1900* (NSW) s 61.

150. *Crimes Act 1900* (NSW) s 60.

151. *Summary Offences Act 1988* (NSW) s 5.

152. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199.

153. *Crimes Act 1900* (NSW) s 546C.

154. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 206.

155. *Summary Offences Act 1988* (NSW) s 11.

156. *Crimes Act 1900* (NSW) s 93C.

157. *Crimes Act 1900* (NSW) s 199.

Further, removing offensive language as an offence and leaving offensive conduct untouched would not preclude an issuing officer taking the language into account as part of the offensive conduct.¹⁵⁸

- 10.81 Another concern about abolition expressed by stakeholders was that, if offensive language were abolished, people could be charged more frequently with other offences that are more serious.¹⁵⁹ Arguments for retaining these offences (as well as other public order offences) have been expressed elsewhere. The Director of BOCSAR, Don Weatherburn, wrote in 2004 that:

Reducing incivility, vandalism and social disorder is important in its own right. People like to be able to walk down the street or use public transport without suffering verbal abuse and harassment, having to put up with damaged or broken public amenities, having to step over drunks and drug users or being discouraged from using public playgrounds by the debris associated with drug and alcohol use. It is also worth remembering that people disposed to commit serious crime are prone to commit minor offences as well.¹⁶⁰

Commission's conclusions

- 10.82 Of all the options considered above we are most strongly inclined towards the abolition of the offence of offensive language. The problems set out above have been known and understood for some time and this inquiry is merely the latest in a number of reports, in Australia and elsewhere, that have identified the same problems. Community attitudes towards the use of language, especially swear words, have changed substantially. Some people may find swearing offensive but the issue under consideration is whether it should be a criminal offence. The argument for abolition of the offence is fortified by the ubiquity of such language in popular culture. Further, the issuing of CINs or other penalty notices for offensive language brings the justice system into disrepute because of the obvious unfairness of police (and others) issuing penalties for behaviour they themselves engage in with impunity.
- 10.83 Where behaviour goes beyond offensive language there are other options, identified above, that may be used by police to deal with bad behaviour. Abolition of this offence would not leave police without options.
- 10.84 We are not persuaded that the other options discussed above will resolve the problems we have identified with the CIN of offensive language. While we have made recommendations for procedural change, these are unlikely to solve the problems. Removing offensive language from the list of CINs is also unlikely to be effective and may have more detrimental than positive effects. In particular, the evidence of net-widening in relation to offensive language demonstrates that CANs have decreased as CINs have increased for this offence. That is, there is evidence of a 'substitution effect' as well as an overall net-widening effect. If offensive language is removed from the list of CINs and instead must be proceeded with by

158. Note also we are not proposing changes to offences of indecency (such as indecent exposure), which should remain offences in their own right, even though involving conduct that is offensive.

159. Aboriginal Legal Service, *Consultation PN7*, Redfern NSW, 2 February 2011.

160. D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (Federation Press, 2004) 100-101.

way of a CAN, police may be reluctant to issue a CAN. On the other hand, they may issue more CANs, with consequent negative effects on alleged offenders and cost to the state. We have noted above that the likelihood that these offences will be challenged by way of a plea of not guilty in court is not high.

- 10.85 However, we are disinclined at this point to make a recommendation for abolition. While there was strong support for this step from some stakeholders, we did not pose abolition as a question in CP 10. Not all stakeholders have had the opportunity to respond on this issue. In particular, NSW Police was not consulted directly on this question.
- 10.86 Further, although we have discussed abolition of offensive language under the *Summary Offences Act* and issues arising in relation to CINs, offensive language is also recognised in many other penalty notice regimes. We received a significant number of complaints in consultations about the alleged inappropriate use of this offence by RailCorp officers.¹⁶¹ The offence is also present in many other contexts – for example in legislation governing behaviour in parks. It would be inconsistent to abolish the offence in one context but leave it in place in others. However, we did not directly consult with these issuing agencies about their views on abolition.
- 10.87 There was less concern expressed in relation to offensive conduct in consultations and submissions. It is not clear whether the same issues arise in relation to offensive conduct. There is evidence of net-widening effects for offensive conduct but the offence is potentially more serious and concerns about community standards and indeterminacy were not raised to the same extent. The issue of the abolition of the offence of offensive conduct requires further exploration.
- 10.88 Our recommendation therefore is that the abolition of the offence of offensive language in the *Summary Offences Act*, and wherever it otherwise occurs as a penalty notice offence, should be further investigated as a matter of urgency. The offence of offensive conduct should be similarly considered.

Recommendation 10.3

- (1) The following questions should be the subject of further inquiry:
- (a) Should the offence of offensive language in the *Summary Offences Act 1988* (NSW), and wherever else it occurs, be abolished?
 - (b) If not, what action should be taken to deal with the problems identified with this offence?
- (2) In conjunction with the inquiry in (1), the offence of offensive conduct should also be reviewed and considered.

161. Clause 12 of the *Rail Safety (Offences) Regulation 2008* (NSW) specifies that (1) A person must not on any train or in any public area wilfully: (a) use offensive language, or (b) behave offensively, or (c) spit. Maximum penalty: 10 penalty units.

Part Four

Vulnerable people

This part of the report deals with the impact of penalty notices on vulnerable people, including people on low incomes (Chapter 11), children and young people (Chapter 12), people with cognitive and mental health impairments (Chapter 13), homeless people (Chapter 14), people living in regional, rural and remote areas (Chapter 15), Aboriginal people and Torres Strait Islanders (Chapter 16) and people in custody (Chapter 17).

Each chapter provides a resource for the reader about the impact of penalty notices on the people under discussion. It also sets out the ways in which the present penalty notice system accommodates, or fails to accommodate, their needs.

Issues relevant to vulnerable people were a major focus of this inquiry. We make recommendations throughout this report that are designed to improve the ways in which the penalty notice system provides for their particular needs. In each chapter in Part Four, we therefore describe the pertinent recommendations that arise earlier in this report. Where necessary, we make additional recommendations to address outstanding issues.

11. People on low incomes

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Introduction

- 11.1 This chapter deals with the problems that arise for people who are on low incomes. We have chosen to start with this issue because the problem of poverty is common to many of the people who are likely to encounter the difficulties that are discussed in this report in relation to the penalty notice system. For example, children have difficulties with penalty notices because many of them have little or no income. People in prison usually have very limited incomes. Those who have a mental health or cognitive impairment are more likely to be in receipt of government benefits and to have financial difficulties with penalties.
- 11.2 Defining 'poverty', 'low income' or 'financial hardship' is difficult. There is much debate about the extent and nature of disadvantage, and ideas about how poverty should be measured in Australia have changed in recent times.¹ There is 'no official measure of poverty in Australia'.² One commonly used measurement is the so-called 'poverty line', which is a measure of the disposable income required to support basic needs (food, rent, transport etc). This is currently calculated as being \$446 per week for a single person.³ Most Centrelink benefits deliver an income that is below this poverty line.
- 11.3 More recent approaches to measuring poverty use the concept of 'social exclusion/inclusion'. This idea takes a broader view of disadvantage,⁴ and considers the interrelationship between long-term financial hardship and a range of social, health and economic factors, including mental health problems and cognitive impairment, substance abuse and homelessness.⁵ It argues that income is too simplistic a measure of poverty, and that other factors are important. The model of

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1. R Scutella, R Wilkins and M Horn, *Measuring Poverty and Social Exclusion in Australia: A Proposed Multidimensional Framework for Identifying Socio-Economic Disadvantage*, Melbourne Institute of Applied Economic and Social Research (2009) 3.
 2. R Scutella, R Wilkins and M Horn, *Measuring Poverty and Social Exclusion in Australia: A Proposed Multidimensional Framework for Identifying Socio-Economic Disadvantage*, Melbourne Institute of Applied Economic and Social Research(2009) 3.
 3. Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia June Quarter 2011*, University of Melbourne (2011).
 4. R Scutella, R Wilkins and M Horn, *Measuring Poverty and Social Exclusion in Australia: A Proposed Multidimensional Framework for Identifying Socio-Economic Disadvantage*, Melbourne Institute of Applied Economic and Social Research (2009).
 5. Social Exclusion Taskforce, *Reaching Out: An Action Plan on Social Exclusion*, UK Cabinet Office (2006) [6.4].

social exclusion/inclusion was originally used in European Union countries to provide a broader measurement of poverty than income alone, taking into account the multi-dimensional and relative nature of socio-economic deprivation in developed countries.⁶ This model may be particularly useful in relation to penalty notices since, as we saw in Part Three of this report, many of those who have difficulty paying penalties, have low incomes combined with other problems, such as mental illness, intellectual disability, homelessness, or geographical isolation.

The impact of fixed financial penalties on low income groups

- 11.4 Financial penalties imposed by courts can be determined by reference to the income levels of those who are fined, whereas a penalty notice involves a fixed financial penalty. Fixed penalties are efficient and cost effective to administer. On a superficial level they appear fair, since everyone pays the same amount for the same offence. However, this ‘fairness’ is one-dimensional because a fixed penalty will have a much greater impact upon low-income earners than others. For example, a \$200 penalty notice for fare evasion⁷ may be very onerous for someone on a low income but have less impact on a person earning an average income. To put this in perspective, recipients of the Disability Support Pension receive \$344 per week⁸ and those on Austudy⁹ receive \$194 per week.¹⁰ Average weekly earnings (before tax) in NSW are \$1324.¹¹
- 11.5 The *Fines Act 1996* (NSW) requires that the courts consider ‘such information regarding the means of the accused as is reasonably and practicably available to the court for consideration’.¹² Consequently, all other things being equal, the fine imposed on someone living below the poverty line can be less than the fine imposed on a person earning at or above average weekly earnings. Courts can also impose non-financial penalties. While those who receive a penalty notice may elect to have the matter dealt with by a court, they are generally disinclined to do so. In consultations lawyers representing people on low incomes told us that they try to persuade clients to go to court because, for a minor offence committed by a person who is living on benefits, a non-financial penalty will often be imposed. However they reported difficulty in persuading people to court-elect because they fear going to court (particularly the cost of lost income or representation) or because they risk a conviction for the offence.

6. R Scutella, R Wilkins and M Horn, *Measuring Poverty and Social Exclusion in Australia: A Proposed Multidimensional Framework for Identifying Socio-Economic Disadvantage*, Melbourne Institute of Applied Economic and Social Research (2009) 3-7.

7. *Rail Safety (Offences) Regulations 2008* (NSW) cl 4(1), sch 1.

8. For a single person over the age of 21: Commonwealth Department of Human Services, Centrelink, *Disability Support Pension – Payment Rates* <http://www.centrelink.gov.au/internet/internet.nsf/payments/dsp_rates.htm>.

9. Austudy is received by a person who is over 25 years old and studying or undertaking an apprenticeship: Commonwealth Department of Human Services, Centrelink, *Payments: Austudy* <<http://www.centrelink.gov.au/internet/internet.nsf/payments/austudy.htm>>.

10. Commonwealth Department of Human Services, Centrelink, *Austudy – Payment Rates* <http://www.centrelink.gov.au/internet/internet.nsf/payments/austudy_rates.htm>.

11. Australian Bureau of Statistics, *State and Territory Statistical Indicators* (2011).

12. *Fines Act 1996* (NSW) s 6(1).

- 11.6 Previous reports have commented upon the inequitable impact fixed penalty amounts have on low-income earners in comparison with other penalty notice recipients. For instance the Sentencing Council noted that current fixed penalties reflect neither the objective seriousness of an offence nor the personal circumstances of the offender.¹³ The Law and Justice Foundation pointed out that

For a person with secure employment and accommodation, receiving a penalty notice is unwelcome and inconvenient. However, for people on Centrelink benefits, people who have no income or a low or irregular income, paying a fine may be extremely difficult, if not impossible.¹⁴

The Law and Justice Foundation further observed that the financial burden imposed by fines might be so significant that it 'may contribute to people moving states or living a transient, potentially homeless, lifestyle to avoid being punished for unpaid fines.'¹⁵

- 11.7 The unequal impact of penalty notices on low-income earners was discussed in our 1996 report on sentencing, which noted that fine systems could operate unfairly because the amount of the fine may represent a more severe punishment for one offender than for another. We also noted that the imposition of further penalties for fine default may be more likely for an offender who does not have the financial means to pay than for an offender who does.¹⁶
- 11.8 The Centre for Economic Policy Research (CEPR) noted the problems with a system that enforces penalties against people who cannot afford to pay them, citing high personal costs for offenders; high social costs; and the risk of the credibility of the criminal justice system being undermined.¹⁷ A 2006 report by the Homeless Persons' Legal Centre (HPLS) and the Public Interest Advocacy Centre (PIAC) warned that imposing fixed penalty amounts on low-income earners could undermine the credibility of the penalty notice system. It commented that 'clients who cannot afford their fines debts often become overwhelmed and disillusioned with the system' which may contribute to recidivism as 'people living in poverty and debt may have little incentive to avoid fines that they know they cannot pay'.¹⁸ This negates the deterrent value of penalty notice offences in such cases.

The marginalising and criminalising potential of penalty notices

- 11.9 Many submissions and consultations expressed concerns about the receipt of penalty notices by members of vulnerable and marginalised groups. For instance,

13. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) xi.

14. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 4.

15. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) (2008) 7.

16. NSW Law Reform Commission, *Sentencing*, Report 79 (1996).

17. B Chapman et al, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines*, Centre for Economic Research, Discussion Paper 461 (2003) 1, 6.

18. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 17.

Redfern Legal Centre (RLC) referred to the ‘marginalising, and in some cases criminalising, effect of debt on people’,¹⁹ while Legal Aid NSW (Legal Aid) made the following comments:

For people already experiencing great disadvantage, the consequences of these accumulated debts can be far-reaching and can have a detrimental effect far exceeding their intended purpose. For example, such debt can impact upon the security of a person’s housing situation, the person’s ability to service other debt, and the person’s capacity to maintain employment and stable family relationships. In some cases, accumulated debt can lead to further criminal offending and even imprisonment.²⁰

- 11.10 The submission from the Law Society of NSW raised questions about the discriminatory effect of penalty notice offences:

The harm sought to be prevented through the penalty should be considered against the broader group harm that the policing and penalising of disadvantaged and marginalised groups can have in increasing their social exclusion, financial disadvantage and stress.²¹

- 11.11 The HPLS noted in its submission the consequential difficulties of imposing penalty notice debt on people who have little capacity to pay. Such people are dealing with many complex problems in their ‘often... chaotic lives’, apart from penalty notice debt; such as ‘finding food and shelter, dealing with a mental illness or navigating the world with a cognitive impairment’. Accumulating penalty notice debt thus merely ‘generates, reinforces and exacerbates disadvantage’. In this situation vulnerable people ‘are more likely not to respond quickly to address the matter and even ignore the penalty notice’.²² This in turn increases the likelihood of secondary offending among vulnerable people, exacerbating more serious conflict with the legal system, as discussed in Chapters 8 and 9.

Should a concession rate apply to low-income earners?

- 11.12 Some stakeholders argued that penalty notice amounts may simply be set at too high a level for certain people to pay. We have focused in this report, especially in Chapter 9, on developing and improving fine mitigation measures, such as time to pay, work and development orders (WDOs), write-offs and the Hardship Review Board. However, an alternative, or additional, approach to this problem would be to adjust the level of penalty specifically for low-income earners.
- 11.13 The size of a financial penalty should reflect the seriousness of the offence and the financial circumstances of the offender. Further, it should be fair, just and proportionate.²³ The Centre for Economic Policy Research has pointed to the enforcement challenges of fines that do not respond to the income level of

19. Redfern Legal Centre, *Submission PN26*, 10.

20. Legal Aid NSW, *Submission PN11*, 1.

21. The Law Society of NSW, *Submission PN31*, 5.

22. Homeless Persons’ Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 4-5.

23. See R Moore, ‘The Use of Financial Penalties and the Amounts Imposed: The Need For a New Approach’ [2003], *Criminal Law Review* 13, 20.

offenders.²⁴ The Victorian Infringement System Oversight Unit has observed that recognition of financial hardship ‘minimises the possibility that the agency will incur unrecoverable costs in the pursuit of a penalty that cannot be paid.’²⁵

- 11.14 In their 2006 report the HPLS and PIAC recommended, if feasible, a concession rate for penalty notice fines for people on low incomes.²⁶ The report states that, in addition to the issue of comparative fairness of penalties for different offences, there is the issue of income inequality between offenders. This is supported by the Australia Institute, which has proposed a proportional fines system based on income.²⁷ The HPLS report quotes the Australia Institute as follows:

Few would argue against the principle that the penalty for an offence should affect all offenders equally. No-one would argue that rich people should receive shorter jail sentences or have fewer demerit points deducted than poor people. Yet the system of flat rate fines for traffic and other offences in Australia is grossly unfair in just this way. A flat fine applied to all imposes much more pain on low-income people than it does on high-income earners.²⁸

- 11.15 The report noted that lessons could be learned from existing systems in Denmark, Finland, France, Germany, Greece, Portugal and Sweden where police and the courts work on a principle that the economic burden of fines should be similar for all offenders.²⁹
- 11.16 Setting penalty notice amounts at levels that take into account low incomes and financial hardship could increase compliance and reduce costs. Onerous enforcement measures such as driver licence sanctions, and resultant problems such as secondary offending would then occur less frequently. However, taking this approach would mean setting concession rates, defining the people to whom such a concession rate applies, and setting up a system to administer these concession rates.
- 11.17 One possible response is a ‘day fine’ system such as the one that operates in Finland. There are similar systems in Sweden, Denmark, Croatia, Germany and Mexico. Under this system fines are calculated according to a formula, taking into account a person’s net income, assets and dependants. This is a way of calculating

24. B Chapman et al, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines*, Centre for Economic Research, Discussion Paper 461 (2003) 1, 6.

25. Victorian Infringement System Oversight Unit, *Financial Hardship: The Relevance of Financial Hardship in Matters Dealt With Under the Infringements Act 2006 (Vic)* [13].

26. Homeless Persons’ Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) Recommendation 8, 17: ‘That the NSW Government investigate the feasibility of introducing a concession rate for people on low incomes’.

27. Homeless Persons’ Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 17.

28. C Hamilton, *Making Fines Fairer*, The Australia Institute (2004) 1, quoted in Homeless Persons’ Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 17.

29. Homeless Persons’ Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 17.

the maximum amount, not as a set amount or a percentage, but as a proportion of the individual offender's income.³⁰

- 11.18 However, it is arguable that a 'day fine' system might not be practical for Australian conditions.³¹ A 'day fine' system would raise privacy concerns, and would be administratively complicated and expensive to implement. Issuing agencies would need information about taxable income, assets, and liabilities such as dependants. This would mitigate some of the purported major advantages of the present penalty notice system, which are cost-effectiveness and relative ease of administration. It could also encourage dishonest disclosure, or concealment of income or assets.
- 11.19 In Consultation Paper 10 we asked whether a concession rate should apply to penalty notices issued to people on low incomes.³² If so, how should 'low income' be defined? Should a person in receipt of certain Centrelink benefits automatically qualify for a concessional penalty amount? If so, which benefits?³³ 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?³⁴ Finally, how could such a system be administered simply and fairly?³⁵

Submissions and consultations

- 11.20 The majority of stakeholders responding to these questions supported a concession rate for low-income earners.³⁶ Unsurprisingly, the support was strongest from those who work with vulnerable people.
- 11.21 Most of the submissions that supported a concession rate argued that it would make the penalty notice system fairer, as currently penalty notices affect people unequally and can cause significant hardship for low income earners.³⁷ The Department of Community Services³⁸ submitted that:

A fixed penalty amount applies regardless of income and therefore has a disproportionate impact on our families, many of whom struggle on low incomes. Furthermore, people who are vulnerable and on low incomes are extremely

30. Homeless Persons' Legal Service, *Submission PN28*, 13, 14.

31. The Shopfront Youth Legal Centre, *Submission PN33*, 8.

32. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.8(1).

33. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.8(2).

34. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.9.

35. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.10.

36. The Shopfront Youth Legal Centre, *Submission PN33*, 21; Legal Aid NSW, *Submission PN11*, 25; Council of Social Service of NSW, *Submission PN21*, 2; Corrective Services NSW, *Submission PN24*, 9; Redfern Legal Centre, *Submission PN26*, 10-11; Illawarra Legal Centre, *Submission PN27*, 19; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 25; The Law Society of NSW, *Submission PN31*, 14; NSW Department of Community Services, *Submission PN36*, 10; Homeless Persons' Legal Service, *Submission PN42*, 6; NSW Disability Discrimination Legal Centre Inc, *Submission PN8*, 4.

37. Council of Social Service of NSW, *Submission PN21*, 1; Redfern Legal Centre, *Submission PN26*, 10-11; Illawarra Legal Centre, *Submission PN27*, 19.

38. Now NSW Department of Family and Community Services.

unlikely to elect to take the matter to court, where a court would take their circumstances into account when determining an appropriate fine.³⁹

- 11.22 A small number of submissions were not supportive of applying different penalty notice amounts to low income earners.⁴⁰ For instance, submissions from issuing agencies expressed concern about issuing officers being made responsible for making a judgment on the spot about an offender's income.⁴¹ The State Debt Recovery Office (SDRO) expressed concern about the impact on its high-volume operation of the need to check tax returns or Centrelink documents, especially as much relevant information is in the hands of federal, rather than state, agencies. The SDRO was also concerned that vulnerable people would not approach the SDRO to claim their concession rate.⁴²
- 11.23 Holroyd City Council argued that if the amount of a penalty notice reflects the objective seriousness of the offence, then that amount should remain stable for all offenders.⁴³ Issuing agencies also argued that lower amounts might decrease the deterrence value of penalty notices.⁴⁴ Legal Aid pointed out, however, that for some vulnerable people, 'the [specific deterrence] effect of financial penalties is limited because their lives are usually too chaotic'.⁴⁵
- 11.24 Most submissions supporting a concession rate for low-income individuals agreed that concession rate eligibility should be linked to the receipt of Centrelink benefits, such as unemployment, disability and carer payments.⁴⁶ The RLC suggested a concession rate of 50% for low-income individuals;⁴⁷ while the Shopfront Youth Legal Centre suggested a reduction by a fixed percentage with an upper limit cap.⁴⁸ Others did not go into such detail. Several suggested that other options, such as withdrawals and write offs⁴⁹ or community service orders,⁵⁰ should also continue to be available to low-income individuals.

Commission's conclusions

- 11.25 Throughout this inquiry we have been conscious of the need to respond to the impact of fixed penalty amounts on low-income earners and the compounding

39. NSW Department of Community Services, *Submission PN36*, 10.

40. NSW Maritime, *Submission PN2*, 18-19, 18; Holroyd City Council, *Submission PN10*, 20; NSW Land and Property Management Authority, *Submission PN17*, 13.

41. NSW Land and Property Management Authority, *Submission PN17*, 13; NSW Maritime, *Submission PN2*, 18.

42. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 16.

43. Holroyd City Council, *Submission PN10*, 25.

44. Holroyd City Council, *Submission PN10*, 20; NSW Maritime, *Submission PN2*, 18.

45. Legal Aid NSW, *Submission PN45*, 16.

46. The Shopfront Youth Legal Centre, *Submission PN33*, 21; Legal Aid NSW, *Submission PN11*, 25-26; Corrective Services NSW, *Submission PN24*, 9; Redfern Legal Centre, *Submission PN26*, 10-12; Illawarra Legal Centre, *Submission PN27*, 19-20; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 25; The Law Society of NSW, *Submission PN31*, 14; NSW Department of Community Services, *Submission PN36*, 10.

47. Redfern Legal Centre, *Submission PN26*, 10-12.

48. The Shopfront Youth Legal Centre, *Submission PN33*, 21.

49. Redfern Legal Centre, *Submission PN26*, 10-12.

50. NSW Department of Community Services, *Submission PN36*, 10.

effects of penalty notice debt on social disadvantage and personal and family distress. Enforcing debt in relation to those who cannot pay is wrong in principle, and in practice wastes the resources of enforcement authorities.

- 11.26 However, we do not support the creation of a concession rate for low-income earners. While there was some support for this in submissions, there were few contributions, and no consistency, about the way in which it would be administered. A concession rate would add considerably to the complexity of the penalty notice system. The main difficulty would be determining who would be eligible for a concessionary rate and what that rate, or amount, should be. It might also encourage greater resort by issuing agencies to placing offenders before the courts, thereby diminishing an important advantage of, and reason for, the penalty notice system.
- 11.27 However, we have made many other recommendations throughout this report, but especially in Chapter 9, that respond to the needs of people on low incomes who receive penalty notices. For example we recommend the availability of an extension of time-to-pay arrangements to apprentices and trainees and for others experiencing unavoidable financial hardship.⁵¹ We support the recommendation of the recent Attorney General and Justice evaluation⁵² of the *Fines Act 1996* (NSW) to relax the definition of acute economic hardship for eligibility for WDOs so that the test will be satisfied if a person is in receipt of an eligible Centrelink benefit.⁵³ Further, we recommend the development of an improved test for economic hardship. In relation to write-offs, we make recommendations to make writing off fines easier for vulnerable people, especially those who have made significant efforts towards paying off their penalty debts through WDOs, or who are making periodical payments via time to pay arrangements.

51. Recommendation 9.2(1).

52. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

53. Recommendation 9.4(1).

12. Children and young people

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Introduction

- 12.1 The Commission's terms of reference require us to consider:
- (1) whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and their obligation to attend school up to the age of 15 years. If so,
 - (2) whether a lower penalty notice amount should be set
 - (3) whether there should be a shorter conditional "good behaviour" period following a write off of their fines, and
 - (4) whether driver licence sanctions should apply to children and young people.¹
- At the time the terms of reference were issued, the obligation to attend school operated up to the age of 15 years. However, it was raised to 17 years from 1 January 2010.²
- 12.2 Consultation Paper 10 (CP 10)³ and our consultation process raised two further, related, issues for consideration:

1. See Chapter 1 [1.1].

2. *Education Act 1990* (NSW) s 21B.

3. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010).

- (5) Should the diversionary options under the *Young Offenders Act 1997* (NSW) apply to penalty notice offences committed by children and young people?⁴
- (6) Should the jurisdiction of the Children's Court be expanded to include traffic offences committed by children and young people?⁵

The approach of criminal law and penalty notices legislation to children and young people

- 12.3 There is no consistency in the way children and young people are defined under NSW law. Although the *Children (Criminal Proceedings) Act 1987* (NSW) (CCPA) defines a 'child' as a person under the age of 18 years,⁶ other legislation applies to 'children' who are defined as aged under 16 years, and 'young persons' who are defined as aged 16 years or above but under the age of 18 years.⁷ There was no consistency of usage in the submissions, or in the literature.
- 12.4 In this report we use both the terms 'children' and 'young people' to refer to people who are below the age of 18 years. While it would be consistent with the CCPA to use only the terms 'child' or 'children', in this report we frequently refer to people who are aged between 16 and 18 years, and who may be driving motor vehicles and receiving penalty notices for motoring offences. We discuss the responsibility it is appropriate for them to bear in respect of penalties for such offences. In this context it seems inaccurate, and lacking respect, to use the term child.
- 12.5 The general criminal law treats children and young people under 18 years differently from adults:
- Under the age of 10, a child is conclusively presumed not to be criminally responsible and cannot be convicted of an offence.
 - Between the ages of 10 and 14 years, the presumption of *doli incapax* applies. This principle means that a child is not criminally responsible unless the prosecution establishes, beyond a reasonable doubt, that the child knew at the time of the offence that the act was 'seriously wrong, as distinct from an act of mere naughtiness or mischief'.⁸
 - A child or young person who commits an offence between the age of 10 years and 17 years is generally tried and sentenced in the Children's Court, according to the CCPA, unless the offence is very serious.⁹ One of the principles underlying that Act is that 'children who commit offences bear responsibility for

4. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 6.5(1)-(3).

5. Young People Roundtable Meeting, *Consultation PN13*, Sydney NSW, 14 February 2011, 21.

6. *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

7. See, for example, *Children (Care and Protection) Act 1998* (NSW) s 3.

8. *BP v R; SW v R* [2006] NSWCCA 172 9 (1 June 2006) [27]; *C v Director of Public Prosecutions* (1996) 1 AC 1, 38.

9. *Children (Criminal Proceedings) Act* ss 3, 16, 28.

their actions but, because of their state of dependency and immaturity, require guidance and assistance'.¹⁰

12.6 In relation to penalty notices, there are also special provisions relating to children and young people:

- Penalty notices may not be issued to children under the age of 10 years.¹¹
- CINs cannot be issued to a person under 18 years.¹²
- The Attorney General's Cautions Guidelines specify:
 - that enforcement officers must consider whether a caution is appropriate for young people under 18 years, and
 - that 'there are very few and exceptional circumstances in which a person under the age of 14 may be issued with a penalty notice or caution'.¹³
- Some penalty notice amounts are set at a lower rate for young people than for adults.
- A driver licence will not be withdrawn as part of enforcement action if the offence occurs while the defaulter is under the age of 18 years, and if the offence was not a traffic offence.¹⁴
- Some enforcement costs are \$25 for children under the age of 18 years, while they are \$50 for adults.¹⁵
- A child may be required to work up to 100 hours under a work and development order (WDO) or a community service order (CSO), while an adult may work for up to 300 hours.¹⁶

12.7 The minimum age of 10 years for issuing penalty notices in NSW is the same in Victoria.¹⁷ In contrast, infringement notices cannot be issued to children younger than 14 years in the Northern Territory.¹⁸ In South Australia, the *Expiation of Offences Act 1996* (SA) provides that 'expiation notices' (the equivalent of penalty notices) cannot be given to a child under the age of 16 years, except where some other Act provides otherwise, and recognises that particular legislation providing for penalty notices may preclude them from being issued to those under 18 years.¹⁹

10. *Children (Criminal Proceedings) Act 1987* (NSW) s 6(b).

11. *Fines Act 1996* (NSW) s 53(2).

12. *Criminal Procedure Act 1986* (NSW) s 335.

13. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* [4.7(d)], [5.4].

14. *Fines Act 1996* (NSW) s 65(3).

15. *Fines Regulation 2010* (NSW) cl 4(1).

16. *Fines Act 1996* (NSW) s 81; NSW Department of Justice and Attorney General, *Work and Development (WDO) Guidelines* [6.5].

17. *Infringements Act 2006* (Vic) s 3(1): definition of a 'child'.

18. *Fines and Penalties (Recovery) Act 2001* (NT) s 7.

19. *Expiation of Offences Act 1996* (SA) ss 4, 6(1)(g). Section 6(1) (h) of that Act also provides that legislation can provide that persons under the age of 18 cannot be given a penalty notice.

Should penalty notices be issued to children and young people?

- 12.8 There are arguments of both a practical and principled nature in favour of not issuing penalty notice to children and young people. One of these is that most children and young people have little, if any, capacity to pay. The second is that the deterrent effect of penalty notices on children and young people is weak.

Capacity to pay

- 12.9 Many children and young people earn little or no money. The school leaving age was raised in 2010, and children and young people must now remain at school until they are 17 years of age or until they complete Year 10, whichever occurs first.²⁰ The majority of teenagers therefore study full time. As at May 2009, 70% of 15- to 19-year-olds were in full-time study (at school or elsewhere); 16.6% were in full-time work; and 13.3% were either unemployed or working part-time.²¹
- 12.10 There is no minimum age for starting work in NSW. A 2005 report by the NSW Commission for Children and Young People found that about 56% of children aged 12-16 years had worked in the previous 12 months.²² The report also found that 'children living in the most disadvantaged areas work least, while those who live in more advantaged areas work most'.²³ However, children and young people who are in full-time or casual employment generally do not earn a great deal. A 15-year-old working casually in the fast food industry earns \$8.25 per hour.²⁴ Children and young people on benefits also have low incomes. A person under 18 years who is not living at home receives \$388.70 per fortnight in youth allowance.²⁵
- 12.11 Given these very low income levels, a penalty notice can be extremely difficult to pay. A \$50 fine (for instance, travelling without a train ticket) would consume a substantial proportion of a child or young person's income. The limited capacity of children and young people to pay financial penalties was raised in many submissions and consultations.²⁶
- 12.12 Legal Aid NSW (Legal Aid) noted that young people must attend school, and that those who are working earn incomes 'significantly lower than that earned by an adult. For those who are still studying, the Youth Allowance payment is less than

20. *Education Act 1990* (NSW) s 21B(2).

21. The Foundation for Young Australians, *How Young People are Faring 2009: The National Report on the Learning and Work Situation of Young Australians* (2009) 4.

22. Of 11,000 children from Years 7-10 across NSW: NSW Commission for Children and Young People, *Children at Work* (2005) 1, 2.

23. NSW Commission for Children and Young People, *Children at Work* (2005) 14.

24. Fair Work Australia, *Fast Food Industry Award 2010*
<http://www.fwa.gov.au/documents/modern_awards/pdf/MA000003.pdf>.

25. Commonwealth Department of Human Services, Centrelink, *Youth Allowance: Payment Rates*
<http://www.centrelink.gov.au/internet/internet.nsf/payments/ya_rates.htm>.

26. Legal Aid NSW, *Submission PN11*, 18; UnitingCare Burnside, *Submission PN12*, 3; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 2; Illawarra Legal Centre, *Submission PN27*, 12; The Shopfront Youth Legal Centre, *Submission PN33*, 14; Youth Justice Coalition, *Submission PN34*, 12; Children's Court of NSW, *Submission, PN35*, 2; NSW Department of Community Services, *Submission, PN36*, 10.

other Centrelink entitlements.¹²⁷ The Commissioner for Children and Young People submitted that the hardship imposed by a fine may 'be a critical burden on particular cohorts of people, particularly children and young people' which may be 'a contributing factor to entrenching a young person's long-term disadvantage'.²⁸ The Commissioner also noted that their lack of capacity to pay may 'limit the effectiveness of the penalty notice'.²⁹ Juvenile Justice agreed that penalty notices issued to vulnerable people caused 'further financial hardship to those who can least afford it' or may 'transfer the onus of payment to a parent or carer'.³⁰ UnitingCare Burnside submitted that a penalty notice imposed upon a child might restrict 'their ability to engage with employment, education and the community'.³¹

- 12.13 However, penalty notices are imposed for offending behaviour. Paying them is intended to involve effort and to educate young people about the consequences of breaking the law. Bearing in mind these concerns, the question that arises is how to respond appropriately to the low income levels of children and young people. Is it appropriate to respond by imposing lower penalty amounts and enforcement responses that take into account their low incomes? Or do the low-income levels of children and young people, taken together with other factors, mean that penalty notices should not be issued to them in the first place?

Deterrence

- 12.14 One important function of a penalty for children and young people is its educative and deterrent effect. However, the deterrent effect of a financial penalty may be less for children and young people than it is for adults because of their more limited ability to plan ahead. The development of the ability to make logical decisions and foresee the future ramifications of a decision occurs at different ages for different people.³² One Children's Court magistrate observed that:

It is typical of the offences committed by young offenders that they are opportunistic, there is little if any forethought of consequences and there is peer pressure or groupthink.³³

- 12.15 The New Zealand Ministry of Justice, in its study of the New Zealand infringement system, affirmed this observation. It found that penalty notices were not considered a strong deterrent to future infringing in young people and many young people continued their infringing behaviour, regardless of the fees and fines, until they had reached a greater level of maturity.³⁴

27. Legal Aid NSW, *Submission PN11*, 18.

28. NSW Commission for Children and Young People, *Submission PN32*, 4.

29. NSW Commission for Children and Young People, *Submission PN32*, 2.

30. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 2.

31. UnitingCare Burnside, *Submission PN12*, 3.

32. L Steinberg and E Cauffman, 'A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?' (1999) 63 *Federal Probation* 52, 56.

33. P Mulroney, 'Sentencing Children and Young People: A Judicial Officer's Perspective' (Paper presented at the Sentencing Conference, National Judicial College of Australia/ANU College of Law, February 2008) 5.

34. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 33.

- 12.16 The study found that once fine levels reached \$2000, young people in New Zealand considered the amount insurmountable and felt that they had no ability to pay it back. They were unlikely to take any action in relation to the penalty.³⁵ This study also found that many parents assist teenagers who have incurred a penalty notice and are unable to pay it. Where this occurs the penalty notice may place a strain on family relationships 'at a stage when parents often have already strained relationships with their children'.³⁶
- 12.17 Submissions to this inquiry also suggested that, in comparison with most adults, children and young people are not easily deterred by the prospect of receiving penalty notices.³⁷ On the contrary, penalty notices might add to a young person's 'street cred' and become a rite of passage among peers.³⁸ If a young person has accrued debt, any deterrent effect is lessened. It was reported that some young people feel that they might as well add to the existing debt, for example, by not buying a train ticket and running the risk of being given a penalty notice for fare evasion.³⁹
- 12.18 Stakeholders informed the Commission that there are young people who have fine debts that are quite substantial, often \$10,000 or more.⁴⁰ This debt level can sometimes make young people think that they have no way out.⁴¹
- 12.19 However, while it may be true that the deterrent effect of fines is limited for some offenders, it may be effective for others. In consultations it was put to us with some force that it would send entirely the wrong message to young people if they could behave as they liked with impunity until they were 18, at which point, having learned no self-restraint, they would become liable to be punished for wrong behaviour. Some penalty notice offences committed by children and young people, such as not wearing a helmet when riding a bicycle, are important to safety. Parents wanting to ensure that their children wear helmets were not impressed by the idea that the law might not back them up on this important safety concern.⁴² Young people also receive penalty notices for traffic offences, and the obvious argument that arises is that if young people are regarded as old enough to drive, they should also be expected to obey the traffic laws.

35. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 35.

36. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10.

37. UnitingCare Burnside, *Submission PN12*, 6; Illawarra Legal Centre, *Submission PN27*, 13.

38. Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

39. Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011.

40. Shopfront Youth Legal Centre, *Preliminary Submission PPN 5*, 2.

41. Wollongong/Illawarra Roundtable Meeting, *Consultation PN18*, Wollongong NSW, 1 March 2011; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 4.

42. Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

Submissions and consultations

12.20 In CP 10, we asked whether penalty notices should be issued to children and young people; and if so, at what age penalty notices should apply and why?⁴³ We also asked whether there are offences for which penalty notices should be issued notwithstanding that the recipient is a child below the cut-off age.⁴⁴ We listed the following possible options for cut-off ages for the application of the penalty notice provisions of the *Fines Act 1996* (NSW) (*Fines Act*):

- 10 years – which retains the current law and aligns with the age of criminal responsibility.
- 14 years – this option would align with the *doli incapax* presumption on the basis that enforcement officers are unlikely to be in a position to judge whether the young person should be held criminally responsible.
- 16 years – this option recognises that, below this age, children are unlikely to be able to pay a penalty notice but allows inclusion of driving offences for young people.
- 18 years but with exemptions – this option recognises that children generally would find penalty notices difficult to pay. An exemption may be necessary for traffic offences and perhaps certain other offences, for example, underage drinking and gambling.⁴⁵

We also asked whether there are practical alternatives to penalty notices for children and young people.⁴⁶

12.21 Most submissions and consultations supported raising the age at which a child is liable for a penalty notice above the current age of 10 years.⁴⁷

12.22 Three submissions and two consultations supported raising the age to 14 years,⁴⁸ on the basis that children below this age are unlikely to have an income and inevitably parents would be left to pay for penalty notices.⁴⁹ One issuing agency told

43. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010) Question 6.1(1).

44. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010) Question 6.1(2).

45. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010) [6.16].

46. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010) Question 6.2.

47. NSW Maritime, *Submission PN2*, 13; UnitingCare Burnside, *Submission PN12*, 6; Holroyd City Council, *Submission PN10*, 15; G Henson, *Submission*, PN5, 6; NSW Food Authority, *Submission*, PN9, 9; Legal Aid NSW, *Submission PN11*, 18; Department of Human Services NSW, Juvenile Justice, *Submission*, PN15, 2; Local Government and Shires Associations of NSW, *Submission*, PN16, 2; Children's Court of NSW, *Submission*, PN35, 2; NSW Department of Community Services, *Submission*, PN36, 16; NSW Industry and Investment, *Submission PN37*, 7; Youth Justice Coalition, *Submission PN34*, 15; NSW Commission for Children and Young People, *Submission PN32*, 2; Illawarra Legal Centre, *Submission PN27*, 12-13; The Law Society of NSW, *Submission PN31*, 9 (with an exception for traffic offences); NSW Land and Property Management Authority, *Submission PN17*, 11 (with exceptions for limited offences for 16- to 18-year-olds); The Shopfront Youth Legal Centre, *Submission PN33*, 14.

48. NSW Maritime, *Submission PN2*, 13; UnitingCare Burnside, *Submission PN12*, 6; Holroyd City Council, *Submission PN10*, 15; Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

49. UnitingCare Burnside, *Submission PN12*, 6.

us that children under 14 years should not be issued with penalty notices due to their 'general state of immaturity and dependency'.⁵⁰ UnitingCare Burnside, and the participants in one consultation, favoured a cut-off age of 14 years to align with *doli incapax*.⁵¹

- 12.23 Seven submissions supported raising the age at which penalty notices can be issued to 16 years.⁵² The Children's Court saw 16 as the age at which a penalty notice may 'strike a balance between deterrence of minor bad behaviour and excessive criminalisation of young people'.⁵³ Some submitted that young people below this age are immature⁵⁴ and innate risk takers. Juvenile Justice reported

the types of infringements likely to incur fines are predominantly committed by young people who are economically and socially disadvantaged, or are otherwise considered to be vulnerable due to their age, mental health or level of intellectual functioning.⁵⁵

The age of 16 years was also seen as appropriate because children become eligible for a licence at that age⁵⁶ and therefore 'need to be subject to the same penalties as other drivers, since they are considered responsible enough to drive'.⁵⁷

- 12.24 The Commission received seven submissions⁵⁸ arguing that no one under the age of 18 years should receive a penalty notice. Reasons included that young people are more likely to be issued with a penalty notice as they are 'particularly mobile, vulnerable to peer pressure and easily identifiable in public space';⁵⁹ they lack financial capacity;⁶⁰ and penalty notices have limited deterrent value.⁶¹ Further, we were told that penalty notices issued to children and young people under the age of 18 years 'disproportionately disadvantage' them due to the requirement that they attend school and the fact that those who are working earn far less than adults.⁶² If debts accumulate:

50. Holroyd City Council, *Submission PN10*, 15.

51. UnitingCare Burnside, *Submission PN12*, 5; Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

52. G Henson, *Submission*, PN5, 6; NSW Food Authority, *Submission*, PN9, 9; Department of Human Services NSW, Juvenile Justice, *Submission*, PN15, 2; Local Government and Shires Associations of NSW, *Submission*, PN16, 2; Children's Court of NSW, *Submission*, PN35, 2; NSW Department of Community Services, *Submission*, PN36, 16; NSW Industry and Investment, *Submission PN37*, 7.

53. Children's Court of NSW, *Submission PN35*, 2.

54. Holroyd City Council, *Submission PN10*, 15; Illawarra Legal Centre, *Submission PN27*, 12.

55. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 2.

56. G Henson, *Submission*, PN5, 5; NSW Maritime, *Submission*, PN2, 13; NSW Department of Community Services, *Submission*, PN36, 4.

57. G Henson, *Submission*, PN5, 5

58. Legal Aid NSW, *Submission PN11*, 18; Youth Justice Coalition, *Submission PN34*, 15; NSW Commission for Children and Young People, *Submission PN32*, 2; Illawarra Legal Centre, *Submission PN27*, 12-13; The Law Society of NSW, *Submission PN31*, 9 (with the exception of traffic offences); NSW Land and Property Management Authority, *Submission PN17*, 11 (with exceptions for limited offences for 16-18 year olds); The Shopfront Youth Legal Centre, *Submission PN33*, 14.

59. Illawarra Legal Centre, *Submission PN27*, 13.

60. Legal Aid NSW, *Submission PN11*, 18.

61. Illawarra Legal Centre, *Submission PN27*, 12.

62. Legal Aid NSW, *Submission PN11*, 18.

penalty notices can entrench young people in a cycle of debt, preventing them, for example, from qualifying for a driver licence, and limiting their job opportunities and their financial capacity.⁶³

We were also told that penalty notices issued to children under the age of 18 years have limited rehabilitative value,⁶⁴ and that penalty notices can have significant adverse effects upon young people, as can civil enforcement mechanisms such as garnishment of wages.⁶⁵ The problem of secondary offending was also mentioned in this context.⁶⁶

12.25 Only one submission, by the State Debt Recovery Office (SDRO), opposed any alteration to the cut-off age at which penalty notices could be issued, stating, ‘there must be a consequence for non compliance with the law’, and arguing that penalty notices are necessary to reduce unsafe behaviour such as not wearing a helmet when riding a bicycle, in order to reduce road trauma.⁶⁷

12.26 Some submissions proposed alternatives to penalty notices for children and young people. For example, the greater use of warnings and cautions was mentioned by some submissions.⁶⁸ NSW Industry and Investment noted that fisheries officers

normally issue a caution to young offenders. The most serious juvenile matters are referred to the Children’s Court and in those limited number of cases, the courts have usually made orders other than fines.⁶⁹

12.27 Other suggestions included education in schools about common offences, such as riding bicycles without helmets.⁷⁰ In some regional towns local police were reported to have taken steps to reward good behaviour, such as holding a weekly raffle for young people who wear bicycle helmets while on their bicycle, with a prize of a burger and chips.⁷¹ Where children and parents are known to police or issuing officers, notifying parents (or other carers) about the offending instead of issuing a penalty notice was suggested.⁷²

Commission’s conclusions

12.28 Determining the minimum age at which it makes sense to issue a penalty notice to a child or young person is a difficult task. Penalty notices involve only a monetary

63. Legal Aid NSW, *Submission PN11*, 10.

64. Legal Aid NSW, *Submission PN11*, 18.

65. For more information, see Chapter 8 [8.53]–[8.62].

66. Legal Aid NSW, *Submission PN11*, 18; Youth Justice Coalition, *Submission PN34*, 15; NSW Commission for Children and Young People, *Submission PN32*, 2.

67. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 12.

68. NSW Maritime, *Submission PN2*, 13; Illawarra Legal Centre, *Submission PN27*, 14; The Law Society of NSW, *Submission PN31*, 9; Youth Justice Coalition, *Submission PN34*, 16. (Some of these recommendations promoted the *Young Offenders Act 1997* (NSW) as the appropriate framework for these warnings and cautions).

69. NSW Industry and Investment, *Submission PN37*, 7.

70. NSW Department of Community Services, *Submission PN36*, 4; Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011.

71. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

72. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 2.

penalty, and the amount is fixed. This means that the approach the criminal law generally takes to children and young people, involving education, rehabilitation and responsiveness to individual circumstances, is not available. Further, whatever minimum age is chosen inevitably involves an arbitrary cut-off point that is not responsive to the significant variations in maturity of children and young people of the same age.

- 12.29 Presently, penalty notices cannot be issued to children under 10 years of age. Consistently with the strong support from submissions and consultations for raising the age at which penalty notices may be issued⁷³ we recommend that the minimum age at which a penalty notice may be issued be raised to 14 years. The age of 14 aligns with the presumption of *doli incapax*. For those below the age of 14, penalty notices have an uncertain deterrent effect and children are unlikely to have the ability to pay a monetary penalty.
- 12.30 For young people over the age of 14 years we consider, on balance, that penalty notices should be available. A penalty notice may be a proportionate response to offending behaviour and is more likely to have a deterrent and educative effect. The possibility that a young person will be able to earn money to pay a penalty is greater. If penalty notices were not available to issuing agencies, it may incline them to prosecute the young person in court, which is neither socially desirable nor in the best interests of the child or young person.
- 12.31 We make this recommendation in the context of other recommendations elsewhere in this report that respond to the needs of children and young people by reducing penalty levels and improving the response of enforcement laws and procedures to their needs.
- 12.32 Warnings and cautions should be the routine response to offending behaviour by children and young people of any age. If our recommendations are accepted, verbal warnings and cautions will be the only responses available in relation to those under the age of 14 years. We do not anticipate that this will make a significant change to the practice of most issuing agencies. We note the current provisions of the Attorney General's Caution Guidelines which provide that 'there are very few and exceptional circumstances in which a person under the age of 14 may be issued with a penalty notice or caution'.⁷⁴
- 12.33 Between the ages of 14 and 18 years, verbal warnings and written cautions should also be a routine response, reserving the issue of penalty notices for cases that are more serious cases – although not those that would so serious as to justify placing the offender before the court. Issuing agencies should develop policies, where they do not already have them, concerning the issue of penalty notices, warnings and cautions, to children and young people. Where cautions are issued, issuing agencies should ensure that they include information about the risk of a penalty notice being issued in the future for the conduct that gave rise to the caution.

73. *Fines Act 1996* (NSW) s 53(2).

74. NSW Department of Justice and Attorney General General, *Caution Guidelines under the Fines Act 1996* [5.4].

- 12.34 We note that if a child below the age of 14 offends in a serious way, an agency also has the option of taking the child to court. This would be a step taken infrequently and only after careful consideration, and the principle of *doli incapax* would apply.

Recommendation 12.1

- (1) Section 53 of the *Fines Act 1996* (NSW) should be amended to provide that Part 3 of the Act, except the cautions provisions contained in Division 1A, does not apply to a person younger than 14 years at the time of the offending behaviour.
- (2) The Attorney General's Caution Guidelines should be amended in accordance with (1).

Should a concession rate apply?

- 12.35 Our terms of reference asked whether penalty notice amounts for children and young people should be set at a rate different from adults.⁷⁵
- 12.36 When a court imposes a fine, it is required to consider 'such information regarding the means of the accused as is reasonably and practicably available to the court for consideration'.⁷⁶ When the Children's Court imposes a fine, that fine must not exceed the maximum prescribed by law, or 10 penalty units, whichever is the lesser amount.⁷⁷ The court is to also consider the child's age, ability to pay the fine, and the potential impact of the fine on the rehabilitation of the child.⁷⁸
- 12.37 Although the penalty notice system cannot provide an offender with the individually tailored response of a court, in some cases penalty notice amounts already recognise that children have a lower capacity to pay and impose a concessional rate. For example, penalty notice offences that only children can commit, such as underage drinking and gambling,⁷⁹ carry lower fixed penalty amounts. Possession or consumption of liquor in a public place by a minor carries a penalty of \$20.⁸⁰ Underage drinking on licensed premises carries a \$220 penalty.⁸¹ By way of comparison, the sale or supply of liquor to minors carries a maximum penalty of \$11,000 (100 penalty units) or 12 months' imprisonment (or both).⁸² Concessions are made for children in relation to some general offences. For example, the amount payable for the offence of fare evasion⁸³ is \$50 for people under the age of

75. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010) Question 6.6.

76. *Fines Act 1996* (NSW) s 6(1).

77. *Children (Criminal Proceedings) Act 1987* (NSW) s 33 (1)(c).

78. *Children (Criminal Proceedings) Act 1987* (NSW) s 33 (1AA); Youth Justice Coalition, *Submission, PN34*, 19.

79. *Gaming Machines Act 2001* (NSW) ss 50(1), 52(1); *Gaming Machines Regulation 2002* (NSW) sch 3; *Registered Clubs Act 1976* (NSW) s 45A; *Registered Clubs Regulation 1996* (NSW) sch 3; *Liquor Act 2007* (NSW) s 114(7), 118(1), 123(1), 129; *Liquor Regulation 2008* (NSW) cl 74, sch 2; *Summary Offences Act 1988* (NSW) s 11(1), 29.

80. *Summary Offences Act 1988* (NSW) ss 11(1), 29.

81. *Liquor Act 2007* (NSW) s 118; *Liquor Regulation 2008* sch 2.

82. *Liquor Act 2007* (NSW) s 117.

83. *Rail Safety (Offences) Regulation 2008* (NSW) cl 4(1).

18 years, only 25% of the amount that adults must pay.⁸⁴ Some enforcement costs are set at \$25 for those under 18 years, half the amount charged for adults.⁸⁵

- 12.38 The question that arises is whether concessional rates of this kind should be extended to all penalty notice offences, so that a lower amount is imposed on offending by young people between the ages of 14 and 18 years? Alternatively, should a concessional rate be extended to more offences?
- 12.39 A lower rate would recognise that children and young people earn significantly less money than adults, if they earn any money at all. Setting penalty notice amounts at a level that a young person is capable of paying may prevent young people being overwhelmed by debt, and consequently increase compliance and reduce enforcement costs. Higher levels of compliance could offset any discount in penalty notice amounts. Lowering penalty notice amounts would also improve consistency with court imposed fines and child-specific offences, which already acknowledge that children and young people have a lower financial capacity.
- 12.40 In CP 10 we asked whether a lower penalty notice amount should apply to children and young people, and, if so, how that amount should be set.⁸⁶ We listed three options for the setting of a proposed concessional rate for children and young people:
- reduction by a set percentage – for instance, children and young people could have their penalty notice amounts set at 25% of the standard adult amount
 - setting a maximum amount (capping) – for example, penalty notice amounts for children and young people could be set at any amount so long as it did not exceed \$50, or
 - fixed sum – this would mean that all penalty notices for children and young people would be set at, for example, \$20, regardless of the offence.⁸⁷
- 12.41 Whichever method is chosen, there would need to be some exceptions made for offences that can only be committed by people aged less than 18 years old and which are already set at appropriately low levels.⁸⁸

Submissions and consultations

- 12.42 Stakeholders who responded to this question overwhelmingly agreed that if penalty notices were issued to children and young people, then a lower penalty notice amount should apply⁸⁹ in recognition of their income inequality and the need to

84. *Rail Safety (Offences) Regulation 2008* (NSW) cl 57(2).

85. *Fines Regulation 2010* (NSW) cl 4(1).

86. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [6.32].

87. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 6.6.

88. For example, offences relating to the use of a gaming machine. The penalty for a person under the age of 18 operating a gaming machine is \$55: *Gaming Machines Act 2001* (NSW) ss 50 (1), 52(1).

89. NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 3; Children's Court of NSW, *Submission PN35*, 3; NSW Department of Community Services, *Submission PN36*, 6, 7; Legal Aid NSW, *Submission, PN11*, 20; Department of Human Services NSW, Juvenile Justice, *Submission, PN15*, 4; The Law

avoid disproportionate punishment.⁹⁰ Many submissions noted the lower financial capacity of children and young people,⁹¹ and the negative impact of debt. One submission stated that debts of children and young people could range from hundreds to thousands of dollars.⁹²

- 12.43 The Children’s Court raised the specific vulnerability of children and young people in attracting fines for public transport offences.⁹³ It noted that the *Rail Safety (Offences) Regulation 2008* (NSW) already imposes lower penalties for young people travelling on trains without a valid ticket and submitted that this approach should be extended to all penalty notice offences committed by young people, in particular public transport and public order offences.⁹⁴ We were also told in consultation that young people are less likely than adults to elect to take matters to court⁹⁵ or otherwise advocate for themselves.
- 12.44 One serious consequence of debt for children and young people is that they may feel defeated by it and lose hope so the deterrent effect is lost.⁹⁶ Some submissions spoke about the need for penalty notice amounts to be consistent with youth justice principles, namely that:

Children and young people should be treated differently from adults and are entitled to special protections when taking into account their age, lack of maturity and lack of financial capacity.⁹⁷

- 12.45 Holroyd City Council (the Council) suggested that measures other than penalty notices should be encouraged for young people under 16 years of age.⁹⁸ The Council also mentioned the importance of enforcement measures being responsive to children and young people through existing programs such as time-to-pay and WDOs.⁹⁹
- 12.46 The SDRO expressed concern that ‘financial hardship alone is not considered adequate grounds for leniency’ since ‘in such circumstances, there appears to be a

Society of NSW, *Submission PN31*, 11; The Shopfront Youth Legal Centre, *Submission PN33*, 17; Youth Justice Coalition, *Submission PN34*, 13; NSW Food Authority, *Submission PN9*, 9; Illawarra Legal Centre, *Submission PN27* 16; Legal Aid NSW, *Submission PN11*, 20; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 4.

90. Children’s Court of NSW, *Submission PN35*, 3.

91. Youth Justice Coalition, *Submission PN34*, 19; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 4; NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 3; Illawarra Legal Centre, *Submission PN27*, 16; The Law Society of NSW, *Submission PN31*, 11; The Shopfront Youth Legal Centre, *Submission PN33*, 17; NSW Department of Community Services, *Submission PN36*, 6, 7.

92. Illawarra Legal Centre, *Submission PN27*, 15.

93. Children’s Court of NSW, *Submission PN35*, 3.

94. Children’s Court of NSW, *Submission PN35*, 3.

95. Youth Justice Coalition, *Submission PN34*, 12.

96. Illawarra Legal Centre, *Submission PN27*, 15; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 4.

97. Legal Aid NSW, *Submission PN11*, 20; Youth Justice Coalition, *Submission PN34*, 19.

98. Holroyd City Council, *Submission PN10*, 15, considered only children over the age of 16 years should be issued with penalty notices.

99. Holroyd City Council, *Submission PN10*, 17.

lack of incentive to change behaviour.¹⁰⁰ NSW Maritime¹⁰¹ took a different approach and argued that penalty notices should only be issued to young people when they are demonstrated to be 'functioning at the level of an adult'. They submitted that once young people are functioning at this level, they should be issued with a penalty notice for the same amount as an adult.¹⁰²

12.47 Stakeholders differed in relation to how any lower penalty notice amount should be set. The Department of Education and Training, Workforce Management and Systems Improvement supported any of the three options suggested in CP 10 in order to reflect the difference in the earning capacity and circumstances of young people from those of adults.¹⁰³ Two submissions supported reducing the penalty notice amount for adults by a set percentage.¹⁰⁴ The Children's Court supported reducing a child's penalty notice amount to 50% of the adult rate for the same type of behaviour.¹⁰⁵ The Department of Community Services (Community Services) proposed a combination of a set percentage amount and a maximum amount. It said a penalty notice amount could then prescribe that children and young people were required to pay 50% of the penalty notice amount or the prescribed maximum amount under the legislation, whichever is the lower.¹⁰⁶ Three submissions supported the setting of a maximum amount.¹⁰⁷ The NSW Food Authority submitted that setting that amount at \$300 would 'provide a sufficient deterrent without proposing an unreasonable burden'.¹⁰⁸ The Illawarra Legal Centre and the Youth Justice Coalition (YJC) recommended a cap of \$25.¹⁰⁹ Legal Aid argued for a fixed sum of \$25.¹¹⁰ Three submissions supported a fixed sum of \$50 or less.¹¹¹ The Law Society and the Shopfront Youth Legal Centre (Shopfront) also argued for a fixed and nominal sum given that 'children and young people usually have no financial means whatsoever'.¹¹² Juvenile Justice¹¹³ said that penalty notice amounts should be indexed to young people's individual incomes, and noted that when a young person had no means to pay, the amount should be nominal, and set between \$5 and \$10.¹¹⁴

100. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 13.

101. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

102. NSW Maritime, *Submission PN2*, 15.

103. NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 3.

104. Children's Court of NSW, *Submission PN35*, 3; NSW Department of Community Services, *Submission PN36*, 6, 7.

105. Children's Court of NSW, *Submission PN35*, 3.

106. NSW Department of Community Services, *Submission PN36*, 6, 7.

107. NSW Food Authority, *Submission PN9*, 9; Illawarra Legal Centre, *Submission PN27*, 16; Youth Justice Coalition, *Submission PN34*, 13.

108. NSW Food Authority, *Submission PN9*, 9.

109. Illawarra Legal Centre, *Submission PN27*, 16; Youth Justice Coalition, *Submission PN34*, 13.

110. Legal Aid NSW, *Submission PN11*, 20.

111. The Shopfront Youth Legal Centre, *Submission PN33*, 17; Legal Aid NSW, *Submission PN11*, 20; The Law Society of NSW, *Submission PN31*, 11.

112. The Law Society of NSW, *Submission PN31*, 11.

113. Now part of Department of Attorney General and Justice.

114. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 4.

Commission's conclusions

- 12.48 Without resiling from our recommendation that, in appropriate cases, the primary response should involve the issue of a warning or caution, but recognising that there are cases where a penalty will be justified, we recommend that lower penalty notice amounts and lower enforcement costs should apply to children and young people. Taking into account our recommendation to prohibit the issuing of penalty notices to people aged under 14 years, this rate would apply to those aged over 14 years and below 18 years.
- 12.49 Of the three options proposed in CP 10 for lowering a penalty notice amount, we support the choice of setting the penalty notice amount for children and young people at a fixed percentage of the adult rate. This option would allow penalty notices to reflect the objective seriousness of different offences by providing a comparable scale to the adult rate of financial penalties. The proposed review of penalty amounts to improve consistency will assist in achieving fair outcomes for children, as well as adults.
- 12.50 On balance we consider 25% of the adult rate to be the appropriate percentage. This reflects some existing concessions, such as the penalty for fare evasion, which is set at 25% of the adult rates.¹¹⁵ It is the approach supported by the Children's Court as well as other stakeholders.¹¹⁶ This reduction would mean, for example, that smoking in a railway area (currently a \$300 penalty notice offence) would be reduced to \$75 for young people.¹¹⁷ Eating or drinking on a train (when prohibited), currently set at \$100, would be reduced to \$25.¹¹⁸
- 12.51 This 25% rate should apply to all offences commonly committed by young people, including offences on public transport, public order offences, and offences such as riding a bicycle without a helmet.
- 12.52 However, there should be some exceptions to this lower penalty notice amount for children and young people. First, there are a small number of offences that can only be committed by people under 18 (for example underage drinking). The penalty notice amount for these offences should be set taking into account the special circumstances of young people.
- 12.53 Second, there are a large number of offences that, in practice, are never committed by people under 18 years. These would include some offences related to carrying on businesses, industry regulation or handling dangerous goods. No special rate need be set for these offences.

115. *Rail Safety (Offences) Regulation 2008* (NSW) cl 57(2).

116. Children's Court of NSW, *Submission PN35*, 3. The Children's Court supported the lower penalties in the *Rail Safety (Offences) Regulation 2008* (NSW), and held the view that at most, young people should be required to pay 50% of the penalty notice amount issued to adults.

117. *Rail Safety (Offences) Regulation 2008* (NSW) cl 14.

118. *Rail Safety (Offences) Regulation 2008* (NSW) cl 15.

- 12.54 Third, we do not consider that serious traffic offences¹¹⁹ should be subject to a lower penalty notice amount. The penalty level for these offences is set at a level to deter potentially dangerous conduct that may result in significant harm.
- 12.55 Consistent with our approach to regulating penalty notices generally, we consider the best approach to implementing these recommendations is through the guidelines for setting penalty notice amounts.

Recommendation 12.2

- (1) The guidelines on penalty amounts should provide that offending by children and young people should attract a penalty at 25% of the adult rate, except where the offence is:
- (a) only committed by children and young people, in which case the penalty level should take into account the special circumstances of children and young people
 - (b) one not likely to be committed by children and young people, in which case a special rate is not required, or
 - (c) a serious traffic offence.
- (2) All enforcement costs imposed on children and young people should be set at half the adult rate.

Should a shorter good behaviour period apply when a penalty notice debt is written off?

- 12.56 Where a successful application is made for a penalty notice to be written off it is conditional on a five-year good behaviour period. If another penalty is incurred within that period, the debt may be reinstated. We deal with this issue in Chapter 9 where good behaviour periods for both children and adults are considered together.
- 12.57 As we note in Chapter 9, there was strong support for reducing the good behaviour period. In relation to children and young people it was noted that the Children's Court frequently imposes a six-month good behaviour bond for minor offences.¹²⁰ Children often receive supervision and support from Juvenile Justice during this time to assist them in complying with this bond. Many submissions called for the good behaviour period to be abolished¹²¹ or reduced to six months¹²² for children and young people. The five-year period was seen as counterproductive,¹²³

119. Offences such as speeding, drink driving and offences involving death or grievous bodily harm. <http://www.rta.nsw.gov.au/usingroads/penalties/serioustrafficoffences/index.html>.

120. Department of Human Services NSW, Juvenile Justice, *Submission*, PN15, 5; NSW Department of Community Services, *Submission PN36*, 9.

121. Legal Aid NSW, *Submission PN11*, 21; Youth Justice Coalition, *Submission PN34*, 25; Illawarra Legal Centre, *Submission PN27*, 18.

122. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 5; NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 4; Illawarra Legal Centre, *Submission PN27*, 18; The Law Society of NSW, *Submission PN31*, 11; The Shopfront Youth Legal Centre, *Submission PN33*, 18.

123. Holroyd City Council, *Submission PN10*, 18.

unrealistic¹²⁴ and onerous¹²⁵ and setting young people up to fail¹²⁶ particularly as it is not subject to any program of support or supervision provided by Juvenile Justice.

- 12.58 We recommend in Chapter 5 that, where the grounds for writing off a penalty notice debt in s 101(1A) of the *Fines Act* are made out, there should be a presumption that the debt is written off unconditionally. However, in exceptional cases it should be possible for the SDRO to impose a good behaviour period where this is justified by the seriousness of the offending, the possibility of reoffending, and the likely deterrent effect. We recommend that the maximum good behaviour period should be six months for children and young people under 18 years of age.

Should driver licence sanctions apply to children and young people?

- 12.59 In Chapter 8 we consider the application of driver licence sanctions to adults and young people. Section 65(3) of the *Fines Act* provides, in summary, that enforcement action with respect to a fine defaulter's driver licence is not to be taken if the offence occurred while the fine defaulter was under the age of 18 years, and the offence giving rise to the penalty notice is not a traffic offence. Consequently, young people aged under 18 who have a licence and commit non-traffic penalty notice offences cannot have action taken against their licence.
- 12.60 However, the SDRO interprets this section to mean that Roads and Maritime Services (RMS) sanctions of a type other than removal of a licence *may* be taken against young people. Young people may, for example, have all dealings with RMS suspended so that they cannot obtain a driver licence if they do not already have one, or they may have other limitations placed upon them.¹²⁷
- 12.61 The SDRO's interpretation of the provision appears to be arbitrary in its effect. There does not appear to be a principled reason why licence sanctions should be applied to young persons for non-traffic offences, depending on whether they have already obtained their licence or not.
- 12.62 The Commission recommends in Chapter 8 that s 65(3) of the *Fines Act* be revised so that the exemption from driver licence sanctions for fine defaulters under the age of 18 for non-traffic offences applies equally.

Diversionsary options under the *Young Offenders Act*

- 12.63 In CP 10, we asked whether police officers dealing with children and young people who have committed, or who are alleged to have committed, penalty notice offences

124. The Law Society of NSW, *Submission PN31*, 11; The Shopfront Youth Legal Centre, *Submission PN33*, 18.

125. The Shopfront Youth Legal Centre, *Submission PN33*, 18; NSW Department of Community Services, *Submission PN36*, 9.

126. The Shopfront Youth Legal Centre, *Submission PN33*, 18; Youth Justice Coalition, *Submission PN34*, 25.

127. *Fines Act 1996* (NSW) s 68(2).

should be given the option of issuing a caution or warning, or referring the matter to a specialist youth officer under the *Young Offenders Act 1997* (NSW) (YOA) to determine whether a youth justice conference should be held.¹²⁸

- 12.64 The YOA provides a framework for diverting children (over the age of 10 and under the age of 18) who have committed summary offences or indictable offences that can be dealt with summarily, away from court proceedings. The YOA requires police to consider warnings, cautions and conferencing as alternatives to court proceedings.¹²⁹ The terms ‘warnings’ and ‘cautions’ are defined for this purpose in the YOA, and are different and more onerous than the warnings and cautions under the *Fines Act* referred to throughout this report. For example a caution under Part 4 of the YOA must be delivered by an authorised police officer at a police station
- 12.65 Currently, the YOA applies to two penalty notice offences.¹³⁰ These are custody of a knife in a public place or school¹³¹ and failure to comply with a direction given by a police officer in relation to the conduct of a young person in a public place (the ‘move on’ power).¹³² In relation to these offences only, the YOA requires consideration of warnings, cautions and conferences before issuing a penalty notice.¹³³
- 12.66 An important advantage of the use of these provisions of the YOA is that no financial penalty is incurred for offences. Instead, a child or young person receives a warning, caution or attends youth justice conferencing. For this reason, in its 2002 review of the YOA, the NSW Attorney General’s Department (as it then was) recommended that the YOA be extended to cover all offences for which penalty notices may be issued to children.¹³⁴
- 12.67 However, options for dealing with penalty notice offences under the YOA may be considerably more onerous than the options available under the *Fines Act* and guidelines. The latter may involve a conversation with an issuing officer or, at most, a written caution, after which the incident is finalised. The YOA procedure for cautions is much more onerous for both the issuing agency and the recipient. It may be an unnecessarily complex response to minor offending, both for police and offender. In addition, YOA conferences require considerable time and resources from those involved. They are based on restorative justice principles, including the idea of offenders facing the victims of their offence – something that would be unlikely to apply to many penalty notice offences.¹³⁵

128. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper No 10 (2010) Question 6.5(1).

129. *Young Offenders Act 1997* (NSW) pt 3-5. The conditions under which young people are entitled to be dealt with by way of warning, caution and youth conference are provided at ss 14, 20 and 37.

130. *Young Offenders Regulation 2010* (NSW) cl 11.

131. *Summary Offences Act 1988* (NSW) s 11C.

132. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199.

133. *Young Offenders Act 1997* (NSW) s 9(2A).

134. NSW Attorney General’s Department, *Report on the Review of the Young Offenders Act 1997* (NSW) (2002) 41, Recommendation 3.

135. NSW Government, *Response to NSW Juvenile Justice Review* (2010) 7; New South Wales, *Parliamentary Debates*, Legislative Council, 21 May 1997, 8960 (Jeffrey William Shaw).

- 12.68 In our 2005 report on young offenders,¹³⁶ we noted challenges that would arise if the YOA were expanded to include all penalty notices:

At present, an officer with the authority to issue a penalty notice can, in his or her discretion, simply warn the young person about the offending behaviour and thereby bring the incident to a close...if penalty notices were covered by the YOA, the gatekeepers under the Act would need to be expanded to include such people as railway ticket inspectors. It is difficult to see how this would work in practice.¹³⁷

We concluded that we could not recommend that the YOA be expanded, since

the practical effect of extending the diversionary options of the YOA to penalty notice offences would be to net-widen and bring a young person further into the criminal justice system than they otherwise would be.¹³⁸

Submissions and consultations

- 12.69 Of the 11 submissions we received in response to this question, eight agreed that police officers should have the option of using the YOA for penalty notice offences.¹³⁹ The YJC argued for the implementation of YOA principles within the *Fines Act*.¹⁴⁰ Only two submissions argued against the implementation of the YOA for penalty notice offences.¹⁴¹
- 12.70 Some submissions saw the YOA as offering a more proportionate,¹⁴² flexible and diversionary approach to offences¹⁴³ than the imposition of a fine or penalty. Shopfront noted that penalty notices can net-widen by bringing young people into court through a court election, or because of secondary offending following enforcement action and driver licence sanctions.¹⁴⁴ The discretion of police officers in deciding which of the options available under the YOA is appropriate, and in taking specific circumstances into account, was seen as a more constructive way of dealing with the penalty notice offences of children and young people.¹⁴⁵
- 12.71 In describing the types of responses that would be appropriate under the YOA, both Legal Aid and UnitingCare Burnside agreed that particular emphasis should be

136. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005).

137. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) [4.16]-[4.18].

138. New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005) [4.16]-[4.18].

139. Holroyd City Council, *Submission PN10*, 16; Legal Aid NSW, *Submission PN11*, 20; UnitingCare Burnside, *Submission PN12*, 7; NSW Department of Education and Training, Workforce Management and Systems Improvement, *Submission PN19*, 1; Illawarra Legal Centre, *Submission PN27*, 15; The Law Society of NSW, *Submission PN31*, 10; The Shopfront Youth Legal Centre, *Submission PN33*, 16; Children's Court of NSW, *Submission PN35*, 2.

140. Youth Justice Coalition, *Submission PN34*, 16-18.

141. NSW Department of Community Services, *Submission PN36*, 6; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 3.

142. Legal Aid NSW, *Submission PN45*, 20.

143. Youth Justice Coalition, *Submission PN34*, 18.

144. The Shopfront Youth Legal Centre, *Submission PN33*, 16.

145. UnitingCare Burnside, *Submission PN12*, 7.

placed on formal warnings and cautions under the Act due to the minor or regulatory nature of penalty notice offences.¹⁴⁶

- 12.72 On the other hand, other submissions raised concerns about the YOA having a net-widening effect and drawing young people into the criminal justice system for minor offences.¹⁴⁷ Community Services was concerned about YOA warnings being used in place of informal warnings.¹⁴⁸

Commission's conclusions

- 12.73 We consider that the stakeholder support for the increased use of warnings and cautions for children and young people can be addressed within the *Fines Act* without recourse to the diversionary options under the YOA. In Chapter 5 we recommend the increased use of cautions, and support the further use of informal warnings. We also recommend that police be subject to the Attorney General's Caution Guidelines (or issue their own consistent guidelines), which require enforcement officers to consider cautions in relation to young people.¹⁴⁹ In our view these recommendations provide a better framework for encouraging greater use of warnings and cautions than the extension of the YOA. Perhaps paradoxically, the YOA procedures may constitute an over-response to a penalty notice offence and may pull children and young people further into the criminal justice system than would a response under the *Fines Act*.

Court election for traffic offences: should the Children's Court have jurisdiction?

- 12.74 The Children's Court specialises in dealing with criminal offences committed by young people as well as having a care and protection jurisdiction. However, it does not have jurisdiction to hear traffic offences.¹⁵⁰ Consequently if a young person who has been issued a penalty notice for a traffic offence elects to have the matter dealt with by a court, rather than pay the penalty amount, their matter must be heard in the Local Court. By way of comparison, some Children's Courts in other states do have traffic jurisdiction.¹⁵¹
- 12.75 With the exception of traffic offences, the Children's Court's jurisdiction is otherwise broad and covers proceedings for 'any offence (whether indictable or otherwise)

146. Legal Aid NSW, *Submission PN45*, 20; UnitingCare Burnside, *Submission PN12*, 7.

147. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 3.

148. NSW Department of Community Services, *Submission PN36*, 6.

149. Recommendation 5.4.

150. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(2). Traffic offences include offences arising under a provision of the road transport legislation listed at *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1). 'Road transport legislation' is defined in the *Road Transport (General) Act 2005* (NSW) s 5.

151. See, for example, *Youth Court Act 1993* (SA) s 7(b); *Young Offenders Act 1993* (SA) s 4(1); *Children, Youth and Families Act 2005* (Vic) s 516(1)(b).

other than a serious children's indictable offence' and committal proceedings in respect of any indictable offence, including serious children's indictable offences.¹⁵²

- 12.76 It may be argued that shifting children's traffic offences to the Children's Court could result in an increased burden on the court. In 2010, only 796 persons under the age of 18 years were found guilty of a traffic offence in Local Court proceedings.¹⁵³
- 12.77 It could also be argued that driving a car is an adult activity and therefore those who engage in it should be treated as adults.¹⁵⁴ On the other hand, traffic offences, even where they are penalty notice offences, may indicate more complex problems for the child or young person. In some cases traffic offences may indicate the need for a rehabilitative approach to be applied, or at least the need for a sentencing option other than a fine. We also note in this context the problem of secondary offending arising from penalty notice debt. In its 1981 report on child welfare, the Australian Law Reform Commission wrote:

If it is felt that a specialist approach should be adopted to the young offender, it is illogical not to employ that approach with regard to all offences allegedly committed by children.¹⁵⁵

- 12.78 The 2010 Strategic Review of the NSW Juvenile Justice System (Juvenile Justice Review) also concluded that traffic offences should be heard in the Children's Court, as this would be consistent with the principles of the *CCPA* and recognise that different considerations should apply to children and young people.¹⁵⁶ The Juvenile Justice Review recommended a study of the consequences of amending the legislation so that children and young people could have traffic offences heard before the Children's Court, and to examine the impact on the time and resources of that court. The Government response to the Juvenile Justice Review indicated that the Department of Justice and Attorney General¹⁵⁷ would consider the feasibility of this recommendation, in consultation with the Bureau of Crime Statistics and Analysis (BOCSAR), the Local and Children's Courts, the NSW Police and the Roads and Traffic Authority (as it was then known).¹⁵⁸

Submissions and consultations

- 12.79 The YJC submitted that the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to permit the Children's Court to hear and determine traffic

152. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a)-(b).

153. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2010*, Table 1.11.

154. Australian Law Reform Commission, *Child Welfare*, Report 18 (1981) [174]; Child Welfare Practice and Legislation Review Committee, Parliament of Victoria, *Final Report* (1984) vol 2, 413 [5a].

155. Australian Law Reform Commission, *Child Welfare*, Report 18 (1981) 126 [174].

156. A McGinness, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* [247].

157. Now the NSW Department of Attorney General and Justice.

158. NSW Government, *Response to NSW Juvenile Justice Review* (2010) 29. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

offence proceedings when a young person is involved. The YJC echoed the recommendation by the Juvenile Justice Review that the AJG undertake a feasibility study. The YJC was also concerned that children appearing in court for traffic offences should have representation by the Children's Legal Service of Legal Aid NSW, which operates only in the Children's Court.¹⁵⁹

- 12.80 Shopfront also commented upon the fact that children and young people with penalty notices who drive while unlicensed, or who have had their licences suspended or disqualified, must appear before an adult court. They noted that 'this means that ultimately the impact has been extremely severe and disproportionate to the initial offence that attracted the penalty notice'.¹⁶⁰

Commission's conclusions

- 12.81 Submissions to this inquiry add to the existing support for extending the jurisdiction of the Children's Court to include traffic offences. We note the Government's undertaking, in its response to the 2010 Juvenile Justice Review, to give such consideration to this issue. We support such consideration by government and add our provisional support for the transfer of jurisdiction for traffic offences to the Children's Court, including where a young person court elects in relation to a penalty notice.

159. Youth Justice Coalition, *Submission PN34*, 21.

160. The Shopfront Youth Legal Centre, *Submission PN33*, 16.

13. People with cognitive and mental health impairments

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Introduction

- 13.1 The *Fines Further Amendment Act 2008* (NSW) introduced a number of measures to assist vulnerable people, including those with cognitive and mental health impairments, in their interaction with the penalty notice system. Reforms were introduced in relation to cautions, internal review, time-to-pay arrangements, and work and development orders (WDOs) to reduce the number of people receiving penalty notices, where appropriate, and to allow more flexible payment and mitigation options.
- 13.2 Our terms of reference required us to review whether penalty notices should be issued to people with an intellectual disability or cognitive impairment. In Consultation Paper 10 (CP 10)¹ we extended our review to include people with mental illness because, despite the significant differences between the two, there are similarities in the problems the two groups confront in relation to penalty notices. A significant number of people have both a mental illness and cognitive impairment and the preliminary submissions supported the inclusion of mental illness in our review.
- 13.3 Throughout this report, especially in Part Three, we make a number of recommendations concerning the issue, review and enforcement of penalty notices that will improve the way in which the penalty notice system operates in relation to vulnerable people, including people with cognitive and mental health impairments. In this chapter we first summarise the way in which the penalty notice system presently provides for people with mental health and cognitive impairments, and outline the recommendations we have made to improve the system in this respect. We then consider three additional issues:

1. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010).

- Should the definitions of mental illness and cognitive impairment in the penalty notice guidelines be updated?
- Should penalty notices be issued to people with mental illness or cognitive impairment at all? If not, how should such people be identified so as to exclude the use of penalty notices for this group?²
- Should a list be maintained of people who are eligible for automatic withdrawal of penalty notices on the basis of their mental health or cognitive impairment?³

The current penalty notice system and the recommendations of this report

- 13.4 The 2008 amendments to the *Fines Act 1996* (NSW) (*Fines Act*) introduced provisions, reflecting the existing practice of some agencies, to encourage cautioning in appropriate cases. Section 19A of the *Fines Act* requires officers who are making a decision about issuing a caution to have regard to applicable guidelines. For many agencies these are the Attorney General's Caution Guidelines,⁴ which provide that, where the issuing officer has reasonable grounds to believe that the person has a mental illness or intellectual disability, this should be taken into account in making a decision to issue a caution instead of a penalty notice.
- 13.5 Despite these provisions, there are continuing concerns that penalty notices are issued inappropriately to people with cognitive and mental health impairments. In Chapter 5 we recommend a number of changes to deal with this problem. First, we recommend that the Attorney General's Caution Guidelines be amended to provide a statement of principle about the need to prevent vulnerable people from becoming entangled in the penalty notice system.⁵ Second, we recommend that agencies provide training to issuing officers on the issues facing vulnerable people, including people with cognitive and mental health impairments.⁶ To ensure that cautions training is improved we recommend it be monitored by the proposed Penalty Notice Oversight Agency (PNOA), and that the PNOA play a role in supporting best practice.⁷ To improve the practice of agencies that do not use the Attorney General's Caution Guidelines, we recommend that all caution guidelines be made public and be monitored.⁸ We also make further recommendations aimed at monitoring and improving the practice of agencies in relation to the issuing of cautions.⁹
- 13.6 Internal review is particularly important for people with cognitive and mental health impairments. It may be difficult for an issuing officer to identify the impairment at the

2. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.1.
3. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.3.
4. NSW Department of Justice and Attorney General, *Caution Guidelines under the Fines Act 1996*.
5. Recommendation 5.2(1).
6. Recommendation 5.2(2).
7. Recommendation 5.2(4).
8. Recommendation 5.3.
9. Recommendation 5.4.

time of issuing a penalty notice, or the notice may be issued inappropriately, despite the impairment. Internal review provides an opportunity for the agency to withdraw a penalty notice. Section 24E(2)(d) of the *Fines Act* provides that a reviewing agency must withdraw a penalty notice if it finds that the person to whom it was issued, because of an intellectual disability, a mental illness, a cognitive impairment or homelessness, was unable to understand that the conduct constituted an offence, or was unable to control the conduct. The Attorney General's Internal Review Guidelines elaborate the meaning of these provisions, and provide definitions of mental illness, intellectual disability and cognitive impairment.¹⁰

- 13.7 In Chapter 7, we recommend a change to the test set out in s 24E(2)(d). In response to criticism of its severity, and the barriers it poses for people with cognitive and mental health impairments, we recommend that an applicant for review should be required to meet the lesser hurdle of demonstrating that his or her mental health or cognitive impairment was a contributing factor to the breach or led to a reduction in responsibility for the penalty notice offence.¹¹ We further recommend that the State Debt Recovery Office (SDRO) and other agencies review their internal review guidelines to make them consistent with the Attorney General's Internal Review Guidelines, and that they make their guidelines publicly available.¹² We recommend the monitoring of these guidelines, so that compliance in relation to people with cognitive and mental health impairments (as well as other groups) will be improved.¹³ We also recommend improvements to the training of reviewing officers, with a focus on the needs of vulnerable groups.¹⁴
- 13.8 Simplification of the requirements for supporting documentation required for internal review is also recommended.¹⁵ This should make it easier for people with cognitive and mental health impairments, and those who support them, to apply for a review.
- 13.9 Many people with cognitive and mental health impairments are in receipt of government benefits, and the recommendations in Chapter 8 relating to development of a fee waiver policy,¹⁶ and in Chapter 9 relating to the development of guidelines on time to pay,¹⁷ should assist those people with cognitive and mental health impairments who have difficulty meeting a financial penalty.
- 13.10 The WDO scheme provides a way for people with cognitive and mental health impairments to satisfy fine debts through unpaid work or certain courses or treatment. The Attorney General's WDO Guidelines define mental illness, cognitive impairment and intellectual disability for the purposes of eligibility, using the same definitions as those used in the Attorney General's Internal Review Guidelines.¹⁸

10. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [5.12]-[5.22].

11. Recommendation 7.2.

12. Recommendation 7.1(2).

13. Recommendation 7.1(3).

14. Recommendation 7.4.

15. Recommendation 7.7.

16. Recommendation 8.1.

17. Recommendation 9.1.

18. NSW Department of Justice and Attorney General, *Work and Development Order (WDO) Guidelines* [4.1] – [4.4].

We do not propose any relevant change to this system, which appears to be working very well.

- 13.11 However, in Chapter 9, we make recommendations to improve the system whereby penalty notice debts are written off. We propose public guidelines relating to writing off penalty notice debts and a reduction of the good behaviour period after a debt has been written off.¹⁹ We also recommend that write offs be made available in conjunction with other mitigation measures, such as time-to-pay arrangements and the completion of a WDO program.²⁰
- 13.12 In Chapter 18 we recommend that the SDRO establish a Penalty Notice Advisory Committee (PNAC), and that its focus be the enforcement issues that arise in relation to vulnerable people. We anticipate that the PNAC would have informed members to provide expert input on mental health and cognitive impairment.

Defining mental health and cognitive impairments

- 13.13 As discussed above, there is no definition of cognitive or mental health impairment in the *Fines Act*. Section 24E(2)(d), dealing with internal review of the issue of a penalty notice, refers to intellectual disability, mental illness and cognitive impairment without defining those terms. However, the Attorney General's Internal Review Guidelines provide definitions and the same definitions are used in the Attorney General's WDO Guidelines. These definitions are useful and inclusive. Examples of particular conditions that fulfill the definitions are provided. The definitional material in the guidelines no doubt provides important information and support to those implementing the *Fines Act*.
- 13.14 Defining cognitive and mental health impairment presents a number of challenges. One of these is that science regularly overtakes law, and legal definitions need to be updated to take these developments into account. For example, improved understanding of disabilities such as acquired brain injury and dementias, means that it is now desirable to include them in a definition of cognitive impairment. They are included in the explanatory material in the Attorney General's Internal Review Guidelines.²¹
- 13.15 The *Fines Act* refers separately to intellectual disability and cognitive impairment, and the guidelines follow this structure and provide separate definitions of the two conditions, as well as explaining how they are linked. Nevertheless it would conform better with accepted understanding if intellectual disability were to be included within the broader category of cognitive impairment.
- 13.16 The second challenge of definitions is that they are constructed with a particular purpose in mind, and a definition appropriate to one purpose may not be appropriate to another. The definition of mental illness adopted in the Attorney

19. Recommendation 9.7.

20. Recommendation 9.9(4)-(6).

21. However the guidelines refer separately to dementias and Alzheimer's disease.

General's Internal Review Guidelines is taken from s 4 *Mental Health Act 2007* (NSW) which provides that:

mental illness means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions,
- (b) hallucinations,
- (c) serious disorder of thought form,
- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).

13.17 This definition no doubt works well in the context of decisions about treatment of people with mental illness. However in the context of decisions about penalty notices, arguably its focus on symptoms could be confusing to a non-expert user, and its emphasis on the more severe manifestations of mental illness may exclude some whose condition should appropriately be taken into account when making a decision in relation to review of a penalty notice.

13.18 The Commission is presently undertaking a review of criminal law and procedure applying to people with cognitive and mental health impairments.²² In that context we have developed, and provisionally adopted, the following definitions to be used for decisions about bail, diversion and sentencing:

'Cognitive impairment' means an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.

Such cognitive impairment may arise from, but is not limited to, the following:

- Intellectual disability
- Borderline intellectual functioning
- Dementias
- Acquired brain injury
- Drug or alcohol related brain damage
- Autism spectrum disorders.

22. See generally: NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: an Overview*, Consultation Paper 5 (2010); NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper 6 (2010); NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Consultation Paper 7 (2010); NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Forensic Samples*, Consultation Paper 8 (2010); NSW Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultation Paper 11 (2010).

‘Mental health impairment’ means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.

Such mental health impairment may arise from, but is not limited to, the following:

- Anxiety disorders
- Affective disorders
- Psychoses
- Severe personality disorders
- Substance induced mental disorders.

13.19 Two terms in the proposed definition of ‘mental health impairment’ require further elaboration. First, ‘substance induced mental disorders’ is intended to include ongoing mental impairments (such as drug induced psychoses) caused by consumption of drugs, alcohol or other substances. It is intended to exclude people with substance abuse disorders (addiction to substances) or people who act when under the temporary effects of such substances.

13.20 Second, a personality disorder must be a severe disorder. The diagnosis of personality disorder is not without controversy in this context, because some personality disorders are diagnosed by reference to criminal behaviour. Used in the context of the criminal justice system, there is the potential for such a diagnosis to be circular (the person is criminal because he or she has a personality disorder, and has a personality disorder because of his or her criminal behaviour). Nevertheless, a severe personality disorder may, for example, cause self-harming or disruptive behaviours that need treatment and thus be relevant to a decision about whether a penalty notice is appropriate. In this context, therefore, we have included severe personality disorders in the definition of mental health impairment. This is consistent with the current provisions of the Attorney General’s Internal Review Guidelines and the Attorney General’s WDO Guidelines.

Commission’s conclusions

13.21 The proposed definitions set out above will be settled in the first report in our review of the criminal law and procedure applying to people with cognitive and mental health impairments, which will be delivered later this year. However, the definitions are contemporary and inclusive. They have been designed for use in the criminal justice system and there is accordingly a strong argument for their use in relation to penalty notice offences. Our proposed definitions do not differ markedly from the present definitions in the Attorney General’s Internal Review Guidelines and the Attorney General’s WDO Guidelines, but would update and improve upon those definitions.

13.22 Accordingly, we recommend that these definitions be adopted in the existing guidelines and that they be used, where relevant, in new penalty notices guidelines, including those developed as a result of recommendations in this report.

Recommendation 13.1

All penalty notice guidelines should adopt the terms ‘mental health impairment’ and ‘cognitive impairment’, and define them as follows:

- (a) ‘Cognitive impairment’ means an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following:
- (i) intellectual disability
 - (ii) borderline intellectual functioning
 - (iii) dementias
 - (iv) acquired brain injury
 - (v) drug or alcohol related brain damage
 - (vi) autism spectrum disorders.
- (b) ‘Mental health impairment’ means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent. Such mental health impairment may arise from, but is not limited to, the following:
- (i) anxiety disorders
 - (ii) affective disorders
 - (iii) psychoses
 - (iv) severe personality disorders
 - (v) substance induced mental disorders.

Should penalty notices be issued to people with mental health and cognitive impairments?

- 13.23 In CP 10 we noted the continuing problems that people with mental health and cognitive impairments experience with penalty notices, and asked whether penalty notices should be issued to this group of people. Stakeholders expressed divergent views in response to this question.²³

Limited deterrent effect and ability to control behaviour

- 13.24 One argument made against issuing penalty notices to people with cognitive and mental health impairments is that people with such impairments do not understand penalty notices and they have no impact in changing their behaviour. In its interim

23. Holroyd City Council, *Submission PN10*, 19; Illawarra Legal Centre, *Submission PN27*, 18; The Shopfront Youth Legal Centre, *Submission PN33*, 13; Redfern Legal Centre, *Submission PN26*, 7; Local Government and Shires Association of NSW, *Submission PN16*, 2; The Law Society of NSW, *Submission PN31*, 12.

report on fines and penalty notices, the Sentencing Council reported that many people with mental health and cognitive impairments do not recognise the seriousness of penalty notices and may not understand the nature of the process. To many recipients, the penalty is simply seen as 'a piece of paper that can be thrown away'.²⁴ Moreover, poor understanding about the value and significance of money makes financial sanctions 'fairly meaningless' and robs them of their educative power.²⁵ The Sentencing Council reported that people with an intellectual disability

may make poor choices about their use of income they receive (which is almost invariably income support received through the disability pension), especially if they are without family or carer support. They tend not to plan and generally demonstrate poor understanding of budgeting and the relative value of money, with the result that the fining exercise can be rendered meaningless. This lack of understanding, rather than reducing recidivism, may result in mounting debt, fine default and eventual incarceration for non-payment.²⁶

- 13.25 Submissions to this reference also indicated that many people with cognitive and mental health impairments find it very difficult to fully comprehend and comply with their legal obligations,²⁷ and do not understand that they have committed an offence or the gravity of the ramifications arising from failure to pay a penalty imposed pursuant to a notice.²⁸
- 13.26 Some people with cognitive impairment, regardless of how much legal advice is provided, will never be able to understand what a penalty notice is, why they received it or how to respond to it. A number of stakeholders expressed the view that there is limited deterrent value in issuing a penalty notice to people with a mental health or cognitive impairment.²⁹ According to one submission, many people in this group 'will continue to incur fines no matter what official action is taken against them'.³⁰

Case study

Gustav is a client of the Intellectual Disability Rights Service (IDRS) and is in his mid-20s. He has a mild intellectual disability and has been in and out of prison since adolescence for minor property, drug possession and public order offences, arising out of his drug addiction. Because of these

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24. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.92]. This was supported in the Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.
25. Frances Roberts, NSW Department of Ageing, Disability and Home Care (12 April 2006), NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.90].
26. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.88].
27. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 6; Legal Aid NSW, *Submission PN11*, 22; Redfern Legal Centre, *Submission PN26*, 7.
28. Redfern Legal Centre, *Submission PN26*, 7; NSW Industry and Investment, *Submission PN37*, 8.
29. NSW Food Authority, *Submission PN9*, 10; Illawarra Legal Centre, *Submission PN27*, 18; Department of Human Services NSW, Ageing, Disability and Home Care, *Submission PN13*, 1; NSW Land and Property Management, *Submission PN17*, 13; G Henson, *Submission PN5*, 5.
30. The Shopfront Youth Legal Centre, *Submission PN33*, 19.

circumstances, he has been unemployed and homeless for most of his adult life.

His disability has left him with an awkward gait, which regularly brings him to the attention of police and other law enforcement officers. He has accumulated thousands of dollars of penalty notices for offences such as riding a bike without a helmet and travelling on trains without a ticket.

The prospects of his being employed or having a driver licence in the foreseeable future are slim. Issuing more penalty notices will most likely have very little, if any, deterrent effect, nor will it result in the payment of any of the penalties.³¹

13.27 However, stakeholders made an important distinction between 'impairment' and 'incapacity'. Some people, perhaps especially people with a severe cognitive impairment, do not understand basic social concepts and rules and this may lead to offending behaviour. For example, a person who does not understand what a train or bus fare is lacks capacity and will be unable to avoid offending behaviour. Under the existing provisions of the *Fines Act* and guidelines discussed above, he or she should not be issued with a penalty notice or, if one is issued, it should be withdrawn.

13.28 Nevertheless, as NSW Trustee and Guardian (NSWTG) emphasised:

it is possible to have a mental illness and/or cognitive impairment and still have capacity for understanding society's rules and appreciating the consequences of one's actions.³²

NSWTG reflected that the challenge is to find the appropriate balance between allowing people with a disability to participate in society, while also providing protection from experiences that, due to their lack of capacity, they cannot understand.³³ The NSW Disability Discrimination Legal Centre emphasised the importance of recognising the participation of people with a disability in the community, submitting that penalty notices should apply to people with mental illness and cognitive impairment, based on the rule of law and principle of non-discrimination.³⁴

13.29 As we heard in consultation, many people with mild or borderline intellectual disability are able, with appropriate support, to understand and control their offending behaviour. According to NSWTG, it may sometimes be appropriate and beneficial, from an educational perspective, for people with mental health and cognitive impairments to experience the consequences of their actions.³⁵ For example, we heard from community and prisoners' groups that penalty notices may operate as a valuable form of early intervention. Penalty notices provide a mechanism to alert guardians and carers as to the commission of antisocial behaviour by people in their care that, left unchecked, could develop into more serious offending conduct.³⁶ In order to ensure the continued independence of

31. Intellectual Disability Rights Service, *Preliminary Submission PPN8*, 17-18.

32. NSW Trustee and Guardian, *Submission PN14*, 6-7.

33. NSW Trustee and Guardian, *Submission PN14*, 6-7.

34. NSW Disability Discrimination Legal Centre, *Submission PN8*, 4.

35. NSW Trustee and Guardian, *Submission PN14*, 7.

36. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

people with mental health and cognitive impairments in the community, it is important not to reinforce or provide tacit support for the commission of antisocial or offending behaviour without consequences.³⁷

- 13.30 However, the Department of Human Services NSW, Ageing, Disability and Home Care (ADHC)³⁸ was less sanguine about the educative effect of penalty notices:

In some cases people with an intellectual disability are able to learn appropriate behaviour ... however they often learn differently and more slowly. They respond best to a positive behaviour support approach. They are not likely to learn appropriate behaviour from the issue and enforcement of penalty notices.³⁹

- 13.31 The Homeless Persons' Legal Service (HPLS) was of the view that a blanket policy against issuing penalty notices to people with mental illness or cognitive impairment would be impossible to implement, especially in relation to people with a mental illness.⁴⁰ While some people have ongoing symptoms, many others experience mental illness intermittently and with varying degrees of severity.⁴¹ Another submission noted that whether a penalty notice is appropriate or fair turns in many cases on the degree, type and stage of the person's impairment at the time of the offence.

- 13.32 Mental illness, due to its episodic and fluctuating nature, will not always be manifest at the time of the offending behaviour or issue of a penalty notice. We heard from community groups and service providers that a person may have capacity to comply with the law on some occasions but not necessarily on others.⁴² This may be the case also for people with cognitive impairments. For example, people with an intellectual disability may generally understand and remember to buy a ticket when travelling on a train but when they are at an unfamiliar station; when it suddenly starts raining; when they are in a rush; or when they are afraid for their safety, they may feel overwhelmed and forget to do so.

Reduced capacity to pay or to respond to a penalty notice

- 13.33 The Sentencing Council has noted that people with mental health and cognitive impairments are 'particularly disadvantaged by the imposition of fines or penalty notices' due to issues of unemployment, or due to their inability to deal with the courts or the SDRO. They are often unable to pay their penalty notices and all of these problems are exacerbated by insufficient advisory or support services.⁴³

37. NSW Trustee and Guardian, *Submission PN14*, 7.

38. Now part of NSW Department of Family and Community Services, Ageing, Disability and Home Care.

39. Department of Human Services NSW, Aging, Disability and Home Care, *Submission PN13*, 1.

40. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 23.

41. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 23.

42. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

43. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.85].

- 13.34 The Intellectual Disability Rights Service (IDRS) has made similar observations, notably that limited educational opportunities mean that many people with intellectual disabilities are more reliant on income support, generalist social services and more specialised disability assistance.⁴⁴
- 13.35 The Law and Justice Foundation found that people with mental health issues face a range of barriers to accessing legal assistance, including a lack of awareness about their legal rights, being disorganised or overwhelmed, having a mistrust of legal service providers, challenging behaviour, poor communication skills and lack of access to appropriate treatment and care.⁴⁵ On a more systemic level, the Foundation also noted the limited availability of affordable legal services, time constraints on service providers, geographical barriers for people in remote, rural and regional areas, and the perceived lack of credibility attaching to people with such impairments.⁴⁶
- 13.36 Stakeholders in submissions and consultations to this inquiry also emphasised that many people with cognitive and mental health impairments have limited financial means, often relying on Centrelink as a primary source of income, and are limited in their capacity to understand the nature of the penalty notice.⁴⁷ The Department of Community Services (Community Services)⁴⁸ submitted that people with mental health or cognitive illness are 'unlikely to have the financial capacity to pay the penalty notice amounts'.⁴⁹

High visibility and poor conflict management skills

- 13.37 Factors such as unemployment, homelessness and boredom mean that some people with mental health and cognitive impairments are likely to spend more time in public spaces; while deviation from narrow conceptions of 'appropriate social behaviour'⁵⁰ means that they are more likely to be approached in the street by issuing officers.⁵¹ A person with a mental or cognitive impairment may have difficulty understanding a conflict or dealing with a stressful situation and may well lack

44. Intellectual Disability Rights Service Inc, Coalition on Intellectual Disability and Criminal Justice, NSW Council for Intellectual Disability, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008) 14.

45. M Karras, E McCarron, A Gray and S Ardasinski, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW*, Law and Justice Foundation of New South Wales (2006) ch 4.

46. M Karras, E McCarron, A Gray and S Ardasinski, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW*, Law and Justice Foundation of New South Wales (2006) ch 5.

47. The Shopfront Youth Legal Centre, *Submission PN33*, 13. NSW Department of Community Services, *Submission PN36*, 10; NSW Legal Aid, *Submission PN11*, 22; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 6.

48. Now NSW Department of Family and Community Services.

49. NSW Department of Community Services, *Submission PN36*, 10.

50. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 3.

51. Intellectual Disability Rights Service Inc, Coalition on Intellectual Disability and Criminal Justice, NSW Council for Intellectual Disability, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008) 71.

resources to assist him or her to learn conflict-handling skills. For example, where a person is questioned on the street, fear and confusion can lead the person to say something that may be unintentionally inappropriate or may be misinterpreted. This can lead to an argument or misunderstanding escalating to the issuing of a penalty notice.⁵²

- 13.38 In our consultations, some stakeholders expressed the view that police and issuing officers sometimes talk to people in an intimidating or authoritarian manner – or at least it is perceived as such – which is ineffective and confrontational when dealing with those who have cognitive and mental health impairments. Consultations with community groups indicated that some people with intellectual disabilities feel as though they are ‘easy targets’ and are singled out by certain issuing officers, particularly for transit and rail offences, even when it is known that the person has an intellectual disability.⁵³

Challenges of identification

- 13.39 If it were to be provided that penalty notices should not be issued to people with cognitive and mental health impairments, then it would be necessary to identify people with such impairments with a high degree of certainty, preferably before a notice is issued. However this poses challenges. Previous inquiries have concluded that many officers who issue penalties are unable to ascertain from appearance alone whether the person they are dealing with has a disability and when it might be appropriate to exercise their discretion by not issuing a penalty notice.⁵⁴
- 13.40 We heard in consultation that identifying people with mental health and cognitive impairments is ‘genuinely difficult’.⁵⁵ Transport NSW⁵⁶ acknowledged that it was difficult for RailCorp transit officers to assess, at the time of issuing, whether the person has a mental illness or cognitive impairment.⁵⁷ Community Services acknowledged that it may not always be apparent to an enforcement officer that the person has an intellectual or cognitive impairment, or a serious mental illness.⁵⁸ Holroyd City Council said that it is difficult for a field officer to make such a

52. Intellectual Disability Rights Service Inc, Coalition on Intellectual Disability and Criminal Justice, NSW Council for Intellectual Disability, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008) 14.

53. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011.

54. Homeless Persons’ Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 12.

55. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011; Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011; Vulnerable People Roundtable Meeting, *Consultation PN11*, Sydney NSW, 10 February 2011; Homeless Persons’ Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011. See generally NSW Law Reform Commission, *People with Intellectual Disability in the Criminal Justice System*, Report 80 (1996).

56. Now Transport for NSW.

57. Transport NSW, *Submission PN30*, 3.

58. NSW Department of Community Services, *Submission PN36*, 9.

determination on the evidence available at the time the person is first spoken to.⁵⁹ NSW Industry and Investment⁶⁰ noted that often identification of impairment would not occur until after a penalty notice is issued and a carer or family member assists in submissions on behalf of the person.⁶¹

- 13.41 Most submissions on this question raised concerns about the challenges that issuing officers would face in identifying people with a mental illness or cognitive impairment.⁶² Identification may require a level of judgment about a person's vulnerability, which can be difficult without independent evidence or appropriate training, particularly in the context of issuing a penalty notice where contact is generally brief.⁶³
- 13.42 One suggestion was that issuing officers could be assisted by the production of identifying material, whether in the form of evidence about a person's Centrelink entitlements⁶⁴ or other income support documents,⁶⁵ or by making greater use of existing health care and concession cards.⁶⁶ However, in consultations community groups were not confident about the usefulness of such an approach. People with intellectual disabilities, even where they have a health care card or a pension card, may forget to carry them or feel too intimidated to present one when asked. In one case, a parent of a young man with a mild intellectual disability said that the only way her son would remember his identification would be to 'tattoo it to his wrist'.⁶⁷
- 13.43 Identifying and dealing with people with impairments is supported by effective training and appropriate attitudes to marginalised sections of the community. However it has been argued that such attitudes are not always present.⁶⁸ Certainly consultations for this inquiry revealed many complaints about the attitude and apparent lack of knowledge of some issuing officers, especially in the context of transport offences.

Commission's conclusions

- 13.44 Currently, a person's cognitive or mental health impairment is a factor to be taken into account when issuing a penalty notice and is a reason to withdraw a notice that has been issued. We do not consider that this approach should be replaced by a policy against issuing penalty notices to people with mental health and cognitive

59. Holroyd City Council, *Submission PN10*, 19.

60. Now the NSW Department of Trade and Investment, Regional Infrastructure and Services.

61. NSW Industry and Investment, *Submission PN37*, 8.

62. NSW Food Authority, *Submission PN9*, 10; Local Government and Shires Association of NSW, *Submission PN16*, 2. Redfern Legal Centre, *Submission PN26*, 7.

63. Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 6. Maritime NSW, *Submission PN2*, 16. Sydney Olympic Park Authority, *Submission PN6*, 2.

64. G Henson, *Submission PN5*, 5.

65. Disability Advisory Council of NSW, *Consultation PN30*, Sydney NSW, 8 June 2011.

66. Redfern Legal Centre, *Submission PN26*, 8.

67. Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011.

68. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.34].

impairment. We believe that such an approach is both inappropriate and unlikely to be effective.

- 13.45 A blanket policy against issuing penalty notices in such cases is not appropriate because it treats people with cognitive and mental health impairments as a homogenous group who all lack capacity, when this is not the case. Many people with such impairments can and do understand what is required of them and avoid offending. However, if they do offend, it is appropriate that the penalty notice system respond in an informed and appropriate way to their situation. We have outlined above the numerous recommendations we have made to ensure that the penalty notice system works better to achieve this end.
- 13.46 Prohibiting the issue of penalty notices to people with cognitive and mental health impairments is unlikely to be effective because of the difficulties of identifying such people. While some of the arguments in favour of prohibition concern the poverty of people with cognitive and mental health impairments, these arguments apply with equal force to other vulnerable groups who may also suffer economic hardship and find it difficult to navigate the penalty notice system or to access help. These would be better addressed through the fine mitigation measures that are dealt with in Chapter 9 rather than by amending the law to preclude penalty notices from being issued to people with cognitive and mental health impairments.
- 13.47 However, there are some people with cognitive and mental health impairments who do not have the capacity to understand offending behaviour and who are unlikely ever to have such capacity. It is appropriate to make special arrangements for such people and we make recommendations to this effect below.

An ‘automatic withdrawal’ list

- 13.48 In CP 10, we asked whether a list should be maintained of people who are eligible for automatic withdrawal of penalty notices on the basis of mental health or cognitive impairment.⁶⁹ Such a list could potentially have several functions. It could identify a person who has an ongoing impairment resulting in a lack of sufficient capacity to understand offending behaviour, and who is unlikely to have the capacity in the future. For such people, automatic withdrawal of a penalty notice would be triggered.
- 13.49 The list could also identify cases where the person is known to have a disability, and alert the SDRO or issuing agency to the need to proactively conduct an internal review, or to take other action. For example, the SDRO may have listed a person with an intellectual disability who is known to travel on trains without tickets repeatedly. With that knowledge, it could withdraw all such penalty notices. However, if a penalty notice were to be issued to that person for failure to vote, further inquiries may be necessary.

69. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 7.3.

- 13.50 We heard in consultation that the SDRO is developing a memorandum of understanding with NSW TG to deal with such issues.⁷⁰ We were also told of informal arrangements between some government agencies and the SDRO to identify and respond to cases where, due to the recipient's known mental health or cognitive impairment, a penalty notice should not have been issued or should not proceed to enforcement. For example, we heard that ADHC has developed an informal practice of notifying the SDRO in situations where clients have received a penalty notice that, due to a cognitive impairment, they are unable to understand or pay.⁷¹ The SDRO may withdraw such penalty notices following such contact from an ADHC officer.

Submissions and consultations

- 13.51 There was opposition in submissions and consultations to the idea that the SDRO maintain a 'list' of people with cognitive and mental health impairments. Some stakeholders suggested that such a list:
- could 'promote stigmatisation, marginalisation and further alienation from the mainstream community', especially for those with mental illness⁷²
 - may raise privacy issues and the 'potential for harm should the list fall into the wrong hands is great'⁷³
 - 'does not address the needs of clients with fluctuating capacity', and⁷⁴
 - creates the potential for abuse if extended broadly and without good evidence.
- 13.52 However, there was support instead for a 'flagging' or notation system that could be tailored to respond to the circumstances facing people with mental health and cognitive impairments. This suggestion envisages that the SDRO would maintain a 'flag' on an individual's file. When an SDRO officer opens that person's file in relation to enforcement of a penalty notice, the file would indicate that the recipient has an impairment that would either justify the withdrawal of any penalty notices issued or would alert the SDRO to the need to take further action. One stakeholder suggested that the 'flag' would alert an officer to the need to follow up the matter and, where appropriate, pass it on to a specialised social support team within the SDRO to enable better assistance where desirable.⁷⁵
- 13.53 While there was support for this proposal,⁷⁶ stakeholders indicated that for any system of data collection to be effective it must incorporate two key features. First,

70. People with Mental Health and Cognitive Impairment Roundtable Meeting, *Consultation PN6*, Sydney NSW, 27 January 2011.

71. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011.

72. NSW Trustee and Guardian, *Submission PN14*, 8-9. See also Redfern Legal Centre, *Submission PN26*, 9; The Law Society of NSW, *Submission PN31*, 12.

73. Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 24.

74. NSW Trustee and Guardian, *Submission PN14*, 8.

75. Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011.

76. Redfern Legal Centre, *Submission PN26*, 9; Homeless Persons' Legal Service, *Submission PN42*, 10; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 24.

issues of privacy and confidentiality should be addressed.⁷⁷ Second, the system should be on an 'opt-in' basis, requiring the client or legal guardian to give their express consent to being 'flagged'.⁷⁸

- 13.54 No consensus emerged on the question of eligibility, even in relation to a flagging system. There was various support for both a broad and narrow approach, with the following identified as potential options:
- determining eligibility according to the definitions of intellectual disability, cognitive impairment and mental illness provided for in the Attorney General's Internal Review Guidelines⁷⁹
 - importing a rebuttable presumption that a person in receipt of a disability support pension should be entitled to automatic annulment of a penalty notice, and⁸⁰
 - restricting eligibility to people with a continuing cognitive impairment that is unlikely to improve.⁸¹

Commission's conclusions

- 13.55 There is a limited group of people who have impairments and who do not understand the nature and consequences of their behaviour. They repeatedly commit minor offences, such as travelling on trains without tickets and, as a result, receive multiple penalty notices. It is a waste of resources to attempt to enforce penalty notices against them. An internal notation or flagging system to identify those people who would be eligible for automatic withdrawal of their penalty notices appears to be a fair and efficient approach to dealing with this group. Indeed it would appear that the SDRO already operates such a system. We support the further development of such a system and recommend that its availability be publicised to the relevant stakeholders.
- 13.56 The system should require the consent of the person, or his or her legal guardian, to be 'flagged' on the SDRO system. The applicant, or his or her legal guardian, would be required to provide evidence that the person:
- has a mental health or cognitive impairment
 - the impairment is unlikely to improve in the foreseeable future, and
 - the impairment is a contributing factor to offending behaviour or reduces that person's responsibility for the offending behaviour.
- 13.57 Once a 'flag' is placed on a file the SDRO should be able to automatically withdraw any future penalty notice and take no enforcement action against the person,

77. Legal Aid NSW, *Submission PN11*, 22. The *Health Records and Information Privacy Act 2002* (NSW) would appear to apply in these circumstances.

78. Redfern Legal Centre, *Submission PN26*, 9; The Shopfront Youth Legal Centre, *Submission PN33*, 20.

79. Legal Aid NSW, *Submission PN11*, 22.

80. NSW Disability Discrimination Legal Centre, *Submission PN8*, 4.

81. Legal Aid NSW, *Submission PN11*, 22.

without requiring further evidence or the need for an application for internal review or annulment. The SDRO should inform the recipient, or his or her guardian, as well as the relevant issuing agency, that it has taken this step.

- 13.58 Privacy legislation should be taken into consideration in developing the system. However, in this context we note that it is proposed that the consent of the person, or his or her guardian, will be provided in relation to information supplied to SDRO about the person's disability.

Recommendation 13.2

The State Debt Recovery Office should establish and publicise a system whereby:

- (a) a person, or his or her legal guardian, may apply for that person to be identified as eligible for automatic withdrawal of any penalty notice on the grounds that he or she
 - (i) has a mental health or cognitive impairment, and
 - (ii) the impairment is unlikely to improve in the foreseeable future, and
 - (iii) the impairment is a contributing factor to the commission of the offence or reduces the person's responsibility for the offending behaviour.
- (b) the State Debt Recovery Office may, upon determination that a person is eligible for automatic withdrawal of any penalty notice on the grounds set out in (a), withdraw any outstanding or future penalty notices without further application.
- (c) the State Debt Recovery Office may, where it is satisfied that the grounds set out in (a) no longer apply, determine that the person is no longer eligible for automatic withdrawal of any penalty notice.

Transport-related penalty notices

- 13.59 The issue of transport-related penalty notices to people with disabilities, especially to people with cognitive impairments, was frequently raised throughout this inquiry. It is clear that a great deal of resources are being expended by government departments, non-government organisations, legal services, the SDRO, individuals, and their families, in dealing with penalty notices issued to people in this group. The recommendations in this report to improve training and other aspects of the penalty notice system may resolve some of these problems. However, the focus of submissions and consultations on transport offences was so strong that initiatives specific to transport were suggested by some stakeholders.
- 13.60 Legal Aid NSW (Legal Aid) suggested giving a free travel pass to people with significant mental health and cognitive impairments where penalty notices are unlikely to be a deterrent.⁸² The NSW Disability Discrimination Legal Centre also suggested that a free travel pass be issued for people under 'financial management

82. Legal Aid NSW, *Submission PN11*, 24.

orders'.⁸³ The Disability Advisory Council argued that for people who cannot understand offending, or how to avoid offending repeatedly, it would be cheaper to give them a travel pass than to issue penalties that are not enforceable.⁸⁴ A free transport pass scheme, funded by local councils, has operated in London since 1984 for people over 65 years of age and those with a disability (including an intellectual disability).⁸⁵ We note that media reports in NSW have raised at least one case of ministerial intervention to secure free travel for a person with a disability repeatedly issued with penalty notices.⁸⁶

- 13.61 There are arguments against free travel passes for people with disabilities. First, comprehensive travel passes are expensive to issue and administer. Second, consultations with community groups also suggested that such an approach could be of limited benefit for people who are generally forgetful or do not understand the need to purchase or carry a travel pass. One mother of a 19-year-old man with an intellectual disability explained that her son travels on trains compulsively. She said that, even when she purchases a weekly or monthly pass for him, and presses upon him the need to carry it while travelling, he routinely forgets the pass and receives penalty notices for travelling without a ticket.⁸⁷

Commission's conclusions

- 13.62 We note the concerns expressed during this inquiry about travel-related penalty notices and their impact on vulnerable people, especially people with cognitive and mental health impairments. While it is beyond the scope of this inquiry to recommend the introduction of travel passes, we note that, from a whole of government perspective, this may be a cost effective step in some cases. The issue of forgetfulness or loss of travel passes is real for some people, and so a register of who holds such passes would provide an instant evidentiary basis for the withdrawal of a penalty notice issued to pass holders. We particularly commend the relevant discussion and recommendations in this report to the attention of Transport for NSW.

83. NSW Disability Discrimination Legal Centre, *Submission PN8*, 4.

84. Disability Advisory Council of NSW, *Consultation PN30*, Sydney NSW, 8 June 2011.

85. London Councils, *Freedom Pass* <<http://www.londoncouncils.gov.uk/services/freedompass/>>.

86. H Aston and A Chesterton, 'Disabled man 'bullied' over train fare fine', *The Daily Telegraph* (Sydney), 15 May 2007. A man with an intellectual disability, described as having a mental age of 8, had accumulated \$1150 in penalties for fare evasion or for having the incorrect ticket. He travelled by train every day to his employment for a weekly wage of just \$73. He had no understanding of what a fare was and hence no concept of fare evasion. When an appeal to the SDRO for a write off was unsuccessful, the man's father sought the then Transport Minister's help. The Minister reportedly asked RailCorp to put in place arrangements for the man to travel without penalty in the future.

87. Intellectual Disability Rights Service Clients Roundtable Meeting, *Consultation PN19*, Sydney NSW, 3 March 2011.

14. Homeless people

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Introduction

- 14.1 Homelessness involves a complex set of circumstances and is not just a 'lack of bricks and mortar'¹ or adequate housing. Anne Coleman provides a very inclusive view of homelessness, describing it as 'having no legitimacy or control over the spaces in which one lives'.² While it is often equated with not having a roof over one's head, homelessness is a 'continuum of experience'³ in which people move between different levels of more or less secure accommodation throughout their lives.
- 14.2 In Australia, two widely accepted definitions are used. Chamberlain and MacKenzie define primary, secondary and tertiary levels of homelessness.⁴ Primary homelessness is equivalent to sleeping rough, including living on the street in improvised dwellings. Secondary homelessness, also known as those states in which people are 'at risk' of becoming homeless,⁵ describes temporary arrangements where people move frequently from one form of shelter to another, including emergency or transitional accommodation, and staying with family and friends. Tertiary homelessness refers to people who live in boarding houses on a

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1. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 6.
 2. A Coleman, 'Five Star Motels: Spaces, Places and Homelessness in Fortitude Valley Brisbane', draft PhD Thesis, School of Social Work and Social Policy, University of Queensland (2000), quoted in P Memmott, S Long and C Chambers, *Positioning Paper, Categories of Indigenous 'Homeless' People and Good Practice Responses to Their Needs*, Australian Housing and Urban Research Institute (2003) 20.
 3. P Memmott, S Long and C Chambers, *Positioning Paper, Categories of Indigenous 'Homeless' People and Good Practice Responses to Their Needs*, Australian Housing and Urban Research Institute (2003) 15.
 4. C Chamberlain and D MacKenzie, *Counting the Homeless Australia 2006*, Australian Census Analytic Program (2008) vii.
 5. P Memmott, S Long and C Chambers, *Positioning Paper: Categories of Indigenous 'Homeless' People and Good Practice Responses to Their Needs*, Australian Housing and Urban Research Institute (2003) 15.

medium- to long-term basis (13 weeks or longer), where accommodation is not self-contained and there is no security of tenure.⁶

14.3 The *Supported Accommodation Assistance Act 1994* (Cth) defines a homeless person as one who has inadequate access to safe, secure, adequate housing.⁷ A person is considered to be in this situation when the only housing to which they have access:

- damages, or is likely to damage, the person's health
- threatens the person's safety
- marginalises the person through failing to provide access to adequate personal amenities or the economic and social supports that a home normally affords, or
- places the person in circumstances which threaten or adversely affect the adequacy, safety, security, or affordability of that housing.

14.4 These definitions capture a significant group of people. The 2006 Census indicated there were 27,374 homeless people in NSW.⁸ The Census also revealed where homeless Australians are staying:

- 44% are staying temporarily with relatives and friends
- 20% are living in boarding housings and other temporary accommodation
- 18% are sleeping rough on the streets of our cities and towns
- 18% find a bed in the homeless service system.⁹

14.5 Homeless people generally share a number of traits: they are predominantly young;¹⁰ have low levels of literacy and education; and experience some level of disability, mental illness, poor physical and mental health, abuse of alcohol and other drugs, or histories of trauma.¹¹ The Bulk Debt Negotiation Project found that 18.54% of its clients had more than one indicator of disadvantage in their life, including ill health, mental health and cognitive impairments, homelessness, unemployment and low income. Of the 52 clients in this project who were homeless, 35 were experiencing multiple indicators of disadvantage.¹² This has particular consequences for homeless people caught up in the penalty notice system.

6. C Chamberlain and D MacKenzie, *Counting the Homeless Australia 2006*, Australian Census Analytic Program (2008) 3-4.

7. *Supported Accommodation Assistance Act* (1994) (Cth) s 4.

8. C Chamberlain and D MacKenzie, *Counting the Homeless Australia 2006*, Australian Census Analytic Program (2008) x. The Census uses the Chamberlain and MacKenzie definition of homelessness.

9. Homelessness Australia, *Homelessness in Australia: Factsheet* (2011).

10. C Chamberlain and D MacKenzie, *Counting the Homeless Australia 2006*, Australian Census Analytic Program (2008) 27.

11. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) xviii, 122-26.

12. D Nelthorpe and K Digney, *The Bulk Debt Negotiation Project: Client Profiles and Project Outcomes*, West Heidelberg Community Legal Service (2011) 13.

Homelessness and penalty notices

- 14.6 Many everyday activities which would be legal if done in a private home, such as consuming alcohol¹³ or sleeping, attract penalty notices when done in a public place. The Law and Justice Foundation in 2005 reported that homeless people who sleep on the street are more likely to be stopped or searched as part of 'rigorous policing practices'¹⁴ and are often charged with what amount to 'survival' offences such as fare evasion when sleeping on a train to keep warm.¹⁵

Case study

A client of the Homeless Persons' Legal Service (HPLS), who had lived on the streets for seven years, would travel by train to undertake his mutual obligation activities in order to receive his unemployment payments from Centrelink. His fortnightly payments amounted to less than \$400. After allowing for rent, food and cigarettes, he would sometimes not have enough money left to purchase a train ticket. At such times he would take a calculated risk and travel without a ticket in order to avoid 'being breached' for failing to perform his Centrelink obligations. He considered it illogical and self-defeating to issue a \$200 penalty notice to a person who did not have \$3 to pay for the ticket in the first place.

- 14.7 Homeless people are less likely to address their penalty notices for a number of practical reasons. As a preliminary matter, many homeless people have no permanent postal address. This means that they are often not aware of or able to keep track of their outstanding penalty notices. This can lead to an accumulation of debt over a longer period of time and an escalation of enforcement costs or sanctions, including driver licence disqualification.¹⁶ The need for written documentation also becomes a challenge for those who have no safe place to keep paperwork.
- 14.8 Moreover, penalty notices generally make up only one form of debt facing the homeless population; many also have housing-related debt,¹⁷ mobile phone debt,¹⁸ overdrawn accounts or Centrelink debt.¹⁹ A survey by the Law and Justice Foundation found that almost three times the number of homeless people had debt

13. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 8.

14. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 110. This occurs notwithstanding the repeal in 1970 of the *Vagrancy Act 1902 (NSW)* and the repeal in 1979 of s 22 of the *Summary Offences Act 1970*.

15. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 106.

16. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 106.

17. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 81-82.

18. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 96.

19. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 96.

problems compared to other respondents.²⁰ In 2010, a study by Queensland's Public Interest Law Clearing House looked at the debt histories of 36 homeless people and found that the average debt was \$5462.51. The amount of debt ranged from \$343 to \$22,108.51, with only four debts under \$1000. At an instalment rate of \$10 per fortnight, assuming no further fines or charges were incurred, a median debt of \$3018.26 would take almost 12 years to satisfy.²¹

- 14.9 Further, many people are negotiating issues arising out of disputes relating to family breakdowns and property settlements.²² Some are engaged with the legal system as either a victim or perpetrator of crime, including domestic violence.²³ Others are facing discrimination in employment, tenancy or consumer law.²⁴ The matrix of interrelated legal issues can be overwhelming and seem insurmountable. As a result, many homeless people consider their legal issues, including those arising out of the receipt of penalty notices, as merely a 'part of life'²⁵ rather than issues that can or should be addressed.²⁶ Unless there is an immediate crisis, legal needs and penalty notices are often very low on a homeless person's list of priorities.
- 14.10 As the Law and Justice Foundation observed, 'it is difficult to separate legal issues from these complex needs and issues'.²⁷ Homeless people are generally reluctant to, or feel intimidated to, seek help with their legal issues due to the confusion, complexity and formality of the legal system. There is a widespread fear and lack of confidence in the legal system, and a particular perception that the legal system is not there to assist them. Through indecision, avoidance or not wanting to complicate issues further, homeless people often carry on with life and leave their legal issues unresolved.²⁸

How does the penalty notice system respond to the needs of homeless people?

- 14.11 As a result of the *Fines Further Amendment Act 2008* (NSW), the penalty notice system now contains a number of provisions specially adapted to respond to the needs and circumstances of vulnerable groups. These are considered in chapters 5,

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20. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 95.
21. Queensland Public Interest Law Clearing House Incorporated, Homeless Persons' Legal Clinic, *The fines enforcement regime in Queensland for people experiencing homelessness: Options for change* (2011) 7-8.
22. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 67.
23. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 71.
24. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 91.
25. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005)128.
26. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005)116.
27. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) xviii.
28. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005)116.

7 and 9 of this report. Those measures of particular relevance to homeless people are summarised below.

- 14.12 First, s 19A of the *Fines Act 1996* (NSW) (*Fines Act*) provides that an issuing officer may give an official caution instead of a penalty notice in appropriate cases. The Attorney General's Caution Guidelines state that, in determining whether it is appropriate to issue a caution, it is relevant to consider whether 'the officer has reasonable grounds to believe that the person is homeless'.²⁹ This is consistent with the approach taken in the *Protocol for Homeless People in Public Places*, which states that homeless people should be 'left alone' unless they request assistance, appear to be distressed or in need of assistance, or their behaviour threatens their safety or the safety and security of others, or is likely to result in damage to property or the environment.³⁰
- 14.13 Second, s 24E(2)(d) of the *Fines Act* imposes an obligation on all reviewing officers, when conducting internal reviews, to withdraw a penalty notice where the applicant was homeless and therefore unable to understand or control the conduct constituting the offence.³¹ Similarly, under s 24E(2)(e), the reviewing officer may withdraw a penalty notice where an official caution should have been issued, having regard to the Attorney General's Caution Guidelines. This would allow a penalty notice to be withdrawn where the person was homeless but this was not evident at the time of the offending behaviour. Moreover, the reviewing agency has a very broad discretion to withdraw a penalty notice on its own motion.³² The Attorney General's Internal Review Guidelines provide some guidance as to how this discretion should be exercised, indicating that the reviewing officer should take into account whether:
- prosecution of the offence would be unlikely to be successful, and/or
 - it is appropriate to continue the enforcement process.³³
- 14.14 While this power has general application, the potential for withdrawing a penalty notice on discretionary grounds is clearly relevant to homeless people.
- 14.15 Third, penalty notice recipients may make arrangements for time to pay where a penalty notice enforcement order has been made.³⁴ Where they are in receipt of Centrelink benefits, and therefore have access to a Centrepay account, recipients may make similar arrangements even before an enforcement order is made.³⁵ Currently, the State Debt Recovery Office (SDRO) determines applications for time to pay based on internal policy documents. While unfortunately there are no publicly available guidelines indicating the matters taken into account in determining whether a person would be a suitable candidate, we heard in consultation that a

29. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996* 1.

30. See NSW Department of Housing, *Protocol for Homeless People: Fact Sheet* (2007).

31. *Fines Act 1996* (NSW) s 24E(2)(d).

32. *Fines Act 1996* (NSW) s 24H.

33. NSW Department of Justice and Attorney General, *Internal Review Guidelines under the Fines Act 1996* [4.11].

34. *Fines Act 1996* (NSW) s 100(1).

35. *Fines Act 1996* (NSW) s 100(1A).

number of homeless people have entered into a payment plan with the SDRO using these provisions.

- 14.16 Fourth, the work and development order (WDO) scheme, originally introduced as a pilot, has recently been made permanent and rolled out across the state. Under the scheme, a person who is experiencing severe financial hardship may address his or her penalty notice debts using non-financial means. This may require the person to participate in a health, treatment, educational or vocational program, or to undertake unpaid work for an approved organisation.³⁶ The *Fines Act* provides the WDO scheme extends to debts owed by homeless people.³⁷
- 14.17 Fifth, the *Fines Act* provides that the SDRO has the power to write off part or all of a penalty notice debt where, due to financial, medical and/or personal circumstances, the amount outstanding cannot be paid. Currently, there are no guidelines indicating on what basis an application for write off will be determined, but this mitigation measure would apply to homeless applicants.
- 14.18 Finally, where a person is dissatisfied with the SDRO's decisions in respect of applications for time to pay, WDOs, or a write off order, they may apply to have their matter reviewed by the Hardship Review Board (HRB). While there is little information about the application process or the basis on which an appeal from a decision by the SDRO will be determined, the HRB application form indicates that financial, medical and personal circumstances will be taken into account. Specifically, applicants must show that their circumstances prevent them from paying their debt 'now and in the near future'. It appears, on the information available, that many homeless people would be able to bring an appeal against unfavourable decisions by the SDRO before the HRB.

What are the continuing problems?

- 14.19 Notwithstanding the above developments, we heard in consultations that more is needed to protect homeless people from the adverse impacts of penalty notices. Three main areas of concern were raised as posing continuing problems:
- warnings and cautions are not being issued
 - a poor relationship exists between homeless people and the SDRO, and
 - there is a lack of information publicly available about mitigation options.

Warnings and cautions

- 14.20 It appears that some agencies that issue on-the-spot penalty notices have been very slow to issue verbal warnings or make use of their cautions power under the *Fines Act* in their dealings with homeless people. The HPLS stated that it was not uncommon for its clients to be harassed by rail and transit officers, particularly where they look untidy or conspicuous. A HPLS client reported being approached

36. *Fines Act 1996* (NSW) s 99A.

37. *Fines Act 1996* (NSW) s 99B(1)(b)

by railway staff on a weekly basis, being spoken to aggressively and having his bag searched and emptied while travelling on the train. He said that transit officers were aware that he was homeless and sought him out for that reason. We heard that the feeling of being a target could lead some people to react angrily and to express their anger in abusive language, leading to the issue of multiple penalty notices.³⁸ The use of multiple penalty notices and the problems that are associated with that practice are considered in more detail in Chapter 6, while the issue of offensive language is examined in Chapter 10.

Relationship with SDRO

- 14.21 Consultations with the HPLS indicated that there is room for much improvement in the relationship between the SDRO and homeless people. We were told that many homeless people regard the SDRO with suspicion and even hostility. We heard that many HPLS clients consider SDRO staff to be generally unhelpful and often unaware of, or unsympathetic to, the realities of homelessness. For example, we heard that SDRO officers often do not understand that queries need to be resolved in one phone call in circumstances in which the person only has access to public telephones. The SDRO was also described as being unforthcoming with information. One person described the organisation as an ‘electronic prison’ to which homeless people have no key.

Access to information

- 14.22 Accessing information about penalty notices is particularly difficult for homeless people. In addition to low levels of literacy, many homeless people lead highly mobile or transient lives, often with only limited access to telephone services and the internet. These difficulties can lead to significant problems with penalty notices. We heard in consultation from an HPLS client with significant long-standing penalty notice debt who was unaware of the availability of time-to-pay arrangements. He reported that, had he known such an option existed, he would have been able to regain his heavy goods vehicle licence at a much earlier point, which would have assisted him in finding employment.³⁹
- 14.23 While the majority of the homeless population of NSW lives in Sydney (15,956), there is a significant homeless population in and around the Illawarra (1338), inland (3667), and along the coast (4428). Services providing information and assistance with a metropolitan focus therefore do not respond to the needs of a large number of homeless people.
- 14.24 Specialised services may be underfunded or limited to metropolitan areas. Even basic services, such as functional public telephones, may be hard to access in some areas. Many homeless people prefer face-to-face communication and do not trust telephone services. This may mean that they are resistant to using services such as LawAccess NSW, which provide much useful penalty notice information.⁴⁰

38. Homeless Persons’ Legal Service *Consultation PN3*, Sydney NSW, 13 January 2011

39. Homeless Persons’ Legal Service *Consultation PN3*, Sydney NSW, 13 January 2011.

40. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 146.

Many homeless people report that they find accessing legal services to be ‘really intimidating’ due to ‘the formality of the legal process, premises, language and requirements to provide and complete documentation’.⁴¹

- 14.25 In practice, therefore, homeless people often rely heavily on friends, family and non-legal services for information about their legal needs. The Law and Justice Foundation noted that health and community service officers, tenancy and advice services, consumer and advocacy bodies, court support workers and Centrelink officers were often called upon to assist or to ‘make a call’ on behalf of homeless people relating to their legal issues. Often these agencies or officers will not have the resources or expertise needed to address new or accumulated penalty notices.⁴²

Responding to the needs of homeless people in the penalty notice system

- 14.26 We have made many recommendations in this report that respond to the concerns of vulnerable people, including homeless people. Above we identified three main areas of continuing concern about the penalty notice system for homeless people:

- warnings and cautions are not being used
- the relationship between homeless people and the SDRO is poor, and
- there is a lack of available information about mitigation options.

- 14.27 The recommendations in Chapter 5 to improve the issuing of cautions should ensure that homeless people are more often identified and dealt with by way of a caution. If a caution should have been issued, but was not, we make recommendations in Chapter 7 regarding the internal review of the penalty notice. These include recommendations for training so that the issues confronting homeless people can be better understood by issuing agencies and reviewers.⁴³ We have also made recommendations to simplify the process of making applications for internal review.⁴⁴

- 14.28 In Chapter 18 we recommend the development of a Penalty Notice Advisory Committee (PNAC) to advise the SDRO about issues affecting vulnerable people in relation to penalty notices. We anticipate that this body will have representation from an organisation such as the HPLS to provide expert advice about improving SDRO services. The SDRO initiatives to provide outreach to other vulnerable groups may be adaptable to the needs of homeless people.

41. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 122.

42. S Forell, E McCarron and L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales (2005) 187.

43. Recommendation 7.4.

44. Recommendation 7.7.

- 14.29 The provision of information in a way that reaches, or is accessible to, homeless people is also an issue that may profitably be addressed by the PNAC. We have made recommendations relating to the increased availability of fine mitigation mechanisms, including time to pay, WDO and write off applications. Ensuring that homeless people can benefit from these options in appropriate cases is a matter of effective service delivery that should be within the scope of SDRO, with the assistance of expert advice.

Special circumstances court

- 14.30 One option for reform is the development of a specialist court list for homeless people and other disadvantaged groups. This option was suggested in the 2006 HPLS report, *Not Such a Fine Thing!*⁴⁵ Such a court list would deal with fines, among other matters, using a therapeutic jurisprudence approach.
- 14.31 The California Homeless Court was cited as a possible model:⁴⁶
- These courts combine plea bargaining with alternative sentencing that substitutes counselling, volunteer work, and participation in agency programs for the traditional fines, public work service, and custody. Defendants are given credit for having entered a shelter, done volunteer work, or enrolled in Alcoholics Anonymous or other self-help and education programs.⁴⁷
- 14.32 One strong argument in favour of such a court for homeless people is that it would increase the efficiency of the penalty notices and fines system, allowing all outstanding matters to be considered at once. The HPLS gave an example of a 19-year-old man who had accrued 33 enforcement orders and was facing 33 court dates at 33 courts across NSW.⁴⁸ Due to the often transient nature of their lives, homeless people may accrue penalties in different locations, which may mean that the court hearings for various matters are listed in different courts.⁴⁹
- 14.33 Second, a specialist list could be more accessible to homeless people who may fear going to a 'normal' court.⁵⁰ As a specialised court with specific expertise about the nature of homelessness, hearings could result in more lenient or better targeted

45 Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006); S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 9. See also Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN42*, 6-9.

46 Judicial Council of California, California Courts, *Community Courts: Homeless Courts* <<http://www.courts.ca.gov/5976.htm>>; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission 28*; Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011.

47. Judicial Council of California, California Courts, *Community Courts: Homeless Courts* <<http://www.courts.ca.gov/5976.htm>>. See also discussion in S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 9.

48. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 25.

49. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 24.

50. S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008) 9.

penalties for vulnerable people that better reflect their individual circumstances and the objective seriousness of the offending behaviour.

- 14.34 A roundtable meeting in Kempsey suggested that, instead of being heard by a magistrate, penalty notice matters could be processed by a court registrar or other administrative branch personnel.⁵¹
- 14.35 In Victoria, a person may apply to the Infringement Court, which sits within the Magistrates Court, to have an infringement notice enforcement order revoked where 'special circumstances' exist.⁵² Special circumstances are defined in s 3 of the *Infringements Act 2006* (Vic) to include intellectual disability, mental illness, serious substance abuse disorder and homelessness.

Commission's conclusions

- 14.36 We do not support the creation of a special court list for homeless people, or for the review of penalty notices more generally, for a number of reasons. First, such a proposal was not explored in Consultation Paper 10⁵³ and support for it in submissions and consultations was limited. The penalty notice system in NSW was designed to divert minor matters away from the court system. Further, a specialist court would involve significant resource implications. Finally, NSW already has a review body for penalty notices; the Hardship Review Board (HRB) is discussed in Chapter 9.
- 14.37 The HRB could, however, play a greater role in dealing with the difficulties of homeless people who have penalty notice debt. We trust that the recommendations made elsewhere in this report in relation to fine mitigation options, and the development of the role of the HRB, will assist in providing better access for homeless people to penalty notice review mechanisms.

51. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011.

52. *Infringements Act 2006* (Vic) s 65.

53. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010).

15. Regional, rural and remote communities

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- 15.1 This chapter provides a brief overview of the issues that arise with regard to penalty notices in regional rural and remote areas; the current response of the penalty notice system; and the relevant recommendations of this report. Submissions and consultations for this inquiry frequently commented on the particular challenges faced by people in regional areas. We visited two NSW regional communities – Kempsey and Lismore – and were also informed about the comparable challenges of outer-urban areas through a consultation with stakeholders from Mount Druitt in Sydney’s west.

Issues for regional, rural and remote communities

- 15.2 The Australian Bureau of Statistics reports that 20.3% of the NSW population live in inner regional NSW; 6.5% live in the outer regional area, while 0.6% live in remote or very remote NSW.¹
- 15.3 Significantly in relation to penalty notices, one of the most important characteristics of these areas is the lack of public transport. Regional and rural areas often have very limited public transport, while remote areas often have none at all. If public transport is available, it may be costly and unreliable.² Not surprisingly, consultations and submissions reflected these concerns. We were told that a vehicle is usually necessary to get to work and to access education and other essential services.³ At a roundtable discussion in Kempsey we were told that a school bus is the only available public transport there, and that driving is absolutely essential for everything else. As in other regional centres, the problems were more acute in Kempsey for some Aboriginal people, who live in communities situated significant distances from town.
- 15.4 Submissions argued that, in urban areas, it is possible to use public transport to maintain employment without the use of a licence or vehicle.⁴ However, this view was challenged in relation to some outer-urban areas. Stakeholders from Mount Druitt (a suburb on the outskirts of Sydney) reported many problems of a similar

1. Australian Bureau of Statistics, *Population Distribution* (2008).

2. Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [4.75].

3. Uniting Care Burnside, *Submission PN12*, 7; Illawarra Legal Centre, *Submission PN27*, 17; Law Society of NSW, *Submission PN31*, 16; Youth Justice Coalition, *Submission PN34*, 20; Department of Community Services, *Submission PN36*, 8; Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

4. UnitingCare Burnside, *Submission PN12*, 7.

nature to those of people in regional areas. We were told that many people in Mount Druitt work in labouring, trades and warehousing industries and need to get to work at 5am or 6am. Limited public transport options in Mount Druitt, especially early in the day, mean that a driver licence is essential to maintain employment.⁵

- 15.5 An important additional issue for penalty notice debt in these areas is the challenge of low income, discussed in Chapter 11. Penalty notice recipients may find great difficulty in paying penalties. When they default, driver licence sanctions are imposed. For vulnerable people throughout NSW, transport-related penalties were a major concern. In regional, rural and remote areas, the focus was on driving and bicycle offences.⁶ However, in urban areas, public transport fines are of greater significance.⁷
- 15.6 Driver licence suspension was a major concern for stakeholders. People who have had their licence suspended through State Debt Recovery Office (SDRO) enforcement measures reported feeling compelled to choose between breaking the law by driving unlicensed and losing their job or source of income.⁸ In Kempsey, we were told that suspending a person's licence was equivalent to 'condemning' a person to unemployment.⁹ In Chapter 8 we outlined the way in which driving without a licence leads to 'secondary offending', and sometimes to the 'slippery slope' to prison.¹⁰ Organisations that work with young people highlighted the inability of people to pay for the original penalty notices, and the high risk of secondary offending as a result of licence sanctions.¹¹
- 15.7 In addition to driving offences, stakeholders identified concerns about penalties imposed on children and young people for riding bicycles without helmets.¹² In Lismore we were told that penalty notices for failing to vote were also frequently encountered.¹³

Responding to the needs of regional, rural and remote communities

- 15.8 The existing penalty notice system has responded to the needs of regional, rural and remote communities in a number of ways. In order to lessen the impact of

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5. Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.
 6. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fine Matters in NSW* (2006) 8.
 7. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fine Matters in NSW* (2006) 8.
 8. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [5.37].
 9. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011.
 10. Chapter 8 [8.19] – [8.46].
 11. Juvenile Justice, *Submission PN15*, 4; Youth Justice Coalition, *Submission PN34*, 20; Children's Court of NSW, *Submission PN35*, 4; Department of Community Services, *Submission PN36*, 8.
 12. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.
 13. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

driver licence sanctions, the SDRO has undertaken licence restoration programs in some regional centres and Aboriginal communities. SDRO representatives visit and work with individuals to determine their penalty notice debts and sign them up for time-to-pay arrangements, thereby enabling them to regain their licences.

- 15.9 If a person enrolls in a time-to-pay arrangement, they can regain their licence and the SDRO may expedite lifting licence sanctions in circumstances that take into account the needs of regional, rural and remote communities.¹⁴ If a person engages in a work and development order (WDO), driver licence sanctions may also be suspended.
- 15.10 As we noted in Chapter 9, the WDO pilot is now being extended throughout NSW. The roll-out of this scheme includes the establishment of a regional network of WDO support teams.¹⁵ These teams will promote WDOs and provide information, advice and other support to organisations, health practitioners and eligible individuals. Small WDO teams are to be based in Coffs Harbour, Dubbo, Nowra and Campbelltown. To ensure Aboriginal engagement, it is proposed that the WDO support teams in Campbelltown, Coffs Harbour and North Western NSW will work closely with Aboriginal Field Officers, a position currently being established in partnership with the Aboriginal Legal Service. Promotional and educational material is also proposed for organisations, practitioners and eligible individuals.
- 15.11 Stakeholders in regional areas were optimistic that WDOs would be a positive development once available in regional areas. There was also optimism that suitable activities for WDOs could be found and that practitioner and non-government organisation supervision would be forthcoming. However the limited availability of services was recognised as a challenge to be overcome.
- 15.12 The Attorney General and Justice evaluation of the WDO scheme (AGJ evaluation) noted that, although the take up of WDOs has been ‘respectable among organisations and health practitioners’, there are concerns about the inadequate number of approved organisations, particularly in some regions with very high fine and penalty debt.¹⁶ The AGJ evaluation used Mount Druitt as an example. Residents of that area were reported to ‘have over \$20 million outstanding in enforcement orders and the area suffers from entrenched socio-economic disadvantage’, but it contains only three approved organisations.¹⁷ The evaluation also noted the need to increase the numbers of WDOs in rural and remote areas, particularly in areas with large Aboriginal populations.¹⁸

14. See NSW Office of State Revenue, State Debt Recovery Office, *How Can RTA Restrictions Be Lifted?* <http://www.sdرو.nsw.gov.au/your_options/if_you_take_no_action/eo_lifting_rta.html>

15. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 78, Recommendation 54.

16. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 73.

17. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 73.

18. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 77.

Recommendations of this report

- 15.13 Recommendations in this report aim at improving the penalty notice system generally and will be to the benefit of all people in NSW. However, we also make a number of recommendations that respond specifically to the problems identified in relation to regional, rural and remote communities. Because of the problems identified above, these recommendations focus on enforcement and fine mitigation options that allow people to retrieve their driver licence.
- 15.14 In Chapter 8 we recommend that the SDRO, Centrelink and Roads and Maritime services should make it possible for people to establish time-to-pay arrangements at Centrelink and RMS offices.¹⁹ We also recommend that the SDRO extend its licence restoration program activities, especially in rural, regional and remote areas and in Aboriginal communities.²⁰
- 15.15 In Chapter 9 we support the regional development of the WDO scheme and recommend that the recently established regional network of Work and Development Order support teams should have the skills and resources to provide information in relation to time to pay and writing off penalties, as well as in relation to Work and Development Orders.²¹

19. Recommendation 8.2(1).

20. Recommendation 8.2(2).

21. Recommendation 9.3.

16. Aboriginal people and Torres Strait Islanders

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- 16.1 This chapter deals with the experiences of Aboriginal people and Torres Strait Islanders in the penalty notice system in force in NSW. We first consider the key issues and problems that arise for these groups. We then examine the present response of the penalty notice system, and finally consider the preferred approach of this report.

Key issues

- 16.2 A 2008 study prepared for the Roads and Traffic Authority (RTA)¹ titled *An Investigation of Aboriginal Driver Licensing Issues* found that fine debt was a very significant issue for Aboriginal and Torres Strait Islander communities. Interviews were conducted with 300 people across 14 urban, regional and remote communities. This survey found that 42% of respondents had outstanding debt with the State Debt Recovery Office (SDRO), and ‘a little over four in ten ... of those ... were paying that debt off.’² Data on Criminal Infringement Notices (CINs) also shows high levels of debt for these groups. Although 48% of all CINs are referred for enforcement, this number rises to 89% for Aboriginal recipients.³ As the Ombudsman pointed out, ‘debts from CINs could add to the cumulative stresses associated with poverty in communities already struggling to cope with chronic debt.’⁴
- 16.3 In Chapters 11 and 14, we consider the issues with penalty notices that arise for people living on low incomes and in regional, rural and remote communities, which are also relevant to many Aboriginal people and Torres Strait Islanders.
- 16.4 Perhaps the most significant issue for Aboriginal people and Torres Strait Islanders is unpaid penalty notices leading to driver licence sanctions, which may in turn lead to secondary offending.⁵ The problem is of particular importance in relation to those Aboriginal people and Torres Strait Islanders who live in regional, rural, remote and outer-urban areas. Driver licence sanctions can also lead to secondary offending for this group. The RTA report noted that 29% of Aboriginal respondents who had

1. As of 1 November 2011, the Roads and Traffic Authority and the Maritime Authority were amalgamated into a single joint agency under s 46 of the *Transport Administration Act 1988* (NSW) called Roads and Maritime Services.

2. Elliot and Shanahan Research, *An Investigation of Aboriginal Driver Licensing Issues* (2008) 60-61.

3. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 93.

4. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 50.

5. Chapter 8 [8.19]-[8.46].

never held a licence had driven on a NSW road in the previous year, with some driving (and thus offending) once per week.⁶ Almost half of respondents who had previously held a valid licence, but no longer did, drove daily.⁷ It has been shown that unpaid fines (31%) and outstanding SDRO debts (28%) are the most common reasons for the suspension or cancellation of driver licences for Aboriginal people and Torres Strait Islanders.⁸ The RTA study recommended that if SDRO debt is to remain linked to licensing, 'the RTA and SDRO need to work more closely to help the community deal with that debt and minimise its impact on licensing'.⁹

- 16.5 We were told in consultations that there are some Aboriginal communities in which there may be only one or two licensed drivers and that these drivers come under pressure to act as 'taxi drivers' to transport people to essential appointments. We also heard about the pressures on unlicensed people to drive unlawfully (for example to attend family funerals or to transport sick children). Grave concerns were expressed about the number of young Aboriginal men who are imprisoned for repeated 'drive while disqualified' offences, and about the consequent impact of imprisonment on them and their families.
- 16.6 Dealing with the practical management of penalty notice debt may be challenging for some Aboriginal people and Torres Strait Islanders. In its 2006 report, the Sentencing Council identified a 'lack of information at crucial points' and 'unnecessarily "dense" forms' as problematic for vulnerable communities, including Aboriginal and Torres Strait Islander communities.¹⁰ The also Council found that:
- Illiteracy, for example, presents an extremely problematic barrier to payment, particularly when the fine or penalty may stem from fairly inconsequential offences (such as riding a bike without a helmet). Unable to read the penalty notice, unlikely to seek legal or financial advice or assistance, and lacking the means to pay, the matters invariably accumulate until fine default licence sanctions apply.¹¹
- 16.7 Literacy problems were also highlighted in our consultations as an issue for some Aboriginal people and Torres Strait Islanders.¹²
- 16.8 Redfern Legal Centre (RLC) provided a case study of an Aboriginal client that illustrates some of these difficulties and the impact they have on penalty notice debt.

6. Elliot and Shanahan Research, *An Investigation of Aboriginal Driver Licensing Issues* (2008) 16.

7. Elliot and Shanahan Research, *An Investigation of Aboriginal Driver Licensing Issues* (2008) 5.

8. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 18-19.

9. Elliot and Shanahan Research, *An Investigation of Aboriginal Driver Licensing Issues* (2008) 7.

10. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [1.23].

11. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.83].

12. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011; Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

Case study

Clara was an Aboriginal woman in her 50s. She suffered from many health issues, including depression, anxiety and post-traumatic stress disorder. She also suffered from poor eyesight which rendered her functionally illiterate. She visited RLC on an unrelated matter and brought her mail for us to read. Included in her mail was an SDRO enforcement order for \$1700 for failing to present for jury duty in 2008. The RLC assisted Clara in sending an annulment application to the Sheriff's Office. The outcome of the application is not known, as the client died shortly after.¹³

16.9 Some Aboriginal people and Torres Strait Islanders may find themselves in difficulty with penalty notices and driver licence sanctions simply because they do not routinely receive their mail. The Ombudsman has commented upon the difficulties for some Aboriginal people and Torres Strait Islander communities in accessing postal services, as a result of the transience of some members of the community, or as a result of the poor signposting and house numbering in some communities.¹⁴ Transient people may be less likely to respond quickly (if at all) to communication from the SDRO, and consequently risk accruing fine related debt,¹⁵ enforcement costs and other enforcement measures. During our consultation in Lismore we were told that some people might stay for extended period of time with friends and relations and only pick up their mail once every few months.¹⁶ Cultural practices, obligations to kin and other factors can also mean that people shift residence, move between communities, miss notices and accrue enforcement costs.

16.10 Poverty is a further reason for the underpayment of penalty notices in some Aboriginal and Torres Strait Islander communities. When considering the amount that a court should fine an Aboriginal person or Torres Strait Islander, it would seem appropriate that a court should:

take account of the fact that Indigenous people tend to have much lower incomes than non-Indigenous people – so a specific level of fine for them will often mean considerably more than the same level of fine for others.¹⁷

16.11 Consultations also highlighted the fact that Aboriginal people and Torres Strait Islanders are more likely to spend a significant portion of their time in public spaces. In some cases this is simply the preferred manner of socialising, or at least the most readily available venue in the absence of suitable housing or other alternatives. For other people this may be for reasons of safety, for example if family members at home are drinking, being physically abusive, or using drugs.¹⁸ This heightened visibility is likely to make Aboriginal people and Torres Strait Islanders more susceptible to policing and to receiving penalty notices. There was some criticism

13. Redfern Legal Centre, *Submission PN26*, 4.

14. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 83.

15. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.83].

16. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

17. Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2009) 2314.

18. Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

expressed in consultation over policing and the targeting of particular people in some of these communities.¹⁹ It was argued that one reason young people commit public order offences, such as offensive language and offensive behaviour, is that they are 'tailed' by police until they eventually 'snap'.²⁰

- 16.12 We were also told in consultation that, for cultural reasons, some Aboriginal people might find speaking to officials over the telephone difficult. They may not request clarification if they have not understood something²¹ and become discouraged from resolving their penalty notice problems. Finding help with penalty notice problems may be difficult for Aboriginal people and Torres Strait Islanders in regional, rural and remote areas. In its submission to this inquiry, the Law Society explained the need for an extended period of time for Aboriginal people to deal with penalty notice issues because, in some remote areas, they may only have access to a solicitor once per month when the Local Court is sitting.²²

The response of the penalty notice system

- 16.13 The SDRO conducts outreach programs to engage people to pay their penalty notice debts, lift licence sanctions where appropriate, and explain other mitigation options. The SDRO is developing a geographical profile of NSW so that areas of greater need can be targeted.²³ There was much support for these SDRO 'road shows', in particular where the focus is on licence restoration, because of the problems noted above. The SDRO has also produced material on penalty notices designed especially for Aboriginal people and Torres Strait Islanders.
- 16.14 Aboriginality is not, in itself, a ground for a WDO. This is appropriate since, as one participant pointed out in consultation, it would be wrong to assume that Aboriginality in itself indicates that a person is vulnerable.²⁴ However some Aboriginal people will otherwise qualify for WDOs on the basis of disability, homelessness or addiction to drugs or alcohol. Communities and service providers consulted for this inquiry were generally optimistic that WDOs would provide a very useful non-financial method of paying off penalty notice debt once the scheme is rolled out more fully.

Recommendations of this report

- 16.15 Throughout this report we recommend the improvement of the penalty notice system in ways that will address some of the problems identified above. In

19. Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

20. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

21. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

22. The Law Society of NSW, *Submission PN31*, 16.

23. M McGregor, 'Options for Vulnerable Clients' (Paper presented at the ANZ Fine Enforcement Reference Group Conference Sydney, November 2011).

24. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011.

Chapter 8, we recommend that the SDRO, Centrelink and Roads and Maritime Services (RMS) make it possible for people to make time-to-pay arrangements at Centrelink and RMS offices, in order to increase access (especially on a face-to-face basis) in regional areas.²⁵ We also recommend that the SDRO extend its licence restoration program activities, especially in rural, regional and remote areas and in Aboriginal and Torres Strait Islander communities.²⁶

16.16 In relation to CINs we have noted the evidence of the net-widening effects of CINs for Aboriginal and Torres Strait Islander communities and the particular impact that CINs for offensive language and offensive conduct can have.²⁷ We recommend mandatory review of such CINs by a senior police officer. We also recommend an inquiry into the proposed abolition of the offence of offensive language, and for the offence of offensive conduct also to be reviewed and considered.²⁸

16.17 In Chapter 18 we recommend the development of an advisory committee for the SDRO, with membership to include key stakeholder organisations who represent vulnerable people.²⁹ We consider that the committee should include a representative of Aboriginal people and Torres Strait Islanders. The committee is intended to provide ongoing advice to the SDRO and issuing agencies about how to improve their response to Aboriginal people and Torres Strait Islanders. We emphasise the need to prioritise attention to this group because of the severity of the problems, particularly of licence sanctions, for those in regional areas. In 2009 the Ombudsman reported that:

Although the SDRO has a number of existing initiatives aimed at assisting Aboriginal clients, the very high proportion of Aboriginal CIN recipients becoming caught up in the fines enforcement system indicates that there is an urgent need for improvements.³⁰

This conclusion continues to be relevant and remains a matter of urgency.

16.18 In Chapter 18 we also recommend the establishment of a Penalty Notice Oversight Agency (PNOA).³¹ As part of its role, the proposed PNOA would have responsibility for making the penalty notice system more responsive to the needs of vulnerable people. The needs of Aboriginal people and Torres Strait Islanders should be a particular priority.

16.19 We note the emphasis in consultations on the need to enhance communication between the SDRO and Aboriginal communities. Suggestions in consultations included improved face-to-face contact, such as through the use of field officers and outreach to communities³² and education about the penalty notice system, for

25. Recommendation 8.2.

26. Recommendation 8.2.

27. See Chapter 10.

28. Recommendation 10.3.

29. Recommendation 18.3.

30. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) iv.

31. Recommendation 18.1.

32. Aboriginal Legal Service Providers (Greater Sydney) Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

instance through community forums and talks to schools.³³ As we note above, communities want the SDRO 'road shows' to occur with greater frequency.³⁴ It appears that the predominant approach of the SDRO of providing telephone assistance and information on the SDRO website, while inexpensive and effective for some groups, is not suitable for many Indigenous communities.

- 16.20 It does not appear to us that changes in the law are required, beyond those proposed elsewhere in this report, to resolve the identified problems for Aboriginal people and Torres Strait Islanders. However, more education and culturally appropriate face-to-face outreach are essential to mitigate the difficulties experienced by Aboriginal people and Torres Strait Islanders with the penalty notice system. In particular, programs aimed at licence restoration are of the utmost importance.

33. Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Sydney 23.2.11

34. Lismore Roundtable Meeting, *Consultation PN17*, Lismore NSW, 28 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

17. People in custody

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Introduction

- 17.1 According to the 2011 NSW Inmate Census, there are 10,064 people subject to custodial orders in NSW.¹ Penalty notice and fine-related debt is a significant issue for people in custody. As the NSW Sentencing Council observed, there is

a significant body of offenders, many of whom are in custody, who have accumulated a very significant debt as the result of unpaid fines, penalties, levies and administrative charges, which they have no hope of paying.²

Corrective Services NSW (Corrective Services) advised the Sentencing Council that the average prisoner has accumulated \$8000 in unpaid penalty notice and fine-related debt.³ More recently, the Law and Justice Foundation confirmed that the majority of prisoners have outstanding fines and penalty notices, and debts of this kind commonly range from \$175 to \$15,000.⁴ Some prisoners have considerably

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1. S Corben, *NSW Inmate Census 2011: Summary of Characteristics*, Corrective Services NSW (2011) 3.
 2. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.109].
 3. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.109]
 4. A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) 79.

larger debt: in consultation we heard of one prisoner who owed the State Debt Recovery Office (SDRO) \$57,000.⁵

- 17.2 Unpaid penalty notices are not the only type of debt carried by prisoners.⁶ Although there is very little detailed information available about the nature and quantum of prisoners' debt, one Queensland study found that 80% of people have debts when they come into custody, while a further 20% accumulate debt while serving their sentence.⁷ The existence of debt has long-term consequences for prisoners: many are released with considerable financial liabilities, 'adding to the challenges they face in successfully reintegrating into the community'.⁸ As the Sentencing Council has observed:

For people who, on release, will be facing problems arising from their earlier dislocation from family, and in securing employment, accommodation and re-adjustment, the added burden of carrying a large and on-going debt is only likely to set up a cycle of re-offending.⁹

- 17.3 In 2003, Baldry *et al* found that people leaving custody with a debt were more likely to return to prison (50%) than those who were debt-free (30%).¹⁰ Similarly, the Queensland Prison and Debt Project reported in 2000 that, of the prisoners who were interviewed for the study, 49% had committed a crime to repay a debt.¹¹ Consultations for this inquiry confirmed that some people in custody regard crime as the only option open to them to pay off their unpaid penalty notices, particularly where the amount outstanding is significant.¹²

Challenges of addressing penalty-related debt in prison

- 17.4 People in custody, by virtue of their incarceration, face both financial and environmental challenges in paying off their debts, including penalty notice debt.
- 17.5 With wages and welfare payments significantly lower in a prison setting than in the general community, prisoners have very little money with which they can reduce their liability to the SDRO. Prisoners are not entitled to receive Centrelink benefits or any other form of income support while in custody. However, Corrective Services pays approximately 2000 prisoners in NSW \$13.50 per week in unemployment benefits to cover basic essentials such as toiletries and phone cards. While the

5. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

6. A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) ch 4.

7. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) 4-5.

8. Corrective Services NSW, *Submission PN24*, 1.

9. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [2.119].

10. E Baldry *et al*, *Ex-Prisoners and Accommodation: What Bearing Do Different Forms of Housing Have on Social Reintegration?*, Australian Housing and Urban Research Institute (2003) 14.

11. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) 3.

12. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

Sentencing Council reported that a person working in a paid position in prison generally earns between \$12-\$65 per week,¹³ we heard in consultation that the average in-custody wage is closer to \$30 per week.¹⁴ Ten per cent of a prisoner's wage is automatically set aside to pay the victims compensation levy. Income from external sources (deposited by family and friends) is capped at \$450 per calendar month.¹⁵ The benefit, and any wages and external income, must cover all of a prisoner's spending while in custody, including items such as telephone calls, recreational activities and discretionary consumer items.¹⁶

- 17.6 Competing calls on prisoners' minimal income may include debts to the Department of Housing, Centrelink, the victims compensation scheme, utilities companies and often to other prisoners.¹⁷ Some prisoners wish to use their limited means to support their families, even in some small way.¹⁸ It is unlikely, therefore, that people in prison will have money to pay off accumulated penalty notice debt.
- 17.7 Although formal assistance is available for prisoners who wish to address their debts (prison libraries, support staff, visiting legal services, LawAccess), the Law and Justice Foundation reports that efforts to deal with debt are limited by 'poor inmate capacity, the systemic environment, the mediated and at times convoluted pathways to assistance and prison subculture'.¹⁹ Prisoners must negotiate periods of lockdown, restrictions based on high-security classifications, limited access to legal and financial services, attitudinal opposition from some prison staff,²⁰ telephone and internet restrictions, uncertain release dates and sudden transfers from one detention facility to another.²¹ Low levels of literacy, a general distrust of

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13. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.110]; A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) 119-120. See also, Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.
14. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.
15. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.110].
16. According to a submission from Corrective Services NSW: 'a typical savings amount out of a \$20 wage is only about \$1': NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.112]. This was reiterated in consultation: Prisoners' Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.
17. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) ch 4; A Stringer 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000).
18. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.
19. A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) xxvi.
20. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) 6.
21. See generally, A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) chs 5, 7. Justice Health NSW estimates that each year there are over 150,000 movements among prisoners in NSW: D Indig et al, *2009 NSW Inmate Health Survey: Key Findings*, Justice Health NSW (2010) 14.

the legal system and widespread under-reporting of debt levels further complicate these challenges.²² As the Law and Justice Foundation has noted:

Given the significant systemic barriers they face to addressing multiple legal issues from inside jail, inmates need to be motivated, tenacious, articulate, patient, organised and familiar with the law and legal process to successfully address their legal needs. In contrast the profile of the prisoners in NSW is characterised by high rates of illiteracy, mental health issues, alcohol and other drug misuse, and cognitive impairment. Many prisoners [have] limited or interrupted education. Periods in custody [have] served to decrease inmates' confidence and skills at being able to function constructively when they return to the community.²³

- 17.8 Prisoners may have, or may develop, issues and attitudes that prevent them from seeking to manage their debts while in prison.²⁴ They may have other pressing problems, such as issues relating to children and families, or debts incurred in prison (drug or gambling related).²⁵ They may decline to pay out of defiance of authority, or may believe that the only way to address debts is to pay them (rather than negotiate a more favourable repayment schedule or declare bankruptcy). Because they cannot earn more income in prison, they may decide not to think about an unresolvable problem.²⁶

The current system and recommendations of this report

- 17.9 While a person is in prison the SDRO puts his or her fines 'on hold'. The prisoner must fill out an inmate request form, and enforcement action and enforcement fees are suspended while that person is serving his or her time in custody, and for three months after release.²⁷
- 17.10 Corrective Services has introduced programs to assist prisoners with financial management, including referral to group-based interventions (both in the community and prison setting), one-to-one counselling, and providing information to assist in resolving debt and financial difficulties.²⁸ Corrective Services is also moving towards implementing a more systematic way of responding to prisoners' debt needs through a series of programs aimed at prisoners on entry to, or exit from, the

22. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) 5. See also A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) ch 6; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

23. A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) xxi.

24. See discussion of the prisoners' 'oppositional code' in A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) ch 7.

25. A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) ch 4.

26. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) 7.

27. NSW Office of State Revenue, State Debt Recovery Office, *Your Options: Clients Who are in Prison* <http://www.sdرو.nsw.gov.au/your_options/if_you_take_no_action/eo_warrant.html>.

28. Corrective Services NSW, *Submission PN24*, 1-2.

custodial system. Enforcement fees are now suspended while a person is serving time in custody. The NSW Back on Track program helps prisoners with their legal needs, including fines and penalty notices. Free calls to SDRO are now available.²⁹

- 17.11 In addition to these positive initiatives, SDRO and Corrective Services are working together on arrangements to enable a better understanding by the SDRO of who is incarcerated, and by Corrective Services of the actual levels of prisoners' penalty notice debts, and to facilitate better management of those debts.³⁰
- 17.12 In Chapter 9 we make recommendations that will assist prisoners to deal with penalty notice debt. Perhaps most importantly, we recommend that prisoners and detainees (whether on remand or under sentence) who meet the eligibility criteria for a work and development order (WDO) should be able to credit voluntary activities, as well as work undertaken while in custody or under community supervision, as eligible activities for a WDO.³¹
- 17.13 In Chapter 9 we also make recommendations that will clarify and simplify applications for writing off fine and penalty notice debt.³² These recommendations should make it clearer who in the prison population may be eligible to write off their debts and facilitate applications in appropriate cases.

Options for reform

- 17.14 In Consultation Paper 10 (CP 10) we asked a number of questions, including whether debts for prisoners with cognitive and mental health impairments should be written off; whether a pro-rata debt reduction scheme should be introduced; and what other strategies might be adopted to deal with this issue.³³ We discuss these issues under a number of headings:
- (1) a daily 'cut-out' rate
 - (2) write offs
 - (3) special write offs for prisoners with cognitive and mental health impairments
 - (4) pro-rata contributions, and
 - (5) a prisoner employee contribution.

29 Corrective Services NSW, *Annual Report 2008-09* (2009) 32; NSW Department of Attorney General and Justice, *Annual Report 2010-2011* (2011) 120.

30. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

31. Recommendation 9.5.

32. Recommendation 9.7.

33. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Questions 7.4-7.6.

Option 1 — ‘Cut-out’ rate

- 17.15 Prior to the introduction of the *Fines Act* it was possible to ‘cut out’ a fine or penalty notice debt by serving time in custody. Time served was credited towards all outstanding fines and penalty notice debt according to a daily cut-out rate.
- 17.16 NSW has moved away from short-term imprisonment for unpaid penalty notices for a number of reasons. First, it was a government response to the serious assault in 1987 on Jamie Partlic, an 18-year-old man who was cutting out his unpaid penalty notices in Long Bay prison.³⁴ Second, imprisonment for penalty notice debt conflicts with one of the fundamental purposes of penalty notices, which are intended to limit the entanglement of people in the criminal justice or corrections system for minor offending. Third, prison as a response to penalty default may be perceived as the criminal justice system being used to ‘punish poverty’.³⁵ A number of other problems have also been identified with short-term imprisonment.³⁶
- 17.17 There was support from some stakeholders for the reintroduction of the cut-out option, and some prisoners’ groups also supported an extension of it.³⁷ They argued that prisoners serving a sentence for an unrelated offence should be able to cut out their penalty notice and fine debt concurrently. In other words, people who are serving a period of imprisonment for an offence unrelated to the matters for which they incurred the fine or penalty notice debt should be able to cut out their fine and penalty notice debt at a daily rate. This cut-out would be concurrent with the sentence of imprisonment, not additional to it.

Submissions and consultations

- 17.18 Justice Action, a prisoners’ advocacy group, submitted that reintroducing cut-outs would ‘stop prisoners from being continually punished for minor offences after serving their debt to society’.³⁸ Other stakeholders in consultations argued that abolishing cut-outs had not worked and had left as a legacy many prisoners who had no way of dealing with their fines and penalty notice debts. Prisoners’ rights groups in particular argued that a person ‘should be able to walk out of prison debt-free, with all fines and debts satisfied’ and that the cut-out rate is the most effective mechanism to achieve this.³⁹ This argument was based on the idea that a period spent in prison should be sufficient to repay all debts to society and that prisoners should be entitled to a fresh start.⁴⁰

34 A Muir, *Report of Inquiry Into the Central Industrial Prison*, Department of Corrective Services (1988).

35 K Beckett and A Harris, ‘On Cash and Conviction: Monetary Sanctions as Misguided Policy’ (2011) 10 *Criminology and Public Policy* 509, 523.

36 See generally: NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004). See also P O’Malley, ‘Politicizing the Case for Fines’ (2011) 10 *Criminology And Public Policy*, 547.

37 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

38 Justice Action, *Submission PN38*, 3; Women in Prison Advocacy Network, *Submission PN39*, 2.

39 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011. Civil debt may be dealt with by prisoners through bankruptcy. However, since this will not deal with penalty notice or fine debt, ‘cut-outs’ were the only way to deal with these debts without repaying them.

40 Justice Action, *Submission PN38*, 2; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

- 17.19 The SDRO expressed a concern that cut-outs could be seen as ‘double-dipping’.⁴¹ A number of other stakeholders in consultation agreed, stating that such an approach would undermine the principle that a person ought to be held accountable to the community for the harm caused by the behaviour underpinning the accumulated penalty notices. According to these stakeholders, allowing a person to cut out their penalty notice debts while serving time in prison for another criminal offence would effectively allow prisoners to avoid responsibility for their antisocial behaviour.⁴²
- 17.20 Stakeholders also spoke of their concern about the perverse incentives attending such a scheme.⁴³ Depending on the rate, cut-outs can allow people to reduce or cancel their fine and penalty-related debts in a relatively short amount of time. If they are available concurrently with a sentence for an unrelated offence, this might encourage people with large and unmanageable penalty-related debts to commit criminal offences in the hope that a brief period of imprisonment would reduce or clear this aspect of their financial liabilities. Stakeholders in consultation spoke of the generally poor financial management and life skills among the prison population⁴⁴ and that, in this context, such an approach could be seen as an effective and pragmatic debt-reduction strategy. A number of stakeholders recalled that when cut-outs were available, minor offending was a well-known and common response to accumulated penalty notices.⁴⁵
- 17.21 Aboriginal community groups expressed concern about the significant and persistent overrepresentation of Aboriginal people in prisons,⁴⁶ and were reluctant to support any measure that could lead to an increase in the imprisonment rates of Aboriginal people.⁴⁷
- 17.22 Some stakeholders, recognising these drawbacks and the potential for abuse of the system, suggested that cut-outs should be reintroduced but restricted to prisoners serving longer sentences, for example sentences of six to 12 months. It was argued that such a safeguard would remove the incentive to commit crime as a response to penalty notices. Prisoners’ rights advocates argued that the prospect of cancelling outstanding penalty notices would not be sufficient motivation to commit a serious criminal offence attracting a sentence in excess of 12 months.⁴⁸

41 NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 16.

42 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

43 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

44 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011. See also A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) chs 4, 6.

45 Kempsey Roundtable Meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

46 In 2011, 22.9% (2303) of NSW prisoners were Aboriginal or Torres Strait Islander: S Corben, *NSW Inmate Census 2011: Summary of Characteristics*, Corrective Services NSW (2011) 3.

47 Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN15*, South Kempsey NSW, 16 February 2011.

48 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

- 17.23 However, other prisoners' rights advocates argued that such an approach would mean that debt-reduction strategies would be made available to people in custody, not according to their needs or individual circumstances, but instead according to their classification within the prison system. This would effectively privilege more serious offenders and would indirectly discriminate against people on remand and female prisoners.
- 17.24 In 2011, there were 10,064 people in prison around NSW.⁴⁹ Of these, 2635 (26.2%) were on remand (including those awaiting sentence).⁵⁰ Women comprised 7% of the prison population⁵¹ and were most likely to be held on remand: 203 of the 703 female prisoners (28.9%) were being held without sentence.⁵² Although many people on remand are held only for a short period, some people can be held on remand for many months.⁵³ Excluding people on remand from the cut-out scheme would mean that more than a quarter of prisoners would be denied its benefits. The Women in Prison Advocacy network submitted that such an approach would 'be a form of discrimination resulting in the exclusion of an extremely disadvantaged segment of the prison population' and argued that that cut-outs should be unconditional and available to 'all prisoners regardless of length of sentence, nature of offence or prisoner classification'.⁵⁴

Commission's conclusions

- 17.25 We do not recommend the reintroduction of cut-outs to deal with penalty notice debt for prisoners, primarily because we do not support the reintroduction of imprisonment as a method of dealing with fines and penalty notice debt. The arguments in favour of concurrent cut-outs are also not convincing in relation to those people who are already imprisoned for another offence. If prisoners serve a longer sentence to cut out their fine and penalty notice debt, imprisonment for fine default is reintroduced by the back door for this group. If they do not serve a longer sentence they could be said to be avoiding responsibility for their offending behaviour.
- 17.26 Further, while many prisoners face a significant number of challenges in relation to poverty, health, mental health and disability, cut-outs would apply to all prisoners,

49 S Corben, *NSW Inmate Census 2011: Summary of Characteristics*, Corrective Services NSW (2011) 3.

50 S Corben, *NSW Inmate Census 2011: Summary of Characteristics*, Corrective Services NSW (2011) 5.

51 S Corben, *NSW Inmate Census 2011: Summary of Characteristics*, Corrective Services NSW (2011) 3.

52 S Corben, *NSW Inmate Census 2011: Summary of Characteristics*, Corrective Services NSW (2011) 5.

53 Time on remand is influenced by a number of factors, particularly the time it takes for a case to come before a court. The median time spent on remand by unsentenced prisoners in custody at 30 June 2011 was 2.8 months. The longest amount of time spent on remand was by prisoners charged with homicide (median of 9.9 months), followed by illicit drug offences and sexual assault (4.5 and 4.4 months respectively). The median number of months spent on remand by unsentenced prisoners in custody at 30 June 2011 was highest in NSW (3.5 months): see Australian Bureau of Statistics, *Prisoners in Australia* (2011) 26, 48.

54 Women in Prison Advocacy Network, *Submission PN39*, 2-3; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

including those who can afford to pay their fine and penalty notice debts. We are also concerned about the perverse incentives attached to cut-outs.

- 17.27 The strategy of providing mechanisms whereby people in prison can repay their penalty notice debt by non-financial means or, in appropriate cases, make applications for debts to be written off, appears to be a better approach.

Option 2 — Automatic write off for all prisoners

- 17.28 Under s 101(1) of the *Fines Act*, a person may apply to the SDRO to postpone or write off a penalty notice debt.⁵⁵ The SDRO has discretion to write off the debt where it is satisfied that due to any or all of the financial, medical or personal circumstances of the fine defaulter:

- (i) the fine defaulter does not have sufficient means to pay the fine and is not likely to have sufficient means to pay the fine, and
- (ii) enforcement action under Division 4 has not been or is unlikely to be successful in satisfying the fine, and
- (iii) the fine defaulter is not suitable to be subject to a community service order.⁵⁶

It is possible, therefore, for prisoners to apply to the SDRO for debts to be written off. However, given the particular challenges of life in prison, it was suggested that automatic write off would be an appropriate measure.⁵⁷

Submissions and consultations

- 17.29 In consultation, prisoners' groups spoke of the frustration of the process involved in preparing a write off application. They argued that, in their experience, the processes are convoluted, applicants must make numerous applications before they meet with success, the criteria are unclear and unreasonably stringent and the SDRO is inconsistent in its determinations. Moreover, applications are rarely successful.⁵⁸ Stakeholders also spoke of the enormous resources required to submit an application and the fact that these resources are not available for every prisoner on an individual basis.⁵⁹ Automatic write off obviously would remove these difficulties.
- 17.30 The Shopfront Youth Legal Centre (Shopfront) submitted that there should be a presumption in favour of a total write off of penalty-related debt for all prisoners, excepting those serving very short sentences and those who clearly have the means to pay their penalty-related debt.⁶⁰ In consultations and submissions some

55 *Fines Act 1996* (NSW) s 101(1B); see also discussion in Chapter 9 [9.75]-[9.118].

56 *Fines Act 1996* (NSW) s 101(1A).

57. Justice Action, *Submission PN38*, 2; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

58 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

59 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011. See also discussion in A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) chs 5, 7.

60. The Shopfront Youth Legal Centre, *Submission PN33*, 20.

prisoners' groups also argued in favour of automatic write offs, arguing that a person should be able to make good their debt concurrently with the head prison sentence. Some prisoners' groups argued that, when leaving prison, most prisoners believe they are starting again, having wiped the slate clean and paid their debt to society.⁶¹ Justice Action submitted that it is illogical and inequitable that, on the one hand, prisoners may serve concurrent prison sentences in respect of two or more different criminal offences but, on the other, this option does not extend to unpaid penalty notices which are by definition more minor in nature.⁶²

- 17.31 However, as we noted above, other stakeholders argued that it would be a dangerous policy to allow an automatic write off for all prisoners because such a policy could have the effect of encouraging criminal behaviour, or if limited to those on longer sentences, would discriminate against people on remand or serving short sentences.

Commission's conclusions

- 17.32 Similar concerns arise in relation to automatic write off as they do in relation to cut-outs and, for the same reasons, we do not recommend the introduction of an automatic write off of all penalty-related debts for all prisoners.
- 17.33 However, we do recommend that the fact that a fine or penalty notice defaulter is imprisoned should be a relevant circumstance in relation to write off applications under the *Fines Act*, and that the write off guidelines proposed in Chapter 9 should reflect this.⁶³
- 17.34 There are several competing issues that arise. On the one hand, there is a concern that prisoners are serving a term of imprisonment for an unrelated offence, and would therefore be 'double-dipping' by having their imprisonment taken into account in relation to penalty notice debt. This must be balanced against concerns about the health, economic and personal difficulties faced by many prisoners, the need for rehabilitation and reintegration of ex-prisoners into society on leaving prison, and the cost and futility of pursuing penalty notice debt in relation to some prisoners.

Recommendation 17.1

The proposed write-off guidelines should provide that imprisonment and its consequences are relevant when deciding whether or not to write off all or part of a penalty notice debt.

Option 3 — Write offs for prisoners with mental health and cognitive impairments

- 17.35 It was suggested in consultations that writing off a fine or penalty notice should be made easier for prisoners with cognitive and mental health impairments. The challenges for people with such impairments in the broader community, discussed

61. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

62. Justice Action, *Submission PN38*, 2.

63. Recommendation 9.7(2).

in detail in Chapter 13, are particularly pronounced in a custodial setting. According to Corrective Services:

People with mental illness or cognitive impairment face significant barriers to effectively dealing with penalty notices including, but not limited to, difficulty in understanding what a penalty notice is, financial hardship that precludes payment of the fine, minimal supports that make it difficult to deal with the fine through other means and, often, limited understanding of the principles of contract which can hinder a time to pay arrangement.⁶⁴

- 17.36 The rates of major mental illnesses such as schizophrenia and depression are three to five times higher among Australian prisoners than in the general population.⁶⁵ In 2003, a study into mental illness among prisoners in NSW found that 74% had experienced 'any mental disorder' in the previous 12 months (psychosis, anxiety disorder, affective disorder, substance use disorder, personality disorder or neurasthenia).⁶⁶ The 2009 Inmate Health Survey found that 54% of women and 47% of men surveyed reported having received mental health assessment or treatment for an 'emotional or mental problem'.⁶⁷ In comparison, mental disorders are found to occur in only 22% of the broader Australian population.⁶⁸
- 17.37 Although estimates vary, the incidence of cognitive and intellectual disability is also much higher among prisoners than it is in the broader population. According to the 2003 Inmate Health Survey, 18% of women and 27% of men scored below the pass rate on the intellectual disability screen used. Of these, 59% of women and 39% of men had either an intellectual disability or were functioning in the borderline range.⁶⁹ In comparison, the prevalence of intellectual disability in the Australian population aged under 65 years is estimated at 2.5%.⁷⁰
- 17.38 The number of prisoners with an acquired brain injury is also disproportionately high: in the 2009 Inmate Health Survey, 49% of prisoners reported a head injury resulting in loss of consciousness. According to the survey, 'studies have

64. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

65. J Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology (2007) 1.

66. T Butler and S Allnut, *Mental Illness Among New South Wales Prisoners*, NSW Corrections Health Survey (2003) 2. The 2003 Inmate Health Survey reported that, overall, 54% of female and 39% of male prisoners interviewed had been diagnosed at some time in the past with a psychiatric problem. Depression was the most common diagnosis in both sexes. Three per cent of women and 5% of men had been diagnosed with schizophrenia: T Butler and L Milner, *The 2001 New South Wales Inmate Health Survey*, NSW Corrections Health Survey (2003) 96.

67. D Indig et al, *2009 NSW Inmate Health Survey: Key Findings*, Justice Health NSW (2010) 135.

68. T Butler and S Allnut, *Mental Illness Among New South Wales Prisoners*, NSW Corrections Health Survey (2003) 2.

69. Note that the 2009 Inmate Health Survey contains limited information on intellectual disability. In the 2003 survey, 18% of women and 27% of men scored below the pass rate on the intellectual disability screener. Of those who were further assessed using the *Wechsler Adult Intelligence Scale Revised* (WAIS-R) test, 59% of women and 39% of men were determined to have either an intellectual disability or were functioning in the borderline range: T Butler and L Milner, *The 2001 New South Wales Inmate Health Survey*, NSW Corrections Health Survey (2003) 93.

70. Australian Institute of Health and Welfare, 'Disability and Disability Services', *Australia's Welfare* (2009) 147.

consistently found levels of head injury and traumatic brain injury among prison inmates which far exceed those documented in the general population'.⁷¹

- 17.39 We were told in consultations that the quantum of debt for prisoners with mental and cognitive impairments has been estimated at \$18 million, with \$4 million owing to the SDRO.⁷² The exact amounts are difficult for Corrective Services to calculate, as many people are unaware of the extent of their debts. We heard of one prisoner with a cognitive impairment who believed he owed the SDRO approximately \$5000; in fact, after carrying out a series of financial background searches, prison welfare staff discovered he owed \$37,000.⁷³
- 17.40 In its interim report examining fines and penalty notices, the Sentencing Council raised the prospect of systematically expunging the debts of prisoners with mental and cognitive impairments on the basis that these fines are unlikely ever to be recovered.⁷⁴ The SDRO and Corrective Services are currently finalising a memorandum of understanding, allowing them to share information so that fine and penalty-related debt can be better managed.⁷⁵ Under the MOU, Corrective Services welfare officers have successfully applied for a number of individual write offs for prisoners with cognitive and mental impairments, even where the amounts involved were significant.⁷⁶
- 17.41 Notwithstanding these developments, we heard that more work is needed to address the needs of prisoners with mental and cognitive impairments in a systematic way.

Submissions and consultations

- 17.42 Submissions and consultations strongly supported mechanisms to deal with penalty-related debts incurred by prisoners with mental health and cognitive impairment.⁷⁷ The Law Society of NSW (Law Society) submitted that

people leaving custody face numerous barriers to successful reintegration into the community. People with mental illness and cognitive impairment leaving custody can face even more significant barriers to successful reintegration due to the pre-existing social exclusion and the lack of effective post-release services specifically for this group.⁷⁸

71. D Indig et al, *2009 NSW Inmate Health Survey: Key Findings*, Justice Health NSW (2010) 63.

72. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

73. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

74. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.116].

75. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN42*, 15.

76. At the Prisoners Roundtable Meeting, we heard of one successful application in respect of a \$20,000 debt: Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

77. Holroyd City Council, *Submission PN10*, 2; NSW Trustee and Guardian, *Submission PN14*, 9; Department of Human Services NSW, Juvenile Justice, *Submission PN15*, 2; Corrective Services NSW, Women's Advisory Council, *Submission PN20*, 2; Corrective Services NSW, *Submission PN24*, 6-7; The Shopfront Youth Legal Centre, *Submission PN33*, 33; Justice Action, *Submission PN38*, 4-5; Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

78. The Law Society of NSW, *Submission PN31*, 13.

- 17.43 There was considerable support for an automatic (and permanent) write off of penalty notices for prisoners with mental and cognitive impairment. However some of this support appeared to relate not so much to the grounds for write off (which relate to financial capacity to pay, futility of enforcement action and unsuitability for community service orders) but rather to the grounds for an internal review, or (most likely) internal review as a component of an annulment application, on the basis that the person lacked sufficient capacity to understand or control their conduct.
- 17.44 Justice Action argued that debt should be automatically written off where prisoners, due to their mental or cognitive impairment, ‘do not have the capacity to understand why their offence was wrong, or if they do not understand the concept of fines or the fine process’.⁷⁹ The Department of Human Services NSW, Ageing, Disability and Home Care⁸⁰ submitted that there should be a mechanism enabling cases involving people with mental and cognitive impairment to be dealt with ‘more expeditiously and appropriately’, suggesting that a caseworker could confirm that a prisoner lacks capacity to appreciate the wrongfulness of his or her actions and that enforcement of the penalty would not deter repeat offences.⁸¹
- 17.45 We consider capacity issues in Chapter 13 and make recommendations there, as well as in chapters 8 and 9, so that applications for annulment⁸² and write off⁸³ will be more effective for people with cognitive and mental health impairments. In prison, as in the general population, some people will lack capacity to understand the wrongfulness of their conduct or to control it. Others will have that capacity but their impairment, combined with their imprisonment, will compound the difficulties they face in responding to and paying penalty notice debts.

Commission’s conclusions

- 17.46 We do not support a blanket write off for all prisoners with cognitive and mental health impairments. Such a proposal ignores important differences in the type, extent and nature of different impairments and their relevance to penalty notices. Many of the arguments presented in favour of a blanket write off for this group were based on issues of capacity to understand or control potentially offending conduct, rather than matters relevant to writing off penalty notice debt.
- 17.47 Where a person lacks capacity to understand their offending behaviour or to control it, they are entitled, in accordance with the provisions of the *Fines Act*, to have their penalty notices withdrawn.⁸⁴ Alternatively, where their financial, medical and personal circumstances are such that they cannot pay; are not likely to have the means to pay in the future; and enforcement action is not likely to be suitable or successful, they are entitled to have their fines written off. Their disability and their imprisonment are each relevant to the issue of writing off penalty notice debts.

79. Justice Action, *Submission PN38*, 4-5.

80. Now NSW Department of Family and Community Services, Ageing, Disability and Home Care.

81. Department of Human Services NSW, Ageing, Disability and Home Care, *Submission PN13*, 2.

82. Recommendation 8.1.

83. Recommendation 9.7, 9.8.

84. *Fines Act 1996* (NSW) s 101.

- 17.48 The implication of this is that automatic write off for all prisoners with cognitive and mental health impairments is not appropriate.
- 17.49 We note the recommendations made elsewhere in this report that are designed to improve applications for review of penalty notices; to improve the write off process; and to make particular provision for those people who lack capacity to understand and control their behaviour. Providing prisoners with disabilities with the support they need to access annulment, write off and other available mechanisms to address their debts will be key to dealing successfully with this issue.
- 17.50 We commend the work being done to develop an effective working relationship between the SDRO and Corrective Services and support its future development to facilitate annulment and write off applications, as well as the use of WDOs. However the difficulties of this group are significant. In particular we note:
- the level of penalty notice and fine debt amongst prisoners
 - the particular difficulties of prisoners with cognitive and mental health impairments
 - the evidence from consultations and submissions that it is likely that some of the penalty notices issued to this group should be withdrawn
 - the likely futility of attempting to enforce penalty notice debt against this group, and
 - the likely entitlement of many of people with cognitive and mental health impairments in prison to have their debts written off.
- 17.51 We recommend that further steps should be taken by SDRO and Corrective Services to deal with penalty notice and fine-related debt for prisoners with cognitive and mental health impairments. As this problem is an ongoing one, we recommend that the SDRO establish a specialist unit for prisoners with cognitive and mental health impairments. Such a unit would develop specialist knowledge and expertise that would assist in managing the debts of these prisoners more effectively according to the provisions of the *Fines Act*. Although the problems of prisoners who have cognitive and mental health impairments are particularly pressing, it may be that such a unit could also extend its operations to all prisoners in the longer term.

Recommendation 17.2

The State Debt Recovery Office should establish a specialist unit to provide advice and assistance for prisoners with cognitive and mental health impairments in relation to penalty notice debt, including applications for annulment, work and development orders, and write offs.

Option 4 — Pro-rata contributions

- 17.52 In its interim report on fines and penalty notices, the Sentencing Council proposed the introduction of a scheme for the pro-rata reduction of prisoner debt. It was

proposed that, for every \$10 contribution by the prisoner, the SDRO would cancel \$100 from the total amount owing.⁸⁵ These contributions could be drawn from prisoners' benefits or income from prison-based employment. The Sentencing Council pointed out that, given prisoners' very low average weekly income, sacrificing even small amounts of money so as to repay an outstanding penalty-related debt represents a considerable commitment to an amount that the SDRO has little chance of recovering in full.⁸⁶

Submissions and consultations

17.53 Stakeholders were divided in their response to this proposal. A number of stakeholders expressed support for the introduction of a system for pro-rata contributions as a way of paying off penalty notice debts.⁸⁷ Redfern Legal Centre submitted that it would be a feasible rehabilitative measure and could be considered on the same basis as concurrent sentencing.⁸⁸ Corrective Services, while supportive in principle, noted a number of challenges with this proposal, namely:

- the differing levels of debt borne by offenders
- the limited income available to people in custody, and
- the challenges of extending such a scheme to a prisoner during his or her transition into the community.⁸⁹

17.54 Perhaps the most significant problem identified with this proposal is the very low income of prisoners. Although it was prisoners' representatives who proposed this option to the Sentencing Council, representatives of prisoners' groups were not supportive of the proposal in consultations for this inquiry. We were told that the proposal would mean that prisoners would have to forego basic essentials such as shampoo and shaving cream on a long-term basis. Such a proposal would be particularly impractical for prisoners who lack support networks outside prison to supplement their income. Prisoners' groups also indicated that people in custody would be likely to see it less as a mechanism for managing debt and more as a further punishment or a form of state-imposed deprivation of the little income they are able to access while in custody.⁹⁰

17.55 Further, we heard in consultation that, if prisoners' limited incomes went towards repaying debt, their families could be put under additional pressure to make payments into prisoners' accounts to supplement the prisoners depleted income. In this way, families would indirectly be paying the debt, rather than prisoners. Not only

85. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.122].

86. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.123].

87. Redfern Legal Centre, *Submission PN26*, 10; The Shopfront Youth Legal Centre, *Submission PN33*, 20; Corrective Services NSW, *Submission PN24*, 8.

88. Redfern Legal Centre, *Submission PN26*, 10.

89. Corrective Services NSW, *Submission PN24*, 8.

90. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

would this undermine the rehabilitative purposes of such a measure,⁹¹ it would further add to the burden of debt and stress on families.

- 17.56 The Prison and Debt Project found that during the term of imprisonment, families often suffer the most from prisoners' debts: they worry more; are harassed by debt collectors; and may need to divert their own income to repaying debts they did not personally incur. In addition, families must contend with loss of income, while also incurring additional expenditure such as caring for the prisoner's children, travel expenses for visits, STD phone calls, and legal fees. Importantly, it is very common for family members to supplement a prisoner's income (up to \$450 per month) to cover 'buy ups', adding a further significant financial burden to many families.⁹²
- 17.57 Consultations with Aboriginal community groups indicated that Aboriginal families bear significant financial hardship to support a relative in prison, often providing this support out of their pension payments.⁹³ This was described as a 'gendered' burden where money is paid into prison accounts predominantly by aunts, mothers and grandmothers. Stakeholders described a cultural pressure to 'look after our boys inside'⁹⁴ even though this has the potential to put extra stress on families who often go short as a result.⁹⁵
- 17.58 Finally, concern was expressed about the potential for negative consequences if some prisoners were left without money usually used to pay for phone calls and personal discretionary items. Corrective Services expressed concern about the risk of undesirable behaviours such as extortion, or standing over weaker prisoners, that would be 'exceptionally difficult to manage'.⁹⁶
- 17.59 The short sentences imposed on most offenders within the target group and the size of penalty notice debts has the consequence that many prisoners would retain a large measure of unpaid debt on release into the community, even if they were able to make pro-rata contributions. While not an argument against pro-rata contributions in principle, offenders with high levels of debt may also need to consider write offs or WDOs.
- 17.60 Justice Action described pro-rata contributions as 'the least effective option', submitting that it would make very little impact on the level of debt that a prisoner

91. See discussion in K Beckett and A Harris, 'On Cash and Conviction: Monetary Sanctions as Misguided Policy' (2011) 10 *Criminology and Public Policy* 509, 523.

92. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000) 2.

93. Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW 23, February 2011. See also discussion in M Spiers Williams and R Gilbert, *Reducing the Unintended Impacts of Fines*, Indigenous Justice Clearinghouse (2011).

94. Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011. See also Kempsey Roundtable meeting, *Consultation PN14*, West Kempsey NSW, 16 February 2011; Kempsey Aboriginal Community Justice Group Roundtable Meeting, *Consultation PN 15*, South Kempsey NSW, 16 February 2011; Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

95. Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting, *Consultation PN16*, Sydney NSW, 23 February 2011.

96. Corrective Services NSW, *Submission PN24*, 8. See also Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

would carry on release into the community.⁹⁷ Similarly, Legal Aid submitted that the limited funds earned while in prison should be made available for prisoners to use to establish themselves once they are released.⁹⁸

Commission's conclusions

- 17.61 In view of the concerns expressed by stakeholders about this proposal, we do not support the introduction of pro-rata contributions. Because of the very low income of the majority of prisoners, and the consequences of depriving them of any of that income, providing a method of paying off penalty notice debt through non-financial means appears to be a better option.

Option 5 — Prisoner employee contribution

- 17.62 We were told that WDO programs are not necessarily a suitable debt-reduction strategy for all people in custody. Some prisoners may choose to work rather than enrol in a prison course. An employee working a skilled job in the prison service sector can earn a significantly higher income (up to \$60 per week) than a prisoner pursuing an educational course or other prison program (up to \$15 per week).⁹⁹ Given prisoners' competing financial imperatives and conflicting daily schedules, there is a danger that those in paid employment might be unable to participate in a WDO program and would unfairly be excluded from the scheme's debt-reduction benefits.
- 17.63 Prisoners who work are paid a small fraction of the commercial value of equivalent work carried out in the community. It was suggested in consultation that prisoners who do work should have an amount, additional to the money they receive for that work, credited against their penalty notice or fine debts. The prisoner would not receive any money: the value of the work would be credited against his or her debt.
- 17.64 The amount to be credited could be determined by Corrective Services in consultation with the SDRO and other key stakeholders. However, it may be possible to allocate a dollar value to prison employment as part of the WDO scheme and thus to integrate the two methods of paying off penalty notice debts. The relevant rate could then be determined by the WDO Monitoring Committee, which already includes all key stakeholders.

Commission's conclusions

- 17.65 We support this proposal. Both 'credit for work' and the extension of WDOs into prisons would mean that prisoners would be rewarded for making positive contributions to society and to their own rehabilitation. Those rewards are a reduction in debt, which will assist their reintegration post-release. Both methods of reducing penalty notice debt avoid the identified problems with payments from

97 Justice Action, *Submission PN38*, 4.

98 Legal Aid NSW, *Submission PN11*, 25.

99 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011. See also A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, Law and Justice Foundation of New South Wales (2008) 119.

prisoners' low incomes. Corrective Services, in consultation with the SDRO and other key stakeholders, should determine the amount of the credit for work.

Recommendation 17.3

Prisoners in prison employment should have a defined amount credited to the State Debt Recovery Office against their penalty notice debts. This amount should be separate from, and in addition to, the amount paid to the prisoner for work undertaken.

Post-release and the transition back into the community

17.66 There is an increasing body of literature both in Australia and overseas focusing on the critical need for support services to help ex-prisoners reintegrate into the community after release, thereby reducing their chances of reoffending. Former prisoners face many problems upon leaving prison, including housing issues, outstanding debt (including civil debt, penalty notice debt and debts to friends and associates), discrimination, additional attention from police and finding and maintaining employment.¹⁰⁰ As Legal Aid explained, in this context, penalty notices can

exacerbate the difficulty of reintegration and provide a precursor to re-entry into the criminal justice system. ... People leaving custody are often in a vulnerable situation of having little money, being isolated from social and service support networks and unfamiliar with law or rule changes. This could make such individuals more likely to commit penalty notice offences and breach the bond.¹⁰¹

17.67 Currently, the SDRO allows a three-month moratorium on enforcement proceedings in relation to recently released prisoners. In recognition of the number of obstacles facing a person trying to re-establish life after prison, it has been argued that this timeframe should be extended.¹⁰²

Submissions and consultations

17.68 Stakeholders in submissions and consultations told us that the current moratorium on enforcement action offers only brief respite and fails to recognise the wide range of competing priorities that a person must face on leaving prison. It was generally agreed that the period should be extended, although there was no consensus on

100. A Stringer, 'Women Inside in Debt: The Prison and Debt Project' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, October 2000); Audit Office of New South Wales, *Performance Audit: Prisoner Rehabilitation*, Department of Corrective Services (2006); M Borzycki, *Interventions for Prisoners Returning to the Community*, Australian Institute of Criminology (2005); E Baldry et al, *Ex-Prisoners and Accommodation: What Bearing Do Differing Forms of Housing Have on Social Reintegration for Ex-Prisoners?*, Australian Housing and Urban Research Institute (2003).

101 The Law Society of NSW, *Submission PN31*, 13.

102 See NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [4.135] – [4.136].

the appropriate length of time. Some stakeholders argued for a minimum of six months; others suggested that 12 months would be more appropriate.¹⁰³

Commission's conclusion

- 17.69 We recommend that the SDRO, in consultation with Corrective Services and other key service providers, review and extend the current three-month moratorium on enforcement action against recently released prisoners. On the basis of the information available to us, a period of six months appears to recognise the financial and other challenges confronted by prisoners on release. However, our consultations on this issue were not extensive and it may be that a longer period is appropriate.

Recommendation 17.4

The moratorium on penalty notice enforcement action against recently-released prisoners should be extended to six months. The State Debt Recovery Office, in consultation with Corrective Services NSW and other key stakeholders, should give consideration to whether a longer period is appropriate.

103 Prisoners Roundtable Meeting, *Consultation PN8*, Sydney NSW, 3 February 2011.

Part Five

**Maintaining the
integrity and
fairness of the
penalty notice
system**

18. Maintaining the integrity and fairness of the penalty notice system

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Introduction

- 18.1 In this chapter we examine the institutional supports that are needed to maintain the integrity and fairness of the penalty notice system. First we consider the case for a dedicated penalty notice advisory agency, set out its possible functions and consider the most appropriate location for it. Then we examine the case for an advisory committee to assist the State Debt Recovery Office (SDRO) to develop

further its response to providing support measures in dealing with vulnerable people.

Should there be a Penalty Notice Oversight Agency?

- 18.2 In Consultation Paper 10 (CP10) we asked whether there should be a central body in NSW to oversee and monitor the penalty notice regime as a whole.¹ There was strong, but not unanimous, support in submissions and consultations for a central body as the most effective way to oversee, administer and monitor the penalty notice system.² Below we examine the arguments for and against establishing such an agency.

Arguments in favour

Support from previous reviews

- 18.3 The Sentencing Council, in its 2006 review of fines and penalty notices, recommended a review of penalty notice offences and penalty levels,³ noting the lack of cross-government scrutiny of penalty notice offences and penalty levels.⁴ In our 1996 report on sentencing, this Commission agreed that any expansion of the penalty notice system should be accompanied by proper safeguards to minimise abuse of the system, including monitoring of the agencies that issue penalty notices.⁵
- 18.4 In 2009, the Ombudsman recommended that, following appropriate consultation, the Attorney General should consider establishing a body with ongoing responsibility for monitoring the fair and effective use of fines and penalty notices in NSW, and providing advice on opportunities for continual improvement.⁶ However

1. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 2.2.
2. Sixteen out of 19 submissions responding on this question supported a central agency: NSW Maritime, *Submission PN2*, 2; NSW Department of Planning, *Submission PN7*, 1; NSW Food Authority, *Submission PN9*, 1; Holroyd City Council, *Submission PN10*, 2-3; Legal Aid NSW, *Submission PN11*, 5; UnitingCare Burnside, *Submission PN12*, 4; NSW Land and Property Management Authority, *Submission PN17*, 1-2; NSW Department of Local Government, *Submission PN23*, 1; NSW Ombudsman, *Submission PN25*, 5; NSW Industry and Investment, *Submission PN37*, 1-2; Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd, *Submission PN28*, 10; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 2; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3-5; The Law Society of NSW, *Submission PN31*, 1; The Shopfront Youth Legal Centre, *Submission PN33*, 1; NSW Department of Community Services, *Submission PN36*, 3; Homeless Persons' Legal Service, *Submission PN42*, 2-4. Also, Homeless Persons' Legal Service, *Consultation PN3*, Sydney NSW, 13 January 2011; Local Government Roundtable Meeting, *Consultation PN26*, Sydney NSW, 30 March 2011; Transport Roundtable Meeting, *Consultation PN23*, Sydney NSW, 18 March 2011; Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.
3. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.106]-[3.107].
4. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [3.93].
5. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.50]-[3.51].
6. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) Recommendation 23.

the Ombudsman's submission to this inquiry noted that he had not received a response in relation to this recommendation.⁷

- 18.5 The recent evaluation of the 2008 amendments of the *Fines Act 1996* (NSW) (*Fines Act*) by the NSW Department of Attorney General and Justice (AGJ evaluation)⁸ also refers to the need for oversight of the penalty notice system, and makes six recommendations in relation to review, awareness-raising, training, and monitoring, to be carried out by 'any body given responsibility for oversight of the penalty notice system'.⁹

Maintain public confidence in the penalty notice system

- 18.6 Public confidence in the penalty notice system is important on a number of counts. Although penalty notices are issued for minor offences and may therefore seem to be the least important part of the justice system, they represent that part of the justice system with which most people have contact.¹⁰ A resident of NSW is much more likely to receive a penalty notice than to have occasion to go to any court. Public confidence in the system is therefore critical, particularly if people generalise their experience of penalty notices to the rest of the justice system.
- 18.7 Penalty notices generate large amounts of revenue. In 2009-2010 the SDRO processed 2.8 million penalty notices to the value of \$491 million.¹¹ Of this amount, the SDRO collected \$214.9 million on behalf of local government and State Government agencies, which helped fund the activities of those agencies.¹² The substantial amounts collected from penalty notices, and the significance of those amounts to the operations of issuing agencies, has led to concerns that the penalty notice system may be used for the wrong reasons.¹³ In particular, there is a perception in some quarters that the system is more concerned with raising revenue, than with fairness and justice.
- 18.8 We have also demonstrated, in CP 10 and in this report, inconsistencies and unfairness in the administration of the penalty notice system. We will not repeat these concerns here, but note that their existence may also undermine public confidence in penalty notices.

7. NSW Ombudsman, *Submission PN25*, 5.

8. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011).

9. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendations (4)-(7), (15)-(16).

10. Chapter 1 [1.26].

11. NSW Office of State Revenue, NSW Treasury, *Annual Report 2009-10* (2010) 26. Prior to the introduction of penalty notices in NSW, all offences, including minor parking and traffic offences that attracted fines, were dealt with by the courts: See generally NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [1.4]-[1.8].

12. The State Debt Recovery Office provides a centralised processing service for all penalty notices issued by the NSW Police, the Roads and Traffic Authority (camera detected offences), and more than 230 other agencies including local councils, semi-government bodies and other government bodies. In 2009-2010, \$276.4 million was collected for the Crown: NSW Office of State Revenue, NSW Treasury, *Annual Report 2009-2010* (2010) 26-27.

13. R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) 288-289.

Support consistency in the penalty notice system

18.9 The power of a central body to ensure consistency and fairness across the penalty notice system was the dominant theme of submissions and consultations in response to our question about whether or not a central agency is needed.

18.10 At present, disparate agencies have responsibility for key parts of the penalty notice system. As the Ombudsman observed:

Centralised support in driving requisite cultural change is particularly important given the large number of agencies that are involved in penalty notice processes, including: issuing agencies such as local councils, RailCorp and police, enforcement through the SDRO, organisations engaged with or representing youth and vulnerable people that are fine recipients, including government agencies like the NSW Trustee and Guardian, non government organisations, financial counsellors and specialist legal advocates.¹⁴

18.11 Penalty notice offences are created by many different issuing agencies. There is presently no mechanism to ensure that these agencies look beyond their own interests and concerns when they are creating or reviewing offences, or setting penalty amounts. Offences and penalty amounts are set by reference to the concerns of the regulatory agencies without reference to the way in which other departments or agencies may have regulated the same or comparable activities. This has produced a system full of illogical differences and inconsistencies, which we have described in CP 10 and in Chapters 3 and 4 of this report.

18.12 As some stakeholders observed, the effectiveness of Parliament as a review body for penalty notices is limited, as its assessment of any penalty notice regulation occurs at the tail end of the policy development phase¹⁵ after the legislative proposal has been drafted by Parliamentary Counsel, endorsed by Cabinet or the Executive Council, and submitted to both Houses of Parliament. While all of these bodies have positive input into the creation of penalty notices and the setting of penalty notice amounts, their focus is not on maintaining consistency in the penalty notice system or considering proposed penalty notices in the light of other regulatory provisions. They have other areas of expertise and other functions. To date, their combined scrutiny has not been sufficient to keep the system consistent and fair. Ideally, oversight of penalty notices should occur early in the process of legislative development.

18.13 The NSW Department of Planning¹⁶ saw merit in a central oversight body that was consulted by regulatory agencies when preparing legislation and regulations giving rise to penalty notice offences in their jurisdiction. It suggested that a central body would be better placed to advise these agencies on the consistency of proposed new penalty amounts with other comparable offences.¹⁷ The NSW Young Lawyers, Criminal Law Committee agreed with other stakeholders that an independent body guided by principles (or guidelines) would improve consistency by considering all

14. NSW Ombudsman, *Submission PN25*, 4-5:

15. Legal Aid NSW, *Submission PN11*, 5.

16. Now NSW Department of Planning and Infrastructure.

17. NSW Department of Planning, *Submission PN7*, 1, 3.

offences against the same scale.¹⁸ The NSW Department of Local Government¹⁹ envisaged that a central body would ensure consistency in the advice provided to enforcement officers on penalty notice matters and also provide an important point of contact for related enquiries from the public.²⁰

- 18.14 Issues of consistency also arise in the issuing and enforcement of penalty notices. The penalty notice system is regulated by the *Fines Act* and associated guidelines. Guidelines have the benefits of flexibility but are presently issued by a wide range of different agencies. The guidelines issued by the AGJ in relation to cautions, internal review and work and development orders (WDOs) support consistency, but agencies can, and do, use their own guidelines. There is presently no method for ensuring consistency in the content of these guidelines, or in their application in practice.
- 18.15 We foreshadowed in CP 10,²¹ and the majority of submissions agreed, that ‘self enforcement’ of guidelines is likely to be of limited effect. There is no guarantee that issuing agencies would apply the guidelines in a consistent way over time or have regard to what other agencies are doing. An effective mechanism for long-term consistency in the application of guidelines across the whole of government appears to be desirable.
- 18.16 The issue of consistency is significant not only within NSW, but between NSW and other states, and between the states and the Federal government. It seems likely that there will be greater impetus towards consistency of regulation across borders in the future, especially where this facilitates commercial activity. A central NSW penalty notice agency could provide expert advice and assistance to government and ensure that the interests of NSW are properly represented in future negotiations relating to inter-state and federal-state consistency in this area.

Redress the privatising effect of penalty notices

- 18.17 Penalty notice offences, in effect, privatise the criminal law because they do not, as a matter of course, encounter judicial scrutiny. These offences depart from the traditional separation of powers doctrine, and from established legal principle, that only courts may impose a criminal penalty on an individual.²² The expansion of penalty notices has been recent.²³ They now cover more than 7000 offences in NSW²⁴ and their reach is diverse: from occupational health and safety, to protection

18. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3. NSW Maritime commented that overarching guidelines, as since recommended in Chapters 3 and 4 of this Report, need an oversight agency to supervise them: NSW Maritime, *Submission PN2*, 2.

19. Now Division of Local Government, NSW Department of Premier and Cabinet.

20. NSW Department of Local Government, *Submission PN23*, 1.

21. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [2.48].

22. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [2.129].

23. In 1996, the *Fines Act 1996* (NSW) was enacted by Parliament and it underpins the current penalty notice system. At first the *Fines Act* contained 43 statutory provisions authorising the use of penalty notices: *Fines Act 1996* (NSW) sch 1. It now contains 114 statutory provisions under which penalty notices can be issued: *Fines Act 1996* (NSW) sch 1. See Appendix C.

24. Information provided by the Judicial Commission of New South Wales: NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [1.8].

of the environment, the supply of electricity and other services, gaming machines, and traffic offences.²⁵ The lack of judicial scrutiny is justified by the high volume and generally minor nature of offending involved in penalty notice offences, and the subsequent cost and time savings for government, issuing agencies and recipients.

- 18.18 It would be undesirable to increase the cost and complexity of the penalty notice system in any way that threatens its positive benefits of speed, simplicity and relative cheapness. However, the ubiquity and the lack of public scrutiny of penalty notices, means that limited monitoring of, and public reporting about, the penalty notice system is desirable to maintain public understanding and respect.

Responding to the needs of vulnerable people

- 18.19 Throughout this report, and especially in Part Four, we have enumerated the difficulties that vulnerable people confront with the penalty notice system. Changes were made in 2008 to improve its operation in this respect and these amendments have been beneficial. We make further recommendations to improve the operation of the system for those who are vulnerable. However, there is likely to be an ongoing need to focus on improving and maintaining the operation of the system in relation to vulnerable people.

Arguments against

Avoid replicating the cost and complexity of courts

- 18.20 Not all submissions were in favour of the introduction of an oversight agency. Three submissions did not support it.²⁶ Even some that favoured such an agency were also aware of its potential disadvantages. In consultations, one agency spoke of the danger of ‘oversight fatigue’ and the importance of checking that the tasks proposed could not be adequately carried out by an existing agency. Other stakeholders questioned whether it was appropriate to ‘create another level of bureaucracy’ when Parliamentary scrutiny already does the oversight work.²⁷
- 18.21 The NSW Department of Environment, Climate Change and Water (DECCW)²⁸ supported penalty notice guidelines,²⁹ assisted by transparent internal guidelines,³⁰

25. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [1.8].

26. Three responding on the question: Transport NSW, *Submission PN30*, 1; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1; NSW Police Portfolio, *Submission PN44*, 1.

27. NSW Police Portfolio, *Submission PN44*, 1; NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1. DECCW stated that parliamentary scrutiny for penalty notices under the disallowance of statutory rules provision (*Interpretation Act 1987* (NSW) s 41) is sufficient, and no need for additional scrutiny exists.

28. In April 2011 most of the functions of the Department of Environment, Climate Change and Water were transferred to the new Office of Environment and Heritage (a division of the NSW Department of Premier and Cabinet). The Office of Water is now part of the Department of Primary Industries.

29. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1, 6.

30. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1 gave examples of two of its published guidelines: *EPA Prosecution Guidelines* and the *NPWS Prosecution Policy*.

but did not support the creation of a central body to oversee and monitor the penalty notice system. DECCW considered Parliamentary scrutiny of the penalty notice system to be adequate and it found no compelling reason for additional scrutiny.³¹

- 18.22 The NSW Police Portfolio (Police) submission argued that an oversight body was unnecessary. Like DECCW, it considered Parliamentary scrutiny of penalty notice legislation to be sufficient. The Police submission was concerned that an oversight agency would create additional costs and complexities for all agencies involved, without commensurate benefits.³²
- 18.23 There is clearly much force in the argument that it is important not to reintroduce the cost and complexity that penalty notices were designed to avoid.

Maintain flexibility and responsiveness to context

- 18.24 Transport NSW³³ considered that supervision and monitoring of penalty notice offences and their amounts should remain with each individual regulatory agency. Like other dissenting submissions, Transport NSW supported the adoption of oversight guidelines to assist each agency with developing, implementing and administering their own penalty notice scheme to ensure a consistent approach to penalty amounts for like offences. However, it favoured continued self-regulation to provide agencies with flexibility in their approach to the oversight guidelines.³⁴
- 18.25 At a roundtable meeting of issuing agencies, some stakeholders expressed concern that a central body would encroach upon the ‘independence’ of issuing agencies in creating penalty notices and in setting their amounts. There was also a danger that such a body could be too general in its ambit to respond to the specific needs and contexts of different agencies. There was concern that a central body could potentially reduce the autonomy of an issuing agency to act on its expert knowledge of specialised parts of its operation when creating penalty notice offences and setting their amounts.³⁵

Cost and additional regulatory load not warranted

- 18.26 The Police submission argued that, depending on the level of oversight, a significant resource impost might be placed on the NSW Police Force if a central body were created, with additional record-keeping requirements that would divert police from their core functions.³⁶ As noted above, NSW Police was also concerned that a new oversight body would create additional costs and complexities for all agencies without commensurate benefits.³⁷

31. NSW Department of Environment, Climate Change and Water, *Submission PN22*, 1.

32. *NSW Police Portfolio, Submission PN44*, 1.

33. Now Transport for NSW.

34. Transport NSW, *Submission PN30*, 1-2.

35. Issuing Agencies Roundtable Meeting, *Consultation PN25*, Sydney NSW, 24 March 2011.

36. *NSW Police Portfolio, Submission PN44*, 1.

37. *NSW Police Portfolio, Submission PN44*, 1.

Commission's conclusions

- 18.27 In our view the arguments in favour of the establishment of an oversight agency for the penalty notice system strongly outweigh the arguments against and; therefore, we recommend that a Penalty Notice Oversight Agency (PNOA) be established in NSW.
- 18.28 We note in particular the support for an oversight agency from previous reviews and from the majority of submissions and consultations. We recognise that the expert knowledge of issuing agencies is of the greatest importance in responding to the specific circumstances in which they operate. However, there is also a demonstrated need for an agency that looks across government and promotes consistency, fairness and public respect for the penalty notice system. There is no reason to suppose that a central agency would be unresponsive to any representations made by individual issuing agencies or that it would fail to consult with them.
- 18.29 We note the concerns of some stakeholders that an oversight agency would be costly and would impose a regulatory burden on issuing agencies. However we believe that these concerns can be taken into consideration in the nature of the agency and the way it operates. These issues are considered below. It is envisaged that the agency would be modest, low cost, and operate in a consultative fashion.
- 18.30 It is inevitable that, in seeking to create fairness and consistency across the penalty notice system, an oversight agency would sometimes call upon individual regulators to make some compromises. However the present fragmented nature of the regulatory system has created the problems of inconsistency and unfairness that we have described. Any compromise required of regulators would be for principled reasons and be in the service of a fair and consistent system for NSW.

Recommendation 18.1

A Penalty Notice Oversight Agency should be established to oversee and monitor the penalty notice system.

Functions and limits of a Penalty Notice Oversight Agency

Functions of the Penalty Notice Oversight Agency

- 18.31 The role of the proposed PNOA should be to develop, maintain and monitor the regulatory framework of the penalty notice system, particularly in relation to setting penalty notice offences and amounts and enforcing penalty notices. In undertaking this role it will have a number of functions, which are discussed below. It is envisaged the PNOA will:
1. provide policy advice to the NSW Government, through the Attorney General, on the penalty notice system
 2. develop guidelines for setting penalty notice offences and amounts and for key aspects of issuing and enforcing penalty notices

3. provide advice to government in relation to new penalty notice offences and amounts proposed by issuing agencies
4. review existing penalty notice offences and amounts
5. work with issuing agencies to support and disseminate best practice, and
6. monitor and report publicly on issuing agencies' compliance with the legislation and guidelines.

Provide policy advice to government, through the Attorney General, on the penalty notice system

- 18.32 The PNOA should have the capacity to provide policy advice on penalty notices to the Attorney General, and to the whole of the government. We have canvassed in this report the wide range of legal and policy issues that arise in relation to penalty notices. We have demonstrated the need for consistent policy to maintain the fairness of the penalty notice system. We have also shown the importance of penalty notices, the breadth and significance of their impact on people in NSW, and the importance of penalty notices to the reputation of the justice system more generally. We have set out the impact of penalty notices on vulnerable people and pointed to significant problems created by penalty notices, including secondary offending with its consequence of imprisonment for some people. The seriousness of these matters, and the many other issues raised in this report, including the inconsistencies in the reach of penalty notice offences and penalty amounts, indicate the need for high-level policy consideration and coordination.
- 18.33 Penalty notice oversight also requires balancing the interests of a wide range of different government departments and agencies in circumstances in which the interests of individual departments may not always coincide with the more general concern of the justice system to maintain fairness and consistency. It is therefore important that the PNOA have the resources to provide legal policy advice at a sufficiently senior level.

Develop guidelines for setting penalty notice offences and amounts and for key aspects of issuing and enforcing penalty notices

- 18.34 The penalty notice system is regulated by the *Fines Act* and the guidelines made under that Act. There are already guidelines in place in relation to cautions, internal review and WDOs. We have proposed some changes to these guidelines in this report. New guidelines are also proposed in relation to:
- creating penalty notice offences
 - penalty amounts
 - time to pay, and
 - writing off penalty notice debt.
- 18.35 It would be the role of the PNOA to develop, revise and keep under review all guidelines relating to penalty notices. We note in this context that stakeholders had positive opinions about the existing guidelines developed by the AGJ, as well as the

methods that were used to develop those guidelines. These practices provide a model for the development of the proposed new guidelines.

Provide advice to government in relation to new penalty notice offences and amounts

- 18.36 The PNOA should scrutinise all proposed new penalty notice offences and penalty amounts for compliance with the guidelines.
- 18.37 The distortions, inconsistencies and inequities of the existing system have come about over time because of a lack of guidelines and the absence of meaningful scrutiny for consistency on a statewide basis. It is important that the PNOA, and the guidelines and associated procedures, be sufficiently robust to ensure consistency, and fairness, into the future.
- 18.38 We recommend for NSW a process similar to the one operating in Victoria. All proposed new, or revised, penalty notice offences should be submitted to the PNOA. Ideally, communication between the department or agency concerned and the PNOA should commence early. The PNOA would serve as a resource of information, advice and assistance in relation to proposed penalty notice offences and the implications of the relevant guidelines. Where there are concerns about whether or not a proposal complies with the guidelines, these would likely be resolved, for the most part, by dialogue aimed at satisfying the concerns of the department and bringing the proposed offences into compliance.
- 18.39 We recommend that the minister proposing the legislative or regulatory amendments in relation to all penalty notice offences should be required to obtain a certificate from the PNOA certifying that the relevant guidelines have been complied with. However, there would no doubt be situations where the relevant department did not agree with the advice of the PNOA and the difference could not be resolved by negotiation.
- 18.40 Ultimately, if the PNOA believed that the department's proposal was non-compliant the matter would need to be resolved by Cabinet. This should be the case even where the proposal concerns regulatory amendment that would not ordinarily be scrutinised in Cabinet. The arguments about the importance of maintaining the fairness, justice and consistency of the penalty notice system have been thoroughly dealt with above. It is important that departures from the mechanisms proposed to keep the penalty notice system fair and consistent be subject to careful consideration and judgment by Government with advice from the Attorney General and the relevant minister.

Recommendation 18.2

- (1) All proposed (new or revised) penalty notice offences must be referred to the Penalty Notice Oversight Agency, which will scrutinise the proposals for compliance with relevant guidelines.
- (2) The Penalty Notice Oversight Agency will provide information, advice and assistance in relation to proposed penalty notice offences and the relevant guidelines.

- (3) The responsible Minister proposing any legislative or regulatory amendments creating or amending a penalty notice must obtain a certificate of compliance or non-compliance from the Penalty Notice Oversight Agency.
- (4) If the certificate is one of non-compliance with the guidelines, the proposal for the penalty notice offence must go to Cabinet, even where the proposal is for a new or amended regulation.

Review existing penalty notice offences and amounts

- 18.41 In CP 10 and this report we have identified serious inconsistencies, particularly in penalty notice amounts. These inconsistencies are of such a nature that the penalty notice system risks being brought into disrepute. We will not repeat here the evidence of obsolete penalty notice offences, widely disparate penalties for the same or similar conduct, and unfair penalty levels.³⁸ Urgent attention is needed to create consistency across the many legislative instruments that currently provide for penalties.
- 18.42 Submissions and consultations were in favour of ‘spring cleaning’ that is, undertaking a review of penalty notice offences that have become obsolete or inappropriate for contemporary conditions, or are of a trivial nature.³⁹ The need for a cross-government review mechanism for adding or removing penalty notice offences which have become irrelevant or outmoded as a compliance tool was noted.⁴⁰ As noted earlier, most submissions and consultations strongly agreed that oversight of the penalty notice system should be carried out by a central co-ordinating body⁴¹ to ensure consistency for similar offences across different pieces of legislation.⁴² They supported the central agency’s core role in clarifying how penalty notices are created and used, and how their amounts are set.⁴³
- 18.43 We recommend that the PNOA conduct a review of existing penalty notices to update them and remove obsolete offences: to ensure consistency across the system, particularly in penalty amounts for like offences, and to ensure consistency of existing offences with the guidelines for the creation of penalty notice offences and the setting of penalty notice amounts.
- 18.44 Such a review is a significant undertaking and would require the PNOA to develop a program for reform. While it may be appealing to approach this task by working separately with each government department or agency, this approach cannot be

38. See generally Chapters 3-4 and NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) chs 2-4.

39. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 1-2 agreed that penalty notices had proliferated over the course of the years. They observed there had not been a corresponding removal of unnecessary, unused or antiquated offences: In other words, there had been continual growth without adequate rationalisation. NSW Ombudsman, *Submission PN25*, 5.

40. See also NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) x-xi.

41. Chapter 18 [18.2].

42. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3; NSW Department of Community Services, *Submission PN36*, 3; Homeless Persons’ Legal Service, *Submission PN42*, 2-4:

43. NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3-5.

the only one adopted. It is precisely the autonomy of each agency in developing its own rules and priorities that has produced (albeit unintentionally) the present situation of inconsistency, potential injustice and unfairness. Working across agencies — for example by focusing on problem areas such the disparities in transport offences or in offences committed in parks and other public places — will be important.

Recommendation 18.3

The Penalty Notice Oversight Agency should conduct a review of existing penalty notices in order to

- (1) update them and remove obsolete offences
- (2) ensure consistency across the penalty notice system, particularly in penalty amounts set for like offences, and
- (3) ensure consistency of existing offences with the proposed guidelines for penalty notice offences and penalty notice amounts.

Work with issuing agencies to support and disseminate best practice

18.45 It was clear from submissions and consultations that many issuing agencies have thorough, well-considered policies, practices and procedures in place in relation to matters such as setting penalty amounts, issuing cautions, and conducting internal review of penalty notices. There are, no doubt, many other aspects of good practice, such as training packages and resources, which we did not hear about during this inquiry. The PNOA, however, could play a very useful role in promoting standards by sharing information and examples of good practice in order to advance best practice models.

18.46 Our recommendations specifically envisage such a role for the PNOA in relation to cautions and internal review.⁴⁴ Several stakeholders suggested a role for a central body in assisting issuing agencies to improve their performance in relation to dealing with vulnerable people. It is apparent from this inquiry that the reforms of 2008 to the *Fines Act* have secured important improvements in the way the system responds to vulnerable people, but more remains to be done and the PNOA could play a significant role in supporting the work of government in this regard.

Monitor and report publicly on issuing agencies' compliance with the legislation and guidelines

18.47 In CP10, we asked whether there should be a provision for annual reporting to Parliament on the number and type of penalty notices issued and any other relevant data. In the event of support for this idea, we asked who should be responsible for this.⁴⁵ Most submissions were supportive of annual reporting to Parliament on

44. Chapter 5, Recommendations 5.2, 5.3; Chapter 7, Recommendation 7.1.

45. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) Question 2.4.

penalty notice offence statistics.⁴⁶ However, opinion was divided on who should be responsible for this reporting.

- 18.48 Some submitted that, as the SDRO currently collects, collates and disseminates this data, it should continue to do so.⁴⁷ The SDRO agreed, commenting that it is the central repository for this information at present. It noted that it already includes statistics on penalty notices in its annual report for a limited range of traffic offences, but that this could easily be expanded and the information delivered to Parliament and the public on an ongoing basis.⁴⁸
- 18.49 Other submissions asserted that a new oversight body could have this role.⁴⁹ Others thought that the Attorney General through the AGJ was the appropriate person to report.⁵⁰ Still others thought that the individual issuing agencies could be specifically required to provide this information in their annual reports.⁵¹ The SDRO noted that individual issuing agencies do include their penalty notice statistics in their annual reports.⁵² Another, while agreeing with a mechanism for public access to information about the issuing of penalty notices, had no comment about who should be responsible for the collection and reporting of data in this context.⁵³
- 18.50 In New Zealand, guidelines specify that issuing agencies must report annually on their infringement notice statistics as required by the Secretary of Justice. The guidelines explain that collection of key statistics not only ensures accountability for the operations of the infringement offence scheme, but also enables growth of the system and allows additional pressures it might place on the community, prosecuting agencies, and the court system to be effectively monitored.⁵⁴
- 18.51 We have made numerous recommendations in this report as to the need for conferring a monitoring and reporting role on a PNOA. We have recommended that the PNOA monitor and report on:

46. NSW Food Authority, *Submission PN9*, 1-2; Holroyd City Council, *Submission PN10*, 4; Legal Aid NSW, *Submission PN11*, 5; NSW Land and Property Management Authority, *Submission PN17*, 2; NSW Maritime, *Submission PN2*, 2; The Law Society of NSW, *Submission PN31*, 1; The Shopfront Youth Legal Centre, *Submission PN33*, 2; NSW Industry and Investment, *Submission PN37*, 2; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 2-3.

47. Holroyd City Council, *Submission PN10*, 4; NSW Land and Property Management Authority, *Submission PN17*, 2.

48. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 2-3.

49. Legal Aid NSW, *Submission PN11*, 5; NSW Maritime also noted this may result in additional reporting requirements for agencies like them who would be required to continue the existing Annual Report mechanism and also be required to report to a new central body: NSW Maritime, *Submission PN2*, 2.

50. The Law Society of NSW, *Submission PN31*, 1.

51. NSW Industry and Investment, *Submission PN37*, 2 suggested an amendment could be made to the relevant regulation to make this reporting mandatory for government agencies. NSW Food Authority, *Submission PN9*, 1-2, believed 'it should be a *specific* requirement of each relevant agency to include this information in its Annual Report' (emphasis added). However, it also stated it currently publishes the number of penalty notices issued in its annual report and also provides penalty notice information on its website.

52. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 2-3.

53. The Shopfront Youth Legal Centre, *Submission PN33*, 2.

54. New Zealand Ministry of Justice, *Infringement Guidelines* (2008) [40]-[42].

1. Penalty notices containing a mental element, defence or proviso; penalty notices that require an issuing officer to make a judgment about community standards; offences where imprisonment is an available sentencing option for serious breaches⁵⁵
2. Issuing agencies' systems and training in relation to issuing cautions, particularly relating to vulnerable people; agency-specific cautions guidelines; the number of cautions issued; agency policies and internal monitoring of cautions⁵⁶
3. Internal review guidelines; compliance with the *Fines Act* provisions relating to internal review in relation to each ground of review⁵⁷
4. The operation of the time-to-pay guidelines⁵⁸
5. The operation of the write off guidelines.⁵⁹

18.52 We envisage that monitoring and reporting on these matters will assist government to understand the effectiveness, or otherwise, of its legal and policy initiatives and provide information that will assist in improving the operation of the system. We also envisage that the systems established to monitor penalty notices will be responsive to the needs of stakeholders, as far as possible, and that they will change over time in response to changes in the penalty notices landscape.

The limits of the role of the Penalty Notice Oversight Agency

- 18.53 We do not advocate that the PNOA should have either a training or customer service role. Nor do we propose that the PNOA should take over any part of the SDRO's enforcement role.
- 18.54 Training should be the responsibility of the agencies issuing or enforcing penalty notices, primarily because an agency should respond to the context in which it operates and benefits from the specialised knowledge and expertise of its staff. However, we do envisage that the PNOA could have a role in supporting and disseminating information about training and in supporting best practice in training. As a central agency working with key stakeholders, the PNOA would be well placed to learn of agency initiatives that may be of broader relevance or that deal with generic issues and that could assist to support or raise standards.
- 18.55 Providing community education, public information, support and referral in relation to penalty notices is a valuable role that may also have systemic benefits. Garnering information from users can provide valuable information about any problems that arise in the system and can inform improvements to it.

55. Chapter 3, Recommendations 3.4, 3.5, 3.10.

56. Chapter 5, Recommendations 5.2, 5.3.

57. Chapter 7, Recommendation 7.1.

58. Chapter 9, Recommendation 9.1.

59. Chapter 9, Recommendation 9.7.

- 18.56 However, on balance we conclude that other agencies – such as Law Access, Community Legal Centres, the SDRO, non-government organisations⁶⁰ and issuing agencies – should retain the responsibility for providing customer service, referral, education and information. These agencies are already involved in this work. For example, the SDRO conducts educational and outreach campaigns about their enforcement processes and the rights of penalty notice recipients, including options such as time to pay and WDOs.⁶¹ Many people who have problems with penalty notices also have other legal and service needs. They would be better served by agencies that can provide a more comprehensive range of service that includes penalty notice assistance amongst other services.
- 18.57 Finally, we do not propose that the PNOA should take over any part of the SDRO's enforcement role. We envisage that the two agencies will develop a positive and co-operative relationship as key agencies in the penalty notice system, but that their roles will be quite different.

The location and constitution of a Penalty Notice Oversight Agency

- 18.58 We have recommended the establishment of a PNOA. This section examines how the PNOA should be constituted and where it should be located.
- 18.59 In CP10, we considered the nature and potential location of a central co-ordinating agency, and proposed for consideration: locating it within the Department of Justice and Attorney General;⁶² establishing it as a stand-alone body; or giving the role to the Parliamentary Legislation Review Committee.⁶³ Subsequently, as a result of submissions and consultations, we canvassed five options for establishing such an agency:
1. In the Better Regulation Office
 2. In the Parliamentary Legislation Review Committee
 3. As an *ad hoc* review committee
 4. As a stand-alone, independent body, or
 5. As a unit located in the Department of Attorney General and Justice.

The last of these options was the only proposal that received any substantial support.

60. Non-government organisations.

61. See also Chapter 9.

62. Now known as the NSW Department of Attorney General and Justice (AGJ).

63. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [2.50]-[2.56].

The Better Regulation Office

- 18.60 The Better Regulation Office (BRO) was established in 2007 within the Department of Premier and Cabinet. Its role is principally focused on the quality and cost of government regulation. However, regulatory proposals relating to police powers, general criminal laws and the administration of justice (such as rules of court and sentencing legislation) are outside its remit.⁶⁴
- 18.61 The option of locating a penalty notices agency within the BRO was supported by few submissions.⁶⁵ The ambit of the BRO's current remit, especially having regard to the exclusion of criminal law matters, means that it is not the most appropriate location for a penalty notice agency.

The Parliamentary Legislation Review Committee

- 18.62 In CP 10, it was contemplated that the Legislation Review Committee could report to Parliament on whether a proposed new penalty notice offence, or proposal for the amendment of an existing offence, satisfied guidelines relating to the creation of penalty notice offences.⁶⁶ This is consistent with the function of the Committee, but it would involve a more limited role for a central penalty notices agency than we envisage in this report. The Parliamentary Legislation Review Committee option was not supported in consultations and submissions. Legal Aid NSW (Legal Aid) noted that the Committee would have limited effectiveness because its contribution would only occur at the end of the policy development phase.⁶⁷

An ad hoc review body

- 18.63 Another possible approach would be to create an interim ad hoc review committee, or working group, to engage periodically in a review of the functioning and operation of the penalty notice system. Such a committee could perhaps be established and operate every few years in order to ensure that the penalty notice system is operating fairly and effectively, after which it would be disbanded.
- 18.64 This proposal did not receive support in submissions and consultations. Given the recommendations of this report and the roles proposed for the PNOA, an ad hoc committee would not appear to have the capacity to carry out the level and nature of work required, nor would it have the corporate memory or membership that would be essential to ensure consistency in the operation of the system.

An independent agency

- 18.65 A permanent, independent body created under its own legislation, with the task of review and oversight of the penalty notice system, was also proposed for consideration in CP 10.

64. NSW Department of Premier and Cabinet, Better Regulation Office, *Guide to Better Regulation* (2009) 10.

65. NSW Maritime, *Submission PN2*, 2; The NSW Department of Planning suggested either the NSW Department of Attorney General and Justice or Better Regulation Office: NSW Department of Planning, *Submission PN7*, 1, 3.

66. NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [2.55].

67. Legal Aid NSW, *Submission PN11*, 5.

- 18.66 There was support for such an agency in submissions from a few stakeholders.⁶⁸ A strong advocate for a stand-alone, independent body was the Ombudsman, who considered that a permanent, independent body would be best placed to engage in an ongoing evaluation of the penalty notice system, while supporting and driving change to the system to increase its fairness and effectiveness.⁶⁹ In some consultation meetings it was also suggested that this model could potentially remove partisan political considerations that were said to sometimes influence which offences become penalty notice offences.
- 18.67 While an independent agency, created by statute, would have the advantages of security and permanency, and would be less vulnerable to changing political or bureaucratic priorities, the costs involved in establishing and maintaining such an agency are an important concern. Both the start-up and ongoing costs would potentially be greater for a new stand-alone body than if an oversight agency were located within an existing department. Further, flexibility and responsiveness to a changing workload should be taken into consideration. We envisage that the proposed agency would have a significant workload at its inception, particularly in reviewing existing penalty notices for compliance and consistency with guidelines; the development of new guidelines; establishing systems for monitoring key elements of the penalty notice system; and improving the standards of some issuing agencies. However, once these things are in place the workload of the agency might reasonably be expected to decline. A stand-alone agency may not have the same flexibility to respond to changes in workload as an agency within an existing department.

A unit within the Department of Attorney General and Justice

- 18.68 The proposal that received most support from stakeholders was locating an agency within the AGJ.⁷⁰ In summary, the reasons given by stakeholders for supporting this model were the department's expertise and experience in law regulation and enforcement; its existing record of involvement with penalty notices; its consultative approach to stakeholder agencies and the public; and the cost-effectiveness of such an approach.

68. NSW Land and Property Management Authority, *Submission PN17*, 1-2; NSW Ombudsman, *Submission PN25*, 6; NSW Young Lawyers, Criminal Law Committee, *Submission PN29*, 3-4. Shopfront Youth Legal Centre, although unsure how the central body should be constituted, considered it must be 'robust and independent' to subject the system to 'proper scrutiny': Shopfront Youth Legal Centre, *Submission PN33*, 1.

69. NSW Ombudsman, *Submission PN25*, 5-6. The Ombudsman also noted that it had recommended this in its recent report, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) Recommendation 23.

70. NSW Food Authority, *Submission PN9*, 1; Holroyd City Council, *Submission PN10*, 3; Legal Aid NSW, *Submission PN11*, 5; NSW Department of Local Government, *Submission PN23*, 1; The Law Society of NSW, *Submission PN31*, 1; NSW Industry and Investment, *Submission PN37*, 1-2; NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 2; Homeless Persons' Legal Service, *Submission PN42*, 2-4. NSW Department of Planning, *Submission PN7*, 1, 3 considered the role should be given to the AGJ or BRO, rather than a new body or parliamentary committee. UnitingCare Burnside supported an independent body within SDRO, which would in conjunction be transferred to the AGJ: UnitingCare Burnside, *Submission PN12*, 4. The NSW Department of Community Services supported the Victorian model, which is an agency within the Department of Justice: NSW Department of Community Services, *Submission PN36*, 3.

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- 18.69 The NSW Food Authority argued that the AGJ's expertise would ensure appropriate legal and jurisprudential input at relevant points in the penalty notice process.⁷¹ UnitingCare Burnside similarly assessed the AGJ as the most appropriate body because 'the punitive nature of penalty notices is a justice issue and should sit within the Attorney General's department'.⁷² Legal Aid agreed that a dedicated body within the AGJ would provide a more purposeful and consistent approach to overseeing the penalty notice system.⁷³
- 18.70 The NSW Department of Local Government, echoing other submissions, considered the AGJ had the 'relevant expertise and experience in the administration of legislation related to systems of law enforcement'. It also highlighted the AGJ's recent 'consultative approach' to co-ordinating the policy development of the Attorney General's Caution Guidelines and the Attorney General's Internal Review Guidelines⁷⁴ as evidence of its suitability for a new oversight role in penalty notices.⁷⁵ NSW Industry and Investment (Industry and Investment)⁷⁶ also mentioned the need for the AGJ, as its preferred repository of an oversight body, to consult closely with issuing agencies.⁷⁷
- 18.71 The Homeless Persons Legal Centre (HPLS) supported the AGJ as the location of a central oversight body. The HPLS proposed that the unit should be called the 'Penalty Notices Oversight Unit' and that it should be headed by a senior public servant. It envisaged that this unit would liaise with an 'Advisory Committee' representing stakeholder's views, expertise and experience.⁷⁸
- 18.72 The SDRO submitted that if the AGJ were the location of a new oversight body, then minimal resources would be anticipated for its establishment because, 'to a degree there is already some centralisation through the [AGJ] which could be expanded'.⁷⁹ Industry and Investment observed that the resource requirements of an oversight body under the AGJ would be an issue for that department.⁸⁰ As noted above, the police considered the resource requirements of establishing an oversight body generally were too burdensome and so did not support the existence of an oversight agency at all.⁸¹
- 18.73 Holroyd City Council agreed that the AGJ was the best, and possibly most cost-effective, option for a central oversight body.⁸² However it considered that the

71. NSW Food Authority, *Submission PN9*, 1.

72. UnitingCare Burnside, *Submission PN12*, 4.

73. Legal Aid NSW, *Submission PN11*, 5.

74. NSW Department of Justice and Attorney General, *Caution Guidelines Under the Fines Act 1996*; NSW Department of Justice and Attorney General, *Internal Review Guidelines Under the Fines Act*.

75. NSW Department of Local Government, *Submission PN23*, 1-2.

76. Now NSW Department of Trade and Investment, Regional Infrastructure and Services (NSW Trade and Investment).

77. NSW Industry and Investment, *Submission PN37*, 1-2.

78. Homeless Persons' Legal Service, *Submission PN42*, 2-4.

79. NSW Office of State Revenue, State Debt Recovery Office, *Submission PN41*, 2.

80. NSW Industry and Investment, *Submission PN37*, 2 also assumed SDRO would continue as it is.

81. *NSW Police Portfolio*, *Submission PN44*, 1.

82. Holroyd City Council, *Submission PN10*, 3.

existing safeguards, such as the *Subordinate Legislation Act 1989* (NSW), Better Regulation Principles, and the Legislation Review Committee, should also remain in force ensuring that relevant guidelines and principles are applied at both the beginning and end of the legislative process.⁸³

- 18.74 In consultations, some stakeholders supported locating the agency in the AGJ to maintain the link between penalty notices and the justice system. Concern was expressed that the penalty notice system presently overemphasises raising revenue. The system is currently very efficient in terms of collecting fines but needs to improve its ability to exercise discretion and take into account the personal circumstances of penalty notice recipients, especially vulnerable people. It was argued that locating the agency in the AGJ would tip the scales in favour of considerations of fairness and justice, rather than bureaucratic efficiency and revenue collection.
- 18.75 In other jurisdictions, penalty notice oversight agencies are located within justice departments rather than finance departments. The New Zealand guidelines require any agency seeking to establish a new infringement scheme, or to review an existing one in statute or regulations, to consult the Ministry of Justice on the provisions and penalties for the proposed infringement offences.⁸⁴ In Victoria, the Infringements System Oversight Unit (ISOU) is a unit within the Department of Justice providing advice to ministers, the whole of government and external enforcement agencies, on the policy and operation of the infringements system. The ISOU also monitors the degree of success of government initiatives with respect to the infringements system and, in consultation with stakeholders, examines potential improvements.⁸⁵
- 18.76 Additionally, there is the need mentioned above for the PNOA to have the function of providing policy advice on the penalty notice system, and issuing guidelines regulating the penalty notice system. Given the role of the Attorney General as the principal adviser to the Government and Cabinet on legal and legal policy issues, and the Attorney General's role in ensuring that the administration of justice in NSW is fair, efficient and consistent and preserves civil liberties, there would appear to be strong reasons to locate the PNOA in the AGJ. Further, penalty notice policy and practice is part of core government operations. We have envisaged in our recommendations that the need for a whole of government approach to ensuring consistency and fairness is important to the future development of the penalty notice system. Locating the PNOA within the AGJ as part of core government would appear advisable for these reasons.

Commission's conclusions

- 18.77 We find the arguments for locating the proposed PNOA within the AGJ to be persuasive. As noted, there was strong support for this approach in the

83. Holroyd City Council noted that a similar assurance process occurs in most successful 'quality systems' in the commercial sector: Holroyd City Council, *Submission PN10*, 3.

84. New Zealand Ministry of Justice, *Infringement Guidelines* (2008) [43]-[44].

85. Victoria Department of Justice, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 2.

submissions. The AGJ has the required expertise and experience in criminal law and justice issues. This option would also appear to be the most cost-effective. The AGJ has an established relationship with key stakeholders and it was apparent from submissions and consultations that it has a good reputation for its consultative approach. The role of the PNOA in developing regulation and ensuring consistency, fairness and justice in the penalty notice system accords with the role and functions of the Attorney General in the Westminster system. It is important to locate the PNOA within core government to support and maintain consistency in the system.

Recommendation 18.4

The Penalty Notice Oversight Agency should be established as a unit within the Department of Attorney General and Justice.

A penalty notice advisory committee for the SDRO

- 18.78 The SDRO is an enforcement agency with roots in both the financial and justice systems. It enforces fine debt and, as part of that task, must pursue vigorously those people who can afford to pay their fine and penalty notice debts but who resist doing so. It must also deal with those people who cannot pay, or have great difficulty in doing so, for reasons of poverty or various types of vulnerability. The SDRO has quasi-judicial functions, including conducting internal reviews of penalty notices. It also has very significant enforcement powers that permit it, for example, to take the wages and property of defaulters without their consent and to compel the disclosure of relevant information concerning a defaulter's means to pay a penalty amount. It can presently impose community service orders and even imprison people, although we recommend changes in these powers. The SDRO is presently situated in the NSW Office of State Revenue in the Department of Finance and Services.⁸⁶ However, in the past it has been located within the AGJ and still has strong links with that department.
- 18.79 One of the most persistent issues raised in this inquiry in relation to the penalty notice system and the activities of the SDRO was its response to vulnerable people who have difficulty paying a financial penalty. We have therefore considered whether or not it would be advisable to recommend support for the SDRO in responding to the problems of vulnerable people. We consider below whether the SDRO should have an advisory committee to support and develop its work in this regard.

SDRO initiatives in relation to vulnerable people

- 18.80 It has been apparent during this inquiry that the SDRO has excellent relationships with issuing agencies. In consultations these agencies expressed satisfaction with these good relationships, spoke highly of the service they receive from the SDRO, and affirmed that the SDRO has a strong understanding of the contexts in which they operate.

86. SDRO is the fines division of the NSW Office of State Revenue which, before relocating to the NSW Department of Finance and Services, was part of NSW Treasury.

- 18.81 However, notwithstanding the views of issuing agencies, it was the opinion of some stakeholders that there is room for improvement in the relationship between the SDRO and vulnerable people and the agencies that provide advice and services to them. It is important to note the positive initiatives that the SDRO has already taken in this regard following the release of the Sentencing Council's report in 2006.⁸⁷
- 18.82 For example, we heard from stakeholders about the work of the SDRO in developing memoranda of understanding with two government departments that provide services to vulnerable people. An advocates' hotline has been established by the SDRO to assist representatives of vulnerable people, such as lawyers and community workers, to contact the SDRO by direct telephone line without having to go through the call centre. Access to the advocacy hotline is given to registered organisations. Many stakeholders praised this service. However, others were pleased to learn of it for the first time during consultations for this inquiry.
- 18.83 As discussed in Chapter 9, the WDO pilot scheme was overseen by an inter-agency monitoring committee, chaired by the AGJ with representatives from the SDRO, State Government health and justice agencies, and non-government organisations. The monitoring committee has worked well in assisting and advising on the WDO pilot scheme and will continue its work as the scheme is rolled out.⁸⁸ The committee could provide a template for future interagency collaboration and advice. The SDRO membership of that committee has been a key element in its success.
- 18.84 We have also noted in previous chapters the work done by the SDRO to provide information and assistance in regional areas and with Aboriginal communities, especially in relation to driver licence restoration.

The Victorian Infringements Standing Advisory Committee

- 18.85 The idea of an advisory committee providing input into a particular area of the penalty notice system is not new. Victoria has an Infringements Standing Advisory Committee (ISAC) that assists the ISOU to achieve its goal of 'ongoing system improvement and responsiveness'⁸⁹ and 'to have a stronger stakeholder management role'⁹⁰ by means of engagement with a diverse range of stakeholders.⁹¹ As part of its role, ISAC:
- provides feedback on agency and stakeholder perspectives of the Attorney-General's Guidelines, including agency review, special circumstances, payment plans and public information campaigns
 - provides a forum for discussion on the operation of the infringements system

87. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006).

88. NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) Recommendation 17.

89. Victoria, *Parliamentary Debates*, Legislative Council, 28 March 2006, 949 (G Jennings).

90. Victoria, *Parliamentary Debates*, Legislative Council, 28 March 2006, 949 (G Jennings).

91. Victoria Department of Justice, *Attorney-General's Annual Report on the Infringement System 2009-10* (2010) 2.

- reviews reports on infringement initiatives and the inclusion of new infringeable offences, and
- provides advice as requested on infringements system matters or issues.⁹²

18.86 Membership of ISAC is flexible. It has included members from the Victorian Department of Justice, issuing agencies, local courts, community legal centres, and a financial counsellor.

Submissions and consultations

18.87 In consultation, some stakeholders representing vulnerable people expressed the opinion that the SDRO would benefit from further assistance to understand the social context of the debts it enforces, and that a multi-agency approach would be of assistance. The HPLS and the Public Interest Advocacy Centre (PIAC), in their 2006 paper on reform of the fine system, supported initiatives to address communication difficulties between the SDRO and community organisations assisting vulnerable people against whom penalty notice enforcement processes are threatened or have commenced.⁹³ Submissions from the HPLS and the Ombudsman, and consultations with those representing vulnerable people, were also supportive of improved interagency communication and co-operation between the SDRO, issuing agencies, and government and non-government agencies representing vulnerable people.⁹⁴

18.88 The Ombudsman submitted that:

Formalised arrangements between the SDRO and other organisations which work with or represent vulnerable persons may help clarify roles and encourage use of the new review mechanisms and alternatives to fine payment in appropriate cases.⁹⁵

18.89 The Ombudsman envisaged that membership of this 'formalised arrangement' would include: the SDRO, NSW Trustee and Guardian, Juvenile Justice, Corrective Services NSW, Ageing Disability and Home Care, large non-government organisations and the peak body for financial counsellors.⁹⁶ The HPLS submitted that membership should be drawn from a wide range of stakeholders, including: the SDRO; major issuing agencies dealing with vulnerable people, such as RailCorp; community legal centres; Legal Aid NSW; non-government organisations such as

92. Infringements System Oversight Unit, *Consultation PN12*, Melbourne, 11 February 2011.

93. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 1: 'Most organisations consulted for this Report identified problems with the bureaucratic processes involved in collecting fines and managing defaulters. This includes communication breakdowns between advocates and the Infringement Processing Bureau (IPB) and the State Debt Recovery Office (SDRO)'.

94. Homeless Persons' Legal Service, *Submission PN42*, 2-4; NSW Ombudsman, *Submission PN25*, 6-7; Vulnerable People Roundtable Meeting, *Consultation PN11*, 10 February 2011.

95. NSW Ombudsman, *Submission PN25*, 7.

96. NSW Ombudsman, *Submission PN25*, 7.

the Salvation Army, St Vincent de Paul Society and Youth Off The Streets; and consumers.⁹⁷

- 18.90 Some stakeholders representing vulnerable people endorsed a permanent advisory committee model for this proposed interagency collaboration and commented that advisory committees consisting of government and non-government agencies were already standard procedure for many government departments.⁹⁸ The Monitoring Committee for the WDO scheme is one example of such an interagency advisory committee. The Commission also met with the AGJ Disability Advisory Committee for this reference and received helpful, well-considered advice. There is clearly no shortage of models for an advisory committee for the SDRO.
- 18.91 Stakeholders commented that if agencies have a common approach and are talking to each other, then red tape is cut and systems operate more cooperatively. Consultations further suggested that such a committee should meet in a systematic, regular fashion.

Commission's conclusions

- 18.92 It has been apparent throughout this inquiry that the response of the penalty notice system to vulnerable people is an area in which there is room for improvement, and we have made recommendations to this end. Many of the issues that arose concerning vulnerable people related to enforcement, including fine mitigation measures. Submissions and consultations were generally in favour of an advisory body that could provide information and advice to the SDRO on the impact of the penalty notice system on vulnerable people. The AGJ has consistently used stakeholder advisory bodies in developing guidelines and supporting the development of fine mitigation measures such as WDOs. This participatory approach has been appreciated and applauded by stakeholders.
- 18.93 It appears that the SDRO could benefit from advice and input in relation to the needs of vulnerable people concerning the enforcement of fines and penalties. Accordingly we recommend that an advisory committee be established and located within the SDRO to provide advice on the improvement of the activities of the SDRO relating to vulnerable people. This committee should involve key stakeholders, including vulnerable people and the organisations that advise and represent them. We note that such an advisory committee would impose minimal costs for the SDRO.

Recommendation 18.5

The State Debt Recovery Office should establish a Penalty Notice Advisory Committee of key stakeholders to provide advice on ways in which it can improve and develop its activities in relation to vulnerable people.

97. Homeless Persons' Legal Service, *Submission PN42*, 2.

98. Vulnerable People Roundtable Meeting, *Consultation PN11*, 10 February 2011.

Appendix A: Submissions

Preliminary Submissions

- PPN1 NSW Police Force
- PPN2 NSW Department of Environment and Climate Change
- PPN3 Illawarra Legal Centre
- PPN4 NSW Attorney General's Department
- PPN5 Shopfront Youth Legal Centre
- PPN6 P McCabe
- PPN7 Youth Justice Coalition
- PPN8 Intellectual Disability Rights Service
- PPN9 RailCorp
- PPN10 NSW Department of Juvenile Justice
- PPN11 NSW Department of Planning
- PPN12 NSW Department of Water and Energy
- PPN13 NSW Office of Fair Trading
- PPN14 NSW Department of the Arts, Sport and Recreation
- PPN15 Department of Local Government

Submissions

- PN1 M Heath
- PN2 NSW Maritime
- PN3 A Whiddett
- PN4 A Kernaghan
- PN5 Judge Graeme Henson, Chief Magistrate of the Local Court
- PN6 Sydney Olympic Park Authority
- PN7 NSW Department of Planning
- PN8 NSW Disability Discrimination Legal Centre Inc
- PN9 NSW Food Authority
- PN10 Holroyd City Council
- PN11 Legal Aid NSW
- PN12 UnitingCare Burnside
- PN13 Department of Human Services NSW, Ageing, Disability and Home Care
- PN14 NSW Trustee and Guardian
- PN15 Department of Human Services NSW, Juvenile Justice
- PN16 Local Government and Shires Associations of NSW
- PN17 NSW Land and Property Management Authority
- PN18 Sutherland Shire Council
- PN19 NSW Department of Education and Training, Workforce Management and Systems Improvement
- PN20 Corrective Services NSW, Women's Advisory Council
- PN21 Council of Social Service of NSW

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- PN22 NSW Department of Environment, Climate Change and Water
- PN23 NSW Department of Local Government
- PN25 NSW Ombudsman
- PN26 Redfern Legal Centre
- PN27 Illawarra Legal Centre
- PN28 Homeless Persons' Legal Service, Public Interest Advocacy Centre Ltd
- PN29 NSW Young Lawyers, Criminal Law Committee
- PN30 Transport NSW
- PN31 The Law Society of NSW
- PN32 NSW Commission for Children and Young People
- PN33 The Shopfront Youth Legal Centre
- PN34 Youth Justice Coalition
- PN35 Children's Court of NSW
- PN36 NSW Department of Community Services
- PN37 NSW Industry and Investment
- PN38 Justice Action
- PN39 Women in Prison Advocacy Network
- PN40 M Bennett
- PN41 NSW Office of State Revenue, State Debt Recovery Office
- PN42 Homeless Persons' Legal Service
- CPN43 Confidential Submission
- PN44 NSW Police Portfolio
- PN45 Legal Aid NSW

Appendix B: Consultations

NSW Parliamentary Counsel's Office — PN 1

8 December 2010

Don Colagiuri, NSW Parliamentary Counsel

Shopfront Youth Legal Centre — PN 2

13 January 2011

Jane Sanders, Principal Solicitor
Jamie Alford, Social Worker
Jacki Maxton, Solicitor

Homeless Persons' Legal Service — PN 3

13 January 2011

Katherine Boyle, Solicitor
Chris Heartley, Policy Officer
Ka-ki Ng, Administrative Assistant
Client 1
Client 2

Toongabbie Legal Centre — PN 4

19 January 2011

Christopher Jurd, Solicitor and President
Susai Benjamin, Solicitor and Honorary Coordinator

Intellectual Disability Rights Service — PN 5

25 January 2011

Pan Pemberton, Educator

People with Mental Health and Cognitive Impairment — PN 6

27 January 2011

Peter Conway, Department of Human Services NSW, Ageing, Disability
and Home Care
Imelda Dodds, CEO, NSW Trustee and Guardian
John Neely, Assistant Director, NSW Trustee and Guardian

Jill Day, Acting Principal Legal Officer, NSW Trustee and Guardian
Tristan Webb, Advocate, Legal Aid NSW
Andrew Taylor, Solicitor, Legal Aid NSW
Karen Wells, Principal Solicitor, Intellectual Disability Rights Service
Fiona Given, Policy Officer, Disability Discrimination Legal Centre
Liz Priestley, CEO, Mental Health Association
Frank Flannery, Vice President, Mental Health Association
Samantha Cheung, Policy Officer, Multicultural Disability Advocacy Association
Peri O'Shea, Policy and Operations Manager, NSW Consumer Advisory Group

Aboriginal Legal Service — PN 7

2 February 2011

Raymond Brazil, Law Reform and Policy Legal Officer
Gerry Moore, Chief Executive Officer
John McKenzie, Chief Legal Officer
Shawn Stubbings, Zone Manager, Central South Eastern Zone
Julie Perkins, Zone Manager, Northern Zone
Lorraine Wright, Zone Manager, Western Zone
Hewitt Whyman, Deputy Zone Manager, Western Zone
Jeremy Styles, Acting Principal Legal Officer, Central South Eastern Zone
Rebecca McMahon, Manager, Redfern Criminal Law Office
Robert Tumeth, Principal Legal Officer, Northern Zone
Nadine Miles, Principal Legal Officer, Western Zone
Garry Johnston, Senior Solicitor, Northern Zone
Phil Naden, Manager, Prisoner and Family Support Unit
Chris Firth, Manager, Information Technology
Jennifer Ledingham, Manager, Human Resources

Prisoners Roundtable Meeting — PN 8

3 February 2011

Luke Grant, Assistant Commissioner, Offender Services and Programs,
Corrective Services NSW
Phillip Stulman, Corrective Services NSW
Nita Dowel, Aboriginal Support and Planning Unit, Corrective Services NSW
Kath McFarlane, Women's Advisory Council, Corrective Services NSW
Will Hutchins, Prisoners Legal Service, Legal Aid NSW
Kat Armstrong, Women in Prison Advocacy Network
Shann Hulme, Intern, Women in Prison Advocacy Network
Brett Collins, Coordinator, Justice Action
Sunaina Sharma, Intern, Justice Action
Wayne Watson, Community Restorative Centre

NSW Fair Trading — PN 9

4 February 2011

Don Jones, Assistant Commissioner, Compliance and Enforcement, NSW Fair Trading

State Debt Recovery Office — PN 10

8 February 2011

Mick Roelandts, Senior Manager, Business Relationships and Development, State Debt Recovery Office

Vulnerable People Roundtable Meeting — PN 11

10 February 2011

Karen Bevan, Director, Social Justice Unit, UnitingCare
Eamon Waterford, Social Justice Unit, UnitingCare
Natalie Ross, Redfern Legal Centre
David Porter, Solicitor, Redfern Legal Centre
Louise Dean, Caseworker, CatholicCare (Newcastle)

Infringements System Oversight Unit — PN 12

11 February 2011

Nita Soemardjo, Principal Policy Officer
Andrea Daghish, Policy Officer

Young People Roundtable — PN 13

14 February 2011

Megan Mitchell, Commissioner, NSW Commission for Children and Young People
Rouel Dayoan, Policy Officer, NSW Commission for Children and Young People
Christine Hall, Solicitor, Children's Legal Service, Legal Aid NSW
Mark Patrick, Solicitor, Youth Justice Coalition
Clare Blakemore, Y Foundation
Jenny Bargen, Youth Justice Coalition
Dean Williamson, Youth Action and Policy Association
Loretta Allen-Weinstein, Project Officer, Juvenile Justice
Cathy Bracken, Manager, Operations Unit, Juvenile Justice

Kempsey Roundtable Meeting — PN 14

16 February 2011

Wayne Evans, Magistrate, Kempsey Local Court
Kevin Henshaw, Aboriginal Legal Service
Talia Donovan, Aboriginal Client Service Specialist
Felicity Forsyth, Deputy Registrar, Kempsey Local Court
Victor Darcy, Circle Sentencing Project Officer, Kempsey Local Court
Ray Cameron, Solicitor, Police Prosecutor
Rod Hetherington, Apprentice, Aboriginal Legal Service
Joe Hull, Aboriginal Legal Service
Roger Williamson, Solicitor
Geoffrey Clarke, Solicitor, Many Rivers Family Violence Legal Service

Kempsey Aboriginal Community Justice Roundtable Meeting — PN 15

16 February 2011

Mavis Davis, Elder, Dunghutti Community Justice Group
Fred Kelly, Dunghutti Community Justice Group, Mission Australia
Louise Pearson, Communities for Children
Madeline Donovan, Goorie Galbans
Pauline McGuinness, Dunghutti Community Justice Group
Eileen Button, Elder, Dunghutti Community Justice Group
Malcolm Webster, Chairperson, Macleay Valley Local Aboriginal Education
Consultative Group
Ruth Campbell-Maruca, Chairperson, Dunghutti Community Justice Group
Debra Morris, Coordinator, Dunghutti Community Justice Group
Deal Roberts, CEO, Thungutti Local Aboriginal Land Council
Gary Morris, CEO, Booroongen Djugun Aboriginal Corporation

**Aboriginal Legal Service Providers (Greater Sydney) Roundtable Meeting
— PN 16**

23 February 2011

Jeremy Styles, Aboriginal Legal Service
Kristy Kendrigan, Mount Druitt Aboriginal Community Justice Group
David Porter, Redfern Legal Centre

Lismore Roundtable Meeting — PN 17

28 February 2011

Amanda Dodds, Aboriginal Community Justice Group.
Ruth Hodson, Transport NSW
Greg Moore, NSW Police Force
Noel King, Lismore Police
Lester Moran, Aboriginal Community Liaison Officer
Ros Sten, Aboriginal Student Support Officer
Struan Presgrave, Youth Liaison, Richmond Police LAC
Trish Wilson, Housing NSW
Heather Jacky, Aboriginal Legal Service
Mel, Circle Sentencing, Lismore Local Court
Mallory, Trainee, Circle Sentencing, Lismore Local Court
Jan Levy, Adult Community Education North Coast
Noelene Lavender, Probation/Parole, Corrective Services NSW
Lurline Dillon-Smith, Legal Aid NSW
Bridget Barker, Northern Rivers Community Legal Centre
Genevieve Beggs, Nurse, North Coast Area Health Service
Greg Telford, Rekindle the Spirit
Genelle Purcell, Aboriginal Justice Group in Macleay/Yamba
Linda McGregor, Legal Aid NSW

Wollongong/Illawarra Roundtable Meeting — PN 18

1 March 2011

Kirsty Lewis, TAFE NSW
Donna Brotherson, TAFE NSW
Kac Mederis, TAFE NSW
Rosemary Elassal, Southern Youth and Family Services
Amy Hans, Southern Youth and Family Services
Eileen Gibson, Southern Youth and Family Services
Scott Wood, Southern Youth and Family Services
Marg Purcell, Denning Foundation
Jennifer Newton, Barnardos
Darren Bell, Access Community Group
Maxine Graham, Warrawong Community Centre
Sharlene Naismith, Legal Aid NSW
Sharon Callaghan, Illawarra Legal Centre

Intellectual Disability Rights Service Clients' Roundtable — PN 19

3 March 2011

Pan Pemberton, Intellectual Disability Rights Service

Parent 1

Client 1

Client 2

Client 3

Client 4

Client 5

Client 6

NSW Ombudsman — PN 20

10 March 2011

Bruce Barbour, NSW Ombudsman

Justine Simpkins, Senior Project Officer

NSW Local Courts — PN 21

15 March 2011

Judge Graeme Henson, Chief Magistrate

NSW Police Force/Law Enforcement Roundtable Meeting — PN 22

15 March 2011

Superintendent Robert Redfern, Local Area Command for Parramatta,
NSW Police Force

Sam Toohey, Policy Manager, Law Enforcement Policy, NSW Department of
Premier and Cabinet

Christabel Sheehan, Senior Policy Officer, Law Enforcement Branch, NSW
Department of Premier and Cabinet

Transport Roundtable Meeting — PN 23

18 March 2011

Greg Riley, Solicitor, Transport Administration, Transport NSW

Peter Robinson, Legal Branch, Roads and Traffic Authority

Kate Tiedt, Legal Branch, Roads and Traffic Authority

Peter Wells, Acting Director, Regulatory Services, Roads and Traffic Authority

Ed Ramsay, Regulatory Services, Roads and Traffic Authority

Jim Morton, Employment, General Counsel and Governance, RailCorp

Matthew Dakin, Manager, Law Enforcement, RailCorp

Children's Court NSW — PN 24

22 March 2011

Judge Mark Marien SC, President
Rosemary Davidson, Executive Officer
Joseph Karam, Acting Registrar

Issuing Agencies Roundtable Meeting – PN 25

24 March 2011

Sean O'Dwyer, Compliance and Litigation, NSW Maritime
Kelly McFadyen, Governance and Risk, NSW Maritime
Lisa White, State Debt Recovery Area, NSW Maritime
Steve Hartley, Crown Forestry Policy and Regulation, NSW Department of Environment, Climate Change and Water
Lynne Neville, Compliance and Assurance, NSW Department of Environment, Climate Change and Water
Chris Kelly, Compliance Services, NSW Department of Environment, Climate Change and Water
Mark Kelly, Principal Legal Officer, NSW Department of Environment, Climate Change and Water
Lindsey Paget-Cook, Legislation Co-ordination, NSW Industry and Investment
Samantha McCallum, Legislation and Policy, NSW Industry and Investment
Tony Andrews, Compliance Operations, Fisheries, NSW Industry and Investment
Andrew Sanger, Agriculture, NSW Industry and Investment
Lisa Lake, NSW Food Authority
Ian Beer, NSW Food Authority

Local Government Roundtable Meeting – PN 26

30 March 2011

David Rolls, Principal Legal Officer, Division of Local Government,
NSW Department of Premier and Cabinet
Frank Loveridge, Legal Officer, Local Government and Shires Association of NSW

Office of State Revenue/State Debt Recovery Office– PN 27

4 April 2011

Mick Mioduszewski, Director, State Debt Recovery Office
John Ovenstone, Assistant Director, Client Services, State Debt Recovery Office
Matt McGregor, Manager, Fines Reconciliation, State Debt Recovery Office
Mary Rebehy, Manager, Ministerial and Executive Services Unit, Executive Division,
Office of State Revenue

Office of State Revenue/State Debt Recovery Office– PN 28

27 April 2011

Tony Newbury, Executive Director and Chief Commissioner of State Revenue,
Office of State Revenue

Mary Rebehy, Manager, Ministerial and Executive Services Unit, Executive Division,
Office of State Revenue

Greg Frearson, Assistant Director for Operations, State Debt Recovery Office

Parramatta City Council – PN 29

28 April 2011

Laurie Whitehead, Manager, Regulatory Services Unit, Parramatta City Council

Rodney Suttcliffe, Manager, Community Safety Program, Parramatta City Council

Disability Advisory Council of NSW – PN 30

8 June 2011

Laurie Glanfield, Director General, Department of Attorney General and Justice

Julie Haraksin, Manager, Diversity Services, Department of Attorney General and
Justice

Richard Branding

Geoffrey Beatson, representing people with intellectual disabilities,

Elizabeth Buchanan, representing people with acquired brain injuries

Philip French, cross disability representation

Stepan Kerkyasharian, President of the Anti-Discrimination Board

Helen Laverty, Policy Officer, Disability Council of NSW

Appendix C: Statutory provisions under which penalty notices may be issued

Animal Diseases (Emergency Outbreaks) Act 1991 (NSW) s 71A
Apiaries Act 1985 (NSW) s 42A
Assisted Reproductive Technology Act 2007 (NSW) s 64
Associations Incorporations Act 2009 (NSW) s 93
Barangaroo Delivery Authority Act 2009 (NSW) s 45
Biofuels Act 2007 (NSW) s 29
Building Professionals Act 2005 (NSW) s 92
Business Names Act 2002 (NSW) s 32
Casino Control Act 1992 (NSW) s 168A
Casino, Liquor and Gaming Control Authority Act 2007 (NSW) s 46
Centennial Park and Moore Park Trust Act 1983 (NSW) s 24
Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW) s 61A
Commercial Agents and Private Inquiry Agents Act 2004 (NSW) s 28
Companion Animals Act 1998 (NSW) s 92
Contaminated Land Management Act 1997 (NSW) s 92A
Conveyancers Licensing Act 2003 (NSW) s 158
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Justices Act (NT)

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