NSW Ombudsman

Review of the impact of Criminal Infringement Notices on Aboriginal communities

August 2009

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Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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ISBN 978-1-921132-42-1

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August 2009

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Dear Ministers

Pursuant to section 344A of the *Criminal Procedure Act 1986*, I have been required to review the operation of provisions relating to the Criminal Infringement Notice scheme, in so far as those provisions impact on Aboriginal and Torres Strait Islander communities.

The legislation also requires that I provide the Attorney General and the Minister for Police with a report in relation to my review by 31 August 2009.

I am pleased to provide you with my report. In addition to reporting on the impact of the relevant legislative provisions, I have made a number of recommendations for your consideration.

I draw your attention to section 344A(4) of the Act, which requires the Attorney General to lay a copy of this report before both Houses of Parliament as soon as practicable after receipt.

Yours sincerely

Bruce Barbour
Ombudsman

Foreword

Criminal Infringement Notices (CINs) provide police with an easy, additional option for dealing with adults who are suspected of certain minor offences that are usually characterised as criminal in nature. After a five-year trial in which 9,452 CINs were issued, the scheme was extended beyond the 12 trial locations to the rest of NSW in late 2007. In the first full year of state-wide use, 8,681 CINs were issued – most for just three offences: offensive conduct, offensive language and shoplifting.

By contrast, an estimated 17,000 offences can be dealt with by penalty notice in NSW. In 2008, police records show that more than 500,000 penalty notices were issued to suspects aged 18 years and over. This was in addition to 170,000 criminal charges.

The State Debt Recovery Office (SDRO) is the agency responsible for collecting penalty notice payments and taking enforcement action against those who do not pay. The SDRO estimates that the 18,133 CINs issued between 1 September 2002 and 31 October 2008 represent just 0.1% of the 15 million penalty notices that it processed in that period.

While CINs make up just a small portion of police and SDRO business, the consequences for individual CIN recipients can be significant. Delays in paying a $150 CIN penalty for swearing or $300 penalty for shoplifting will usually result in enforcement action, adding an extra $50 in costs to each penalty notice, plus another $40 for each time that enforcement action involves an RTA sanction. Penalties and costs can quickly accumulate. Recipients who elect to have their CIN heard at court risk incurring a criminal record, a harsher penalty, additional costs and the stresses associated with the prosecution process.

To the extent that CINs can divert petty offenders who would otherwise have been arrested, charged and brought before the courts, there are clear diversionary benefits. Paying the fixed penalty in the time allowed finalises the matter, providing a sanction to punish one-off misdemeanours without the recipient incurring a criminal record. There are also savings for police, courts and others involved in the judicial process. At the same time, the scheme preserves the right for recipients to elect to have their CIN determined by a court.

Yet there are also risks associated with the use of CINs. These include risks of net increases in sanctions, in that some offenders may be issued with CINs in circumstances where previously they would have been warned or cautioned, risks that recipients might not court-elect or request an internal review despite having strong grounds to do so, and risks that recipients may simply ignore the penalty notice and become entrenched in the fines enforcement system – thereby incurring further debts, RTA sanctions and an increased likelihood of becoming involved in secondary offending.

Our review has found that these pitfalls are particularly acute for Aboriginal people, who are already over-represented in the criminal justice system. The number of CINs issued to Aboriginal people has grown significantly since the scheme was extended state-wide, with Aboriginal suspects now accounting for 7.4% of all CINs issued, much higher than would be expected for a group that makes up just over 2% of the total NSW population. We also found that Aboriginal people are less likely to request a review or elect to have the matter heard at court, and that nine out of every 10 Aboriginal people issued with a CIN failed to pay within the time allowed, resulting in much higher numbers of these recipients becoming entrenched in the fines enforcement system.

The impact of CINs and CIN-related debts on Aboriginal communities must be considered in the context of broader fines processes. During this review, Parliament approved important changes to the *Fines Act 1996* that aim to reduce the negative impacts of the fines system on marginalised sections of the community, including Aboriginal people.

In my view, the NSW Police Force and SDRO, as the agencies with primary responsibility for administering the CINs scheme, should take steps to ensure that the processes for issuing and enforcing CINs are consistent with these recent reforms and with other government polices aimed at addressing the over-representation of Aboriginal people in the criminal justice system.

Bruce Barbour
Ombudsman

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Glossary and abbreviations

ACLO	Aboriginal Community Liaison Officer (Aboriginal civilian staff employed by the NSW Police Force)
ACSS	Aboriginal Client Service Specialist (NSW Attorney General's Department)
ASD	*NSWPF Aboriginal Strategic Direction 2007 – 2011* policy
ATSI	Aboriginal and Torres Strait Islander
Bail CAN	See 'CAN'
CAN	Court Attendance Notice. NSW has four types of CAN: • *Bail CAN* – CAN issued (with bail conditions) to defendants in custody. • *No Bail CAN* – CAN issued (without bail conditions) to defendants in custody. • *Field CAN* – CAN issued to defendant 'in the field', usually at point of arrest. Service confirmed by supervisor. Not used if bail is required. • *Future CAN* or *Future Service CAN* – CAN created but service delayed. If a bail determination is required, service requires the defendant to be in police custody. If the offence is minor and no bail required, the notice can be served via mail, email or fax.
Cannabis Cautioning Scheme	A scheme that allows police to issue a formal caution rather than charge certain adult offenders for possessing or using small amounts of cannabis or marijuana.
CIN	Criminal Infringement Notice. Also referred to as a Penalty Notice.
Centrelink	Agency responsible for the disbursement of social security payments in Australia.
Centrepay	A free direct bill-paying service that enables welfare recipients to authorise regular deductions from their Centrelink benefits.
CINs scheme	The scheme under the *Criminal Procedure Act 1986* that enables police to issue CINs for prescribed offences.
CSO	Community Service Order
COPS	Computerised Operational Policing System. A centralised database maintained and operated by the NSWPF.
Field CAN	See 'CAN'
Future CAN	See 'CAN'
IMPS	Infringement Management Processing System (SDRO)
IPB	Infringement Processing Bureau. A former NSWPF agency responsible for the initial administration of penalty notice payments, including CINs. The IPB became a division of the SDRO in 2003.
LAC	Local Area Command (NSWPF)
LALC	Local Area Lands Council
LACACC	Local Area Command Aboriginal Consultative Committee (NSWPF)
Larceny	A nominated CIN offence. In relation to CINs, larceny generally refers to shoplifting.
LEPRA	*Law Enforcement (Powers and Responsibilities) Act 2002*
No Bail CAN	See 'CAN'
NSWLRC	New South Wales Law Reform Commission
NSWPF	New South Wales Police Force, previously referred to as 'NSW Police' and the 'NSW Police Service'.
PIN	Parking Infringement Notice
Report on the CIN scheme trial	NSW Ombudsman report, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005
RTA	Roads and Traffic Authority
OSR	Office of State Revenue (NSW Treasury)
POI	Person of Interest, generally used by police to describe a suspect, defendant or offender.
SDRO	State Debt Recovery Office – a division of the OSR that issues and processes penalty notices and manages an enforcement system that collects unpaid fines, including those imposed by courts.
SOPs	Standing Operating Procedures
TIN	Traffic Infringement Notice

Terms used in this report

Aboriginal – in this report, the term 'Aboriginal' refers to Aboriginal and/or Torres Strait Islander peoples.

Legislation – since the introduction of CINs, a number of related legislative provisions referred to in this report have been amended. Unless specifically stated, the Acts referred to in this report are current legislative provisions. Comments about laws that have been repealed or updated are referenced accordingly.

Offensive conduct and offensive behaviour – 'Offensive conduct' is an offence under section 4 of the *Summary Offences Act 1988.* Although often referred to in case law, police policy and other legislation as 'offensive behaviour', the two terms can be used interchangeably as there is no substantive difference between offences defined as a person 'conducting himself or herself in an offensive manner' and those that refer to 'behaving in an offensive manner'. This report generally uses the term 'offensive conduct'.

The initial 12-month trial period – refers to the first official trial of CINs conducted in 12 Local Area Commands from 1 September 2002 to 31 August 2003.

The extended trial period – refers to the use of CINs in the 12 trial LACs from 1 September 2002 until 31 August 2007, after which the scheme was extended to all LACs in NSW.

The current review period – refers to the first full year of the CINs scheme from 1 November 2007 to 31 October 2008.

Executive Summary

The Criminal Infringement Notices (CINs) scheme enables police in New South Wales to issue penalty notices to any adults who appear to have committed a limited range of certain offences, mostly relating to minor incidents of offensive conduct, offensive language and larceny/shoplifting.[1] CINs give police an additional, intermediate option between cautioning offenders on the one hand, and arresting and charging on the other.

Until recently, CINs could only be issued in 12 trial locations.[2] The initial CINs trial ran from 1 September 2002 to 31 August 2003 and an estimated 1,598 CINs were issued. As required by the legislation establishing the trial, we reviewed those early uses.

Our report, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005), concluded that CINs were largely successful in providing police with an easy, additional way to deal with minor offences. We recommended changes, including measures aimed at reducing the risk of 'unintended and undesirable consequences such as net-widening', especially in smaller towns and those with sizeable Aboriginal populations.[3]

The initial 12-month trial was extended, allowing police to continue fining minor offenders in the trial areas until the current state-wide scheme commenced on 1 November 2007. When Parliament legislated to extend the use of CINs across NSW, it included a requirement that we undertake a further review of the scheme 'in so far as those provisions impact on Aboriginal and Torres Strait Islander communities'.[4] This report examines the impact of CINs issued in the 12 trial areas during the extended trial period (2002 – 2007), and CINs issued across NSW in the first year of the current scheme (1 November 2007 to 31 October 2008).

Issues and findings relating to police issuing of CINs in Aboriginal communities

Police issued 8,681 CINs in the first year of the state-wide scheme, including 645 CINs (7.4% of all CINs) to Aboriginal suspects. In reviewing the data we found that:

- 70% of all CINs (and 83% of CINs issued to Aboriginal people) were for offensive conduct or offensive language. For Aboriginal suspects, offensive language was by far the most common offence, making up 45% of CINs issued to Aboriginal people.
- CINs use is concentrated in a small number of commands. Most are issued in commands with busy transport hubs or shopping and entertainment areas, suburban commands with big retail centres and commands based in larger regional centres. Commands such as City Central, Newcastle, Wollongong, Coffs-Clarence, Manly, Wagga Wagga, Tuggerah Lakes and Miranda issue high volumes of CINs. By contrast, about half of the 80 local commands in NSW issue fewer than one CIN per week. Certain commands, including Newtown, Green Valley, Ashfield and Cabramatta, rarely use CINs.
- Compared with other options (charging or warning offenders), the data shows that CINs are now the most common way for police to deal with minor public order incidents. In the first three months of 2008, soon after the scheme was expanded, the 3,461 offensive conduct or offensive language incidents involving adults resulted in a total of 1,438 charges (42%), 1,493 CINs (43%) and 530 warnings (15%). In the last three months of 2008, police recorded 3,038 offensive conduct or offensive language incidents resulting in 1,304 charges (43%), 1,732 CINs (57%) and 2 warnings (0.1%).[5]
- Recent changes to police procedures for recording warnings or cautions issued to adults make it difficult to determine whether, and how often, adults are cautioned instead of charged or issued a CIN. Until 2008, between 16% and 20% of all offensive conduct and offensive language incidents involving adults resulted in a recorded warning.[6] Changes to the police COPS system in August 2008 effectively removed this option. Police advise that adults are still 'informally' cautioned in appropriate circumstances, but it is now less clear how often this is done.

1 The *Criminal Procedure Regulation 2005* specifies that penalty notices can be issued for larceny/shoplifting of goods to the value of $300 ($300 penalty), goods in custody ($350), offensive language ($150), offensive behaviour ($200), obstruct person/vehicle/vessel ($200), obtain money or benefit by deception ($300), and unauthorised entry of a vehicle or boat ($250). Common assault was also a prescribed CIN offence until 12 December 2006.
2 The 12 trial commands were Albury, Bankstown, Blacktown, Brisbane Water, City Central, Lake Illawarra, Lake Macquarie, Miranda, Parramatta, Penrith, The Rocks and Tuggerah Lakes.
3 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005.
4 *Criminal Procedure Act 1986,* s.344A, as amended by the *Police Powers Legislation Amendment Act 2006*.
5 Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666.
6 Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Estimates based on recorded offensive conduct and offensive language incidents in 2006 and 2007. The lowest incidence of recorded warnings for these offences in recent years was 15% in the April – June quarter of 2005. The highest was 20% in July – August 2006.

- In assessing the scheme's success in diverting minor offenders from the courts, the data shows that the volume of additional CINs issued in 2008 greatly outnumbered any decreases in charges for the same offences. This is particularly evident in the comparisons of CINs and charges for offensive conduct. When the scheme was expanded the number of offensive conduct CINs issued rose from 1,065 in 2007 to 4,078 in 2008. Charges fell, but not to the same extent that the use of CINs rose. There were 2,288 charges in 2008, compared with 3,562 in 2007, 3,148 in 2006 and 3,254 in 2005. That is, there were 3,013 more CINs and, compared with previous years, between 860 and 1,274 fewer charges. For offensive language, there were 1,482 more CINs in 2008 and between 495 and 855 fewer charges.[7] While there is no way to know how many charges there would have been in 2008 had CINs not been widely used, the data suggests there has been a significant net increase in minor matters resulting in some form of sanction.

In summary, the data on legal processes relating to the two most common CIN offences, offensive conduct and offensive language, shows that many more offenders are being punished for these offences than before CINs became widely available, there are some offenders being diverted from the courts and, because of the limited options for recording adult cautions, it is difficult to gauge whether, and how often, police opt to caution suspects instead of charging or issuing on-the-spot fines.

Further monitoring is needed to assess the influence of the scheme over time. Monitoring is also needed to ensure that the immediate diversionary benefits of CINs are not dissipated by large numbers of recipients simply re-entering the criminal justice system at a later stage as a result of secondary offences associated with the imposition of RTA sanctions for fine default. In most cases the secondary offences, such as driving while a driver's licence suspension is in place, are more serious than the original CIN offence.

The increased use of on-the-spot fines as a way of diverting minor offenders from the courts presents particular risks for Aboriginal people and others who are over-represented in the criminal justice system. In commenting about the adequacy of current measures to prevent CINs being issued in circumstances where a caution or no action would have been more appropriate, the Attorney General's Department said:

> *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 … There is no evidence of any Aboriginal person seeking an internal review.*[8]

State Debt Recovery Office (SDRO) data indicates that between 2002 and 2008, just seven Aboriginal recipients elected to have their CIN heard at court, and four requested an internal review by police. None of the four requests for internal review related to CINs issued in the first year of the state-wide scheme, even though 7.4% of all CINs issued in that period were to Aboriginal people. We identified a number of procedural barriers to having a CIN reviewed, including flaws in the SDRO's processes for referring matters to the NSW Police Force for a decision. In its response to our draft report, the SDRO 'accepted that the practices previously in operation may not have been the most effective in ensuring that requests for review for CINS matters were suitably dealt with' and noted changes aimed at ensuring that all representations 'disputing the offence, seeking leniency or offering extenuating circumstances' now receive appropriate consideration.[9]

In relation to informing recipients about their options for dealing with the penalty notice and the consequences of failing to challenge or pay the penalty, we found that much of what recipients knew about CINs was provided by police when the CIN was issued. The importance of serving a CIN in person at the time of, or soon after, the alleged offence is reflected in police policy advising that provisions allowing officers to serve CINs by post should only be used as a last resort. However, whereas 30% of all CINs issued during the extended trial period were served by post (despite a provision in the Criminal Procedure Act at the time requiring that all CINs be served in person), the number of occasions where service by post is now deemed necessary and appropriate has risen to 46%. Our report recommends measures to reduce police reliance on postal service and, when a CIN must be served by post, improve the information provided to recipients.

7 NSW Bureau of Crime Statistics and Research, ref. jh09-7422.
8 Attorney General's Department response to draft report, 16 July 2009.
9 SDRO response to draft report, 20 July 2009.

Many of our other recommendations about practices associated with the issuing of CINs are aimed at strengthening the legal basis for police decision-making, ensuring recipients understand their legal options and the likely consequences if they fail to request a review or pay, ensuring supervision and monitoring to deter fines from being issued in circumstances where a court would be unlikely to convict and strategies to reduce Aboriginal over-representation. We also recommended giving police the option to issue an 'official caution', which would expand the options available to police and promote consistency in the way penalty notices are issued and reviewed.

Issues and findings relating to the enforcement of CINs

As the Criminal Procedure Act required us to consider how the provisions impact on Aboriginal communities,[10] this report also includes information about issues relating to CIN payments and enforcement, and how outcomes for Aboriginal recipients compare with those for CIN recipients generally.

The SDRO is responsible for collecting CIN payments and taking enforcement action against those who do not pay. It has a Penalty Notice database to track payments and other details at the initial stages, and a separate Enforcement database to track outcomes relating to any unpaid penalty notices referred for enforcement.

After allowing 10 weeks to ensure that any CINs issued late in the current review period had time to be processed, the data showed:

- The SDRO Penalty Notice database had records of 18,759 CINs with a total face value of $4.5 million, including 895 CINs issued to Aboriginal people. Nine out of every 10 Aboriginal people issued a CIN (89%) failed to pay in the time allowed and were referred for enforcement. By comparison, 48% of all CIN penalty notices were referred for enforcement.
- The SDRO's Enforcement data indicated that, of the 792 Aboriginal CIN matters referred for enforcement, just 10% had paid their enforcement order (compared with 29% of all CINs) and 89% were still 'open', meaning they were subject to (or potentially subject to) enforcement action.
- Fewer Aboriginal people were granted leniency at this stage – just 0.6% of Aboriginal CIN enforcement matters were written off or withdrawn, compared with 2.9% for all recipients. And more Aboriginal people were paying off their CIN debts in instalments using time-to-pay agreements – 12.6% compared to 8.4% of all recipients.
- When combined, information from the two SDRO databases shows that by mid-January 2009, 67% of all CINs issued between 1 September 2002 and 31 October 2008 had been closed or finalised, most as a result of the recipient paying at either the penalty notice or enforcement stages. Of the 895 CINs identified as belonging to Aboriginal recipients, just 21% had been closed or finalised.
- The SDRO refers to the combined figures as the 'settlement' rate. It said the current CINs settlement rate of 67% 'reflects a far better position than the settlement rate for similar matters previously via Courts (pre CINS) which was in the vicinity of 24%'.[11] There were no comparable figures provided for Aboriginal clients.
- To see how the settlement rate changes over time, we excluded CINs issued after 1 November 2007 in order to check outcomes for CINs that had been subject to enforcement action for at least one year. This showed a settlement rate of 71% for all CINs issued during the extended trial period. For Aboriginal people, the settlement rate was 29%.
- Half (49%) of all CIN recipients – and 40% of Aboriginal recipients – who were referred for enforcement action owed nothing else to SDRO, the debts only related to the CIN or CINs issued between 1 September 2002 and 31 October 2008.

In summary, many of the CINs issued – almost a third of those issued to all recipients, and more than two-thirds of Aboriginal recipients – remained unpaid some months, or in many cases years, after the offence. In many cases, the CIN penalty and enforcement costs were the only debts owed. It is evident that the CINs scheme is increasing the number of Aboriginal people being caught up in the fines system, many of whom have accumulated significant fine debts. In addition, the imposition of RTA sanctions in response to unpaid CIN penalties appears to have increased the risk of secondary offending by Aboriginal people, particularly young recipients who make up the majority of CIN recipients.

10 *Criminal Procedure Act 1986,* s.344A, as amended by the *Police Powers Legislation Amendment Act 2006*.
11 SDRO response to draft report, 20 July 2009.

In separate analysis, the SDRO identified just 330 requests for a review of some kind. Of these, just 44 led to a decision to withdraw the CIN. Our audit of 100 of these representations showed that most were rejected without being referred to police, including some that raised legitimate issues for police to consider. The SDRO has amended its procedures to address the concerns raised. The data also showed that few CIN recipients generally, and almost no Aboriginal recipients, opt to have their CIN heard at court. There were no reliable figures available on the outcomes of matters heard at court.

We recommended a number of measures to improve the information and assistance provided to recipients in light of data showing: that disproportionately high numbers of Aboriginal people receive CINs, most CINs issued to Aboriginal people are not paid and result in costly enforcement action, Aboriginal recipients rarely request a review or court-elect, and for many the only debt they owed to SDRO was for the CIN. Our recommendations highlight the need for:

- clearer information about payment and review options on the penalty notice form
- a fact sheet about the CIN scheme to be sent with all CINs served by post, with penalty reminder notices, and published on the SDRO website
- the SDRO to evaluate and improve the effectiveness of its group advocacy network, with a view to checking the value of information and support provided by SDRO via its Advocacy Hotline, and review the effectiveness of current SDRO outreach initiatives, identifying ways to improve its services to regional and remote communities, and
- the SDRO to provide clearer information about the implications of electing to have a CIN heard in court and how recipients could go about sourcing legal advice and assistance.

A related issue the report identifies is that the SDRO needs to improve the information provided to legal services about the fines enforcement system, so that CIN recipients who seek legal assistance can be properly advised about their options. In our view, those who have no grounds to contest a CIN will be less likely to court-elect if properly advised. And even those who do have grounds to dispute the CIN may choose not to after being warned of the risks associated with having the matter heard at court – that is, the risks of incurring a criminal record, a harsher penalty, additional costs and the stresses associated with the prosecution process.

In addition to improving general information about CINs and the fines system, we found there was an urgent need for targeted measures to help reduce or prevent marginalised groups from becoming permanently entrenched in the fines enforcement system. Although limited, the current data indicates that people who are homeless, or who have a mental illness, intellectual disability or cognitive impairment, are at high risk of becoming entangled in the SDRO's fines enforcement processes. Our analysis of CINs records also indicates that disproportionately high numbers of Aboriginal people, people with low incomes and high debts, and those living in isolated communities, experience difficulties in dealing with the debts they owe SDRO. This increases the likelihood of incurring further enforcement action, higher debts, sanctions and the risk of secondary offending.

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. We have recommended measures aimed at improving the SDRO's capacity to collect and systemically use available data about CIN recipients who are more likely to default on their fines, including the 89% of Aboriginal recipients who fail to pay their CIN in the time allowed and are referred for enforcement. Without this kind of information, it is difficult to see how SDRO can assess the effectiveness of its compliance and diversion measures.

Our review of CINs coincided with a number of recent and planned reforms that aim to reduce the number of marginalised people being caught up in the fines enforcement system. These reforms include recent changes to the *Fines Act 1996* that aim to increase payments from low-income earners, divert vulnerable groups out of the fines system and provide them with meaningful and effective non-monetary sanctions, reduce enforcement costs and reduce the incidence of secondary offending brought about by fine default. As many of the reforms being introduced will address issues arising from our review of CINs, they are noted in the report. This includes issues relating to exercising discretion to withdraw CINs in appropriate circumstances, writing off fine debts and clarifying the role of the Fines Hardship Review Board.

Our discussion of enforcement measures concludes with a recommendation that, following appropriate consultation, consideration be given to 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.

Other issues relating to the use of CINs

The report concludes with a brief discussion of three other key issues that arose in the course of this review:

- Fingerprinting and identification powers. This section considers whether fingerprints gathered as part of the procedure for issuing CINs could also be used for other investigative purposes, what safeguards should apply, and whether legislative amendment was required to clarify these issues.
- Using CIN histories in unrelated court proceedings. We considered the records created as part of the CINs process, and the use of those records in unrelated court proceedings. Although many submissions expressed concerns about CIN records being presented at court despite no independent finding of guilt, important procedural safeguards stipulated by the Attorney General appear to address many of the issues raised. However, any future changes to police policy or practices in this regard should be carefully monitored.
- Data anomalies. This section relates to significant data disparities between the police and SDRO records of CINs. As of March 2009, there were 1,154 CIN records on the SDRO Penalty Notice database that had no matching record on COPS. The NSW Police Force identified 706 CINS recorded on COPS that had no matching record on the SDRO databases. Following concerns raised as part of our review, both agencies have implemented plans to rectify these issues.

Summary of recommendations

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13.	The NSW Police Force and SDRO develop a fact sheet about the Criminal Infringement Notice scheme to be sent with all Criminal Infringement Notices served by post, with penalty reminder notices, and published on the SDRO website.	104

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14. That the SDRO take steps to evaluate and improve the effectiveness of its group advocacy network, in particular by: a. Consultation with advocates about improving the provision of information and support provided by SDRO via the Advocacy Hotline. b. Setting strategic goals and action plans to increase the number of groups or persons registered to the Advocacy Hotline that might assist Aboriginal people living in regional and remote communities. c. Evaluating the outcomes of the Advocacy Hotline including initiatives supported by SDRO such as debt clinics and information seminars.	113
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16. The SDRO review how it presents and disseminates information about the fines enforcement system to legal centres, with the aim of developing strategies to improve information provision.	115
17. The SDRO consider keeping records about the Aboriginality of CIN recipients.	117
18. The SDRO strategically and systematically analyse records kept about CIN recipients with a view to: • learning more about the characteristics of people who default on their fines and those who have significant fine debts • learning more about the utilisation of different payment options, including whether different options benefit people likely to have difficulty paying their fines • improving the provision of information and assistance to people who default on their fines and those who have significant fine debts.	117
19. That the SDRO review the initial uses of flexible payment options under the *Fines Further Amendment Act 2008* and advise the Attorney General of the outcome for the purpose of considering, within 18 months of the date of this report, the need to amend the Fines Act to extend the availability of flexible upfront payment options to other applicants who can demonstrate financial hardship or other reasons why they will have difficulty meeting their payment obligations at the penalty notice stage.	122
20. That the SDRO consider developing ways to extract and report on data relating to applications for it to use discretion to lift RTA sanctions in exceptional circumstances, including the number of applications received, the grounds for seeking an immediate sanction lift, the characteristics of applicants, and the outcome of these requests.	128
21. That, as part of the current reforms to the fines system, the Attorney General consider amendments to Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the *Fines Act 1996* to make the police uses of CINs subject to the review processes outlined in the *Fines Further Amendment Act 2008*.	137
22. That the State Debt Recovery Office develop a strategy to improve provision of information to fine recipients and organisations who advocate on their behalf, about the role of the Hardship Review Board and reasons for determinations made by the board.	141
23. That, following appropriate consultation, the Attorney General 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.	143
24. That the Minister for Police take steps to have the *Law Enforcement (Powers and Responsibilities) Act 2002* amended to clarify whether fingerprint and palm print identification evidence gathered under section 138A may also be used to investigate offences unrelated to the alleged CIN offence, and consider the adequacy of associated safeguards.	150
25. That the NSW Police Force review the adequacy of the advice that it provides to officers exercising powers under section 138A of the *Law Enforcement (Powers and Responsibilities) Act 2002* to ensure compliance with appropriate safeguards.	150

Chapter 1. Introduction

This is a report by the Ombudsman as required by section 344A of the *Criminal Procedure Act 1986.* It relates to the police use of Criminal Infringement Notices (CINs) for certain minor offences in NSW, the processes used to enforce these sanctions, and the impact of CINs on Aboriginal and Torres Strait Islander communities. The issues arising from our review, including findings and recommendations, are noted throughout the report.

Chapter 2 explains the approaches used to seek the input and advice of organisations and individuals that had information about CINs and about the scheme's impact on Aboriginal communities.

Chapter 3 sets out the background to the current CINs scheme, notably the reports and reviews that led NSW to trial and then expand the use of fixed penalty notices for offences that are usually characterised as criminal in nature, and **Chapter 4** outlines the current rules and processes that govern the use and enforcement of CINs.

The report then examines issues relating to the police use of CINs from 1 November 2007 to 31 October 2008 – the first full year of the scheme. **Chapter 5** summarises data relating to CINs issued by police, and **Chapter 6** considers issues arising from the data including the increased police use of CINs in Aboriginal communities, the types of offences addressed through CINs, concerns about net-widening and other issues associated with police practices.

The final part of the report examines the processes used to enforce CINs and the impact of these enforcement measures on Aboriginal communities. **Chapter 7** summarises data relating to the payment of CIN penalty notices and the many unpaid CINs that are referred for enforcement. **Chapter 8** considers the impacts of CINs on Aboriginal communities, recent reforms to the fines enforcement system, and opportunities to improve the processes used to identify and manage the impacts and risks to Aboriginal CIN recipients.

The report concludes with a brief examination of other issues that arose in the course of this review relating to fingerprinting and identification powers, the use of CIN records in court proceedings, and attempts to reconcile significant disparities between the police and SDRO records of CINs.

Chapter 2. Methodology

2.1. Aboriginal community and agency feedback

In seeking Aboriginal community views about Criminal Infringement Notices (CINs), our consultations and interviews focused on:

1. locations where police were known to be using CINs
2. people and organisations that were actively advising or assisting Aboriginal people in relation to dealing with CINs and other debts.

The most knowledgeable advisors who had up-to-date knowledge of the available options were generally those who helped debtors deal with high volumes of fines, had links with advisors in other locations, and asked questions of State Debt Recovery Office (SDRO) staff about available options. They included:

- networks of Aboriginal staff based at Local Courts, notably Aboriginal Client Service Specialists, Aboriginal Community Justice Group Coordinators and Circle Sentencing Coordinators
- some non-Aboriginal staff at Local Courts, especially Registrars
- field officers employed by Aboriginal Legal Services
- Legal Aid and Community Legal Centres that use the SDRO's advocacy hotline
- financial counsellors, and
- a few NSWPF Aboriginal Community Liaison Officers.

In some locations this debt counselling role was taken on by individuals at Aboriginal land councils, employment and training bodies, drug counselling programs, driver education programs and other groups and services that had frequent contact with people affected by chronic debt. This was often the case in country towns with no Aboriginal staff at the Local Court, no community justice group or where the Aboriginal staff employed by government agencies had had little experience in advising on debts. Most regions had at least one or two people with enough practical knowledge of the fines enforcement system to counsel people about their debt problems, yet the levels of expertise varied considerably from one location to the next. Advisors rarely had formal training or instruction and their advisory role was typically ad hoc, voluntary and unregulated.

We also interviewed informal networks of Aboriginal fine recipients. These mainly consisted of SDRO clients who had successfully negotiated time-to-pay agreements or other arrangements with the SDRO, with or without the assistance of counsellors or advocates, and passed on advice about their experiences to friends and family. For some SDRO debtors in some Aboriginal communities, this informal word-of-mouth advice via the 'Koori Grapevine' was their main source of information about payment options.

We convened meetings and presentations to seek community and local agency feedback from locations where police were known to be using CINs, including:

- Albury
- Armidale
- Bateman's Bay, Moruya
- Broken Hill, Dareton
- the Central Coast (Wyong, Toronto)
- Inner Sydney (Redfern and the Sydney CBD)
- Moree
- the North Coast (Coffs Harbour, Grafton, Casino, Lismore, Tweed Heads)
- Wagga Wagga, and
- Western Sydney (Mt Druitt, Penrith).

We also sought the advice of established groups and forums that had an interest in the impact of fines on Aboriginal communities, including:

- a forum of Aboriginal Client Service Specialists in Sydney
- representative Aboriginal bodies such as the Western Sydney Koori Interagency, the Aboriginal Justice Advisory Committee and Aboriginal Legal Services NSW/ACT
- legal agencies such as Legal Aid, the Law Society of NSW, Redfern Legal Centre and the Shopfront Youth Legal Centre
- non-government and advocacy bodies including Mission Australia, the NSW Council of Social Services and the Public Interest Advocacy Centre, and
- Aboriginal and other staff in key agencies including the SDRO, the RTA, Ministry of Transport and Attorney General's Department.

2.2. NSW Police Force

The information provided by the NSW Police Force for this review included:

- specialist advice from police with key management responsibilities, notably the sponsor of the CINS implementation project, Superintendent Rob Redfern, and technical and procedural advice from the NSWPF Criminal Records Unit relating to the use, storage and destruction of fingerprint records
- data and records from the Computerised Operational Policing System (COPS), notably detailed police analysis and summary reports of all CINs issued between 1 September 2002 and 31 October 2008
- Standing Operating Procedures, training, educational and briefing materials relating to the use of CINs
- interviews with senior police in Local Area Commands making frequent use of CINs (Castlereagh, City Central, Coffs/Clarence, Darling River, Far South Coast, New England, Mount Druitt, Wagga Wagga and Wollongong)
- interviews with senior police in Local Area Commands where CINs use was comparatively rare (Newtown and Orana)
- detailed focus group discussions and interviews of frontline officers at the City Central, Far South Coast and New England commands
- local crime managers' analyses of CINs use within individual commands (Barrier, Blacktown, Castlereagh, Coffs/Clarence, Darling River, Far South Coast, Lake Macquarie, Mount Druitt, New England and Richmond)

We also monitored NSWPF CINs Project Steering Committee meetings made up of representatives of NSWPF, the NSW Police Association, the Ministry for Police and SDRO.

2.3. State Debt Recovery Office

Analysis and information provided by the SDRO for this review included:

- data and records from the SDRO's Penalty Notice and Enforcement databases, including detailed SDRO analysis and summary reports relating to SDRO records of CINs issued between 1 September 2002 and 31 October 2008
- information relating to 100 representations by CIN recipients or their representatives requesting a review of the CIN or seeking leniency because of special circumstances, an error or some other grounds
- procedures and briefing materials relating to the payment and enforcement of CINs and other penalty notices, including OSR write-off procedures, guidance on allowing time to pay unpaid enforcement orders (including scheduled amounts), exercising discretion to lift RTA sanctions, and information about the Fines Hardship Review Board
- Treasury of NSW 'Guidelines for Writing Off Fines' issued under section 120 of the *Fines Act 1996*
- information published by the SDRO to assist clients including *SDRO Review Guidelines,* brochures, forms, Office of State Revenue annual reports and other information published on the SDRO website, and
- SDRO responses to detailed requests for information.

2.4. Other sources

The NSW Bureau of Crime Statistics and Research provided extensive data about the police use of CINs, how CINs compare with other legal processes used to deal with similar offences, and the frequency of CIN offences. This information is referred to throughout this report.

Other sources of information relied on for this review included:

- Surveys of:
  - — Aboriginal CINs recipients
  - — financial counsellors
- Judicial Commission analysis and reports
- Parliamentary Hansard records
- Court transcripts from prosecutions relating to matters in which CIN recipients elected to have the matter determined by a court
- Media reports on CINs use
- Commentary and analysis of the CINs scheme and similar schemes in other jurisdictions, including legislation and reviews relating to those schemes, and
- Complaints and inquiries relating to police uses of CINs.

In December 2008 we published Issues Papers setting out a number of questions for consideration and inviting comments. In addition to detailed submissions from the NSWPF and SDRO, we received 16 submissions expressing views on specific aspects of the scheme and proposed improvements, including submissions from advocacy groups, Aboriginal organisations, the Director General of the Attorney General's Department, local councils and legal services.

On 22 June 2009 we provided consultation drafts of this report to:

- the Commissioner of Police
- the Executive Director and Chief Commissioner of State Revenue, Office of State Revenue, and
- the Director General, Attorney General's Department.

All were invited to provide their views or feedback in relation to the content of the report and the provisional findings and recommendations, to identify any errors in the report and provide any comments that could assist. Comments provided in July 2009 have been incorporated into relevant sections of this report.

Chapter 3.
Background to this report

This chapter outlines the recent reforms and reviews that have helped shape the current Criminal Infringement Notice (CIN) scheme, starting with the initial trial of CINs in 2002 – 03. It concludes with a brief discussion of issues affecting Aboriginal communities and some of the key NSW Government and police initiatives aimed at addressing disadvantage in those communities.

3.1. The initial trialling of CINs

In September 2002, the *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* commenced. The Act established a 12-month trial enabling police in 12 Local Area Commands (LACs) to issue on-the-spot fines, known as Criminal Infringement Notices, to adults for certain minor criminal offences.

The initial trial ran from 1 September 2002 to 31 August 2003, and an estimated 1,598 CINs were issued. It was then extended, effectively allowing police to continue issuing CINs in the 12 trial commands until the current state-wide scheme commenced on 1 November 2007. By that date, police in the 12 trial commands had issued an estimated 9,452 CINs. Throughout this report these two trial periods tend to be referred to as:

- 'the initial 12-month trial period' (1 September 2002 to 31 August 2003), and
- 'the extended trial period' (1 September 2002 to 31 August 2007).

Essentially, if police in the trial commands believed that an adult had committed one or more of the eight nominated CIN offences, they could issue a CIN as an alternative to providing a warning or caution, or charging the person with that offence. A CIN or penalty notice:

> *Is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations …* [12]

If the amount specified is paid, no person is liable to any further proceedings for the alleged offence.[13] Alternatively, the person issued with the CIN can elect to have the matter determined at court.

The eight CIN offences (and fixed penalties) were: common assault ($400 penalty); larceny or shoplifting to the value of $300 ($300); obtaining money, valuable things or benefits by wilful false representation ($300); goods in custody ($350); offensive conduct ($200); offensive language ($150); obstructing traffic ($200); unauthorised entry of vehicle or boat ($250).[14]

The 12 trial commands were: Albury, Bankstown, Blacktown, Brisbane Water, City Central, Lake Illawarra, Lake Macquarie, Miranda, Parramatta, Penrith, The Rocks, and Tuggerah Lakes. Most are located in and around Sydney. The only country command was Albury.

When it was first introduced the objectives of the CIN scheme included:

- reducing the administrative demands on police in relation to relatively minor offences by providing a quick alternative to arrest
- reducing the time taken by police in preparation for and appearance at court
- allowing police to remain on the beat rather than having to take the offender back to a police station
- extending the use of penalty notices and allowing them to become a general tool in the array of responses available to police
- providing police with greater flexibility in their response to criminal behaviour
- saving the court system the cost of having to deal with relatively minor offences and thereby reducing both court time and trial backlogs.[15]

12 *Criminal Procedure Act 1986*, s.334(1).
13 *Criminal Procedure Act 1986*, s.338(1).
14 Criminal Procedure Regulation 2005, Schedule 2.
15 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p.23. See also Ombudsman, *Put on the Spot – Criminal Infringement Notices Trial, Review of Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper*, 2003, p.6.

It was also intended that the legislation would satisfy these objectives while retaining the option for an alleged offender to contest the facts of a case in court.

The scheme also features important safeguards such as restricting CINs to nominated minor offences, excluding children and young people from the scheme, requirements preventing CIN recipients having a conviction recorded for the alleged offence, and rules relating to the destruction of fingerprints. By including these safeguards, Parliament recognised that there were risks associated with using on-the-spot fines to deal with criminal offences. These risks were highlighted in a 1996 NSW Law Reform Commission report, *Sentencing,* which warned that dealing with offences in this way could lead to:

- the diminution of the moral content of particular offences in that they may become trivialised and considered administrative contraventions
- the departure from the traditional principles of criminal law in that the alleged offender is deemed guilty without requiring the prosecution to produce evidence of guilt to a judicial authority
- the failure to consider each alleged offender's particular circumstances
- the pressure on the alleged offender to pay even if they are innocent so as to avoid the trauma of going to court or incurring a greater penalty if found guilty in court
- 'net-widening' in the sense that the use of infringement notice is preferred where previously a caution or warning may have been appropriate
- the victimisation of specific groups in the community by police and other agencies administering the infringement notice scheme.[16]

Two dissenting commissioners recommended against using on-the-spot fines for minor offences, arguing that there was too great a risk that authorities could abuse the scheme and that it may particularly disadvantage Aboriginal people and other marginalised groups.

However, the majority of commissioners concluded that the benefits of diverting minor offenders from the court system outweighed the risks. The NSWLRC recommended expanding the use of infringement notices for minor offences, provided that proper safeguards were in place including:

- a provision that stipulates that receipt of an infringement notice should not result in the recording of a conviction for that offence
- the issue of an infringement notice should be discretionary with guidelines setting out criteria for the use of the discretion
- the agencies responsible for issuing infringement notices should be properly monitored to guard against abuse and to ensure that infringement notices are not imposed on people who would not ordinarily be punished.[17]

3.2. Ombudsman review of the initial 12-month trial period

The CINs legislation included a provision requiring the NSW Ombudsman to *'keep under scrutiny'* the operation of the scheme – including the associated fingerprinting provisions – for the first 12 months,[18] and to prepare a report and recommendations.[19] That report, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police,* was provided to the Attorney General, the Minister for Police and the Commissioner for Police in April 2005. The Attorney General tabled the report in Parliament on 30 November 2005.[20]

3.2.1. Report findings and recommendations

Our report concluded:

> *The CINs trial has largely been successful in providing police with a further option to deal with minor offences in a simple and timely fashion. This has been achieved without denying the recipient the opportunity to elect that a court determine the matter.*[21]

16 NSW Law Reform Commission, Sentencing, Report No. 79*,* Sydney, 1996.
17 *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, 2005, p.13.
18 *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002*, schedule 1, s.172. The Act was repealed on 26 November 2003 and the review provision became a part of the *Criminal Procedure Act 1986*, s.344A.
19 *Criminal Procedure Act 1986*, s.344A(3) – (4).
20 *Criminal Procedure Act 1986*, s.344A(5). A copy of the report can be downloaded from the Ombudsman website, http://www.ombo.nsw.gov.au.
21 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, Executive Summary, p.vi.

The report identified a number of legislative and procedural issues for consideration by Parliament and relevant agencies, and made 27 recommendations.

In relation to the offences covered by the CINs scheme trial, the report found:

- An audit of CINs revealed that some of the assaults for which CINs were issued were random, unprovoked and surprise attacks with a substantial element of violence, and that the inclusion of common assault within the CIN scheme should be reconsidered.[22]
- Almost two-thirds of the offensive language CINs that we audited for the report were issued for language or were in circumstances where the recipient may have had a sufficient defence if the matter was heard at court. It was therefore recommended that better guidance be provided to police about what is offensive language, and more thorough reviews be conducted by supervisors of CINs issued for offensive language.[23] It should be noted that the NSW Police Force disputed this finding. This is discussed further (below at section 3.2.2) in relation to the response to our recommendations.

Police have the discretion to fingerprint people issued with a CIN. In relation to this power, the report found that although there was a legislative requirement that a person's fingerprints should be destroyed on payment of a CIN, there was no such requirement if a person elected to have the matter heard at court and the matter was dismissed or the person was found not guilty. It was recommended that this matter be rectified. It was also noted that in contravention of the requirement that fingerprint records should be destroyed on payment of a CIN, the majority of fingerprint records were not being destroyed in a timely manner.[24]

There was no avenue for CIN recipients who experienced difficulty paying the fine to apply for additional time to pay or to pay by instalments, unless and until they defaulted on the penalty notice and the matter was referred for enforcement action – resulting in additional costs to both the CIN recipient and the State Debt Recovery Office (SDRO). We recommended that such applications be allowed at the outset, without the person incurring additional administrative costs, before the recipient defaults and enforcement action commences.[25]

The report also recommended that:

- CINs be permitted to be served by mail, as well as personally
- Additional safeguards in relation to certain CIN records being presented to courts
- Police have access to a person's CIN history, including information about whether CINs previously issued had been paid, to assist in determining whether a CIN should be issued for any subsequent matter
- A CIN include explanation of the potential consequences of non-payment of the notice and failure to successfully defend the matter at court.[26]

In terms of the possibility of extending the CIN scheme state-wide, the report concluded:

> *Our review indicated that effective police officer training was central to the generally successful implementation of the CINs scheme in trial commands. We have recommended enhancements to police training to assist officers in determining whether, in a given circumstance, a CIN is appropriate.*
>
> *In our view, local community consultation and education will also be necessary prior to the implementation of CINs state-wide. This is especially the case in smaller communities, and those with sizeable* [Aboriginal] *populations. For these communities, we believe that the implementation should have an emphasis on developing local solutions as to how the CIN scheme might be used effectively without creating unintended and undesirable consequences, such as net widening.*[27]

3.2.2. NSW Government and police responses to our recommendations

The NSW Government's response to the recommendations in our report was positive, supporting outright 23 of the 27 recommendations, 'supporting in principle' three other recommendations but adopting an alternative implementation strategy to that suggested, and declining to support one recommendation. That recommendation related to presenting CIN histories in court yet setting out the safeguards that should apply when CIN records are presented.

22 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, pp.112 – 117.
23 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, pp.73 – 76.
24 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p.52.
25 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, pp.132 – 133.
26 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, recommendations 9,19, 20, and 21.
27 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, Executive Summary, p.vi.

The Attorney General summarised the government response in a letter to the Ombudsman noting that all of the procedural recommendations were supported, with two exceptions:

> *The first exception relates to Recommendation 19, concerning legislative safeguards to prevent a person's history of CINs being brought to the attention of the court. It is appropriate for a person's CIN history to be presented to the court subject to the following safeguards:*
>
> - *paid and unpaid CINs may be provided to the court only on sentencing, as a matter relevant to an assessment of a person's character,*
> - *paid and unpaid CINs must not be included in a person's criminal record (as there has been no independent finding of guilt), and*
> - *paid and unpaid CINs are not equivalent to a criminal conviction, and need not be declared as part of any check relating to criminal history.*
>
> *The second exception relates to Recommendations 21 and 22 concerning the information that should be included on a Criminal Infringement Notice. While the recommendations are accepted in principle, it is not practical to include more information on the CIN form. Alternative means of conveying the necessary information will be adopted. As an immediate measure, the SDRO website, which is referred to in the CIN form, will feature information about the meaning and consequences of a CIN.*[28]

Recommendation 21 advocated that the CIN form include information about the consequences of failing to pay or defend the matter in court. Recommendation 22 called for the CIN notice to include advice to the effect that the receipt and payment of a CIN does not amount to a conviction or finding of guilt, and that it need not be declared as part of any check relating to the criminal history of the recipient. Appended to the Attorney's letter, the detailed summary of the Government's response explaining its 'in principle' support for Recommendation 21 noted:

> *The recommendation is supported in principle, however, NSW Police advise that it is not practical to include more information on the CIN form. It therefore recommended that alternative means of conveying the necessary information should be adopted …* [29]

The response went on to note that as an immediate measure, information be provided on the SDRO web site and that, in future, the Law Access phone number be included on CIN forms when they are reprinted. The SDRO has since advised that the proposal to add the Law Access telephone number to the penalty notices was not implemented as it was decided that having the telephone numbers for both the SDRO and for Law Access might cause confusion.[30]

In relation to Recommendation 22, the Government response noted:

> *Standard police procedures require the officer to convey this information verbally when issuing a CIN. The recommendation is supported in principle, however, as stated above, it is not practical to include detailed further information on the CIN form.*[31]

This issue will be considered further in Chapter 6 in the sections that discuss the importance of information provided by police when issuing CINs and current practices relating to delayed service of CINs and serving CINs by post.

The Government response also provided an explanation of the Government's 'in principle' support for and response to Recommendation 23. This recommendation suggested that consideration be given to developing the capacity for an internal review of CINs at penalty notice stage (prior to the matter being referred for enforcement). Is also suggested that this process provide for CIN recipients to make representations, for the representation to be considered, for any action to be put on hold (preserving the option of either paying or electing to have the matter heard at court if the representation is declined), and that there be clear guidelines specifying the relevant matters to be considered in reviewing a CIN.

This was supported in principle, with the following explanation:

> *Review mechanisms for the issue of penalty notices and CINs will be considered as part of the response to the Sentencing Council's* Report on Effectiveness of Fines as a Sentencing Option – Court Imposed Fines and Penalty Notices.[32]

28 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007.
29 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007.
30 Email advice dated 15 June 2009.
31 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007, Attachment A.
32 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007, Attachment A.

With the merger of the former Infringement Processing Bureau with the SDRO, responsibility for managing the payment of CINs at penalty notice stage has been transferred to the SDRO and that agency's review procedures are now applied to representations of this kind. This issue, and the process implemented by the NSW Police Force to consider applications for an internal agency review of CINs, are discussed further in section 8.5 which concerns the procedures for the withdrawal of CINs.

Finally, as noted in the previous section, the NSW Police Force disputed our finding regarding the number of CINs issued for offensive language, during the initial 12-month trial, in circumstances where the recipient may have had a defence at court. The NSW Police Force argued that the legal test used for our audit was at odds with older, more authoritative case law that established the standards that police rely on when determining whether an apparent incident of offensive language is actionable at law.

Despite these differences, police initially agreed to act on our recommendation that clear guidance be provided to officers issuing CINs on what does and does not constitute offensive language and conduct. The police position was that such decisions should be guided by 'current case law' and that a Law Note providing guidance to officers would be issued, but that individual officers should retain discretion on whether to 'lay a charge, issue a CAN, issue a CIN or issue a caution'. Our report on the initial 12-month CINs trial noted the police response and our view that it was consistent with our recommendation.[33]

Some time later, the NSW Police Force advised that the lack of recent authoritative case law meant that it was unable to provide its officers with more definitive advice in this regard, however:

> *In line with the spirit of this recommendation, legal services representatives have been consulted and subsequent case study examples have been agreed for insertion into the education and training package currently being developed and refined by Education Services. Some of the examples have been cited directly from the Ombudsman's report and considered quite appropriate to explore as working case studies.*[34]

The education materials used to train officers for the state-wide implementation of the current CINs scheme in late 2007 were finalised in July 2007. These remain the primary resources still available to officers on the NSW Police Force Intranet.

A few months later the NSW Government response also 'supported' this recommendation, adding the following explanation and qualification:

> *Some guidance is provided in the NSW Police Book of Proofs, which states that the reasonable person test applies in relation to determining whether an offensive language offence has been committed and police may use evidence of bystanders or observers.*
>
> *Since liaising with* [NSW Police Force] *Legal Services on the matter, the CINs project team determined that it is impossible to provide a list of terms or clear guidelines and the issue is further exacerbated by the differing opinions held by NSW Police and the Ombudsman on what constitutes offensive language.*
>
> *However, based on consultation with Legal Services, case study examples have been agreed for insertion into the education and training package currently being developed by Education Services.*[35]

The government response largely reflected the NSW Police Force position and response at that time, which noted that 'court decisions regarding what is acceptable / not acceptable language and behaviour are not consistent', making it difficult to articulate more precise guidance to officers.

3.3. The NSW Sentencing Council Interim Report

In late 2005 the Attorney General instructed the NSW Sentencing Council to consider and report on the effectiveness of fines as a sentencing option, and the consequences for those who do not pay fines, paying particular regard to increases in imprisonment for offences relating to driving while unlicensed, suspended or disqualified.[36]

In its interim report in October 2006, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices*, the Sentencing Council listed advantages and disadvantages associated with the use of penalty notices. Among the list of advantages [at 3.28] were a number that also apply to CINs, including:

- saving the courts and criminal justice system considerable time and money
- saving offenders and issuing agencies the cost, time and inconvenience of having to prepare for a court appearance

33 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, 2005, p.76.
34 Schedule of advice provided by NSW Police Force Commissioner's Inspectorate, 23 May 2007.
35 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007, Attachment A.
36 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, p.vii.

- offenders will usually (but not always) be fined less than the fine imposed by the courts
- penalty notices are relatively easy to administer
- the penalty is immediate and certain, and does not include additional court costs and victim's compensation levies, and
- offenders avoid having a conviction recorded for the offence, the existence of which can present significant problems for travel to those countries that deny visas to persons with any form of criminal conviction.

Among the disadvantages inherent in penalty notice schemes [at 3.31], the Sentencing Council listed several that also apply to CINs, including:

- the net-widening effect arising from the ease of issuing penalty notices, leading to fines for conduct that could be more appropriately dealt with by a warning or caution and which was previously dealt with on that basis
- the lack of practical opportunities to independently review the offending conduct, the penalties imposed or the practices of the issuing agency, other than when an offender opts to challenge the penalty notice at court
- the risk that innocent people may simply admit guilt and pay the fine because it is easier to do this than challenge it in court
- penalty notices may be used to raise revenue rather than to modify behaviour or improve community safety
- there is little scope or obligation upon issuing agencies to consider an offender's individual circumstances and means or capacity to pay, and
- the reduction of judicial and public scrutiny over the investigation and enforcement procedures of the relevant agencies, with a consequent potential for discrimination, corruption, and arbitrary and negligent use of penalty notices.

The Sentencing Council cited particular concerns that groups such as Aboriginal people were more susceptible to being issued with penalty notices, often in circumstances where they have little real understanding of the alleged offence.

> *So for instance, young people, the intellectually and mentally disabled, the homeless, and Aboriginal persons, who are more visible, tend to make up the bulk of those who receive penalty notices for minor conduct offences and street offences.*[37]

It questioned the effectiveness of using fines in relation to vulnerable people, people with limited means to pay, and people who have refused or failed to pay fines in the past.

> *The imposition of a large fine on an already disadvantaged person simply opens the door to excessive interaction with the criminal justice system, with consequent negative impacts for family life, employment, individual morale and often, the wider community …*
>
> *Contesting fines or obtaining time to pay may be difficult, stressful and time consuming, requiring literary skills and self-confidence. For people living in poverty or who are otherwise disadvantaged, the prospect of facing multiple court dates and venues to deal with outstanding charges can be daunting.*[38]

Particular problems identified by the Sentencing Council include:

- bureaucratic restrictions on court time-to-pay arrangements and the penalty enforcement hierarchy
- the associated administrative costs imposed in addition to the original fine
- procedural delays
- lack of information at crucial points
- unnecessarily 'dense' forms requiring extensive proof of financial circumstances, and
- the limited payment methods (such as the inability to direct debit court-imposed fines or to pay SDRO debts and Court fines at the same location) which actively discourage early or sustained debt repayment. [1.23]

The Sentencing Council also raised concerns about the escalating problems that often arise when a fine is not paid, such as the difficulties accessing employment and services when driver license or vehicle sanctions are imposed,

37 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, [3.32].
38 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, [2.52].

and the serious driving offences that may be committed if an offender elects to continue to drive because of a lack of transport options.[39] The Sentencing Council outlined a number of possible reforms, including:

- a general review of all offences where a penalty notice can be issued
- provision for more flexible payment options
- providing further scope for administrative review of penalty notices
- guidelines to allow debts to be written off or reduced at an earlier date, and
- consideration of establishing community service and diversionary options for offenders who are unable to meet penalties which have been imposed.[40]

3.4. Extending the use of CINs across NSW

Amendments to the Criminal Procedure Act led to the current CIN scheme, which extended the use of CINs beyond the 12 trial commands to the rest of NSW on 1 November 2007.[41] The main differences between the current scheme and the earlier trial are:

- CINs can now be issued anywhere in NSW, not just in the 12 trial sites
- common assault was removed from the list of nominated CIN offences
- CINs may be served personally or by post, whereas previously police had to serve CINs in person
- a senior police officer can now withdraw a CIN '*at any time*', potentially making it easier to deal with fines issued in error or where a supervisor's review of the event indicates that a warning or charge would have been a more appropriate response to the incident
- if a CIN is withdrawn, any enforcement action in relation to the CIN is to be reversed and any related costs are repayable, and
- if a CIN is withdrawn or dismissed at court, any fingerprints taken by police when issuing the CIN must be destroyed.

Other key provisions remain the same. CINs can only be issued for offences specified in the Criminal Procedure Regulation 2005, and failure or refusal to comply with a police request for name and other details remains an offence. The Act prohibits police from serving CINs to children aged under 18 years, or in relation to offences that occur in the context of an industrial dispute, demonstration or organised assembly.

3.5. Reviewing the impact of CINs on Aboriginal communities

The legislation extending CINs to the rest of NSW included a requirement that the Ombudsman conduct a further review into the operation of the CIN scheme *'in so far as those provisions impact on Aboriginal and Torres Strait Islander communities'*,[42] and to report to the Attorney General and the Minister for Police.[43] As with the previous report, the Attorney General is to table the report in Parliament as soon as practicable after receiving the report.[44]

Neither the legislation nor the parliamentary debates explain why Parliament required a further review. However, issues raised in our first report that may have been a factor in Parliament's decision to require a further review include:

- During the initial 12 months of the CINs scheme trial, Aboriginal and Torres Strait Islander people, who make up 1.7% of the population of the 12 trial commands, were issued with 4.9% of all CINs.
- As CINs were not widely used in commands that had high numbers of Aboriginal residents, the potential impact of using CINs in these communities was unclear.
- The use of CINs to target offensive conduct and offensive language, offences where Aboriginal over-representation is already high.

39 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, [3.38].
40 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, [3.105] – [3.131].
41 Legislative amendments were contained in the *Police Powers Legislation Amendment Act 2006*.
42 *Police Powers Legislation Amendment Act 2006*, Schedule 4, s.[6].
43 *Criminal Procedure Act 1986*, s.344A.
44 *Criminal Procedure Act 1986*, s.344A(4).

- The potential for CINs to be issued in circumstances where previously a warning or caution was given, and for any such net-widening to undermine efforts to reduce offending and over-representation of Aboriginal people in the criminal justice system.[45]

The legislation requiring the Ombudsman to undertake a further review included a requirement to review *'the operation of the provisions of … sections 138A and 138C (in so far as it relates to the exercise of the powers under section 138A) of the Law Enforcement (Powers and Responsibilities) Act 2002*'.[46] These provisions relate to the power of police officers to require a person issued with a CIN, to submit to having his or her finger-prints and/or palm-prints taken, and the safeguards associated with this power.

The focus of this further review is on the issuing and enforcement of CINs in the year immediately following the extension of the CINs scheme across NSW. Throughout this report, this further review period for this current review is generally referred to as:

- 'the current review period' (1 November 2007 to 31 October 2008).

3.6. Administrative and procedural reforms to the fines system

Our current review of the impact of CINs on Aboriginal communities after 1 November 2007, including issues associated with the enforcement of unpaid CINs and other fine debts, coincided with a period of innovation and change in the fines system in NSW. These reforms – largely administrative and procedural in nature – were initiated by the SDRO and other agencies with key responsibilities in managing the fines system in order to address the concerns identified in the Sentencing Council report and in other recent reviews.[47] The reforms aim to make the issuing and enforcement systems fairer, more efficient and more responsive to the needs of people who experience difficulties in paying their fines.

The SDRO advised that initiatives under way or about to commence at the time of our further review of CINs included:

- Increased flexibility in relation to part payment and time-to-pay arrangements for SDRO clients experiencing financial hardship, including allowing clients who are subject to enforcement orders to use automated Centrepay deductions from their Centrelink benefits in order to repay their debts over time.
- Measures in conjunction with the Department of Corrective Services to identify prison inmates who have outstanding fines in order to put a stay on any enforcement action until three months after their release.
- Substantial reductions in the time it takes clients to get through to operators at SDRO's Customer Contact Centres and falls in the rate of call abandonment, largely achieved through improvements to the telephone system, increased staff and better training.
- Extending an advocacy hotline service to give priority access to advocacy groups, financial counsellors and others who regularly assist individuals who experience difficulties in dealing with debts owed to SDRO.
- Initiatives specifically aimed at improving Aboriginal access to the SDRO, including outreach to Aboriginal community organisations, developing links with Aboriginal staff and programs in other agencies such as the RTA and local courts, convening Aboriginal community information days, recruitment of four identified Aboriginal staff, printing and distribution of information material to provide clients and advocates with advice on available options, relaxing the RTA sanctions imposed on certain clients living in communities that have an added need for licensed drivers and support for remedial driving programs.
- Undertaking a full review of all of SDRO policies relating to time-to-pay agreements and the circumstances for lifting sanctions.[48]

Although largely administrative in nature, these kinds of internal agency reforms can undoubtedly make a big difference to individuals who experience difficulties paying their debts. For instance, the introduction of Centrepay gives some of the SDRO's poorest clients a realistic way to access and manage time-to-pay agreements. Despite almost no information being provided to the public about this facility until long after it was introduced in February 2008,[49] by the following November the SDRO estimated that 14,700 clients had signed up for this deduction scheme

45 NSW Police Force, *Aboriginal Strategic Direction, 2007 – 2011*, Objective 7.
46 *Criminal Procedure Act 1986*, s.344A(1)(c).
47 See for example, Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Not such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*, April 2006; and NSW Standing Committee on Law and Justice, *Final Report, Community based sentencing options for rural and remote areas and disadvantaged populations*, 30 March 2006.
48 Correspondence from M Roelandts, Senior Manager, Business Relationships & Development, State Debt Recovery Office, to M Gleeson, Manager, Police Division, Ombudsman, 22 October 2008.
49 Until recently, the only publicly available SDRO publications to mention that SDRO allowed clients to direct debit via Centrepay were a brochure directed at Aboriginal clients, 'What will happen if I don't pay my fine?', and the Office of State Revenue's 2007 – 08 Annual Report. In April this year the SDRO added a detailed fact sheet to its web page, www.sdro.nsw.gov.au, with links to relevant forms.

and paid $7.3 million. The SDRO recently advised that as at the end of June 2009, 45% of clients on time-to-pay arrangements were using the Centrepay option.[50] Significantly, the default rate for clients using Centrepay to manage their repayments dropped to about 2%, compared with 40% for other time-to-pay arrangements.

These initiatives are especially important for people who may have accumulated large fine debts at some point in their lives and, even though they may have long since stopped offending, and who need practical options for eventually paying their way out of the fines enforcement system. The changes enable them to enter into time-to-pay arrangements with the SDRO or have RTA sanctions lifted for some other reason. For many, this enables them to access education and employment, reducing the risks of secondary offending while increasing their capacity to repay their debts.

3.7. Legislative reforms to the fines system

The administrative and procedural reforms described above are being complemented by further legislative reforms.

3.7.1. Recent changes to the Fines Act

Recent changes to the *Fines Act 1996* (Fines Act) will provide the legislative tools needed to accelerate the reform process further. Central to these reforms are amendments introduced by the *Fines Further Amendment Act 2008* which aim to improve:

> *… the system for the administration and enforcement of court fines and penalty notices. Specifically, the amendments are intended to increase the recovery of court fines and penalty notices from low-income earners; divert vulnerable groups out of the fine and penalty notice system and provide them with meaningful and effective non-monetary sanctions; reduce enforcement costs by providing better-targeted fine payment and mitigation options; and reduce the incidence of secondary offending brought about by fine default.*[51]

The new laws, assented to on 8 December 2008, were planned to commence in stages as the SDRO and other agencies responsible for implementing the reforms put in place the necessary administrative and other processes needed to support the changes.

The reforms, overseen by the Attorney General's Department and the Office of State Revenue, feature a number of important innovations including:

- A trial scheme aimed at allowing certain vulnerable groups to mitigate their fines by undertaking activities under a Work and Development Order such as completing a drug and alcohol program, attending financial counselling, or undertaking some form of unpaid community service.
- A clear legislative basis for issuing agencies to initiate internal reviews of the penalty notices they issue.
- A clear legislative power for officers to give people a caution instead of a penalty notice where appropriate.
- A new power for the SDRO to partially write off fine and penalty notice debt when dealing with individuals who have no realistic prospect of satisfying that debt, yet might not qualify for a full write off. There is also a provision enabling the Fines Hardship Review Board to direct the SDRO to partially write off a person's fine and penalty notice debt.
- The creation of separate suspended and cancelled driver offences arising from non-payment of a fine or penalty notice. This will make it easier to distinguish offenders who drive while suspended due to fine default from those whose driving suspension is related to unsafe driving.
- Provisions allowing people on Centrelink benefits to enter into instalment arrangements with the SDRO from the outset. Currently, time-to-pay arrangements and automated Centrepay facilities are only available to clients who are referred for enforcement action (with additional fees and penalties) after defaulting on their fine or penalty notice.

The new power to order a partial write off was the first amendment to take effect. Other important changes required the agencies responsible for implementation to make necessary system changes and prepare appropriate guidelines. The further amendments were scheduled to commence by July 2009.

The NSW Government has put in place a number of mechanisms to ensure that proposed reforms are implemented effectively and that more is known about the consistency and fairness of penalty notices issued across NSW.

50 SDRO response to draft CINS report, 20 July 2009.
51 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.

3.7.2. Committee to implement changes to the Fines Act

The Attorney General's Department and the Office of State Revenue have established a committee to oversee the implementation, and a two-year trial of one of the more innovative and challenging of the reforms, the new Work and Development Order scheme. The agencies involved include the Department of Corrective Services, NSW Health, the Department of Ageing, Disability and Home Care, and non-government organisations that will take on responsibility for supervising participants in the scheme, such as the Salvation Army. The committee's responsibilities include developing guidelines to cover the Work and Development Order scheme, establishing application and reporting procedures, and community education and engagement.

The Attorney General's Department and the Office of State Revenue are also consulting with relevant government and non-government stakeholders in the development of guidelines to govern the new powers to issue cautions and conduct reviews of penalty notices.

3.7.3. Law Reform Commission inquiry into penalty notice offences

On 5 December 2008, the Attorney General instructed the NSW Law Reform Commission to inquire into, and report on, the laws relating to penalty notices in NSW. The terms of reference for the inquiry provide:

> *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.*[52]

3.8. Issues, inquiries and policies relevant to Aboriginal people

In assessing the impact of CINs on Aboriginal communities – both the positive and negative – it is important to consider the situation of Aboriginal communities. This section provides some context to the use of CINs as a diversionary measure by briefly outlining factors related to Aboriginal disadvantage, the high levels of Aboriginal over-representation in the criminal justice system and some of the key NSW Government and police policies and initiatives aimed at addressing that disadvantage and over-representation.

52 Referred by the Hon John Hatzistergos MLC, pursuant to section 10 of the *Law Reform Commission Act 1967*. http://www.lawlink.nsw.gov.au. Accessed 22 February 2009.

3.8.1. Issues affecting Aboriginal communities

Aboriginal and Torres Strait Islander people make up 2.5% of the Australian population, and 2.2% of the population of NSW. They are relatively young, with a median age of 21 years compared to 37 years for the non-Aboriginal population, and 37% of the Aboriginal population are younger than 15 years compared with 19% of non-Aboriginal people.[53]

For Australians living in remote areas, distance can be a barrier to accessing services. In 2006, one in four Aboriginal people lived in remote or very remote areas, compared with one in 50 non-Aboriginal people.[54] More Aboriginal people live in NSW (29% of the Aboriginal population) than in any other state or territory.

The Australian Bureau of Statistics recent report into the *Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2008* highlights some of the significant disadvantages experienced by Aboriginal people, including:

- Over-crowded housing. One in seven Aboriginal households (14%) were overcrowded in 2006 and around one-quarter of the Aboriginal population (27%) were living in overcrowded conditions.
- Low income. The median weekly individual income of Aboriginal people aged 15 years and over was $278 in 2006, just over half that for non-Aboriginal Australians – $473. Measures of household income were much lower – $362 a week compared with $642.[55]
- Unemployment. The rate of unemployment for Aboriginal people aged 15 – 64 years is improving, down from 20% in 2001 to 16% in 2006, but was still three times higher than for non-Indigenous Australians (16% compared with 5%).
- Education outcomes. These are improving, but are still lower than for other Australians. Data from 2006 show that nationally, 23% of Aboriginal adults have completed Year 12, compared with 49% of non-Indigenous adults. The outcomes were markedly poorer in remote areas, with just 14% of Aboriginal people living in remote areas completing Year 12 and relatively poor school retention rates.
- Life expectancy. In the period 1996 – 2001, the life expectancy at birth for Aboriginal Australians was estimated to be 59.4 years for males and 64.8 years for females, compared with 76.6 years for all males and 82.0 years for all females for the period 1998 – 2000, a difference of approximately 17 years between Aboriginal and non-Aboriginal people, for both males and females.[56]

Other measures of disadvantage relating to home ownership, suicide and self-harm, and family and community violence are markedly poorer for Aboriginal people. Aboriginal people also typically experience higher rates of disability and long-term health conditions and hospitalisation.

Aboriginal people are far more likely to come into contact with the criminal justice system than non-Aboriginal people. Aboriginal prisoners made up 24% of the total prison population at 30 June 2007. After adjusting for the relative youthfulness of the Aboriginal population, Aboriginal people in NSW were still 13 times more likely to be in prison than non-Aboriginal people.[57]

There are variations in the types of offences for which Aboriginal and non-Aboriginal people come before the courts:

> *Indigenous people are much less over-represented for offences relating to fraud, traffic-related matters and illicit drugs. Generally, Indigenous people come before the courts for more serious property offences including break and entering, and stealing motor vehicles, whereas non-Indigenous people have a greater proportion of more minor property offences such as shoplifting and larceny. Another area of significant difference is the large proportion of Indigenous people who come before the courts on matters of violence.*[58]

53 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, *2008*. http://www.abs.gov.au. Accessed 3 June 2009.
54 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, *2008*. http://www.abs.gov.au. Accessed 3 June 2009.
55 The median equivalised household income for Indigenous people was $362 per week, equal to 56% of the median equivalised household income for non-Indigenous people ($642).
56 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, *2008*. http://www.abs.gov.au. Accessed 3 June 2009.
57 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, *2008*. http://www.abs.gov.au. Accessed 3 June 2009. See also NSW Bureau of Crime Statistics and Research, *Indigenous over-representation in prison: The role of offender characteristics*, September 2006, p.1.
58 Cunneen C., *Crime, Justice and Indigenous People*, University of NSW Faculty of Law Research Series 11, 2008. http://www.austlii.edu.au/au/journals/UNSWLRS/2008/11.html. Accessed 23 February 2009.

In addition, Aboriginal over-representation is particularly pronounced for offensive language charges, with a 1999 study showing that Aboriginal people accounting for '15 times as many offensive language offences as would be expected by their population in the community'.[59] This over-representation was particularly pronounced in some areas of NSW, particularly in the north-west, north and far south coast. In 1998 the 'local government areas of Inverell recorded a level of 83 times the average and Richmond River recorded close to ninety times the average'.[60]

While most people charged with a criminal offence have not appeared in court in the preceding five years, this is not the case for Aboriginal people. In 2001, only 17% of Aboriginal males and 27% of Aboriginal females brought before the courts had no previous court appearance in the preceding five years. Also, more than 25% of Aboriginal males and 15% of Aboriginal females had appeared in court more than five times in the preceding five years.[61]

The factors thought to contribute to the rate at which Aboriginal Australians enter the criminal justice system include:

- Offending patterns (especially over-representation in offences likely to lead to imprisonment such as homicide, serious assaults, sexual assaults and property offences).
- The impact of policing (in particular the adverse use of police discretion, issues around police bail, and the availability and use of alternatives to arrest and of other diversionary options).
- Legislation (especially the impact of laws giving rise to indirect discrimination such as legislation governing public places or alcohol).
- Factors in judicial decision-making (in particular bail conditions, the weight given to prior record, the availability of non-custodial options).
- Environmental and locational factors (especially the social and economic effects of living in small rural and remote communities).
- Cultural difference (such as different child-rearing practices, the use of Aboriginal English, vulnerability during police interrogation).
- Socio-economic factors (in particular high levels of unemployment, poverty, lower educational attainment, poor housing, poor health).
- Marginalisation (in particular drug, alcohol and other substance abuse, alienation from family and community).
- The impact of specific colonial policies (especially the forced removal of Indigenous children).[62]

Given the complexity of these factors, the Royal Commission into Aboriginal Deaths in Custody found:

> *changes to the operation of the criminal justice system alone will not have a significant impact on the number of persons entering custody … the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses on them are much more significant factors in over-representation.*[63]

Aboriginal disadvantage can also be manifest in the most pedestrian of measures, as the following information highlights.

Limited vehicle and driver licence availability in Aboriginal communities

The 2006 Census showed that almost a quarter (23%) of Aboriginal households did not have ready access to a registered vehicle (ie. garaged or parked at or near their home), compared with 10% of other households. This is particularly problematic for the one in four Aboriginal people living in remote or very remote locations who often rely on private transport to access education and job opportunities, or to access basic health and other services.[64]

59 NSW Bureau of Crime Statistics and Research, *Race and offensive language charges*, August 1999, p.1.
60 Aboriginal Justice Advisory Council, *Policing Public Order: Offensive Language & Behaviour, The Impact on Aboriginal People*, undated.
61 NSW Bureau of Crime Statistics and Research, *Contact with the New South Wales court and prison systems: The influence of age, Indigenous status and gender*, August 2003, p.9.
62 Cunneen C., *Crime, Justice and Indigenous People*, University of NSW Faculty of Law Research Series 11, 2008. http://www.austlii.edu.au/au/journals/UNSWLRS/2008/11.html. Accessed 23 February 2009.
63 Royal Commission into Aboriginal Deaths in Custody, Volume 4, Chapter 26.
64 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, *2008*. http://www.abs.gov.au. Accessed 3 June 2009.

A recent investigation commissioned by the RTA highlighted the 'prevalence' of unlicensed driving in Aboriginal communities in NSW.[65] The study found that 29% of Aboriginal respondents who have never held a licence had driven on NSW roads in the previous 12 months, many of whom (40%) were driving on a weekly basis. It also found that almost half (46%) of past licence holders (ie. they no longer had a valid licence) were continuing to drive on a daily basis.

Many Aboriginal people find it difficult to maintain a licence once they have obtained one. The RTA study found that 74% of past licence holders and 43% of current licence holders indicated their licence had been suspended or cancelled at some point, with 21% of past licence holders having lost their licence more than once. The most common reasons cited for licence suspension or cancellation were unpaid fines (31%) and outstanding SDRO debts (28%). A significant proportion of the Aboriginal community (40%) have outstanding debt with the SDRO.

The limited availability of licensed drivers and registered vehicles can hamper the ability of learner drivers to complete the supervised driving hours needed to qualify for a licence. This, in turn, limits access to employment and other opportunities.

In recruiting Aboriginal home care workers, the NSW Department of Ageing, Disability and Home Care (in partnership with TAFE, education and Centrelink) is trialling a pilot program that includes driver training as part of the traineeships for those positions. Without driver training, and the funding to achieve this, these impediments would continue to adversely affect the recruitment of suitable staff and limit the delivery of home care services.[66]

3.8.2. NSW Standing Committee on Social Issues Inquiry

In September 2007 the Minister for Aboriginal Affairs, in recognition of the ongoing disadvantage experienced by Aboriginal communities, instructed the Standing Committee on Social Issues to inquire into, and report on, a range of issues relating to closing the gap between the lifetime expectancy between Aboriginal and non-Aboriginal people.[67]

The Committee's report highlighted the importance of ensuring genuine partnership between government departments and Aboriginal communities in the design and delivery of programs and services in Aboriginal communities:

> *Aboriginal communities should be being asked what they need, or be able to say what they need, knowing that they will be listened to. They should be offered assistance in meeting that need, rather than tokenistic consultation after plans have been made.*[68]

In total, the Committee made 23 recommendations across a range of areas, including government prioritisation of issues affecting Aboriginal people, enhancing the way funding is delivered for projects strengthening Aboriginal communities, and improving strategies for educating people about Aboriginal history, culture and issues. In addition, it was recommended that:

- NSW Government agencies engage Aboriginal communities to identify local problems and solutions, and tailor programs delivered in a community accordingly, and
- the NSW Department of Aboriginal Affairs develop practical training to be delivered to NSW public servants on how to communicate clearly and effectively with Aboriginal communities, without using bureaucratic language.[69]

3.8.3. Government policies aimed at strengthening Aboriginal communities in NSW

The NSW Government has in place a number of policies which recognise the disadvantage of Aboriginal communities and aim to put in place coordinated strategies to improve opportunities for Aboriginal people. The policies and practices of government agencies should accord with the principles outlined in these documents.

65 *An Investigation of Aboriginal Driver Licencing Issues*, Elliott & Shanahan Research for the RTA (NSW), December 2008.
66 Interview, Warren Steadman, Manager, Aboriginal Home Care Development, DADHC, 17 April 2009.
67 NSW Standing Committee on Social Issues, *Overcoming Indigenous Advantage in New South Wales: Final Report*, 27 November 2008, p.iv.
68 NSW Standing Committee on Social Issues, *Overcoming Indigenous Advantage in New South Wales: Final Report*, 27 November 2008, p.xiii.
69 NSW Standing Committee on Social Issues, *Overcoming Indigenous Advantage in New South Wales: Final Report*, 27 November 2008, recommendation 7, p.37, and recommendation 9, p.46.

3.8.3.1. NSW State Plan

The NSW State Plan, released in November 2006, sets out the priorities for government action until 2016. It is not specific to Aboriginal people but includes a number of goals and priorities of relevance to Aboriginal disadvantage and over-representation in the criminal justice system, including:

- R1 – Reduced rates of crime, particularly violent crime
- R2 – Reducing re-offending
- R3 – Reduced levels of anti-social behaviour
- S3 – Improved health through reduced obesity, smoking, illicit drug use and risk drinking
- F1 – Improved health and education for Aboriginal people
- F4 – Embedding the principle of prevention and early intervention into government service delivery in NSW.[70]

The State Plan includes targets for improvement, to guide decision making and resource allocation.[71]

3.8.3.2. NSW Aboriginal Affairs Plan 2003 – 2012

Two Ways Together is the NSW Government's 10 year plan to improve the lives of Aboriginal people and their communities. In particular, better outcomes are sought for Aboriginal people in the areas of health, housing, education, culture and heritage, justice, economic development, and families and young people.

The overall objectives of *Two Ways Together* are to develop sustainable partnerships between Aboriginal people and government, and improve the social, economic and cultural wellbeing of Aboriginal people in NSW.

Two Ways Together will track all State Plan priorities of relevance to Aboriginal people.[72]

3.8.3.3. NSW Aboriginal Justice Plan – Beyond Justice 2004 – 2014

In 1997 a National Indigenous Deaths in Custody Summit was held to examine strategies to reduce the increasing imprisonment rate of Aboriginal people across Australia. At the summit each State and Territory government agreed to develop an Aboriginal Justice Plan which would focus on specific justice issues as well as the underlying causes of offending in Aboriginal communities.[73]

The NSW Aboriginal Justice Plan focuses more broadly than on the criminal justice system alone:

> *Recent research identifies clear linkages between poor education levels, housing conditions, unemployment, family disruption, alcohol consumption, long-term health problems and Aboriginal involvement in the criminal justice system. By targeting these specific problems, the Aboriginal Justice Plan aims to reduce the likelihood of Aboriginal people becoming involved in the criminal justice system.*[74]

The three goals of the Aboriginal Justice Plan are to reduce the number of Aboriginal people coming into contact with the criminal justice system in its entirety, improving the quality of services for Aboriginal people, and developing safer communities. Some of the key principles on which the plan is based are that:

- As Aboriginal people understand their own problems and issues, they are best placed to find innovative ways to address them.
- The responsibility for addressing the underlying causes of crime in Aboriginal communities is shared by Aboriginal communities, governments and the broader community.
- The provision of improved access to opportunities and services for Aboriginal people promotes choices that reduce the likelihood of their contact with the criminal justice system.[75]

70 NSW Government, *A New Direction for NSW: State Plan*, November 2006, http://www.nsw.gov.au/stateplan/pdf/State_Plan_complete.pdf. Accessed 4 March 2009. Note, this is not a comprehensive list of priorities of relevance to Aboriginal people.
71 NSW Government, *A New Direction for NSW: State Plan*, November 2006, p.5. http://www.nsw.gov.au/stateplan/pdf/State_Plan_complete.pdf. Accessed 4 March 2009.
72 *Two Ways Together, New South Wales Aboriginal Affairs Plan 2003 – 2012*. http://www.daa.nsw.gov.au/publications/TWT%20CopBroch_LR_1.pdf. Accessed 25 February 2009.
73 NSW Aboriginal Justice Plan, *Beyond Justice 2004 – 2014*, NSW Aboriginal Justice Advisory Council, February 2005, p.6.
74 NSW Aboriginal Justice Plan, *Beyond Justice 2004 – 2014*, NSW Aboriginal Justice Advisory Council, February 2005, p.6.
75 NSW Aboriginal Justice Plan, *Beyond Justice 2004 – 2014*, NSW Aboriginal Justice Advisory Council, February 2005, pp.8 – 9.

The Aboriginal Justice Plan includes a wide range of objectives and strategic actions. Some that are particularly relevant to this review, include:

- Develop Aboriginal crime prevention strategies that actively support local Aboriginal communities to develop and implement their own solutions to their identified crime problems.
- Improve Aboriginal people's knowledge of their rights under criminal, civil and family law, through targeted information and education strategies.
- Use an inter-agency 'offence targeting' model to develop strategies to reduce particular types of crime, including road and traffic offences, public order offences, and offences against justice procedures.
- Continue to review NSW police training and internal reporting and management processes to improve and assess the focus on cultural and racism awareness, community policing, Aboriginal community partnership programs, police and Aboriginal relations, and measurements and use of alternatives to arrest.
- Directly involve local Aboriginal communities in establishing and managing local policing priorities, including methods of policing and the provision of locally managed and delivered Aboriginal cultural awareness programs.
- Develop and utilise a full range of Aboriginal community based alternatives to avoid Aboriginal prosecution for minor summary offences.
- Each agency establish an ongoing review of service delivery to Aboriginal clients that directly engages external Aboriginal stakeholders.
- Provide for the ongoing review of government service delivery to Aboriginal communities to identify structural or legislative barriers that inhibit full access to services.[76]

The Aboriginal Justice Plan is being evaluated by way of annual reports, interim evaluations (after three and eight years), a mid term evaluation (after five years), and a final evaluation at the conclusion of the ten year plan.[77]

3.8.3.4. NSW Police Force Aboriginal Strategic Direction 2007 – 2011

The *Aboriginal Strategic Direction 2007 – 2011* (ASD) is the latest in a series of NSW Police Force policies that identify where police can have input in decreasing the over-representation of Aboriginal people in the criminal justice system. Overall, the ASD is consistent with *Two Ways Together*, particularly in the aim that 'NSW public sector agency work practices are culturally appropriate and that services are delivered in a way that meets the needs of Aboriginal people'.[78]

The seven objectives of the ASD are:

> *1. Improve communication and understanding between Police and Aboriginal people.*
>
> *2. Improve community safety and reduce fear of crime.*
>
> *3. Seek innovation in the provision of Aboriginal Cultural Awareness and Aboriginal recruitment and retention.*
>
> *4. Divert Aboriginal youth from crime and anti-social behaviour.*
>
> *5. Establish an integrated approach to managing family violence …*
>
> *6. Develop a strategic response to Aboriginal substance abuse.*
>
> *7. Reduce offending and over-representation of Aboriginal people in the criminal justice system.*[79]

Police have a variety of structures and state-wide, regional and local forums and working groups to guide their work with Aboriginal communities and facilitate better feedback from, and communication with, those communities. These include:

- The Police Aboriginal Strategic Advisory Council (PASAC)
- Regional Aboriginal Advisory Committee (RAAC), and
- Local Area Command Aboriginal Consultative Committee (LACACC).

Under the *Aboriginal Strategic Direction*, commanders (through their LACACCs) are expected to develop Local Area Command Aboriginal Action Plans to guide local level interventions and ensure that police and local Aboriginal people work together to identify and act on priority initiatives.

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76 NSW Aboriginal Justice Plan, *Beyond Justice 2004 – 2014*, NSW Aboriginal Justice Advisory Council, February 2005, pp.16, 19, 20, 21 and 24.
77 NSW Aboriginal Justice Plan, *Beyond Justice 2004 – 2014*, NSW Aboriginal Justice Advisory Council, February 2005, p.28.
78 NSW Police Force, *Aboriginal Strategic Direction 2007 – 2011*, p.11.
79 NSW Police Force, *Aboriginal Strategic Direction 2007 – 2011*, p.23.

Chapter 4.
Rules relating to issuing and enforcement of CINs

This chapter outlines the rules and processes that govern the issuing and enforcement of CINs.

The seven offences covered by the current CINs scheme are just a few of the estimated 17,000 offences under 97 separate laws that can lead to the issuing of a penalty notice in NSW.[80] COPS data indicates that 507,799 penalty or infringement notices (other than CINs) were issued to adults in NSW in 2008, 472,939 in 2007 and 459,640 in 2006.[81] Police practices relating to the issuing of penalty notices under the CINs scheme are regulated by legislation specific to CINs. This recognises that CINs differ in important respects from other penalty notices.

By contrast, the policies and practices used by the SDRO to track CIN payments and penalise any failure to pay are mostly the same as for other penalty notices issued by police. There are some requirements that are specific to the CINs scheme. For instance, the NSW Police Force needs SDRO information on CIN payments in order to comply with the laws relating to the destruction of fingerprints. But generally the SDRO's handling of CIN payments (and recipients' failure to pay) is the same as for other on-the-spot fines.

4.1. Police powers and responsibilities

4.1.1. Legislative provisions

The Criminal Procedure Act, as amended by the *Police Powers Legislation Amendment Act 2006,* provides that a police officer may serve a penalty notice – described in the Act as 'penalty notice' but referred to in police procedures as a 'CIN' – on any person aged 18 years or older 'if it appears to the officer that the person has committed a penalty notice offence'.[82] The Act does not require police to issue a penalty notice.[83] It just provides an additional, intermediate option between a caution and a charge.

CINs can only be issued for offences specified in the Criminal Procedure Regulation 2005. The seven offences listed during the current review period are set out in table 1.

Table 1 Schedule 2 Penalty notice offences, Criminal Procedure Regulation 2005

Offence	Related legislation	Penalty
Larceny/shoplifting, where value does not exceed $300	*Crimes Act 1900*, s.117	$300
Obtaining money etc by wilful false representation	*Crimes Act 1900*, s.527A	$300
Goods in custody	*Crimes Act 1900*, s.527C	$350
Offensive conduct	*Summary Offences Act 1988*, s.4(1)	$200
Offensive language	*Summary Offences Act 1988*, s.4A(1)	$150
Obstructing traffic	*Summary Offences Act 1988*, s.6	$200
Unauthorised entry of vehicle or boat	*Summary Offences Act 1988*, s.6A	$250

During the initial trialling of CINs, penalty notices could also be issued for common assault. This offence was removed as a penalty notice offence on 12 December 2006.[84]

80 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
81 NSW Bureau of Crime Statistics and Research, ref. jh09-7422.
82 *Criminal Procedure Act 1986*, s.333.
83 *Criminal Procedure Act 1986*, s.342(3).
84 *Police Powers Legislation Amendment Act 2006*, Schedule 4, s.4.4 [2].

Section 334 of the Criminal Procedure Act provides that:

> *(1) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence …*
>
> *(2) A penalty notice may be served personally or by post.*

The provision allowing penalty notices to be served by post was included after the CINs scheme trial, in response to the report on the CIN scheme trial.[85]

Section 338(1) of the Criminal Procedure Act states that 'if the amount of penalty prescribed for an alleged penalty notice offence is paid, no person is liable to any further proceedings for the alleged offence.' However, Section 338(2) states:

> *Payment of a penalty notice 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.*

The Act also specifies some limitations on when CINs can be issued. Section 339 provides that police may not issue CINs in relation to an industrial dispute, an apparently genuine demonstration or protest, a procession or an organised assembly.

Also, CINs may not be issued to people who are under 18 years of age. If a penalty notice is issued to a person who is under 18, the amount that was payable under the notice is not payable, any amount that is paid under the notice is repayable, and further proceedings may be taken against the person as if the notice had never been served.[86]

4.1.1.1. Powers relating to identity and fingerprints

Section 341 of the Criminal Procedure Act enables police to require anyone who is to be issued with a CIN to disclose their name and address, and provides penalties for failure or refusal (without reasonable excuse) to comply or for providing false or incorrect particulars.

An officer making such a request must provide evidence that he or she is a police officer (unless already in uniform), provide his or her name and place of duty, explain the reason for the request, and warn that failure to comply may be an offence.

Section 138A(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), the primary police powers legislation in NSW, provides that a police officer who serves a penalty notice under the Criminal Procedure Act:

> *… may (whether before or after the penalty notice has been served) require the person to submit to having his or her finger-prints or palm-prints, or both, taken and may, with the person's consent, take the person's finger-prints or palm-prints, or both.*

An officer exercising this power to require fingerprints must provide evidence that he or she is a police officer (unless already in uniform), provide his or her name and place of duty, explain the reason for the request, and warn that failure to comply may lead to the person being arrested for the offence concerned and that, while in custody, be subject to fingerprinting without consent.[87]

Section 138A(3) of the LEPRA provides for the destruction of prints upon payment, or if the matter is dismissed at court or the court finds the person not guilty, or if the penalty notice is withdrawn. Until 12 December 2006, fingerprints taken to verify the identity of CIN recipients only had to be destroyed if the penalty notice was paid.[88]

The fingerprinting and identification powers, and the safeguards that guide the use of these powers, are considered at Chapter 9.

4.1.1.2. Withdrawing penalty notices

The Criminal Procedure Act provides police ('a senior police officer') with broad discretion to withdraw a CIN 'at any time', either at their own discretion or at the direction of the Director of Public Prosecutions.[89] Previously, CINs could only be withdrawn 'before the due date for payment'.[90]

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85 *Police Powers Legislation Amendment Act 2006*, Schedule 4, s.4.3 [1]. See also, Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p.97.
86 *Criminal Procedure Act 1986*, s.335.
87 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.138C(1).
88 This provision was contained in the *Crimes Act 1900*, s.353AC(3).
89 *Criminal Procedure Act 1986*, s.340(1) – (2). Note, a senior police officer means a Local Area Commander, a Duty Officer for a police station, or any other police officer of the rank of Inspector or above. *Criminal Procedure Act 1986*, s.332.
90 s.340(1) of the *Criminal Procedure Act 1986* was amended by the *Police Powers Legislation Amendment Act 2006*.

Section 340(3) of the Act states that the following provisions have effect in relation to an alleged offence if a penalty notice for the alleged offence is withdrawn:

> *(a) The amount that was payable under the notice ceases to be payable.*
>
> *(b) Any amount that has been paid under the notice is repayable to the person by whom it was paid.*
>
> *(b1) Any subsequent action already taken in relation to the notice, including any enforcement action, is to be reversed.*
>
> *(b2) Any costs relating to that subsequent action are not payable and, if paid, are repayable.*
>
> *(c) Further proceedings in respect of the alleged offence may, subject to any time limit within which such proceedings are required to be commenced, be taken against any person (including the person on whom the penalty notice was served) as if the notice had never been served.*[91]

The Fines Act specifies the circumstances that the SDRO may, on application, or of its own initiative, withdraw a penalty notice enforcement order. Circumstances might include an order relating to a matter that was previously subject to enforcement action, or where there has been a mistake in identity or perhaps some other error in issuing the order.[92] The rules and procedures relating to withdrawing CINs are discussed in section 8.5.

4.1.2. NSW Police Force policies, procedures and training

NSW Police Force policy, training and procedural advice guides the day-to-day use of CINs. Although these documents essentially reflect the legislative requirements set out in the Criminal Procedure Act, they also feature important additional instruction that is not included in that Act. Examples include procedural requirements that bar CINs from being issued to serving police officers or in relation to domestic violence offences, offences involving suspects too intoxicated to comprehend the procedure, and 'continuing offences' – that is, when the suspect continues the offending behaviour despite police requests to stop.Many of these requirements have their origin in other legislation or in case law, and are essential to the appropriate and effective use of CINs.

For CINs, the most important of these NSW Police Force documents is the *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPS) v.4* (June 2007), referred to here as the 'SOPS'.[93] The introduction of the SOPS summarises the effects of the legislative scheme, the aims and objectives of CINs, and key definitions. The SOPS then go on to summarise and explain procedures relating to:

- who can and who cannot be issued with a CIN
- the legal requirements relating to requests for identification details and the steps officers would normally take to confirm the person's identity
- the CIN offences prescribed in the Regulation and offence codes that must be noted on the penalty notice itself, and
- circumstances when a CIN cannot be issued, both those specified in the Criminal Procedure Act (eg. industrial disputes and demonstrations) and those devised by NSW Police Force or derived from other sources (eg. serving police officers, or in relation to domestic violence offences).

There is also advice on how to deal with multiple offences (up to four CINs can be issued at a time), repeat offenders (police should use their discretion), and the effect of paying a CIN (no further proceedings, not to be regarded as an admission of guilt and no criminal record). The section concludes by noting:

> ***Use of CINs in high visibility operations***
>
> *Police are encouraged to use Criminal Infringement Notices whilst undertaking 'high visibility' operations such as Vikings if the criteria for use are met.*

The SOPS also set out detailed step-by-step advice on:

- the process for issuing a CIN, much of which repeats and emphasises the legal requirements, but also specifies details such as the checks that should be made, the recording requirements and information that should be provided to CIN recipients
- taking fingerprints in the field, including a requirement that this should be done in an area that is private and out of public view, and

91 *Criminal Procedure Act 1986*, s.340.
92 *Fines Act 1996*, ss.17 and 46.
93 While this has been the primary NSW Police Force policy document for CINs since June 2007, the following caveat is attached to the SOPS: *'This document is a work in progress. It should not be considered NSW Police Force Policy or complete until such time as the project sponsor endorses it as such.'*

- the details that must be recorded on COPS upon returning to the police station, the documentation that must completed and forwarded in relation to fingerprint records and the information that must be sent to the SDRO.

The section concludes with advice on withdrawing CINs, including specifying that CINs *must* be withdrawn in any of the following circumstances:

Circumstances when a CIN must be withdrawn

- *The CIN was inadvertently issued to a person under the age of 18 years of age.*
- *The CINs' criteria was not met, because either, the identity of the suspect cannot be confirmed, or the offence is not an offence prescribed on the CINs offence list.*
- *The CIN was inadvertently issued to a serving police officer.*
- *The CIN was issued in another circumstance when it cannot be issued.*

The SOPS also set out important information on the management of penalty notice books, including auditing requirements and what to do if books are lost, stolen or missing.

Where relevant, details from these SOPS and other NSW Police Force policy and training materials are noted throughout this report.

4.2. The fines enforcement process

The SDRO is the agency with primary responsibility for administering penalty notices schemes in NSW, including the CINs scheme. The SDRO is part of the Office of State Revenue, a division of the NSW Treasury.[94]

The SDRO issues and processes penalty notices on behalf of NSW government departments, including the NSW Police Force, as well as local councils and other agencies.[95] During 2007 – 08 the SDRO processed 2.9 million penalty notices with a face value of $453.7 million. This included 1.4 million penalty notices with a total face value of $265.8 million processed on behalf of the Crown.[96]

The SDRO also manages a fine enforcement system to collect unpaid fines, including those imposed by courts. The legislative provisions governing the fines enforcement system are included in the Fines Act and Fines Regulation 2005. During 2007 – 08 the SDRO issued 823,951 enforcement orders with a face value of $243.7 million.[97]

4.2.1. Penalty notice stage

When a person receives a CIN or some other penalty notice, they have 21 days to pay the amount in full, elect to have the matter heard at court, or seek to have the matter reviewed. If the CIN recipient does not pay the specified amount or nominate an alternative course of action within the 21 day period, the SDRO issues a penalty reminder notice. This provides the CIN recipient with an additional 28 days in which to act.

On 25 June 2008 the Fines Act was amended to formally permit a person to pay the amount by part payments as long as 'the full amount payable under a penalty notice is to be paid within the time required by the penalty reminder notice.'[98] The practice of allowing such part payments had previously been informally permitted by the SDRO.[99]

At present the SDRO does not accept applications to extend the time to pay a penalty notice beyond the date specified in the penalty reminder notice. However, recent reforms introduced by the *Fines Further Amendment Act 2008*, will provide that 'an application for time to pay a fine may be made by a person in receipt of a Government benefit in respect of a fine before a fine enforcement order is made in the matter.'[100] This is one of a number of reforms scheduled to commence in 2009.

94 The Office of State Revenue administers and collects taxes, implements legislation relating to State revenue, makes the payment of various grants, subsidies, and rebates, and collects various outstanding state debts. The other arm of Treasury is the Office of Financial Management, which advises the Treasurer and the NSW Government on state financial management policy and reporting, and on economic conditions and issues.

95 The Office of State Revenue was created in March 1998 as the revenue administration arm of the NSW Treasury. In April 2002, the Office of State Revenue took over responsibility for the State Debt Recovery Office after it was transferred from the Attorney General's Department. In October 2003, the Office of State Revenue resumed responsibility for the Infringement Processing Bureau from the NSW Police Force. Office of State Revenue, NSW Treasury, *The history of OSR*, http://www.osr.nsw.gov.au/lib/doc/other/osr_history.pdf. Accessed 28 January 2009.

96 Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.28.

97 Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.28.

98 *Fines Act 1996*, s.33(2), as amended by the *Fines Amendment Act 2008.*

99 State Debt Recovery Office, *A Guide to the Fine Processing and Enforcement System*, October 2007.

100 To be inserted as section 100(1A) of the *Fines Act 1996*.

Payment options for penalty notices include online credit card payments, credit card payments by phone, paying in person at Australia Post, posting a cheque or money order, or paying by BPay.[101]

Alternatively, a person who receives a penalty notice can request a review of the fine, by contacting the SDRO by phone, or by writing a letter explaining the circumstances of the case and attaching relevant documentation. With respect to requests for a CIN to be reviewed, the *SDRO Review Guidelines* advise:

> *NSW Police Force issue penalty notices for criminal infringement notice offences. These offences cannot be reviewed by SDRO with the exception of the circumstances listed below, which will be referred to NSW Police Force for a decision.*
>
> *All criminal infringement notices that are decided in court will be recorded on a person's criminal record.*[102]

The guidelines then note that the circumstances whereby recipients can request the SDRO to review the CIN include:

- *Fraudulent use of particulars/claims of false identity …*
- *Deceased persons (the person who committed the offence is now dead)*
- *Vulnerable persons – mental incapacity (the person issued the penalty notice has a diagnosed mental health condition and this condition was a contributing factor or lessens the responsibility of the person for the penalty notice).*

The advice indicates that the SDRO can determine applications on these grounds without reference to the NSW Police Force, but 'may' refer the issue to police for a decision. There is no mention in the guidelines regarding other grounds for requesting that a CIN be reviewed. However, the SDRO website advises:

> ***Request a review**: if the person is deceased, mentally incapacitated or there is a claim of fraudulent use of a person's identity, you can send SDRO a request for review. Details of evidence required to prove these circumstances are contained in the SDRO Review Guidelines. These will be referred to NSW police for consideration. If you wish to dispute the fine for any other reason, you should choose to go to court.*[103]

Penalty notice recipients may elect to have the matter heard at a local court by completing a court election form or by writing to the SDRO. This option remains available if a person has applied for a review of the fine, and this was unsuccessful. When a recipient chooses to have the matter heard at court, a court attendance notice (CAN) will be sent to them, outlining details of the court (usually the local court closest to where the offence allegedly occurred) and attendance date.[104] There is no fee to apply to have a CIN heard in court, provided that enforcement action has not begun.[105] Once a CAN has been issued, the matter must proceed to court, even if the CIN recipient changes his or her mind.[106]

Prior to legislative changes which commenced on 25 June 2008 a person could only elect to have a CIN heard at court if the fine had not yet been paid. The *Fines Amendment Act 2008* inserted new provisions into the Fines Act to permit a person to elect to have a penalty notice heard in court, even if the penalty notice has been paid in part or full, if such an election is made within 90 days of the penalty notice being served.[107] If a person elects to have a matter dealt with by a court, after some or all of the penalty notice has been paid, the provisions stating that the person is not liable to any further proceedings for the alleged offence cease to have effect, and the amount that has been paid is repayable.[108]

The SDRO's website advises that all CINs that are decided in court will be recorded on a person's criminal record. A conviction will be recorded against a person found guilty of an offence, and a non-conviction will be recorded if the person is found not guilty.[109] When determining a matter, a court may increase the amount specified in the penalty notice, or impose costs.[110]

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101 State Debt Recovery Office, http://www.sdro.nsw.gov.au. Accessed 16 September 2008. Note, the option to pay by BPay, which allows people who do not have a credit card, to pay by phone or over the internet, was introduced on 6 August 2007. State Debt Recovery Office, http://www.sdro.nsw.gov.au. Accessed 16 September 2008.
102 State Debt Recovery Office, *SDRO Review Guidelines*, updated May 2008.
103 State Debt Recovery Office, 'Frequent questions – Your Options', http://www.sdro.nsw.gov.au, updated 15 September 2008, accessed 5 June 2009.
104 State Debt Recovery Office, http://www.sdro.nsw.gov.au/your_options/pn_court.html. Accessed 16 September 2008.
105 State Debt Recovery Office, *Having Your Penalty Notice Heard in Court*, February 2008.
106 State Debt Recovery Office, *Having Your Penalty Notice Heard in Court*, February 2008.
107 *Fines Act 1996*, s.23A, as amended by the *Fines Amendment Act 2008*.
108 *Fines Act 1996*, ss.23A(3)(a) and 23A(3)(c).
109 State Debt Recovery Office, 'Frequent questions – Your Options', http://www.sdro.nsw.gov.au, updated 15 September 2008, accessed 5 June 2009.
110 State Debt Recovery Office, *Having Your Penalty Notice Heard in Court*, February 2008, p.1.

4.2.2. Enforcement order stage

If a CIN recipient takes no action by the date specified in the penalty reminder notice, the SDRO will commence enforcement action. This involves the CIN recipient being given a further 28 days to pay the penalty notice amount, plus an additional $50 enforcement fee.

At present, the recipient of an enforcement order may pay the CIN amount plus enforcement order costs in full, make arrangements with the SDRO for time to pay these amounts in instalments, or seek to have the enforcement order annulled or written off.

4.2.2.1. Time-to-pay arrangements

Section 100 of the Fines Act provides that after an enforcement order is made a fine defaulter may apply to the SDRO to enter into a time-to-pay agreement.[111] The SDRO may extend the time for payment of the whole fine, or allow the fine to be paid by instalments. If the application is received before the due date for the enforcement order, and is approved, the SDRO will not seek further enforcement action. However, if enforcement action such as RTA restrictions have already been activated these will not usually be reversed. It is not possible to apply for a time-to-pay agreement if a community service order has been issued.[112]

A time-to-pay agreement can cover more than one enforcement order. If a client receives further enforcement orders subsequent to entering into the time-to-pay arrangement, these should be incorporated into the time-to-pay agreement to ensure no further enforcement action is taken against the person.

In June 2008 the Fines Act was amended 'to provide flexibility in the use of time to pay orders, by allowing them to be varied if the fine defaulter's financial circumstances change'.[113]

Payments under a time-to-pay agreement may be automated, for example, by scheduled deductions from a person's bank account. People who have not automated their time-to-pay payments usually have to attend a post office each fortnight to make payments in person. In December 2008, there were further amendments to the Fines Act that will extend the range of circumstances whereby a person in receipt of a government benefit may use 'Centrepay' direct debit deductions to manage their payments.[114] Centrepay instalments are deducted before a person's Centrelink benefit is paid into his or her bank account. This option is useful because it helps avoid the situation where schemes that deduct payments from a person's bank account can result in the client incurring expensive bank charges and penalties if the automatic deduction results in them over-drawing their account.

4.2.2.2. Annulment of enforcement orders

The SDRO will cease further enforcement action if documentation is provided confirming that the person who was issued the penalty notice is deceased. It will also consider ceasing enforcement action if documentary evidence is supplied proving that the person issued with the penalty notice was not at the location where the offence took place (for example, they were in hospital or overseas).[115]

In other circumstances where a review at the enforcement stage is requested, an application to annul the enforcement order must be completed and provided to the SDRO with a $50 fee. If the SDRO annuls a penalty notice enforcement order, it must refer the matter to a Local Court unless the amount payable under the penalty notice is paid on the annulment of the order.[116] The Local Court is to hear and determine the matter as if no penalty notice enforcement order has been previously made.[117]

Before the SDRO annuls an enforcement order on the ground that a question or doubt has arisen as to the person's liability, it must refer the matter to the NSW Police Force. The NSW Police Force is to review the matter to determine whether the penalty notice to which the enforcement order applies should be withdrawn. If the NSW Police Force determines that the penalty notice should be partly or wholly withdrawn, the SDRO must withdraw the penalty notice enforcement order in whole or part. The SDRO must annul the order if there is no decision on the review within 42 days.[118]

111 As noted earlier, amendments to *the Fines Act 1996* in late 2008 (which will commence in late 2009) will allow people in receipt of a government benefit to enter into a time-to-pay agreement before a fine enforcement order is made. *Fines Further Amendment Act 2008*, cl.23.
112 State Debt Recovery Office, http://www.sdro.nsw.gov.au. Accessed 4 February 2009.
113 The Hon. Henry Tsang MLC, NSWPD, Legislative Council, 18 June 2008. *Fines Act 1996*, s.100(4A), as amended by the *Fines Amendment Act 2008*, s.26.
114 This provision is now contained in the *Fines Act 1996*, s.100(3A).
115 State Debt Recovery Office, *SDRO Fines Information Pack*, June 2008, p.12.
116 *Fines Act 1996*, s.49(3).
117 *Fines Act 1996*, s.51.
118 *Fines Act 1996,* s.49A.

Amendments contained in the *Fines Further Amendment Act 2008*, which are expected to commence in 2009, provide that before making a decision whether to annul a penalty notice enforcement order the SDRO is to seek a review of the decision to issue each penalty notice to which the penalty notice enforcement order applies, if a review has not previously been conducted by the NSW Police Force, and the SDRO has reason to suspect that the penalty notice should be withdrawn, for reasons such as:

- the penalty notice was issued contrary to law or should not have been issued due to exceptional circumstances
- the issue of the penalty notice involved a mistake of identity, or
- the person to whom the penalty notice was issued is unable, because of an intellectual disability, mental illness, cognitive impairment or homelessness, to understand that his or her conduct constituted an offence, or to control such conduct.[119]

In the second reading speech about these amendments the Attorney General stated:

> [When an] *enforcement order is annulled … the State Debt Recovery Office must refer the matter to court, which can be a time-consuming, expensive and distressing process. In many cases the grounds for withdrawal of the enforcement order would also have constituted grounds for withdrawal of the penalty notice itself if the information had been available to the issuing agency or the State Debt Recovery Office at an earlier time. In those cases, referral to court is an inefficient use of resources.*[120]

Sections 6A and 7 of the Fines Regulation 2005 provide that the SDRO and registrar of a local court may waive, postpone or refund enforcement costs, and fees relating to the application for an annulment in such circumstances as considered appropriate.

4.2.2.3. Writing off enforcement orders

In the period after a fine enforcement order is made and before a community service order is issued, a person may apply to the SDRO to have the matter written off. The SDRO may write off the fine if it is satisfied that:

- due to the financial, medical or personal circumstances of the fine defaulter that the fine defaulter does not have sufficient means to pay the fine, and is unlikely to do so
- enforcement action has not been successful or is likely to be unsuccessful in satisfying the fine, and
- the fine defaulter is not suitable to be subject to a community service order.[121]

The SDRO must write off an unpaid fine if it is directed to do so by the Hardship Review Board.

During 2007 – 08 the SDRO wrote off 243,885 enforcement orders, with a value of $56.5 million. Of these:

- nearly $2 million related to enforcement orders where the debtor was deceased, and
- $37 million related to fines for relatively minor offences prior to December 1999.[122]

Amendments contained in the *Fines Further Amendment Act 2008* provide that the SDRO and Hardship Review Board can now partially write off fines.[123] Previously, these agencies could only write off fines completely or offer the recipient additional time to pay. That is, there were no intermediate options that recognised hardship but still imposed a penalty.

Even if a fine has been written off, it can be reinstated with enforcement action recommenced by the SDRO within five years if a further fine enforcement order is made against the fine defaulter, or the SDRO is satisfied that the fine defaulter has sufficient means to pay, that enforcement action is likely to be successful or that the fine defaulter is suitable to be subject to a community service order.[124]

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119 *Fines Further Amendment Act 2008*, cl.19. Upon commencement, this legislative provision will replace section 49A of the *Fines Act 1996*.
120 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
121 *Fines Act 1996*, s.101. Under section 120 of the *Fines Act 1996*, the Treasurer may issue guidelines with respect to the exercise by the SDRO of its functions, including writing off unpaid debts in certain circumstances. Since 25 February 2008, the Treasurer's *Guidelines for Writing Off Fines,* have been extended to give SDRO officers the delegated authority to write off fines in accordance with the Treasurer's directions. Guidelines relating to the writing off of fines are not required to be made public and are not currently circulated publicly. The SDRO can write off amounts owing under unpaid enforcement orders if clients cannot be located, clients are incapable of making payments, the liability is not contested but continued enforcement would be unfair or otherwise unjust, the fine is unrecoverable at law, is uneconomical to pursue, or if the records are dated and cannot be relied on.
122 Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.29.
123 *Fines Act 1996*, s.101, as amended by the *Fines Further Amendment Act 2008*.
124 *Fines Act 1996*, s.101(4).

4.2.3. Sanctions

Part 4, Divisions 3 – 6 of the Fines Act contain detailed provisions concerning the sanctions that may be applied if a person does not comply with a fine enforcement order. The SDRO advises:

> *If you do not pay the enforcement order by the due date, your driver licence may be suspended, your car registration cancelled or customer business restrictions introduced. A further $40 enforcement cost will also apply.*[125]

Sanctions are imposed by the RTA at the request of the SDRO. In order to remove a sanction, usually any outstanding enforcement orders must be paid in full. The SDRO has discretion to lift restrictions if the fines remain outstanding. This will be done if the fine recipient:

- has medical circumstances requiring them to drive, or the health or safety of someone else is dependent on them being able to drive
- needs to drive for employment or prospective employment
- lives in an Aboriginal community, or
- lives in a remote location.[126]

If a person has had their driver's licence suspended or cancelled and they are caught driving they will be charged with driving while disqualified under the *Road Transport (Driver Licensing) Act 1998*. Until 9 March 2009, a person disqualified from driving because of non-payment of a fine was charged with the same offence as a person disqualified because of driving related offences.[127]

Amendments contained within the *Fines Further Amendment Act 2008*, which formally commenced on 9 March 2009, create separate suspended and cancelled driver offences arising from non-payment of a fine or penalty notice.[128] These changes were introduced to:

- Enable the government to collect better data on the extent of secondary offending due to fine default.
- Provide for a shorter disqualification period for a person convicted for the first time of driving without a license if the licence was suspended or cancelled because of fine default (rather than unsafe driving practices). The intention for this amendment being to encourage people to pay their fines and penalty notices sooner.
- Allow courts to consider certain factors, such as the impact a lengthy disqualification would have on employment and the offender's ability to pay the outstanding debt.
- Provide that the offence of driving without a license if the license was suspended or cancelled because of fine default is not a relevant offence for the purpose of declaring a person to be a habitual traffic offender, which entails a five year driver's license disqualification period.[129]

If a fine enforcement order recipient continues to fail to comply with the order after RTA sanctions have been applied, or does not have a driver's licence or a car registered in their name then:

> *SDRO will authorise seizure of your goods or property, garnishee your wages or assets, or place a charge on any land fully or partly owned by you. You'll also have to pay another $50 enforcement cost and any garnishee or Sheriff's costs.*[130]

For each civil sanction an enforcement cost of $50 will be added to the fine. The fine defaulter will also have to pay the costs and expenses reasonably incurred by the Sheriff in taking such enforcement action.[131]

If the SDRO determines that it cannot recover outstanding fines through RTA sanctions or civil sanctions, it can issue a community service order requiring the person to perform unpaid community work to the value of outstanding enforcement orders. Community service orders are calculated at the rate of one hour for each $15 of the amount of the fine that remains unpaid.[132]

Failure to comply with a community service order can result in imprisonment.[133]

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125 State Debt Recovery Office, *A Guide to the Fine Processing and Enforcement System*, October 2007.
126 State Debt Recovery Office, http://www.sdro.nsw.gov.au. Accessed 4 February 2009.
127 *Road Transport (Driver Licensing) Act 1998*, s.25A.
128 *Fines Further Amendment Act 2008*, Schedule 2.3 [3].
129 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008. See also Legislation Review Digest, No. 15, 2 December 2008, pp.45 – 54.
130 State Debt Recovery Office, *A Guide to the Fine Processing and Enforcement System*, October 2007.
131 *Fines Act 1996*, s.76A.
132 *Fines Act 1996*, s.81(1).
133 *Fines Act 1996*, s.87.

Using RTA sanctions to enforce fine default

The scheme of driver's licence cancellation and motor vehicle registration cancellation was introduced as a replacement for imprisonment for fine default in the late 1980s.[134] The impacts of this scheme were considered by the NSW Standing Committee on Law and Justice in its inquiry into whether it is appropriate and in the public interest to tailor community based sentencing options for rural and remote areas in NSW and for special need/disadvantaged populations.[135]

In particular, the committee found that:

- young offenders who have multiple unpaid fines, usually for minor public order offences, are unable to ever obtain a driver's licence, and
- offenders who have their licence suspended or cancelled because of unpaid fines may drive while unlicensed and be subject to mandatory disqualification.[136]

The report illustrated the extreme difficulties faced by people in remote communities with few licensed drivers and little or no public transport, and noted that people in such circumstances often have little option but to drive in order to access employment, shops and services, even if they do not have a driver's licence. The consequences that may arise from this situation are significant. The person may incur additional fines for driving offences which, if not paid, result in additional enforcement costs and sanctions, longer periods of licence suspension, and further possible driving offences and, ultimately, imprisonment. The committee recommended that the government 'undertake a multi-agency project to examine the issues relating to fine default and driver's licences'.[137]

4.2.3.1. Proposed work and development orders

In 2006 the Sentencing Council, when discussing proposals to reform the penalty notice system, stated:

> *Consideration could usefully be given to the establishment of a mechanism where recipients of penalty notices could engage in voluntary community service, utilising reputable welfare and community organisations, or for diversion into an appropriate rehabilitation program to encourage behavioural change, where they are unable to meet the penalties imposed.*[138]

The *Fines Further Amendment Act 2008*, which was assented to in December 2008 contains provisions establishing such a mechanism. The proposed trial Work and Development Order scheme will allow certain people to mitigate their fines by undertaking activities under a work and development order, such as completing a drug and alcohol program, attending financial counselling, or undertaking some form of community service.

In the second reading speech outlining the proposed scheme, the Attorney General explained:

> *The trial scheme will operate for two years and will be open to 2,000 people who have fine and penalty notice debts. Strict eligibility criteria will apply. Work and development orders will only be available to people who are homeless, have a mental illness, an intellectual disability or cognitive impairment, or who are otherwise experiencing acute economic hardship.A work and development order will require the person to undertake unpaid work with an approved organisation; mental health or other medical treatment; an educational, vocational or life skills course; financial or other counselling; drug and alcohol treatment; or a mentoring program if the person is under 25 years of age. The work or development to be undertaken will be proposed by the applicant in his or her application according to guidelines that will govern the scheme …*
>
> *Similar to community service orders, there will be an hourly rate at which voluntary work can diminish a fine or penalty notice debt.*[139]

The legislative provisions establishing work and development orders are expected to commence in 2009, with the trial of the orders to begin some time after July 2009.

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134 NSW Standing Committee on Law and Justice, *Final Report, Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006, p.262.
135 NSW Standing Committee on Law and Justice, *Final Report, Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006.
136 NSW Standing Committee on Law and Justice, *Final Report, Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006, pp.263 – 264.
137 NSW Standing Committee on Law and Justice, *Final Report, Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006, recommendation 49, p.269.
138 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, p.112.
139 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.

4.2.4. Hardship Review Board

The Fines Hardship Review Board (Hardship Review Board) is an independent statutory body made up of the Chief Commissioner of State Revenue, the Secretary of the Treasury and the Director-General of the Attorney General's Department (or their delegates).[140]

A person subject to a fine enforcement order can apply to the Hardship Review Board to review a decision of the SDRO in regard to the making of, or failure to make a time-to-pay order or the writing off or the failure to write off, the whole of or part of, an unpaid fine.[141] Recent reforms also enable applicants to ask the Hardship Review Board to review SDRO decisions regarding work and development orders.[142]

The SDRO may suspend enforcement action against a person who makes an application to the Hardship Review Board but is not required to do so unless the board makes such a direction.[143]

The Hardship Review Board may direct the SDRO to make, revoke or vary a time-to-pay order, or write off, in whole or part, an unpaid fine. With the commencement of the Work and Development Order scheme, it can also direct the SDRO to make, vary or revoke a work and development order.[144] There is no right of appeal to the Hardship Review Board's decision, and the board does not have the authority to direct the SDRO to remove RTA restrictions.[145]

4.3. Schemes in other jurisdictions

NSW is one of a number of Australian jurisdictions to have recently trialled the expanded use of on-the-spot fines or fixed penalty notices for minor offences that are usually characterised as criminal in nature. At the time of our further review, there were trials of schemes with similarities to the NSW CINs scheme in:

- The Australian Capital Territory: In April 2008 the ACT started a 12-month trial to give police the option of issuing on-the-spot fines for certain offences under the ACT's Crimes Act 1900, namely defacing premises ($200 fine), urinating in a public place ($200) or failure to comply with a noise abatement order ($200).
- Victoria: From 1 July 2008, Victoria instituted a three-year trial of using on-the-spot fines for seven common offences, namely indecent or obscene language, offensive behaviour, shop theft of goods worth up to $600, failure to leave a licensed premise when requested, consuming or supplying liquor in an unlicensed premise, wilful damage of property to the value of $500, and careless driving. The fine for careless driving is $272, and $227 for the other six offences.
- Queensland: On 1 January 2009, Queensland police began a 12-month trial of on-the-spot fines of $75 to $300 for public nuisance offences, namely disorderly behaviour (challenging people to fight, interrupting a peaceable gathering by screaming abuse), offensive behaviour (making offensive gestures, writing offensive matters on a wall, urinating in public), threatening behaviour (making threats to people, taking an aggressive stance with a view to intimidating people) and violent behaviour (actually fighting).

The Northern Territory also gives police the option to issue infringement notices for a range of summary offences, including various public order offences.[146] In mid-2009, Western Australia was considering a proposal to implement a 12-month trial of Criminal Penalty Infringement Notices (CPINs) that could be issued for disorderly conduct, stealing (value less than $1,000) and certain conduct related to trespass offences such as failure to provide identification details to police. The police submission for the scheme included a proposal that CPINs be recorded, but be given the status of a spent conviction from the time they are recorded.

Victoria's Infringement Notice Trial most closely resembles the NSW CINs scheme, with offences similar to NSW's three main CIN offences – shoplifting, offensive conduct and offensive language – included in the Victorian scheme. It also includes one traffic offence and two licensing offences, similar to those that in NSW may already be dealt with by way of traffic or general infringement notices. The Victorian trial includes guidelines to assist police on deciding whether an infringement or other action, such as issuing a charge and going to court, will be appropriate.[147] As with other fines, it also provides for 'official warnings' whereby police may use their discretion not to infringe or fine the alleged offender, but to formalise any warning or caution given by issuing an official warning under section 8 of the *Infringements Act 2006* (Vic) and make a record of the offence that they believe the person committed.

140 *Fines Act 1996*, s.101A. There is also a NSW Taxation Hardship Review Board that considers applications from people experiencing serious financial hardship in meeting their taxation obligations to the NSW Government. See www.hrb.nsw.gov.au.
141 *Fines Act 1996*, s.101B(1).
142 *Fines Act 1996*, s.101B(1)(a) commenced on 10 July 2009. It refers to the making of, the failure to make or the varying or revocation of, a work and development order.
143 *Fines Act 1996*, s.101B(4) – (5).
144 *Fines Act 1996*, s.101B(6).
145 Hardship Review Board, www.hrb.osr.nsw.gov.au. Accessed 10 August 2009.
146 Summary Offences Regulations 1994 (NT).
147 Office of the Attorney General, media release, 'On-the-spot fines trial for minor offences, 27 June 2008.

The trial in Queensland followed a report by the Crime and Misconduct Commission into the policing of public nuisance offences, which recommended that 'ticketing be introduced as a further option available to police to deal with public nuisance behaviour' in conjunction with 'de-escalation' and informal resolution strategies. In relation to penalties for public nuisance offences, the commission found that Indigenous offenders were more likely to receive a custodial sentence and less likely to receive a fine than non-Indigenous offenders.[148] Importantly, it noted that the court is required to take into account the financial circumstances of the defendant and their capacity to pay when imposing a fine.[149] The commission concluded that if the ticketing option was to be introduced, care must be taken to ensure that the potentially adverse effects seen in other jurisdictions, such as the decline in the use of informal resolution for public order incidents, do not eventuate in Queensland.[150]

4.3.1. Payment and management of fines

Each scheme is subject to the legal and regulatory arrangements for managing and enforcing unpaid fines in that jurisdiction. Like NSW, governments in other jurisdictions have made substantial changes in recent years, and continue to review these arrangements to improve their effectiveness and try to reduce the incidence of people being unfairly or unjustly caught up in the fines enforcement system.

4.3.1.1. Victoria

As in NSW, Victoria recently reformed its systems for managing fine payments and enforcing fine defaults. Legislative reforms, most noticeably changes under the *Infringements Act 2006* (Vic), establish a framework of tiered sanctions through which infringements can be enforced if the fines are not paid, contested at court or subject to a request for internal agency review.

The Victorian fines enforcement system also has a number of current and evolving features that distinguish it from schemes elsewhere, including:

- Official warnings: as noted above, these can be given at the point of issue. Recipients may also apply for an infringement notice to be withdrawn and substituted for an official warning in certain circumstances.
- Payment plans upfront: prior to July 2006, time-to-pay and other flexible payment options for fine recipients experiencing financial hardship were only allowed after the person had defaulted on their debt. In Victoria, fine recipients can not be refused an extension of time to pay if they hold a Centrelink Pensioner Concession Card, Veterans' Affairs Pensioner Concession Card or Gold Card or Centrelink Health Care Card (all types). Other fine recipients may also apply for additional time to pay on the basis of financial hardship.
- Internal agency reviews: Part 2, Division 3 of the *Infringements Act 2006* (Vic) provides that a person served with an infringement notice may ask the issuing agency, including police, to review the fine if the recipient believes the decision to serve it was contrary to law, involved a mistake of identity, that special circumstances apply to the recipient, or the conduct should be excused having regard to any exceptional circumstances. Special circumstances are defined to include a person with a mental or intellectual disability, disorder, disease or illness, a serious addiction to drugs, alcohol or a volatile substance (chroming), or homelessness, where these circumstances result in the person being unable to control the conduct that constitutes the offence.
- Standard notices: issuing agencies are required to provide information on the infringement notice regarding the right to internal agency review, the right to apply for an instalment plan and the right to elect to have the matter determined by a court.
- Ongoing review and improvement: the question of what additional information should be included on infringement notices has been referred to the Infringements System Oversight Unit, a body established by the Victorian Department of Justice in mid-2006 to monitor and oversight the operation of the fines enforcement system. Specifically this oversight role involves maintaining and amending the *Infringements Act 2006* (Vic) and regulations, consulting across government on proposed offences, stakeholder engagement including supporting the Infringements Standing Advisory Committee to resolve issues and assist agencies in meeting their obligations, collecting data from enforcement agencies, and providing the Attorney-General with information to facilitate publication of an annual report on the infringements system.

148 Crime and Misconduct Commission, *Policing Public Order: A review of the Public Nuisance Offence*, May 2008, p.103.
149 Crime and Misconduct Commission, *Policing Public Order: A review of the Public Nuisance Offence*, May 2008, p.61, *Penalties and Sentences Act 1992*, (Qld), s.48.
150 Crime and Misconduct Commission, *Policing Public Order: A review of the Public Nuisance Offence* (May 2008).

4.3.1.2. Queensland

The fines enforcement process in Queensland follows principles similar to those in NSW and Victoria insofar as the fine recipient is given the opportunity to pay their fine within a specified period, beyond which enforcement action is taken. Like Victoria and (soon to be implemented for some people in NSW), a fine recipient can apply to pay the fine by instalments at the infringement notice stage (as opposed to the enforcement stage). Queensland limits the application of these provisions to fines that are $200 or more.[151]

A fine recipient in Queensland who does not have the capacity to pay also has the option of applying for a Fine Option Order which, if granted, converts the fine and any costs into hours of community service at a rate of an hour's unpaid service for every $20. Such orders may be granted in circumstances where the person is able to demonstrate that they do not have the financial capacity to pay their fine.[152] Alternatively, a fine recipient who is experiencing financial hardship and has a medical or psychiatric condition or other exceptional grounds for consideration that prevent them from being able to pay or undertake community service work may apply for a Good Behaviour Order. Under this scheme a person's fine is waived if they agree not to commit an offence within a specified time. Applications are assessed by the Registrar of the State Penalties Enforcement Registry based on the fine recipient's explanation as to why they are unable to pay all or part of the unpaid fine and other costs, why they are not suitable to perform community service and why it would be inappropriate for a warrant to be issued for their arrest and imprisonment.[153]

4.3.1.3. South Australia

South Australia has a wide range of payment methods, perhaps more than any other Australian state or territory, including options to pay via post offices, court registries and various telephone and online facilities. Court registries, Fines Payment Unit offices and the Easy Pay Fines Call Centre can also assist applicants to set up direct debit arrangements.

South Australia has Aboriginal Justice Officers who know the fines system and whose job includes counselling clients about realistic options from the outset. If it is determined that an individual has no property available for seizure, then he or she may be arrested and brought before an officer of the Fines Payment Unit to undergo a means assessment to ensure that assets or source of income have not gone undetected. However, anyone who knows at the outset that they are likely to default on fine debts is encouraged to self-identify as having financial hardship and submit to a voluntary assessment. The aim is to prevent people from being subject to various stages of enforcement when they know from the outset that they are unable to pay. Fine recipients present their case in person, including any supporting documentation. They can also elect to have an alternative penalty imposed by the court. The aim throughout is to tailor a client-focused outcome with realistic payment plans that recognise their means to pay.

4.3.1.4. Northern Territory

The Northern Territory also has a number of user-friendly payment options, including direct debit via Centrepay and payroll deductions for public sector employees. Whereas most fine enforcement systems state that their focus is to collect debts owed to the Crown, the Fines Recovery Unit website makes it explicit that its primary function is to offer 'a case-managed debt recovery system focused on assisting clients manage their financial obligations to the Territory'.

151 http://www.sper.qld.gov.au/foo_faq.htm accessed 27 March 2009.
152 *State Penalties Enforcement Act 1999* (Qld), s.43(1).
153 State Penalties and Enforcement Registry, *Good Behaviour Order,* Fact Sheet, April 2007.

Chapter 5.
Data on CINs issued by police

As with other on-the-spot fines issued by police, details about the issuing and enforcement of CINs are recorded on three separate databases: the NSW Police Force's Computerised Operational Policing System (COPS), the SDRO's Penalty Notice database, and the SDRO's Enforcement database. The data summarised in this report draws on all three.

5.1. CINs issued by police in NSW

According to the NSW Police Force, police issued 18,133 CINs between 1 September 2002 (the commencement of the trial CINs scheme) and 31 October 2008. Of these, 9,452 were issued in the 12 trial commands during the five years of the extended 2002 – 2007 trial period. The remaining 8,681 CINs were issued in commands across all NSW in the first year of the full rolled out CINs scheme. Table 2 summarises all CINs issued in the 12 trial commands in the extended trial period.

Table 2 CINs issued in 12 trial commands 2002 – 2007 by offence, Aboriginality

	Offensive conduct		Offensive language		Larceny/ shoplifting		Goods in custody		Obstruct person/vehicle		Unauthorised entry vehicle		Obtain money etc		Common assault		Total CINs						
Command	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**Aboriginal**	**Non Aboriginal**	**TOTAL**	**% CINs to Aboriginal**	**% Aboriginal population**	**Total population**	**Aboriginal population**
Albury	15	594	16	312	8	159	1	26	–	4	1	1		1	8	102	49	1,199	**1,248**	3.9	1.9	71,508	1,371
Bankstown		36		45	1	276	1	10	–	–	–	–	–	2	–	27	2	396	**398**	0.5	0.6	170,481	1,056
Blacktown	2	41	2	46	12	420		8	–	–	–	–	–	2	1	24	17	541	**558**	3.0	1.9	83,880	1,563
Brisbane Water	4	233	10	225	4	459	1	25	–	1	–	–	–	–	–	169	19	1,112	**1,131**	1.7	1.6	158,111	2,510
City Central	8	463	10	187	18	321	8	63	–	10	–	11	–	9	5	272	49	1,336	**1,385**	3.5	0.4	32,165	142
Lake Illawarra	1	34	4	40	12	330	1	10	–	–	–	2	–	–	1	45	19	461	**480**	4.0	2.1	149,897	3,208
Lake Macquarie	4	72	3	75	4	271	1	8	–	–	–	–	–	3	4	70	16	499	**515**	3.1	2.4	183,050	4,304
Miranda	2	305	5	241	3	292		20	–	1	–	2	–	3	1	38	11	902	**913**	1.2	0.6	79,882	451
Parramatta	3	69	6	62	8	454	1	29	–	1	–	–	–	1		39	18	655	**673**	2.7	0.9	63,425	561
Penrith	5	82	6	70	7	323		14	–		–		–		3	50	21	539	**560**	3.8	2.2	85,515	1,916
The Rocks	2	162	1	89	3	242		17	–	2	–	1	–	1		104	6	618	**624**	1.0	0.9	6,058	55
Tuggerah Lakes	6	127	6	148	16	364	4	28	–	1	–	–	–	7	3	118	35	793	**828**	4.2	2.7	139,834	3,811
Non-trial LAC	2	62	2	54	0	6	0	4	1	5	0	0	0	0	0	3	5	134	**139**	3.6	–	–	–
TOTAL	**54**	**2,280**	**71**	**1,594**	**96**	**3,917**	**18**	**262**	**1**	**25**	**1**	**17**	**0**	**29**	**26**	**1,061**	**267**	**9,185**	**9,452**	**2.8**	**1.7**	**1,223,806**	**20,948**

Source: NSW Police Force COPS database. CINs issued in 12 trial commands from the beginning of the initial trial period on 1 September 2002 until 31 October 2007. n=9,452.

In relation to CINs issued by the 12 trial commands during the extended trial, table 2 shows:

- The most common CIN offence was larceny or shoplifting – 43% of all CINs issued.
- Aboriginal people, who make up 1.7% of the population in the 12 trial LACs, received 2.8% of the 9,452 CINs issued.
- Of the 267 CINs issued to Aboriginal people, 36% were for larceny or shoplifting, 27% for offensive language, 20% for offensive conduct, 10% for common assault and 7% for goods in custody.

- Of the 9,185 CINs issued to non-Aboriginal people, 43% were for larceny or shoplifting, 25% for offensive conduct, 18% for offensive language, 12% for common assault, 3% for goods in custody, and 1% for other offences.

Table 3 summarises all CINs issued in NSW in the first full year of the state-wide use.

Table 3 CINs issued in NSW 1 Nov 2007 to 31 Oct 2008 by offence, Aboriginality

	Offensive conduct		Offensive language		Larceny/ shoplifting		Goods in custody		Obstruct person/vehicle		Unauthorised entry vehicle		Obtain money etc		Total CINs					
Command	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	TOTAL	% CINs to Aboriginal	% Aboriginal population	Total population	Aboriginal population
Albury	3	112	4	31	3	27	2	4	–	–	–	1	–	–	12	175	**187**	6.4	1.9	71,508	1,371
Bankstown	1	10	1	28	–	51	–	1	–	–	–	–	–	1	2	91	**93**	2.2	0.6	170,481	1,056
Blacktown	–	13	1	18	1	61	–	4	–	–	–	–	–	–	2	96	**98**	2.0	1.9	83,880	1,563
Brisbane Water	1	72	2	43	2	99	–	1	–	1	–	–	–	–	5	216	**221**	2.3	1.6	158,111	2,510
City Central	4	336	6	66	1	83	–	5	–	4	–	10	–	5	11	509	**520**	2.1	0.4	32,165	142
Lake Illawarra	2	20	1	16	1	52	–	3	–	–	–	–	–	1	4	92	**96**	4.2	2.1	149,897	3,208
Lake Macquarie	–	57	2	27	2	63	–	3	–	–	–	1	–	–	4	151	**155**	2.6	2.4	183,050	4,304
Miranda	–	123	–	56	–	36	–	2	–	4	–	1	–	–	0	222	**222**	0.0	0.6	79,882	451
Parramatta	–	9	–	20	–	76	–	4	–	1	–	–	–	–	0	110	**110**	0.0	0.9	63,425	561
Penrith	1	20	1	28	1	42	–	2	–	–	–	–	–	–	3	92	**95**	3.2	2.2	85,515	1,916
The Rocks	1	91	–	23	–	78	–	4	–	–	–	1	–	–	1	197	**198**	0.5	0.9	6,058	55
Tuggerah Lakes	3	63	2	78	2	89	–	8	–	–	–	–	–	–	7	238	**245**	2.9	2.7	139,834	3,811
Ashfield	–	2	–	2	–	1	–	–	–	–	–	–	–	–	0	5	**5**	0.0	0.5	73,050	395
Barrier	6	50	13	25	1	7	–	–	–	–	–	–	–	–	20	82	**102**	19.6	9.1	28,786	2,618
Barwon	10	22	12	11	4	11	1	–	–	–	–	–	–	–	27	44	**71**	38.0	12.6	32,074	4,036
Blue Mountains	–	15	–	8	–	8	–	–	–	2	–	1	–	–	0	34	**34**	0.0	1.3	74,066	974
Botany Bay	3	19	–	9	–	45	–	–	–	–	–	–	–	–	3	73	**76**	3.9	1.7	36,794	625
Burwood	–	–	–	2	1	17	1	–	–	–	–	–	–	–	2	19	**21**	9.5	0.3	96,682	315
Cabramatta	–	–	–	2	–	2	–	1	–	–	–	–	–	–	0	5	**5**	0.0	0.7	51,049	358
Camden	–	32	–	24	–	4	–	–	–	1	–	–	–	–	0	61	**61**	0.0	1.6	82,714	1,293
Campbelltown	–	3	1	2	2	42	–	–	–	–	–	–	–	1	3	48	**51**	5.9	3.0	70,060	2,094
Campsie	–	2	–	3	–	27	–	1	–	–	–	1	–	–	0	34	**34**	0.0	0.5	96,576	442
Canobolas	6	54	15	43	1	17	–	3	–	–	–	–	–	–	22	117	**139**	15.8	4.3	59,837	2,594
Castlereagh	4	2	18	1	1	–	–	–	–	–	–	–	–	–	23	3	**26**	88.5	28.6	11,717	3,356
Central Hunter	–	72	–	10	1	17	–	3	–	1	–	–	–	–	1	103	**104**	1.0	2.9	113,314	3,291
Chifley	–	37	–	19	–	6	–	1	–	–	–	–	–	–	0	63	**63**	0.0	3.1	67,105	2,099
Coffs-Clarence	19	129	29	67	12	55	1	5	–	–	–	–	–	3	61	259	**320**	19.1	4.0	125,319	4,986
Cootamundra	3	95	8	67	2	2	–	1	–	2	–	–	–	–	13	167	**180**	7.2	2.8	43,049	1,187
Darling River	5	3	8	3	4	–	–	–	–	–	–	–	–	–	17	6	**23**	73.9	19.2	14,818	2,851
Deniliquin	6	72	5	35	1	6	–	2	–	–	–	–	–	–	12	115	**127**	9.4	2.7	35,390	970
Eastern Beaches	3	31	–	13	–	13	–	2	–	–	–	–	–	–	3	59	**62**	4.8	1.3	119,892	1,514
Eastern Suburbs	–	32	–	10	–	51	–	1	–	1	–	–	–	–	0	95	**95**	0.0	0.3	54,561	146
Eastwood	–	4	–	4	–	43	–	–	–	1	–	–	–	–	0	52	**52**	0.0	0.2	119,104	231
Fairfield	–	6	2	7	–	39	–	2	–	–	–	–	–	–	2	54	**56**	3.6	0.6	128,884	710
Far South Coast	18	101	21	60	3	22	–	1	5	3	–	–	–	–	47	187	**234**	20.1	3.6	66,044	2,382
Flemington	–	7	–	5	–	22	–	–	–	–	–	–	–	–	0	34	**34**	0.0	0.6	96,959	590
Gladesville	–	2	–	–	–	6	–	–	–	–	–	–	–	–	0	8	**8**	0.0	0.3	72,867	250
Goulburn	–	31	–	12	–	4	–	–	–	1	–	–	–	–	0	48	**48**	0.0	1.5	87,453	1,348
Green Valley	–	1	–	3	–	4	–	–	–	–	–	1	–	–	0	9	**9**	0.0	1.7	72,324	1,195
Griffith	8	77	10	35	1	12	–	–	–	–	–	–	–	–	19	124	**143**	13.3	4.9	52,524	2,559

Command	Offensive conduct		Offensive language		Larceny/ shoplifting		Goods in custody		Obstruct person/vehicle		Unauthorised entry vehicle		Obtain money etc		Total CINs		TOTAL	% CINs to Aboriginal	% Aboriginal population	Total population	Aboriginal population
	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal	Aboriginal	Non Aboriginal					
Harbourside	1	31	–	5	–	6	–	1	–	–	–	–	–	–	1	43	**44**	2.3	0.1	84,471	116
Hawkesbury	–	2	1	6	–	7	–	1	–	–	–	–	–	–	1	16	**17**	5.9	2.0	61,874	1,216
Holroyd	–	3	–	3	1	24	–	3	–	–	–	–	–	–	1	33	**34**	2.9	0.9	89,813	769
Hunter Valley	1	54	1	23	–	8	–	–	–	–	–	–	–	–	2	85	**87**	2.3	3.3	56,042	1,860
Hurstville	–	24	1	13	–	42	–	4	–	–	–	–	–	–	1	83	**84**	1.2	0.4	106,614	418
Kings Cross	2	122	3	26	–	16	2	6	–	1	–	–	–	–	7	171	**178**	3.9	0.8	25,771	212
Kuring Gai	–	7	–	10	–	33	–	1	–	–	–	–	–	–	0	51	**51**	0.0	0.3	159,635	424
Lachlan	6	18	3	9	1	5	–	–	–	–	–	–	–	–	10	32	**42**	23.8	9.2	30,623	2,812
Leichhardt	1	8	1	6	–	13	–	–	–	–	–	–	1	–	3	27	**30**	10.0	1.2	64,132	784
Liverpool	–	14	–	18	1	83	–	4	–	–	–	–	–	–	1	119	**120**	0.8	1.0	92,310	955
Macquarie Fields	–	7	1	10	–	8	–	–	–	–	–	–	–	–	1	25	**26**	3.8	2.4	74,748	1,760
Manly	–	214	–	76	–	19	–	3	–	–	–	4	–	–	0	316	**316**	0.0	0.2	37,114	80
Manning-Great Lakes	2	14	1	14	1	14	1	3	–	–	–	–	–	1	5	46	**51**	9.8	3.9	75,922	2,924
Marrickville	–	–	–	–	1	13	–	–	–	–	–	–	–	–	1	13	**14**	7.1	1.5	51,039	782
Mid North Coast	15	128	11	73	3	29	–	1	2	1	–	–	–	–	31	232	**263**	11.8	4.6	114,045	5,299
Monaro	1	62	–	16	2	11	–	–	–	–	–	1	–	22	3	112	**115**	2.6	1.9	68,856	1,275
Mount Druitt	2	–	5	12	1	3	–	–	–	–	–	–	–	–	8	15	**23**	34.8	4.4	94,556	4,160
Mudgee	2	16	6	10	–	1	–	–	–	–	–	–	–	–	8	27	**35**	22.9	4.4	30,880	1,367
New England	10	53	31	28	8	20	1	3	–	–	–	–	–	–	50	104	**154**	32.5	5.7	62,676	3,581
Newcastle	7	263	2	62	–	98	–	3	–	8	–	–	–	–	9	434	**443**	2.0	2.1	137,018	2,918
Newtown	–	5	–	3	–	1	–	2	–	–	–	–	–	–	0	11	**11**	0.0	1.0	33,010	321
North Shore	–	1	–	1	–	29	–	1	–	–	–	–	–	4	0	36	**36**	0.0	0.1	116,408	165
Northern Beaches	–	60	–	43	–	62	–	1	–	3	–	1	–	–	0	170	**170**	0.0	0.3	187,964	611
Orana	5	1	3	–	1	1	2	–	–	–	–	–	–	1	11	3	**14**	78.6	11.9	57,605	6,850
Oxley	19	95	17	50	2	18	1	2	1	2	–	–	–	–	40	167	**207**	19.3	7.8	75,458	5,862
Port Stephens	–	31	4	25	2	35	–	1	–	–	–	–	–	1	6	93	**99**	6.1	2.9	69,798	2,056
Quakers Hill	–	2	–	1	–	5	–	–	–	–	–	–	–	–	0	8	**8**	0.0	1.4	93,286	1,285
Redfern	2	11	1	1	1	7	1	–	–	–	–	1	–	1	5	21	**26**	19.2	2.2	42,838	949
Richmond	33	106	13	57	7	42	–	–	–	1	–	–	–	1	53	207	**260**	20.4	4.1	112,863	4,610
Rose Bay	–	1	–	–	–	1	–	–	–	–	–	–	–	–	0	2	**2**	0.0	0.2	56,318	106
Rosehill	–	1	1	5	–	3	–	–	–	–	–	–	–	–	1	9	**10**	10.0	0.8	73,200	608
Shoalhaven	–	16	2	15	–	15	–	2	–	2	–	–	–	–	2	50	**52**	3.8	3.8	88,443	3,341
St George	–	7	–	13	–	14	–	–	–	–	–	–	–	–	0	34	**34**	0.0	0.4	110,947	492
St Marys	–	6	2	6	–	4	–	–	–	–	–	–	–	–	2	16	**18**	11.1	2.3	92,136	2,139
Surry Hills	6	110	3	25	1	14	–	4	–	4	–	3	–	1	10	161	**171**	5.8	0.6	22,186	142
Sutherland	–	29	–	9	–	5	–	5	–	–	–	–	–	–	0	48	**48**	0.0	0.6	125,495	771
The Hills	–	3	–	3	–	33	–	–	–	–	–	–	–	–	0	39	**39**	0.0	0.2	158,357	382
Tweed-Byron	7	151	6	34	–	59	–	2	–	2	–	2	–	1	13	251	**264**	4.9	2.6	108,109	2,808
Wagga Wagga	13	185	3	45	6	45	1	1	1	12	–	–	–	–	24	288	**312**	7.7	3.8	75,955	2,882
Wollongong	3	160	4	73	1	96	1	5	–	–	–	1	–	–	9	335	**344**	2.6	1.4	113,668	1,540
TOTAL	**245**	**3,850**	**288**	**1,746**	**87**	**2,182**	**15**	**123**	**9**	**59**	**0**	**32**	**1**	**44**	**645**	**8,036**	**8,681**	**7.4**	**2.1**	**6,539,001**	**137,989**

Source: NSW Police Force COPS database. CINs issued in all commands from 1 November 2007 until 31 October 2008. Shaded records at the top of the table denote CINs issued in the 12 former trial LACs in the current review period. n=8,681.

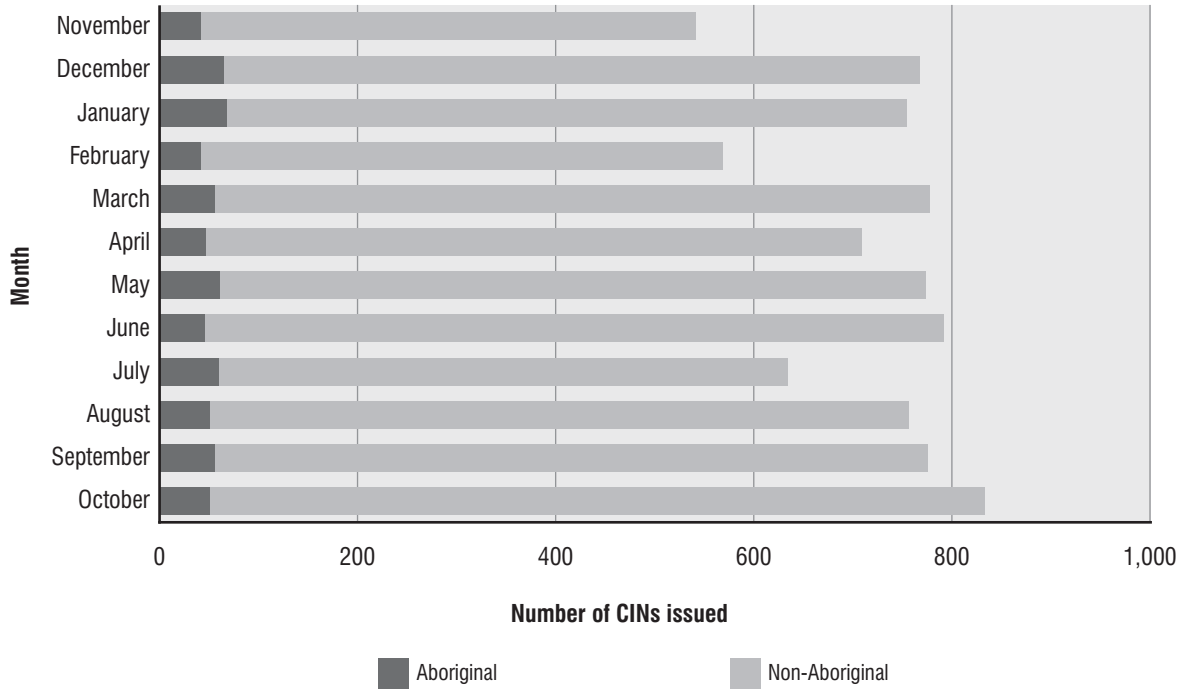
The data in table 3 relating to the first full year of the CINs scheme following the state-wide rollout shows:

- Almost half (47.2%) of all CINs issued were for offensive conduct.
- Aboriginal people, who make up 2.1% of the population of NSW, received 7.4% of the 8,681 CINs issued.
- Of the 645 CINs issued to Aboriginal people, 45% were for offensive language, 38% for offensive conduct, 14% for larceny or shoplifting, 2% for goods in custody, and 2% for other offences.
- Of the 8,036 CINs issued to non-Aboriginal people, 47% were for offensive conduct, 26% for larceny/shoplifting, 23% for offensive language, 2% for goods in custody, and 2% for other offences.
- Half of all Local Area Commands issued the equivalent of fewer than one CIN a week, including several that issued fewer than a dozen CINs for the whole first 12 months of the state-wide scheme.
- Almost a third of all LACs (24 of 80) have no record of having issued a CIN to an Aboriginal person in this period. All but two of these 24 commands are located in Sydney.

The information from both the extended trial period and the current review period show significant variations from one command to the next in terms of the numbers of CINs issued and the types of offences targeted. These issues will be considered in greater detail in the Chapter 5 discussion of issues and findings relating to the police use of CINs in Aboriginal communities.

Figure 1 shows the month-by-month usage of CINs across NSW in the first full year of the scheme.

Figure 1 CINs issued 1 Nov 2007 to 31 Oct 2008 by month, Aboriginality

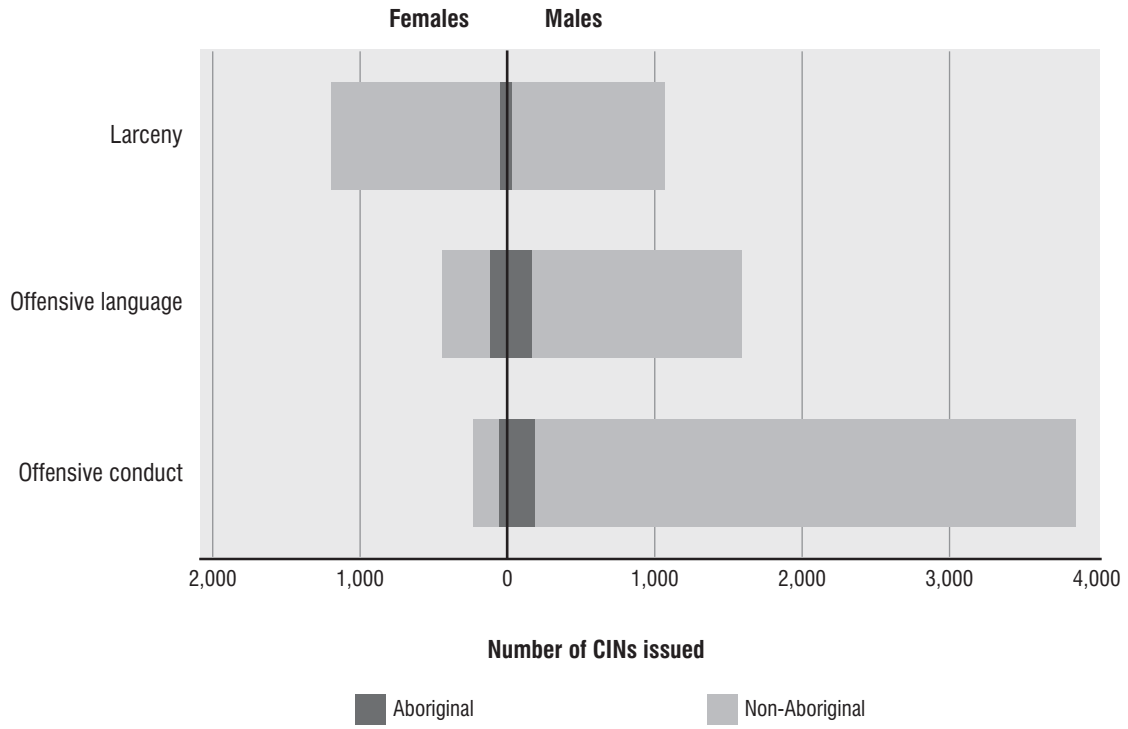


Source: NSW Police Force COPS database. CINs issued in all NSW commands, 1 November 2007 to 31 October 2008. 'Non-Aboriginal' includes all records where Aboriginal status was 'refused' and 'unknown'. n = 8,681.

November 2007, the first month of state-wide use of CINs, was also the lowest with 541 CINs issued compared with a monthly average of 740 CINs issued during the current review period. The busiest month for issuing of CINs during the current review period was October, when police issued 833 CINs.

There are marked differences in the gender and Aboriginality of CIN recipients in relation to the three main CIN offence types – larceny, offensive language and offensive conduct – as figure 2 shows.

Figure 2 CINs issued for larceny, offensive language and offensive conduct 1 Nov 2007 to 31 Oct 2008, by gender and Aboriginality



Source: NSW Police Force COPS database. Excludes 10 records where gender of recipient was not recorded. CINs issued in all NSW commands, 1 November 2007 to 31 October 2008. 'Non-Aboriginal' includes all records where Aboriginal status was 'refused' or 'unknown'. n = 8,388 (larceny 2,262, offensive language 2,034, offensive conduct 4,092).

Figure 2 shows that Aboriginal people generally are more likely to be issued with a CIN for offensive language (14% of all offensive language CINs) than for offensive conduct (6%) or shoplifting (4%).

The figure also shows the gender of CIN recipients. Male recipients greatly outnumber females in relation to CINs issued for offensive language and offensive conduct. For offensive language, the ratio of males to females is almost 4:1, and for offensive conduct, males outnumber females 16:1.

However, Aboriginal women received a quarter of the offensive language CINs issued to women and, although the numbers are small, also received a quarter (26%) of the offensive conduct CINs issued to women. By comparison, Aboriginal men received 11% of the 1,590 offensive language CINs issued to males and 5% of the 3,671 offensive conduct CINs issued to males.

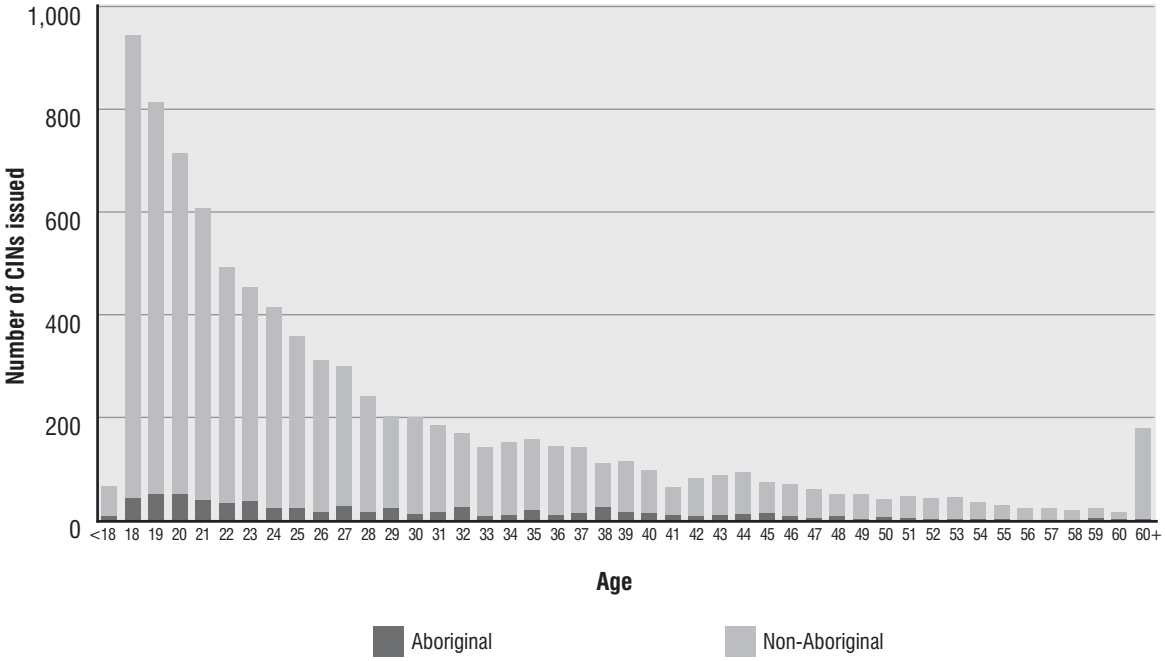
In relation to the CINs issued for larceny, the gender ratio is close to 1:1, with the1,197 female recipients slightly outnumbering the 1,065 males. It is not clear why the gender profile of larceny CIN recipients is so different from the male-dominated public order offences. Yet the relatively high female involvement in theft from retail premises is well-established. A 1995 study of adult female involvement in crime in NSW noted that men generally outnumbered women as proven offenders in almost all types of crime brought before the courts. Among the handful of offences where females comprised a substantial proportion of offenders were 'larceny by shop stealing' (45.9% of proven offenders were women) and 'other larceny' (25.5%).[154]

A number of police and other contributors to our review pointed out that practices relating to the policing of larceny offences differed from the policing of offensive conduct and offensive language in important ways. One difference is the mode of detection. Whereas the nature of public order offences requires police to be present (or arrive immediately after) the alleged incident, police are rarely involved in detecting larceny offences except during pro-active policing operations run in conjunction with retailers. Another likely factor is the influence of alcohol. Our review of a sample of CINs found that police cite alcohol and/or other substance use as a factor in almost all offensive conduct and offensive language incidents, but rarely in relation to shoplifting.

154 Trimboli L, 'Women as victims and offenders', *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No. 22.* NSW Bureau of Crime Statistics and Research, April 1995.

The age distribution of Aboriginal and non-Aboriginal CIN recipients during the current review period is summarised in figure 3.

Figure 3 CINs issued 1 Nov 2007 to 31 Oct 2008, by age and Aboriginality



Source: NSW Police Force COPS database. CINs issued in all NSW commands, 1 November 2007 to 31 October 2008. 'Non-Aboriginal' includes all records where Aboriginal status was 'refused' and 'unknown'. n = 8,681.

Young recipients dominate the data in relation to the age distribution of CINs issued. Those aged 18 to 21 years received more than one-third (35% or 3,078 of 8,681) of all CINs issued in the first 12 months of state-wide use. The relative youthfulness of CIN recipients was true for all major CIN offence types – larceny, offensive conduct and offensive language. This is also true for most offence types. Australian Institute of Criminology data indicates that persons aged 15 – 19 years comprise the group most likely to be dealt with by police. For instance, in 2002 – 2003 the offending rates for persons aged 15 – 19 years was more than four times the offending rate for the rest of the population. The next highest offending rate was for the population aged between 20 – 24 years of age, almost double the rate for the remainder of the population. Thus the rate of police contact with teenagers and young adults is high compared to the contact police have with older sectors of the community.[155]

Interestingly, figure 3 also shows that 180 CIN recipients in this period were aged 60 years or older. CINs for larceny or shoplifting account for the majority of CIN offences issued to this group.That is, 86% or 155 of the 180 CINs issued to people aged 60 or older were for larceny.

5.2. Crime data about the offences targeted through CINs

Figures provided by the NSW Bureau of Crime Statistics and Research summarise information recorded by police about how the use of CINs compare with some other legal processes used to deal with those offences, and the frequency of CIN offences.

CINs are part of a continuum of options available to police when deciding how best to respond to any of the seven CIN offences prescribed in the Criminal Procedure Regulation 2005.[156] The options range from issuing an informal warning or caution, through to an arrest and charge to bring the offender before the courts.

155 Australian Institute of Criminology, Australian Crime: Facts and Figures 2004, Canberra, 2004, p.53.

156 The seven current CIN offence are offensive conduct, offensive language, larceny or shoplifting (where the property or amount does not exceed $300), obtaining money or some other benefit by wilful false representation, obstructing traffic or unauthorised entry of vehicle or boat. Until late 2006, police could also issue a CIN for common assault.

Proceedings against alleged offenders

Police may proceed against alleged offenders through a variety of legal or other processes. Most alleged offenders are referred to the NSW criminal courts. The more serious offences are dealt with by way of a Bail Court Attendance Notice (known as a Charge prior to July 2003) or a No-Bail Court Attendance Notice (known as a Court Attendance Notice … prior to July 2003). In these instances, the alleged offender is arrested, taken to a police station, fingerprinted and the details of the person and all charges are recorded. Alternatively a Field Court Attendance Notice may be issued by police at other locations. A Future Court Attendance Notice (previously called a Summons) is used for less serious offences …

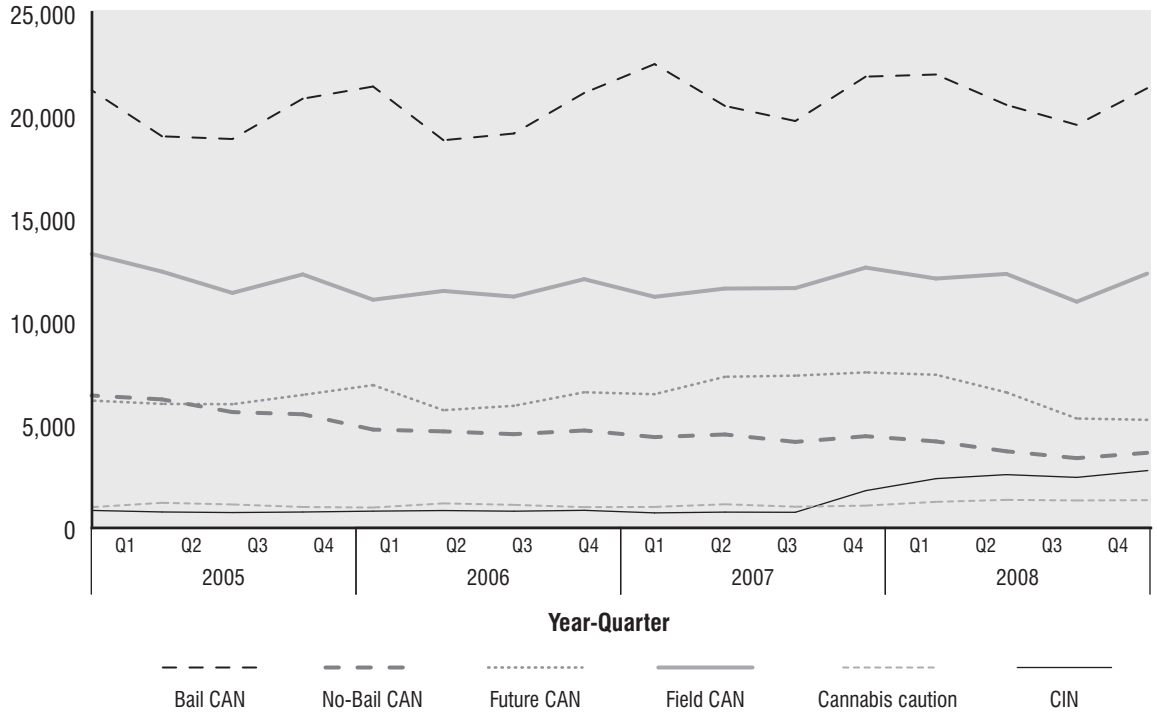
Some alleged offenders are proceeded against but diverted from the criminal court system. For many minor offences police can issue Infringement Notices. By paying the prescribed penalty the offender avoids having to go to court. Under the Young Offenders Act 1997, a juvenile offender can be issued with either a warning, a caution or referred to a youth justice conference …

While the only formal provisions to give warnings are under the Young Offenders Act 1997, until July 2008 warnings were recorded for both juveniles and adults. COPS changes on 7 August 2008 specifically limited warnings to only those proceeded against under the Young Offenders Act 1997, resulting in a large drop in numbers from August to November 2008. Another change to the COPS system on 10 December 2008 further modified how Young Offenders Act 1997 warnings are recorded. Caution should be exercised when using this data.

From: NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics 2008*, 'Definitions and explanatory notes'.

CINs provide police with an additional, intermediate option to deal with people aged 18 years or older who appear to have committed one of the seven CIN offences. As the NSW Police Force submission explained, the scheme 'provides greater flexibility to police by providing an intermediate response between arrest and warning'.[157]

Figure 4 Persons of interest aged 18 years and older recorded by NSW Police by method of legal proceedings 2005 – 2008



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Excludes warnings, other infringement notices, other drug cautions, incidents recorded as Young Offenders Act interventions, and other legal processes. Infringement notices (other than CINs) are by far the most common sanctions imposed for traffic and other offences. COPS data indicates that a total of 507,799 infringement notices were issued to adults in NSW in 2008, 472,939 infringement notices in 2007 and 459,640 in 2006.

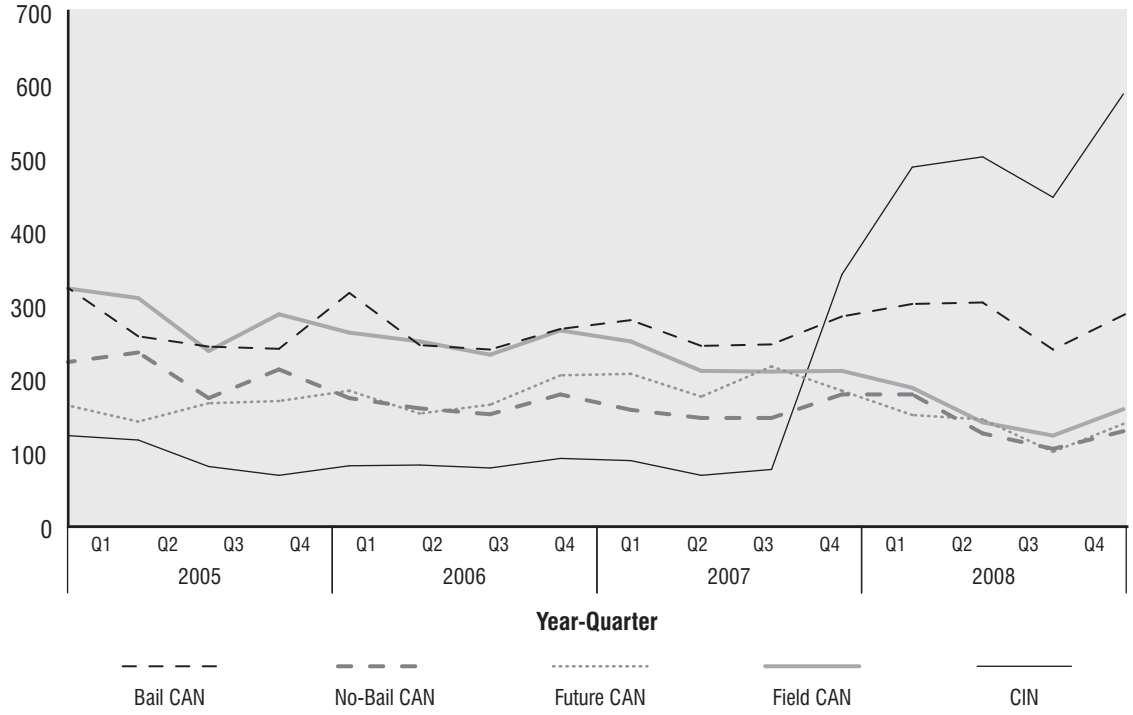
157 NSW Police Force submission, 17 February 2009.

Each year police in NSW deal with many thousands of offences deemed serious enough to be brought before the courts or result in some other form of sanction. Figure 4 shows the number of recorded offences involving adults from 2005 to 2008 that resulted in police issuing a CIN, a Court Attendance Notice (CAN) or, in the case of certain minor drug offences, a Cannabis Caution.

Police issue between 40,000 and 45,000 CANs per quarter for all offences involving adults. About half of these are Bail CANs. By comparison, police issued between 2,000 and 2,500 CINs per quarter in 2008 (the first full year of state-wide CINs use). The use of Cannabis Cautions, a formal diversion for minor drug offences, increased in 2008, with about 900 to 1,000 issued each quarter.

Figure 5 presents Bureau of Crime Statistics and Research information drawn from the same COPS data as figure 4, but for legal processes used in relation to offensive language only.

Figure 5 Persons of interest aged 18 years and older for offensive language offences recorded by NSW Police by method of legal proceedings



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Excludes warnings, other infringement notices, other drug cautions, incidents recorded as Young Offenders Act interventions, and other legal processes.

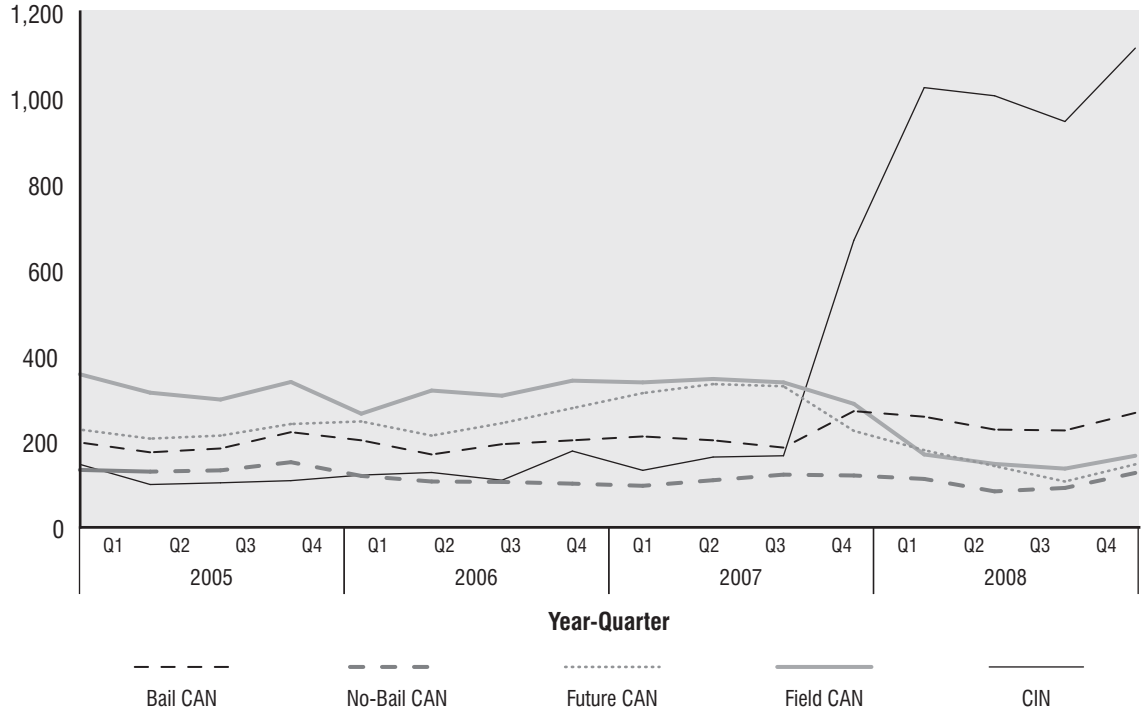
The sharp rise in offensive language CINs coincides with the extension of the CINs scheme across NSW. Total offensive language CINs issued each quarter in 2008 were 483 (January – March), 497 (April – June), 446 (July – September) and 597 (October – December). At the same time, there is some initial evidence to indicate that fewer offensive language matters were brought before the courts in 2008. In January – March 2008, police issued 784 offensive language CANs, compared with 860 in January – March 2007, 902 in the same period in 2006, and 998 in 2005. The figures for other quarters were also lower than in previous years:

- April – June: 680 CANs (2008) – down from 743 (2007), 774 (2006) and 910 (2005)
- July – September 544 (2008) – down from 785 (2007), 754 (2006), 787 (2005)
- October – December 708 (2008) – down from 823 (2007), 882 (2006) and 876 (2005).

There is no way to know how many CANs would have been issued in 2008 had CINs not been an option. Yet the figures for 2008 indicate that CINs have successfully diverted at least some offensive language matters from the courts. If we use the figures for the three years immediately preceding 2008 as a guide, the 483 CINs issued for offensive language in January – March 2008 coincided with a fall in CANs issued in the same period, with 76 to 214 fewer offensive language matters being brought before the courts than in the previous three years. The figures for other quarters vary, but the pattern is similar with increases in CINs coinciding with between 63 (minimum) and 243 (maximum) fewer offensive language CANs issued each quarter.

Similar trends are apparent in the initial data for offensive conduct – see figure 6.

Figure 6 Persons of interest aged 18 years and older for offensive conduct offences recorded by NSW Police by method of legal proceedings



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Excludes warnings, other infringement notices, incidents recorded as Young Offenders Act interventions, and other legal processes.

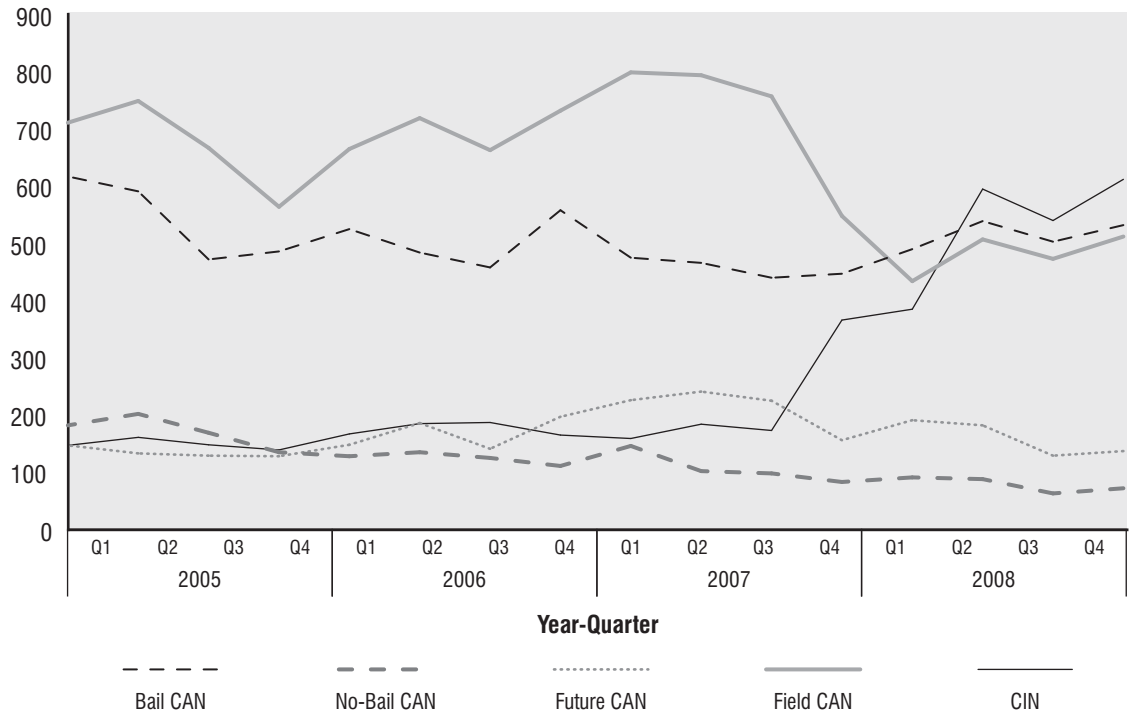
As with offensive language, there was a sharp increase in CINs issued for offensive conduct after the CINs scheme was extended on 1 November 2007. Total offensive conduct CINs issued each quarter in 2008 were 1,010 (January – March), 990 (April – June), 943 (July – September) and 1,135 (October – December). At the same time, fewer offensive conduct matters were brought before the courts. The 654 CANs for offensive conduct in January – March 2008, were below the 892 (2007), 767 (2006) and 849 (2005) issued in the first quarter in previous years. The figures for other quarters were:

- April – June: 533 CANs (2008) – down from 925 (2007), 742 (2006), and 758 (2005)
- July – September: 505 (2008) down from 908 (2007), 782 (2006), 761 (2005)
- October – December: 596 (2008) – down from 837 (2007), 857 (2006), 886 (2005).

Again, there is no way to know how many CANs might have been issued if CINs were not an option. But, using the CANs issued in recent years as an indicator, the 1,010 CINs issued for offensive conduct in January – March 2008 coincided with a fall in CANs issued, with perhaps 113 to 238 fewer offensive conduct matters being brought before the courts in the same quarter than in the previous three years. The numbers for other quarters vary, but the figures indicate that at least 209 (minimum) and up to 403 (maximum) fewer offensive conduct matters were brought before the courts each quarter in 2008.

Figure 7 shows COPS records of the CINs issued for the other main CIN offence – shoplifting/larceny for goods valued less than $300 – and the total CANs issued for offences grouped as 'steal from retail store'.

Figure 7 Persons of interest aged 18 years and older for steal from retail store offences recorded by NSW Police by method of legal proceedings



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Excludes warnings, other infringement notices, incidents recorded as Young Offenders Act interventions, and other legal processes.

Caution is needed when comparing the CINs for larceny/shoplifting with the CANs for related 'steal from retail store' offences. If police responding to offensive conduct opt to charge instead of issue a CIN or a warning, there is only one offence available under the *Summary Offences Act 1998* and one way to record that charge. The options for charging suspects for offensive language under the *Summary Offences Act 1998* are similarly constrained.[158] Thus, direct comparisons between CINs and CANs issued for those offences are relatively straightforward.

However if police detect shoplifting of goods to the value of $300 and decide to charge the suspect instead of issuing a CIN or a warning:

- The associated CAN may be one of four offences: 'larceny' (recorded as Law Part Code or LPC 621[159]), 'larceny value less than or equal to $2,000' (LPC 620), 'shoplifting' (LPC 626), and 'shoplifting value less than or equal to $2,000' (LPC 625). Estimating of the total CANs issued for potentially 'CIN-able' larceny or shoplifting offences must take account of all four.
- Depending on the facts, police also have discretion to charge the suspect with one of a number of other larceny offences that are not linked to the CINs scheme. The 'Steal from retail store' grouping in Figure 7 is an existing BOCSAR reporting classification made up of the four CIN larceny offences noted above, and other common larceny or shoplifting offences.
- As any CANs issued for larceny of property exceeding the value of $300 would be ineligible for a CIN, they should be excluded from any comparisons of legal processes used. However, as there is no requirement for police to record the value of the property stolen, there is no way to easily distinguish those CANs involving the theft of goods valued less than $300 and (depending on the circumstances) potentially eligible for a CIN.

The data in figure 7 should be viewed with those caveats in mind.

The data shows a sharp rise in CINs issued for larceny and shoplifting offences from late 2007. Yet unlike offensive conduct and offensive language, there is no obvious corresponding fall in the total number of CANs issued. This

158 While there is only one avenue to charge, it should be noted that there are numerous other on-the-spot fines that can be issued for offensive language (use offensive language on Trust lands, $175; passenger use offensive language, $300; disorderly behaviour or use offensive language, $300; wilfully use offensive language on train or public area, $400).

159 Law-part codes are used by police and justice agencies in NSW to describe offences and facilitate the exchange of information about those offences.

may be because the CINs issued for shoplifting and larceny in 2008 are additional to, not instead of, CANs for those offences. Or it may be that there were falls in CANs issued in relation to potentially 'CIN-able' shoplifting and larceny offences, but that there were also increases in CANs issued for other 'steal from retail store' offences.

Finally, in order to identity commands that potentially have a need for CINs, the following tables show commands that currently charge relatively high numbers of adults for offensive language, offensive conduct and steal from retail store offences. The ranking is calculated on total CANs issued in the past three years. Data from earlier years is included for comparison.

Table 4 Persons of interest aged 18 years and older proceeded against to court 2002 – 2008, offensive language – top 15 commands

LAC	2002	2003	2004	2005	2006	2007	2008
Mid North Coast	146	127	151	142	134	130	78
Richmond	191	155	138	122	94	144	91
Coffs-Clarence	185	170	138	114	136	90	54
Manning-Great Lakes	65	31	36	41	70	105	103
Wollongong	73	72	61	51	102	95	63
New England	105	91	84	69	89	85	78
Canobolas	89	57	59	78	79	86	67
Liverpool	41	58	68	81	99	80	52
Mount Druitt	84	92	148	124	72	72	81
Goulburn	124	103	101	58	66	89	69
Barwon	66	62	49	61	58	80	75
Lachlan	93	73	74	67	80	75	41
City Central	71	74	52	87	51	71	72
Cootamundra	92	79	69	112	58	84	52
Newcastle	100	69	43	82	39	91	63

Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. LACs ranked in order of total incidents recorded in 2006 – 2008.

Table 5 Persons of interest aged 18 years and older proceeded against to court 2002 – 2008, offensive conduct – top 15 commands

LAC	2002	2003	2004	2005	2006	2007	2008
Richmond	192	151	110	161	138	167	90
Newcastle	111	107	98	90	101	182	65
New England	75	103	121	130	113	102	74
Mid North Coast	105	100	135	128	88	129	57
City Central	53	43	52	81	71	86	107
Wagga Wagga	85	99	79	78	67	134	31
Goulburn	81	69	89	76	82	91	54
Manly	29	50	82	149	123	83	17
Sutherland	17	17	20	38	30	151	40
Tweed-Byron	124	111	136	105	85	107	29
Canobolas	67	72	52	70	79	89	48
Griffith	92	62	62	90	71	79	60
Manning-Great Lakes	40	25	45	39	43	93	72
Oxley	77	77	67	95	73	78	54
Coffs-Clarence	135	122	82	81	79	83	42

Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. LACs ranked in order of total incidents recorded in 2006-2008.

Table 6 Persons of interest aged 18 years and older proceeded against to court 2002 – 2008, steal from retail store – top 15 commands

LAC	2002	2003	2004	2005	2006	2007	2008
Parramatta	302	270	201	181	250	259	177
Liverpool	284	316	273	268	250	174	162
Eastern Suburbs	170	110	97	133	209	164	185
Wollongong	159	188	168	138	136	214	169
Newcastle	189	117	110	97	146	185	148
The Rocks	382	258	238	200	114	152	213
City Central	141	125	137	136	129	173	154
Lake Macquarie	196	125	126	131	152	134	154
Fairfield	215	242	261	160	160	167	103
Campbelltown	239	274	191	220	155	146	127
Burwood	131	160	130	125	152	129	133
Bankstown	319	189	149	127	159	114	135
Blacktown	213	266	140	150	125	141	141
Lower Hunter	167	211	177	144	135	170	102
Mount Druitt	240	155	154	108	167	120	107

Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. LACs ranked in order of total incidents recorded in 2006 – 2008.

The figures indicate that the commands that prosecute relatively high numbers of adult suspects for these offences are generally those that have embraced the use of CINs. As noted at the start of this chapter, City Central, Newcastle, Wollongong, Coffs/Clarence, Manly and Wagga Wagga are among the commands that are issuing the highest numbers of CINs (see table 3). As expected, they are also among the commands that continue to charge relatively high numbers of suspects for these offences.

Interestingly, the data on charges also shows a few commands that rarely use CINs were also among the commands that charge relatively high numbers of offenders for these three offences. For instance, Mount Druitt is ranked 67th in terms of total CINs issued in the first full year of the CINs scheme, yet prosecutes high numbers of adults suspected of offensive language and steal from retail store offences. Burwood, ranked 68th in terms of CINs issued, prosecutes high numbers of shoplifters.

Further monitoring is needed to determine trends in the use of CINs over time.

Chapter 6.
Police issuing of CINs in Aboriginal communities

When legislating to extend the use of CINs across NSW, Parliament included a provision requiring the Ombudsman to conduct a further review of the CINs scheme 'in so far as those provisions impact on Aboriginal and Torres Strait Islander communities'.[160] This chapter considers issues associated with the increased police use of CINs in Aboriginal communities, the types of Aboriginal offending addressed through CINs, concerns about net-widening, and other issues associated with the police use of CINs.

6.1. Advantages and disadvantages of issuing CINs to Aboriginal people

A number of reviews and reports have highlighted issues regarding the inherent pros and cons associated with substituting a judicial process with a regulatory or administrative fixed penalty system for dealing with minor offences – see for instance the NSW Law Reform Commission's advice noted in section 3.1 of this report, and the NSW Sentencing Council's advice at section 3.3.

Submissions to our current CINs review reiterated many of the factors noted in these reports and urged close scrutiny of the impacts of CINs.

The NSW Police Force said [at 1.1 of its submission] there are broad systemic benefits for all parties – police, courts and offenders – but cautioned that 'the specific advantages and disadvantages of issuing a CIN to an Aboriginal person will of course vary according to the specific circumstances of an incident and the individual concerned'.[161]

6.1.1. Advantages

The advantages noted by the Sentencing Council such as the savings in time and costs for police, courts and recipients, the ease of administering such schemes, the certainty of fixed penalties and so on, apply to penalty notice schemes generally. It is important to note that when Parliament legislated to extend the use of CINs to the whole of NSW, the scheme included features that protect the interests of recipients and provide incentives to pay. Recipients who pay the prescribed CIN penalty:

- do not have to attend court
- are to have any fingerprints taken destroyed, and
- do not have the offence is not recorded on their criminal history.

In addition, payment of the penalty is not an admission of liability or guilt (Criminal Procedure Act, section 338) and, as with penalty notices generally, paying the CIN on time ensures the recipient does not incur additional enforcement costs.

These provisions are consistent with the kinds of key safeguards advocated by Professor Richard Fox in his landmark work on model legislation for penalty notice schemes. In his influential 1995 report, he concluded that any legislative scheme to regulate the use of penalty notices should:

- only apply to summary offences
- not result in the recording of a conviction if payment is made
- have fixed penalty amounts
- preserve the discretion of issuing officers to issue a warning or caution
- enable recipients to elect to have the matter referred to a court, and
- give the issuing agency the discretion to withdraw the notice upon receipt of additional factual information justifying such a course.[162]

160 *Criminal Procedure Act 1986*, s.344A.
161 NSW Police Force submission, 17 February 2009.
162 Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology, 1995 and the summary of Fox's conclusion in the NSW Sentencing Council's Interim Report, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices,* 2006.

To some degree, all of these elements are part of the CINs scheme – or could be included without further legislative amendment. Their inclusion helps counter critical disadvantages associated with dealing with offences in this way.

In providing the NSW Police Force submission for this review, the Commissioner of Police noted that CINs provide police with an intermediate option between an arrest and charge on the one hand, and a warning or caution on the other. He said the benefits of CINs include reducing red tape for police, freeing up police resources to deal with more incidents, reducing the resources that police and courts spend on minor offences, diverting minor offenders from custody, reducing the risks of harm associated with transporting and detaining offenders, and the lack of criminal record in certain circumstances.[163] The police submission also argued that the wider use of CINs would help reduce the personal trauma, shame and safety risks associated with arresting and charging offenders, that charging may lead to courts imposing a tougher penalty, and diverting more Aboriginal offenders from court is an important step in addressing ongoing Aboriginal community distrust of government and law enforcement agencies.[164]

Significantly, the Commissioner regards the higher proportion of Aboriginal people being issued with CINs as a clear indicator of the scheme's success, noting:

> *The primary purpose of CINs is to divert persons from the criminal justice system. A higher take up rate for this community would surely be viewed as a positive in this regard.*[165]

In part, the police force's confidence in the diversionary benefits of CINs appears to be premised on critical assumptions that:

1. most CIN recipients would otherwise be arrested and charged rather than cautioned, and
2. recipients are not re-entering the criminal justice system at a later stage due to secondary offences associated with RTA sanctions imposed for failing to pay their CIN and enforcement penalties, such as continuing to drive while driver's licence suspension is in place.

These issues, and the limited options available to any people inappropriately issued with a CIN to have the CIN withdrawn or sanctions modified, will be considered further in this chapter.

In focus groups and interviews conducted as part of this review, frontline police and senior officers repeatedly praised:

- the ease with which CINs can be issued
- the way that CINs can free up police
- the way that CINs can maximise the police presence on the street at peak periods, and
- how CINs can cut the time spent 'processing' offenders from a few hours to a few minutes.

Police could also see that, from an offender's perspective, recipients benefit from having their matter dealt with quickly, not having to spend three or four hours in custody being processed for a charge, avoiding incurring a criminal record, and avoiding the stresses associated with having to go to court, lose a day's pay, incur legal costs and not knowing what the outcome would be. Police in our focus groups and interviews said anyone who had previously been in police custody immediately recognised the benefits of an on-the-spot fine.

> *If they've been in* [custody] *for anything where they've actually been arrested and taken to the station, they know how much better it is to* [receive a CIN] *– like a lot of them, I think, are appreciative to just be able to get their ticket and then walk away.*[166]

At the same time, police said it was also important for frontline police to know and 'sell' these benefits to CINs recipients – that is, to explain the reasons for issuing the ticket and warn offenders whether they might be arrested and charged if they continued to offend or failed to cooperate. Several officers in one focus group said that providing an explanation at the time of issuing the CIN will greatly reduce the likelihood of that recipient later calling the station for an explanation or electing to have the matter heard at court.

> *Give them the option* [by saying]*: 'look if I give you a ticket and you go home, that'll be the last you hear. But if you keep on carrying on like you are, you'll be arrested'.*[167]

Some commanders and senior police said CINs provide an option for acting on the offence in a way that avoids arrest and greatly reduces the risk of escalation and further charges:

163 Commissioner's letter, NSW Police Force submission, 17 February 2009.
164 NSW Police Force submission, 17 February 2009.
165 Commissioner's letter, NSW Police Force submission, 17 February 2009.
166 Officer focus group, 3 February 2009.
167 Officer focus group, 3 February 2009.

You either issue them a CIN or you turn around and walk away and take no notice of it which is not a particularly desirable thing … Or you grab hold of the person and throw them in the back of the truck. Not only is that bad because it's resource intensive and the person goes into custody, but there's a very, very large chance that it is going to escalate into a 'resist arrest' and 'assault police' and 'malicious damage' [charges] *back at the police station.*[168]

Police Aboriginal Community Liaison Officers (ACLOs) acknowledged the benefits associated with diverting minor offenders from police custody, though few had had practical experience in advising recipients about their CINs or seen a noticeable fall in Aboriginal offenders being brought into custody. One ACLO who had been approached by a CIN recipient for advice also noted that sometimes the CIN penalty is less than the penalty likely to be imposed by a court. He said police in his town – a large regional centre – had issued an 'offensive conduct' CIN to an Aboriginal man because of his involvement in a fight in the main street area. The CIN recipient had only recently completed a period of supervised parole for other offences and both the ACLO and his police colleagues believed that, had the matter gone to court, the local magistrate would almost certainly have considered imposing a custodial sentence.

If he'd gone to court he'd have gone to jail – he was just off parole. He'd have got a 'holiday', for sure.[169]

After discussing the CIN with the ACLO, the man was said to have agreed that paying the CIN would be 'better than going to court, hey'.

The submissions provided as part of this review all acknowledged that the CINs scheme had the potential to deliver benefits in certain circumstances, especially if CINs succeeded in reducing the number of minor offenders entering police custody.

6.1.2. Disadvantages

Support for the CINs scheme was qualified with almost all submissions voicing reservations about disadvantages associated with CINs, such as the impacts of fine-related debts, the failure of many Aboriginal people to understand the adverse legal consequences of non-payment of fines until it was too late, the potential for net-widening and the pitfalls associated with putting the onus on recipients to elect to have matters heard at court. All commented on the need for measures to minimise the many disadvantages and maximise the anticipated benefits of wider CINs use.

In general terms, two factors dominated Aboriginal community and agency feedback about the particular disadvantages associated with the wider police use of CINs:

1. *For many Aboriginal people outside of the NSW Police Force, our interviews and consultations were the first they had heard of CINs, even though our consultations strategy deliberately sought out groups and individuals who actively assist people experiencing difficulties in managing fine-related debts in locations where police actively use CINs. Thus there was little awareness of how CINs differed from other types of penalty notices issued by police or the likely consequences of failing to pay on time.*
2. *Of the Aboriginal people contributing to this review who already knew of CINs, especially those employed by police, local courts and other agencies, all voiced concerns 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.*

The many Aboriginal staff from local courts, police, justice groups, legal services, and training and employment agencies who contributed to this review all readily understood the principles of CINs and could immediately identify potential benefits and likely disadvantages for their communities. On the one hand there was widespread support for any initiative, including CINs, that purports to divert minor offenders from police custody. Yet on the other, we could find no Aboriginal organisations or people who felt that overall the scheme would provide a net benefit to the Aboriginal communities that they worked with.

The primary concern was not that CINs are being or would be deliberately misused or that police unfairly target Aboriginal offenders – though some thought that this was a risk. Overwhelmingly, the greatest misgiving was that the ease with which CINs could be issued meant that the majority of CINs would be issued to petty offenders at the margins of Aboriginal communities – including many who are already laden with high levels of debts, often from repeated misdemeanours in the past. There was a perception that a significant proportion of the fine-related debt affecting many Aboriginal communities stemmed from fines and enforcement costs for minor offences such as cycling without a helmet, fisheries offences, fare evasion, drinking in parks, failing to vote, failing to respond to a jury summons, or failing to register a dog. Many argued that an influx of new fines and enforcement costs would simply compound the problems associated with existing levels of debt. Rather than deter offensive language and other

168 Local Area Command interview, 15 January 2009.
169 ACLO interview, 30 January 2009.

minor offending, they feared that expanding the use of CINs could push this group further to the margins while doing nothing to actually address the disruption caused by their anti-social behaviour.

The feedback provided by the police ACLO who said that the CIN issued to the former parolee had a positive impact on the offender in that instance (see previous section on 'Advantages') was typical of the ambivalence voiced by many Aboriginal staff working in the criminal justice area. He agreed there may be some short-term benefits in using CINs to reduce the number of minor offenders being brought into police custody, but he voiced strong concerns about the longer-term problems likely to flow from the wider police use of on-the-spot fines:

> *Personally, I'm not a big fan of CINs. I've been out and spoken to the community about them. There's very little resistance to CINs. But I don't think people really comprehend what happens when* [recipients] *don't pay … A lot of the poorer people can't pay – giving them a CIN is just making it worse for them …* [yes] *they shouldn't be out on the street cursing in the first place –* [but] *a lot don't really understand what a CIN is and the consequences of not paying.*[170]

These concerns about the potential for CINs to compound existing problems in Aboriginal communities were shared by some senior police. One local commander from Western NSW said:

> *I was never really excited about* [using CINs in his command] *… there's all those social problems with it, how people pay … It might work well in middle class Australia – like everything else does where there's money involved …* [but] *these communities are different. Aboriginal people have different social issues to anybody else.*[171]

Many of the submissions to this review reiterated the concerns listed in the Sentencing Council's summary of the disadvantages associated with penalty notice schemes generally: that is, the potential for net-widening; the diminished opportunities to scrutinise offending conduct, penalties imposed or issuing practices; that some people may simply pay the fine even if they are innocent; that CINs might be more useful for raising revenue than modifying offending behaviour or improving community safety; the inability or unwillingness of issuing agencies to consider an offender's personal circumstances and means or capacity to pay; and the reduction of judicial and public scrutiny over the investigation and enforcement procedures. Most then related these concerns to aspects of the CINs scheme and the susceptibility of poorer, less educated, unemployed and other more marginalised individuals to be affected by these disadvantages.

In addition, consistent with the terms of our review, some submissions argued that any assessment of CINs should consider the scheme's wider impacts on Aboriginal communities – not just on individuals in those communities. One common concern was the potential for the scheme to undermine relationships between communities and police, especially if there is a perception that CINs are being used unfairly, that Aboriginal people are being singled out or that police do not exercise discretion where appropriate.[172]

> *Some clients also feel targeted by the police – they feel they are being cautioned or given a CIN when other people are not targeted in the same way.*[173]

Another common concern was that fresh debts from CINs could add to the cumulative stresses associated with poverty in communities already struggling to cope with chronic debt. These submissions noted that poverty tends to be concentrated in communities that are also affected by high levels of family conflicts, domestic violence, substance abuse, gambling and other symptoms of dysfunction and disadvantage.[174] Debts from unpaid fines can also compound the problems faced by other marginalised groups, such as young people being released from detention. As Mission Australia's submission explained:

> *The consequences of non payment of CINs is a major concern. Even with recent reforms to the fine enforcement system, major problems still exist.*
>
> *According to* [Mission Australia's] *youth post release support service, the impact of outstanding and unpaid fines on the clients is significant and includes the following:*
>
> - *inability to obtain driver's licence*
> - *reduction in employment options*
> - *lack of transport options (particularly in remote communities)*
> - *poor or limited access to services*

170 ACLO interview, 30 January 2009.
171 Local Area Command interview, 21 January 2009.
172 Submission, R. Hodson; submission, Bankstown Council.
173 Submission, Mission Australia 30 January 2009.
174 Western Sydney Koori Interagency.

- *isolation*
- *perpetuates cycle of poverty and hardship*
- *increased risk of offending behaviour.*[175]

Old debts must be dealt with to have any hope of turning their situations around. Adding new fines would heighten the stresses while doing little to address the underlying causes or provide much-needed respite from anti-social behaviour.[176]

A number of submissions also argued that suspending an offender's driver's licence in response to CIN-related fine defaults had led, or at least had the potential to lead, to increased secondary offending – that is, offences relating to driving while suspended or, in the case of repeat offenders, driving while disqualified.[177] This issue was also examined in some detail in the Sentencing Council's interim report.[178]

The NSW Police Force submission said that to date there was little tangible evidence of secondary offending arising from Aboriginal CIN recipients' failure to pay their CIN, but acknowledged that there was scope for local level preventive measures to counter this risk.

> *One Local Area Command noted that the rates of offences for secondary offending are relatively low in the Aboriginal community at the local level. Other commands indicated that there is no evidence of secondary offending at this stage.*
>
> *Notwithstanding this, general awareness of the potential consequences could be highlighted through the LACACC* [Local Area Command Aboriginal Consultative Committee] *or information days for the community to discuss this issue and identify strategies for the Aboriginal community to minimise the risk.*[179]

In summary, the submissions to our review highlight numerous risks associated with increasing the use of CINs in Aboriginal communities. Some are specific to the CINs scheme; some are about the impacts of fines generally. Our review has found that there are difficulties for the NSW Police Force in responding to these kinds of criticisms and perceptions, including:

- Almost no-one outside the NSW Police Force knew or understood the CINs scheme. We found that Aboriginal community sources frequently confused and conflated their concerns about CINs with wider concerns about police issuing of fines, or the fines system generally.
- Concerns such as the diminution in judicial oversight and the inability of a fixed penalty system to take account of individual circumstances are an inevitable consequence of using penalty notices to divert minor offenders from the courts.
- Overwhelmingly the greatest concerns related to the high levels of fine debts among Aboriginal people and of an unfair and punitive fines system. Only part of these debts related to fines issued by police, yet the CINs scheme provides a flash point for community anger about fines and the sanctions arising from fine debts generally.
- Although 89% of Aboriginal CIN recipients default on their CIN and are referred for enforcement (see Chapter 7), CIN-related debts are relatively small compared to the volume of fine debts generally affecting Aboriginal communities.
- Failure to deal with fine debts can result in licence suspension and other sanctions, thereby raising the risk of secondary offending (an issue of real and immediate concern to police), yet it can be notoriously hard to demonstrate whether the increased use of CINs is a factor in offences of this kind.

6.2. Police use of CINs in Aboriginal communities

As noted earlier in this report, the main differences between the CINs scheme since 1 November 2007 and the earlier trial scheme are:

- police can issue CINs anywhere in NSW, whereas previously CINs could only be issued in the 12 trial locations
- common assault is no longer a nominated CIN offence
- CINs may be served personally or by post – previously police had to serve CINs in person

175 Mission Australia submission, 30 January 2009. See also Law Society of NSW submission, 12 February 2009.
176 Western Sydney Koori Interagency.
177 Mission Australia submission, 30 January 2009.
178 See Part 5, NSW Sentencing Council, Interim Report, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices,* 2006.
179 NSW Police Force submission, 17 February 2009.

- a senior police officer 'may at any time withdraw' a CIN, removing legislative impediments to withdrawing CINs issued in error or where a supervisor decides that an informal caution or charge would have been more appropriate
- if a CIN is withdrawn, any enforcement action related to the CIN is to be reversed and any related costs are repayable, and
- if a CIN is withdrawn or dismissed at court, any fingerprints or palm-prints taken by police when issuing the CIN must be destroyed.

Other key provisions remain the same. CINs can only be issued for offences specified in the Criminal Procedure Regulation 2005, and failure or refusal to comply with a police request for name and other details remains an offence. The Act prohibits police from serving CINs to anyone aged under 18 years, or in relation to offences that occur in the context of an industrial dispute, demonstration or organised assembly.

Figure 8 compares aspects of the use of CINs in the 12 trial commands during the extended trial period, with CINs issued in all NSW commands in the first year that the scheme was available state-wide.

Figure 8 Comparison of CINs issued before and after 1 November 2007

12 trial LACs: Sept 2002 – Oct 2007	All NSW LACs: 1 Nov 2007 – 31 July 2008
9,452 CINs issued over 5 years in 12 commands with a total population of 1.2 million residents.	8,681 CINs issued in 1st year of full scheme across NSW, total population of 6.5 million residents.
CIN offence types	
• larceny 43% • offensive conduct 25% • offensive language 18% (43%) • common assault 12% • other 2%	• larceny 26% (↓17%) • offensive conduct 47% • offensive language 23% (70%) • common assault* 0% • other 4%
% issued to Aboriginal people	
2.8% issued to Aboriginal people (who make up 1.7% of the population of the 12 trial LACs)	7.4% issued to Aboriginal people (who make up 2.1% of the population of NSW)
CINs issued to Aboriginal people	
Of the 267 CINs issued to Aboriginal people: • larceny 36% • offensive conduct 20% • offensive language 27% (47%) • goods in custody 7% • common assault 10%	Of the 645 CINs issued to Aboriginal people: — larceny 14% — offensive conduct 38% — offensive language 45% (83%) — goods in custody 2% — other 2%

Source: NSW Police Force COPS data 2002 – 2008. *common assault removed as a CIN offence in December 2006

The figure highlights important changes in the use of CINs after the scheme was extended beyond the 12 trial locations in late 2007. Firstly, the wider use of CINs across NSW coincided with a sharp increase in the number of CINs issued to Aboriginal people. In the five years before the roll-out, 2.8% of the 9,452 CINs issued in the trial locations were issued to Aboriginal recipients. After the roll-out, Aboriginal people received 7.4% of all CINs issued. Secondly, there was a significant shift in the kinds of offences that commonly attracted a CIN, with CINs for larceny offences falling from 43% of all CINs to just 26%, while CINs for minor public order offences (offensive conduct and offensive language combined) jumped from 43% to 70%. These shifts were even more evident with respect to the types of CINs issued to Aboriginal people.

The 7.4% of CIN recipients identified as Aboriginal refers to those who were asked by police about their Aboriginality at the time the CIN was issued, and whose Aboriginality was then recorded on COPS. The actual number of Aboriginal recipients may be much higher, as there is no requirement for police to ask about a person's Aboriginal status when issuing a CIN (partly because it is accepted practice not to ask when issuing on-the-spot fines, and partly because there may be situations when such questions could be inappropriate, irrelevant or perhaps inflammatory).[180] Custody data relating to Aboriginality is presumed to be more accurate because all people in police custody are routinely asked whether they identify as Aboriginal or Torres Strait Islander. However, the Aboriginal Client Service Specialist based at Sydney's Downing Centre court complex, the busiest local court in NSW, estimated that just 40% of her Aboriginal clients are identified by police as Aboriginal at the time of their arrest and charge. Most are not.[181]

In considering whether the wider geographical use of CINs was a factor in the sharp rise in CINs issued to Aboriginal people, we examined data on CINs issued in the 12 trial commands before and after 1 November 2007 to check whether those sites experienced the same growth in Aboriginal-related CINs as the rest of NSW. In the year following the state-wide expansion of the CINs scheme, 2.3% of all CINs issued in the 12 former trial locations were issued to Aboriginal people. That is, Aboriginal people in those locations attracted CINs at roughly the same rate after the roll-out as they did during the extended trial period – confirming that the recent growth in the rate of CINs issued to Aboriginal people occurred largely in non-trial areas. By comparison, Aboriginal people in non-trial commands received 9.2% of the 6,441 CINs issued in those areas in the first year of the state-wide scheme.

Of the 15 commands that issued the highest numbers of CINs to Aboriginal people in the current review period (1 November 2007 to 31 October 2008):

- none were part of the earlier CINs trial
- all are country commands
- together these commands issued 460 (71%) of the 645 CINs issued to Aboriginal people in the first full year of the scheme, and
- all have a strong focus on offensive conduct and offensive language with CINs for those offences making up 75% or more of all CINs issued in each of those locations – this was highest in Cootamundra (where 96% of CINs were for offensive conduct and offensive language), Barrier (92%) and Griffith (91%).

Although the earlier CINs trial included commands with sizeable Aboriginal communities, including the Lake Macquarie, Tuggerah Lakes and Lake Illawarra commands, the recorded use of CINs issued to Aboriginal people in those locations was low during the extended trial and remained comparatively low after 1 November 2007. A high proportion of the CINs issued in those commands were for larceny or shoplifting.

In considering whether the wider geographical use of CINs may have also been a factor in shifting CINs away from shoplifting and towards offensive conduct and offensive language, we checked the data on CINs issued in the 12 trial commands before and after 1 November 2007. This showed that the proportion of CINs issued for offensive conduct and offensive language in the 12 trial locations since the roll-out was 62% – below the total NSW rate of 70%, but still well above the 43% for those two offences in the trial period. That is, the state-wide shift towards issuing more CINs for minor public order offences also occurred in the 12 trial locations following the roll-out – just not to the same extent as in non-trial areas.

Another recent change affecting the make-up of the scheme was the removal of common assault from the schedule of CIN offences in late 2006. During the extended trial period, 12% of all CINs were for assault. Reducing the number of CIN offences from eight to seven means – as a proportion of the total – CINs for other offences would be expected to rise. This may have been a factor in the increases in offensive conduct and offensive language CINs noted above. However, despite the removal of common assault, the proportion of CINs issued for larceny or shoplifting actually fell sharply – from 43% of the CINs issued for eight types of offences during the extended trial period, to just 26% of CINs issued for seven types of offences in the first full year of the scheme.

The shift towards a scheme in which 70% of all CINs issued are for offensive conduct and offensive language has implications for our current review as more Aboriginal people receive CINs for public order offences than for larceny or shoplifting. Since the state-wide rollout in late 2007, 4% of all shoplifting CINs were issued to Aboriginal people, whereas 6% of offensive conduct CINs and 16% of offensive language CINs were issued to Aboriginal people. As figure 8 shows, Aboriginal people now receive more fines for offensive language than any other offence. Of the 645 CINs issued to Aboriginal people, almost half (45%) were for offensive language. By comparison, of the 8,036 CINs issued to non-Aboriginal people, 22% were for offensive language.

180 NSW Police Force Chief Statistician Mr Jim Baldwin, personal communication, 12 March 2009.
181 Interview Ms Jennifer Stanford, Aboriginal Client Service Specialist, Downing Centre, 30 July 2008.

Other data relating to the police use of CINs since the state-wide rollout of relevance to our review of the potential impact of CINs on Aboriginal communities include:

- Four out of every five CINs served on Aboriginal people in NSW were issued in country areas,[182] including 61 CINs issued in the Coffs-Clarence command, 53 in Richmond, 50 in New England and 47 in the Far South Coast. Those four commands account for a third of all CINs issued to Aboriginal people since the state-wide rollout.
- A third of all commands (25 of 80) have no recorded issuing of a CIN to an Aboriginal person. Almost all of these (24 of 25) were in metropolitan areas.
- As with other types of crime, most CIN recipients are young males. Yet closer analysis of CINs shows that Aboriginal women are much more likely to be issued a CIN than non-Aboriginal women. Of the Aboriginal recipients, two in every five (38%) were women. Among the non-Aboriginal recipients, one in five (21%) were women.

Other changes coinciding with the state-wide roll-out, including provisions relating to serving CINs by post, withdrawing CINs and reversing any enforcement action and costs, and fingerprint destruction, have the potential to influence issuing practices. However, the number of CINs affected by each of these measures appears to be too small to have had a significant influence on the major changes noted in figure 8.

6.3. Variations in local commands' use of CINs

All local area commands use CINs, but the data relating to the number and type of CINs issued in each command varies widely – see table 3 for the summary of CINs issued in the current review period (1 November 2007 to 31 October 2008). At the upper end of the scale, 50% of all CINs in NSW since 1 November 2007 were issued by just 15 local commands – City Central (520 CINs), Newcastle (443), Wollongong (344), Coffs-Clarence (320), Manly (316), Wagga Wagga (312), Tweed-Byron (264), Mid North Coast (263), Richmond (260), Tuggerah Lakes (245), Far South Coast (234), Miranda (222), Brisbane Water (221), Oxley (207) and The Rocks (198).

By contrast, about half of the 80 local commands in NSW each issued the equivalent of fewer than one CIN a week, including several that issued fewer than a dozen CINs for the whole first 12 months of the state-wide scheme – Newtown (11 CINs), Rosehill (10), Green Valley (9), Gladesville (8), Quakers Hill (8), Ashfield (5), Cabramatta (5) and Rose Bay (2).

The mix of offence types also varies widely from command to command. In some commands where CINs are frequently used, 80% to 90% are for offensive conduct and offensive language. Some other commands rarely issue offensive conduct or offensive language CINs, but issue a number of larceny or shoplifting CINs. These include former trial sites such as Bankstown, Blacktown, Lake Illawarra and Parramatta. Only a handful of commands issue substantial numbers of CINs for all three main CIN offences.

While the state-wide CINs scheme is still in its early stages, the initial data relating to CINs issued and the feedback provided by police in interviews and focus groups, indicates that the current use of CINs appears to be concentrated in:

1. **CBD and hub locations**

   High-use commands such as City Central, Manly, Newcastle and Wollongong have busy shopping and entertainment precincts, and experience frequent influxes of visitors. Most CINs in these commands are issued for offensive conduct and, to a lesser extent, offensive language and shoplifting. Many recipients reside outside the command and very few CINs are recorded as having been issued to Aboriginal people. For instance, of the 443 CINs issued in Newcastle City LAC in its first year of using the fines, 61% were for offensive conduct and the proportion of all CINs issued to Aboriginal people was 2%. In Manly LAC, another enthusiastic new user of the scheme, 74% of its 316 CINs were for offensive conduct and none were recorded as having been issued to Aboriginal people. To some extent, commands with busy entertainment areas or transport hubs – such as Miranda, Kings Cross, The Rocks and Surry Hills – might also be characterised in this way. Although they issue fewer CINs than the high-volume CBD locations, the mix of offences is similar.

2. **Suburban and outer urban retail precincts**

   Commands with busy retail precincts in suburban Sydney, the Illawarra and the Central Coast issue more CINs for larceny or shoplifting than for any other offence. Data from the extended CINs trial period (2002 – 2007) shows that half or more of the 12 trial commands could be characterised in this way. For some, larceny makes up more than two-thirds of the CINs they issued since 2002 – eg. Bankstown (70% of CINs were for larceny), Blacktown (77%), Parramatta (69%) and Lake Illawarra (71%). As with the CBD or hub commands, the records indicate that these commands issue very few CINs to Aboriginal people.

182 Commands in Sydney, the Central Coast, Newcastle, the Illawarra and Wollongong issued 113 of the 645 CINs issued to Aboriginal and Torres Strait Islander people in NSW for 1 November 2007 to 31 October 2008.

3. **Large regional centres**

   The highest volumes of CINs issued to Aboriginal people are in commands based in larger regional centres such as Coffs/Clarence, Richmond (based in Lismore), New England, Far South Coast, Oxley, Mid North Coast and Wagga Wagga. Most CINs issued in these locations are for offensive conduct and, to a lesser extent, offensive language and larceny. Feedback from senior police and general duties officers indicates that CINs in these commands are usually issued in the main street areas of regional cities and at times when the focus is on anti-social behaviour and maintaining public order, typically on Friday or Saturday nights as licensed premises are closing, or in conjunction with major festivals or events.

4. **Towns with high numbers of Aboriginal residents**

   Although police in commands such as Castlereagh (based at Walgett) and Darling River (Bourke) issue far fewer CINs than their colleagues in large regional centres and might be characterised as 'low-use' in terms of the total number of CINs issued, they are important in the context of this review because the small number of CINs that they do issue are mostly to Aboriginal people.

Outside of these situations, the use of CINs to date remains comparatively rare. About half of all local area commands in NSW issue no more than one CIN a week. Almost all of these 'low-use' commands are located in and around suburban Sydney. Despite their modest use of CINs, some of these commands have significant crime issues including several with very high rates of domestic violence. What seems to set them apart from the commands that make much more frequent use of CINs is that they have neither the transport hubs nor the concentrations of entertainment or shopping precincts where the majority of CINs are issued. As the commander of one busy western Sydney command explained:

> *To be perfectly honest, mate, we are fully occupied dealing with substantive offences. We haven't got time to bother people with CIN notices just because we don't like their language … we're not interested in somebody dropping the occasional 'F' word.*[183]

Much of the growth in CINs issued to Aboriginal people since the state-wide roll out in November 2007 has occurred in the commands based in large regional centres and, to a lesser extent, the less populous commands with high numbers of Aboriginal residents. Feedback from interviews of commanders and senior officers at Wagga Wagga, New England, Far South Coast and Coffs/Clarence indicates that most CINs in large regional centres are issued in busy main street locations, usually on Friday or Saturday nights as licensed premises are closing. One commander said CINs were typically useful for:

> *… our Target Action Group and our General Duties crews around … 2 to 3am when we have closing time in* [name of regional centre]. *If they do happen to confront someone for anti-social behaviour, offensive language conduct that sort of thing, they can deal with them on the spot. As opposed to resorting to arrest and taking the police off the street and then tying someone up in custody and, well we can keep our resources out there and keep our visibility there.*[184]

A commander in another large regional centre said he encouraged his officers to use CINs as part of that command's efforts to deter alcohol-related offending around licensed premises:

> *I think it's important especially for country commands where quite often our centres of activity … are concentrated on our CBDs … I actually do encourage my police especially at* [name of town] *if it's closing time and there's no better deterrent to would-be offenders to see a couple of people get thrown in the back of a paddy wagon … I'm not saying those people are dragged back to the police station and charged … more often than not they'd be taken home … and given a Field CAN or a CIN.*[185]

Both commanders said the relatively high numbers of Aboriginal people being issued with CINs in each of their commands was incidental to police efforts to maintain public order in areas adjacent to licensed premises in main street locations.

Commanders and senior officers based in smaller towns such as Walgett and Bourke said the use of CINs in those locations differed markedly from larger regional centres. When asked to describe a typical situation where CINs might be used, one commander said most CINs in his Western Region local command are issued in response to disturbances and incidents in residential areas:

> *In these towns … the majority of CINs are going to be issued for things such as offensive conduct style offences … Generally it is alcohol-related but not necessarily around licensed premises. A lot of it is related to alcohol consumed at home … and often it is in the street and it might be immediately preceding or after some sort of melee. It's generally a situation where there has been a volatile incident and people are wound up* [and]

183 Local Area Command interview, 20 January 2009.
184 Local Area Command interview, 22 January 2009.
185 Local Area Command interview, 28 January 2009.

> *the police are trying to arrest a number of people and other people become involved or* [police are] *trying to disperse a crowd.*[186]

Similarly, a senior officer from another Western Region town said most CINs in his command were issued in response to alcohol-related disturbances on streets in residential areas, and not in main street locations. He said he would like his officers to make greater use of CINs, but factors limiting their ability to do so included the seriousness of the offending behaviour – especially if improvised weapons are used, the need to arrest and remove potential protagonists to prevent volatile situations escalating further, the criminal history of people involved in the incidents and the need to impose bail conditions to deter further offending.[187]

6.4. Using CINs to target public order offences

As the data in figure 8 highlighted in the previous section, the shift towards a scheme where the majority of CINs issued are for minor public order offences was even more pronounced among Aboriginal recipients. Whereas 47% of CINs issued to Aboriginal people during the extended trial period were for offensive conduct and offensive language, these two offences now account for 83% of CINs issued to Aboriginal recipients. This shift occurred at a time when the proportion of CINs issued to Aboriginal people rose from 2.7% of all CINs issued, to 7.4%.

Almost all submissions expressed concerns about the high use of CINs for offensive language and offensive conduct to impact on Aboriginal communities. The specific criticisms vary, but generally related to concerns that:

- such a high proportion of the CINs issued to Aboriginal people are for public order offences (offensive language and offensive conduct)
- the breadth of discretion and lack of transparency in the standards that officers are required to apply in determining whether and how to act on these offences, and
- the processes and decisions relating to issuing CINs are generally not subject to independent review or scrutiny – except on the rare occasions that a recipient elects to have a local court review the fine (see Figure 7.1 and the related discussion in Chapter 8).

For many, the breadth of police discretion in deciding when and how to act on these offences significantly raised the risk of arbitrary or biased decision-making. The Law Society of NSW argued that when individual officers decide to act on offensive language incidents, it is unclear when they should warn the offender, issue a CIN or proceed by way of charge.

> *The selection process by which a CIN … is issued appears to be quite arbitrary. This is in contrast to, for instance, a speeding offence where the procedure to be followed by police is the issue of a Traffic Infringement Notice (which has similar features to a CIN). If a police officer has a particular bias or view about certain types of offences or particular individuals or groups, this may affect his or her decision about whether to issue someone with a CIN or a CAN.*[188]

There were also concerns about whether the breadth of police discretion in determining if and when to act on offensive language and offensive conduct incidents could disproportionately impact on Aboriginal communities, especially marginalised groups in those communities. In this regard, several submissions argued that police decision-making in this area should consider:

- The normalisation of offensive language in some Aboriginal communities, where the language used might be considered offensive or aggressive in other contexts but not in that community or situation.
- The influence of broader social issues in the language used such as a lack of education or positive role models, feelings of helplessness or frustration, whether the language used is symptomatic of pressures associated with social and emotional dysfunction, the prevalence of substance misuse, and other underlying factors.
- That household arguments or grievances in Aboriginal communities may be more likely to be dealt with and resolved in public settings rather than 'behind closed doors'.[189]

These submissions reflect long-standing community concerns about the policing of offensive language and offensive conduct incidents and the impact on Aboriginal communities. There was some support for these views among local commanders in western NSW, including one who attributed much of the bad language he encountered to frustration rather than a deliberate intent to offend:

186 Local Area Command interview, 15 January 2009.
187 Senior Officer interview, 27 January 2009.
188 Law Society of NSW submission.
189 Ruth Hodson submission, 2 March 2009; Attorney General's Department submission; Mission Australia submission and Law Society of NSW submission.

Aboriginal people around here tend to be fairly inarticulate when it comes to making their point, particularly when they get frustrated and more so if they are intoxicated, they just swear a lot more out here … they become frustrated very easily because they can't say or describe what they want to, they revert to a fairly base style of communication which is more prevalent out here in the West and you know they tend to get thrown in for offensive language – it's as simple as that.[190]

He contrasted this with his experience working with Aboriginal communities in coastal regions where there was lower unemployment and easier access to education and training opportunities, and where the residents in those communities tended to be 'more articulate, they're more easily able to set out what they are trying to say rather than becoming frustrated and abusive'.

In examining the alleged conduct associated with the issuing of CINs, we reviewed police records relating to offensive conduct and offensive language CINs issued to Aboriginal people. Figure 9 summarises offence-related information noted in police narratives about incidents that led to the issuing of CINs to Aboriginal people. Narratives are recorded centrally and form the basis of the police briefs of evidence if the recipient elects to have the matter heard at court. As such, they are expected to note key elements of the offence.

Figure 9 Conduct associated with CINs issued to Aboriginal people

Offensive language (n=103)	Offensive conduct (n=77)
Words used: • 90% 'fuck', 68% 'cunt', 63% used both • 79% of incidents involved alcohol Who the language was directed at: • 70% police only, 23% police and others Witnesses: • 18% witnessed by police only	Conduct alleged: • 40% violence, 25% urinating, 26% offensive language • 84% involved alcohol Witnesses: • 18% witnessed by police only, 55% witnessed by police and others

Source: Ombudsman audit of police narratives from COPS event entries 1.9.2002 to 31.12.2007.

The review of offensive conduct CINs showed that some form of violence was alleged in 40% (30 of 77) of these incidents, most often for 'fighting'. Urinating and offensive language were the next most common forms of conduct alleged. Offensive conduct CINs that involved some form of bad language generally also alleged some other conduct. However, four of the offensive conduct CINs reviewed appeared to have been issued for the language alone.

As expected, the array of expletives cited in relation to the offensive language CINs typically involved use of the words 'fuck', 'cunt' or – in most cases – a combination of the two. Of the 103 offensive language incidents reviewed, there were four where the language alleged was not specified in the narrative, and there was one incident involving use of the term 'white trash'.

Alcohol was noted as a factor in the majority of incidents relating to both offences. This is consistent with advice from interviews of senior officers and focus group discussions with frontline police, who said that CINs were most commonly issued in conjunction with operations to maintain public order around licensed premises or at major festivals or events. The frequency that violence is cited as a factor in decisions to impose a CIN for offensive behaviour also lends some support to police arguments that although offensive behaviour is generally characterised as a minor summary offence, the threatening behaviour associated with many minor public order incidents has the potential to create serious disruption or harm.

6.5. Trends in offensive language and offensive conduct proceedings

Issuing a CIN is just one of a number of options available to police when responding to minor public order offences. Figures 10 and 11 show the number of Aboriginal and non-Aboriginal adults proceeded against by police by way of charges, fines or warnings for offensive language or offensive conduct incidents from 2002 to late 2008.

190 Local Area Command interview, 15 January 2009.

Figure 10: Persons aged 18 and over^ proceeded against^^ by police for offensive conduct

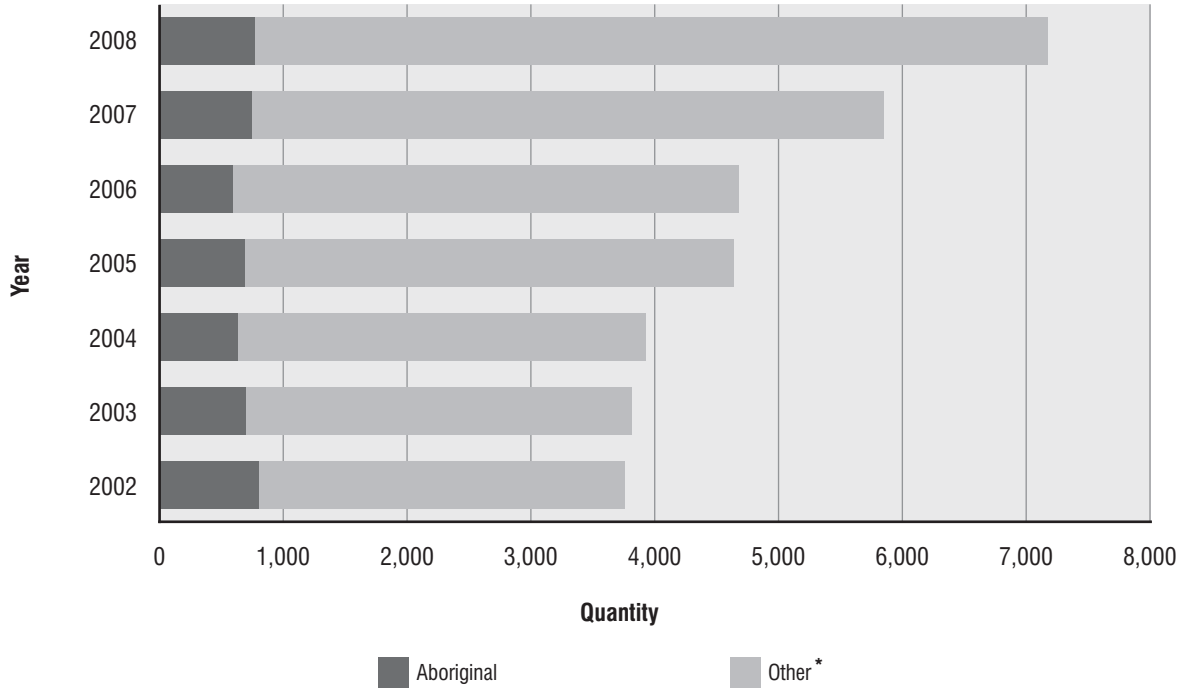
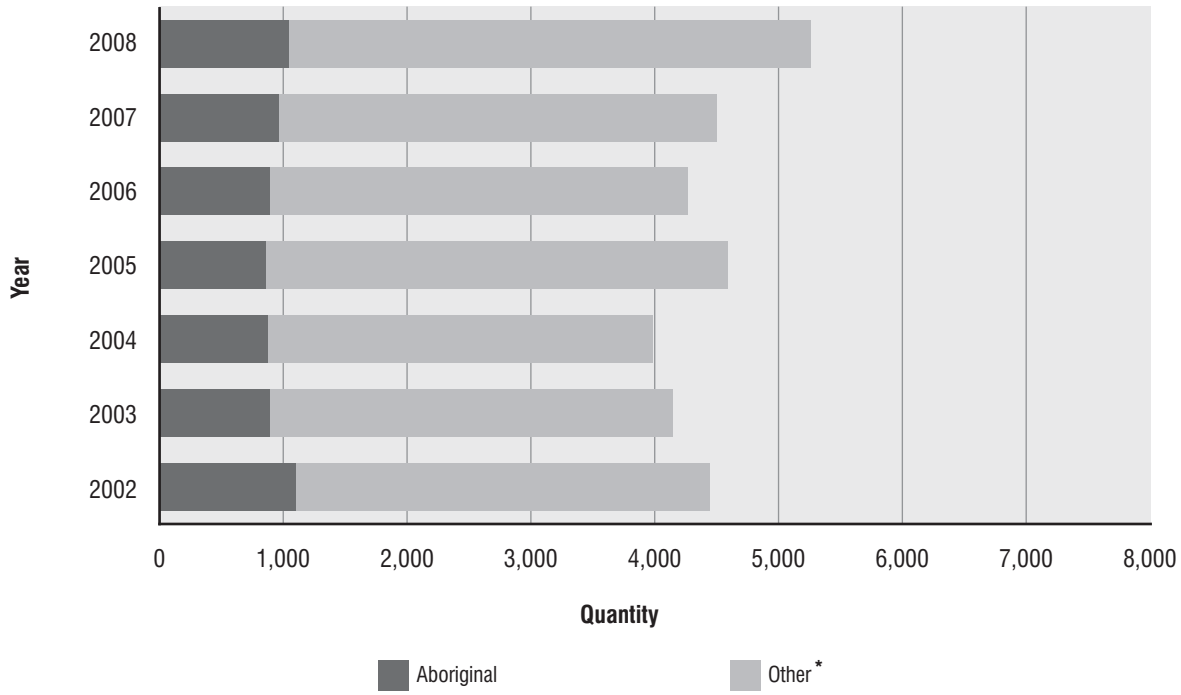


Figure 11: Persons aged 18 and over^ proceeded against^^ by police for offensive language



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666

*** 'Other' includes non-Indigenous and missing/unknown records. ^ Refers to all adult persons of interest (POIs) where age was known. This is not a count of unique offenders. Where an individual is involved in multiple criminal incidents throughout the year they will appear as a POI multiple times. ^^ 'Proceeded against' includes all proceeding to court by way of Court Attendance Notice or proceeded against other than to court by way of Criminal Infringement Notice, Infringement Notice or Warning.**

The number of adult offensive conduct incidents where police charged the offender, issued a CIN or some other infringement notice, or issued an informal caution or warning, has increased every year from 3,759 persons proceeded against in 2002 to 7,174 in 2008. By contrast, the number of offensive language proceedings remained more or less steady until 2007, then jumped from 4,499 persons proceeded against in 2007 to 5,258 in 2008, an increase of 17%.

In considering whether Aboriginal people might be disproportionately affected by police decision-making in this area, figures 10 and 11 show that the number of Aboriginal people proceeded against for both offences is much higher than would be expected for a group that makes up just 2% of the population of NSW. In 2007, Aboriginal people were the subject of 20% of all proceedings relating to offensive language incidents and 11% of offensive conduct incidents. Yet in terms of the number of incidents, the data for both offences indicates that similar numbers of Aboriginal people are being charged, fined or warned for these offences today as they were in 2002. Even in relation to offensive conduct, where there have been notable increases in action taken by police, proceedings against Aboriginal people have remained steady – 803 matters in 2002, compared to 769 in 2008. Moreover, as a proportion of all offensive conduct proceedings, Aboriginal involvement has actually fallen – from 21% (803 out of 3,759) of offensive conduct incidents in 2002, to 11% (769 of 7,174) incidents in 2008.

So although Aboriginal people are still being charged, fined and cautioned by police for offensive language and offensive conduct incidents in much higher numbers than would normally be expected for 2% of the population, the *numbers* of Aboriginal offenders being proceeded against for both offences has not increased in recent years. And in the case of offensive conduct, the *rate* of Aboriginal involvement has actually decreased – though principally because many more non-Aboriginal offenders appear to be coming to police attention.

And although there were sharp rises in action taken in response to offensive conduct and offensive language incidents in 2008, it is too soon to know whether CINs were a factor in this growth. In the case of offensive conduct actions, up 23% (from 5,852 in 2007 to 7,174 in 2008), the data indicates this was already trending upwards before the state-wide extension of CINs. In the case of offensive language, a one-off rise of 17% in 2008 (from 4,499 to 5,258) might be the start of an upward trend, but it is too soon to know.

At a local level, the frequency with which police act on each of these offences varies widely. This is reflected in the number and type of CINs issued in each command – see table 3. The NSW Police Force submission said that the use of CINs was concentrated in those commands that were already acting on high numbers of 'CIN-able' offences.

> *The take-up rate is highest in local area commands where police experience the highest incidence of problems of this type (eg CBD areas with high anti-social issues and/or shoplifting). Similarly, local area commands with low usage are generally those with less of these problems. An initial assessment with regard to Aboriginal people again suggests that they are being dealt with by way of CIN in much the same proportion as they are identified in regard to the 'CIN-able' offences and again LACs with high numbers of CINs issued to Aboriginal people are areas with relatively more Aboriginal people.*[191]

Police data on the two most common CIN offences, offensive conduct and offensive language, support this view. In commands such as City Central, Newcastle and Manly where police already charge and warn high numbers of offenders for minor public order incidents, CINs use has also been high. Conversely, commands such as Ashfield, Cabramatta, Green Valley and Newtown rarely charge or warn offenders for CIN-type offences – and thus appear to have little use for the additional option of CINs.[192]

There can also be significant variations within individual commands. When Barrier command reviewed the 61 CINs it issued in the first nine months after the state-wide roll-out, it found that almost all were issued in Broken Hill. None were issued in Wilcannia, despite high numbers of CANs issued for CIN-type offences in that sector in the same period, especially offensive conduct. The 41 recorded offensive conduct incidents in Wilcannia in that period were made up of 24 Bail CANs, nine No Bail CANs, five Future CANs or summons, one Field CAN and two Cautions. The Crime Manager at Barrier LAC said CINs provide a ready alternative to some legal processes, especially Field CANs.

In relation to Barrier LAC's relatively high use of Future CANs and Bail CANs he noted:

> *The high number of future CANs are not so concerning to me as this course of action is often taken when the accused is intoxicated and could not be expected to understand a Field CAN or CIN infringement. (Served at later time when sober, not locked up).*

191 NSW Police Force submission 17 February 2009, at 5.1.

192 Source: Bureau of Crime Statistics and Research, 'Number of persons of interest aged 18 years and older for offensive language and offensive conduct offences (all combined) recorded by NSW Police by Local Area Command and method of legal proceedings by type of process', ref: jh09-7422.

> *The high number of Bail CANs are also not so concerning as circumstances have existed where bail conditions were required, or the offence continued (more often than not* [with] *other, more serious and violent offences involved).*[193]

There were opportunities to increase the use of CINs in locations where Field CANs were still being issued but, he said, the frequent use of Bail CANs and scarcity of Field CANs in Wilcannia indicated that there were fewer opportunities to use CINs in that sector.

Senior police based in Armidale, Bateman's Bay, Coffs Harbour, Wagga Wagga and other large regional centres said much of the growth in Aboriginal people being issued with CINs in those locations was incidental to police strategies to address anti-social behaviour in and around licensed premises in main street locations generally. One commander said:

> *We certainly focus on the behaviour and usually offensive conduct comes down to urinating in a street environment or fighting. It usually occurs in those, that environment on a Friday and Saturday night. We've got several high-risk licensed premises and it's part of our overall campaign against alcohol-related crime and anti-social behaviour around those premises on those nights.*[194]

He said the number of Aboriginal people issued with CINs in his command was higher than he expected.

> *I actually got a surprise … in relation to Aboriginals because* [that issue] *didn't really factor into our consideration of their use to start with. I was focused upon applying the use of CINs in the CBD environment … and my emphasis has always been alcohol-related crime and that really isn't … an Aboriginal and non-Aboriginal problem, it's a problem overall and predominantly I'd suggest it's mostly non-Aboriginal people.*[195]

Police in interviews and focus groups listed numerous factors that contribute to individual police decisions on whether and how to act on these offences, including their assessment of the seriousness of the offending conduct or language, whether the offence is continuing or likely to continue, the person's level of intoxication, and so on. The ease with which CINs can be issued and lack of available back-up also influenced police decision-making, especially in country commands. Officers at one country command said they could ill-afford to take a car crew off the road at busy times to process an arrest for a minor offence.

> *You might grab someone who's swearing. On the scale of things it's a minor thing and if you're going to take someone off the road to do that, you've then lost your second truck crew as a back-up.So if an all-in brawl starts, you've got two people against 100 whereas if we had four, it evens us up a little bit more.*[196]

> *Why tie yourself up for four hours when you could be done in two minutes and given them a CIN. Like you think, well what's the point in doing a CAN? I'm not going to go and sit for four hours in the charge room with him.*[197]

Other officers in the same group said that public scrutiny of police in smaller towns also contributed to pressure to act.

> *I'm not going to let anyone walk down the street and just swear at me when I'm off duty or on duty or whatever, you know carrying on like idiots. So – and people see you and they expect you to take action and do something about it … there's expectations of when you're the police in a small community that you will enforce these minor things because people don't, that's why people live in these little country towns is because they don't want to have to put up with the city lifestyle and the city hooligan sort of stuff.*[198]

However all of the western NSW commanders and senior officers contributing to this review said there was a need for police to adjust their expectations in relation to offensive language, and that officers need to be more tolerant in determining when to penalise offensive language in that context.

> *In these* [western region] *LACs police come from mainly metropolitan areas, many of them are very young and relatively inexperienced, and many of them have had very little to do with Aboriginal people. They do come out here* [and] *the immediate reaction of a lot of people is they are absolutely horrified by the way that offensive language is bandied around. I think whilst as part of that cultural awareness training you don't say that it's totally acceptable for people to use offensive language all the time, I think you have to probably condition people a little bit in that unfortunately it's just a little bit the way it is out here. And whilst I think it is getting better and it will improve over time, I think if you can pre-condition police that every time a person swears at someone it's not necessarily an offence that needs to be proceeded against – that's the first step in that process.*[199]

193 Email Barrier LAC Crime Manager, Inspector Paul Smith, 4 September 2008.
194 Local Area Command interview, 22 January 2009.
195 Local Area Command interview, 22 January 2009.
196 Officer focus group, 3 February 2009.
197 Officer focus group, 3 February 2009.
198 Officer focus group, 3 February 2009.
199 Local Area Command interview, 15 January 2009.

Although police in the officer focus group discussions voiced strong resistance to the notion that a person's capacity to pay a fine could be a factor in determining whether and when to issue a CIN, some conceded that this did sometimes influence their decision-making. Views included the comments by some officers that it was 'pointless' issuing a penalty notice if it was obvious that the person was unable to pay:

> *There's no point issuing* [a fine] *to someone if they've got no means to pay. It's pointless … you might as well do nothing.*[200]

Officers in the same group said that leniency should be extended to minor offenders whose situation or circumstances made it difficult to control their offending behaviour. They said that homeless people in their command often benefited from this kind of discretion:

> *If there's a couple of homeless people … urinating or doing something they shouldn't, if you – obviously you can't CIN them but if you were to arrest them every time you saw them* [offending] *you'd be forever* [arresting] *them or probably up for harassment and it's not worth it. So you just give them a warning and tell them to put it away or be quite firm.*[201]

This group of officers recognised the need to intervene but to exercise their discretion in a way that was most likely to address and reduce the person's offending behaviour. They said there were no hard and fast rules, but that fining or charging homeless people for minor public order offences rarely produced positive outcomes. However, the following case study shows an instance when police did proceed to issue a CIN:

Case study

A $150 CIN issued to homeless man accused of using offensive language included the following police description of the alleged offence: *At* [2.20pm, Sunday 26.12.2004, in Hyde Park North] *the accused was observed sitting in Hyde Park. Police stopped and spoke with the accused in relation to tourniquet on blanket and bail compliance. Accused became aggressive saying, 'Fuck off and leave me alone'. He was warned his language was offensive. He said, 'For Christ's sake fucking leave me alone.' He was again warned re offensive language. Accused stated: 'Go fucking hassle someone else this is my backyard.' Again warned. He said, 'Just fuck off.' Accused arrested for offensive language. Hyde Park is a public place in NSW.*

The Homeless Persons Legal Service prepared a letter on the man's behalf detailing his version of events. He said that after lunching at a drop-in centre in the city he had gone to the park to read his newspaper. He did not dispute the language used, but asserted that he only became abusive and continued to swear when – while he was handcuffed – the officers began to look through his personal effects, including photographs. As it was Boxing Day, he said there was no-one else around and that part of the park was deserted. The man was homeless and 'sleeping rough' in parks, and had a fortnightly income of $390.

After his application for leniency was rejected on 21 March 2005, the man elected to have the matter heard at court. When it was eventually heard on 16 February 2006, the magistrate dismissed it on the basis that the language was not offensive in the circumstances.

As at January 2009, SDRO enforcement records indicate that the $150 and $50 enforcement costs remain unpaid and 'pending civil action'. He has no other outstanding fines. Nor is there anything on the NSW Police Force COPS records to indicate the court outcome.

On 2 June 2009 we asked the SDRO to check its records relating to this matter and whether the police had been consulted in the decision to reject the application for leniency. On 15 June the SDRO advised: '*The rep was not referred to NSW Police. The client's solicitor was advised that SDRO had no authority to adjudicate and providing the options of payment or court election. The client court-elected.*' The following day the SDRO added that, after further checking, the unpaid enforcement order related to a $150 fine imposed by the court: ' *… the advice is that the matter was heard and a fine of $150 plus $50 EO cost. This is still outstanding and pending civil action. IMPS* [Infringement Management Processing System] *is correct as the last status was CAN issued. Court results do not go back into IMPS.'*

The Registrar of the Local Court where the matter was heard has since advised that the court records indicate the matter was 'dismissed'. There is no indication that a fine or costs were imposed.[202]

In response to the draft report, the SDRO advised: 'Following this matter being drawn to attention I can now confirm that the Enforcement Order has been withdrawn and the matter is closed with no outstanding amount to reflect the dismissal at Court'.[203]

200 Officer focus group, 5 March 2009.
201 Officer focus group, 5 March 2009.
202 SDRO Representation audit – CIN no. 10.
203 SDRO response to draft report, 20 July 2009.

While the police focus group's assertion that homeless people routinely benefit from police discretion to deal with offensive conduct and offensive language with a verbal warning, one practical difficulty in examining that discretion is that detailed records of these encounters are generally only created when more intrusive police take action – either by issuing a CIN or proceeding to charge. At present, there is no way to quantify how often these kinds of encounters result in a warning.

The officers in the focus group were more equivocal about people with mental health issues where scheduling under the *Mental Health Act 2007* or court-imposed measures might be needed, depending on the person's offending behaviour and apparent state of well-being.

> *It depends on the offence again. A serious offence – then they're charged and they rely on a Section 34.*[204]

Section 34 of the Mental Health Act provides for a Magistrate to review the medical assessment of anyone detained under the Act. This group also explained that frontline officers do not always have the information needed to make the best decision, or that they might view the options differently if other information were to come to light.

6.6. When language or conduct can be 'offensive' at law

The case law concerning when language or conduct may be considered 'offensive' at law and what tests that should apply in determining whether particular language or conduct is legally actionable were considered in detail in our 2005 report, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*. As noted earlier in section 3.2 of this report, the legal tests and the police policy regarding the standards that should apply in enforcing these offences remain largely unchanged. The following discussion relates mainly to additional issues raised in further submissions to the current review regarding the impact of CINs on Aboriginal communities.

A central concern raised by submissions related to whether CINs were being issued to deal with language or conduct that would not be considered offensive if the matters were to be referred to the courts. In its submission, the Law Society asserted that 'much of the language on which charges or CINs are based is not offensive at law'. As with the on-the-spot fines issued by transit officers for offensive language, it said that many offensive language CINs are based on language that would not be regarded as offensive by most magistrates and would almost certainly be dismissed if tested at court. The Law Society also reported instances of police taking action for offensive behaviour, but where subsequent analysis of the facts presented by police showed that the incident related to the lesser offence of offensive language.

In preparing its submission, Mission Australia sought advice from its youth services, including a youth legal service in Sydney, regarding their experiences in assisting Aboriginal and other clients to defend offensive language and offensive conduct charges at court:

> *In the experience of the youth legal service included in this submission, police often lay charges (and presumably issue CINs) for language that may be rude but is not 'offensive' at law. The Supreme Court states that it is not necessarily offensive to tell someone to 'f@#& off' or to use 'f@#&ing' as an adjective.*[205]

The policy guidance that the NSW Police Force provides to police officers regarding what constitutes an actionable offence of offensive language simply reflects the terminology in section 4A of the *Summary Offences Act 1988*, in that a defendant must have used offensive language in or near, or within hearing from, a public place or school. The police advice adds that the evidence of bystanders or observers is relevant and admissible, but not essential. The test is that of a 'reasonable man'.[206] Questions regarding the words or circumstances that make particular language offensive are not addressed.

The advice provided to police in relation to offensive conduct is similarly broad, but includes helpful examples of the kind of conduct that might warrant police intervention. In defining 'offensive conduct', the police guidelines explain:

> *There is no useful distinction between behaviour and conduct; it has a broad meaning and may apply to sexual harassment, throwing of missiles, fighting, urinating in public, insulting words/sounds directed to people, calculated to wound or offend the feelings of others, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.*

204 Officer focus group, 5 March 2009.
205 Mission Australia submission.
206 *Book of Proofs – A guideline which provides legal solutions for operational police*, Legal Services, NSW Police, 2002, updated 9 September 2003, accessed from NSW Police Force Intranet 31 March 2009.

The police guidelines note that this 'conduct' can extend to the wearing of a garment with offensive words and cite a 1990 Supreme Court case, *Stutsel v Reid*,[207] as authority for the view that members of the public need not be present for conduct or language to be considered offensive. In that case, the court held that no evidence need be adduced to prove that there was a person who could have heard the offensive words in the public place at the relevant time. NSW Police Force policy notes that offensive conduct might also include gestures, as the following case study shows.

Case study

A $200 offensive conduct CIN issued to an 18 year old man standing in the front yard of his home in late 2007 included the following police description of the alleged offence: *As police drove past the accused. The accused placed his left arm out and had a closed fist, with the middle finger pointing out up in the air. The accused moved his arm from right to left following police direction. Police conducted a U-turn and confronted the accused. The accused denied doing what he did, so he was issued with a Criminal Infringement Notice.*

The young man's father to wrote the SDRO asserting his son's innocence and alleging that the two officers were 'intimidating, offensive and rude' to his son, and were also 'very rude to me and my wife using unnecessary language'. A police investigation found the allegations against the officers 'not sustained' and concluded: '*If your son's actions are indicative of the attitude of youth in your area then police will be forced to take whatever action is necessary in the circumstances to maintain mutual respect.'*

SDRO records show the CIN was referred for enforcement a few months later and paid in full within days of the enforcement order being issued.[208]

Many submissions called for clearer guidance to frontline police and greater independent scrutiny. They saw this as vital to ensuring the fairness and integrity of police practices in this area, especially in light of the breadth of conduct that can be penalised and the fact that CIN recipients rarely court-elect – effectively limiting independent scrutiny or review of the standards applied in determining what conduct is actionable at law.

As noted earlier in this report at section 3.2, these issues were considered in some detail in our 2005 report on the earlier CINs trial, and led to the following recommendation:

> *Recommendation 5: That clear guidance on what does and does not constitute offensive language and conduct be provided to police officers to determine whether the Criminal Infringement Notice is the appropriate intervention.*[209]

In response to Recommendation 5, the NSW Police Force initially undertook to issue a Law Note providing guidance on existing case law regarding whether the language used is offensive, but noting that any decision on 'whether to lay a charge, issue a CAN, issue a CIN or issue a caution is a matter for the exercise of discretion by the individual officer'. After further consideration, police subsequently advised that there was insufficient recent and authoritative case law in this area to support a Law Note that provided further clarification to frontline officers in this area, and instead included two case studies in materials used to train officers on the appropriate use of CINs.

The offensive language scenario in those training materials describes a man talking loudly on his mobile phone and repeatedly using the word 'fuck' in conversation while standing among other people on a railway platform. Factors that trainee officers are encouraged to consider when deciding whether to issue a CIN include:

- that the man continued to use the word after being warned
- that on the last occasion he was aggressive and loud when he exclaimed, 'Fuck me, I'm only talking on the phone, leave me alone' which might lead to a reasonable person more likely to be offended or intimidated
- the number of people in the vicinity of differing ages, young and old
- tone of the words used
- the time of day, and
- the location.

207 *Stutsel v Reid* (1990) 20 NSWLR 661.
208 SDRO Representation audit – CIN no. 27.
209 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, 2005.

The trainer's notes then conclude that police have discretion to issue a CIN to the suspect based on the following information: appropriate circumstances; the suspect's name and address can be confirmed; the suspect is over 18 years of age; no further investigation is needed to prove the offence prior to the CIN being issued; police discretion in relation to the suspect's criminal history in relation to repeat offences etc; and the behaviour of the suspect is not continuing.[210]

The case study and materials for the offensive conduct scenario are similarly concise, describing a situation involving a man urinating in a public park on a Saturday morning, within sight of a small crowd protesting against a local building development. The trainer's notes advise that police have discretion to issue a CIN to the man based on the following information: 'appropriate circumstances; the suspect's name and address can be confirmed; the suspect is over 18 years of age; no further investigation is needed to prove the offence prior to the CIN be issued; police discretion in relation to the suspect's criminal history in relation to repeat offences etc; and the behaviour of the suspect is not continuing.'[211]

It is not clear whether the training used to facilitate the state-wide implementation of the CINs scheme will be repeated, and whether this and other policy and training materials available to officers will continue to be refined and developed. While most commands seldom fine or charge people for offensive conduct and offensive language offences, periodic refresher training should certainly be considered in commands that regularly prosecute these offences or routinely deal with people whose offending behaviour is affected by their substance addiction, mental health or intellectual disability, homelessness and other factors that contribute to their over-representation in the fines enforcement system. As discussed in chapter 8, the over-representation of Aboriginal people in the fines enforcement system and the presence of large numbers of Aboriginal people in a command may be another factor that alerts the NSW Police Force to the need for training or locally devised diversion strategies in that location.

One step towards improving the advice provided to officers might be to include information about the defences available in relation to offensive conduct and offensive language. In the case of offensive language, section 4A(2) states:

> *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.*[212]

Section 4(3) provides an identically worded 'reasonable excuse' defence available in relation to offensive conduct.[213]

Recommendations

1. That the NSW Police Force revise the guidance provided to police to reflect the requirements in section 4(3) and section 4A(2) of the Summary Offences Act that police should consider whether 'the defendant had a reasonable excuse for conducting himself or herself in the manner alleged'.
2. That the NSW Police Force training and policy advice for officers responding to offensive conduct and offensive language incidents include guidance about the options available to frontline police when dealing with people whose particular vulnerabilities such as homelessness, substance addiction, intellectual disability or mental health may be contributing to their offending behaviour.
3. That the NSW Police Force develop local strategies to reduce the over-representation of Aboriginal people being charged and fined for offensive conduct and offensive language incidents.

The NSW Police Force supported these recommendations, indicating that any advice provided should enhance rather than impede individual police discretion when dealing with offensive conduct and offensive language incidents.

210 NSW Police Force, *Mandatory Continuing Police Education Scheme – M037,* July 2007 at 2.77.
211 NSW Police Force, *Mandatory Continuing Police Education Scheme – M037,* July 2007 at 2.80.
212 *Summary Offences Act 1988.*
213 *Summary Offences Act 1988.*

In supporting Recommendation 2, the police response added that it already has training and policies in place to 'provide guidance on dealing with vulnerable people from a range of communities'. Our recommendation that specific guidance be provided to assist police when dealing with people whose homelessness, substance addiction, intellectual disability or mental illness might affect their ability to control their language or behaviour was not intended to belittle the significant progress police have made in relation to dealing with vulnerable clients in other contexts. This is particularly true with respect to the supports now routinely provided to a range of vulnerable people brought into police custody or referred to other services for treatment or assistance. The training and guidance we have recommended above is intended to complement these measures.

In supporting our suggestion that police develop local strategies to reduce the disproportionately high numbers of Aboriginal people being charged or fined for offensive conduct and offensive language incidents, the police response noted evidence presented in our report (figure 10 and figure 11) showing that the numbers of Aboriginal people being proceeded against for these two offences had not increased in recent years and, in relation to offensive conduct, that the proportion of Aboriginal involvement had actually fallen – from 21% (803 out of 3,759) of offensive conduct incidents in 2002, to 11% (769 of 7,174) incidents in 2008 – as police prosecute many more non-Aboriginal offenders for this offence. While positive, the data also shows that a small number of commands are responsible for the majority of prosecutions, highlighting the potential for local strategies and individual commands to further reduce over-representation.

6.7. Net-widening concerns

As part of this review, we asked police, government agencies, legal and advocacy groups and Aboriginal community organisations to comment on whether giving police the option of issuing CINs for minor criminal offences had resulted in fewer people being warned or cautioned for those offences – thereby leading to 'net-widening' in that the use of CINs would effectively widen or increase the formal actions taken by police in those instances.

Many submissions argued that the speed and relative ease with which police can issue CINs would almost certainly contribute to net-widening, and that early data showing that Aboriginal people are issued with CINs at considerably higher rates than non-Aboriginal people may be evidence that this net-widening is already disproportionately impacting on Aboriginal communities.[214]

> *When one considers that offensive language and behaviour constitutes so much of the use of CINs against Aboriginal people, the question arises as to whether these sorts of matters might otherwise have proceeded by way of warning. The suspicion must be that net-widening is occurring.*[215]

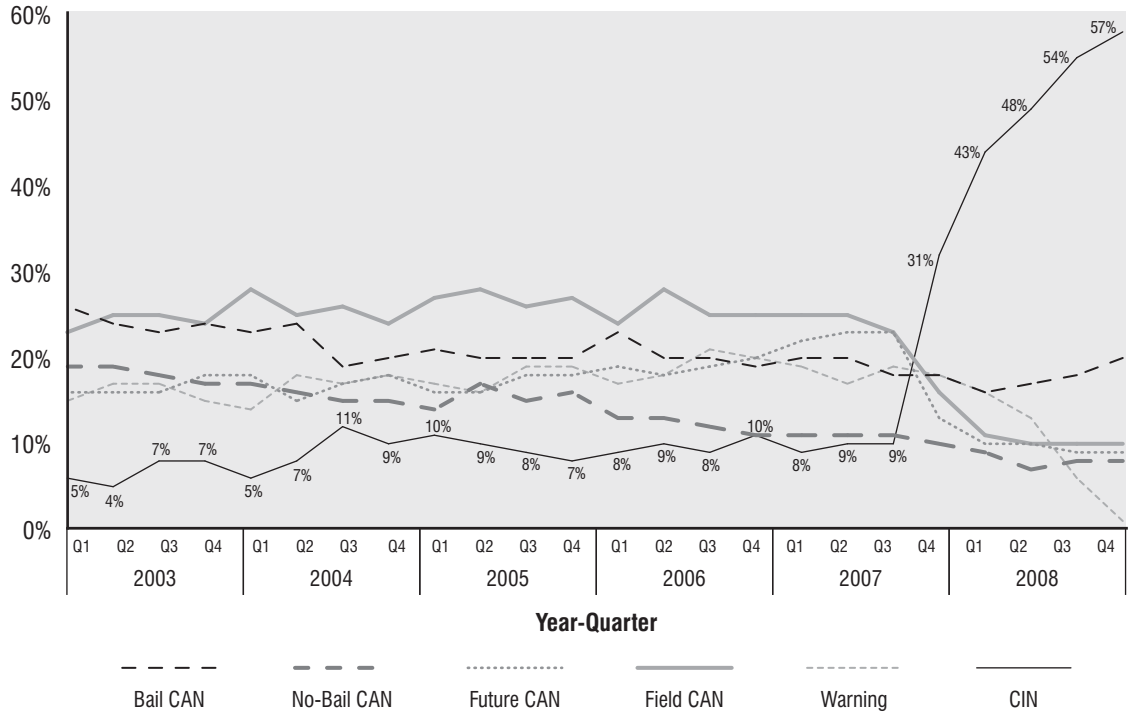
The NSW Police Force submission rightly cautions against putting too much weight on any data so early in the state-wide use of CINs. It generally agreed that increases in CINs should lead to fewer people being arrested and charged for those 'CIN-able' offences, while the number of recorded informal cautions or warnings should remain steady. However, the police submission warned, these figures can also be influenced by other factors such as the level of policing activity, and that it was too soon to identify causal factors from the limited data available.

> *It is not clear whether there is any net-widening since the introduction of CINS. It is a complex question which requires further consideration. This is specifically so in terms of identifying causal links and examining whether any increases are products of increased pro-activity or a movement from warnings to the issuing of a CIN. A further consideration is whether action is now being taken because of the simplification of the process created by the introduction of CINS when it should have been taken but was not previously so taken. Again, this is an area where the data does not allow meaningful interpretation at this time.*[216]

Although, as the police submission emphasises, many factors can affect the data and it may be too soon to identify meaningful trends, the data shows that CINs have already had a noticeable impact on the types of processes used by police to deal with the most common CIN-type offences. Figure 12 shows CINs issued for the two most common CIN offences, offensive conduct and offensive language, as a proportion of all legal processes used for these two offences.

214 Ruth Hodson submission, 2 March 2009; Law Society of NSW submission; Ted Noffs Foundation submission.
215 Law Society of NSW submission.
216 NSW Police Force submission 17 February 2009.

Figure 12 All legal processes for offensive conduct & offensive language (combined) incidents involving persons aged 18 years or older in NSW, 2003 – 2008



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Data excludes records relating to offensive conduct or offensive language incidents relating to persons younger than 18 years old.

In 2008, the first full year of the CINs scheme, almost half (49%) of the 12,432 recorded offensive conduct and offensive language incidents in NSW were dealt with by way of CINs. The rapid shift to using CINs after the scheme was extended state-wide in late 2007 coincided with a decline in the proportion of offensive conduct and offensive language incidents being brought before the courts. In 2007, 68% or 6,773 of the 10,351 recorded offensive conduct and offensive language incidents in NSW led to some form of Court Attendance Notice (CAN). This fell to 40% (5,004 of 12,432) in 2008. The decreases were most evident in relation to CANs served at the point of arrest (Field CANs – down from 21% in 2007 to 9% in 2008), and future-service CANs or summons (Future CANs – down from 19% to 8%). CANs with no bail conditions (No-bail CANs) dropped from 10% to 7%, maintaining a long-established downward trend for these offences, while CANs with bail conditions imposed (Bail CANs) appeared to be relatively unaffected by the introduction of CINs. This is consistent with feedback provided through interviews of local commanders and senior officers who said that CINs and other less punitive options are unlikely to be used if the circumstances of the offence are serious enough to warrant bail conditions being imposed.

The other noticeable decrease was in the number of recorded warnings which fell from 17% of all legal processes for these two offences in 2007 to 8% in 2008. After consistently recording between 350 to 550 warnings per quarter for adult offensive conduct and offensive language incidents in NSW for a few years, this fell to 130 warnings recorded for these two offences in July – September 2008 and just 2 warnings in October – December 2008. As there was no evidence to indicate a fall in offending behaviour or policing activity (in fact, the data showed that police now act on more public order offences than ever) the fall in warnings suggested a change in recording practices. The NSW Police Force confirmed that from August 2008 it changed the way that warnings are recorded on COPS. In the field used to record 'Legal Processes', it restricted the use of 'Warnings' to warnings issued under the *Young Offenders Act 1997*. Thus any 'informal' warnings or cautions issued to adults in relation to CINs and other offences, thereafter had to be recorded in another way. This will be discussed further in section 6.8.

The state-wide shifts accompanying the increased use of CINs are also evident in individual local commands that now make frequent use of CINs. Table 7 shows quarterly legal actions initiated by two leading users of CINs – Manly and Newcastle City LACs – in relation to adult offensive conduct and offensive language incidents since 2005.

Table 7 Legal processes for offensive conduct & offensive language (combined) incidents involving persons aged 18 years or older in Manly and Newcastle LACs, 2005 – 2008

		2005				2006				2007				2008			
LAC	**Type of Process**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**
Manly	Bail CAN	–	3	5	5	2	4	3	5	5	3	2	1	2	2	4	7
	No-Bail CAN	4	6	8	10	2	3	1	2	1	3	2	3	2	1	1	3
	Future CAN	5	5	2	13	3	5	3	2	2	–	3	2	3	–	–	2
	Field CAN	14	30	48	71	42	33	37	24	17	18	31	17	3	1	–	3
	Proceeded against to court	**23**	**44**	**63**	**99**	**49**	**45**	**44**	**33**	**25**	**24**	**38**	**23**	**10**	**4**	**5**	**15**
	Criminal infringement notice	–	–	–	–	1	–	–	–	–	–	–	38	71	71	64	93
	Infringement notice	–	–	–	–	–	–	–	–	–	1	–	–	–	1	–	1
	Warning	9	6	4	7	13	5	6	10	5	4	13	8	4	5	1	–
	Legal process - other	–	–	–	–	–	–	–	–	–	–	–	–	–	–	2	–
	Proceeded against other than to court	**9**	**6**	**4**	**7**	**14**	**5**	**6**	**10**	**5**	**5**	**13**	**46**	**75**	**77**	**67**	**94**
	All proceedings	**32**	**50**	**67**	**106**	**63**	**50**	**50**	**43**	**30**	**29**	**51**	**69**	**85**	**81**	**72**	**109**
Newcastle	Bail CAN	14	6	2	7	4	6	3	7	8	13	8	16	6	15	7	10
	No-Bail CAN	15	6	14	8	6	11	3	3	7	3	6	13	9	11	2	4
	Future CAN	3	3	6	3	4	2	3	16	20	35	22	8	6	8	4	9
	Field CAN	26	16	15	24	9	20	15	25	29	36	26	15	15	9	5	3
	Proceeded against to court	**58**	**31**	**37**	**42**	**23**	**39**	**24**	**51**	**64**	**87**	**62**	**52**	**36**	**43**	**18**	**26**
	Criminal infringement notice	1	–	1	–	–	–	–	1	–	–	4	78	110	71	47	49
	Infringement notice	–	1	1	–	–	–	–	–	5	13	4	–	2	–	–	–
	Warning	9	7	13	7	6	13	17	9	23	25	29	24	25	22	7	–
	Legal process – other	–	–	–	–	–	–	–	–	–	–	–	1	3	1	2	–
	Proceeded against other than to court	**10**	**8**	**15**	**7**	**6**	**13**	**17**	**10**	**28**	**38**	**37**	**103**	**140**	**94**	**56**	**49**
	All proceedings	**68**	**39**	**52**	**49**	**29**	**52**	**41**	**61**	**92**	**125**	**99**	**155**	**176**	**137**	**74**	**75**

Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Includes all adult persons of interest (POIs) where age was known. This is not a count of unique offenders. Where an individual is involved in multiple criminal incidents throughout the year they will appear as a POI multiple times. The term 'legal process – other' refers to recorded incidents where the process used was not further classified on COPS.

The quarterly CINs data in table 7 shows that both commands quickly embraced CINs when the scheme was extended beyond the 12 trial areas in late 2007. This is consistent with the observation noted at the start of this chapter that commands with busy shopping, entertainment and transport hubs began issuing CINs in relatively high numbers as soon as this option was made available in those areas.

Table 7 groups the data for each command to show all proceedings where offenders are brought before the courts for these offences ('Total CANs'), and all those proceeded against other than to court, principally by way of CIN or warning ('Total other than court'). Since the introduction of CINs in November 2007, Manly and Newcastle police have brought far fewer offenders before the courts for offensive conduct or offensive language. In Manly, there is a marked decrease in the use of Field CANs for these offences. In Newcastle, fewer Future CANs and Field CANs were issued in 2008 – at least compared to relatively high numbers issued in 2007. These shifts indicate a positive benefit in reducing the number of offenders brought before the courts in both locations.

As with the state-wide data, there are also fewer recorded warnings. In Manly, the drop in recorded warnings occurred at about the time that CINs were introduced. In Newcastle, recorded warnings for these offences remained steady for the first half of 2008, then fell after July – coinciding with changes in August 2008 to the way adult warnings are recorded.

Also, police in both commands appear to be detecting and acting on higher numbers of offensive conduct and offensive language incidents. That is, the marked rise in CINs is greater than the fall in CANs, suggesting an increase in policing activity to deal with these offences.

The situation is similar among other police commands that started issuing high numbers of CINs following the state-wide roll out in late 2007. Table 8 shows CANs, CINs and warnings relating to offensive conduct and offensive language in five local commands that first used CINs in November 2007, and quickly became leading issuers of CINs in NSW.

Table 8 Legal processes for offensive conduct & offensive language (combined) incidents involving persons aged 18 years or older in the Coffs-Clarence, Far South Coast, Tweed-Byron, Wagga Wagga and Wollongong LACs, 2005 – 2008

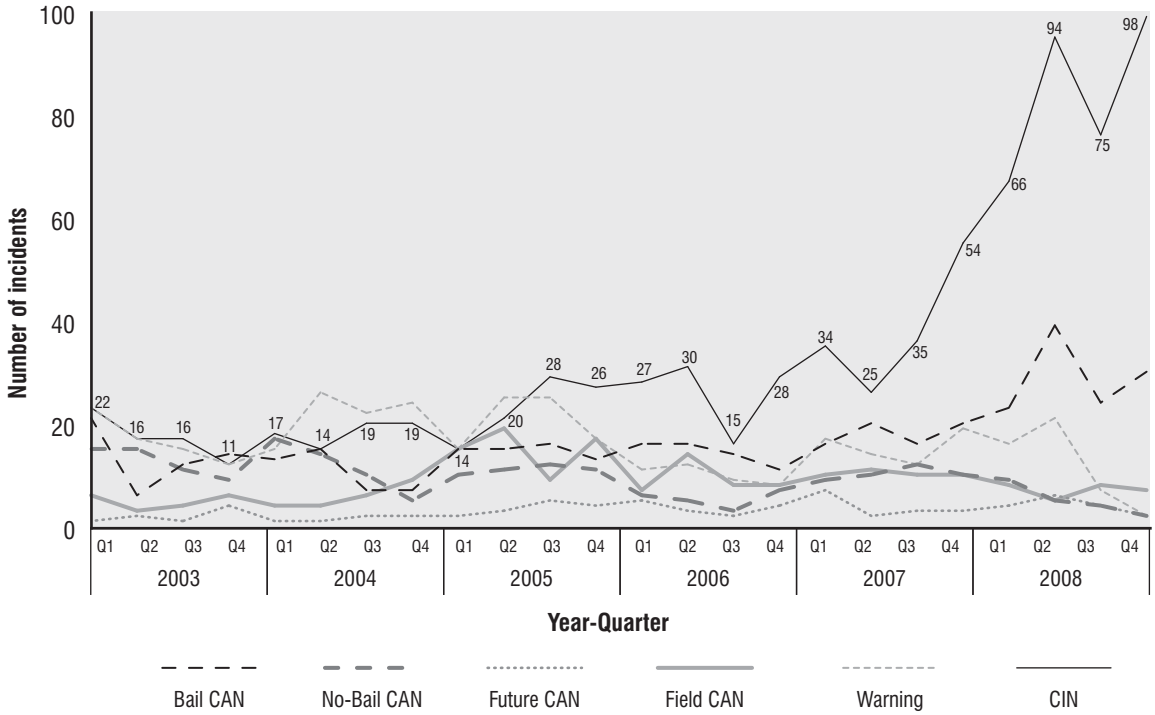
		2005				2006				2007				2008			
LAC	**Type of Process**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**
Coffs-Clarence	Total CANs	42	43	40	49	40	43	46	65	49	31	42	38	31	23	10	17
	CINs	–	–	–	–	–	–	–	–	–	–	–	19	34	55	67	61
	Warning	12	10	14	10	10	7	11	11	5	5	5	7	9	4	2	–
	All proceedings	**54**	**53**	**54**	**59**	**50**	**50**	**57**	**76**	**54**	**36**	**47**	**65**	**77**	**82**	**81**	**81**
Far South Coast	Total CANs	35	26	15	32	49	18	31	43	34	26	32	21	12	14	10	11
	CINs	–	–	–	–	–	–	–	–	–	–	–	28	73	30	39	58
	Warning	4	3	10	5	5	6	5	19	14	2	4	6	12	6	4	–
	All proceedings	**39**	**30**	**25**	**37**	**54**	**24**	**37**	**62**	**48**	**28**	**36**	**58**	**98**	**50**	**55**	**70**
Tweed-Byron	Total CANs	62	27	24	42	28	37	33	33	25	42	40	38	15	13	13	18
	CINs	–	–	–	–	–	–	–	–	–	–	–	32	62	43	31	54
	Warning	13	11	14	24	14	12	18	27	29	15	16	26	22	3	5	–
	All proceedings	**75**	**38**	**38**	**66**	**43**	**49**	**51**	**60**	**54**	**58**	**58**	**98**	**100**	**61**	**49**	**75**
Wagga Wagga	Total CANs	24	32	22	33	24	24	35	20	28	50	53	39	19	11	12	14
	CINs	–	–	–	–	–	–	–	–	–	–	–	28	72	60	31	44
	Warning	6	8	4	5	6	4	14	6	5	1	4	6	8	6	2	–
	All proceedings	**30**	**40**	**26**	**38**	**30**	**28**	**49**	**26**	**33**	**51**	**57**	**73**	**100**	**78**	**46**	**60**
Wollongong	Total CANs	18	17	8	36	34	38	36	39	33	34	36	32	27	18	19	29
	CINs	–	–	–	–	–	–	1	1	1	–	–	34	67	44	58	51
	Warning	5	4	1	3	2	4	4	3	10	5	12	14	10	10	2	–
	All proceedings	**23**	**22**	**9**	**39**	**36**	**42**	**42**	**43**	**46**	**41**	**48**	**84**	**106**	**74**	**81**	**83**

Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Data refers to all adult persons of interest (POIs) where age was known. This is not a count of unique offenders. Where an individual is involved in multiple criminal incidents throughout the year they will appear as a POI multiple times. 'All proceedings' is the sum of all CANs, CINs, warnings and legal process not further classified.

The shifts that were evident in the state-wide data and at Manly and Newcastle are also evident in the data for these other leading users of CINs. All are issuing high numbers of CINs and fewer CANs, and most are dealing with historically high numbers of offensive conduct and offensive language incidents. Monitoring is needed to determine what influence CINs might have as the scheme becomes established practice in these areas.

The experience of local commands that trialled the use of CINs since 2002 may provide clues on how the frequent use of CINs in a particular location might impact on the use of other legal processes for the same offences. Figure 13, compares City Central LAC's use of CINs for offensive conduct and offensive language incidents with other legal processes used for dealing with these incidents since 2002.

Figure 13 Legal processes for offensive conduct & offensive language (combined) incidents involving persons aged 18 years or older in City Central LAC, 2003 – 2008



Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Figure includes all adult persons of interest (POIs) where age was known. This is not a count of unique offenders. Where an individual is involved in multiple criminal incidents throughout the year they will appear as a POI multiple times.

As one of the most active issuers of CINs among the 12 trial commands throughout the extended trial period, City Central has led the use of CINs from the outset. Yet although City Central police have had the option of issuing CINs since 2002, their use of CINs escalated around the time that the scheme was extended to the rest of NSW. CINs are now the main way that City Central police deal with offensive conduct and offensive language incidents. In September – December 2008, 72% (98 of 136) of all recorded offensive conduct and offensive language matters in City Central were dealt with by way of CIN.

The types of CINs issued also changed as City Central police increased their use of CINs. In the first year of the trial, about half of the CINs issued in City Central were for shoplifting. By the end of the extended trial period, most CINs issued in Sydney's CBD were for offensive conduct and offensive language. In the current review period (1 November 2007 to 31 October 2008), 79% of CINs issued by City Central police were for offensive conduct and offensive language. While the *number* of shoplifting or larceny CINs issued in City Central has remained stable, the escalating use of CINs for offensive conduct and offensive language has reduced the *proportion* of CINs issued for shoplifting to just 16% of the total.

The trends are less clear in other commands. The two other leading issuers of CINs in the trial period were the Albury and Brisbane Waters commands. Albury's use of CINs for public order offences appeared to peak in late 2004 and early 2005, yet charges for these two offences dropped soon after CINs were first used and have remained consistently low ever since. Although Brisbane Waters has always focused its use of CINs on shoplifting offences, the number of CINs issued for offensive conduct and offensive language rose in 2007 and 2008. Even so, shoplifting CINs still make up 47% of all CINs issued by the Brisbane Waters command.

Table 9 indicates how CIN issuing practices can change over time, showing CINs issued for offensive conduct and offensive language incidents in the 12 trial commands since the scheme was first introduced in late 2002.

Table 9 **CINs issued for offensive language and offensive conduct (combined) in 12 trial LACs, 1 September 2002 to 31 December 2008***

	2002		2003			2004					2005				2006				2007				2008			
LAC	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**
Albury	3	1	17	19	42	72	17	28	96	82	102	32	35	28	40	21	24	46	41	51	48	29	33	45	25	24
Bankstown	1	1	1	–	1	1	1	4	–	–	2	4	–	1	5	5	4	1	2	5	7	6	6	6	7	9
Blacktown	–	4	8	2	3	2	3	1	1	1	1	3	–	2	3	4	5	10	3	6	5	5	5	14	5	6
Brisbane Water	–	6	17	15	12	16	18	19	16	21	27	34	13	14	14	23	18	33	22	25	33	30	25	32	26	35
City Central	2	12	22	16	16	11	17	14	19	19	14	20	28	26	27	30	15	28	34	25	35	54	66	94	75	98
Lake Illawarra	1	3	7	–	2	1	–	2	–	3	4	1	9	3	4	1	3	3	3	3	3	8	3	8	6	6
Lake Macquarie	2	7	5	3	2	5	6	6	4	2	5	6	10	5	10	9	5	7	5	9	9	17	15	21	9	15
Miranda	5	4	11	4	9	9	23	17	36	34	33	45	18	20	20	22	24	50	26	16	10	62	24	46	40	38
Parramatta	1	4	1	–	3	5	5	7	6	7	2	3	3	2	10	7	3	1	5	1	–	6	4	6	6	10
Penrith	–	2	7	8	7	3	4	2	1	4	4	8	8	9	4	3	11	8	9	11	11	8	17	10	11	9
The Rocks	–	2	–	1	1	1	1	4	–	7	7	8	11	5	14	20	22	19	12	20	16	32	37	31	33	44
Tuggerah Lakes	–	6	5	1	7	13	5	7	6	18	22	12	13	16	11	13	9	13	20	11	15	33	32	25	21	30
Trial LAC totals	**15**	**52**	**101**	**69**	**105**	**139**	**100**	**111**	**185**	**198**	**223**	**176**	**148**	**131**	**162**	**158**	**143**	**219**	**182**	**183**	**192**	**290**	**267**	**338**	**264**	**324**
	Initial CINs trial Sept 02–03																									

Source: NSW Bureau of Crime Statistics and Research. Reference: jh09-7666 * CINs could be issued in the 12 trial LACs from 1 September 2002. Totals do not include CINs where the person's age was missing or unknown.

The data in table 9 highlights just how few offensive conduct and offensive language CINs were issued in the 12 trial commands during the initial trial period, even in locations such as City Central and Miranda that now lead the use of CINs in NSW. It also shows how quickly issuing practices can change. For instance, The Rocks LAC, which barely used CINs for these offences in the initial trial period, has since become one of the leading issuers of CINs. The Rocks' use of CINs escalated in late 2007, about the same time that City Central increased its use.

In most commands, increases in CINs use coincided with sharp net increases in action taken on offensive conduct and offensive language incidents. Yet at least one command appears to have increased its use of CINs without widening the net in this way – see table 10.

Table 10 **Legal processes for offensive conduct & offensive language (combined) incidents involving persons aged 18 years or older in New England LAC, 2006 – 2008**

		2006				2007				2008			
LAC	**Type of Process**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**	**Q1**	**Q2**	**Q3**	**Q4**
New England	Total CANs	57	29	32	64	54	28	49	35	41	29	25	27
	CIN	–	–	–	–	–	–	–	18	29	21	26	24
	Warning	3	8	9	8	7	5	2	6	6	6	2	–
	All proceedings	**60**	**37**	**41**	**72**	**61**	**33**	**51**	**59**	**77**	**56**	**54**	**53**

Source: NSW Bureau of Crime Statistics and Research, ref. jh09-7666. Refers to all adult persons of interest (POIs) where age was known. This is not a count of unique offenders. Where an individual is involved in multiple criminal incidents throughout the year they will appear as a POI multiple times. 'All proceedings' is the sum of all CANs, CINs, warnings and 'legal process not further classified'.

The data in table 10 shows that the growth in CINs issued for minor public order offences in the New England command, one of the most active users of CINs in NSW, appears to have been achieved principally by diverting offenders who would otherwise have been arrested, issued a CAN and had to appear at court. That is, as New England increased its use of CINs, it reduced the CANs issued for those offences. The overall number of incidents resulting in some form of sanction remained about the same. When New England does issue CANs for these offences, almost all have bail conditions imposed or are future-service CANs (summons). As noted earlier, the availability of CINs is unlikely to reduce the number of CANs issued for incidents serious enough to warrant bail conditions or that are being dealt with some time later by way of summons.

With half of all adult offensive conduct and offensive language incidents detected in NSW now resulting in CINs, there can be no doubt that the scheme is having a major impact on how police deal with these offences. Overall legal actions in relation to these two offences are increasing, and Aboriginal people remain significantly over-represented in relation to both.

The initial state-wide data indicates that CINs are contributing to a significant net increase in legal action taken on offensive language and offensive conduct incidents. That is, some offenders are being diverted from court, but the early data indicates that the decreases in court appearances are being eclipsed by the very high numbers of minor offenders now being fined for those offences.

What is not yet clear is whether the changes noted in 2008, the first full year of the CINs scheme, will continue and whether this increased use of on-the-spot fines for minor offences – many of which would previously have resulted in a caution or warning – will deliver the diversionary benefits that were anticipated when the scheme was extended state-wide. Further monitoring is needed to assess these trends over time.

As the use of CINs is concentrated in a small number of commands, any state-wide monitoring of CINs use and CIN-related trends should be complemented with an examination of how high-use local commands employ this option, and any measures they have put in place to maximise the diversionary benefits of CINs while guarding against the potential for net-widening.

For this reason, our draft report provisionally suggested the NSW Police Force carefully monitor trends relating to actions (including warnings or cautions) taken in response to common CIN offences in commands that are making frequent use of CINs, and that any strategies to promote the use of CINs include measures to monitor and guard against the risk of net-widening.

The NSW Police Force supported the need for local monitoring in commands issuing high numbers of CINs, but rejected the call for broader measures to prevent net-widening, saying that:

> *It seems to suggest that police have increased legal action for offensive behaviour by way of CINs whereas no action would previously have been taken. It is not possible to conclude this from the data. An apparent increase in the number of CINs issued for offensive conduct or language may be due to police response to community concerns about disorderly behaviour. As the draft report itself indicates, there are significant variations in the numbers of CINs issued within individual commands over time.*
>
> *Prior to the introduction of CINs, police officers had the choice of taking legal action against offenders or taking no action. It is not possible to determine how often police opted to take no action because the nature of the offence did not warrant the disproportionate diversion of police resources involved in prosecuting the offender. The introduction of CINs provided police with an intermediate option to address offending, using police resources more efficiently.*[217]

The police response does not dispute that there have been net increases in the number of formal proceedings taken in relation to common CIN offences, only that the causes of those increases are not yet clear. The police response also notes that:

- it is too soon, and there are too many variations from one command to the next, to determine whether these increases constitute a trend
- the increases may be attributable to legitimate factors that are independent of the CINs scheme such as increases in offending behaviour or improved police responses to community concerns about public disorder, and
- at least some of the increases directly attributable to CINs may also be legitimate – such as when CINs are issued in circumstances where action should always have been taken, but where the lack of practical alternatives in the past meant that offenders were often let off with an informal caution or no action at all.[218]

217 NSWPF response to draft report, 22 July 2009.
218 Although increases such as these might be partly justified by reference to legitimate causal factors, any diversionary measures that ultimately result in higher numbers of people being subject to stronger enforcement action can still be described as net-widening.

For these reasons, the NSW Police Force response urges caution in describing the apparent increases as 'net-widening'. Elsewhere in its response, it makes the following observation about net-widening:

> *… CINs are available as an additional option where police would otherwise have charged an offender. The objective of diverting these offenders from the criminal justice system is being met if more offenders are being dealt with by way of CINs rather than the matter proceeding to court.*[219]

While the diversionary objectives of the CINs scheme are undoubtedly being met if a minor offender is fined in circumstances where previously he or she would have been arrested and charged, it is doubtful that the same could be said of an offender who is issued with a CIN in circumstances where previously a warning would have been given. The net effect of the latter scenario is that a harsher penalty is imposed even if the reason for issuing a CIN instead of a warning or caution is appropriate.

In his response to the draft report, the Director General of the Attorney General's Department argued against both the recommendation that police monitor local commands making frequent use of CINs, and the recommendation for broader police measures to deter net-widening. In relation to local monitoring, he said a similar recommendation in our 2005 report appeared to have done little to influence police practices at the local level. In relation to our call for police to implement broader measures to prevent net-widening, he said that stronger action was needed to curb the use of CINs in relation to minor public order offences:

> *In 2005, in response to concerns about net widening, your Office recommended that all offensive language offences be reviewed by a senior officer, and that CINs for these offences should be withdrawn if inappropriately issued. It is unclear the extent to which these recommendations were implemented by police.*
>
> *In my Department's view, stronger action to restrict the use of CINS for offensive language/conduct is necessary, given the concerns about net widening expressed in the 2005 report, the evidence provided in the 2009 draft report, and the significant costs to individuals and the Government associated with fine enforcement and secondary offending.*
>
> *Options to consider include:*
>
> - *Mandating by law the requirement that all CINS issued for offensive language/conduct offences be the subject of internal review by a senior Police officer, who would need to be satisfied that the offence met the legal test for these offences. This review should not have to be initiated by the recipient.*
> - *Requiring the Police to provide detailed data on CINS issued for offensive language/conduct offences to your Office, so that your Office can monitor trends and report to the Parliament on the need for any further action; or*
> - *Prohibiting the use of CINS for offensive language/conduct offences (noting that Police have an extensive suite of alternative powers to deal with public order offences).*[220]

The purpose of recommending that the NSW Police Force monitor and report on the use and effectiveness of the scheme in the small number of commands where CINs use is concentrated was not just as an accountability measure, but also as a way of encouraging the NSW Police Force to reflect on the differing ways that high-use commands employ CINs. Of particular interest is the early data suggesting that some commands have successfully used CINs to divert minor offenders from the court system without also inflating the overall number of offenders being sanctioned for these offences. These commands may have local practices and protocols that could be applied more broadly.

This sort of operational monitoring can only be achieved over time, and is best done by police themselves. In light of the NSW Police Force's support for careful monitoring of trends relating to actions (including warnings or cautions) taken in response to common CIN offences in commands that are making frequent use of CINs, and for its reporting of these trends to be published, this recommendation should remain. Annual publication of these reports would assist in keeping Parliament informed of important developments in the way CINs are used.

Recommendation

4. That the NSW Police Force monitor and report annually on trends relating to actions (including warnings or cautions) taken in response to common CIN offences in all commands that make frequent use of CINs.

219 NSWPF response to draft report, 22 July 2009.
220 Attorney General's Department response to draft report, 16 July 2009.

In provisionally calling for broader measures to guard against net-widening, our intention was for the NSW Police Force to actively monitor any net changes (increases or decreases) in actions taken in relation to common CIN offences, the likely reasons for any changes and whether additional measures might be needed to maximise the diversionary benefits of CINs.

We consider that implementation of recommendation 4 and reforms associated with warnings or cautions (see sections 6.8 and 6.9) will assist in guarding against the risk of net-widening. It is a matter for Parliament whether any of the options suggested by the Director General of the Attorney General's Department should be adopted.

6.8. What happened to recorded 'warnings' on COPS?

Until recently it was common for police officers who issued 'warnings' to adults (for various offences) to record that information in the field of the COPS computer system that is used to record and track the legal action taken against persons of interest (POIs) and the alleged offences that led to police proceeding against them. This field in COPS is the source of the 'Legal Process' data presented in figures 12 and 13 showing that the increases in CINs issued to POIs for offensive language and offensive conduct coincided with some reductions in CANs and other legal processes for the same offences.

The data for adult POIs proceeded against for offensive conduct and offensive language shows that from late 2004 until mid-2008, police recorded at least 350 warnings per quarter in this way. That is, until recently 'warnings' made up between 15% and 20% of all recorded actions taken in relation to adult POIs each quarter for these two offences.

The NSW Police Force then introduced changes to COPS in August 2008 that effectively barred any warnings or cautions that were issued to adults in relation to all offences from being recorded in this way. From that date, the recording of warnings in relation to POI legal processes was restricted to warnings issued under the *Young Offenders Act 1997.* The option on COPS changed from 'WARNING GIVEN' to 'WARNING YOA' to make this change clear to officers using COPS. The NSW Bureau of Crime Statistics and Research noted in relation to the 2008 data on warnings under 'Methods of proceedings against alleged offenders':

> *Whilst the only formal provisions to give warnings are under the Young Offenders Act 1997, until July 2008 warnings were recorded for both juveniles and adults. COPS changes on 7 August 2008 specifically limited warnings to only those proceeded against under the Young Offenders Act 1997, resulting in a large drop in numbers from August to November 2008. Another change to the COPS system on 10 December 2008 further modified how Young Offenders Act 1997 warnings are recorded.*[221]

The NSW Police Force advised that what police officers and police policy refer to as a 'warning' in relation to CIN offences can still be recorded in the Legal Processes section of COPS as 'NO FORMAL ACTION' and then, when required to nominate a reason for declining to take formal action, officers are expected to choose the option, 'INFORMAL CAUTION GIVEN'.

> *Strictly* [speaking]*, a 'warning' other than under the YOA is informal, i.e. it is not a legal action. The YOA specifies that a Warning must be recorded.*
>
> *So, if an officer exercises discretion and opts to take no legal action against a person, the correct record is NO FORMAL ACTION. From Aug 2008, it is necessary to record a Reason for No Formal Action … Informal caution given is the option to be selected for the situations described.*[222]

It is not yet clear how many warnings or informal cautions are now being recorded in this way as information relating to no formal action taken is not presently included in standard reporting on the methods of legal proceedings against alleged offenders.

Although warnings or cautions issued in relation to CINs might not be recognised as a legal action on COPS, the NSW Police Force's procedures and training materials emphasise that warnings are an important part of a continuum of options available to officers when exercising their discretion in relation to CINs.

> ***Use of Discretion***
>
> *The introduction of Criminal Infringement Notices does not remove the discretion police officers currently have to deal with minor offences. Police officers retain the right to issue warnings, cautions, FCANs or determine that the offence is one where the offender should be taken into custody and either issued with a Court Attendance Notice (CAN) or be charged.*[223]

221 Goh D & Moffat S, *NSW Recorded Crime Statistics 2008*, NSW Bureau of Crime Statistics and Research, p50.
222 Email, Mr Jim Baldwin, Chief Statistician, NSW Police Force, 29 April 2009.
223 Mandatory Continuing Police Education Scheme *MO37 Criminal Infringement Notices (CINs)* Part 2: Training Sessions, NSW Police Force, July 2007.

We asked officers participating in focus group discussions about whether, why and how they might record CIN warnings or cautions. Our initial assumption that most CIN warnings would be recorded in officers' official notebooks, and that only some would warrant a corresponding COPS entry, was borne out by the following comment from an officer based in a country area:

> *Listen if you're going to do an entry for a COPS entry, it's very time consuming and to spend, sit there for half an hour to type out and then go 'he's been given a warning', it doesn't seem worth the effort. Whereas if you make a quick scratch in your notebook, you've recorded* [that] *you to spoke to him. It's not your official way to do it but it's a lot of effort to just type an entry or say 'he's been given a warning for it'.*[224]

Yet many other officers were strongly of the view that CIN warnings must be centrally recorded if they are to have any legitimacy or purpose. Many officers in the City Central focus group discussion were unequivocal about the need to record CIN warnings on COPS. When asked if and when warnings issued to adults might be recorded on COPS, we were told:

> *Officer A: We record everything. We …*
>
> *Officer B: Each time.*
>
> *Convenor: Even, even for something as minor as offensive language?*
>
> *Officer B: Yep.*
>
> *Convenor: Yeah?*
>
> *Officer A: Yep, everything … so that you can help the report show continuity of behaviour so you know that if you do a check on someone and they're yelling and screaming and carrying on like a fruitcake in the middle of the street, and you do a check on them and they've been given five warnings for it in the past, well then obviously they're not – the warning's not doing anything. They're not curbing their behaviour so it needs to be recorded …* [225]

This group was dismissive of criticisms that this kind of recording was time-consuming or wasteful, saying that officers who know COPS should take only a few minutes to create such a record.

Although this information can no longer be recorded as 'WARNING GIVEN' in the legal process section of COPS, it is important to note that there are other ways to record information about CIN warnings or cautions on COPS. One country based group, all team leaders, said they would usually record 'formal warnings' for CIN offences in the narratives linked to move-on directions or person-search records.

> *If you looked it up, if you would just look up 20 move-on direction events it'd all be, that would be a result of someone being stopped and spoken to about their language or their behaviour, something that they have done to bring them under your attention which they're then given a move-on direction for because you know like with move-on, their actions are intimidating or whatever the persons around them so that's why that's the end result. It's not giving a warning. It's just they have been given a warning but they've just been …* [given a] *move-on direction to get out of there.*[226]

When asked whether the formal legal requirements associated with police decisions to issue move-on directions meant that officers were more likely to record this information on COPS, rather than just noting the directions given in their official note-books, we were told:

> *Yeah, yeah well it's, yeah I suppose it's a lawful direction so you really want to be recording it somewhere* [on COPS].[227]

Finally, although references to warnings as a legal process on COPS should now only apply to warnings issued under the *Young Offenders Act 1997*, it was apparent from our discussions with frontline officers and interviews of commanders and senior officers that police see their decisions to issue CIN warnings as something more than simply deciding not to take formal action on an offence. For this reason, many officers saw that there continued to be a need for officers to record at least some CIN warnings or cautions on COPS in order to:

- give the CIN warning 'formal' status
- strengthen its evidential value
- inform future decision-making in relation to individuals who are repeatedly warned, or
- provide a record of pro-active policing activity associated with particular operations.

224 Officer focus group, 3 February 2009.
225 Officer focus group, 5 March 2009.
226 Officer focus group, 3 February 2009.
227 Officer focus group, 3 February 2009.

While there were sound reasons for the NSW Police Force restricting the use of warnings recorded as a legal process on COPS to warnings issued under the Young Offenders Act, removing 'WARNING GIVEN' as an option for recording CIN warnings issued to adult POIs would appear to be a backward step.On the other hand, it appears that the NSW Police Force will only reinstate this option if CIN warnings or cautions are given formal status as an option that officers are encouraged to consider – and record – in relation to decisions made under the CIN provisions of the Criminal Procedure Act.

6.9. Quantifying CINs' impact on other proceedings

One difficulty in trying to quantify the CIN scheme's positive influences (notably through diverting offenders from police custody and court), or potentially negative influences (such as when fines are issued instead of warnings), is the array of variables that can affect the data, such as changes in policing activity and offending behaviour.

Another factor is that at least some of the incidents previously resulting in a warning (or no action at all) and now subject to a CIN might always have been serious enough to warrant more intrusive action. As one commander based in an area with a high Aboriginal population explained:

> *To be totally forthright I think it* [CINs] *has widened the net slightly but only because police were probably turning around and walking away a little too often. I've done it myself …* [In the past] *we had a bloke out in the street in the middle of the night and he would be abusing people, particularly the police … and you weigh up the options and you think, 'could I be bothered?' because I'm going to get into a fight with this bloke if I try to arrest him, I know I'm going to get into a fight with him and all he's doing is abusing everyone. Even though it looks disgraceful, I'm going to get into the truck and drive away. I'm proud to say that I haven't done it too often.*[228]

As was the case for other commanders and crime managers, he said the introduction of CINs provided a valuable, intermediate option for dealing with offences serious enough to warrant formal action, but not serious enough to justify the resources and risks associated with making an arrest and issuing a CAN.

> *It is very seldom appropriate that if a person is abusing police and/or others and/or carrying on in an offensive manner … very seldom is it appropriate just to get in the truck and drive away. At times in the past though, that happened because the next option was to complete a court attendance notice or summons, which is obviously fairly resource-intensive and makes the person go before the court and so on, or the other option was to … arrest him and sometimes that can escalate into all sorts of things. So police in a lot of cases were just probably driving or walking away, whereas now they have an option where they can put a sanction in place and it's not overly oppressive in its nature but it does address the behaviour and it does impose a penalty.*[229]

Certainly the CINs scheme appears to provide benefits with respect to freeing up police and court resources and reducing the number of offenders being brought before the courts for minor offensive conduct and offensive language. Yet the rapid growth in CINs can only be partly explained by shifts from other forms of legal processes or warnings. The data across NSW and in particular commands such as City Central shows that many new offences are being detected – indicating a substantial rise in policing activity, a rise in offending behaviour and/or that a number of CIN recipients are being fined for incidents that would previously have not resulted in any formal action other than a warning recorded somewhere on COPS.

As noted in relation to the earlier discussion of the data presented in figure 6.6 and figure 6.7, there is no way to know how many CANs might have been issued in 2008, had CINs not been an option. Yet it is clear that there has been a net increase in minor matters resulting in some form of sanction. This is particularly evident in the comparisons of CINs and CANs issued for offensive conduct offences which show that fewer offensive conduct matters were brought before the courts in 2008, but that the 4,078 CINs issued in the 12 months to 31 December 2008 (up from 1,065 CINs in 2007) greatly outnumber the decrease in CANs. The 2,288 CANs issued for offensive conduct in 2008 were 1,274 fewer than the total CANs issued for that offence in 2007, 860 fewer than in 2006 and 966 fewer than in 2005.[230]

Although police discretion in relation to individual incidents depends on the circumstances of each offence, the offender's interaction with police and the willingness or capacity of individual officers to consider other options, CINs have become the standard option for responding to the majority of offensive conduct and offensive language incidents in many commands.

In summary, the data on legal processes relating to offensive conduct and offensive language incidents shows that police in many of the commands that make frequent use of CINs now:

228 Local Area Command interview, 15 January 2009.
229 Local Area Command interview, 15 January 2009.
230 NSW Bureau of Crime Statistics and Research, ref. jh09-7422.

1. act on many more offensive conduct and offensive language incidents than they did before CINs were available
2. bring fewer offensive conduct and offensive language offenders before the courts, and
3. because of the limited options for recording CIN warnings on COPS, warnings are now recorded in such a way that it can be difficult to gauge the influence of CINs on the former system of warnings.

Although the figures showing net increases in action taken on offensive conduct and offensive language clearly indicate that CINs may be contributing to increased proceedings against offenders, it is not yet possible to quantify the impact of CINs in this regard.

Further monitoring is needed to assess the influence of the scheme over time and whether the shift towards imposing more on-the-spot fines can be shown to be effective. Monitoring is also needed to ensure that the immediate diversionary benefits of CINs are not dissipated by large numbers of recipients simply re-entering the criminal justice system at a later stage due to secondary offences associated with RTA sanctions imposed for failing to pay their CIN and enforcement penalties. In many cases these offences can be more serious than the original CIN, such as continuing to drive while driver's licence suspension is in place.

As the data in chapter 5 shows, Aboriginal people are already over-represented in relation to action taken on offensive language and offensive conduct incidents. Also, as noted in section 3.8, recent research commissioned by the RTA shows there is a very real risk that *any* net-widening of this kind is likely to disproportionately impact on disadvantaged Aboriginal communities, especially those in remote areas where licensed drivers are often few and far between. That investigation estimated that a significant proportion of the Aboriginal community (40%) have outstanding debt with the SDRO and that unpaid fines and outstanding SDRO debts were significant contributors to the 'prevalence' of unlicensed driving in Aboriginal communities in NSW.[231] SDRO debts impeded many Aboriginal people ever getting a licence, and made it difficult for those with current licences to hold onto them.

In light of the increased use of fines and charges, and the concerns noted in the previous section about the need to give the CINs warnings some legitimacy as an option when dealing with minor offenders, to strengthen the evidential value of such warnings and to record them in a way that informs and assists police decision-making in relation to individuals who are repeatedly warned, there is scope for Parliament to consider giving formal recognition to warnings as part of a continuum of options available to police when issuing CINs.

One option could be to make the CINs scheme subject to the new 'official caution' provisions in the Fines Act, as amended by the *Fines Further Amendment Act 2008*. Those new Fines Act provisions, which are scheduled to commence this year, create a legislative basis for 'an appropriate officer' to give a person an 'official caution' rather than issuing a penalty notice.

Division 1A Official cautions

19A Appropriate officer may give official caution

(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.

(2) In making a decision under subsection (1), an appropriate officer (other than a police officer) must have regard to the applicable guidelines relating to the giving of official cautions in respect of penalty notice offences.

(3) In this section:

guidelines means guidelines:

(a) issued by the Attorney General that are published in the Gazette and made available on the internet site of the State Debt Recovery Office, or

(b) issued by the relevant issuing agency that are consistent with the guidelines issued by the Attorney General.

The official caution and the associated guidelines are intended to formalise and guide practices in relation to when officers issuing penalty notices should consider matters such as the seriousness or triviality of the offending conduct, whether the person has voluntarily complied with a request to stop the offending conduct, whether the commission of the offence was knowing and deliberate, the age of the person, and other specified circumstances, for example, intellectual disability or homelessness.[232]

231 *An Investigation of Aboriginal Driver Licencing Issues*, Elliott & Shanahan Research for the RTA (NSW), December 2008.
232 Second Reading Speech, the Hon John Hatzistergos MLC, 27 November 2008.

At present, the official cautioning provisions and the requirement for guidelines are not expected to apply to NSW police officers when they commence. The Attorney General explained:

> *I note that the guidelines relating to cautions will not apply to police officers, given that police discretion in this regard is already dealt with in legislation and in police training and operating procedures.*[233]

However, the Attorney General also explained that the recent Fines Act reforms also makes clear it that a caution will not affect the powers of an issuing agency to take other action they would otherwise be permitted to take in respect of the offence. Thus, these provisions would not fetter police discretion to take other action if it later transpired that a person's conduct was more serious than was originally thought, or if additional information came to light indicating that some other action was warranted.

The application of 'official cautions' to the CINs scheme would provide an additional option, between informal cautions on the one hand (recorded under 'NO FORMAL ACTION'), and the issuing of a CIN on the other.

Our draft report therefore recommended that the Attorney General consider amending Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the *Fines Act 1996* to give police officers the option of issuing an official caution in accordance with section 19A of the *Fines Act 1996*. It also recommended that police develop caution guidelines in accordance with the *Fines Act 1996*, that cautions be recorded on COPS and that the Attorney General consider legislative amendments to make the police use of CINS subject to the review processes outlined in the *Fines Further Amendment Act 2008* ('the Amending Act').

The Attorney General's Department endorsed this approach, commenting:

> *These recommendations are welcome as they will promote consistency in the way penalty notices are issued and reviewed, and ensure 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.*[234]

On the other hand, the NSW Police Force argued against legislating to give police officers the option of issuing an official caution (and related procedural amendments and changes to COPS), stating that police already have sufficient powers to caution adult offenders:

> *Police have common law and statutory powers to issue cautions. The Fines Act powers to issue official cautions were introduced to ensure that officers from agencies other than the NSWPF had such a power. As noted above, CINs were introduced as an intermediate option between charge and caution for police dealing with specified offences. It should also be emphasised that no conviction is recorded against an offender who pays a CIN penalty.*
>
> *Further, the issue of cautions or warnings to adults is not a formal legal sanction. This is distinct from the official cautioning of juvenile offenders under the Young Offenders Act 1997, which requires police to maintain a record of the legal sanction applied.*
>
> *Police currently have the options of taking no legal action (which may include giving a caution or warning), issuing a CIN or charging offenders. The decision is always subject to the exercise of an individual police officer's discretion. It should be noted that cautions and warnings can be recorded in COPS.*[235]

Elsewhere in its response, the NSW Police Force noted:

> *Cautions can already be recorded on COPS under a person's status (No Formal Action because caution given). CINs adequately provide police with an intermediate option between taking no action and charging and prosecuting an offender.*[236]

While we acknowledge the NSW Police Force's concerns, giving frontline officers the option of issuing official cautions in accordance with section 19A of the *Fines Act 1996* should not fetter their existing options. Depending on the circumstances, police officers will still have wide discretion to charge offenders, issue CINs or give informal warnings (in effect, take no action). Introducing official cautions for these offences will simply provide an additional intermediate option for minor incidents that officers determine are not serious enough to warrant fining an offender, yet where some action should still be taken. Determining the appropriate course of action would still remain subject to individual police discretion.

The recommendations should also improve the reliability and accessibility of information available to frontline officers when exercising their discretion on how best to respond to certain minor offences. Although informal cautions or warnings to adults may be recorded on COPS as an option under 'NO FORMAL ACTION' despite having no recognised standing as a legal sanction, participants in our police focus group interviews thought that it would be highly unlikely that frontline officers would embrace this option.

233 Second Reading Speech, the Hon John Hatzistergos MLC, 27 November 2008.
234 Attorney General's Department response to draft report, 16 July 2009.
235 NSWPF response to draft report, 22 July 2009.
236 NSWPF response to draft report, 22 July 2009.

One group made up mostly of team leaders and supervisors said 'informal' cautions or warnings to adult offenders tended to result in 'a quick scratch in your notebook'. Such warnings were generally only 'formally' recorded on COPS if the warning could be linked to an action that had a legislative basis, such as a narrative attached to a search record or linked to a 'move-on' direction issued under Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.[237] The same group said that a high proportion of the 'move-on' directions recorded on COPS would have arisen in the context of suspects being 'stopped and spoken to about their language or their behaviour'. Some felt that linking informal warnings with records such as these was a de facto way of giving 'verbal' warnings some recognised status.

> … [these warnings] *would probably more likely be recorded as a move-on direction with a narrative to say, 'look, they were warned regarding their offensive language' – that's just a verbal warning. Then it'd just be recorded that way more so than a, like an official warning on the system.*[238]

They said that without a search record or legal direction to attach the warning to, the warning was unlikely to be recorded.

A related issue is the need for accessible records that show 'continuity of behaviour', so that police dealing with anyone engaging in offensive conduct or offensive language can easily check whether warnings have already been given for similar conduct in the past. As one officer explained, COPS entries showing that a person has been repeatedly warned for past incidents would 'obviously' demonstrate that 'the warning's not doing anything' and firmer action may be needed to curb the offending behaviour.[239]

For the NSW Police Force to be confident that CINs are successfully diverting offenders from the criminal justice system, it must consider CINs in the context of other interventions used by police. While it can easily compare the CINs issued in each command with information about CANs issued for the same offences, feedback from frontline police indicates that there is a need for more reliable and more readily accessible information about the use of both formal cautions and informal warnings to complete the picture. In addition, readily accessible information about patterns of offending behaviour and any previous action taken should enhance rather than fetter individual police decision making.

Thus we recommend that:

Recommendations

5. That the Attorney General consider amending Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the *Fines Act 1996* to give police officers the option of issuing an official caution in accordance with section 19A of the *Fines Act 1996*.
6. That the NSW Police Force develop guidelines in relation to the issuing of 'official cautions' for CINS in accordance with section 19A(1)(3)(b) of the *Fines Act 1996*.
7. That the NSW Police Force implement enhancements to COPS to allow 'official cautions' to be recorded and reported as a legal action taken in relation to CIN offences.

6.10. Information provided by police when issuing CINs

Our telephone survey of Aboriginal CIN recipients found there was considerable value in the explanation provided by officers at the time of issuing CINs. Respondents attributed much of what they knew about CINs and their options for dealing with the fines, to the information provided by issuing officers. This was important in ensuring recipients at least understood the importance of doing something about the CIN, even though the amount of their income appeared to have a greater influence over whether they opted to pay (or contest) the fine.

Frontline officers agreed that explaining their actions to recipients was a crucial part of the process of serving CINs. Police in one focus group discussion said recipients were much less likely to question or dispute a CIN or elect to have the matter heard at court if they were provided with an explanation for the officer's actions at the time of issuing. They said there was peer pressure from colleagues to get this right, as failure to do so was likely to create more work for fellow officers:

237 Officer focus group, 3 February 2009.
238 Officer focus group, 3 February 2009.
239 Officer focus group, 5 March 2009.

> *If I give someone a ticket and just go 'hey there you go mate, get that into you' and don't explain it, they're ringing up my* [work] *mate and probably going 'what the hell have I just got this for' and then you've got one of your mates copping a mouthful from them and they don't know why they've got it. If you go and make the effort to tell them why they've got it, then it saves your work mates more work and more grief.*[240]

Officers said the explanation provided when issuing CINs is analogous to the explanation required when issuing CANs or charges, in that recipients are much less likely to question or contest a matter if they understand why police acted in the way they did.

> *You soon learn if you explain to someone what they've been charged with and why they've been charged with it and what your evidence is that you're relying on to prove that, nine times out of 10 it will save you someone pleading 'not guilty' or wanting to see your brief because, just so that they can have a clear understanding of what the offence is and how you, what you have to prove and how you can prove that. Like it's just they'll look at you 'oh yeah, yeah no you got me, yep I stuffed up … ' So it's the same thing with a CIN, if you explain what it is and how it works, then it can save you … a lot of heartache.*[241]

For many CIN recipients, the verbal explanation provided by the issuing officers is often the only practical advice they receive. Feedback from CIN recipients, advocates and legal advisers indicates that many recipients have difficulty making sense of the limited information printed on the penalty notice itself. For some, poor literacy is a factor. Yet even many well-educated people said they find the information on the notice confusing. One reason is that the notices used for CINs are the same as those used for traffic and other penalty notices issued by police. While this is convenient for police and easier for SDRO to administer, the sparse printed information on the notice baffles some CIN recipients. For instance, the notice gives recipients just two options:

1. pay the fine, or
2. elect to have the matter heard at court.

The section titled 'Court Election' states only 'the person responsible or registered operator of the vehicle nominated in this notice' or the 'authorised representative of the corporation in whose name the vehicle nominated in the notice is registered' can elect to have the matter heard before a local court. For some CIN recipients, it was not clear whether the option to court-elect applies to all offences, or just traffic offences.

The only other option on the notice is to pay the fine. Under 'Payment Options', the advice notes a web address and a telephone number, but gives no indication as to whose number it is or whether recipients could call for reasons other than to provide payment details. Nowhere on the notice is advice provided on how to seek a withdrawal, even though the legislation provides police with broad discretion to withdraw a CIN at any time. The information provided in Penalty Reminder Notices issued by the SDRO is similarly limited. Only recently the form was changed to include the SDRO's general enquiries number and advice noting: 'If you wish to seek leniency based on certain circumstances or if you believe an error has been made, information on requesting a review of your penalty notice is available at www.sdro.nsw.gov.au'.[242] The avenues available for requesting a police or SDRO review will be considered later in this report.

The Crime Manager of a command that was among the state's highest issuers of CINs expressed surprise that CINs were written on the same penalty notices as those used for traffic fines. Until speaking with Ombudsman staff about CINs in late 2008, he had assumed there were separate notices for CINs that, as with the notices used for the Cannabis Cautioning Scheme, explained the CINs scheme and set out important information advising recipients what to do. He said: 'But as a matter of fact you don't – you just write them out a traffic ticket'. While acknowledging the importance of verbal advice provided by officers when issuing CINs, he thought it would be preferable for the NSW Police Force to supplement this advice by creating a hand-out to accompany the CIN:

> *It makes more sense to me to standardise the information that's being given out so every single officer across this command or across the organisation is telling people to whom a notice is being issued the same thing. We know there would be gaps in the service depending on the circumstances, depending on the officer, depending on a lot of things.*[243]

While the information printed on the penalty notice itself and the explanation provided by issuing officers will always be the recipient's primary source of advice, a printed hand-out with standardised advice would be especially useful for any recipients who have difficulty taking in the verbal explanation provided by police at the point of issuing. It could also improve the effectiveness of CINs by explaining key features of the scheme, such as the incentives to pay, while providing officers who have had less experience in issuing CINs with a check list to refresh their knowledge of key points. As there would continue to be circumstances where recipients do not receive the printed information with

240 Officer focus group, 3 February 2009.
241 Officer focus group, 3 February 2009.
242 From a Penalty Reminder Notice issued 23 March 2008.
243 Senior Officer interview, 27 January 2009.

their CIN, any police hand-out should be made available for the SDRO to send out with the reminder notices sent to CIN recipients.

As the information on the penalty notice itself remains the main source of advice to all recipients, the notices should also be reviewed in light of the fact that these forms are now commonly used for CINs. Although the format of the notices and the thousands of offences that the notices can be used for limits the detail that can be added, at the very least there is scope to update the advice and simplify the language used.

As noted earlier in section 4.3, other jurisdictions appear to have been able to provide additional information on their infringement notices in line with recent reforms, such as advising recipients of the right to seek an internal agency review and the right to apply for an instalment plan in certain circumstances. In addition, the Infringements System Oversight Unit, a body established by the Victorian Department of Justice in mid-2006 to monitor and oversight the operation of the fines enforcement system, has also been tasked to consider what additional information should be included on infringement notices. It is also required to monitor and look for other opportunities to improve the fines system and to put those recommendations to the Infringements Standing Advisory Committee.

The issue of information provided to CIN recipients was considered in our first report on the initial 12-month trial of CINs, culminating in the following recommendations:

> *Recommendation 21. That the body of a Criminal Infringement Notice include explanation of the potential consequences liable to be imposed in the event of each of (i) non-payment of the notice, and (ii) failure to successfully defend the matter in a court.*
>
> *Recommendation 22. That the body of a Criminal Infringement Notice contain advice to the effect that receipt and payment of a Criminal Infringement Notice does not amount to a conviction or finding of guilt, and that it need not be declared as part of any check relating to the criminal history of the recipient.*[244]

As noted earlier in the report at section 3.2, the NSW Government supported these proposals 'in principle' but, as police had advised that it was not practical to include more information on the CIN form, 'alternative means of conveying the necessary information' would be adopted. This included improving the information available on the SDRO web site and adding the NSW Law Access phone number to the CIN forms when they are reprinted.

As part of this review we inspected examples of penalty notices currently being used for CINs and found none that included the Law Access number. The SDRO recently advised that the proposal to add the Law Access telephone number to the penalty notices was not implemented as it was decided that having the telephone numbers for both the SDRO and for Law Access might cause confusion.[245]

The NSW Government response to Recommendation 22 highlighted the importance of information provided by officers issuing CINs, noting:

> *Standard police procedures require the officer to convey this information verbally when issuing a CIN. The recommendation is supported in principle, however, as stated above, it is not practical to include detailed further information on the CIN form.*[246]

The SDRO has since advised:

> *I am advised the decision not to include the Law Access contact details on the various notices issued by SDRO was made after discussion with Law Access. The inclusion of different contact numbers was considered a risk of causing confusion for clients which could result in unnecessary referrals backward and forward between Law Access and SDRO and consequent client dissatisfaction.*[247]

Issues regarding the timely provision of information to CIN recipients will be considered further in the next section on delayed service or service by post, and in discussion on the payment and enforcement of CINs in chapter 8.

6.11. Delayed service or service by post

When the CINs scheme was extended across NSW, Parliament included a provision permitting police officers to serve CINs personally or by post. Previously CINs could only be served in person.

The amendment enacted a change recommended in our earlier review which found that although the law at that time required CINs to be served in person, there were instances of CINs being issued by mail. Often this was because the offender was moderately to heavily affected by alcohol, making it inappropriate to issue a CIN 'on the spot'. We also noted that there may be other reasons for delaying the service of a CIN, including the need to make further inquiries,

244 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005.
245 Email advice dated 15 June 2009.
246 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007, Attachment A.
247 SDRO response to draft report, 20 July 2009.

and recommended that – consistent with other penalty notices and some Court Attendance Notices – the option of serving a CIN by post be permitted where the issuing officer considers this necessary and reasonable.

NSW Police Force training and advice emphasises that CINs should be served at the time of the offence or, if there are sound reasons for delaying service, in person as soon as it is reasonable to do so. Serving a CIN by post should only be considered when there is no other option:[248]

> *The legislation allows service by postage. However, this should only occur as a last resort; it must be stressed it is an on-the-spot fine. It can be posted, but try to avoid this if possible … police are only to post CINs after all reasonable attempts to serve personally have been exhausted.*[249]

In most instances serving a CIN in person is preferable to service by post, as personal service ensures the recipient:

- has an opportunity to explain his or her actions or provide mitigating information
- actually receives the CIN
- is told why it was issued
- is given advice on the options for disposing of or contesting the fine, and
- is warned of the additional sanctions likely to be imposed if the CIN is ignored.

These factors should generally apply regardless of whether CINs are served at the time of the offence or, in cases where it is necessary to delay service, in person some time later. On the other hand, in cases where police officers must resort to serving CINs by post, there is a real danger that these benefits can be dissipated or lost.

In its submission, the NSW Police Force endorsed the principle that the options of allowing police to delay or post CINs should be used sparingly, and only when on-the-spot service in person is clearly inappropriate:

> *A primary purpose of CINs was to provide a tool to deal with matters immediately. Proof of service can also be an issue when the CIN is not issued on the spot. Dealing with matters immediately is the preferred approach by NSW Police Force and will be completed in the majority of cases. There will of course be times when delayed service is necessary and appropriate.*[250]

However, information provided by the NSW Police Force and the SDRO indicates that serving CINs by post has become much more common since the provisions formally providing for postal service were added and the scheme was extended across NSW. Table 11 compares the proportion of CINs issued by post in the 12 trial commands during the 2002 – 2007 extended trial period, with those issued by post in the first year of the state-wide scheme.

Table 11 CINs issued by post by Aboriginality and period issued

	Extended trial period			Current review period		
	n	Served by post	% by post	n	Served by post	% by post
Aboriginal	269	71	26.4	626	289	46.2
Non-Aboriginal	8,845	2,636	29.8	7,865	3,637	46.2
Unmatched	714	204	28.6	440	191	43.4
Total	**9,828**	**2,911**	**29.6**	**8,931**	**4,117**	**46.1**

Source: SDRO Penalty Notice database.

The data indicates that whereas just over a quarter of CINs issued during the extended trial period were issued by post (despite a provision in the Criminal Procedure Act at that time requiring notices to be served in person), the number of occasions where service by post is now deemed necessary and appropriate has grown to almost half of all CINs issued. In other words, it appears that the NSW Police Force policy of posting CINs as a last resort is not being applied in practice. There are no significant differences between Aboriginal and non-Aboriginal recipients in this regard.

248 NSW Police Force, *Policing Issues and Practice Journal,* November 2007, p.5.
249 *CINs Frequently Asked Questions*, 'Q29 – Can you post the CIN?', NSW Police Force Intranet, accessed 17 April 2009.
250 NSW Police Force submission, 17 February 2009.

Of the remaining CINs, it is not clear how many were served 'on the spot' (the preferred approach of the NSW Police Force), compared with the number of CINs served at a police station as an alternative to issuing a CAN, or how many were served in person some time later. Police policy requires any delayed service of CINs to be completed within 14 days of the offence.

Comments from each of the three focus group discussions and the interviews with commanders and senior officers indicated considerable disparity in the approaches employed by individual commands in determining when to delay service and when it might be necessary and appropriate to resort to serving CINs by post.

One group of frontline officers from a command making frequent use of CINs told us it was common to delay service if the person was intoxicated, if a penalty notice book was not readily accessible or if police were busy dealing with other people at the scene, but that:

> *We were warned off it* [delayed service] *though when we did the training that … basically you give it to them there and then or if they're seriously pissed, you may go back the next day. But with 12-hour shifts, you may not have the opportunity to go back the next day and they're not, then a week's gone by and then we're basically told that once that timeframe has expired you shouldn't be doing it. You should be going by way of Future CAN.*[251]

A group of Sydney officers said that if they were unable to serve a CIN on the spot, decisions on whether the delayed CIN should be served in person or by post often turn on whether the recipient lived nearby. One officer said:

> *It depends on where they live but probably more leaning towards post.*[252]

A colleague in the same group added:

> *Yeah, I always post them. Oh, I give them a ring. I just get their phone number and give them a ring* [before posting].[253]

An officer based in a small country station said postal service was only occasionally used in her command, but that she had once used the option to deal with a recipient who was thought to be deliberately evading police in order to avoid being served the CIN.

> *I've used it because the person I've used it on wouldn't answer the door. As soon as a cop knocks on the door, he knew he was getting it. He wouldn't come to the door … He knew he was getting it for the language but as soon as you knock on the door, he's obviously home, wouldn't answer the door, so you just post it.*[254]

Outside of the NSW Police Force, views were mixed on the merits of allowing police the flexibility to delay service or to serve by post, and how these practices might impact on Aboriginal communities.

In relation to delayed service, most submissions recognised the need to defer issuing CINs to intoxicated people until they had sobered up, were better able to understand the reason for the CIN and ask questions about their options for disputing or disposing of the fine. However, some were concerned that delayed service would tend to disadvantage CIN recipients, arguing that the time when issuing officers are most likely to issue a warning is at the time of an offence. When officers attend an address for the purpose of serving a pre-prepared CIN the following day or some days later, it is unrealistic to expect that any mitigating or extenuating information provided at that point would lead police to withdraw the notice and issue a warning instead. Yet despite these concerns, most submissions acknowledged that there were occasions when it is sensible and appropriate for police delay serving CINs.

On the other hand, there was little or no support outside of the NSW Police Force for provisions allowing officers to serve CINs by post. The main criticism was that using ordinary mail was seen to be a highly unreliable way of initiating a legal process that can have important consequences for recipients. Another criticism was that, as with delayed personal service, serving CINs by post may effectively deny recipients an important opportunity to respond to the police allegation or explain their actions when it matters most – at the time that officers are deciding what sanction to impose in relation to the offence. The chance to respond to allegations is important for all accused offenders, but more so for people with poor literacy or limited formal education. Unless they have ready access to quality legal advice to assist in mounting a formal defence, the only realistic chance that many people may have to defend themselves against police allegations is to explain their actions at the time that police are deciding whether the conduct alleged warrants a CIN or alternative action.[255]

The problems associated with posting CINs to incorrect, out of date or over-crowded addresses are particularly evident in poorer or more remote Aboriginal communities. The Law Society's submission noted feedback from its members about the high mobility of many Aboriginal clients:

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251 Focus group discussion, 28 January 2009.
252 Officer focus group, 5 March 2009.
253 Officer focus group, 5 March 2009.
254 Officer focus group, 3 February 2009.
255 Ruth Hodson submission, 2 March 2009; Submission from P. Webster.

> *Many Aboriginal people lead a transient lifestyle, migrating between different towns to stay or visit relatives. Committee members have reported that their own case files already show that correspondence sent on to the last stated address of clients is regularly returned, or the client informs the solicitor that they did not receive the letter as they were out of town. There is a real danger that such people would not receive the CIN through the post.*[256]

As part of this review we met with many Aboriginal people residing in former mission communities now managed by local land councils. Poor street signage and irregular house numbering in many such communities can affect postal and other services in those locations. A number of Aboriginal people commented on the strategies they use to improve the reliability of mail services, such as having RTA and other important correspondence directed to their work address.

Incorrect and out of date address details are also more likely to affect those living in more isolated areas where mobility is needed to take up scarce educational or job opportunities in other parts of the state, or to access health and other services in larger centres. In the case of CINs posted to homeless or transient people, or to people who have had to leave home and move on because of their disruptive behaviour, it is even less likely that the fines will reach the addressee. Yet no proof of service is required – only that the CIN was sent and that police made reasonable attempts to verify the address.

Australia Post employs a number of strategies to maximise the speed and reliability of mail services to 'delivery points' in privately managed precincts such as the dozens of former mission communities and other Aboriginal settlements managed by local land councils in NSW, many of which have no council-named streets or sequential council-managed house numbering. Options depend on the physical location but can include delivery to cluster letterboxes on public roads some distance from actual residences, customers collecting their mail directly from their local post office or delivery to a single 'bulk drop' point such as a community administration office or some other agreed delivery point. Residents are sometimes polled on their preferred method of delivery. Australia Post emphasised that it does not normally deliver to individuals, but 'as-addressed' to addresses which referred to as 'delivery points'. With respect to Registered Post items, we were advised that it was not unusual for representatives to collect mail on behalf of addressees in some locations:

> *In the case of person-to-person mail delivery, obviously we will make every effort to obtain the signature of the addressee, but we will have also fulfilled our delivery obligations once we obtain the signature for a Registered Post item from a bona fide representative on behalf of an individual.*[257]

The NSW Sentencing Council's 2006 interim report, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices*, noted the high level of inaccuracy in court and police records. It noted claims that a significant proportion of defendants who are absent from local court proceedings will never receive court documents that are sent by mail.

> *… This is particularly the case where the defendant is homeless, itinerant or illiterate, and is not assisted by the fact that the current system allows fines notices and enforcement notices to be served by ordinary post.*
>
> *An estimate putting the number of incorrect addresses held by a regional court at 10% was deemed to be 'conservative.' Research studies have confirmed that poor verification procedures, particularly in relation to the absent defendant, account for a significant amount of subsequent fine default.*
>
> *The practical effect is that an absent defendant may be unaware of the existence of a fine or of default until enforcement procedures are commenced, and licence sanctions applied. Very often the first knowledge they have of the fine occurs when they are stopped for a minor traffic offence and informed that as the result of an enforcement sanction they are driving while suspended. The result, in many cases, is that absent offenders, when subjected to licence or motor vehicle sanctions, face the prospect of being charged with more serious offences and of accumulation of fines if convicted of those offences, ie unless police deal with the matter by way of a caution because of the difficulty in proving knowledge of the suspension.*[258]

Elsewhere the Sentencing Council's report noted that one court had advised that although it was the practice of that court to send reminder letters, the council was told 'there was little point as false addresses and inaccurate court data result in staggering proportions of undeliverable mail'.[259] The Council said one explanation for there being so many inaccurate and out-of-date addresses was the high number of homeless or itinerant people in this group who are less likely to maintain regular contact with government agencies such as the RTA or the courts. It also reasoned that absent or itinerant defendants would be more likely to fail to meet their debt obligations. However, as neither the courts nor the SDRO were able to provide a profile of who pays and who defaults, there was no way to quantify the influence of posted penalty, reminder and enforcement notices failing to reach the addressee.

256 Law Society of NSW submission.
257 Mr Rod Byatt, Manager Communications, NSW Delivery, Australia Post, email 14 May 2009.
258 Para 2.227 – 229.
259 Para 2.212.

Using Registered Post to try contact Aboriginal CIN recipients

Our own attempts to use police records to contact Aboriginal CIN recipients for a survey in mid-2008 underscored the Sentencing Council's concerns about the reliability of the address details on COPS for certain groups of offenders. The first step in our survey was to write to all recipients in the survey sample. We used registered post rather than ordinary post in order to track delivery to the addressee. Of the 194 letters sent to Aboriginal CIN recipients in the survey sample, only two-thirds (130) of the letters sent actually reached the addressee. The remaining 64 letters (33%) were undeliverable.

Of the 130 or 67% of CIN recipients who actually received our letter, only 75 (58%) had a current telephone number recorded in COPS or listed in the telephone directory and only 22 (17%) of the 130 answered when called – despite our interviewers calling each number several times at various times of day and in the evening.

The high rates of undeliverable mail and low contact rates for Aboriginal CIN recipients are markedly poorer than for previous Ombudsman audits using similar methodologies.

When we checked SDRO and RTA records for information about the 64 people whose letters were undeliverable, we found:

- 58 were sent an SDRO reminder notice, including 30 people whose SDRO address was different from their address on COPS
- 54 were subject to enforcement action, including 22 who were subject to RTA sanctions, and
- 28 had enforcement orders in place only for the unpaid CINs – of the remaining 36 people who were subject to enforcement orders for CINs and other unpaid fines, there were six individuals who each had 20 or more other enforcement orders in place with total debts ranging from $3,700 to $13,400.

Just as there are a high number of court defendants who are apparently unaware that they have defaulted on fines and are subject to RTA and other enforcement sanctions, our attempts to use COPS records to make contact with CIN recipients indicates that it is likely there are many Aboriginal CIN recipients who may also be unaware of the enforcement action against them. In the case of those subject to RTA sanctions, it is probable that many will not find out that their licence is suspended until they are stopped by police for some unrelated reason or are alerted through their dealings with the RTA.

Police in some commands phone the CIN recipient prior to posting the notice to confirm details and explain the process. This can be an important additional check to reduce the many disadvantages of serving CINs by post. However, as our attempts to survey Aboriginal CIN recipients showed, many recipients do not have a current telephone number or can be difficult to reach if they do.

The apparently low number of current addresses and telephone numbers recorded for Aboriginal CIN recipients contrasts with our experience in other reviews in using similar methodologies to contact other groups of alleged offenders using details recorded on COPS.

Although frontline police strongly favoured retaining the option of serving CINs by post, they also recognised its shortfalls – even when notices reach the recipient. In explaining why it is preferable to serve a CIN in person, one officer commented:

> *If you don't, it's sitting under the door or something or you mail it to them, they go 'oh what the hell is this for' because if they're intoxicated they're probably not going to remember half the time.*[260]

Another said:

> *It's same as the other system where they send out a licence suspension. The person says they never got it. You end up in a long, drawn-out, red tape thing through the judiciary to figure out whether they did or didn't get service.*[261]

Whatever the reason for the apparently high number of police records relating to CIN recipients without a current address or telephone number, it is clear that relying on ordinary post to serve CIN notices and initiate enforcement processes can be highly problematic. Registered post provides the sender with some information on whether the CIN has been collected by the addressee, but does not resolve the issue of CINs posted to incorrect or out of date addresses or how to serve a notice upon individuals who are deliberately trying to evade service.

260 Officer focus group, 3 February 2009.
261 Officer focus group, 28 January 2009.

An alternative approach is that applied under the Victorian *Infringements Act 2006,* which requires that defendants personally be handed a notice of penalty by the Sheriff. As the NSW Sentencing Council's comment on this option noted:

> *2.278 … This safeguard measure is designed to ensure that individuals are aware that they have the fine, aware of the consequences of default and aware of the seriousness of the position that they are in.*
>
> *2.279 Requiring the use of personal service or a notice with similar effect as a committal warrant to advise absent defendants of the court imposed penalty would alert the courts if an offender is no longer at their last address, and avoid a sequence of events that wastes fine enforcement resources.*
>
> *2.280 Implementing these safeguards in the service of notices stage would protect people who do not receive notice of their financial liability, as well as providing the fine enforcement agencies with better quality information to ensure a more effective and efficient process.*[262]

In light of the large volume of penalty notices currently served by post in NSW, it may be impracticable to make service in person a requirement for penalty notices. However, the personal service requirement is worth considering in relation to the actions needed to enforce unpaid notices, especially when imposing RTA sanctions.

As a general principle, personal service of legal processes such as CINs would appear to be the preferable course in all but the most exceptional circumstances. Current police policy reflects this approach, establishing a hierarchy of preferences that stress the importance of serving CINs 'on the spot' in most instances or, where factors such as intoxication necessitate a delay, in person at a later date. And, according to police policy, postal service should only be used as a last resort.

There would be merit in having the law reflect and reinforce current police policy because:

- the many benefits associated with personal service may be dissipated or lost when police must resort to postal service
- there are important legal consequences for recipients even if they do not actually receive the posted penalty notice, and
- there may be an unacceptably high number of CINs served by ordinary mail not reaching the addressee.

For these reasons, measures are needed to discourage service by post in all but the most exceptional circumstances and improve the quality and consistency of information provided to CIN recipients at the time of service.

Recommendations

8. That the option for police to serve penalty notices by post be retained, but the *Criminal Procedure Act 1986* be amended to provide that postal service should only occur after all reasonable attempts to serve the notice in person have been exhausted.
9. In circumstances where penalty notices must be served by post, that the NSW Police Force ensure that the notice is accompanied by information explaining key features of the scheme, including the provisions relating to criminal records and the destruction of fingerprints upon payment at the penalty notice stage, the options for seeking an internal administrative review, the likely consequences of failing to deal with the notice and how recipients might go about obtaining further advice.

The NSW Police Force supported both recommendations. In relation to the proposed legislative amendment, it added:

> *Legislative change may be unnecessary. This could be dealt with through NSWPF procedures.*[263]

As noted earlier in this section, police training is already clear on this issue, stipulating that service of CINs by post 'should only occur as a last resort' and that, although CINs can be posted, 'police are only to post CINs after all reasonable attempts to serve personally have been exhausted'.[264] The legislative amendment we have suggested is intended to reflect and reinforce this approach and reduce the current high reliance on postal service of CINs. On the other hand, we would welcome any additional changes to police procedure that could strengthen police practices in this area and reduce the current reliance on postal service.

262 NSW Sentencing Council's Interim Report, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices,* 2006.
263 NSW Police Force response to draft report, 22 July 2009.
264 *CINs Frequently Asked Questions*, 'Q29 – Can you post the CIN?', NSW Police Force Intranet, accessed 17 April 2009.

In relation to the NSW Police Force providing better information to suspects who receive their CIN by post, the SDRO advised that it would be happy to assist in developing a standard advice form or flyer for CIN recipients, and to send the same form to CIN recipients when sending penalty reminder notices – see Recommendation 13 (Chapter 8).[265]

6.12. Information provided to CIN recipients when secondary offending is detected

The recent reforms include changes to the *Roads Transport (Driver Licensing) Act 1998* that aim to provide a more accurate measure of the extent to which people are detected driving while unlicensed because of fine default, and enable analysis of sentences imposed for such offences.[266] This will assist in determining the extent to which people, including Aboriginal people are becoming involved in the criminal justice system because of fine default – see Chapter 8 for further discussion of this issue.

While we are of the view that it is crucial that information about CINs be circulated to CIN recipients as early as possible to encourage people to deal with the penalty notice before defaulting on the fine and becoming subject to further costs, enforcement action and sanctions, we recognise that many people fail to engage with the SDRO or police at this early stage, even if they know the consequences that will arise from doing so. In other words, while improving information provision when CINs are issued or at the penalty notice phase is likely to assist in increasing the rate of payment of fines at the penalty notice phase, the extent to which this will occur is unclear.

People may ignore a penalty notice and subsequent sanctions for numerous reasons other than ignorance about the consequences. They might be disorganised, have more pressing financial or personal matters to deal with, be unsure about how best to proceed, believe that whatever they do will make little difference, or simply hope that the issue will go away. Some make a conscious decision to ignore penalty notices and sanctions that are imposed. Some of the Aboriginal Client Service Specialists interviewed for this review told us of clients who saw defiance of the fines enforcement system as an act of political resistance. One described a proud Aboriginal man who had huge debts from a long history of driving offences, mostly for driving without a licence, linked in part to a campaign of deliberate refusal to comply with non-Aboriginal law. Yet after the fines were eventually addressed through a period of community service at an Aboriginal cultural centre, the man has not offended since.

As outlined in the previous section, in October 2008 we wrote to 194 people identified in COPS as an Aboriginal or Torres Strait Islander recipient of at least one CIN between 1 November 2007 and 29 February 2008 to determine more about their experience in receiving and dealing with a CIN. Of the 12 respondents we were able to survey, eight (66%) said they took no action in relation to the CIN. Of these, one woman said she had not paid her fine (offensive behaviour) because she disputed the police version of events. The woman, a single mother with no paid employment, asked an Aboriginal Legal Service for advice but failed to court-elect before the matter was referred for enforcement and added to previous debts related to failing to vote, assault and unlicensed driving.

Of the other seven Aboriginal respondents who did not act on their fines, one man took no action because he 'does not pay fines', two said they intended to pay but had not done so, and four said that they had other, more pressing financial priorities to attend to. The case study below explains the situation of one such respondent.

Case study

Financial difficulties facing a CIN recipient

One man received a $200 offensive behaviour CIN for urinating in public late at night in November 2007. In a separate incident on the same day, he was fined $300 for shoplifting after going to pay for sweets that he had started to eat but then found there were insufficient funds in his account. He earns $400 – $600 a week and told us that he had not paid the fines (by November 2008) because he first has to pay $300 rent, $70 maintenance for two children, $3,000 in credit card debts and an older $160 traffic fine received in another state. As his licence had already been suspended because of the older fine, his priority was to pay that fine in order to get his licence back as he lives in a regional area and depends on his partner to get to work, earn an income and pay off his debts.

265 SDRO response to draft report, 20 July 2009.
266 These amendments were contained in the *Fines Further Amendment Act 2008*, Schedule 2.3 [3].

When a person defaults on a penalty notice payment, and fails to contact the SDRO about the matter, enforcement action is commenced and additional fees are imposed. If the enforcement order is ignored, sanctions are imposed. This generally involves the imposition of further costs, and the fine recipient's driver's licence being suspended or car registration cancelled. If the fine recipient does not have a car registered in his or her name, and does not possess a driver's licence, he or she will be restricted from dealing with the RTA so that it is not possible to obtain a licence or transfer registration of a car. In addition, civil action may be taken, such as the garnishing of wages or seizure of property.

There is no doubt that some people who lose their driver's licence due to fine default continue to drive their car. They may do so because they find it more convenient to drive, because they believe that there is only a small chance that they will be detected, or simply because of contempt or disregard for the law. Others, however, will choose to drive because they genuinely have no real alternatives to access employment, education and services. As outlined in section 8.4.1 this is particularly the case in remote areas, and is a significant issue in many Aboriginal communities.

Until recently when a person was detected driving without a licence, it was not possible to distinguish between those drivers whose licence was suspended because of dangerous driving practices, and those whose licence was suspended as a result of non-payment of fines. As outlined in sections 4.2.3 and 8.4.2 new separate suspended and cancelled driver offences arising from non-payment of a fine or penalty notice, were enacted in March 2009.

This should enable the government to collect better data on the extent of secondary offending due to fine default, and allow courts to consider the effect the penalty or period of disqualification will have on the person's employment and his or her ability to pay the outstanding fine.[267] It will also provide an additional opportunity for police to provide people detected driving while unlicensed because of fine default with information about managing their fine debt, or advice about where they may seek assistance.

Such information could be provided a number of ways. For example, in relation to Aboriginal people, it may be appropriate for the officer who detects a person driving while unlicensed because of fine default to inform the local Aboriginal Community Liaison Officer (ACLO) about the offender. The ACLO could then get in contact with the person whose licence has been suspended and provide them with information about options to address outstanding fines, and information about local advocacy, advisory or legal services. One stakeholder commented:

> *You raise the possibility of ACLO contacting recipients afterwards. If that was possible or practicable, that would be a good idea. They can tell them what to do if the person thinks the CIN issued is unreasonable or unjust.*[268]

While this is one strategy that police could use to provide information and assistance to people detected driving after having their licence suspended because of fine default, we are of the view that it would be most appropriate for local police and Aboriginal communities to determine themselves how to best deal with this issue at the local level, and to develop strategies that suit their local environment and communities.

Commands with Local Area Command Aboriginal Consultative Committees (LACACCs) already have a forum for developing these kinds of crime prevention strategies. LACACCs bring police and local Aboriginal community representatives together to identify and address issues of mutual concern. Their role is to:

- *be a voice for local Aboriginal communities within the LAC*
- *develop programs for youths, men and women*
- *monitor the implementation of the NSW Police Force Aboriginal Strategic Direction 2007 – 2011, and*
- *provide feedback to the Commissioner of Police through the* [Regional Aboriginal Advisory Committee].[269]

In practice, this includes providing advice to the Local Area Commander, identifying and resolving local issues, developing and monitoring LAC Aboriginal Action Plans, and contributing to local programs focused on crime prevention.[270]

We therefore provisionally recommended that LACACCs consider the adequacy of local information and assistance currently provided to Aboriginal people who are caught driving after having their licence suspended because of fine default. Involving the LACACCs was also intended to ensure that any measures to reduce secondary offending complemented other local policing objectives.

The NSW Police Force response to our draft report appeared to provide qualified support for this recommendation, noting that:

267 *Road Transport (Driver Licensing) Act 1998*, s.25A(3B).
268 Submission from P Marsh, Inner Sydney Regional Council for Social Development, 4 February 2009.
269 NSW Police Force brochure, *LACACC – Let's work in partnership to keep our mob out of custody,* PAB 70/07, www.police.nsw.gov.au – accessed, 15 April 2009.
270 NSW Police Force, 'LACACC Terms of Reference', *Aboriginal Strategic Direction 2007 – 2011.*

NSWPF does not have a role in providing legal or financial advice to offenders. However, NSWPF considers that referral to appropriate assistance would be consistent with its Aboriginal Strategic Directions 2007 – 2011.[271]

The NSW Police Force is right to advise against LACACCs taking on a direct role in the provision of legal or financial services. In asking LACACCs to consider the information and assistance provided to offenders whose offending is directly linked to their fine default, our expectation is that these groups will examine the local availability and adequacy of legal services and debt counselling, not to play an active role in attempting to provide that assistance themselves.

Many will undoubtedly identify deficiencies in local service provision. Yet even where LACACCs include people who are directly involved in the provision of these kinds of supports, we believe their role as LACACC members should be – consistent with the committee's terms of reference – to consider these issues from a crime prevention perspective and to identify practical ways to reduce this kind of offending. Where other agencies have responsibility for delivering services that are needed to make these crime prevention strategies work, LACACC members should use their influence to push for improvements.

Recommendation

10. That Local Area Command Aboriginal Consultative Committees consider the local availability and adequacy of information and assistance about management of fines to Aboriginal people who are detected driving after having their licence suspended because of fine default.

The creation of separate suspended and cancelled driver offences arising from non-payment of a fine or penalty notice could also provide practical avenues for the Crime Management Units in police local commands to actively identify offenders whose failure to attend to their unpaid CINs and other fines put them at higher risk of secondary offending. In the case of Aboriginal people whose licence suspensions and any subsequent driving offences are linked to fine default, there may be value in the Aboriginal Community Liaison Officer (where one is available), Youth Liaison Officer or someone else from the command talking to them about their offending behaviour and suggesting ways for them to address their unpaid fines. This might include putting them in touch with court staff, legal services or other advocates who can assist them to negotiate a time-to-pay agreement or some other arrangement with the SDRO.

Recommendation

11. That the NSW Police Force develop a strategy that assists Local Area Commands to monitor the incidence of the new suspended and cancelled driver offences under the *Roads Transport (Driver Licensing) Act 1998*, with a view to devising ways to prevent further offending.

The NSW Police Force did not support this recommendation, referring to its earlier comment (above) that it has no role 'in providing legal or financial advice to offenders' but that 'referral to appropriate assistance' would be consistent with current police policy. This seems to suggest that police have interpreted the recommendation to monitor these new driving offences and devise strategies to prevent further offending to mean that police take on a direct role in providing legal or financial advice. This was not our intention.

The recent changes to the *Roads Transport (Driver Licensing) Act 1998* are an important element of reforms to the fines system in NSW. The reforms are intended to provide clearer information about the extent of secondary offending due to fine default, and to help distinguish those offences from more serious incidents of unsafe driving.[272] As the agency responsible for detecting and prosecuting many of these offences, the NSW Police Force will be critical to the success of this initiative. This new source of information about offending behaviour could also provide Local Area Commands with the data needed to underpin measures to prevent further breaches. The measures might include local police talking to offenders about their offending behaviour and referring them to other services. Our recommendation is simply that local police, with the assistance of the NSW Police Force, take steps to monitor these offences and look for ways to use this data to inform strategies to prevent further offending.

271 NSWPF response to draft report, 22 July 2009.
272 Second Reading Speech, the Hon John Hatzistergos MLC, 27 November 2008.

While our review is limited to examining the operation of the CIN scheme 'in so far as those provisions impact on Aboriginal and Torres Strait Islander communities' we note that it may also be useful for police to examine the feasibility of providing additional information or assistance about the fines enforcement system to non-Aboriginal people who are detected driving while unlicensed because of fine default. If the government decided to establish a committee with an ongoing mandate to examine issues related to improving the penalty notice system (as recommended in section 8.8) such a committee may be well-placed to further examine this issue.

Chapter 7.
Data on payment and enforcement

Details about the payment of CIN penalty notices are recorded on the SDRO's Penalty Notice database. Information relating to enforcement orders for unpaid CINs is recorded on its Enforcement database. This chapter draws on both sources.

7.1. One agency, two databases

The SDRO is the agency responsible for collecting the payment of CINs and taking enforcement action against those who do not pay. After a CIN is issued, the recipient has 21 days to pay the CIN. If the CIN remains unpaid after this period, the SDRO sends the recipient a penalty notice reminder providing a further 28 days for payment. This is known as the penalty notice stage.

If the recipient does not pay the CIN in full, elect to have the matter heard at court or take some other action during the penalty notice stage, the SDRO refers details of the unpaid fine to its enforcement division to commence action to enforce the fine debts and enforcement costs.

The SDRO has a Penalty Notice database to track payments and other details at the penalty notice stage, and a separate Enforcement database that it uses to track and report on unpaid penalty notices that are referred for enforcement. We asked the SDRO to check both databases on the same date in mid-January, to give any initial payment and debt recovery action in relation to CINs issued late in the current review period to take effect.

7.2. CIN records on the Penalty Notice database

The CIN records on the SDRO's Penalty Notice database show that between 1 September 2002 and 31 October 2008 police issued 18,759 CINs with a total face value of $4.5 million in penalties. This consists of 9,828 CINs with a total face value of $2.5 million issued in the 12 trial commands during the extended trial period from 2002 to late 2007, and 8,931 issued across NSW in the first 12 months of state-wide use.

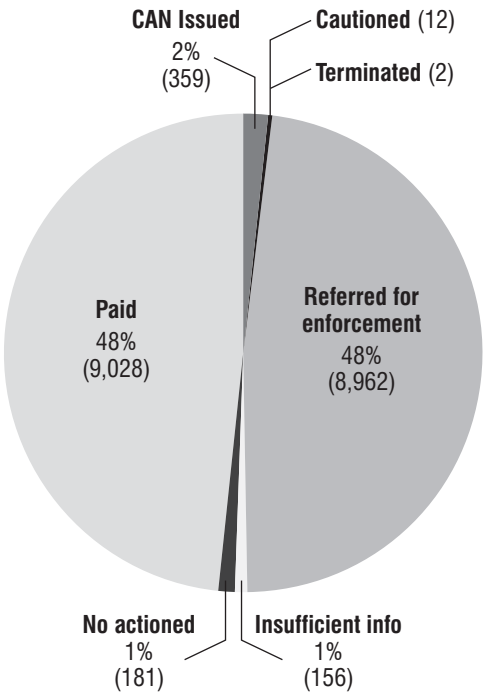
7.2.1. Rates of payments and fine default – all CIN recipients

Figure 14 shows the outcomes noted against all CINs on the SDRO's Penalty Notice database as at 19 January 2009, and figure 15 shows outcomes relating to Aboriginal CIN recipients on the Penalty Notice database.

Figure 14 shows that of the 18,759 CINs recorded on the SDRO's Penalty Notice database, about half were dealt with at this stage of the debt collection and enforcement process. That is:

- 9,028 (48.3%) of CINs were paid at penalty notice stage
- 359 (1.9%) court-elected and had a Court Attendance Notice issued

Figure 14 All SDRO records of CIN Penalty Notices issued 2002 – 2008

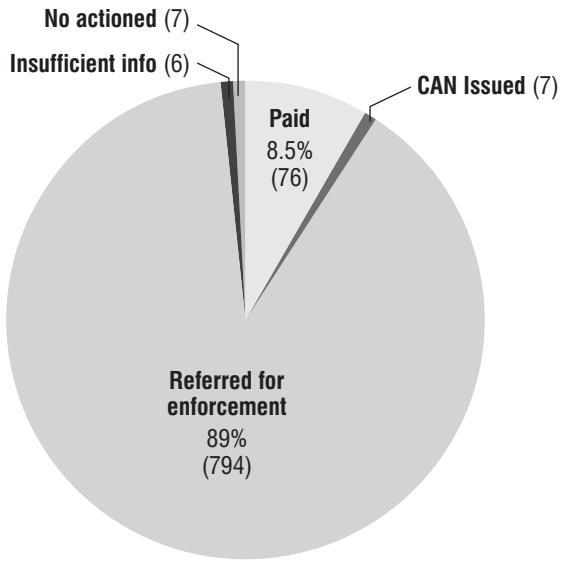


n = 18,700. Source: SDRO Penalty Notice database. Shows status of CINs issued 1 September 2002 to 31 October 2008 as at 19 Jan 2009. Consists of CIN penalty notice records 'closed' (18,654 CINs) or 'finalised' (46), but excluding 59 CIN records recorded as 'outstanding'.

- 181 (1%) were 'no actioned', meaning the CIN was withdrawn and no further action taken following some kind of review
- 156 (0.8%) had insufficient information on the CIN provided for SDRO to act
- 12 had the CIN withdrawn and substituted with a caution, and
- 2 CINs were terminated for some other reason

The remaining 8,962 (47.9%) CIN penalty notices were not paid at this stage and referred for enforcement action, with costs. Wrongly issued CINs such as the 139 CINs issued by officers outside the 12 trial commands during the extended trial period (see 'non-trial command' data in table 2) and the 65 CINs issued to people aged younger than 18 years (see figure 3), should have been identified at this point and withdrawn. These would account for at least some of the withdrawals noted above. However, it appears that at least some were either paid or referred for enforcement.

Figure 15 Aboriginal SDRO records of CIN Penalty Notices issued 2002 – 2008



n = 890. Source: SDRO Penalty Notice database. Shows status of CINs issued 1 September 2002 to 31 October 2008 as at 19 Jan 2009. Consists of Aboriginal CIN penalty notice records 'closed' (888 CINs) or 'finalised' (2), but excluding 5 CIN records recorded as 'outstanding'.

7.2.2. Identifying the SDRO's Aboriginal clients

Before considering the comparative information relating to Aboriginal recipients in figure 15, it is important to note the methodology used to identify those recipients.

Using police information to identify the SDRO's Aboriginal clients

The SDRO does not record the Aboriginality of its clients because, as the SDRO explained in its submission to this review, *'this information is not available to SDRO nor is there a need'* to record it. When asked if there were opportunities for the SDRO to develop strategies to identify Aboriginal clients experiencing difficulties in managing their scheduled payments in order to advise them of their options, the submission added that the *'SDRO attempts to assist all clients in an equitable manner based on their individual circumstances'*.[273]

In order to understand more about the circumstances of the SDRO's Aboriginal CIN clients and see how they fare in the fines enforcement system compared with CIN recipients generally, information from the NSW Police Force COPS system was used to identify Aboriginal CIN recipients on the SDRO's databases. Of the 18,759 records of CINs on the SDRO's Penalty Notice database, there were 17,605 that had a matching police reference – 8,491 from the current review period and 9,114 from CINs issued in the 12 trial LACs in the earlier extended trial period.

In relation to the 1,154 CIN records on the SDRO's Penalty Notice database with no corresponding COPS entry, neither the SDRO nor NSW Police Force could provide a clear explanation as to how there could be so many SDRO records without a corresponding COPS entry. Details of any CINs issued by police should be logged on COPS and a carbon copy ('Part A') of the CIN forwarded to SDRO, usually within days of being issued. We were advised that one likely explanation for the higher number of CINs on the SDRO Penalty Notice database was that some commands or some officers might have been slow to log details of CINs issued onto the COPS system and return the Part A copies of the completed CIN notices to the SDRO. As CIN recipients return their copy of the CIN ('Part C') with their payment directly to the SDRO, those details can be recorded on the SDRO Penalty Notice database but have no matching COPS record until police get around to entering the details. However, a joint SDRO-NSW Police Force exercise to address this issue in March 2009 succeeded in identifying only 19 additional CINs that police had apparently been slow to enter.

273 SDRO submission, 3 February 2009.

On the other hand, it is important to note that the number of 'unmatched' records was lower in the current review period – 440 of 8,931 CINs on the penalty notice database compared with 714 of the 9,828 matters recorded during the 2002 – 2005 extended trial period. This indicates that whatever is causing the recording disparity appears to be having less of an influence on recently issued CINs.

Of the 8,491 SDRO CIN Penalty Notice records from the current review period with a matching COPS record, 7.4% or 626 were Aboriginal and 7,865 were (according to COPS) non-Aboriginal, 'unknown' or 'refused'. Of the 9,114 Penalty Notice records of CINs issued in the 12 trial commands that have a COPS reference, 3% (269) were Aboriginal. As expected, these figures are very similar to the estimates based on the COPs data alone which show that Aboriginal people received 7.4% of all CINs issued during the current review period (see table 3) and 2.8% of CINs issued in the 12 trial commands during the extended trial period (see table 2).

For ease of reference, the 269 Aboriginal clients on the SDRO's Penalty Notice database shown as having been issued with a CIN before 1 November 2007 and the 626 Aboriginal people issued with a CIN in the year immediately following that date, will be considered together in our analysis of the SDRO's penalty notice and enforcement records.

The SDRO's response to our draft report included the following comment about the joint SDRO-NSW Police Force project to resolve the recording disparity noted above:

> *As NSW Police Force currently use manually issued penalty notices these are data entered into the SDRO system from hard copies of the notices, Part A's as you identify in your report. Unfortunately a number of these never made their way to SDRO. SDRO provides regular reports to NSW Police, as it does to all agencies which issue penalty notices, to identify any potentially missing notices. This is an issue which is being further pursued with NSW Police Force due to the diverse nature of their operation.*

Recording and data integrity issues are discussed further in the final chapter of this report.

7.2.3. Rates of payments and fine default – Aboriginal recipients

Figure 15 summarises the outcomes noted on the SDRO's Penalty Notice database relating to the 895 CIN recipients who, through cross-checking with COPS records, could be identified as Aboriginal.[274]

Whereas 48% of all CINs closed or finalised at the penalty notice stage were paid in full, and 48% were referred for enforcement, for Aboriginal CIN recipients just 8.5% (76 of 890)[275] had paid in full at penalty notice stage, and 89% (794 of 890) were referred for enforcement – see figure 15.

In relation to other penalty notice outcomes, the data indicates that just seven Aboriginal CIN recipients (fewer than 1%) elected to have their matters heard at court, seven received leniency ('no actioned') and none managed to have their CIN reduced to a caution.

Aboriginal applicants' very low success in having their CINs 'no actioned' or 'cautioned' is consistent with other SDRO data showing that few Aboriginal recipients apply for reviews. Of the 330 CIN representations for leniency or review between 2002 and 2008, there were matching COPS records for 309 (enabling us to identify Aboriginal applicants). Of these, just four of the 309 representations were from Aboriginal people. None related to CINs issued in the current review period, even though Aboriginal people made up 7.4% of all CIN recipients in that period.

7.3. CIN records on the Enforcement database

Details relating to CINs referred for enforcement are recorded on the SDRO's Enforcement database.

As at 19 January 2009, the Penalty Notice database showed that 8,962 unpaid CIN notices had been referred for enforcement. Yet data extracted from the SDRO's Enforcement database showed that, as at 17 January 2009, enforcement action had been taken in relation to 9,028 unpaid CINs – 66 more CINs than had been referred. Both sets of figures refer to CINs issued between 1 September 2002 and 31 October 2008.

Our draft report noted that it was not clear how the number of CINs on the Enforcement database could exceed the number of CINs referred at any given time. The SDRO advised:

274 As at the date these figures were checked on 19 January 2009.
275 Five Aboriginal CINs were still 'outstanding', indicating that there was still scope for those matters to be finalised at the Penalty Notice stage.

… the cause of such differences can be attributed to timing differences between two systems, the fact that a single enforcement order can cover more than one CIN and also that at a given point in time there will be matters awaiting the issue of enforcement orders.[276]

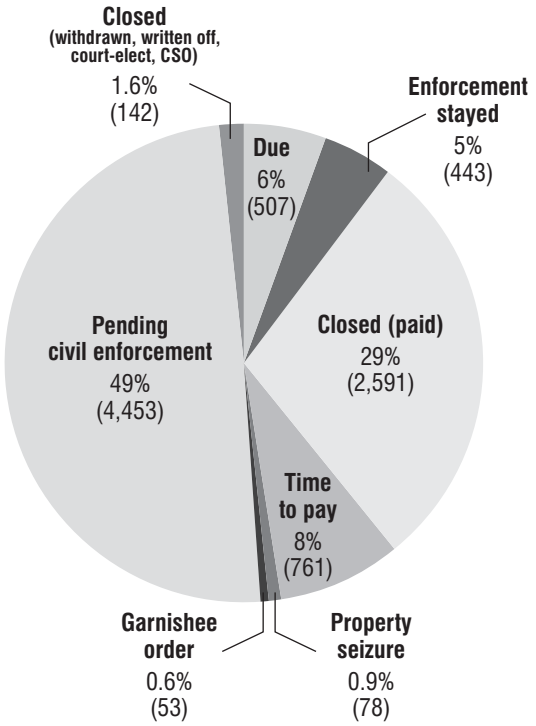
Although these factors do not fully explain the apparent discrepancy, the difference between the two sources is small.

As with the SDRO's Penalty Notice database, CIN records from the police COPS system were used to identify Aboriginal CIN clients on the SDRO's Enforcement database. Of the 9,028 CIN Enforcement records, 8,506 CINs had a matching COPS record. This showed that 9.3% (792 of 8,506) were Aboriginal.

As more and more CINs are issued to Aboriginal people, their over-representation in the fines enforcement system grows. The Enforcement database figures show that Aboriginal recipients were responsible for 5.3% (235 of 4,410) of CINs referred for enforcement during the extended trial period. For CINs issued in the current review period, the proportion of Aboriginal recipients was 13.6% (557 of 4,096).[277]

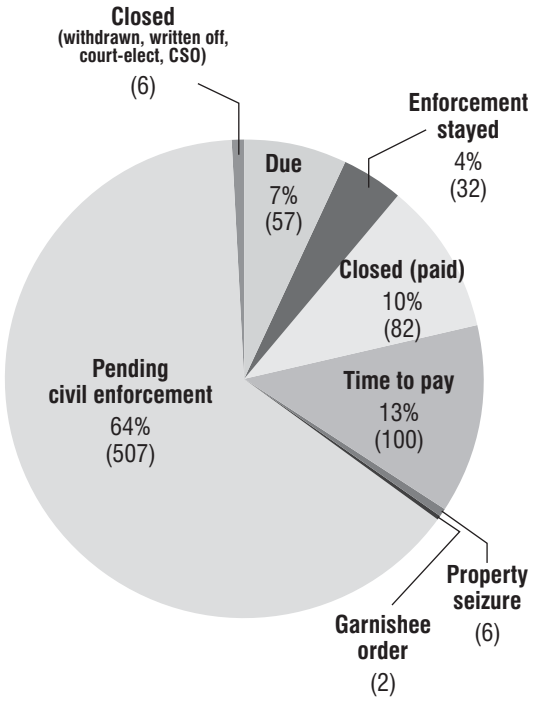
Figure 16 summarises the status of all unpaid CIN Penalty Notices referred for enforcement action as at 17 January 2009, and figure 17 shows comparative figures relating to Aboriginal CIN recipients referred for enforcement action.

Figure 16 Enforcement of all unpaid CINs issued 2002 – 2008



Source: SDRO Enforcement database. Figures refer to the SDRO's records of unpaid CINs issued between 1 September 2002 and 31 October 2008 referred for enforcement action by 17 January 2009. n= 9,028.

Figure 17 Enforcement of unpaid CINs issued to Aboriginal people 2002 – 2008



Source: SDRO Enforcement database. Figures refer to the SDRO's records of unpaid CINs issued to Aboriginal people between 1 September 2002 and 31 October 2008 referred for enforcement by 17 January 2009. n = 792.

7.3.1. Enforcement outcomes – all CIN recipients

In relation to the enforcement action taken to recover debts owed on all unpaid CINs, figure 16 indicates that 30% or 2,733 of the 9,028 unpaid CINs that had been referred for enforcement had been 'closed' by 17 January 2009. These closed matters consist of:

- 2,591 (29%) matters that were paid in full at enforcement stage, and

276 SDRO response to draft report, 20 July 2009.

277 As with the unmatched CIN records on the SDRO's Penalty Notice database, there is less of a disparity between the SDRO Enforcement database and NSW Police Force records in relation to more recent records – 7.2% (341 of 4,751) from the extended trial period and 4.2% (181 of 4,277) from the current review period had no matching COPS reference.

- 142 (1.6%) that were closed at this stage for some other reason – 92 matters were withdrawn, 39 written off, 9 applied to the court for an annulment order under section 48 of the Fines Act, and 2 had completed community service orders to acquit the fine and related enforcement costs.

The remaining 70% or 6,295 of 9,028 matters on the Enforcement database were still 'open' on the date this snapshot was taken, meaning that they were subject to some kind of enforcement action, or at least potentially subject to such action. By far the biggest group of 'open' CIN matters on the Enforcement database related to the 4,453 CINs that remained unpaid, but where civil enforcement such as property seizures and garnishee orders was yet to commence. This group made up 49% of all CIN matters recorded on the Enforcement database. The remaining 'open' CIN matters consisted of:

- 507 (5.6%) of matters that were due, meaning they were still in the early stages of enforcement action
- 761 (8.4%) of CINs and related enforcement costs that were being paid off over time through a time-to-pay agreement
- 443 (4.9%) matters where enforcement action had been 'stayed' or temporarily put on hold
- 78 (0.9%) matters subject to an order to seize property in order to satisfy the debt, and
- 53 (0.6%) matters where an order had been issued to garnish or deduct money from the CIN recipient's wages.

7.3.2. Enforcement outcomes – Aboriginal CIN recipients

In relation to the enforcement of CINs issued to Aboriginal people, figure 17 shows that just 11% (88 of 792) of unpaid CINs referred for enforcement had been 'closed' by 17 January 2009 – far fewer than the 30% of CINs referred for enforcement generally. The Aboriginal closed matters consist of:

- 82 (10.4%) matters paid in full at enforcement stage, and
- 6 (0.8%) that were closed for some other reason – 1 matter was withdrawn, 4 written off, and 1 applied to the court for an annulment order under section 48 of the Fines Act.

The remaining 89% or 704 of 792 Aboriginal CIN matters on the SDRO's Enforcement database were still 'open', meaning that they were subject to some kind of enforcement action or potentially subject to such action. The 'open' Aboriginal CIN matters consisted of:

- 507 (64%) CINs that remained unpaid, but where civil enforcement was yet to commence
- 57 (7%) of matters that were due, meaning they were still in the early stages of enforcement
- 100 (13%) of CINs and related enforcement costs that were being paid off through time-to-pay agreements
- 32 (4%) matters where enforcement action had been temporarily 'stayed'
- 6 CINs subject to court orders to seize property, and
- 2 CINs where an order had been issued to garnish or deduct money from the person's wages.

As the information in figures 16 and 17 shows, the main differences between Aboriginal CINs referred for enforcement and CINs generally is that far fewer Aboriginal CINs are paid at enforcement stage (10% compared with 29%), and many more are pending civil enforcement action (64% compared to 49%).

Two other differences are also apparent in the data:

- Whereas 2.9% (131 CINs) of all recipients were granted leniency at this stage (either written off or withdrawn), the proportion of Aboriginal people granted leniency was just 0.6% (5 CINs).
- More Aboriginal people are paying off their CIN debts in instalments using time-to-pay agreements – 12.6% (100 CINs) compared to 8.4% (761) of all recipients.

One contributor to the slightly higher proportion of Aboriginal CIN recipients on time-to-pay agreements might be the recent introduction of automated Centrepay facilities that enable some SDRO clients to have regular instalments deducted directly from their Centrelink benefits. The Attorney General's Department Aboriginal Client Service Specialists were among the first to discover that the SDRO was offering direct debit via Centrepay, and have actively promoted this option to eligible Aboriginal clients across NSW ever since.

Table 12 summarises information provided by SDRO comparing the use of Centrepay direct debit facilities with other time-to-pay arrangements.

Table 12 Use of Centrepay to manage time-to-pay instalments

	Centrepay		Normal	
	Clients	Fines	Clients	Fines
Aboriginal	54	60	32	35
Non Aboriginal	286	322	282	301
No match to police info	16	17	15	15
Listed as Both	2	6	3	5
Total	**358**	**405**	**332**	**356**

Source: SDRO Enforcement database. 'Listed as both' refers to clients listed on COPS as Aboriginal in relation to at least one matter, and non-Aboriginal in relation to another. n = 761.

Table 12 shows a total of 690 CIN clients with time-to-pay arrangements relating to 761 CINs. Of the 86 Aboriginal CIN clients who have time-to-pay agreements with SDRO, 63% (54) use Centrepay deductions to manage their payments. Of the 568 non-Aboriginal CINs subject to time-to-pay agreements, 50% (286) use Centrepay facilities. Other time-to-pay arrangements (which the SDRO calls 'normal' time-to-pay agreements) usually require fortnightly payments be paid in person at a post office using Australia Post's Billpay facility, or can be automated by using online banking to set up regular direct debit transfers from an individual's bank account to the SDRO's BPay account.

The SDRO recently advised that the default rate for clients who use Centrepay to manage their repayments had dropped to about 2%, compared with 40% for other time-to-pay arrangements. A critical factor in Centrepay's success is that direct debit deductions are made before a person's Centrelink benefit is paid into his or her bank account, whereas schemes that deduct payments from a person's bank account can result in the client incurring expensive penalty bank charges if the automatic deduction results in them over-drawing their account.

Table 12 also shows the numbers of clients and CINs that have no matching record on COPS and those 'listed as both'. This occurs when an individual's Aboriginality is noted in relation to police records of one incident, but then recorded as either 'unknown' or 'refused' in relation to another. The NSW Police Force's Chief Statistician has advised that there is no requirement for police to ask about a person's Aboriginal status when issuing a CIN. This is partly because it is accepted practice not to ask when issuing on-the-spot fines, and partly because there may be situations when such questions could be regarded as inappropriate, irrelevant or perhaps inflammatory. As such, there may be a number of CIN recipients listed as unknown or refused who are actually Aboriginal. He said custody and charge data relating to Aboriginality tended to be more accurately recorded because custody procedures require police to ask whether the person identifies as Aboriginal or Torres Strait Islander and certain safeguards, such as access to legal advice, often apply in relation to those who answer 'yes'.[278]

Although large numbers of CINs remain unpaid after being referred for enforcement, the lack of civil enforcement does not necessarily mean that no action has been taken to recover the debts. By far the most common action taken in response to fine default at the enforcement stage is to impose some form of RTA sanction – that is, the suspension of driver's licences, cancellation of vehicle registrations, and customer business restrictions. Customer business restrictions can prevent SDRO debtors from obtaining a licence, registering or transferring ownership of a vehicle, or having any other dealings with the RTA, until the debt owed to SDRO is paid or the SDRO has agreed that sanctions be lifted for some other reason.

Table 13 shows CIN recipients listed on the SDRO's Enforcement database who were subject to RTA sanctions as a result of their unpaid fines.

278 NSW Police Force Chief Statistician Mr Jim Baldwin, personal communication, 12 March 2009.

Table 13 CIN recipients subject to RTA sanctions

	Customer Business Restriction	Licence Suspension	Vehicle Registration Cancellation	TOTAL
Aboriginal	208	60	33	**301**
Non-Aboriginal	1,529	786	330	**2,645**
No match to police info	101	49	25	**175**
Listed as both	8	4	–	**12**
Grand Total	**1,846**	**899**	**388**	**3,133**

Source: SDRO Enforcement database. Clients can have more than one sanction type in place. 'Listed as both' refers to clients listed on COPS as Aboriginal in relation to at least one matter, and non-Aboriginal in relation to another. n = 3,133.

Table 13 shows that similar proportions of Aboriginal and non-Aboriginal CIN recipients had their vehicle registrations cancelled because of unpaid fines – 11% Aboriginal, 12.5% non-Aboriginal. The proportion of Aboriginal CIN recipients who had customer business restrictions imposed was 69% (58% for non-Aboriginal people), and the proportion of licence suspensions was 20% (30% for non-Aboriginal people).

7.4. Comparing net rates of payment and fine default

The data in figures 14 and 15 regarding CIN payments at the penalty notice stage show that, compared to CIN recipients generally, far fewer Aboriginal recipients pay their fine at the initial stages – just 9% (76 of the 890 identified Aboriginal recipients) paid at the penalty notice stage, compared with 48% (9,028 of 18,700) of all CINs paid at this stage. The inclusion of CINs subject to court-election, cautions, 'no action' determinations or closed at this point for some other reason adds another 2.2% (20 Aboriginal CINs) to the total dealt with at this stage – compared with 3.8% (710) of all CINs.

Additional payments at the enforcement stage lift the overall number of CINs paid, but only to a point. As at 17 January 2009, 2,591 CINs referred for enforcement had been paid in full. Of these, 82 belonged to Aboriginal CIN recipients. And a small number of matters had been closed at this stage for other reasons (withdrawn, written off, court-elect or by some other means).

Table 14 collates information from both the penalty notice and enforcement databases to estimate the total CINs paid or closed/finalised in some other way.

Table 14 CINs paid, finalised at penalty notice and enforcement stages as at January 2009 – all CINs

	Penalty notice stage (n=18,700)				Enforcement stage (n=9,028*)				Combined total	
	Paid	Closed/ finalised other	Total paid/ closed		Enforced	Paid in full	Closed/ finalised other	Open – stayed, TTP etc	Open – pending civil	Paid/ finalised total	% of total PN paid
Aboriginal	76	20	96	10.8%	794	82	6	197	507	184	20.7
Non-Aboriginal	8,452	576	9,028	54.1%	7,652	2,336	126	1,561	3,691	11,490	68.9
Unmatched	500	114	614	54.3%	516	173	10	84	255	797	70.5
Total	**9,028**	**710**	**9,738**	**52.1%**	**8,962**	**2,591**	**142**	**1,842**	**4,453**	**12,471**	**66.7**

Refers to SDRO records relating to all CINs issued between 1 September 2002 and 31 October 2008. *As at 17 January 2009, the SDRO's Enforcement database showed 9,028 unpaid CINs, 66 more than the total CINs identified on the penalty notice database at 19 January 2009 as having been referred for enforcement. 'Closed/finalised other' at penalty notice stage is made up of all matters recorded as CAN issued, cautioned, insufficient information, no actioned, terminated. 'Enforcement stage' refers to records of CINs withdrawn, s48 court-elect, written off, community service order.

Combined, information from the two SDRO databases show that by mid-January 2009, 12,483 or 67% of all CINs issued between 1 September 2002 and the end of the current review period on 31 October 2008, had been closed or finalised at either the penalty notice or the enforcement stages, most as a result of the recipient paying the fine at either the penalty notice or enforcement stage. Of the 895 CINs identified as belonging to Aboriginal recipients, just 21% (184) had been paid or dealt with at either the penalty notice or enforcement stages by that date.

In short, the combined data on payments indicates that at the time these data snapshots were taken, three out of every 10 CINs issued between 2002 and 2008 remained unpaid. In relation to CINs issued to Aboriginal people, eight out of every 10 CINs issued remained unpaid. It is not clear why so many CIN recipients default on their CIN payments, or why the rate of default is so much higher among Aboriginal people.

At present, there is no time limit on how long enforcement action and sanctions such as RTA sanctions can remain in place. The number of CIN recipients who pay at enforcement stage – both Aboriginal and CIN recipients generally – can be expected to increase over time as individuals complete time-to-pay agreements, are subject to civil enforcement, pay their outstanding fines in order to have RTA sanctions removed or, in a handful of cases, are granted leniency or have the matter withdrawn for some other reason. Yet it is evident that a substantial number will remain unpaid some months – or in many cases years – after the offence.

To get a sense of how these figures can change over time as sanctions and other enforcement measures take effect and unpaid fines on the enforcement database eventually get paid, table 15 uses the same method used to collate the data presented in table 14 – but restricts the analysis to CINs issued during the 2002 – 2007 extended trial period. Excluding all CINs issued after 1 November 2007 effectively restricts this analysis to CINs that have been subject to enforcement for at least one year.

Table 15 CINs paid, finalised at penalty notice and enforcement stages as at January 2009 – CINs issued during extended 2002 – 2007 trial period

	Penalty notice stage (n=9,828)				Enforcement stage (n=4,751*)					Combined total	
	Paid	Closed/ finalised other	Total paid/ closed		Enforced	Paid in full	Closed/ finalised other	Open – stayed, TTP, civil action	Open – civil action pending	Paid/ finalised total	% of total PN paid
Aboriginal	23	12	35	13.0%	234	38	5	34	158	78	29.0
Non-Aboriginal	4,335	399	4,734	53.5%	4,111	1,594	104	453	2,024	6,432	72.7
Unmatched	314	68	382	53.5%	332	140	10	32	159	532	74.5
Total	**4,672**	**479**	**5,151**	**52.4%**	**4,677**	**1,772**	**119**	**519**	**2,341**	**7,042**	**71.7**

Refers to SDRO records relating to CINs issued in 12 trial commands between 1 September 2002 and 31 October 2007.

*** As at 17 January 2009, the SDRO's Enforcement database showed 4,751 unpaid CINs from those issued during the extended trial period, 74 more than the total trial command CINs identified on the penalty notice database at 19 January 2009 as having been referred for enforcement. 'Closed/finalised other' at penalty notice stage is made up of all records of CAN issued, cautioned, insufficient information, no actioned, terminated. 'Enforcement stage' it is made up of records of CINs withdrawn, s48 court-elect, written off, community service order.**

Combined, the two SDRO databases show that by mid-January 2009, 7,042 or 71% of all CINs issued in the 12 trial commands during the extended trial period had been closed or finalised at either the penalty notice or the enforcement stages. Of the 269 CINs identified as belonging to Aboriginal recipients, 29% (78) had been paid or dealt with at either the penalty notice or enforcement stages by that date. As expected, the net rates of payment and finalisation are higher for both Aboriginal CIN recipients and CIN recipients generally. The table 15 data on CINs paid at the penalty notice stage show that a greater proportion of those issued to Aboriginal people during the extended trial period were paid at this earlier stage than is currently the case. However, the numbers are low and should be treated with caution.

The higher net payment and finalisation rates noted in table 15 potentially show the value of enforcement action over an extended period. However, it is important to note that other factors could also be at play. Apart from the longer period for enforcement action to take effect, another important difference is that the CINs referred to in table 15 were all issued in the 12 trial commands, most of which were located in Sydney and surrounding areas. As most

of the CINs issued to Aboriginal people since 1 November 2007 (and thus excluded from the analysis in table 15) were issued in regional and country centres, demographic factors such as lower incomes and higher levels of unemployment might also have influenced the outcomes on payments and fine default.

The SDRO refers to the combined figures noted in tables 14 and 15 as the 'settlement' rate. Its response to our draft report observed:

> *The settlement rate of 66.7% identified in the first table for CINS as at January 2009 reflects a far better position than the settlement rate for similar matters previously via Courts (pre CINS) which was in the vicinity of 24%. Admittedly the settlement rate following the statewide rollout of CINS has dipped slightly from 71.7% during the trial period but this is consistent with what has been experienced across all penalty notice offences. Fines collection is always competing for a share of a client's payment capability so the economic downturn has had a flow on affect to the operations of SDRO.*[279]

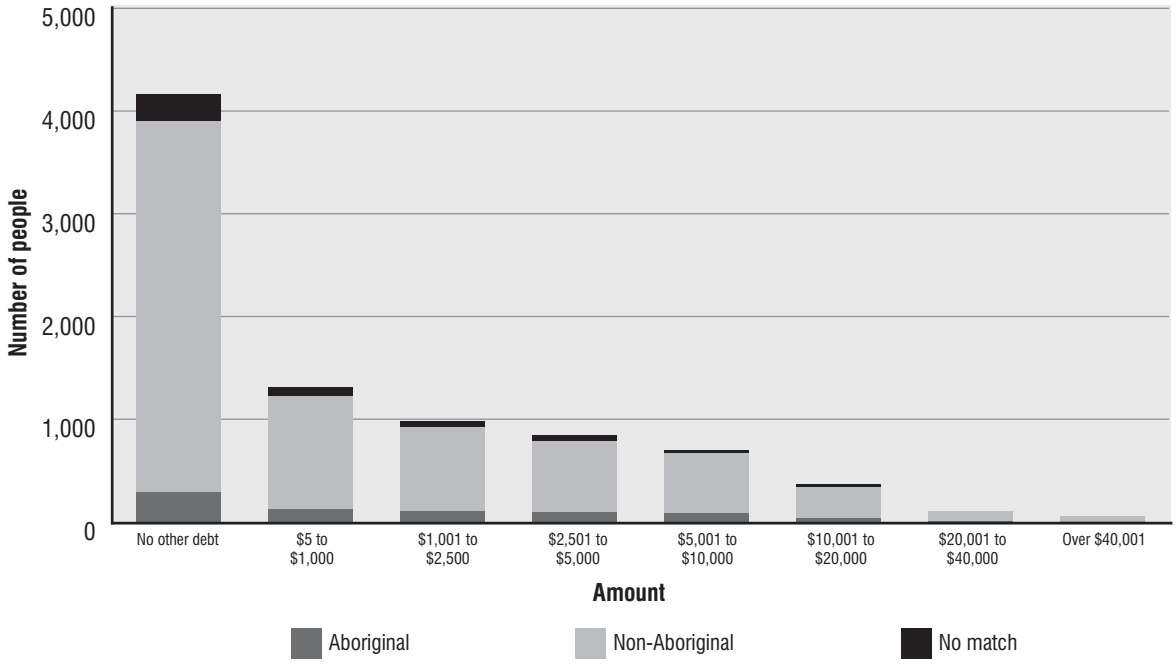
In time, the number of CIN recipients who have 'paid in full' at enforcement stage may increase further. However, it appears that substantial numbers of unpaid CINs remain in the fines enforcement system for long after the offence. For Aboriginal people, the proportion of CIN recipients still subject to fines enforcement and other sanctions long after receiving their CIN is much higher.

This data will be discussed further in the following chapter, together with any strategies used by the NSW Police Force and the SDRO to identify clients who experience difficulties in paying their fines or who might qualify for leniency in certain circumstances.

7.5. Fine debt of CIN recipients

The SDRO also provided information about other fine-related debts linked to CIN recipients whose unpaid CIN had been referred for enforcement action – see figure 18.

Figure 18 CIN recipients with outstanding SDRO debts other than CINs



Source: SDRO Enforcement database.

The information in figure 18 indicates that 49% (4,159 of 8,421) of all CIN recipients referred for enforcement action owed nothing else to SDRO, only the debts from their unpaid CIN or CINs and related enforcement costs.

We were also able to identify 717 individual Aboriginal CIN recipients are referred for enforcement action for failing to pay their CIN or CINs. Of these, 40% (287 of 717) had no other SDRO debts – only the debts related to the CIN or CINs issued between 1 September 2002 and 31 October 2008.

279 SDRO response to draft report, 20 July 2009.

This data indicates that Aboriginal CIN recipients more likely to be in debt to SDRO for other fine-related debts. That is, 60% of Aboriginal CIN recipients referred for enforcement owed money to the SDRO for other (non-CIN) enforcement orders, compared with 51% of all CIN recipients referred for enforcement.

However, Aboriginal CIN recipients appear less likely to be represented among the big debtors. There is just one identified Aboriginal CIN recipient among the 51 CIN recipients identified as owing $20,000 or more to the SDRO, and none among 10 who owed more than $40,000.

The SDRO also provided information about the quantum of unpaid enforcement orders, sorted by postcode. This location data included the total number of SDRO clients in each postcode area, the number of enforcement orders, the value of those orders and how many of those clients were on time-to-pay agreements with the SDRO. This showed, for instance, that (when this data snapshot was taken earlier this year):

- In the suburbs in and around Bankstown in western Sydney, the SDRO had 33,103 clients owing $26 million for a total of 72,680 enforcement orders. Of these, 1,289 or 3.9% of the clients had time-to-pay arrangements with the SDRO.
- In the suburbs in and around Blacktown, there were 67,201 clients with 163,235 orders (value $58 million), and 2,838 or 4.2% of clients had time-to-pay arrangements with the SDRO.

The SDRO provided similar data for all locations, including more sparsely populated country locations with high numbers of Aboriginal residents:

- Brewarrina and Weilmoringle – 1,097 clients with 2,523 orders, value $1.03 million, 31 or 2.8% of clients had time-to-pay agreements.
- Bourke area (including Enngonia) – 1,820 clients with 4,478 orders, value $1.7 million, 43 or 2.4% of clients had time-to-pay agreements.
- Wilcannia, White Cliffs – 738 clients with 1,485 orders, value $623,000, 12 or 1.6% of clients had time-to-pay agreements.

This data indicates the volume of debts owed and the monumental task facing the SDRO in tracking and recovering those debts.

However, the figures also show some encouraging signs in relation to time-to-pay agreements. In locations that have active Aboriginal Client Service Specialists and others who actively promote time-to-pay arrangements, there appears to be higher proportions of SDRO clients using these instalment payments options. For instance:

- Kempsey area (including Bellbrook) – 3,842 clients, 10,748 orders, value $4.7 million, 372 or 9.7% of clients on time-to-pay agreements.
- Nowra, Bomaderry – 5,184 clients, 12,858 orders, value $5.8 million, 308 or 5.9% of clients on time-to-pay arrangements.
- Shoalhaven 2540 postcode area (other than Nowra) – 3,760 clients, 8,254 orders, value $3.5 million, 278 or 7.4% of clients on time-to-pay arrangements.
- Toronto area – 2,940 clients, 7,610 orders, value $2.8 million, 214 or 7.3% of clients on time-to-pay agreements.
- Wyong, Tuggerah Lakes – 6,629 clients, 16,177 orders, value $6.3 million, 421 or 6.4% of clients on time-to-pay agreements.
- Menindee – 184 clients, 429 orders, value $208,000, 13 or 7.1% of clients on time-to-pay agreements.

The presence of advocates actively promoting the use of flexible arrangements to repay outstanding SDRO debts appears to be a factor in the higher proportions of SDRO clients using time-to-pay options in those locations. Having a critical mass of SDRO clients using these options may also contribute to awareness of and demand for these options in those areas.

While the numbers for Menindee are small, the use of time-to-pay agreements in this location contrasts with other towns in the Central Darling Shire, such as Wilcannia (see above).

Chapter 8.
Issues and findings relating to payment and enforcement of CINs

This chapter considers the impacts of CINs on Aboriginal communities, recent improvements to the administration of fines enforcement, and opportunities to further improve the fines system to better address and manage the impacts and risks to Aboriginal CIN recipients, particularly in relation to:

- information provided to CIN recipients about the consequences of fine default and the options to pay or remit penalty notice and enforcement orders
- the collection and analysis of data about fine debts of Aboriginal people and communities
- the strategic expansion of and support for the SDRO Advocacy Hotline, and
- identifying Aboriginal CIN recipients at increased risk of secondary offending.

8.1. Impacts of CINs enforcement on Aboriginal communities

The CINS enforcement process, outlined in Chapter 4, delivers benefits to Aboriginal communities insofar as it can divert minor Aboriginal offenders from police custody and from being brought before the courts on charges. Notwithstanding these benefits, there are significant consequential risks and impacts for Aboriginal recipients that can flow from the enforcement of unpaid CINS under the Fines Act.

The findings outlined in Chapters 5 and 6 indicate that Aboriginal people receive a significantly higher number of CINs than would be expected for a group that makes up just over 2% of the population. Also, the police use of CINs to deal with offensive language and offensive behaviour is increasing – and appears likely to continue to increase. The potential consequences for Aboriginal communities are significant.

The data on CINs enforcement outlined in Chapter 7 indicates that the CINs scheme is leading to an increase in the levels of fine debt of Aboriginal people and communities, in that:

- only 8.5% of CINs received by Aboriginal people were paid at penalty notice stage compared with 48.3% paid overall – most (89%) CINs issued to Aboriginal people lead to enforcement action, with additional costs and sanctions
- the proportion of CINs issued to Aboriginal people that are paid at penalty notice stage has decreased since the CINs scheme was extended to the whole of NSW
- 51% of Aboriginal CIN recipients that received a fine enforcement order for an unpaid CIN had previous unpaid fines with the SDRO, and
- SDRO data suggests that there may be high levels of fine debt in Aboriginal communities relating to court fines and penalty notices other than CINs.

In the context of the relative economic disadvantage of Aboriginal people, the marked increases in CINs being issued to Aboriginal people and the fact that most CINs issued to Aboriginal people are not paid and lead to enforcement action, it is evident that the CINs scheme is increasing the number of Aboriginal people being caught up in the fines system. In addition, the imposition of RTA sanctions in response to unpaid CIN fines is likely to increase the risk of secondary offending by Aboriginal people, particularly young recipients who make up the majority of CIN recipients.

To date, there has been minimal use or impact of the other civil enforcement sanctions available to SDRO, such as property seizures and the garnishment of wages.

8.2. Information and assistance available to Aboriginal CIN recipients

It is essential that people are given clear, comprehensive and accurate information about their options on receiving a CIN. This is particularly important for the Aboriginal community in light of the fact that disproportionately high numbers of Aboriginal people receive CINs, most CINs issued to Aboriginal people lead to fine default and enforcement action, and the reality that:

- Aboriginal people rarely elect to have CINs determined by a court (just seven of the 895 Aboriginal CIN recipients the SDRO Penalty Notice database chose this option)
- it is very rare for Aboriginal people to make representations in relation to their CIN (four of the 895 recipients had made representations since 2002, and none during the current review period when most Aboriginal CINs were issued), and
- for 40% (287) of the 717 individual Aboriginal CIN recipients referred for enforcement action since 2002, the only debt they owed to SDRO was for the CIN.

Although government and police policy objectives recognise the need for measures to reduce the rate at which Aboriginal people come into contact with the criminal justice system (see discussion at section 3.8.), there can sometimes be particular difficulties in providing clear and timely information. Aboriginal CIN recipients are, for example, much more likely to live in regional or remote areas far from government services and court facilities. Also, many Aboriginal people do not have easy access to internet facilities, may not have high levels of English literacy (or computer literacy) and, because of socio-economic stressors, may have more immediate concerns to deal with than their fines.

These factors were highlighted in a number of submissions we received from stakeholders. For example:

> *Almost all of the residents of this community have no access to the internet (in their homes) and for the majority of adults, even if access was available, as occurs through the local public library, those most likely to receive a CIN would not demonstrate any degree of computer literacy, nor would such individuals think of accessing the internet to receive information concerning their CIN issuance, nor would 'they' generally understand the (relative) complexity of negotiating a website, drop down menu, search facilities etc.*[280]

> *Aboriginal people often have poor access to the internet and to information generally.*[281]

These issues are more pronounced for ex-prisoners and others living on the margins of disadvantaged communities.

> *It is often the case that clients exiting custody have so many other more pressing issues to address such as accommodation, income, employment, health, alcohol or drugs etc, that fines may not be seen as a priority for them and therefore ignored.*[282]

The likelihood that many Aboriginal people who receive CINs may have difficulty in obtaining information about fine enforcement processes and options is compounded by the fact, as our community and agency consultations found, that almost no-one outside of the NSW Police Force knew about CINs, understood the key principles of the scheme or how it worked, or knew of people who would admit to having been issued with a CIN.

Where help is available, this advisory role is typically ad hoc, voluntary and unregulated. Few advisors have any formal training or instruction on how to deal with the fines system. As a result, assistance is scarce and the levels of expertise vary considerably from one location to the next. Of particular concern was that this lack of knowledge about CINs extends to staff of legal services and Local Courts who regularly take on the role of helping members of the public deal with fines and fine enforcement. Of the few who thought that they might have provided advice to CINs recipients about their options, it was common for them to confuse aspects of the CIN scheme with other notices issued by police, especially general infringement notices issued for cycling without a helmet, minor breaches of the Liquor Act and other common misdemeanours.

8.2.1. Written information provided with the CIN penalty notice and reminder notice

When a police officer considers a person has committed an offence which can be dealt with by way of a CIN, and the officer uses his or her discretion to proceed by issuing such a notice, the officer will complete a NSW Police Force Penalty Notice form, which contains a unique identifying penalty notice number. The issuing police officer is required to complete a number of fields on the penalty notice form, including details about:

- the sex, name, address, date of birth, and licence details of the alleged offender, and details about the alleged offender's vehicle, if relevant
- the type of penalty notice which is being issued (traffic infringement notice, general infringement notice or CIN), and
- the title of the offence and the fixed penalty amount.

280 Submission from P Webster, p.9.
281 Submission from P Marsh, Inner Sydney Regional Council for Social Development, 4 February 2009.
282 Mission Australia submission

The front of the notice advises recipients that their options are to:

- pay the fine (by credit card online, by phone, by post or in person at a post office), or
- elect to have the matter heard at court, by completing a court election form on the rear of the penalty notice and posting the form to the SDRO.

There is no further information on the penalty notice about the option to apply for a review of the police decision to issue the CIN, what to do if there are likely to be difficulties in paying the fine by the due date, where to seek advice, or the consequences of non-payment of the fine. And, as CINs are written on penalty notices used for other offences, nor is there specific information about the CINs scheme such as advice that receipt and payment of a CIN does not amount to a conviction or finding of guilt, and that the CIN need not be declared as part of any check relating to the recipient's criminal history.

If a person does not pay the CIN within the required 21 days, a reminder notice is posted to them by the SDRO. Section 29 of the Fines Act provides that 'it is presumed that a penalty reminder notice sent to a person by post is served on the person 7 days after it is posted, unless the person establishes that it was not served within that 7-day period.'

A penalty reminder notice contains details about the penalty notice recipient, the offence which is alleged to have occurred, the due date for payment and options about how to make payments or elect to have the matter heard at court.[283] More recent versions of the penalty reminder notice include an SDRO telephone number for people who have enquiries about the matter, and the following statement:

> *If you wish to seek leniency based on certain circumstances or if you believe an error has been made, information on requesting a review of your penalty notice is available at www.sdro.nsw.gov.au.*[284]

It is unclear the extent to which penalty notices and reminder notices which are sent by mail reach Aboriginal CIN recipients – see earlier discussion at section 6.11, including comments by the Law Society noting the 'real danger' that many more transient Aboriginal people may not receive the CIN through the post.

> *The same comments apply in relation to the 'reminder letter' sent out by SDRO informing the offender that they have a further 28 days to pay the fine.*[285]

Our own research demonstrated similar difficulties in contacting Aboriginal CIN recipients by mail.

One submission we received suggested that the 'use of language on the infringement and addition supportive documents [could] be adapted [to better] reflect the level of understanding of the criminal infringement processes'.[286]

Notwithstanding these difficulties, it is our view that consideration should be given to the incorporation of additional information on the CIN penalty notice including the consequences of fine default, an SDRO telephone number for inquiries about payment options including instalments and time to pay, and information about the availability of an internal review that may be conducted by the NSW Police Force.

Increasing the number of people who understand the consequences of non-payment of fines, including the fact that additional fees will be incurred, and sanctions will be imposed, is likely to encourage at least some people, particularly those not experiencing significant financial difficulties, to deal with their fines promptly. Second, informing people who may have difficulty paying the penalty notice about their options to pay by instalments or by Centrepay, and where they can obtain assistance in accessing these options, will encourage people to engage with the SDRO before enforcement action is taken and further costs are imposed. This will assist in diverting people from the criminal justice system who have a genuine desire to pay their infringement notice.

We recognise that the penalty notice used to issue a CIN is a generic infringement notice used for a range of fines including traffic fines. The additional information listed above is relevant to payment of CINs and other fines issued by the NSW Police Force.

We note that a report by Victoria's Law Reform Committee into *Warrant Powers and Procedures* included a review of the Victorian infringement notice system.[287] In response to that report, the Victorian Government made a decision that 'Infringement notices … will be required to include information on the right to internal agency review, the right to apply for an instalment plan and the right to elect to go to Court to contest the matter.'[288]

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283 Section 27 of the *Fines Act 1996* outlines what a penalty notice must say.
284 Penalty reminder notice dated 28 April 2008.
285 Law Society of NSW submission, 12 February 2009, p.3.
286 Supplementary submission from Bankstown City Council, 2 February 2009.
287 Parliament of Victoria, Law Reform Committee, *Warrant Powers and Procedures*, November 2005. http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Warrants/final%20report.pdf. Accessed 25 March 2009.
288 Government response to the Victorian Parliament Law Reform Committee's Warrant Powers and Procedures Final Report, p.13. http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Warrants/govt%20resp.pdf. Accessed 25 March 2009.

Recommendation

12. The NSW Police Force, in consultation with the SDRO, consider the feasibility of providing additional information relating to payment and review options on penalty notice forms.

The NSW Police Force supported this recommendation. However, the SDRO did not support it 'due to the limited printing space available on the notices'. The SDRO readily conceded that the downside of using a 'generic style penalty notice book' for issuing CINs is that 'the limited printing space on the notice does restrict the amount of information that can be included'. It did not dispute the value of providing additional information on the penalty notice form, only that space constraints restrict the scope for including additional information.

As jurisdictions such as Victoria appear to have addressed this issue, there may be value in seeking professional design advice regarding formatting options. A formatting review could consider:

- whether there might be scope to remove some of the repetition on the current penalty notice, such as instructions (including an address) on where to send to send a completed court election form on the front of the form that are then repeated in full on the reverse side of the notice
- whether it is necessary to have one SDRO postal address for receiving court election forms, and a separate SDRO postal address for receiving payments, and
- the scope to simplify some of the language used on the form. For instance, whereas the NSW penalty notice refers to 'METHODS OF DISPOSAL TO FINALISE THIS MATTER' before listing the available options, the equivalent heading on the Victorian notice is 'Options'.

As Victoria's reforms have now been in place for some time, there may be value in seeking advice from the Infringements System Oversight Unit in Victoria's Department of Justice and others involved in administering fines, regarding their experience and what they might do differently with the benefit of hindsight. Similarly, other jurisdictions may also have insights for NSW to consider.

8.2.1.1. Fines fact sheet

We are also of the view that there would be significant merit in the NSW Police Force and the SDRO developing a fact sheet or information brochure about CINs, which the SDRO could disseminate with all penalty reminder notices posted to CIN recipients. This would include:

- plain-language advice about the offences (and penalties) incorporated into the scheme
- payment options (including information about part-payments, time-to-pay agreements, and who to contact if the recipient is experiencing difficulty paying the penalty)
- how to seek a review of the penalty notice and factors that will be considered as part of this process
- the consequences for not dealing with a penalty notice
- who to contact if further assistance is required
- information about the option to elect to have a court determine the matter, including the processes to be followed in order to court-elect, and the outcomes that may arise if this course of action is taken, and
- how to obtain legal advice.

We note that it would be beneficial for a comprehensive fact sheet about CINs to be developed as soon as is reasonably practicable. However, to ensure that it does not become quickly outdated it may be appropriate to delay publication of the fact sheet until all the legislative amendments contained within the *Fines Further Amendment Act 2008* have come into force. Alternatively, if legislative changes are likely to be delayed, the fact sheet should be developed outlining details of the proposed changes. This will ensure people receive up-to-date information about the option to apply for time-to-pay penalty notices, and the availability in some circumstances to seek to undertake a work development order.

Recommendation

13. The NSW Police Force and SDRO develop a fact sheet about the Criminal Infringement Notice scheme to be sent with all Criminal Infringement Notices served by post, with penalty reminder notices, and published on the SDRO website.

The NSW Police Force supported this recommendation. It noted that the form drafted in response to recommendation 9 (regarding information to accompany CINs served by post) could be adapted to provide the information needed to accompany penalty reminder notices. The SDRO also 'fully supported … the inclusion of a 'flyer' with computer printed reminder notices for CINS offences'.

8.2.2. Information about CINs published by the SDRO

The SDRO publishes information about fines and the fines enforcement system, for example, it has a range of fact sheets, brochures, review guidelines, and annual reports. However, the primary way that the SDRO disseminates such information is via its website which provides a step-by-step guide to payment of penalty notices, requesting a review of a penalty notice, and the options following the issue of an enforcement order including requesting time to pay, seeking annulment of the order, seeking review of an enforcement order, and requesting that RTA sanctions be lifted.

The SDRO includes the following information about CINs in the 'Frequent Questions' section of its website.

> **I have received a criminal infringement notice (CIN). What are my options?**
>
> Police officers may choose to issue a penalty notice for minor criminal offences. Your options are to:
>
> **Pay:** if you choose to pay the fine, the record of fingerprints will be destroyed and it will not appear on your criminal record.
>
> Or
>
> **Request a review:** if the person is deceased, mentally incapacitated or there is a claim of fraudulent use of a person's identity, you can send SDRO a request for review. Details of evidence required to prove these circumstances are contained in the SDRO Review Guidelines. These will be referred to NSW police for consideration. If you wish to dispute the fine for any other reason, you should choose to go to court.
>
> Or
>
> **Choose to go to court:** you can choose to have the penalty determined in court, however all criminal infringement notices that are decided in court will be recorded on a person's criminal record. If the offence is proven in court it will appear as a conviction. If you are found not guilty, it will appear as a non-conviction. If you wish to proceed to court you should complete the court election form received with your penalty reminder notice, or download the court election form.
>
> **My criminal infringement notice (CIN) has become an enforcement order? What are my options now?**
>
> If you do not pay the fine by the due date on the penalty reminder notice, enforcement action will commence. An enforcement order will be issued and additional costs will apply. If the enforcement order remains unpaid, further enforcement action will follow which may include suspension of your driver license, restrictions on conducting business with Roads & Traffic Authority (RTA), garnisheeing of wages, property seizure order or a community service order and additional fees.
>
> Your options for an enforced fine are to:
>
> **Pay:** if you pay the fine, any fingerprints will be destroyed and it will not appear on your criminal record.
>
> Or
>
> **Choose to go to court:** you can apply to have an enforced fine decided in court in certain circumstances. These are described in Section 49 of Fines Act 1996. You do this by sending us an Annulment Application with the $50 non refundable application fee. If accepted, we will advise you of the court and date to attend. If proven in court, the offence will appear on your criminal record. If you are found not guilty, it will appear as a non-conviction.
>
> **What will happen if I don't pay my fine by the due date?**
>
> If you do not pay the fine by the due date on the penalty reminder notice, an enforcement order will be issued and additional costs will apply. If the enforcement order remains unpaid further enforcement action will follow, which may include suspension of your driver licence, restrictions on conducting business with the RTA, garnisheeing of wages, property seizure order or a community service order and additional fees.[289]

In an issues paper seeking comments about aspects of the CINs scheme, we asked the NSW Police Force to provide its views on the accuracy of the SDRO's advice regarding requests for reviews. The police response noted:

289 'Frequently asked questions', www.sdro.nsw.gov.au accessed 12 August 2009.

> *The information contained within this section of the Frequently Asked Questions page is considered too limiting and does not accurately reflect the circumstances in which a CIN may be withdrawn. Accordingly, NSW Police Force will take steps to modify this part and request the SDRO to update the website. There is regular consultation between the SDRO and NSW Police Force in relation to guidelines and CINS data issues. It is understood that the SDRO will commence a consultative review of their guidelines in February 2009 and it is the intention of NSW Police Force to raise these issues during this process.*[290]

The SDRO has advised that its website, www.sdro.nsw.gov.au, is where information gets updated most often.[291] We note, however, that in at least some instances there has been a significant delay in relevant information being uploaded onto the SDRO website. For example, while people have had the option to make time-to-pay payments using Centrepay deductions since February 2008, information about utilising this option was not included on the SDRO website for over 12 months.

The SDRO acknowledges the difficulties that people in remote communities may experience in accessing the internet, and:

> *For that reason hard copy publications are provided through the various community networks, via the Aboriginal specialists in local courts, the Aboriginal coordinators network in the RTA, local councils, the NSW Police Force, the Legal Aid network, Law Access and the Advocacy Groups which have registered with SDRO.*[292]

In 2005 the SDRO established a telephone hotline to handle calls from the Ombudsman's Office, Members of Parliament and major stakeholder agencies. This has since been extended to various advocacy groups, such as the Salvation Army, Homeless Persons Legal Service, Aboriginal Support agencies, Legal Aid and mental illness support agencies. This service allows support groups to call the SDRO and discuss a client's options while the client is with them. In 2007 – 08 the hotline handled more than 3,000 calls.[293]

Groups using the advocacy line told us it is relatively helpful. However, several commented on the lack of consistency of advice provided by different SDRO staff, even in relation to key issues such as the minimum amounts required for time-to-pay agreements in certain circumstances.[294]

The SDRO does not collect information about the ethnicity or Aboriginality of penalty notice recipients, therefore it is not possible at the current time for material specifically aimed at Aboriginal people to be forwarded directly to them when, for example, penalty reminder notices are posted. However, in 2008 the SDRO published a brochure aimed at Aboriginal people called 'What will happen if I don't pay my fine?' which explains in relatively simple language the consequences of not paying a fine, the options for seeking time to pay, and who to contact in order to obtain more information.[295]

The SDRO has advised that a number of measures are being undertaken to heighten public awareness about penalty notices and enforcement orders. For example:

- Periodically throughout 2009 flyers will be sent with penalty notices and enforcement orders to heighten public awareness about options such as part payment of penalty notices and time to pay enforcement orders, as well as direct debit via Centrepay.
- In the first half of 2009 a letter will be sent to clients who use Australia Post to make payments in accordance with a time-to-pay agreement, advising them of the option to use Centrepay. A similar letter was circulated in early 2008.
- The SDRO is seeking to expand its communication networks through the Premier's Department Regional Coordinators network, the Department of Aboriginal Affairs and existing networks.
- In the first half of 2009 the SDRO will consult Aboriginal community groups in the more remote areas to identify the most successful means of providing information to them.[296]

The SDRO has also advised that it is attempting to address the question of availability of information to the general community through all sources possible, and would 'welcome any further suggestions on how information on fines compliance/enforcement can be disseminated.'[297]

290 NSW Police Force submission, 17 February 2009.
291 SDRO submission, 3 February 2009.
292 SDRO submission, 3 February 2009.
293 Correspondence from M Roelandts, Senior Manager, Business Relationships & Development, State Debt Recovery Office, to M Gleeson, Manager, Police Division, NSW Ombudsman, 22 October 2008.
294 For example, interview with Coffs Harbour Legal Aid, 21 August 2008.
295 http://www.sdro.nsw.gov.au/lib/docs/forms/fl_wwh01.pdf. Accessed 18 March 2009.
296 SDRO submission, 3 February 2009.
297 SDRO submission, 3 February 2009.

8.2.3. Information provided by advisors and advocacy groups

The NSW Government has a range of programs and employees whose role it is to assist and advocate for people caught up in the criminal justice system. For example:

- it is the role of Aboriginal Client Service Specialists to improve communication and coordination between courts and the Aboriginal community in order to provide a more effective service to Aboriginal clients
- the Witness Assistance Service provides a range of services to meet the needs of victims of crime and witnesses appearing in court matters prosecuted by the Department of Public Prosecutions
- Legal Aid provides legal advice and other legal services to disadvantaged people, and
- Law Access NSW provides a free telephone service that includes legal information, advice and referrals for people who have a legal problem in NSW.

However, there are no employees or agencies whose role it is to specifically provide advice, assistance and advocacy for people caught up in the fines system.

At present there are networks of advisors who take on the role of providing advice to Aboriginal people about handling their fines and fine debt. However, such people often provide advice on managing fines and fine-related debts in an unpaid capacity or in addition to their formal responsibilities.

These include Aboriginal court staff, Aboriginal Legal Service officers and some employees of Aboriginal community organisations. In several locations, individuals based at local area land councils, community development employment programs, drug counselling programs, driver education programs, employment services and others with experience in dealing with government bodies, such as Police Aboriginal Community Liaison Officers have taken on the role of helping people to deal with outstanding fines or obtaining specialist advice. This is often the case in locations where there are no Aboriginal positions based at the Local Court, no community justice group in place or where those available had little experience in assisting those in debt.

The assistance provided by these people, usually involves them telephoning the SDRO on behalf of their client. However, as this advisory role is typically ad hoc, voluntary and unregulated, and few advisors have any formal training or instruction, the levels of expertise of advocates vary considerably from one location to the next.

Those with better networks and who process higher volumes of calls know to register with the SDRO in order to access the SDRO's advocacy hotline, a priority number which is restricted to registered advocates.

During our consultations we found that most people who provided advice and assistance to people who had received CINs and/or other fines had a limited understanding about the details of the CIN scheme, and could not differentiate CINs from other general infringement notices. Nonetheless, we found a number of individuals who had accumulated considerable expertise through assisting others to deal with their fines. Several were acutely aware of the impact of unpaid fines, had a sophisticated understanding of fines enforcement procedures and had developed considerable expertise in assisting people to deal with fine-related debts and sanctions – including sanctions arising from CINs.

Generally, the most knowledgeable advisors with the most up-to-date knowledge of the available options are those who help others deal with high volumes of fines, have good links with advisors helping fines recipients in other locations, and ask plenty of questions when they make contact with the SDRO.

Some organisations and individuals have been particularly pro-active in developing and implementing strategies to assist people with fine debts. For example:

- In addition to their main responsibilities, many of the Aboriginal Client Service Specialists employed to assist Aboriginal people appearing before Local Courts make a point of asking clients about outstanding debts to SDRO and assisting them to negotiate time-to-pay and other agreements with SDRO. Some supplement this 'debt work' by arranging regular information sessions and community outreach, usually without SDRO assistance. One Sydney-based ACS specialist estimated she spends about 15% of her work time assisting clients with SDRO matters.
- Some legal centres, including Coffs Harbour Legal Aid, conduct active outreach programs and 'debt clinics' to identify and assist clients who are experiencing difficulties in dealing with their fine debts. For instance, in September 2008 the Kempsey Family Community Project (auspiced by the Mid North Coast Regional Council for Social Development), in partnership with Coffs Harbour Legal Aid, held a one day forum to assist 35 Aboriginal people to undertake the administrative procedures required to have their drivers' licences returned. The SDRO assisted by rostering extra staff on its advocacy hotline to expedite applications.[298]

298 Submission from the Mid North Coast Regional Council for Social Development, 30 January 2009, pp.2 – 3.

- One Justice Group Coordinator who is a former Aboriginal Education Assistant spends a significant amount time in schools trying to educate children on the need to respect the law, pay their train fares and not merely ignore the fines if they are caught. She also visits drug and alcohol rehabilitation groups, homeless shelters and other forums seeking out people with debt issues and assists them to arrange time-to-pay agreements.[299]
- A Community Justice Coordinator advised that she and an Aboriginal Client Services Specialist colleague were planning to hold regular clinics in a regional correctional facility to assist inmates to sort out outstanding court, SDRO and other issues prior to their release.[300]

Other advisors we spoke to expressed an interest in conducting similar community education initiatives in the future, including measures targeted at prison inmates and people seeking drug and alcohol treatment.[301]

We note that in instances where recipients of fines seek assistance from advisors or advocates, this is often not sought until after the person has defaulted on the fine, enforcement action (with additional costs) has been taken, RTA or other sanctions have been imposed, the accumulated debt is too great for the person to pay, the person has defaulted on a previous time-to-pay arrangement, and/or the person has been brought before the court for driving related offences because of debts owed to the SDRO.

8.2.4. Community Legal Centre advice, clinics and publications

Community legal centres provide a further avenue where people can obtain information and advice about penalty notices. These centres are independent, non-profit community organisations that provide free legal services to the public. Some community legal centres cater specifically to particular client groups, such as young people or Aboriginal people. Some centres also conduct specialist outreach clinics to assist clients with fine debts and other unresolved legal issues.

At least two publications specifically about fines and the fines enforcement process have been developed by community legal centres in NSW. The Shopfront Youth Legal Centre has developed a quick reference guide to dealing with fines which contains detailed information about the fines system and relevant contact details if further assistance is required. The electronic version of the document also contains direct links to relevant SDRO, court and Hardship Review Board forms.[302]

In addition, *Fined Out,* was developed by the Redfern Legal Centre and Inner City Legal Centre to provide an overview of the fines enforcement process in NSW.[303] This document was last updated in 2004, so its content is not current. However, we understand that a working group is currently revising the content for an updated publication.

8.2.5. The 'Koori Grapevine'

Another influential source of advice involves informal word-of-mouth networks among fines recipients themselves. These seemed to consist mainly of SDRO debtors who have successfully negotiated time-to-pay agreements with the SDRO, with or without the assistance of community advocates, and passed on advice about their experiences to friends and family. The extent and influence of this type of self-help approach is unclear. But for at least some SDRO debtors in some Aboriginal communities, this informal word-of-mouth advice via the 'Koori Grapevine'[304] was their main source of information about payment options.

Although important, there are disadvantages to this type of information exchange. As information passes from one person to the next, its accuracy, relevance and currency can be affected. For instance, we found that at least some advice provided informally through the 'Koori Grapevine' was out-of-date or did not address the varied circumstances of different debtors. This is not surprising, as even advocates who know the fines system very well are often unaware of important payment or review options.

299 Anita Barker, Aboriginal Community Justice Group Coordinator, Toronto, interview 24 July 2008.
300 Kerry Standley, Community Justice Coordinator, Broken Hill, 7 August 2008.
301 For example, Avery Brown, Aboriginal Legal Service Officer, Grafton; Colleen Cattermole, Aboriginal Client Service Specialist, Broken Hill.
302 The Shopfront Youth Legal Service, *Fines – Step by Step*, 29 September 2008. http://www.theshopfront.org/documents/Fines_Step_by_Step_004875126v36.pdf. Accessed 25 March 2009.
303 Redfern Legal Centre and Inner City Legal Centre, *Fined Out: A joint community legal education resource by Inner City & Redfern Legal Centres*, December 2004.
304 Also known as the Murri Grapevine, the Black Telegraph and other such names.

Case study

Word of mouth

One Aboriginal man living in Northern NSW had entered into a time-to-pay agreement with the SDRO in 2003, requiring him to pay fortnightly instalments until 2014. In practice, this necessitated him paying in person at the post office every fortnight. After seeing that this was an affordable way to remove driver licence and vehicle registration restrictions, a number of his friends and workmates adopted his example and entered into similar arrangements with the SDRO. One said he had just entered into an agreement to pay amounts every fortnight until the debt is repaid in 2015. Interestingly, none were aware of the more recently introduced options for automating these payments. While the first man has demonstrated the necessary discipline and commitment to make payments in person each fortnight year after year, the data on SDRO clients failing to complete time-to-pay agreements indicates that at least some of his friends will need to automate their payments if they are to comply with these arrangements over such a long period.[305]

The SDRO response to our draft report commented on this issue, noting:

> *Following the introduction of Centrepay direct debits, all clients on time-to-pay arrangements were written to in February 2008 advising of the Centrepay facility and inviting them to take up that option. The consequential take up rate was significant. As at the end of June 2009, 45% of clients on time-to-pay arrangements are utilising the Centrepay option. SDRO will again write to time to pay clients, who are not yet on Centrepay direct debits, later in 2009 again offering the option to change over.*[306]

The SDRO also offered to contact the people mentioned in this case study to discuss the option of Centrepay direct debits. We will provide details of the SDRO's offer to these debtors.

8.2.6. Options for improving the effectiveness of advocates and provision of information and assistance about CINs

The recommendations to improve the written information provided to CIN recipients will assist some Aboriginal people to take action in relation to CINs and other fines enforced by the SDRO. It is our view these initiatives should be complemented by strategies to improve the ability of community organisations and advocates that assist Aboriginal people to negotiate the fines system.

Feedback provided to us through community consultations and submissions during this review revealed strong evidence that fine debt is a significant issue impacting on Aboriginal communities and that community advocates have identified a need for better resources to assist them to make representations to SDRO on behalf of Aboriginal people. Some of the practical suggestions by Aboriginal advocates included:

- An Aboriginal Client Service Specialist who was planning to conduct regular fine debt clinics and information days in Far West NSW said they would welcome SDRO advice on how to go about this exercise.
- An Aboriginal Community Justice Coordinator who advises prison inmates on legal and other issues thought there was scope to include information on the steps that inmates could take to address outstanding court fines and SDRO debts prior to their release.
- An Aboriginal Client Service Specialist who had helped more than 200 Local Court clients negotiate time-to-pay agreements with SDRO in the previous year had developed a standard 'SDRO Client Information Sheet' and checklist to ensure he obtains all the information that SDRO typically needs to determine the options available to clients. Other advocates who heard about this checklist said an SDRO version of this form could save them, the SDRO and their clients a lot of time in having to gather all the information needed for the SDRO.
- Many Aboriginal advocates worked with children and young people and could see opportunities to prevent offending, fine default and long-term problems with SDRO. For instance, an Aboriginal Community Justice Group coordinator in an area with high rates of juvenile fare evasion said it was not uncommon for young clients to owe SDRO more than $10,000 in unpaid fines and enforcement costs. She often visits schools to alert students of consequences of 'jumping the trains' and the difficulties they will have getting a driver's licence when they are adults.

305 The SDRO has advised that the default rate for clients on time-to-pay agreements using Centrepay has dropped to about 2%, compared to 40% for other time-to-pay agreements. Email from SDRO (Mick Roelandts) to NSW Ombudsman's Office, 19 December 2009.
306 SDRO response to draft report, 20 July 2009.

- One Legal Aid solicitor who runs 'debt clinics' praised the SDRO for ensuring enough staff were rostered on the SDRO advocacy hotline to take their calls and provide assistance. She thought there was scope to extend this service to their twice-weekly legal clinics for homeless young people but noted the staff and volunteers would need information on CINs and on the hardship review provisions.

As most of the Aboriginal advocates from Local Courts, justice groups, drug treatment services, employment services and legal services had not heard of CINs before we approached them for their views (even in areas with very high rates of CINs use and high rates of fine default), almost all said they would like to know more about CINs so that they could then educate their communities about the likely consequences. This issue was also raised in a number of written submissions:

> *Any shortcomings in the fine default aspect of the Criminal Infringement Notice Scheme might be more appropriately addressed through a more focused education campaign in the Aboriginal community and improved information dissemination from the State Debt Recovery Office to acquit fine debts.*[307]
>
> *The education of Aboriginal persons and of advocates regarding options for payment and alternatives should be the subject of focused policy and education.*[308]
>
> *The writer would inform* [Local Area Lands Council] *staff and Elder's Councils and provide suitable resources for them to display information and communicate to offenders and potential offenders and apply cultural (and other) pressure.*[309]

On the basis of information provided to us during the review we are of the view that SDRO should:

- conduct a strategic evaluation of the effectiveness of the Advocacy Hotline, including opportunities to improve the effectiveness of registered groups and individual advocates in providing advice and assistance to SDRO clients in relation to CINs, penalty notices and payment options
- develop strategies to increase the availability of registered advocates in locations where there is currently no such assistance, especially those who can assist Aboriginal people living in regional and remote communities
- develop the capacity to collect and use information about the Aboriginality of CIN recipients, especially the 89% of Aboriginal CIN recipients who are referred for enforcement after failing to deal with their CINs, and
- actively identify people who are likely to fail to pay their CINs (based on the improved records that are kept) and develop strategies to reduce fine default and increase payments.

8.2.7. Improving the effectiveness of organisations that provide advocacy and advisory services

As outlined in sections 3.6 and 8.2.3 people and organisations that provide advice and assistance to fine recipients can now register to access the SDRO's advocacy hotline, a priority number which is restricted to registered advocates. As at the beginning of February 2009, 63 advocacy groups had registered with the SDRO to access the hotline service.[310]

It is unclear the extent to which the SDRO publicises this facility (there is no reference to it on the SDRO website), and how many advisors and advocates are aware of this service. As outlined in section 8.2.3 many of the people that we consulted for this review, who provide advice to fine recipients, did not have a comprehensive and up-to-date understanding about CINs or current options for dealing with fines generally, and many of the stakeholders we spoke to had either not heard of the SDRO Advocacy hotline, or had learnt about it from other organisations who had used the service.

We note that the SDRO does not accredit advisors that it registers to use its priority phone hotline, and there are no measures in place to assess the quality and consistency of information and advice provided by different organisations and individuals. As advised by the SDRO:

> *Advocacy Groups 'register' with SDRO for the purposes of accessing a direct hotline and to be able to deal with SDRO on behalf of their clients. The 'registration' is purely to establish the bona fides of the Advocacy Group and to streamline on-going contact for the benefit of the clients. It does not involve any assessment of the capabilities of that Group nor expertise of personnel.*[311]

307 NSW Police Force submission, 17 February 2009.
308 Law Society of NSW submission, 12 February 2009, p.5.
309 Submission from P Webster, p.13.
310 SDRO submission, 3 February 2009.
311 SDRO submission, 3 February 2009.

The success of dealings with Advocacy Groups relies upon a co-operative approach, a level of trust between the client and the Group and a level of confidence between the Group and SDRO. Any regulation of this arrangement or over complication could well be self defeating.[312]

In addition, the SDRO has stated:

- *It is acknowledged that third parties can provide assistance in the process of resolving fine enforcement matters but this should not be seen as the norm. In the great majority of cases direct contact between the client and SDRO can similarly resolve matters without delay.*[313]
- *It is not the role of SDRO to promote any particular advocacy groups nor is this considered appropriate.*
- *the role of the SDRO, in respect of fines compliance/enforcement, should not be confused with the role of welfare agencies'*[314]

The SDRO comments suggest that its role in supporting advocacy and advisory services in assisting fine recipients should be limited. The SDRO does not appear to support engaging more closely with advisors and advocates, of having a role in ensuring that registered advocates are available to all fine recipients who may need such a service, or ensuring that advocates are performing this role effectively.

It is our view that the level of fine debt among Aboriginal people provides strong grounds for improving the capacity of advocates and community organisations to assist Aboriginal people in making representations to the SDRO.

As noted in chapter 7, almost half (47.9%) of the CINs issued between 1 September 2002 and 31 October 2008 were not paid at the penalty notice stage and were referred for enforcement action. For Aboriginal CIN recipients, this figure was 89%. In addition, only 30% of all CINs referred for enforcement action had been paid or closed for some other reason by 17 January 2009. For Aboriginal CIN recipients, the figure was just 11%.Together these figures showing high rates of fine default among Aboriginal CIN recipients at Penalty Notice stage and poor rates of debt recovery at Enforcement stage suggest significant scope for advocates to assist Aboriginal people in negotiating the resolution of fines.

We recognise that the SDRO is taking steps to improve the way it deals with Aboriginal people, including hiring Aboriginal staff, and attempting to liaise more closely with government and non-government staff members who provide assistance to Aboriginal people. However, we are of the view that there is scope for the SDRO to be more pro-active in undertaking such work, and to recognise the important role that other organisations could play to further assist Aboriginal and other disadvantaged people to more effectively manage their fine debts and reduce offending behaviour.

While we acknowledge that liaising directly with the SDRO may be relatively easy for many people, this clearly does not extend to those who experience one or more forms of disadvantage, such as people who have limited English or literacy skills, those who live in remote locations, people who are unemployed, or live in poverty, and people who are homeless, incarcerated or who have intellectual disabilities or mental illness.

In addition, people who have had a history of conflict or negative relations with government departments may be reluctant to deal directly with the SDRO, and feel more comfortable dealing with someone who can advocate on their behalf. It is an unfortunate fact that many Aboriginal people experience more than one of these disadvantages. What this means in practice is that people who are likely to have the most difficulty paying their fines are often going to be those who find it most difficult to liaise directly with the SDRO.

As well as assisting individual SDRO clients, it is highly likely that improving the utility and effectiveness of advocacy services will be to the advantage of the SDRO. Most obviously, an effective advocacy network would be likely to increase the number of people taking action to pay off their fine debts. This is because a high proportion of the people advocates assist would be those who have difficulty accessing information provided directly by the SDRO because they lead a transient lifestyle, live in a remote community, have limited access to communication facilities or have limited English language or literacy skills.

In addition, as many of the organisations currently undertaking an advocacy role in relation to fine debt provide an array of other advisory, advocacy and referral services to disadvantaged people, they are in a unique position to proactively identify people who may owe money to the SDRO and attempt to have such people engage with the SDRO before debt levels and enforcement costs spiral to unmanageable levels. If well supported by the SDRO, such organisations would also be better equipped to educate people in disadvantaged communities about the consequences of ignoring fines and the risks of engaging in behaviour for which penalty notices can be issued – in other words taking action to prevent people becoming involved in the fines enforcement system in the first place.

312 SDRO submission, 3 February 2009.
313 SDRO submission, 3 February 2009.
314 SDRO submission, 3 February 2009.

There are a number of steps that the SDRO could take to assist advocacy and advisory organisations to provide fine recipients with clear and comprehensive information about managing their fines. For example, it would be useful for the SDRO to publicise information about its Group Advocacy Network to ensure that organisations which provide advocacy and advisory services to fine recipients (or those that may be in a position to do so) are aware of the option to become registered advocates. This could be done a number of ways, including uploading information for advocates (and prospective advocates) on the SDRO website, writing to relevant organisations, attending community events and liaising with staff from courts and other government departments.

In addition, the SDRO should provide organisations that register with the SDRO as an advocacy service with comprehensive and up-to-date information about penalty notices (including CINs) and the fines enforcement process. This could involve the development of an induction kit to be distributed to all registered advocates, as well as the provision of ongoing information updates and support by way of email communication, website updates, face-to-face meetings, or information seminars.

It may also be useful for the SDRO to conduct an analysis of organisations which have registered with its advocacy hotline. This would enable the SDRO to determine whether there are any regions where there are a significant number of people who would benefit from an advocacy service, because of their isolation or other disadvantage, and where no advocacy service is registered. The SDRO could then undertake to determine whether any appropriate government staff or non-government organisation (such as a NSW Police Force Aboriginal Community Liaison Officer, court officer, Local Area Land Council staff or employment service provider) is in a position to assist with improving local knowledge about the fines enforcement system, and assisting people who have defaulted on their fines to address this.

We note that in the near future non-government agencies, such as Youth Off The Streets and the St Vincent De Paul Society will be closely involved in the fines enforcement system through participation in the work development order scheme.[315] This is likely to provide the SDRO with the opportunity to liaise with organisations that may be in a position to become involved in the Group Advocacy Network, and to seek the views of organisations that deal with people experiencing hardship and disadvantage about additional ways to engage with people who have defaulted on their fines and encourage them to pay off their fine debt.

We note that the effectiveness of having well informed and supported registered advocates across the state will be limited unless people who receive CINs and other fines are made aware that such organisations exist and are available to assist them. Throughout section 8.2 we have suggested a number of ways that provision of information to CIN recipients could be improved, such as including fact sheets about CINs with CINs served by post and penalty reminder notices. We are of the view that all initiatives undertaken to improve the provision of information to CIN recipients should include information about the existence of advocacy services and details about how to contact them.

As outlined in section 8.2.3 the NSW Government has a range of employees who have a specific role in assisting and advocating on behalf of people caught up in the criminal justice system. No such service currently exists for people caught up in the fines enforcement system, even though the consequences for people with high levels of fine debt are significant. As has been discussed, people and organisations that provide assistance for people with outstanding fines usually do so in addition to their formal responsibilities, and often without a comprehensive understanding of SDRO processes and the fines enforcement system.

Given the NSW Government's 'ongoing commitment to ensuring the fines enforcement system remains fair and efficient'[316] we are of the view that there may be benefits in the government considering whether it would be appropriate for positions dedicated to assisting fine recipients, who are struggling to manage their fines and fine debt, to be established and resourced. Detailed consideration of this proposal is beyond the scope of this review. However, if a body were to be established to oversee and monitor the administration and continual improvement of the NSW fines enforcement system (as suggested in section 8.8) this may be an issue that such a body would be well-placed to consider.

In light of the potential for advocates on the SDRO register to improve the SDRO's access to Aboriginal communities, our draft report recommended that the SDRO take steps to evaluate and improve the effectiveness of its group advocacy network by consulting advocates about their information needs, looking to expand the number of groups or persons on its register who could assist Aboriginal people in regional and remote communities, and evaluating the outcomes of current SDRO initiatives.

The SDRO made the following observation about its advocacy hotline and the potential to provide additional assistance to advocacy groups.

315 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
316 The Hon Henry Tsang MLC, NSWPD, Legislative Council, 18 June 2008.

The report appears to be suggesting a far more active role for SDRO in respect of these groups. I think it is important to realise that SDRO does not co-ordinate, assess, performance monitor nor fund the various community groups, voluntary organisations, charity organisations, counselling associations nor government run programs in the welfare environment.

Having said that SDRO has been proactive in the development and production of resource material to assist these agencies to assist their clients. In particular the Fines Information Pack which provides detailed information to advocacy groups on the fines system in NSW. Also by participating in regional forums and information sessions.

The establishment of the Advocacy Hotline and the recruitment of four identified Aboriginal positions in Lithgow (2) and Maitland (2) also illustrate SDRO's commitment to assisting disadvantaged clients.[317]

In relation to the provisional recommendation mentioned above, the SDRO response stated:

SDRO has no ownership of the advocacy network, it is made up of various groups as mentioned … above. SDRO aims to assist those groups through the resources that are available to achieve maximum coverage. SDRO already evaluates the outcomes of the regional forums with detailed reporting in place at the end of each visitation program.[318]

We acknowledge the steps taken by the SDRO to improve its support for disadvantaged and vulnerable clients, both directly through its participation in regional forums and information sessions and indirectly through the information that it makes available to networks of advisers and others who try to assist clients to deal with their fines. We also recognise that the SDRO has no role in funding or running the advocacy services on its register, despite benefiting from the work they do in assisting members of the community to talk with the SDRO about dealing with their debts. It is also important to note that although targeted outreach initiatives are important, the SDRO's call centres, web site and publications will remain the principal avenues for disseminating information and dealing with clients.

Yet, as the SDRO response explains, it is already investing in initiatives to reach out to clients who default on their debts. It already provides fines information packs for advocates, organises and contributes to clinics and forums in regional areas, has developed targeted publications, employs Aboriginal staff, has developed links with Aboriginal staff and programs in other agencies, and has relaxed the use of RTA sanctions imposed on certain clients living in communities that have an added need for licensed drivers. The targets of these outreach initiatives presumably include the nine out of every 10 Aboriginal CIN recipients who fail to pay their CIN in the time allowed and are referred for enforcement, with additional costs and penalties. It makes little sense for the SDRO to invest in these kinds of initiatives without checking how effective they are in improving outcomes and using the information provided to inform its work in this area. While the SDRO notes it has undertaken some evaluation of its outreach work, we believe it could be more strategic in its approach to building bridges with Aboriginal communities. This could include asking the groups and individuals that it has registered as advocates about the adequacy and accessibility of supports already provided by the SDRO (such as the information published on its web site) and what opportunities there might be to further improve its work in this area. The SDRO's decision to recruit four Aboriginal staff for the purpose of reaching Aboriginal clients is a positive step forward. Its consultations with registered advocates could include discussion of priority initiatives and what these staff could be doing to help the SDRO to deliver better outcomes for Aboriginal communities.

Recommendation

14. That the SDRO take steps to evaluate and improve the effectiveness of its group advocacy network, in particular by:
    a. Consultation with advocates about improving the provision of information and support provided by SDRO via the Advocacy Hotline.
    b. Setting strategic goals and action plans to increase the number of groups or persons registered to the Advocacy Hotline that might assist Aboriginal people living in regional and remote communities.
    c. Evaluating the outcomes of the Advocacy Hotline including initiatives supported by SDRO such as debt clinics and information seminars.

317 SDRO response to draft report, 20 July 2009.
318 SDRO response to draft report, 20 July 2009.

8.2.8. Improving information about legal services

Aboriginal people are not only less likely to pay their penalty notice than non-Aboriginal people, they are also less likely to elect to go to court. As outlined earlier, in the period 1 September 2002 to 31 October 2008 only seven people who identified as Aboriginal and received a CIN elected to have the matter determined by a court.

Reasons that Aboriginal people do not make use of the court-elect option include:

> *homelessness, disability, disorganisation, lack of literacy skills, lack of access to legal advice, or lack of awareness that they even have this option.*[319]

It is clear that these factors do not only affect Aboriginal people, but also others who are socially and economically marginalised. As one stakeholder advised us:

> *A lack of education and financial opportunity to engage, or even conceptualising engagement, with the courts is a luxury of thought and concept that comes from social advantage,*[320]

In relation to seeking legal advice, the Law Society of NSW has stated:

> *Even when a person understands that they should seek legal advice, they may not always be in a position to access it. In some remote locations there are no solicitors in the local or nearest township, and the Local Court may sit only once a month, or less. Typically, a person in this situation with a court attendance notice (CAN) will seek legal advice from an Aboriginal Legal Service or Legal Aid solicitor on the day they are due to appear in court. Occasionally, a person with a CAN will go to court even if their matter is yet to come up, so that they can talk to a solicitor and get advice. However, when the magistrate is not sitting, the court is shut and not staffed, so no lawyers are available to consult.*
>
> *An example of this is at Boggabilla, which has a large number of Aboriginal people living a 15-minute drive away on the mission at Toomelah, and is itself a 90-minute drive from the nearest Local Court at Moree. There is no public transport to Moree, and most Toomelah residents do not have access to a car, or have a driver licence, and many do not have a phone. If a Toomelah resident receives a CIN, for instance, a few days after the court has sat, the 21-day notice provision will have expired before the court next returns to town and the person has had an opportunity to see a solicitor at court.*[321]

It is a key element of the CIN scheme that the right to have the matter for which the CIN was issued heard at court be retained. In order for this to be meaningful it is important for recipients to be aware that they have the option to have the matter heard at court, and to understand that it may be appropriate for them to seek legal advice before making a decision about whether to proceed in this way.

At present the SDRO website contains a form for people who are electing to have a matter heard at court. However, there is no information on the form about ways to access legal advice before or after proceeding with this option. In addition, while the SDRO brochure aimed at Aboriginal people entitled 'What will happen if I don't pay my fine' advises 'The Chamber registrar or Aboriginal Client Service Specialist at your local court can also give you information about how to pay your fine'[322] this brochure does not mention the option of electing to have a penalty notice heard at court.

We are of the view that information which is disseminated for recipients about CINs and other penalty notices should include information about the option to elect to have the matter heard at court. In addition, such material should include details about how to access legal advice, or who to contact if this sought. The SDRO has previously advised us that 'SDRO already publicises Law Access as an independent advisory service'.[323] A fact sheet produced in March 2009, 'Having your penalty notice heard in court', now notes some avenues for obtaining legal advice, including contact details for Law Access NSW, and a link to the Law Access web site has recently been added to the 'Other useful links' page on the SDRO web site. Although a positive step forward, the SDRO could also consider adding information about how to seek independent legal advice in its other materials, such as the SDRO Fines Information Pack, its brochure for Aboriginal clients ('What happens if I don't pay my fine?') and its web page advice on 'Your options – Choose to go to court'.

In addition to providing CIN recipients with information about when they should consider having the matter heard at court, and how to access legal advice in relation to this option, we are of the view that the SDRO should also review how it presents and disseminates information to legal centres. As outlined in section 8.2.4 at least two community legal centres have developed information kits about the fines enforcement process. While we acknowledge that it is not a core function of the SDRO to ensure community legal centres have a comprehensive understanding of the

319 Mission Australia submission, 30 January 2009. Very similar comment made in Law Society of NSW submission, 12 February 2009, p.4.
320 Submission from P Webster, p.9.
321 'Problems for remote communities in criminal infringement notice scheme', *Law Society Journal*, Vol. 47, No. 2, March 2009, p.6.
322 State Debt Recovery Office, 'What will happen if I don't pay my fine' December 2008, http://www.sdro.nsw.gov.au/lib/docs/forms/fl_wwh01.pdf. Accessed 18 March 2009.
323 SDRO submission, 3 February 2009.

fines enforcement system, we note that community legal centres may provide advocacy services and assistance to fine recipients, and by ensuring they have up-to-date knowledge about the system, they will be in a better position to assist fine recipients to engage with the SDRO and begin to acquit their fine debt.

Recommendations

15. The SDRO consider ways to improve the provision of information to CIN recipients about the option to have the matter for which the CIN was issued heard in court, including avenues for seeking legal advice and representation.
16. The SDRO review how it presents and disseminates information about the fines enforcement system to legal centres, with the aim of developing strategies to improve information provision.

The SDRO supported the proposal to review the advice provided to legal centres. However, it argued against providing CIN recipients with information about electing to have a matter heard at court and how to access legal advice in relation to this option. It said that providing CIN recipients with this kind of information:

> *… appears to be at odds with the intent of the CINS scheme which was understood to be aimed at reducing the number of clients going to court for relatively minor criminal offences. However court election is still identified as an option to dispute a penalty notice.*[324]

This seems to imply that telling CIN recipients about their legal options, including how to obtain independent advice, will result in additional matters with little merit being brought before the courts. The reverse may actually be true. That is, properly advised defendants who have no grounds to contest a CIN are highly unlikely to court-elect. And even those who do have grounds to dispute the CIN may choose not to after being told of the risks associated with having the matter heard at court – that is, they risk incurring a criminal record, a harsher penalty, additional costs and the stresses associated with the prosecution process.

The Attorney General's Department commented on this issue in the context of its discussion on net-widening, arguing that the right to have a CIN determined at court was one of two important safeguards against the injudicious use of CINs:

> *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. The draft report notes that over a six year period, only 330 CIN recipients sought an internal review, and only 44 of these reviews were upheld. There is no evidence of any Aboriginal person seeking an internal review.*[325]

If properly advised, only those who have a strong defence are likely to contest their CIN. In our view, it is in the public interest for such matters to be heard at court. It is also in the public interest that CIN recipients know how to go about obtaining legal advice, and understand the risks associated with disputing a CIN at court.

8.2.9. Actively identifying people at risk of fine default

In addition to improving general information about CINs and the fines system, there is an urgent need for targeted measures to help reduce or prevent marginalised groups from becoming permanently entrenched in the fines enforcement system. The current data is limited, but indicates that people who are homeless, or who have a mental illness, intellectual disability or cognitive impairment, are at high risk of becoming entangled in the SDRO's fines enforcement processes. Our analysis of CINs records also indicates that disproportionately high numbers of Aboriginal people, people with low incomes and high debts, and those living in isolated communities, experience difficulties in dealing with the debts they owe SDRO. This increases the likelihood of incurring further enforcement action, higher debts, sanctions and possibly secondary offending.

In its report about the effectiveness of fines as a sentencing option, the NSW Sentencing Council commented:

324 SDRO response to draft report, 20 July 2009.
325 Attorney General's Department response to draft report, 16 July 2009.

The Council … notes with concern the absence of reliable and consistent statistics on the part of the Local Court, SDRO and other agencies as to:

- *the imposition of fines and penalties*
- *the respective default rate*
- *offender profiles*
- *the reasons for default*
- *the impact of the enforcement procedures, and*
- *their deterrent value.*

Such that it is difficult to evaluate the net-widening effect of any increase in the range of offences for which fines and penalties are available, or the extent to which they may be unfairly or inappropriately imposed.[326]

In its report about warrant powers and procedures, the Victorian Law Reform Committee argued that authorities needed to use data to identify at-risk groups if they were to have any hope of preventing them from becoming irreversibly caught up in fines enforcement.[327]

The SDRO already keeps detailed records about its dealings with individual clients, including information that could be used to identify those who are more likely to default on their fine payments, incur further debts and become more deeply entrenched in the enforcement system. Yet its capacity to extrapolate systemic data from these records is limited, restricting its ability to identify at-risk groups and the measures needed to manage their debts more effectively.

In addition, valuable information is sometimes not recorded. The SDRO does not, for example, record information about a person's Aboriginal status, even when the agency issuing the fine records that information (eg. police records of CINs) or the information is disclosed to the SDRO in the course of its own dealings with the client (eg. applications for the immediate lift of RTA sanctions on the basis that the client has enrolled in an Aboriginal driver education program).

It is recognised there are significant privacy concerns about public authorities collecting information about the ethnicity or background of citizens. However, these have to be balanced against the public good that may flow from the collection of such data.

The strategic use of such records would help the SDRO learn more about those clients who typically experience difficulties in paying their fines and why they fail to pay. Identifying its at-risk clients is essential if the SDRO is to develop targeted strategies to provide them with the information and assistance needed to help them manage their fine debts more effectively. For example, a basic analysis of debt 'hot spots' could help SDRO determine priority locations for education initiatives, clinics and other such strategies. The SDRO could also use this kind of analysis to alert potential advocates from other agencies or services such as Aboriginal Legal Services or Legal Aid as to the need in a particular area.

In our view, the systemic use and analysis of data about CIN recipients, and providing people likely to default on their fines, or with high levels of fine debt, targeted information and assistance, will result in a number of benefits to the SDRO and CIN recipients. The SDRO would most likely recoup more money from fines payments and expend fewer resources on undertaking enforcement action if more people are made aware of the consequences of failing to deal with a CIN, and of the different options for dealing with the penalty notice. CIN recipients (and their family members) may benefit by avoiding enforcement costs and sanctions.

As outlined in chapter 7 Aboriginal people are significantly less likely to pay their fines at the penalty notice phase than non-Aboriginal people, and are more likely to be subject to enforcement action and sanctions. If the SDRO recorded information about each client's Aboriginality it would have the ability to actively improve the provision of information about fines to Aboriginal people.

An additional benefit of capturing information about the Aboriginality of CIN recipients is that this would allow a comprehensive examination of whether the CIN scheme is inadvertently bringing Aboriginal people into the criminal justice system when sanctions imposed for non-payment of fines are breached. This would be particularly valuable given government objectives to reduce the number of Aboriginal people coming into contact with the criminal justice system.

326 New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, p.xiii.
327 Parliament of Victoria, Law Reform Committee, *Warrant Powers and Procedures*, November 2005, p.439.

Recommendations

17. The SDRO consider keeping records about the Aboriginality of CIN recipients.
18. The SDRO strategically and systematically analyse records kept about CIN recipients with a view to:
    - learning more about the characteristics of people who default on their fines and those who have significant fine debts
    - learning more about the utilisation of different payment options, including whether different options benefit people likely to have difficulty paying their fines
    - improving the provision of information and assistance to people who default on their fines and those who have significant fine debts.

The SDRO's response to our provisional comments on this issue included the following observation:

> *Throughout the report there are many references suggesting SDRO should commence recording information on Aboriginality. Currently the computer systems of SDRO are not structured to achieve this. Secondly in the majority of the cases SDRO would not be aware of a person's Aboriginality or ethnicity as the same face-to-face contact does not exist at the time of the offence as it does with CINS offences.*

In relation to our suggestion that the SDRO keep records about the Aboriginal status of their CIN clients, the SDRO response said:

> *Not supported for the above reason and also if the information is already recorded on COPS why duplicate the process.*

The SDRO said it partly supported the recommendation to analyse its records about its CIN clients, explaining that:

> *As part of the overall debt management strategies to be employed by SDRO this will address all aspects of debt profiling.*

The aim of recommending that the SDRO collect and systemically use readily accessible data about CIN recipients is so that the SDRO can identify those clients who are more likely to default on their fines and provide targeted assistance where appropriate. This analysis should include SDRO clients with high levels of existing fine debt, and the 89% of Aboriginal CIN recipients who fail to pay their CIN in the time allowed and are referred for enforcement. We recognise there are limitations to the assistance SDRO can provide in this regard. Elsewhere in its response to our draft report it notes that:

> *Fines collection is always competing for a share of a client's payment capability so the economic downturn has had a flow-on effect to the operations of SDRO.*

This seems to suggest that those who do not have the means to pay will continue to be among those who are most likely to default on their fine payments and be referred for enforcement.

Yet the popularity of recently introduced options such as Centrepay which allows Centrelink clients to authorise direct debit deductions from their welfare payments, shows that even some of the SDRO's poorest and most disadvantaged clients will respond in large numbers if given practical ways to address their debt obligations. As at the end of June 2009, 45% of clients on time-to-pay arrangements use the Centrepay option.[328] This could increase further as this option becomes more widely known.

Our analysis of CINs payments shows that almost nine out of every 10 Aboriginal CIN recipients fail to pay their penalty notice and are referred for enforcement action. Of those who are referred for enforcement, most still had not paid months or even years after enforcement action commenced. This would appear to suggest that current SDRO measures to reach this group and improve compliance are not working. It is difficult to know what else the SDRO could be doing unless and until it begins to record and use more complete information about these clients. One option might be for the SDRO to request access to information currently recorded on COPS. Another would be to ask clients who contact the SDRO directly to volunteer this information, such as those on time-to-pay agreements who ask the SDRO for immediate removal of RTA sanctions on the basis that they live in an Aboriginal community or a remote location. Recording this kind of information should provide the SDRO with important data about who is taking advantage of these measures, and how effective they are in reducing fine default and improving debt recovery.

328 SDRO response to draft report, 20 July 2009.

While the SDRO's current computer systems are not structured to record additional information, the SDRO has previously advised that it is undertaking a major upgrade of its computer systems. Consideration should be given at the design and implementation stages as to the potential to include important information about clients' Aboriginality, other demographic factors, requests for RTA sanctions to be lifted on specified grounds, and so on.

8.3. Provision of flexible payment options for CINs

In terms of payment of penalty notices, there is a clear distinction between the penalty notice stage and the enforcement order stage. The penalty notice stage usually lasts 49 days from when the penalty notice was issued. This includes the initial 21 days given to the recipient to pay the fine, plus an additional 28 days following the posting of the penalty reminder notice (which occurs if the fine is not paid in the initial 21 day period).[329] The enforcement order stage commences on the expiration of the penalty notice phase.

A number of stakeholders have been critical of the inflexibility of payment options for penalty notice recipients.[330] In particular, criticisms have been raised about the inability of people to enter into a time-to-pay agreement until the penalty notice phase has expired, and additional enforcement costs, incurred.

However, there have been a number of recent initiatives designed to make it easier for people experiencing financial difficulties to pay off their fines. In particular, in relation to the penalty notice phase, on 25 June 2008 the Fines Act was amended to formally permit a person to pay a fine by part payments as long as 'the full amount payable under a penalty notice is to be paid within the time required by the penalty reminder notice'.[331] In addition, in relation to the enforcement order stage:

- In 2007 – 08 the SDRO began accepting time-to-pay applications for outstanding fines over the phone.[332]
- In February 2008 the SDRO introduced Centrepay whereby people on time-to-pay agreements who receive Centrelink benefits, can have their allocated payments debited automatically before their Centrelink benefit is paid into their bank account. By January 2009, 16,391 SDRO clients were using this option to manage their payments, with 1,416 clients having paid in full.[333] The default rate for clients using Centrepay had dropped to about 2%, compared with 40% for other time-to-pay agreements.[334]

The SDRO explained its decision not to widely publicise the availability of Centrepay until a year after its introduction, advising:

> *As part of the co-operative approach with Centrelink the implementation of the Centrepay direct debit facility was restricted to a gradual implementation as opposed to a widely publicised 'big bang' approach. This was to ensure the capabilities of both organisations could meet client expectations. The result of this approach speaks for itself.*[335]

Further amendments introduced by the *Fines Further Amendment Act 2008*, which are due to commence later this year, provide that a person in receipt of a government benefit will be able to apply for a time-to-pay agreement at the penalty notice stage.[336] This is significant as it means that certain people will not have to wait until they have defaulted on their fine and incurred enforcement costs before seeking an extension for time to pay. In relation to these reforms, the SDRO commented:

> *The reported inflexibility of payment options at penalty notice stage will be addressed as part of the amendments to the Fines Act which will allow for voluntary enforcement of fines without the additional enforcement costs and the opportunity for time to pay arrangements to be entered into. This functionality is due to commence in late 2009.*[337]

8.3.1. Options for further improving the flexibility of payment options

There is no doubt that the measures which have been implemented in recent years to assist people to automate payments made under a time-to-pay agreement, and pay in instalments have benefited fine recipients who have difficulty paying their fines. In addition, the proposed changes to allow Centrelink recipients to apply for a time-to-pay agreement at the penalty notice phase have broad support among stakeholders.

329 The penalty reminder notice is said to be served seven days after it is posted, and the due date for payment must be at least 21 days after it is served on the person. *Fines Act 1996*, s.30.
330 See for example, New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, p.5.
331 *Fines Act 1996*, s.33(2), as amended by the *Fines Amendment Act 2008.*
332 Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.5.
333 SDRO submission, 3 February 2009.
334 Email from SDRO (Mick Roelandts) to Michael Gleeson, 19 December 2008.
335 SDRO submission, 3 February 2009.
336 To be inserted as section 100(1A) of the *Fines Act 1996.*
337 SDRO response to draft report, 20 July 2009.

However, in order to be truly effective, information about the options for paying fines, including details about applying for time-to-pay agreements, and how payments may be automated, must be widely publicised and easily accessible. In addition, the system for payment of CINs needs to be based on consistency, predictability and transparency, while retaining sufficient flexibility to take into consideration the circumstances of different individuals. We are of the view that there is scope for improvement to be made in these areas.

In particular, we are of the view that the SDRO should consider:

- improving the provision of information about payment options (see section 8.2 for a detailed discussion about the opportunities to improve the information provided to CIN recipients)
- developing and publicising clearer guidelines about time-to-pay applications and agreements
- seeking legislative amendment to extend the time-to-pay and other flexible payment options that will soon be available at the penalty notice stage to clients on Centrelink benefits to other applicants who can clearly demonstrate that financial hardship or other specified grounds make it unlikely they can meet their payment obligations prior to enforcement without entering into a flexible plan.

8.3.1.1. Development and publication of guidelines about time-to-pay applications and agreements

As discussed in section 7.5, many of the SDRO's clients have high levels of fine debt. It is not uncommon for SDRO clients to owe thousands of dollars, or even tens of thousands of dollars. As the SDRO does not record information about its clients' Aboriginality – even when that information is available – it is not clear how the debts owed by Aboriginal clients compare with other SDRO clients. The analysis in figure 18 relating to CIN recipients who defaulted on their fines indicates that Aboriginal recipients are more likely to already owe money to the SDRO – 60% of Aboriginal CIN recipients referred for enforcement owed money to the SDRO for other (non-CIN) enforcement orders, compared with 51% of all CIN recipients referred for enforcement. However, Aboriginal CIN recipients were less likely to be among the CIN recipients owing tens of thousands of dollars in unpaid fines.

The postcode data noted in section 7.5 also indicates high levels of outstanding SDRO debts across the state generally, including towns with high numbers of Aboriginal residents such as Wilcannia, Bourke and Brewarrina. The impact of SDRO debts on Aboriginal communities was highlighted in recent research conducted for the RTA.

> *Outstanding debt was a major issue with study participants; in fact it was preventing many from renewing or obtaining their licence. We found a wide cross section of the Aboriginal community … had outstanding debts with the SDRO, with many young people having accrued debts of $5000 or more. In fact, in our discussions with Aboriginal Program Advisor's* [sic] *and Liaison Officers there were references to young people who had accumulated upwards of $15,000 debt. Interestingly, many claimed to be unaware of their debts until they had applied for or went to renew their licence.*[338]

It is unlikely that the vast majority of people who owe such high levels of fine debt are going to be able to acquit such fines unless they enter a time-to-pay agreement in which scheduled payment amounts are manageable, and payments are automated wherever possible.

We note that during our consultations we interviewed a number of people who had not automated their time-to-pay payments. In most cases, this meant they had to attend a post office each fortnight to make payments in person. Many feared that RTA sanctions would be re-imposed if they missed one or more of their fortnightly payments or were late in making payments. Most were unaware that they could use direct debit facilities to automate their payments.

We sought advice from the SDRO about the consequences for SDRO clients who miss out on one or more payments, and were advised:

> *When it is identified that a client is behind in their payments SDRO attempts to contact the client by phone to discuss why they have fallen behind in their payments and how they can get back up to date. If the client cannot be contacted by phone a letter will be sent to the client advising of arrears, the need to get back up to date or to contact SDRO to discuss the arrangement. If there is no resolution following the phone call or letter the time to pay arrangement will be cancelled and sanctions imposed.*
>
> *Where contact can be established new arrangements can be discussed. Depending on the circumstances a lump sum payment in advance may be requested before establishing a new time to pay arrangement. The client may apply for a RTA sanction lift on grounds such as employment, remote community, medical, job network or Centrepay etc.*[339]

338 Elliott & Shanahan Research, *Research Report: An Investigation of Aboriginal Driver Licencing Issues*, Prepared for Roads & Traffic Authority of NSW, December 2008, p.25.
339 SDRO submission, 3 February 2009.

It is positive that the SDRO attempts to contact people who default on a time-to-pay agreement prior to cancelling the agreement. However, stakeholders we spoke to advised us that in their experience there is some inconsistency in the way that the SDRO staff manage time-to-pay agreements, their re-establishment after default, and the removal of sanctions in response to the making of a time-to-pay agreement. In addition, some practices adopted by the SDRO were seen as inflexible and onerous.

For example, we were advised:

- There can be significant diversity in the minimum fortnightly payment the SDRO will accept when an application for time-to-pay is made and organisations advocating for fine recipients have advised that they actively seek out SDRO staff members who have been accommodating in relation to previous time-to-pay applications.[340]
- The advice provided to SDRO clients and their advocates in relation to obtaining a review of a time-to-pay application can be quite variable and the reasons provided for a decision are often not clear.
- When a person defaults on a time-to-pay agreement and subsequently seeks to have it re-established, there are differences in how this is managed by SDRO staff. In particular, there are differences in the requirements imposed by staff about what must be undertaken in order to have sanctions lifted. We have been advised that some staff generally require 10% of the fine amount upfront before considering having sanctions lifted, others will not consider lifting sanctions until six consecutive payments have been made under the new agreement.[341]

We understand that the SDRO has guidelines for staff about the factors that should be taken into account when calculating the fortnightly amounts that a client is required to pay under time-to-pay arrangements. Given that numerous stakeholders have commented that in practice they experience great inconsistency in this area, we asked the SDRO about the feasibility of making information about this issue more widely available, such as to registered advocates. In response, we were advised:

> *This 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'. Clients expect personal treatment and that is what SDRO attempts to deliver when negotiating payment arrangements. The publication of suggested payment amounts or limits is not desirable as many people will opt for the minimal amount when in actual fact they can meet more realistic payment plans.*[342]

After considering our draft report, the SDRO provided additional comment about the differing approaches used in relation to clients who default on time-to-pay arrangements:

> *The report infers a degree of inconsistency in decisions of SDRO staff which may not be the case. This is directly related to the specific circumstances of the individual case as there may have been multiple defaults, previous commitments not honoured, the level of the outstanding debt and the client's capacity to pay. These will all be taken into account when considering the lifting of sanctions.*[343]

While we recognise that the SDRO wishes to treat its clients as individuals, and as such, tailor time-to-pay agreements to take into account individuals' circumstances, our draft report noted our view that there would be significant merit in the SDRO developing and publishing guidelines concerning time-to-pay arrangements. We said that such guidelines need not be prescriptive and should allow for flexibility, but would usefully include:

- guidance about the approximate minimum fortnightly payment amounts for people on different income levels
- information about how to apply for time-to-pay using the Centrepay facility
- advice that applications can be made to have time-to-pay agreements amended if, for example, the fine recipient's financial circumstances change
- information about the procedures usually undertaken when a person defaults on a time-to-pay agreement
- details about how to proceed with re-establishing time-to-pay arrangements if a previous time-to-pay agreement has been cancelled
- information about seeking to have sanctions removed when a time-to-pay agreement is established, and
- information about the process to be followed if a review of a decision concerning a time-to-pay application is sought, including information about the option of seeking to have the matter reviewed by the Hardship Review Board.

We felt that guidelines about time-to-pay agreements would provide fine recipients and advocates with greater

340 Coffs Harbour Legal Aid, interview, 20 August 2008.
341 Interview with Cobowra CDEP, Moruya, 8 August 2008.
342 SDRO submission, 3 February 2009.
343 SDRO response to draft report, 20 July 2009.

assistance when completing time-to-pay applications, and associated review requests, and ensure greater predictability, consistency and transparency in relation to time-to-pay agreements.

The SDRO has since advised:

> [The] *SDRO reviewed the policy on time to pay in late 2008. Information on time to pay, how to apply and what is considered as part of that application process is provided on the SDRO web site and in Fact Sheets.*
>
> *The policy is not published as it provides guidance to staff dealing with requests for time to pay in terms of outstanding debt level, employed or unemployed clients, suggested re-payment plans and the client's past history in respect of defaulting and arrears. As each case needs to be assessed on its own merits the publishing of payment plans is undesirable because clients may seek to minimise such commitments when in fact the capacity to pay may be much higher.*[344]

The information and fact sheets added to the SDRO web site on 20 June 2009 largely address the deficiencies noted above. Significantly, the new web pages explaining the various payment options appear easy to find, note the steps needed to establish time-to-pay arrangements and provide clear advice about available review options if a time-to-pay application is refused or the repayment amounts proposed are too high.

8.3.1.2. Consideration of extending time to pay at the penalty notice stage

At the present time the SDRO does not accept applications to extend the time to pay a penalty notice beyond the date specified in the penalty reminder notice. However, a recent amendment to the *Fines Act 1996*, which is due to commence in late 2009, provides that 'an application for time to pay a fine may be made by a person in receipt of a Government benefit in respect of a fine before a fine enforcement order is made in the matter'.[345]

Enabling people to enter into a time-to-pay agreement before the penalty notice reaches enforcement stage will provide a number of advantages. In particular, it will mean that people who are unable to pay their penalty notice in full by the due date will be able to begin making payments toward their penalty notice without incurring enforcement costs at the time the payment was initially due. In addition, as recipients of government benefits, those able to enter into a time-to-pay agreement before the enforcement order stage will be able to utilise the Centrepay facility, which means that payments are deducted before the benefit is deposited into the person's bank account – decreasing the likelihood that the person will default on the time-to-pay agreement and ensuring that scheduled payments will not result in the person's bank account becoming over-drawn.

Given that the legislative provisions are not yet in place to enable the SDRO to offer time-to-pay agreements in the penalty notice stage, it is too early to determine how many people will seek to utilise this option, and whether its availability will increase the amount of people who begin paying off their fine debt before incurring enforcement costs. The SDRO has previously advised that introducing time-to-pay at the penalty notice stage could in fact decrease the number of people paying their penalty notice at the penalty notice stage – on the assumption that people who may be able to afford to pay their penalty notice(s) up front may instead choose to pay their fine debt over a longer period.[346]

When the government was debating the introduction of the *Fines Further Amendment Act 2008*, the Attorney General flagged that while the option of entering a time-to-pay agreement at the penalty notice stage would initially be limited to Centrelink benefit recipients, it could be extended in the future.[347] This is encouraging, as it is clearly inequitable to exclude others on similarly low incomes such as those in paid employment who earn no more than the people receiving Centrelink benefits. There is no reason to believe they would find it any easier than those on welfare payments to pay their fine upfront. This potentially affects the many rural and remote Aboriginal communities that formerly relied on Aboriginal Community Development Employment Programs (known colloquially as 'work for the dole' schemes) for much of their paid employment, and where high numbers of residents are now enrolled in low-paid traineeships and other employment programs. There is no reason why they should be denied the opportunity to pay off their fine over a period of time without incurring additional enforcement costs and penalties, simply because they have a different income source.

Given that there are a number of questions about the extent to which the extended time-to-pay system will be utilised, and the impacts that it will have, there will be significant benefit in the SDRO keeping detailed records about who applies to use this facility, whether applications for time-to-pay are granted or refused, and whether people manage to successfully acquit their fine debts through this scheme. This will enable the government to determine in future whether it is appropriate for the scheme to be extended, and any amendments that may appropriately be made to its operation.

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344 SDRO response to draft report, 20 July 2009.
345 To be inserted as section 100(1A) of the *Fines Act 1996.*
346 Meeting between SDRO and NSW Ombudsman, 23 October 2008 (Ref: 2008/088583).
347 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.

As outlined in section 8.2.9 it is not the current practice of the SDRO to undertake analysis of demographic information about penalty notice recipients to determine the characteristics of people most likely to pay their fines, those most likely to elect to go to court, and those who are least likely to deal with the fine. Nor does the SDRO systematically examine or analyse information about payment of penalty notices, including the number of people who apply for and use different payment options, and the rate at which people using different methods successfully meet their payment obligations or default on their payments. In section 8.2.9 we recommend that this be rectified (see recommendation 18).

We are of the view that if the SDRO starts analysing available data on a systematic basis it will be able to obtain a better understanding of the clients which it deals with, and the effectiveness of the systems it uses. This will enable the SDRO to determine whether additional measures could be developed or utilised to enable people to acquit their fine debts in a fair and efficient way.

We believe the initial uses of flexible payment options being introduced by the *Fines Further Amendment Act 2008* should be reviewed for the purpose of considering, within 18 months of the date of this report, the need to amend the Fines Act to extend the availability of flexible upfront payment options to other applicants who can demonstrate financial hardship or other reasons why they will have difficulty meeting their payment obligations at the penalty notice stage.

The Attorney General's Department supports such a review and has suggested that the SDRO, which is part of the NSW Treasury's Office of State Revenue,[348] would be the more appropriate agency to lead this review:

> *It may be more appropriate for this review to be conducted by the SDRO rather than my Department. I make this comment noting that the Fines Act 1996 is primarily administered by the Treasurer, and that only 50,000 court fines are issued each year, as opposed to 2.9 million penalty notices.*

The SDRO made a similar observation about its responsibilities in administering the fines system when it compared the small number of CINs issued with the millions of penalty notices it has processed in the same period.

> *Whilst I appreciate that the review was in respect of the impact of CINS on Aboriginal communities there are a number of comments and recommendations throughout the report which appear to extend to the total fine enforcement system for NSW. On that basis it might be appropriate to put this into total perspective.*
>
> *According to the quoted NSW Police Force figures a total of 18,133 CINS were issued during the period 1 September 2002 – 31 October 2008. This compares to approximately 15 million penalty notices processed by SDRO during the same period. CINS therefore represented 0.1% of the total notices processed.*[349]

Recommendation

19. That the SDRO review the initial uses of flexible payment options under the *Fines Further Amendment Act 2008* and advise the Attorney General of the outcome for the purpose of considering, within 18 months of the date of this report, the need to amend the Fines Act to extend the availability of flexible upfront payment options to other applicants who can demonstrate financial hardship or other reasons why they will have difficulty meeting their payment obligations at the penalty notice stage.

8.4. Sanctions

If a person does not pay a penalty notice or elect to have the matter heard at court, an enforcement order will be issued and if no action is taken by the time the enforcement order is due, the SDRO can direct the RTA to impose sanctions on the penalty notice recipient.

As outlined above in section 4.2.3, sanctions imposed include driver's licence suspension, cancellation of vehicle registration, and RTA customer business restrictions which prevent the penalty notice recipient from applying for a driver's licence or transferring vehicle registration. When an RTA restriction is applied there is an additional $40 enforcement cost added to the penalty amount and enforcement order costs already payable.[350]

348 The Office of State Revenue administers and collects taxes, implements legislation relating to State revenue, makes the payment of various grants, subsidies, and rebates, and collects various outstanding state debts. The other arm of Treasury is the Office of Financial Management, which advises the Treasurer and the NSW Government on state financial management policy and reporting, and on economic conditions and issues.

349 SDRO response to draft report, 20 July 2009.

350 http://www.sdro.nsw.gov.au/your_options/if_you_take_no_action/eo_rta_restrictions.html. Accessed 27 April 2009.

Generally RTA sanctions are not lifted until all outstanding enforcement orders are paid. However, the SDRO has discretion to lift RTA sanctions in circumstances such as when the penalty notice recipient:

- provides transport for someone whose health or safety is dependent on them being able to drive
- has medical circumstances requiring them to drive
- is required to drive for employment or prospective employment
- lives in an Indigenous community, or
- lives in a remote location.[351]

In addition:

> *SDRO can direct RTA to lift restrictions if this is your first application for time to pay or you have previously paid out your enforcement orders under a time to pay without any defaults and you make six consecutive payments in accordance with your current time to pay order.*[352]

8.4.1. Impacts of sanctions on Aboriginal CIN recipients

Issuing a person with a CIN means that the person is diverted from the criminal justice system at the time an offence is committed (in that the person is not taken down to the police station to be charged). There is no doubt that this approach has a number of benefits, as outlined in section 3.3. However, in recent years it has become widely recognised that the sanctions for non-payment of fines can have serious and sometimes disproportionate or unintended consequences for people on low incomes. In some instances this involves people becoming further enmeshed in the criminal justice system, contrary to the original intention of the CIN scheme. This has been raised in a number of recent reports which have considered the impacts of fines, including the NSW Sentencing Council's report about the effectiveness of fines as a sentencing option,[353] and has been acknowledged by the NSW Government.[354]

Of particular concern is the 'strict hierarchy' of penalties, and the fact that non-payment of fines invariably leads to RTA sanctions, including the suspension of a fine recipient's driver's licence and/or car registration, or the inability of the recipient to obtain such a licence or registration. This has a range of consequences, which include:

- Reduction in employment options
- Lack of transport options (particularly in remote communities)
- Poor or limited access to services
- Isolation
- Perpetuates cycle of poverty and hardship
- Increased risk of offending behaviour[355]

In its report the Sentencing Council stated:

> *It was argued that licence sanctions also:*
>
> - *Confuse the 'Road Safety' message*
> - *Give rise to a perception of unfairness*
> - *Constitute a double penalty*
> - *Fail to alleviate any of the causes of failure to pay*
> - *May actually exacerbate the cause of failing to pay*
> - *Can result progressively in an accelerating or excessive interaction with the criminal justice system*
> - *Have a wider personal and community effect, and*
> - *Represent a potential drain on the economy.*[356]

351 http://www.sdro.nsw.gov.au/your_options/if_you_take_no_action/eo_lifting_rta.html. Accessed 8 May 2009.
352 State Debt Recovery Office, 'Fact sheet: How to Lift RTA Restrictions', October 2007.
353 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006. See in particular, Part 5. See also Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Not such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*, April 2006; and NSW Standing Committee on Law and Justice, *Final Report, Community based sentencing options for rural and remote areas and disadvantaged populations*, 30 March 2006.
354 See for example, the Hon John Hatzistergos, Legislative Council, NSWPD, 27 November 2008, discussing the Fines Further Amendment Bill 2008.
355 Mission Australia submission, 30 January 2008.
356 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006, p.143.

As 43% of Australia's Aboriginal population lives in regional areas and 26% in remote areas,[357] this means a high number of Aboriginal people live in areas where there are few transport options, and most people rely on private car use to access education, employment, services, family and cultural events and recreational activities. Sanctions imposed for fine default therefore have a significant impact on many Aboriginal communities.

Submissions we received on this issue included:

> *Many …* [Aboriginal] *clients had their licences suspended, and suffered extreme hardship as a result of not being able to drive their vehicles. This includes inability or difficulty in accessing medical care, social gatherings, attending education facilities, barriers in accessing employment, and loss of employment.*[358]
>
> [Name of] *Community is some 5.5 kilometres from access to shops, medical and hospital services. To deprive an extended family of vehicular access, due to the (admitted illegal) actions of a single member, appears to be unreasonable. Making women, children and the elderly walk this distance in the hot summer sun can be problematic. Children and others will hitch, which has its own risks, which would be disparate to any CIN offence.*[359]
>
> *Women* [whose licences are suspended] *aren't going to leave their kids at home or make a sick child catch a bus to get to the doctor … so they break the law and get caught.*[360]
>
> *We have found that RTA sanctions are a significant problem for Aboriginal communities. Particularly in rural and remote communities, where unpaid fines have left most, if not all, residents without a licence, secondary offending (e.g. driving while suspended or without a licence) is widespread because there simply is no way of travelling or being mobile without driving.*[361]
>
> *A further impact of concern is that loss of licences can result in secondary offending, leading to further criminal charges and ultimately imprisonment. Given the over representation of ATSI communities in the criminal justice system, it is extremely important to ensure that Government policies do not exacerbate this problem.*[362]

The issues relating to Aboriginal people obtaining and retaining driver's licences are complex and interconnected. There are a number of reasons why Aboriginal people find it difficult to obtain a licence including lack of valid forms of identification, low literacy and computer literacy levels, lack of funds to pay for driving lessons and equipment, few community members with a driver's licence able to supervise driving practice and few roadworthy vehicles.[363]

The RTA recently commissioned research to learn more about licensing issues amongst Aboriginal people in order to direct the development of policy, program and service responses relating to these issues.[364] The study consisted of two phases, the first involved a series of 15 mini-group discussion sessions amongst the Aboriginal Community in NSW and a presentation/workshop with Aboriginal Program Advisors and Liaison Officers. The second consisted of 300 face-to-face interviews across 14 urban, regional and remote locations.[365] Key findings of the research were:

- *Unlicensed driving is prevalent in the Aboriginal community. For many it is a necessity as they have limited access to licensed drivers, are unable to obtain or maintain a licence themselves, and have limited access to public transport. Yet they have busy lives that require them to be mobile.*
- *… Many in the Aboriginal Community find it difficult to maintain a licence once they have obtained one. Just under three quarters (74%) of past licence holders and 43% of current licence holders indicated their licence had been suspended or cancelled at some point, with 21% of past licence holders having lost their licence on more than one occasion;*
- *A significant proportion of the Aboriginal Community (40%) have outstanding debt with the State Debt Recovery Office … whilst others suggest they have limited financial capacity and the costs of licensing and registration are beyond them.*[366]

There is no doubt that the issue of secondary offending, by way of driving unlicensed because of fine default, is a matter of significant concern. As the Sentencing Council has argued:

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357 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, 2005. http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/3919938725CA0E1FCA256D90001CA9B8. Accessed 25 February 2009.
358 Submission from the Mid North Coast Regional Council for Social Development, 30 January 2009, p.2.
359 Submission from P Webster, p.2.
360 Submission from P Marsh, Inner Sydney Regional Council for Social Development, 4 February 2009.
361 Mission Australia submission, 30 January 2009.
362 Submission from the Mid North Coast Regional Council for Social Development, 30 January 2009, p.3.
363 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006, pp.25 – 26.
364 Elliott & Shanahan Research, *Research Report: An Investigation of Aboriginal Driver Licencing Issues*, Prepared for Roads & Traffic Authority of NSW, December 2008.
365 Elliott & Shanahan Research, *Research Report: An Investigation of Aboriginal Driver Licencing Issues*, Prepared for Roads & Traffic Authority of NSW, December 2008, p.4.
366 Elliott & Shanahan Research, *Research Report: An Investigation of Aboriginal Driver Licencing Issues*, Prepared for Roads & Traffic Authority of NSW, December 2008, p.5. Emphasis in original removed.

> *Historically, the imposition of fines on Aboriginal offenders has been a major factor in the over-representation of Aboriginal people in the prison population. As one of the driving motivators behind the overhaul of the NSW fines regime was to eliminate imprisonment for fine default, it would be of major concern if people can eventually find themselves imprisoned as a result of relatively minor offences for which imprisonment was considered inappropriate in the first place. Submissions argued that if fines only serve to increase the incarceration of Aboriginal offenders, even though indirectly, then they are rendered wholly ineffective as a sentencing option.*[367]

In addition, a recent article in the *Sydney Morning Herald* argued that the state government policy of abolishing prison sentences for fine defaulters appears to have backfired. The article quoted Dr Don Weatherburn, the Director of the NSW Bureau of Crime Statistics and Research, as saying:

> *It does look like the efforts to reduce the number of fine defaulters going to jail have not been entirely successful … Large numbers of people who have had their licence suspended or cancelled for non-payment of fines have decided to risk prosecution and continue driving. As a result a growing number of people have been appearing in court, and then prison, for driving licence offences.*[368]

Data obtained from the NSW Police Force and SDRO demonstrates that Aboriginal people are far less likely than non-Aboriginal people to pay their fines by the due date and there is a high likelihood that they will remain in the fines enforcement system for up to several years after they have committed the offence(s) for which one or more penalty notices were issued. This is coupled with the fact that Aboriginal people often live in circumstances where driving is virtually a necessity while obtaining and retaining a licence is extremely difficult. These factors demonstrate the significant impact that existing sanctions within the penalty notice system have on Aboriginal communities.

In its report the Sentencing Council stated:

> *In consultations conducted throughout the State, participants were united in their assertion that if the risk of serious driving offences is to be averted, much more needs to be done to ensure young Aboriginal people obtain and retain their drivers licence, for example, by introducing greater flexibility in the enforcement system.*[369]

8.4.2. Recent and proposed reforms

The recent changes to the *Roads Transport (Driver Licensing) Act 1998* will enable the government to determine more accurately the extent to which people are detected driving while unlicensed because of fine default, and enable analysis of sentences imposed for such offences.[370] This will assist in determining the extent to which people, including Aboriginal people are becoming involved in the criminal justice system because of fine default.

In addition, there have been a number of recent initiatives that have been introduced in recognition of the importance of Aboriginal people obtaining and retaining drivers licences in order to access employment, education and services, and to minimise the negative consequences of Aboriginal communities having so few licensed drivers. For example:

- In recruiting Aboriginal home care workers, the NSW Department of Ageing, Disability and Home Care (in partnership with TAFE, education and Centrelink) is trialling a pilot program that includes driver training as part of the traineeships for those positions. Without driver training, and the funding to achieve this, these impediments would continue to adversely affect the recruitment of suitable staff and delivery of home care services.[371]
- The RTA has recently commissioned research into identifying and quantifying licensing issues amongst Aboriginal people in order to direct the development of policy, program and services responses; and establish benchmark measures for the future monitoring of effectiveness of policy, program and services to address these issues.[372]
- Several Aboriginal communities have embarked on remedial driver training programs, including one conducted at Broken Hill in conjunction with TAFE.[373]

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367 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006, p.28. Note references in the original have been omitted.
368 Catherine Munro, 'Charity alternative to jail for road fines', *Sydney Morning Herald*, 3 March 2009, http://www.smh.com.au/national/charity-alternative-to-jail-for-road-fines-20090302-8mel.html. Accessed 18 March 2009.
369 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006, p.26.
370 These amendments were contained in the *Fines Further Amendment Act 2008*, Schedule 2.3 [3]. See section [number] for a detailed explanation of the changes and their rationale.
371 Interview, Warren Steadman, Manager, Aboriginal Home Care Development, DADHC, 17 April 2009.
372 Elliott & Shanahan Research, *Research Report: An Investigation of Aboriginal Driver Licencing Issues*, Prepared for Roads & Traffic Authority of NSW, December 2008, p.4.
373 Correspondence from M Roelandts, Senior Manager, Business Relationships & Development, State Debt Recovery Office, to M Gleeson, Manager, Police Division, NSW Ombudsman, 22 October 2008.

- In September 2008 the Kempsey Family Community Project (auspiced by the Mid North Coast Regional Council for Social Development), in partnership with Coffs Harbour Legal Aid and the SDRO held a one day forum to assist 35 Indigenous people to undertake the administrative procedures required to have their drivers' licences returned.[374]

The reform that may have the capacity to most significantly minimise the negative impacts of sanctions imposed through the fines enforcement system on Aboriginal people is the work and development order scheme being introduced under the *Fines Further Amendment Act 2008*.

As outlined in section 8.4.2 the trial work and development order scheme will operate for two years. It will allow people who are homeless, have a mental illness, intellectual disability or cognitive impairment or who are otherwise experiencing acute economic hardship to mitigate their fines by undertaking activities such as completing a drug and alcohol program, attending financial counselling, or undertaking some form of community service. There will be an hourly rate at which voluntary work can diminish a fine or penalty notice debt.

While the legislative provisions relating to the work and development order scheme have not yet commenced, a committee comprising government and non-government agencies has been working to determine how the scheme will be implemented. The committee has been tasked with the development of guidelines to cover the Work and Development Order scheme, the development of application and reporting procedures, as well as community education and engagement.

It is likely that the work and development order scheme, when operational, will offer a number of benefits to disadvantaged fine recipients. Most obviously it will provide a non-monetary option for people to mitigate their fine debt. We note that in the existing fine enforcement system the SDRO can issue community service orders for this purpose. However, criticisms have been raised about the lack of accessibility of community service orders to enable fine defaulters to pay off their fine debt. As the NSW Sentencing Council has noted:

> *In 1996 the NSW Law Reform Commission noted that fine default enforcement procedures "do not appear to assist those fine defaulters who are able to satisfy their fines by community service work but who must first default in payment and undergo all other non-custodial enforcement procedures before community service is available."*
>
> *This criticism still holds true. Community service is currently not available to an offender until they have progressed through and exhausted all civil enforcement alternatives. …*
>
> *Stating that it can take up to two or three years for an impecunious offender to become eligible for a community service order, the Commission noted that as the SDRO adds enforcement costs and sheriff's costs at each stage of the enforcement process, most outstanding fines have increased substantially in value by the time offenders have become eligible for … community service.*[375]

It is currently not clear whether people involved in the work and development order scheme will be required to pay enforcement costs, as part of their involvement in the scheme.[376]

Another concern about the utility of community service orders that has been raised is that the lack of infrastructure in areas where Aboriginal communities tend to reside may mean that alternatives to fines and RTA sanctions may not be available.[377] We note that there is a possibility that Aboriginal and Torres Strait Islander people may find it difficult to participate in the work and development order scheme for the same reasons – that is, lack of appropriate facilities and services at which they can undertake community service, counselling or treatment.

Given that the work and development order scheme is not yet operational, and details about its operation are not yet finalised it is too early to make detailed comments about the likely impact of the scheme. We do note, however, that during the course of our review concerns have been raised that the eligibility criteria for work and development orders may unintentionally exclude Aboriginal and Torres Strait Islander people.

> *Under section 99B* [of the *Fines Further Amendment Act 2008*] *the fact of being ATSI will not, on its own, qualify a person to participate in a Work and Development Order (WDO) arrangement.* [The Public Interest Advocacy Centre] *suspects that acute economic hardship would require more than merely being the recipient of a Centrelink benefit and an unintended consequence of the Act may be that many ATSI people who are issued CINs may fall outside the scope of some of the benefits offered by the current reforms.*[378]

374 Submission from the Mid North Coast Regional Council for Social Development, 30 January 2009, pp.2 – 3.
375 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006, pp.127 – 128. References in the original have been omitted.
376 Section 99B(1)(a) of the *Fines Further Amendment Act 2008* provides that a work and development order may be made after a fine enforcement order has been made.
377 New South Wales Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report, October 2006, p.26.
378 Submission from the Public Interest Advocacy Centre Ltd, 30 January 2009.

Given that our review has demonstrated that the current fines enforcement system is not effectively engaging the vast majority of Aboriginal and Torres Strait Islander people who are issued with CINs, and that such people suffer significant negative consequences as a result, it may be appropriate for consideration to be given to specifically providing that the SDRO will consider applications for work and development orders from people who identify as being Aboriginal or Torres Strait Islander. At the very least, when considering applications for work and development orders from Aboriginal people on the basis of economic hardship, the issues raised in this and other reports highlighting Aboriginal disadvantage should be taken into account.

We reiterate once again that the SDRO does not currently have access to information about the Aboriginality or ethnicity of the vast majority of penalty notice recipients. This fact is clearly an impediment to determining whether the impacts that the CIN scheme and enforcement of CINs have on Aboriginal people are representative of the issues faced by Aboriginal people who receive other types of penalty notices. As outlined in section 8.2.9 we are of the view that there would be a number of benefits in issuing agencies and the SDRO recording the Aboriginality, and possibly other demographic characteristics, of all fine recipients, not just those who receive CINs.

In most cases the SDRO is currently unable to determine from its databases the Aboriginality of people applying to be involved in the work and development order scheme. However, one possible way of determining whether Aboriginal people are applying to be involved in the work and development order scheme, and whether applications by Aboriginal people are being accepted, would be for a question about Aboriginality to be included on the work and development order scheme application form. While it is not clear what analysis is going to be conducted to determine the effectiveness and fairness of the work and development order scheme, we are of the view that any such analysis should include examining who is applying for entry into the scheme, and the reasons for approval being granted or denied. This will assist in determining whether current eligibility criteria are appropriate or need to be reconsidered.

Our final comment in relation to the proposed work and development order scheme is to note that applications for entry into the work and development order scheme 'will have to be made with the support of an approved organisation or, in the case of mental health or medical treatment, a medical professional or registered psychologist.'[379]

It is likely that at least some organisations that provide assistance and advocacy services to fine recipients will consider participating in the work and development order scheme. This provides further justification for the argument (outlined in section 8.2.7) that the SDRO should provide comprehensive information to, and support of, its Group Advocacy Network members about the fines enforcement system (including work and development orders). This is because if advocates are not aware of the option for clients to apply to be part of the scheme, and do not understand its operation, they will not be able to effectively assist eligible clients in putting together an application. Similarly, fine recipients will need to know how and where to obtain the assistance of an approved organisation, otherwise they will not be able to access the work and development order scheme. As the scheme is eligible only to significantly disadvantaged fine recipients, consideration will need to be given as to how to best provide such clients with meaningful and accessible information.

8.4.3. Further options for reforming sanctions

As outlined above, significant steps are being taken to ensure the fines enforcement system becomes fairer and more efficient, particularly for disadvantaged and vulnerable fine recipients. To ensure that current programs and proposed reforms relating to sanctions are meeting their stated objectives and to determine whether further reforms need to be implemented we are of the view that comprehensive monitoring and evaluation needs to occur.

It is therefore pleasing to note that the Attorney General's Department:

> *… has arranged for the Bureau of Crime Statistics and Research to assist with the formal evaluation of the* [Work and Development Order] *scheme, and of the legislative amendments relating to driving while licence suspended due to penalty notice default. My Department will also be chairing the Interagency Working Group that will be monitoring the new arrangements and reporting back to Cabinet two years after they commence.*[380]

While evaluations of new reforms are important, the SDRO could also significantly improve its monitoring and evaluation of existing initiatives. These include policies enabling the SDRO, in certain exceptional circumstances, to exercise its discretion to approve the immediate lift of RTA sanctions before fines are paid. This can occur if applicants need a licence to access medical treatment, transport others whose health or safety depends on them being able to drive, have employment or prospective employment that requires a licence, live in an Aboriginal community and/or in a remote location.[381]

379 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
380 Attorney General's Department response to draft, 16 July 2009.
381 http://www.sdro.nsw.gov.au/your_options/if_you_take_no_action/eo_lifting_rta.html. Accessed 8 May 2009.

Our draft report therefore suggested that the SDRO look for ways to monitor and evaluate its use of these measures. The SDRO noted that it keeps details of these decisions on individual client files, but questioned the value of any broad based monitoring of all sanction-lifts:

> *Information is maintained per client for dealing with individual cases but not for statistical reporting. To do so would be fairly meaningless in that clients can apply for a variety of reasons or for that matter a combination of reasons. Similar to all decisions made by SDRO these are subject to review by both internal and external audit.*[382]

We agree that meaningful analysis requires a targeted approach. Not all applications for sanction lifts should be subject to this kind of monitoring, only those where the SDRO is asked to exercise its discretion to lift RTA sanctions prior to all outstanding enforcement orders being paid on the basis that the applicant:

- has medical circumstances requiring them to drive
- must transport others whose health or safety depends on them being able to drive
- has employment or prospective employment that requires a current licence
- lives in an Aboriginal community and has enrolled in a driver education training program, or
- lives in a remote location.[383]

The SDRO already records details about these applications on individual case files. The challenge would be to adapt its recording systems and processes to enable some basic analysis of the effectiveness of these measures. This might include periodic checks of the number of applications received, the grounds for seeking an immediate sanction lift, the characteristics of applicants, and the outcome of these requests. While these SDRO initiatives to assist vulnerable clients are important, basic data is needed to know how widely they are used and whether they are effective.

Reporting on these measures could also help other agencies and services to improve related initiatives. For instance, Aboriginal driver education programs could use SDRO data on the number and location of sanction-lifts granted to applicants enrolled in driving programs to demonstrate the value of current efforts to reduce unlicensed driving.

Recommendation

20. That the SDRO consider developing ways to extract and report on data relating to applications for it to use discretion to lift RTA sanctions in exceptional circumstances, including the number of applications received, the grounds for seeking an immediate sanction lift, the characteristics of applicants, and the outcome of these requests.

8.5. Exercising discretion to withdraw CINs

The CINs legislation provides police with wide discretion to review and withdraw CINs, allowing a senior police officer to withdraw a CIN '*at any time*'.[384] Ordinarily, the local area commander in which the CIN was issued is expected to consider any requests for withdrawal.

8.5.1. Mechanisms for reviewing and withdrawing CINs

8.5.1.1. When CINs must be withdrawn

The police policy regarding withdrawals of CINs notes that a CIN must be withdrawn if:

- inadvertently issued to a person aged under 18 years
- the CINs criteria was not met because either the suspect's identity cannot be confirmed or the offence is not prescribed on the CINs offence list
- inadvertently issued to a serving police officer, or
- issued in another circumstance when it cannot be issued.[385]

382 SDRO response to draft report, 20 July 2009.
383 SDRO brochure, 'How to lift RTA restrictions', October 2007.
384 *Criminal Procedure Act 1986*, s.340.
385 *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPs) V.4*, NSW Police Force, June 2007.

This last point refers to a long list of circumstances where the use of CINs is prohibited or would be inappropriate, such as issuing CINs in relation to domestic violence offences, continuing offences, to offenders who are seriously intoxicated (drugs or alcohol) or subject to outstanding warrants, where further investigation is required, offences involving protests, demonstrations or industrial disputes, assault offences, and so on.

8.5.1.2. When CINs may be withdrawn

In addition to circumstances where CINs must be withdrawn, the legislation also provides police with a broad discretion on other circumstances whereby a CIN *may* be withdrawn. The NSW Police Force submission described a sophisticated and responsive approach to the way its commanders and other senior officers are expected to exercise their discretion in relation to considering and deciding whether to withdraw CINs.

> *Section 340 of the Criminal Procedure Act provides a broad discretionary power for the withdrawal of penalty notices, consistent with that which occurs in criminal matters. It is essential that the application of this discretion is not prescriptive and allows the senior police officer to bring his/her vast experience into the decision making process. The context within which the offence occurred; previous good behaviour; age/ maturity of a person; are some examples of factors which might apply in a given situation. Each matter is considered on its merits within the circumstances of the case.*
>
> *Of course, there are circumstances where withdrawal of a CIN must occur i.e. where the circumstances do not meet the eligibility criteria such as: a person was under the age of 18 years, the identity of the suspect could not be confirmed; the offence is not on the prescribed list, the CIN was issued to a serving police officer; where further investigation is required etc.*[386]

The police submission accurately reflects the legislation and current police policy in that, firstly, there are certain CINs that *must* be withdrawn because they fail to comply with fundamental aspects of the CINs scheme, and, secondly, there are potentially many other CINs that *may* be withdrawn on other grounds at the discretion of a senior officer. This is consistent with a key principle of the scheme that provides an appropriate mechanism for police to correct any obvious errors at the earliest opportunity, and maintains broad discretion to escalate or reduce the sanction imposed in light of new information or other factors that might not have been apparent to police when the CIN was issued.

8.5.1.3. NSW Police Force and SDRO practices relating to reviewing and withdrawing CINs

In practice, once a CIN has been issued there are barriers that recipients or their advocates must address in order to have a CIN brought before a senior officer for review. Information provided by NSW Police Force and SDRO policies and procedures, and through our interviews of senior officers and discussions with focus groups of frontline officers, indicated that there are numerous practical and procedural impediments to a potentially reviewable CIN coming to the attention of a senior officer, including:

- The NSW Police Force does not appear to have any publicly available guidelines explaining to recipients how to seek an administrative review or what factors may be considered as grounds for withdrawing a CIN under section 340 of the Criminal Procedure Act.
- The information printed on the penalty notice itself gives recipients just two options: pay the fine, or elect to have the matter heard at court. The notice does not indicate that the law (and police policy) permits recipients to request a review in circumstances such as those listed above. Nor is there information on how recipients could obtain advice on their options.
- Representations sent directly to the SDRO requesting that the CIN be reviewed will, according to the advice published in guidelines available on the SDRO website, only be reviewed in circumstances where the CIN recipient 'is deceased, mentally incapacitated or there is a claim of fraudulent use of a person's identity' and where there is evidence to prove this.
- Our audit of CIN representations sent directly to the SDRO found that the SDRO's practices reflect the guidelines published on its web site. Applications showing that the CIN recipient was dead, mentally incapable or a victim of mistaken identity were usually (but not always) referred to police for further consideration.
- Applicants raising other issues were usually rejected and advised that their only options were to pay or court-elect. This was consistent with published SDRO guidelines stating that 'if you wish to dispute the fine for any other reason, you should choose to go to court'. Even when it was clear that the CIN was wrongly issued, the matter was not always withdrawn by SDRO or referred to police. One person under 18 years of age who was inadvertently issued a CIN was advised to court-elect in order for the CIN to be withdrawn, despite police policy indicating that CINs issued contrary to the Act must be withdrawn.

386 NSW Police Force submission, 17 February 2009, at 5.1.

- When the SDRO did refer matters to police for review, our audit found that the NSW Police Force usually then forwarded it to the issuing officer for consideration and advice rather than to a more senior officer for independent review.
- If the officer who issued the CIN can establish that there are grounds warranting the withdrawal of the CIN, the issuing officer may – with the consent of a senior officer – prepare a report seeking to have the matter withdrawn.
- If a senior officer then approves a request to withdraw or cancel a CIN, the process for withdrawal requires the issuing officer to update the details on COPS, notify the recipient and any witnesses and victims, prepare a brief of evidence and refer information about the withdrawal to the SDRO.

It appears that the senior officers responsible for making decisions under section 340 of the Criminal Procedure Act often only get an opportunity to consider the merits of the application according to the circumstances of each case in the final steps of the process. Decisions to withdraw CINs are rare, and generally only occur after the officer who issued the CIN prepares a report supporting an application for leniency or withdrawal – see data in section 7.2.

Police policy describes the process whereby issuing officers must seek the consent of a senior officer to withdraw a CIN in the following terms:

Police process for withdrawing a CIN

Infringement Notices to be Withdrawn

When you have issued an infringement notice which requires withdrawal (e.g. a CIN is now to be dealt with via alternate action) do not try to retrieve it from the person to whom it has been issued. Generate a report outlining the reason for the withdrawal and submit it to your supervisor with Part A attached. File a copy of that report with Part B in the infringement book. Endorse the word 'withdrawn' on Part A.

Supervisor

Send the report and Part A to SDRO with a covering memo as soon as possible.

The State Debt Recovery Office

The infringement should be actioned as 'withdrawn' and advise the reporting officer of this.

Reporting officer

On receiving the advice from the SDRO, update the COPS event to reflect the withdrawal of the notice and commence other proceedings if applicable in line with the CINs SOPs.[387]

The officers in one focus group said the documentation required to support a decision to withdraw a CIN was an important factor in police decision-making:

> *You can withdraw* [CINs] *at any time but withdrawing stuff in our job is more hassle than doing it in the first place … If you want to withdraw it, then you've got to submit a full brief of evidence … so your boss can then make a determination whether you've got enough evidence to proceed or not. So there's more work in stopping it than to do it in the first place.*[388]

The commander of a busy Sydney command said the requirement for officers to submit a brief of evidence could fetter their willingness to withdraw a CIN in some circumstances. As CINs relate to minor offences, he thought there were opportunities to streamline the process:

> *I don't particularly think that to change from a CIN to a caution should be as complex as withdrawing a criminal proceedings. I think there should be a documented process but it should be as simple as just a documented issue background report outlining the reasons why and therefore the decision can normally be made on that in relation to withdrawal.*[389]

In many cases, the decision to refer a representation for leniency to the officer who issued the CIN may make sense, as there might be factors in the documentation provided that were not apparent at the time that the officer issued the CIN. One such representation related to a CIN issued in a trial command late in the 2002 – 2007 extended trial period:

387 *Criminal Infringement Notices Policy and Standard Operating Procedures (SOPs) V.4*, NSW Police Force, June 2007.
388 Officer focus group, 3 February 2009.
389 Officer focus group, 19 February 2009.

Case study

Police issued a $300 shoplifting CIN to a 66 year old man who had been caught leaving a supermarket in January 2006 without paying for a snack bar and small tubs of yoghurt that he had placed in his pockets. A letter (dated 15 February) from the man's advocate explained that he suffered from a form of dementia that affects his understanding of right and wrong and of appropriate behaviour. Steps had been taken to have him placed in care as he was no longer able to care for himself or manage his financial affairs. Reports from two doctors confirmed the man's condition and its effects.

The advocate was initially advised in March that the notice was legally issued and *'using strict guidelines we considered the issue you raised and have concluded that the penalty must stand'*. The advocate was given 21 days to pay the fine or court-elect. At some point, the matter was also referred to police but there was nothing in the letter to the advocate to indicate this.

On 12 May the senior constable who issued the CIN reviewed the application and recommended the CIN be withdrawn. His report noted that at the time of the offence the man appeared to be a bit 'odd', but *'nothing that indicated to me that he was suffering dementia or had any other mental problems'*. He concluded: *'I am of the opinion there can be no action taken against* [name] *because it would appear* [name] *cannot know what is right or wrong, therefore the mens rea* of the offence is unable to be proved in court.'*

The officer concluded by recommending that no action be taken in relation to the offence. His senior officer endorsed the recommendation. A letter was sent then to the advocate explaining that the CIN had been cancelled and enforcement action had been stopped.[390]

***mens rea,* a Latin term meaning 'guilty mind', refers to whether the person had the necessary intent to commit a wrongful act.**

Of the 100 applications we reviewed, this was one of the few instances where the issuing officer appeared to readily agree to withdraw the CIN after being provided with information that was not apparent to police at the time they issued the CIN. Generally we found that unless the applicant could demonstrate that police had made an obvious error, there was a general reluctance to withdraw the CIN irrespective of the circumstances.

Several representations were written by friends, family or advocates on behalf of recipients affected by mental illness, dementia, brain injury and other issues impairing their ability to understand their offending behaviour. Not all appear to have been referred to police for their view on what should happen, such as the following letter written by the child of an elderly man who was fined $200 for offensive conduct after allegedly masturbating in public:

Case study

My father is 84 years of age and suffers from dementia. He has been assessed by Aged Care Assessment Team (ACAT). My mother who is his carer is in [name of hospital] *recovering from having her leg amputated. I will do my best to look after him until he can be placed in aged care accommodation. He can't recall the incident and I don't know what happened to the original fine. I ask if you could please pardon him on this occasion as we do not wish to take the matter to court.*

The reply, addressed to the elderly man with dementia, noted that the fine was legally issued and that the penalty must stand as, '*We do not have the authority to issue a caution for this type of offence'.* As a cheque was written on the same day as the application to waive the fine (indicating that it was enclosed with the application), payment was accepted and the matter finalised on that basis.

We asked the SDRO to check whether this matter was referred to police for consideration. The SDRO advised: *'The rep*[resentation] *was not referred to NSW Police. The PN* [penalty notice] *was paid by the son and subsequently a letter was sent from the son asking for a pardon. At that stage there was no legislative provision for court election after payment so the son was advised that the matter was finalised.'*[391]

Our review of reports provided by officers who issued the CINs found that these reports appear to have an important influence over the outcome. However, we found one instance where an issuing officer's recommendation to reject an application for leniency was over-ruled by the senior officer upon review:

390 SDRO Representation audit – CIN no. 83.
391 SDRO Representation audit – CIN no. 58.

Case study

On 3 July 2008 police issued a $300 CIN to a 43 year old woman caught swapping a defective saucepan handle that she had purchased earlier at a discount, with an undamaged handle valued at $9.99. On the same day the woman, a disability pensioner with no criminal record and who cares for a severely disabled son, completed the court-elect option on the back of the notice and sent it to the SDRO with a four-page letter addressed to the 'Judge' explaining her actions, pleading for leniency and to *'apologise of my stupidity thinking it was a swap'* [sic]. After providing a very detailed account of her version of events, the woman's letter states:

> *Please Judge, I swear to you that I am telling you the truth I really and truly didn't think that I was considering stealing I thought I was just swapping. Please believe me I am very religious I have a brain tumour and had my left lung removed I also have a child with a severe disability I have never done anything like that in my life even to swap. I am very aware also that now for the 1st time I have made a huge, huge mistake and was explained thats considered stealing even though I honestly thought it was considered swapping …*

The response from SDRO confirmed that it had no scope under its guidelines to cancel or offer leniency in the circumstances described and that, as she had chosen to have the matter heard in court, she would be advised of those details at a later date.

In a brief report dated 22 August 2008, the probationary constable who issued the CIN noted that he had been asked for 'my opinion on whether the matter should stand or be dismissed' and attached the records relating to the CIN. He concluded with a recommendation that the CIN *'stands or the matter be heard at court. I believe that* [name] *acted dishonestly in her actions and should be dealt with accordingly'*. The officer's team leader and the duty officer both endorsed the recommendation that the matter proceed to court. However, the Crime Manager rejected this advice, noting:

> *Due to the minor nature of the crime, I have considered the value of the subject item, the fact that there is no criminal history, also the hardship that would be undertaken by* [name] *and her family. I believe that this matter should be cancelled* [and] *also recorded on COPS as 'Cautioned'.*

The SDRO then wrote to the woman on 27 August advising her of the police decision.[392]

This representation was one of the few in our audit where the decision of the senior officer differed from the recommendation made by the issuing officer. It was also one of the few clear instances of police (or SDRO) withdrawing a CIN on discretionary grounds following a request for review. While there might have been more CINs withdrawn for discretionary reasons, the grounds for withdrawing CINs were not always clear. Nor was it always clear whether it was police or the SDRO that made the decision. The following case illustrates these points:

Case study

One applicant repeatedly asserted that the $350 goods in custody CIN issued in his name (for possession of a student bus pass belonging to someone else) in 2004 could not have been him and appeared to have been issued in error. Police were asked to urgently check their records. When the SDRO later issued an enforcement order, the applicant forwarded a copy of his earlier correspondence with a further request to correct the alleged identification error. When this application was rejected, he elected to have the matter heard at court. A few weeks later he was advised that the matter would not proceed further *'because of the time that had passed since the alleged offence'*, and that the applicant did not need to take any further action.

The applicant then wrote again, acknowledging the decision not to proceed but seeking clarification that the notice had been removed from his criminal records. '*I consider the matter stated on the notice extremely serious and could impact on my future employment prospects if this matter is not completely resolved. I would greatly appreciate your written confirmation that the record in relation to this matter has been expunged.'* He was subsequently sent another letter again advising that the matter would not proceed further *'because of the time that had passed since the alleged offence'*, and that he did not need to take any further action.

392 SDRO Representation audit - CIN no. 100.

As the information provided by the SDRO did not clarify whether police were involved in this decision or had taken steps to investigate and correct the alleged mistake in identity, we asked SDRO to check. The SDRO advised: *'The rep was not referred to NSW Police. There was a system error with the statute of limitations on this PN which caused it to show as stat*[ute*] barred when the representation was being replied, so a letter was sent to the client advising no further action was required to resolve the PN. When the error with the statute was detected,* [a senior SDRO manager] *advised that this PN should stay 'no actioned' because the client had already been advised of this.'*[393]

Most CINs withdrawn or cancelled as a result of representations appeared to be those that could establish clear grounds indicating that the CIN *must* be withdrawn because of some basic error, evidence that the conduct alleged was not unlawful or that the recipient was not capable of understanding the offence. Only occasionally would a correctly issued CIN be withdrawn as a result of mitigating information or extenuating circumstances. Our audit found that most applications for withdrawal or leniency based on broader discretionary issues were rejected at the outset. In practice, it appeared that senior officers rarely had an opportunity to even consider these requests.

8.5.2. Police views of the review process

The senior officers interviewed for this review accepted that although the legislation gives them broad discretion to withdraw CINs at any time, in practice they rarely receive such submissions and decisions to withdraw a CIN would be rare if they did. None of the senior staff from the 11 commands included in these interviews could recall having actually seen a representation asking for a CIN to be reviewed or a report recommending withdrawal.

> *We have a fairly steady flow of representation from* [the Aboriginal Legal Service] *in relation to criminal proceedings and none that I've seen or heard of have come as a result of a CIN.*[394]

> *No, not at all. I've never had, I've never been requested to reject one. I've never – when I've seen them, I've never had a request. I've never seen it. I've never done it … and I'm not aware of any other supervisors who have actually been doing it.*[395]

The commander from one of the state's leading issuers of CINs said he was responsible for approving any requests for withdrawals, but he had seen none since arriving at the command a few months earlier.

> *I basically review the information and make a decision … to withdraw any matter, it's not a simple matter but probably nor should it be either. It shouldn't be taken lightly to go one way or the other … if it is the same process as a normal withdrawal then it is a complex matter. The officer has to submit a report outlining all the reasons why he wants to go one way or the other and then no doubt then that may well come up as a failed prosecution for us … we review those on a monthly basis.*[396]

The fact that few commanders and senior officers have seen representations requesting that the CIN be reviewed is not surprising. CIN recipients rarely request administrative reviews of police decisions to issue CINs or plea for leniency. When requests are made, many are declined without referring the matter to police for advice. Of the 18,759 CINs recorded on the SDRO database as having been issued between 1 September 2002 and 31 October 2008,[397] the SDRO identified 330 (1.8%) where the recipient or a representative requested a review of some kind. Of these, the SDRO said just 44 led to a decision to withdraw the CIN.

8.5.3. Issues raised in CIN representations

Only some of these 330 matters could be accurately characterised as requests for review or representations for leniency. We audited records associated with 100 of these 330 requests. Of the 100 CIN withdrawal requests reviewed, at least 43 did not directly ask for the CIN to be withdrawn or the penalty reduced. The subjects of this correspondence varied but included requests for information, requests for additional time to pay, advice that the recipient intended to court-elect, letters expressing regret, letters admitting the offence but complaining about the conduct of police, or payments accompanied by pleas of extenuating circumstances. The 100 records that the SDRO provided for us to audit also included notes written on mail that was returned to the SDRO and files that did not include the recipient's original letter.

393 SDRO Representation audit – CIN no. 95.
394 Senior Officer interview, 28 January 2009.
395 Local Area Command interview, 21 January 2009.
396 Local Area Command interview, 19 February 2009.
397 According to police records, there were 18,133 CINs issued in the same period.

Of the 100 matters audited, we were able to identify 66 where the recipient or a representative requested a review of some kind. Of these, 22 resulted in the CIN being withdrawn. Common reasons for approving the withdrawal requests were:

- the recipient was not the person who committed the offence (5 CINs)
- the CIN was wrongly issued by police in a non-trial command during the extended trial period (4 CINs)
- mental incapacity[398] (3 CINs)
- the circumstances or minor nature of the offence justified substituting the CIN with a caution (3 CINs), and
- wrongly issued to a minor (2 CINs).

Other reasons cited for withdrawing CINs included questions about the adequacy of evidence, considerations of hardship and the recipient's inability to pay. In some of the matters audited, the reasons for withdrawing the CINs were not clear.

A number of the letters to the SDRO requesting advice, or asking for enforcement to be deferred, received standard replies that did not provide the information requested. For instance, the mother of a man fined $200 for urinating in public wrote:

> *At this present time my son is in rehab for drug & alcohol addiction. The rehab is in Dandenong. His doctor's name* [details provided]*. He will have to see to these matters when he comes out.*

She also provided details of his status as a disability pensioner. The SDRO's response was addressed to her son advising that it could not cancel or offer leniency and advising that he had 21 days to pay the fine or court-elect.

There appeared to be at least one Aboriginal recipient among the 100 review requests we audited. A 26 year old woman disputed a CIN for offensive language during a disturbance involving about 50 people outside a hotel in Sydney in 2005.[399] The SDRO advised her to pay or court-elect. She did neither in the time allowed and the matter was referred for enforcement. She eventually paid the $150 fine and the $90 in additional enforcement costs.

Our review of SDRO and COPS records show that Aboriginal recipients rarely request a review. As the SDRO does not record the Aboriginality of its clients, information from the NSW Police Force COPS system had to be used to identify which SDRO clients were Aboriginal. Of the 330 records identified by the SDRO as having been subject to some kind of review request, there were 319 that had a matching police reference showing the Aboriginal/non-Aboriginal status of the recipient. Of these 319 representations, Aboriginal people submitted just four of those requests. Interestingly, all four requests were submitted in the extended 2002 – 2007 trial period. Although Aboriginal people received 7.4% of all CINs issued in the first 12 months of the statewide use of CINs, not a single Aboriginal recipient that we could identify requested a review.

8.5.4. Recent reforms

In addition to the provisions in the Criminal Procedure Act allowing senior police officers to withdraw CINs at any time, recent reforms to the Fines Act have expanded the grounds for reviewing and withdrawing penalty notices and the annulment of enforcement orders.

8.5.4.1. Review and withdrawal of penalty notices

In relation to the withdrawal of penalty notices generally, the Fines Act currently provides that 'an appropriate officer may withdraw a penalty reminder notice before the due date for payment under the notice.'[400] It also provides that the SDRO may withdraw a penalty notice enforcement order in certain circumstances, such as when the person named in the penalty notice enforcement order is not the same person as the person in respect of whom a fine to which the order applies was imposed, or when the order was made in error.[401]

In its report about the effectiveness of fines as a sentencing option, the Sentencing Council expressed concerns about the absence of a clear legislative power or procedure for internal review of penalty notices.[402] As a result, provisions contained within the *Fines Further Amendment Act 2008* (which are yet to commence) provide for a 'standard, statutory process for review of penalty notices.'[403] When commenced, the legislation will provide that, except in limited circumstances, the agency that issued a penalty notice must conduct a review of the penalty notice

398 Specifically, 'moderately severe mental retardation' – SDRO Representation audit – CIN no. 79; 'mood swings, personality disorder and hypomania' – SDRO Representation audit – CIN no. 80; 'PICCS dementia' – SDRO Representation audit – CIN no. 83.
399 SDRO Representation audit – CIN no. 43.
400 *Fines Act 1996*, s.39(1).
401 *Fines Act 1996,* s.46.
402 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, p.108.
403 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.

if an application for a review is made in writing and includes the grounds on which the review is sought. The review must be conducted by someone who was not involved in making the decision that is subject of the review.

The reviewing agency must withdraw a penalty notice if it finds:

- the penalty 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
- the person to whom the penalty notice was issued is unable, because of an intellectual disability, a mental illness, a cognitive impairment or is homeless to understand that the person's conduct constituted an offence, or to control such conduct, or
- an official caution should have been given instead of a penalty notice.[404]

The legislation also provides that a reviewing agency may, at its own discretion, decide to withdraw a penalty notice for other reasons.[405]

We note that some agencies that issue penalty notices will be exempt from this scheme for reviewing penalty notices.

> *This is because some agencies which already have effective internal review processes in place may prefer not to modify their current practices. Accordingly, before the internal review provisions come into force, the Government will make regulations that make clear which penalty notices will be subject to the internal review process under the Fines Act.*[406]

It is our understanding that police issue of CINs will be exempt from the proposed internal review scheme to be introduced under the Fines Act. This is because section 340 of the Criminal Procedure Act already provides that '[a] senior police officer may at any time withdraw a penalty notice issued by a police officer … ' In other words, there are already legislative provisions in place which provide police with the authority to review and withdraw penalty notices.

8.5.4.2. Annulment of penalty notice enforcement orders

At present, the Fines Act provides that the SDRO must annul a penalty notice enforcement order if satisfied that:

> *(a) the person was not aware that a penalty notice had been issued until the enforcement order was served, or*
>
> *(a1) the penalty reminder notice, or both the penalty notice and the penalty reminder notice, in relation to a particular offence were returned as being undelivered to its sender after being sent to the person at the person's recently reported address (within the meaning of section 126A) and notice of the enforcement order was served on the person at a different address, or*
>
> *(b) the person was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the penalty notice, or*
>
> *(b1) a question or doubt has arisen as to the person's liability for the penalty or other amount concerned, or*
>
> *(c) having regard to the circumstances of the case, there is other just cause why the application should be granted.*[407]

However, before the SDRO annuls a penalty notice enforcement order made against a person on the ground that a question or doubt has arisen as to the person's liability for the penalty or other amount concerned, it must refer the matter to the issuing agency. The issuing agency must then review the matter to determine whether a penalty notice to which the penalty notice enforcement order applies should be withdrawn.[408]

When the SDRO annuls a penalty notice enforcement order, it must refer the matter to a Local Court unless the amount payable under the penalty notice is paid on the annulment of the order.

As noted in section 4.2.2.2 reforms introduced by the *Fines Further Amendment Act 2008* (which are due to commence later this year) provide that, before making a decision whether to annul a penalty notice enforcement order, the SDRO is to seek a review of the decision to issue each penalty notice to which the penalty notice enforcement order applies, if a review has not previously been conducted by the issuing agency and the SDRO has reason to suspect that the penalty notice should be withdrawn. The Act provides for reasons such as:

404 *Fines Further Amendment Act 2008*, Schedule 1, cl.10.
405 *Fines Further Amendment Act 2008*, Schedule 1, cl.10.
406 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
407 *Fines Act 1996*, s.49.
408 *Fines Act 1996*, s.49(A)(1) and (2).

- the penalty notice was issued contrary to law or should not have been issued due to exceptional circumstances
- the issue of the penalty notice involved a mistake of identity, or
- the person to whom the penalty notice was issued is unable, because of an intellectual disability, mental illness, cognitive impairment or homelessness, to understand that his or her conduct constituted an offence, or to control such conduct.[409]

These amendments are being implemented so that in appropriate circumstances enforcement orders may be reviewed and withdrawn by the issuing agency, rather than being annulled by the SDRO and then referred to court, which can be a 'time-consuming, expensive and distressing process.'[410]

8.5.5. Options for improving the review and withdrawal processes for CINs

It is our understanding that the NSW Police Force will be exempt from the internal review processes outlined in the *Fines Further Amendment Act 2008* which are expected to commence in the near future. As noted earlier, the NSW Police Force has advised that section 340 of the Criminal Procedure Act gives senior officers considerable breadth in the discretion they can apply to decisions on whether to withdraw a CIN. The police submission argued that it is 'essential' that the application of this discretion is not prescriptive and that senior officers be allowed to bring their vast experience into the decision-making process so that each matter can be considered on its merits.[411]

As noted above, our review of CIN representations sent to the SDRO found that although NSW Police Force policy encourages senior police officers to exercise their discretion and turn their minds to the individual circumstances of each matter brought to their attention, the administrative processes put in place by the SDRO and NSW Police Force effectively exclude most applications based on discretionary grounds from being considered.

The few CIN representations that are referred for consideration are generally those that raise issues indicating that, according to police policy, the CIN *must* be withdrawn. However, not even all of these are referred to police by the SDRO. When matters are referred, they most often go to the issuing officer in the first instance, including those applications where the request for review relates to the reasonableness of the officer's actions in the first place.

We found the process in place for the SDRO to refer requests for review of CINs to the NSW Police Force for consideration was inadequate in a number of other respects. As outlined above, the information published by the SDRO about review options is not comprehensive and is in some circumstances misleading. In addition, when people make representations seeking a review of the penalty notice this is often not forwarded to police and SDRO responses sometimes do not address the issues raised.

Further, the NSW Police Force does not have any publicly available policies providing guidance for people who may wish to seek a review of a CIN.

As a result of these factors it appears to be very uncommon for CINs to be withdrawn as a result of mitigating information or extenuating circumstances. This is concerning given the government's recent commitment to improving the ability of penalty notice recipients to seek to have their penalty notices reviewed and withdrawn, particularly in cases where the penalty notice recipient has diminished capacity to understand the consequences of his or her conduct, or to control it.

The SDRO made the following observation about its processes for dealing with CIN representations that are sent to the SDRO for consideration by the NSW Police Force:

> *It is accepted that the practices previously in operation may not have been the most effective in ensuring that requests for review for CINS matters were suitably dealt with.*
>
> *Broadly speaking requests for review fall into two main categories:*
>
> *(a) Disputing the offence, seeking leniency or offering extenuating circumstances*
>
> *(b) Approach based on financial hardship.*
>
> *SDRO has now introduced a process whereby any requests in respect of (a) will be directed to the Local Area Commander / Unit Commander for attention. Requests in respect of (b) will be dealt with by SDRO in accordance with its normal policies and procedures relating to financial hardship.*[412]

This is a welcome development, as it appears to remove the principal impediment to genuine requests for review being brought to the attention of the agency that has ultimate legal responsibility for making these decisions.

409 Upon commencement, the revised provision will replace the current section 49A of the *Fines Act 1996*.
410 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
411 NSW Police Force submission, 17 February 2009.
412 SDRO response to draft report, 20 July 2009.

Our draft report also proposed changes to how these requests were handled upon being forwarded to the NSW Police Force. In order to ensure that CINs are reviewed and withdrawn in appropriate matters, in a way that is consistent and efficient, we were of the view there would be significant merit in the NSW Police Force use of CINs being subject to the review processes outlined in the *Fines Further Amendment Act 2008*.

There are a number of statutes that provide for penalty notice offences for 'offensive language' and or 'offensive conduct' in addition to the offences under the CINs scheme:

- *Rail Safety Act 2009 s.39*
- *Passenger Transport Act 1990 s.59*
- *National Parks and Wildlife Act 1974 s.160*
- *Centennial Park And Moore Park Trust Act 1983 s.24*
- *Royal Botanic Gardens and Domain Trust Act 1980* s.22B
- *Parramatta Park Trust Act 2001*. s30
- *Inclosed Lands Protection Act 1901 s.10*

It appears that penalty notices issued under the above statutes will be subject of the new internal review provisions outlined in the *Fines Further Amendment Act 2008.* We are concerned that a decision to exempt CIN offences from the new review processes will lead to inconsistent outcomes for persons that seek a review of a penalty notice on the basis of special circumstances such as an intellectual disability, mental illness, cognitive impairment or homelessness.

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 2008*. A useful part of this process would be the development of guidelines about the withdrawal of CINs, including the factors that may be considered as grounds for withdrawing a CIN. The Director-General of the Attorney General's Department has previously outlined his support for the development of such guidelines, and the development of associated training for officers:

> *I note there do not appear to be any guidelines for the withdrawal of CINs by police. The Attorney General's Department is strongly in favour of the development of such guidelines, which would then be incorporated into the NSW Police Force Standard Operating Procedures. The Department also supports appropriate training for senior officers who have been authorised to withdraw CINs.*[413]

We are of the view that the content of any police guidelines about review and withdrawal of CINs that are developed should be made publicly available to ensure CIN recipients are aware of their rights in relation to reviews.

Recommendation

21. That, as part of the current reforms to the fines system, the Attorney General consider amendments to Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the *Fines Act 1996* to make the police uses of CINs subject to the review processes outlined in the *Fines Further Amendment Act 2008*.

As noted earlier in a related discussion on official cautions (see section 6.9), the Attorney General's Department welcomed this recommendation. He said this amendment – together with the changes proposed in recommendations 5, 6 and 7 – would 'promote consistency in the way penalty notices are issued and reviewed, and ensure 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'.

On the other hand, the NSW Police Force did not support this recommendation, arguing that

> *CINs are criminal matters and representations concerning CINs should be dealt with in the same manner as representations in other criminal matters. They are not purely administrative.*

413 Laurie Glanfield, Director General, Attorney General's Department 14 January 2009.

Yet as our analysis of CINs review processes has already highlighted, representations concerning CINs are already treated differently from representations relating to criminal charges. At present any requests for police to consider amending or withdrawing criminal charges are determined by police, whereas the only CIN representations that police can review are those that the SDRO determines raise sufficient grounds to be referred for consideration. As the SDRO noted in its comment on this issue (above), its past referral practices relating to CINs were flawed and it is now committed to improving the quality of its decision-making and referral processes. In our view, making the CINs scheme subject to the review processes outlined in the *Fines Further Amendment Act 2008* should reinforce and complement these changes. The Attorney General's Department appears to support this view.

The NSW Police Force also voiced concerns that subjecting CINs to the review processes outlined in the *Fines Further Amendment Act 2008* had the potential to 'be construed as interference with police discretion'. As noted in our earlier discussion on related legislative issues (see section 6.9), nothing in the proposed amendments should fetter police decision-making or restrict the available options already available to police. Police will still be able to consider each case on its merits. Establishing processes to ensure that CIN representations are given appropriate consideration should increase transparency, promote fairness and consistency in review decision-making, and provide police with more – not fewer – options on how to respond.

8.6. Writing off fine debt

As outlined in section 4.2.2.3 a person may apply to the SDRO to have a fine written off after a fine enforcement order is made and before a community service order is issued. The fine may be written off if it is determined that:

- due to the financial, medical or personal circumstances of the fine defaulter that the fine defaulter does not have sufficient means to pay the fine, and is unlikely to do so
- enforcement action has not been successful or is likely to be unsuccessful in satisfying the fine, and
- the fine defaulter is not suitable to be subject to a community service order.[414]

If a fine is written off, it is taken to have been paid for the purpose of cancelling enforcement action under this Act.[415] If a fine has been written off, it can be reinstated with enforcement action recommenced by the SDRO within five years if a further fine enforcement order is made against the fine defaulter, or the SDRO is satisfied that the fine defaulter has sufficient means to pay, that enforcement action is likely to be successful or that the fine defaulter is suitable to be subject to a community service order.[416]

Guidelines for writing off fines were approved by the Treasurer in January 2003. These provided that in order to have an unrecoverable fine waived and the outstanding debt removed, the SDRO was required to refer the matter to the Treasurer for approval. However, in February 2008 the guidelines were revised to allow a delegated officer to write off unrecoverable fines in accordance with Treasurer's directions.[417]

The SDRO is required to write off an unpaid fine if it is directed to do so by the Hardship Review Board.[418]

During 2007 – 08, the SDRO wrote off 243,885 enforcement orders, with a value of $56.5 million. Of these:

- nearly $2 million related to enforcement orders where the debtor was deceased, and
- $37 million related to fines for relatively minor offences prior to December 1999.[419]

8.6.1. Recent reforms relating to write off procedures

Prior to December 2008 the only options for the SDRO to manage fine defaulters without sufficient means to pay their fines, or who were experiencing special circumstances, were to write off the fines completely, or offer the fine defaulter additional time to pay the fine (and associated enforcement costs). However, since the commencement of relevant sections of the *Fines Further Amendment Act 2008,* the SDRO is now authorised to partially write off fines. Similarly, the Hardship Review Board can now also direct the SDRO to partially write off a person's fines.[420]

414 *Fines Act 1996*, s.101. Under section 120 of the *Fines Act 1996*, the Treasurer may issue guidelines with respect to the exercise by the SDRO of its functions, including writing off unpaid debts in certain circumstances. Since 25 February 2008, the Treasurer's *Guidelines for Writing Off Fines,* have been extended to give SDRO officers the delegated authority to write off fines in accordance with the Treasurer's directions. Guidelines relating to the writing off of fines are not required to be made public and are not currently circulated publicly. The SDRO can write off amounts owing under unpaid enforcement orders if clients cannot be located, clients are incapable of making payments, the liability is not contested but continued enforcement would be unfair or otherwise unjust, the fine is unrecoverable at law, is uneconomical to pursue, or if the records are dated and cannot be relied on.

415 *Fines Act 1996*, s.101(3).

416 *Fines Act 1996*, s.101(4).

417 The *Fines Act 1996*, s.120(2) provides that guidelines issued by the Treasurer in relation to the writing off of unpaid fines are not required to be made public.

418 *Fines Act 1996*, s.101(1B).

419 Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.29.

420 *Fines Act 1996*, ss.101 and 101B, as amended by the *Fines Further Amendment Act 2008*.

In relation to the partial write off provisions, the SDRO has advised:

> *The ability for SDRO to now consider partial write offs of outstanding fines will greatly assist the fines hardship review provisions and will allow additional flexibility in considering individual circumstances. In particular the circumstances surrounding fines previously incurred by young offenders who have since demonstrated a concerted effort to change their behaviour.*[421]

The changes made in 2008 to enable delegated officers of the SDRO to directly write off fines; and enable the partial write off of fines are positive. These measures will enable the write off process to be streamlined, and should provide SDRO staff with more flexible options to deal with people whose personal circumstances make it difficult to acquit their fine debt. We note that at this stage it is too early to tell whether these changes have had any impact on the way the SDRO and Hardship Review Board conduct their business. To determine what, if any, impacts these measures are having, it would be useful for the SDRO to monitor the operation of the new provisions. At the very least, information about write offs (including partial write offs) should continue to be included in the NSW Office of State Revenue Annual Report.[422]

In addition, it may be useful for the SDRO to consider recording and analysing information about the fines which are written off, but are re-instated within five years. This will enable more to be known about the extent to which people suffering hardship are being re-introduced into the fines enforcement system at a later date, and whether their fines are dealt with more expediently at this time.

8.7. Hardship review

As outlined in section 4.2.4 a person subject to a fine enforcement order can apply to the Hardship Review Board to independently review a decision of the SDRO in regard to the making of, or failure to make a time-to-pay order, the writing off or the failure to write off, the whole or part of an unpaid fine.[423] Under the amended scheme, applicants can also ask the Hardship Review Board to review a decision of the SDRO in regard to the making of, the failure to make, or the varying or revocation of, a work and development order.[424]

In practice penalty notice recipients rarely utilise the Hardship Review Board. For example, in 2007 – 08 the Hardship Review Board reviewed 48 decisions of the SDRO worth a total value of $302,719. In the same year it processed 2.9 million penalty notices, with a face value of $453.7 million.[425]

Table 16 SDRO matters reviewed by the Hardship Review Board 2007 – 08

Decision	Number of matters	Value $
Write off	16	$43,814
Time to pay	7	$146,242
SDRO decision upheld	25	$112,663

Source: Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*.

It is not clear why so few people are applying to the Hardship Review Board to have decisions of the SDRO reviewed. One reason may be that the vast majority of SDRO clients who apply for a time-to-pay agreement, or to have their fine written off, are satisfied with the decision of the SDRO in relation to the application. Alternatively it may be that people who may be eligible to apply to the Hardship Review Board in relation to their outstanding fines and enforcement orders, do not do so because of ignorance about the option, inability to prepare an application (for example, because of intellectual disability, limited English language or literacy skills) or because of factors such as disorganisation and more pressing priorities – such as finding a job, somewhere to live or obtaining medical care.

It is worth noting that in relation to CINs, a high number of people do not engage with the SDRO about their fines and fine debt, and are therefore automatically ineligible to have their matter considered by the Hardship Review Board. As outlined in section 7.2 (see figure 7.1) Aboriginal people are significantly more likely than non-Aboriginal people to fail to pay their CIN fines at the penalty notice stage and to remain in the fines enforcement system for long periods of time. It is likely that many of the barriers people experience in contacting the SDRO also apply when it comes to them contacting the Hardship Review Board.

421 SDRO submission, 3 February 2009.
422 See for example, Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.29.
423 *Fines Act 1996*, s.101B(1).
424 *Fines Act 1996*, s.101B(1)(a).
425 Office of State Revenue, NSW Treasury, *Annual Report 2007 – 08*, p.28.

We have been advised that there have been no applications to the Hardship Review Board by people who have received a CIN in the entire time that the CIN scheme has been operating. In addition, very few of the people we consulted for the purpose of our review had experience with making applications to the Hardship Review Board.

In recent years criticisms have been made about the lack of clarity concerning which matters the Hardship Review Board will consider. In its interim report about the effectiveness of fines as a sentencing option, the Sentencing Council stated:

> *Conflicting views exist in relation to the time at which the Hardship Review Board can review decisions of the SDRO refusing applications for time to pay, or to write off debts. The SDRO maintains that it can do so any time once the Director has refused such an application; consultants to the Council and submissions received, however, suggest that it only exercises this power at the end of the enforcement process, a view which might gain support from the limited number of applications that are made.*[426]

We note the information on the Hardship Review Board website concerning which applications are eligible for consideration, is not particularly clear. For example, the website states:

> *If you are genuinely facing serious financial, medical and/or personal hardship and the State Debt Recovery Office (SDRO) has refused to write off your fines or to allow you time to pay the fines, you **may** be eligible to apply to the Fines Hardship Review Board to review SDRO's decision.*[427]

The website further states, *'You will receive written confirmation when your application has been received which will advise you if your case is eligible for referral to the Board or not.'* [428]

We note that the Hardship Review Board does not currently have any publicly available guidelines to assist people who are considering making an application to the Board. Nor does it publish information about matters that have previously come before it, including reasons for the decisions that have been made, that could assist other potential applicants to determine whether their circumstances might warrant consideration for review. Officers of one Legal Aid office we spoke to commented that they were unaware of the eligibility criteria for making an application to the Hardship Review Board, and expressed a desire to obtain more advice about this option, possibly by way of learning about applications that had been previously approved and/or knocked back.[429]

Throughout this report we have emphasised the importance of providing CIN recipients in particular (and fine recipients generally) with clear and easily accessible information about penalty notices and the fines enforcement process. Without comprehensive information about relevant processes and available assistance, penalty notice recipients – particularly those who are suffering personal disadvantage or hardship – will often be unable to manage their fine debt, and will suffer significant and ongoing hardships as a result.

In particular, we have made a number of recommendations about how the provision of information to CIN recipients, as well as to organisations that are in a position to provide advisory and advocacy services to such recipients, could be improved (see section 8.2 for a discussion about this issue). To ensure such people are aware of the existence of the Hardship Review Board, and understand when and how to make applications, we are of the view that all initiatives being taken by the SDRO and other government agencies to improve the provision of information about penalty notices and the fines enforcement system should include reference to the Hardship Review Board.

In addition, it may be useful for the government to consider whether additional measures need to be taken to achieve greater community awareness about the Board, and in particular whether it would be appropriate for information to be circulated to stakeholders about:

- the circumstances when the Hardship Review Board is likely to consider a matter (or the circumstances when it will not consider a matter)
- the type of factors that are taken into consideration when the Hardship Review Board considers a matter, and
- examples of cases where the Hardship Review Board has over-turned a decision of the SDRO (or has chosen not to do so), and the reasons for this.

The publication of such information would assist individuals and advocates to determine whether or not to seek a review by the Hardship Review Board, and may assist in achieving greater transparency, consistency and predictability of decisions made by the Board.

426 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, p.109.
427 http://www.hrb.osr.nsw.gov.au/. Accessed 17 June 2009. Emphasis added.
428 http://www.hrb.osr.nsw.gov.au/frequent_questions/fines.html. Accessed 17 June 2009.
429 Interview, Coffs Harbour Legal Aid, 21 August 2008.

Recommendation

22. That the State Debt Recovery Office develop a strategy to improve provision of information to fine recipients and organisations who advocate on their behalf, about the role of the Hardship Review Board and reasons for determinations made by the board.

The SDRO supported this recommendation and outlined the measures it has already put in place to address this issue, including the addition of detailed information on the SDRO web site. The advice on the 'Frequently Asked Questions' page of the SDRO's web site (updated 1 July 2009) now features much more complete explanations of current review processes, the role of the board, what can be reviewed and how to apply for hardship review. It also has links to relevant information on the Hardship Review Board's web site. This is a very welcome development.

The SDRO should also consider including this kind of practical detail in its *Fines Information Pack*. At present, the pack provides only basic information on review processes and on the role of the Hardship Review Board. As the SDRO noted, its *Fines Information Pack* remains an important means of educating advocates and their clients about the available options, as the pack:

> *… is distributed to all advocacy agencies who either register with SDRO, contact SDRO or are identified as offering advisory services. This provides detailed information to assist those people to assist their clients. These information packs have been distributed widely via Local Courts, Members of Parliament, councils, Aboriginal networks, Financial Counsellors Association, Legal Aid, Law Access and the over 60 agencies which have registered with SDRO.*[430]

In supporting the recommendation, the SDRO said it was committed to ongoing improvements in the advice it provides:

> [The] *SDRO is always keen to improve the availability of information to clients and will pursue any avenues available.*[431]

8.8. Monitoring and evaluating programs and strategies

We have made a number of recommendations throughout this report to improve the operation of the CIN scheme, and associated fines enforcement system. Our review has focused on the operation of the CIN scheme 'in so far as those provisions impact on Aboriginal and Torres Strait Islander communities'[432] and our recommendations are focused on achieving improvements for members of these communities.

However, throughout the course of this review we have become aware of a number of issues that, while related to the impact of the CIN scheme on Aboriginal and Torres Strait Islander communities, have much broader implications. The reasons for this include:

- The issues that arise when CINs are issued to Aboriginal people often also arise when CINs are issued to non-Aboriginal people. For example, both Aboriginal and non-Aboriginal people may experience significant difficulty paying a CIN fine if they have a low income. In addition both Aboriginal and non-Aboriginal people who have limited English or literacy skills, or experience circumstances which make it difficult to obtain assistance and advice, may have difficulty comprehending the implications of receiving a CIN and understanding how they are expected to deal with it.
- People who receive CINs (whether they are Aboriginal or not) often have additional outstanding penalty notices and/or enforcement orders, and it is the combination of these fines – rather than CINs alone – that have led to disengagement with the fines enforcement system, the accumulation of high levels of fine debt, and exposure to risks of secondary offending.
- The SDRO does not have specific policies or practices relating to CINS issued to Aboriginal people, rather all penalty notices and enforcement orders are treated the same.

For these reasons in some instances it has been difficult for us to consider the impact of CINs on Aboriginal people in isolation from how CINs impact on non-Aboriginal people, and it has been difficult for us to consider the impact of CINs in isolation from other penalty notices.

430 SDRO response to draft report, 20 July 2009.
431 SDRO response to draft report, 20 July 2009.
432 *Police Powers Legislation Amendment Act 2006*, Schedule 4, s.6.

We note that the NSW Government is committed to ensuring that the fines enforcement system remains fair and efficient[433] and that it has stated its intention to review the reforms contained in the *Fines Further Amendment Act 2008*, two years after they come into operation.[434] Given this commitment, and the issues that have arisen as part of our review, we are of the view that there may be significant benefits in the government further examining:

- The impacts of penalty notices and the fines enforcement system on Aboriginal and Torres Strait Islander people and communities. This would enable more to be known about whether the issues relating to the issuing of CINs to Aboriginal people are representative of issues experienced by Aboriginal people who receive penalty notices other than CINs. We reiterate once again that the SDRO does not currently have access to information about the Aboriginality or ethnicity of the vast majority of penalty notice recipients. This fact is clearly an impediment to obtaining a better understanding about the impacts of penalty notices and the fines enforcement system on Aboriginal people, and would need to be rectified before further analysis could be conducted in relation to this issue.
- Whether there are additional measures that could be adopted to improve the fairness, efficiency and effectiveness of penalty notices as a sentencing option, and the fines enforcement system.

As outlined in section 3.7.3 the NSW Law Reform Commission is currently conducting an inquiry into penalty notice offences. In addition, the Attorney General's Department and the Office of State Revenue have established a committee to oversee the implementation and a two-year trial of the new Work and Development Order scheme. These initiatives are positive and important, but it is unclear whether current arrangements are sufficient to ensure comprehensive ongoing monitoring and evaluation of penalty notice schemes and strategies to foster continual improvement of the fines enforcement system.

We note that in 2006 the Victorian Government, in response to a report by the Victorian Parliament Law Reform Committee about warrant powers and procedures, established an Infringements System Oversight Unit within the Victorian Department of Justice. This was in response to the Committee's recommendation to establish an advisory board to:

- develop consistent policies and guidelines with respect to issues such as education, agency discretion, withdrawal of penalties, payment plans, non-monetary sanctions, design and content of infringement notice documentation, special circumstances categories and applications and training of issuing officers
- address ongoing systemic issues in the infringements system
- collect and analyse empirical data from infringement system agencies, individuals who receive infringements, the Sheriff's Office, and relevant courts and organisations, and
- monitor and apply best practices and innovations from other jurisdictions.[435]

The role of the ISOU includes:

- supporting the Minister responsible for administering relevant legislation
- monitoring the operation of the infringements system
- providing advice to the Minister and Government on infringements policy
- effecting legislative instruments and develop guidelines
- supporting an ongoing advisory committee comprising agencies, stakeholders and community groups, and
- undertaking system improvement projects such as a review of infringement notices and associated documentation.[436]

We are of the view that there may be significant benefits in the NSW Government considering the establishment of a body or committee with an ongoing mandate to examine issues related to improving the penalty notice system. This need not necessarily be as formalised as the Victorian model and could be established by extending the mandate of an existing committee – such as the committee headed by the Attorney General's Department and SDRO, and which includes representatives from other government departments and non-government organisations, that is overseeing the implementation of the Work and Development Order scheme.

If established on an ongoing basis, such an oversight body may be well-placed to:

433 The Hon Henry Tsang, NSWPD, Legislative Council, 18 June 2008.
434 The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008.
435 Government response to the Victorian Parliament Law Reform Committee's Warrant Powers and Procedures Final Report, undated, p.20.
436 Government response to the Victorian Parliament Law Reform Committee's Warrant Powers and Procedures Final Report, undated, p.20.

- consider the type of information it is most appropriate and useful to record about fine recipients and the fines enforcement system, and how this information could be used to contribute to increasing the fairness, effectiveness and efficiency of the penalty notice system
- review the data on the extent of secondary offending due to fine default
- consider the provision of direct assistance to fine recipients with a view to reducing fine default and improving compliance
- track and report on the effectiveness of reform measures that have been implemented, and
- advise the Attorney General and the Government on the potential to improve fines issuing and enforcement in NSW.

Issues affecting Aboriginal communities would be integral to each of these issues.

Our draft report suggested that, in conjunction with the current reforms to the fines system, the Attorney General consider establishing a body with ongoing responsibility for monitoring the fair and effective use of fines in NSW and providing advice on opportunities for continual improvement.

The Director General of the Attorney General's Department responded by saying that the need for such a body 'seems beyond dispute'. However, he said that it would be preferable to seek the Law Reform Commission's views on the form and make-up of this kind of body.

> *In light of the serious problems with the fine system revealed in the reports by* [the Public Interest Advocacy Centre]*, the Sentencing Council, and your office, the need for such a body seems beyond dispute. The form it should take, however, is open to question. Given the Law Reform Commission's current reference into the fine and penalty notice system, it may be appropriate to seek its views on how the body should be constituted. The LRC could consider this issue without the need to amend its existing terms of reference.*[437]

The SDRO expressed similar views about the need to seek the Law Reform Commission's advice.

Recommendation

23. That, following appropriate consultation, the Attorney General 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.

437 Attorney General Department's response to draft report, 16 July 2009.

Chapter 9.
Other issues relating to the use of CINs

9.1. Fingerprinting and identification powers

When Parliament amended the Criminal Procedure Act to extend the CINs scheme to the whole of NSW, it required the Ombudsman conduct a further review into the impact of the CINs scheme on Aboriginal communities, including a provision requiring the Ombudsman to assess the impact of powers relating to fingerprints taken under section 138A of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and the related safeguards in section 138C.[438]

This section considers the impact of those powers as they relate to the CINs scheme.

9.1.1. Legislation relating to the taking of identification particulars

In order to give someone a CIN, police must be sure of the person's identity. Thus, the Criminal Procedure Act gives police officers powers to request the person's name and address,[439] and to request proof of their identity.[440] This will generally involve the person showing a driver's licence or some other documentation to verify the information provided if such documentation is available.

There is a fine of up to $220 for refusing or failing to comply. That is, it is an offence for anyone who is asked their name and address to, without reasonable excuse:

a. fail or refuse to comply with the police request

b. state a name that is false in any material particular, or

c. state an address other than his or her full and correct address.[441]

Although police may request proof of identity, failure to carry documentation that verifies name and address details is not an offence.

The powers for police to take fingerprints (or palm-prints) when issuing CINs are set out in Part 3, Division 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, which states:

Division 3 Taking of identification particulars from other offenders

138A Taking of finger-prints and palm-prints from persons issued penalty notices

(1) A police officer who serves a penalty notice on a person under the *Criminal Procedure Act 1986* may (whether before or after the penalty notice has been served) require the person to submit to having his or her finger-prints or palm-prints, or both, taken and may, with the person's consent, take the person's finger-prints or palm-prints, or both.

(2) A requirement under this section must not be made of a person who is under the age of 18 years …

Section 138C sets out the safeguards that apply to uses of the power to obtain fingerprints of CIN recipients without arrest. When exercising this power, section 138C(1) requires officers to provide any CIN recipients being fingerprinted with:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),

(b) the name of the police officer and his or her place of duty,

(c) the reason for the exercise of the power,

(d) a warning that, if the person fails to comply with the requirement, the person may be arrested for the offence concerned and that, while in custody, the person's finger-prints and palm-prints may be taken without the person's consent.

The section 138A power to fingerprint CIN recipients provides police with a sure and convenient way to resolve any subsequent disputes about whether the person named on the CIN is indeed the person who was stopped, fined and fingerprinted by police.

438 *Criminal Procedure Act 1986*, s.344A.
439 *Criminal Procedure Act 1986*, s.341(1).
440 *Criminal Procedure Act 1986*, s.341(4).
441 *Criminal Procedure Act 1986*, s.341(3).

These CINs identification powers, and the basic safeguards that should apply, are distinct from the more coercive powers (and more stringent safeguards) that apply to suspects who are arrested and brought into police custody, or fingerprints obtained under the *Crimes (Forensic Procedures) Act 2000* for the purpose of investigating serious offences.

9.1.2. Policy and procedures relating to fingerprint powers

The NSW Police Force's Criminal Infringement Notices Policy and Standard Operating Procedures (CIN SOPS) advise that police must be certain of the identity of a suspect before issuing a CIN, and set out the powers provided to police relating to suspect identification.

> *In the absence of evidence or other verifiable information which confirms a suspect's identity (e.g. CNI* [Central Names Index] *record via police radio or personal knowledge of person by the police officer), a CIN cannot be issued.*[442]

The CIN SOPS outline steps for police to follow when checking a CIN recipient's name and address and deciding whether there is a need to take fingerprints. As part of the advice on 'Process for Issuing a CIN', the SOPS state:

- verify the suspect's identity. Seek proof of the suspect's name and address. Normal checks for identity such as licence, vehicle registration and other personal identification provided by the suspect should be undertaken. It is not an offence if the suspect fails to supply confirmation of personal details, however an unverifiable name and address means that a CIN cannot be issued
- decide whether fingerprints need to be taken. Consider the proof provided by the suspect and whether it is sufficient to verify the details provided, especially given recent trends in identity theft and the use of fake identification that appears authentic
- if you determine that fingerprints are to be taken, request the suspect consent to having fingerprints and palm prints taken …
- issue a warning to the suspect that if they do not consent to the request to provide fingerprints/palm prints, an arrest for the offence may be made and that while in custody the suspect's fingerprints/palm prints may be taken without consent
- contact a supervisor or duty officer in cases of uncertainty relating to fingerprinting.[443]

In a separate section titled, 'Taking Fingerprints in the Field', the procedures include steps to remind officers of their legal obligations[444] when taking fingerprints of CIN recipients. Officers must provide evidence that they are police officers (if not already in uniform), provide their names and place of duty, request the suspect to consent to having fingerprints or palm prints taken 'if not completely satisfied of the suspect's identification', **give the reason for requesting the prints** (emphasis added), and warn that if the suspect does not consent then he or she may be arrested for the offence and have fingerprints taken without consent while in custody.

There is also advice for officers to contact a senior police officer if they are uncertain about whether to fingerprint, and advice that the suspect should be taken to an area that is relatively private and not in full view of the public.

With respect to the method used for fingerprinting suspects, the current SOPS note:

> *The special fingerprint form is designed for taking fingerprints in the field only and, along with the Easy Print Ink Pad, is only to be used when a CIN is issued.*
>
> *The regular method of fingerprinting a suspect using the P691 fingerprint form by ink or Livescan will be used when a decision has been made to proceed by CAN or charge.*[445]

The CIN number is recorded on the top of the fingerprint form and a notation is made on the form indicating whether the person is Aboriginal.

The officer must then create an 'Event' entry on COPS and add the Event number and the person's Central Names Index[446] number to the fingerprint form. The fingerprint form is then sent to the Fingerprints Operations section of the NSW Police Force's Forensic Services Group (FSG).

442 Criminal Infringement Notices Policy and Standard Operating Procedures V 4 June 2007.
443 Criminal Infringement Notices Policy and Standard Operating Procedures V 4 June 2007.
444 Under Section 138C(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* .
445 Criminal Infringement Notices Policy and Standard Operating Procedures V 4 June 2007.
446 The Central Names Index number is a unique identifier on the COPS system that is intended to enable police to easily distinguish persons with the same or similar names.

The Easy Print Ink Pads referred to in the SOPS are small, portable ink pads that provide police with a way to obtain a fingerprint to verify a suspect's identity when issuing a CIN or a Field Court Attendance Notice without having to take them back to the police station. The other methods noted refer to the fingerprinting of suspects at the police station. Until recently, 'Livescan' technology that records electronic finger and palm print images and enables police to conduct 'real time' checks of these images against the prints already on the police database, was only available at police stations. From early 2009, the NSW Police Force has made mobile 'Field ID handheld units' much more widely available, enabling police in many commands to use this technology to obtain fingerprints of CIN recipients in the field. The implications of this development are discussed further, below.

9.1.3. The use of fingerprint powers during the current review period

The NSW Police Force provided a summary of COPS information relating to fingerprints taken by police when issuing CINs during the current review period – see table 17.

Table 17 Fingerprints taken when CINs issued, 1 November 2007 to 31 October 2008

	Nov-07		Dec-07		Jan-08		Feb-08		Mar-08		Apr-08		May-08		Jun-08		Jul-08		Aug-08		Sep-08		Oct-08		Total	
	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	**Aboriginal**	**Non-Aboriginal**
Fingerprinted	7	33	4	38	2	26	1	22	1	20	3	27	2	24	2	20	1	13	2	12	0	14	0	9	**25**	**258**
Not fingerprinted	35	466	61	664	66	660	41	504	55	702	44	635	59	689	44	726	59	561	49	693	56	705	51	773	**620**	**7,778**

Source: Criminal Records Section, NSW Police Force. 'Non-Aboriginal' includes all recipients where Aboriginality was 'unknown' and 'refused'. n=8,681.

Of the 8,681 CINs issued between 1 November 2007 and 31 October 2008, police took fingerprints from suspects in relation to 283 or 3% of the CINs issued. Of the 283 sets of fingerprints taken, 25 were identified as belonging to Aboriginal people.

The figures indicate that on most occasions, the identity of the CIN recipients was not in doubt and they were able to satisfy police that they were who they claimed to be. That is, the details obtained through 'normal checks for identity' such as licence, vehicle registration and other personal identification provided by the recipient were deemed to be sufficient. In focus group discussions on this issue, frontline officers were clear that fingerprints were a useful way for them to deal with any doubts about identity.

> *If you had any doubts or lingering doubt, that's when you'd print them. If you had that ID, then happy days.*[447]

However, if suspects were unable to convince police as to their identity, then police would '*run them up to the station now*'.[448]

When a CIN is issued without police obtaining fingerprints from the recipient, police are required to record a reason on COPS. The most common reason entered for not taking prints was that police were satisfied with the proof of identity provided by the person. Other common reasons cited were that the recipient was known to police, no equipment was available to take prints, and that the recipient was intoxicated and would be issued with a CIN at a later date.

The figures in table 17 indicating that fingerprints were taken by police in relation to 3% of CINs issued during the current review period, are markedly lower than during the initial 12-month trial of CINs. In the period 1 September 2002 to 31 August 2003, police in the 12 trial commands took fingerprints in conjunction with 31% or 506 of the total 1,595 CINs issued.

In our earlier report on that trial, we indicated that one explanation for the markedly higher use of fingerprinting in relation to CINs during the trial period was there appeared to be a common misconception among many police in the trial commands that it was mandatory to take fingerprints when issuing a CIN.[449] The issue was clarified in the CINS SOPs and training that accompanied the state-wide implementation of the current CINs scheme in late 2007.

447 Officer focus group, 28 January 2009.
448 Officer focus group, 28 January 2009.
449 Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p.53.

In addition, the impediments to fingerprinting CIN recipients noted in our report on the initial 12-month trial appear to be a factor still in police decisions on whether to require prints. In focus group discussions for this further review, the concerns raised by frontline officers included:

- the use of manual ink pads can be time-consuming and messy
- if identity can not be confirmed through radio checks and other means, it is preferable to arrest the suspect rather than risk making a mistake
- the availability of the ink pads can be limited, and
- the CIN offences were minor and did not warrant the embarrassment caused by fingerprinting a suspect in public, even when it is conducted away from public view.

Some officers were also conscious of how requiring fingerprints could undermine their attempts to avoid conflict in the context of a potentially unpredictable crowd.

> *It's, yeah. I think it could cause more problems than it's worth. It's like trying to strip-search someone in front of the, like out in the middle of the thing. You're not going to do it and a lot of people would jack up if you even try and give them a pat search. It's just humiliating.*[450]

A question arising from the comparatively low use of the fingerprint provisions during the current review period is how many potential CIN recipients were arrested and charged instead of being issued with a CIN because of doubts about their identity. However, the data reported in Chapter 5 indicates that very few minor offenders are being arrested for CIN offences in circumstances where they should have received a CIN. Firstly, the data shows that half of all offensive conduct and offensive language incidents in NSW are now dealt with by way of CINs. Secondly, when charges are laid for offensive conduct or offensive language, they often have bail conditions attached, indicating that the person charged was unlikely to be eligible for a CIN.

In addition, it appears that at least some of the fingerprints taken from CIN recipients to verify their identity are actually taken after the suspect was arrested and brought back to the police station. We checked the COPS records relating to a sample of 54 people fingerprinted when they were issued with CINs during the current review period (1 November 2007 to 31 October 2008). We found that 35% (19 of the 54 CINs) had their fingerprints taken at the police station, not at the point of arrest.[451]

9.1.4. The introduction of the electronic 'Field Identification' system

As noted earlier, the NSW Police Force has begun to introduce mobile versions of its Livescan technology across NSW. The system, known as the Field Identification System or 'Field ID' relies on mobile devices that electronically scan and transmit fingerprints in the field.

Prints taken with Field IDs are transmitted to the National Automated Fingerprint Identification System (NAFIS)[452] to check whether the person's fingerprints are on record. Within about 90 seconds, police in the field should receive a message of 'hit' or 'not matched'. A 'hit' shows that NAFIS has a copy of the person's prints on record, enabling police to verify the person's identification details.[453] Details such as the person's name, date of birth, gender, address, photograph (if one is on record) and any warnings such as outstanding warrants or special needs should accompany the notification of a matched record.[454] Officers would normally rely on police radio to check this information (except for photographs). If the fingerprints indicate there is no matching record on the NAFIS database, the prints sent for checking are not retained by NAFIS. However, the prints are retained by the NSW Police Force as part of the record of the CIN.

The NSW Police Force submission said the use of Field ID or 'FID' had the potential to reduce the number of minor offenders being brought into police custody, to identify whether the person has special needs, or if he or she is missing or wanted.

> *The ability to accurately identify CIN recipients enables police to issue a CIN where appropriate and may result in fewer persons in custody. The CIN recipient will benefit from the introduction of FID through the potential decrease in custody and the availability of appropriate 'warnings', such as medical/special needs/missing person notices, which will allow police to more appropriately deal with the CIN recipient's needs.*

450 Officer focus group, 3 February 2009.
451 Audit of CINs recorded on the NSW Police Force COPS system, accessed 16 June 2009.
452 The National Automated Fingerprint Identification System is a centralised database established by the Australian Government to assist police across Australia to establish identity from fingerprint and palm impressions. See www.crimtrac.gov.au.
453 Police Weekly Volume 20, No 32, 1 September 2008 p.4.
454 NSW Police Force submission, 17 February 2009.

> *Police will benefit in that FID will allow the identification of 'wanted persons', reduce administrative work, decrease transport times of persons in custody particularly in rural areas, increase the quality of fingerprints collected at the time of CIN issue allowing improved matching if identity is later disputed, improve efficiencies in court processing, and enhance police officer safety through timely warnings.*[455]

The NSW Police Force's Forensic Services Group has indicated that it expects the number of fingerprints taken when issuing a CIN to rise significantly with the introduction of the Field ID device given the relative ease of using this new technology.[456]

9.1.5. Safeguards relating to fingerprints powers

The purpose of the powers provided to police under section 138A of the *Law Enforcement (Powers and Responsibilities) Act 2002* is to obtain identification evidence needed to enforce a CIN if doubts are later raised about the recipient's identity.

During the review we consulted with staff at the Criminal Records Section, Forensic Services Branch about the procedures for storage and destruction of fingerprints. We were given informal advice by the commander of that unit that the NSW Police Force was considering the possibility of whether fingerprints taken under the CIN identification provisions could be used for other investigative purposes, such as checking the prints taken against records relating to serious unsolved crimes or so-called 'cold cases'. He advised that the NSW Police Force had requested legal advice from the Office of the Crown Solicitor in relation to this issue.

In order to better understand what, if any, implications might arise from police using fingerprints taken to verify the identity of CIN recipients to investigate serious offences, we invited the NSW Police Force to provide a copy of the Crown Solicitor's advice and/or provide us with the force's own views on this issue, including clarification about whether police were proposing to change their current procedures. In a letter from the Deputy Commissioner, Operations we were advised:

> *I have sought opinions from both our General Counsel and Forensic Services Group as to whether all or part of the requested advice could be provided to you. Unfortunately, the legal advice obtained by NSWPF is not restricted to the issues being examined in your review and the content can not be readily partitioned. Accordingly, NSWPF will need to assert legal privilege in relation to these documents and not make them available.*[457]

Standard Operating Procedures of the Forensic Services Group indicate that fingerprints taken by police for the purpose of issuing a CIN are routinely checked against the Unsolved Latent Database by the Repeat Offenders Unit. However, the advice provided by NSW Police Force has not clarified whether the fingerprints are used to conduct investigations unrelated to issues related to the alleged CIN offence.

The use of CIN fingerprints to investigate unsolved cases raises a question about whether the NSW Police Force is complying with the requirements of sections 138A and 138C of the *Law Enforcement (Powers and Responsibilities) Act 2002.* For instance, section 138C(1) requires that police provide the person being fingerprinted with the reason for exercising the power to take their fingerprints, and to warn of the consequences if they fail to consent. The police SOPS for issuing CINs do not provide guidance about what reasons should be provided and do not mention that fingerprints may be used to investigate unsolved cases.

There might also be a question about the adequacy of safeguards associated with these powers. The CINs identification powers and related fingerprinting provisions clearly anticipate that fingerprints and palm prints will be taken for the purpose of verifying the identity of minor offenders for the purpose of issuing a CIN. These powers should be distinguished from the more coercive fingerprinting powers such as fingerprints obtained under the *Crimes (Forensic Procedures) Act 2000* for the purpose of investigating serious offences. If CIN fingerprints are also to be used to investigate serious offences, then consideration should be given to whether the more stringent safeguards that apply to the coercive fingerprinting powers should apply to the powers under the CINs scheme. In particular, section 10 of the Forensic Procedures Act provides strict obligations on police dealing with Aboriginal suspects to obtain their informed consent before performing 'non intimate' forensic procedures such as taking their fingerprints.

In order to resolve this issue, we provisionally recommended that the Minister for Police consider whether section 138A of the Law Enforcement (Powers and Responsibilities) Act 2002 should be amended to make explicit that fingerprints and palm prints be used only for the purpose of identification of the CIN recipient and not for other investigative purposes.

455 NSW Police Force submission, 17 February 2009.
456 Meeting with FSG 6 November 2008.
457 Letter from Deputy Commissioner Paul Carey, 17 June 2009.

The NSW Police Force opposed this suggestion as it considered that it was:

> *… in the public interest for evidence obtained for a lawful purpose to be available for law enforcement and investigative purposes. It should be noted that fingerprints and palm prints are destroyed once the CIN penalty has been paid and no conviction is recorded.*[458]

The section 138A power to fingerprint CIN recipients clearly allows police to use this identification evidence to resolve any subsequent disputes about whether the person named on the CIN is indeed the person who was stopped, fined and fingerprinted by police. What is not clear is whether fingerprints required from CIN recipients can also be used for other investigative purposes. The inclusion of safeguards requiring such prints to be destroyed upon payment of the CIN, or if the matter is dismissed at court or the court finds the person not guilty, or if the CIN is withdrawn, appears to indicate that this evidence was not expected to be used to investigate other offences. If Parliament intended to allow the broader application of CIN fingerprint evidence, it is our view is that these uses should be expressly provided for in the Act.

A related issue is what safeguards should apply if CIN fingerprint evidence is to be used for investigating offences that are not related to the alleged CIN offence. The legislation currently requires that persons being fingerprinted are asked to consent to the procedure and that police provide reasons for exercising the power. If CIN fingerprints are to be used to investigate other offences, police training and procedures may need to be amended to guide officers on the explanation they must provide regarding their reasons for exercising the power. As noted above, we believe consideration should also be given to whether more stringent safeguards should apply, such as the provision in the Forensic Procedures Act that imposes strict obligations on police dealing with Aboriginal suspects to obtain their informed consent before performing 'non intimate' forensic procedures such as taking their fingerprints.

Recommendations

24. That the Minister for Police take steps to have the *Law Enforcement (Powers and Responsibilities) Act 2002* amended to clarify whether fingerprint and palm print identification evidence gathered under section 138A may also be used to investigate offences unrelated to the alleged CIN offence, and consider the adequacy of associated safeguards.
25. That the NSW Police Force review the adequacy of the advice that it provides to officers exercising powers under section 138A of the *Law Enforcement (Powers and Responsibilities) Act 2002* to ensure compliance with appropriate safeguards.

9.1.6. Destruction of prints

As noted above, section 138A(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides the legislative basis for the destruction of prints taken when a penalty notice is issued:

> (3) The Commissioner must ensure that a finger-print or palm-print taken under this section is destroyed:
>
> (a) on payment of the penalty under the penalty notice, or
>
> (b) if the relevant penalty notice offence is dealt with by a court and the court dismisses the charge in relation to the penalty notice or arrives at a finding of not guilty for the charge, or
>
> (c) if the penalty notice is withdrawn.

Table 18 shows the number of CIN fingerprints taken and destroyed, according to advice provided by the NSW Police Force.

458 NSWPF response to draft report, 22 July 2009.

Table 18 Retention and destruction of CIN fingerprints

Print status	Extended trial period 2002 – 07	Current review period	Total
Prints destroyed	987	110	1,097
Prints retained	1,093	173	1,266
Total	**2,080**	**283**	**2,363**

Source: Criminal Records Section, NSW Police Force. Estimates are based on information provided about the extended trial period in November 2008, and in relation to the current review period on 19 May 2009. n=2,363.

With respect to police compliance with the fingerprint destruction provisions during the current review period (1 November 2007 to 31 October 2008), the NSW Police Force advised that it was complying with the section 138A(3)(a) requirement to destroy prints upon payment of the penalty, but that it was unable to comply with the requirements under section 138A(3)(b) and (c) because of a conflict between these provisions and section 21 of the *State Records Act 1998*.

Subsequently, an amendment to the State Records Regulation 2005 was made authorising the destruction of prints under section 138A (b) and (c) of LEPRA and this came into effect on 6 March 2009. The NSW Police Force has advised that the standard operating procedures have subsequently been amended to ensure compliance with the whole of section 138A(3).

As so few CINs issued to Aboriginal recipients are paid at penalty notice stage, it is therefore likely that any fingerprints taken of Aboriginal CIN recipients will, on average, be kept for longer periods than those of non-Aboriginal recipients.

9.2. Use of CIN histories in court proceedings

This section deals with the records that the NSW Police Force keeps in relation to individuals who are issued with a CIN, and the use of those records in court proceedings.

In acknowledging that there were potential benefits in extending the use of on-the-spot fines to deal with minor criminal offences, the NSW Law Reform Commission anticipated that the scheme would feature proper safeguards, including provision that no criminal conviction be recorded as a result of having been issued with a CIN.

> *Such safeguards should include, for example, a provision which stipulates that receipt of an infringement notice should not result in a conviction being recorded for that offence.*[459]

Other essential safeguards recommended by the Commission have already been discussed elsewhere in this report, such as measures relating to the use of discretion, guidelines on how this discretion is to be exercised, and proper monitoring 'to guard against abuse and to ensure that infringement notices are not imposed on people who would not ordinarily be punished'.[460]

Although the Criminal Procedure Act does not stipulate that no criminal conviction be recorded, there is a provision stating that once a CIN penalty has been paid, no further proceedings can be taken against the suspect for that offence and payment is not to be regarded as an admission of liability for the purposes of any civil claim, action or proceeding arising out of the same occurrence.[461]

In practice, the NSW Police Force policy makes it clear that the alleged CIN offence is not to be recorded as a conviction and that payment is not to be regarded as an admission of guilt. When issuing CINs, police should inform recipients that payment of the CIN is not an admission of guilt and will not result in a criminal record for that offence.[462]

On the other hand, the NSW Police Force maintains a record of all CINs issued and this information can be made available to courts in certain circumstances. Current police practice is to record an individual's 'CIN history' on a part of the COPS database that is separate from records relating to any criminal convictions. At present, a CIN will only be recorded as a criminal conviction if the recipient elects to have the CIN determined by a court and is found guilty of that offence:

459 *NSW Law Reform Commission, Sentencing, Report No. 79, Sydney, 1996 at* [3.51].
460 *NSW Law Reform Commission, Sentencing, Report No. 79, Sydney, 1996 at* [3.51].
461 *Criminal Procedure Act 1986*, s.338(1) and (2).
462 Available at: www.police.nsw.gov.au (accessed 16 December 2008).

> *The NSWPF maintains a history of CINs issued to all persons on the Computerised Operational Policing System (COPS). A CIN history is stored separately from criminal record information (if any). If at a later time a CIN recipient appears before a court, a copy of their criminal record (if any) and CIN history is produced and may be presented during bail or sentencing proceedings. It is confirmed that a CIN does not form part of a person's criminal history and is not disclosed for employment, visa, adoption or licensing purposes. However, if a CIN recipient elects to have the matter heard before a court, and is subsequently convicted, the details of the conviction may then form part of the person's criminal record, in accordance with Section 5 of the Criminal Records Act (1991).*[463]

The distinction between records of CIN histories and records of criminal convictions is important as there can be significant adverse consequences resulting from having been convicted of a criminal offence. These include restrictions on visa availability and travel, requirements to disclose any convictions in applications for employment and other applications such as for insurance, credit facilities and working with children checks. There is also a risk that such information can lead to unfair and sensational reporting in the media, and the potential for automatic revocation of parole.[464]

The Sentencing Council contrasted the seriousness of the consequences that can flow from having a conviction and criminal record, with the relatively 'trivial' nature of offences such as those covered by the CINs scheme. It argued that elevating an 'administrative' penalty notice to criminal status would be inconsistent with the policy behind its adoption.[465] In its discussion of the importance of keeping an individual's penalty notice records separate from records relating to criminal convictions, the Sentencing Council made particular reference to CINs:

> *The greatest incidence of the use of CINS, in particular, occur with the marginalised sections of the community, i.e. 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.*[466]

The Sentencing Council concluded that no penalty notices should be regarded as convictions or as an admission of liability unless the matter has been adjudicated by a court.

Current police practice is not inconsistent with this approach. With respect to information about an individual's CIN history that is submitted as part of sentencing proceedings, the NSW Police Force submission argued that this is done in a way that courts can easily distinguish CIN records from criminal convictions.

> *The CINS record is not a record of conviction and judicial officers consider the 'weight' of information in the overall consideration of whether to impose a conviction or the penalty to be imposed if a conviction is recorded. There is clearly a distinction between the two aspects.*[467]

In explaining the relevance and admissibility of CIN-related information, the NSW Police Force submission argued:

> *NSW Police Force considers that a CIN history provides the court with relevant historical information. Section 21A of the Crimes (Sentencing Procedure) Act 1999 sets out the factors that can be taken into account by a sentencing court. In determining the appropriate sentence for an offence, a court is to take into account the aggravating factors and mitigating factors that are relevant and known to the court. The mitigating factors are set out in subsection (3). Paragraphs (f), (g) and (h) of the subsection allow courts to take into account whether the offender was a person of good character, whether the offender is unlikely to re-offend, and whether the offender has good prospects of rehabilitation (by reason of the offender's age or otherwise). It is considered that a CIN history could be relevant to each of these considerations and may, therefore, be made known by the prosecution to the sentencing court.*[468]

A number of other submissions raised concerns about the use of CIN histories in unrelated court proceedings and the potential for this information to unfairly influence court proceedings. The following comment from the Law Society of NSW was typical of the concerns raised:

> *The Committee is strongly opposed to the court being provided with a CIN history of a person who appears in court for sentence of a subsequent charge. Issuing a CIN is an administrative exercise and not a criminal proceeding (unless a court election has occurred and a subsequent conviction flows).*

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463 NSW Police Force submission, 17 February 2009.
464 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, at [3.102].
465 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, at [3.100].
466 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices – Interim Report*, October 2006, at [3.100].
467 NSW Police Force submission, 17 February 2009.
468 NSW Police Force submission, 17 February 2009.

The production of an offender's criminal history at the time of sentence is done to assist the court in determining an appropriate penalty. Indeed, it is one of the factors a Magistrate or Judge is required to consider under s.21A of the Crimes (Sentencing Procedure) Act 1999. In other words, it is a factor of influence. The Ombudsman's review states that payment of a CIN is not an admission of liability or guilt. 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/her character.[469]

However, as noted earlier at section 3.2 of this report, the Attorney General has advised that the use of a person's paid and unpaid CIN history in court proceedings is subject to the following safeguards:

- CINs may be provided to the court only on sentencing, as a matter relevant to an assessment of a person's character,
- CINs must not be included in a person's criminal record (as there has been no independent finding of guilt), and
- as CINs are not equivalent to a criminal conviction, they need not be declared as part of any check relating to criminal history.[470]

Provided that NSW Police Force policy and practice continues to apply these safeguards and makes this information readily available to CIN recipients, our view is that these measures are sufficient. However, any future changes to police policy or practices in this regard should be carefully monitored.

9.3. Data anomalies

As outlined in section 7.2, we obtained data from NSW Police Force about the number of CINS issued by Police as recorded on COPS and we obtained data from SDRO about CINS recorded on their penalty notice and enforcement databases. The data did not entirely match as it should.

In March 2009 we asked the agencies to reconcile the disparities in relation to CINS issued since the commencement of state-wide roll out to 1 November 2007.

9.3.1. Missing records on COPS

As of March 2009, there were 1,154 CIN records on the SDRO Penalty Notice database that had no matching record on COPS. Of these, 440 were issued since the commencement of the state wide roll out.

Of the 1,154 CINS, 480 were paid at Penalty Notice stage and 522 proceeded to enforcement. Of the 522, 183 have since been finalised (173 were paid, 8 withdrawn, and 2 written off). The remaining 339 CINS remained the subject of enforcement actions by SDRO.

The absence of a COPS record for the 1,154 matters poses significant risks for the administration of the CIN scheme insofar as the NSW Police Force may be less able to:

- comply with legislative obligations to destroy fingerprints
- collect accurate data about the use of CINS and monitor trends over time
- ensure the accuracy of CIN histories, and
- ensure that supervisors review the appropriateness of decisions to issue CINs by the checking COPS events.

9.3.2. Missing SDRO Records

The NSW Police Force identified 706 CINS recorded on COPS that had no matching record on the SDRO databases. These 706 'unmatched' CIN records on COPS included 210 that were issued in the 12 months following the statewide roll-out of CINs on 1 November 2007.

In March 2009, the NSW Police Force undertook an audit of the 210 unmatched COPS records and was able to provide the SDRO with a copy of the CIN papers for a further 19 matters.

The remaining 191 matters, and the 496 matters issued during the extended trial period, are currently unenforceable by the SDRO. It is not clear whether NSW Police Force has retained the relevant infringement books or may have already lawfully destroyed many of the oldest CIN records in accordance with disposal authorities under the State Records Act.

469 Submission, Law Society of NSW, 12 February 2009.
470 Letter from the Attorney General, the Hon John Hatzistergos MLC, to the Ombudsman, Mr Bruce Barbour, dated 28 August 2007.

9.3.3. Reconciling disparities between the police and SDRO records

As each agency has its own systems and processes for recording CINs, some differences between the NSW Police Force's records of CINs issued and the corresponding records on the SDRO's databases are to be expected.

However, we were concerned about the size of the disparities and, despite considerable effort on the part of both police and SDRO staff to address these issues, significant gaps remained.

The SDRO said one possible contributor to the disparity between the two databases may relate to the 'manual' nature of the current notification process.[471] That is, after issuing a CIN and recording the details on COPS, the officer must then ensure that all 'Part A' copies of the original notice are forwarded to the SDRO.

> *As NSW Police Force currently use manually issued penalty notices, these are data entered into the SDRO system from hard copies of the notices, 'Part A's as you identify in your report. Unfortunately a number of these never made their way to SDRO.*
>
> *SDRO provides regular reports to NSW Police, as it does to all agencies which issue penalty notices, to identify any potentially missing notices. This is an issue which is being further pursued with NSW Police Force due to the diverse nature of their operation.*[472]

However, a joint SDRO-police exercise to address this issue in March 2009 succeeded in identifying only 19 additional CINs that police had neglected to enter promptly, suggesting that notification delays were not a significant contributor to the disparities in record keeping.

The NSW Police Force already has reasonably strict recording and notification procedures in place, and has recently updated its Command Management Framework policy 'to include a specific instruction for supervisors to conduct random checks to ensure that CINs are accurately recorded'.[473] This should ensure that simple notification delays are kept to a minimum.

The NSW Police Force is currently undertaking further measures to reconcile CINs records on COPS with those recorded on the SDRO's databases:

> *The majority of discrepancies between COPS and the SDRO databases were identified and resolved in April of this year. There are approximately 888 outstanding COPS records where further action may be required. A resolution process has been identified and is progressing. It is considered that a number of SDRO records currently recorded as infringements and said to relate to CINs are not in fact CINs. In this context, it is not considered appropriate to withdraw any notices until this process is completed.*
>
> *The list of possible outstanding errors and the method of addressing these issues are set out below:*

CIN was not issued by NSWPF	*Office of Police Statistician to further review following recent manual back capture from Trial LACs.*
Date of offence does not match NSWPF date of offence	*No change to COPS. Data set to be provided to SDRO with recommendation that COPS date of offence be uploaded.*
Final status invalid	*Generate list and Commissioned Officer to review manually and then apply current SOPS to withdraw with or without action following independent review.*
Court name does not exist	*A Commissioned Officer will review these manually then update COPS with correct court and result.*
CIN has already been reported to NSWPF	*An entry already exists on the COPS system and further action is not required.*
Offence code does not match offence code on COPS	*Commissioned Officer to review manually. Following clarification, a bulk update of COPS will be conducted with correct offence code.*

471 For a brief explanation of these processes, see discussion at section 7.2.1.2.
472 SDRO response to draft report, 20 July 2009.
473 NSW Police Force response to draft report, 22 July 2009.

Created in COPS as an Infringement or Public Safety Infringement (COPS error)	1. *Generate list, Commissioned Officer to review manually.* 2. *Following review, convert infringements identified as a CIN into a CIN record in COPS.* 3. *Incorrect notices, eg. to juveniles, to be reviewed by Commissioned Officer on a case by case basis and action taken to withdraw with or without action and update COPS.* 4. *Complete list of all CIN/Infringements to Criminal Records Branch with current status update to enable a manual check if prints were taken. Bulk update CIN records on COPS with fingerprint result. Destroy prints taken for non-CIN infringements.* 5. *A technology solution to sort list to convert records where CIN-able offence and date of birth shows as 'over 18' is continuing to be pursued.*
Offence code missing from COPS (COPS error)	*Individual review of narratives and add offence codes. There are 31 records in this category and they will be reviewed and updated by Parramatta LAC.*[469]

This list of issues and associated actions shows that the NSW Police Force has a plan in place to cut the number of CINS records on COPS that have no corresponding SDRO record, amend or rectify individual records and, where appropriate, withdraw matters.

With respect to CINS recorded on the SDRO's database that have no matching COPS entry, the NSW Police Force said it had asked the SDRO to provide details of these matters.

> *… a further back-capture report has been requested from the SDRO for copies of any records where an SDRO payment 'shell' has been created but for which the COPS entry, Part A of the infringement notice or infringement book copies are missing. The SDRO is yet to provide the final list of 'Infringement' numbers for which no NSWPF record has been provided. It is observed that for an SDRO record to exist either:*
>
> 1. *A fine has been paid into the SDRO database 'shell', which exists for every ticket in every infringement book that is issued to police. In these cases, a COPS record is unlikely to be created if this is all the information there is; and/or*
> 2. *A Part A has been received from NSWPF. In these cases, a COPS record should have been created and, if this has not occurred, such a record will be created as part of the back capture process; and/or*
> 3. *A court election has been received. In these cases, a COPS entry should have been created and must be created to record and acquit the CAN details.*[475]

The SDRO has indicated its support for these initiatives and that it will take steps to address the data integrity issues relating to its own CIN-related records.

474 NSW Police Force response to draft report, 22 July 2009.
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Acknowledgements

This report was researched and written by Brendan Delahunty and Kate Smithers with the support and assistance of the following Ombudsman staff: Les Szaraz, Maria Akrivou, Joan Gennery, Michael Gleeson, Greg Andrews, Aimee Tan, Gabrielle McNamara, Terry Donnelly, Kylie Wilson Parsons, Laurel Russ, David Ryan, David Snell, Belinda Seeto, Shelagh Doyle and Kirsteen Banwell.

We would also like to thank the NSW Police Force, the State Debt Recovery Office, the Attorney General's Department, the NSW Bureau of Crime Statistics and Research and the Judicial Commission of NSW for providing information and assistance throughout this review. Particular thanks to all of the police local area commanders, crime managers, Aboriginal Community Liaison Officers and frontline officers who participated in focus groups and interviews, providing us with their views about issues relating to the use of Criminal Infringement Notices in their area.

Thank you also to the other agencies, services and individuals, including the many Aboriginal staff and community representatives, who provided information and insights through interviews, surveys and in response to requests for assistance. Of particular value was the advice provided by the networks of Aboriginal staff based at Local Courts, notably Aboriginal Client Service Specialists, Aboriginal Community Justice Group Coordinators and Circle Sentencing Coordinators, and others who have developed up-to-date knowledge of the fines system through the day-to-day assistance they provide to people who experience difficulties in dealing with their fines.

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