



NSW Ombudsman

## On the Spot Justice?

# The Trial of Criminal Infringement Notices by NSW Police.

A report to Parliament pursuant  
to section 344 of the *Criminal  
Procedure Act 1986*

April 2005



Review of the Crimes Legislation  
Amendment (Penalty Notice Offences)  
Act 2002

April 2005

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NSW Ombudsman

April 2005

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Dear Attorney General,

I am pleased to provide you with this report in accordance with the provisions of the *Criminal Procedure Act 1986*, as amended by the *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (the '*Penalty Notice Offences Act*').

Section 344 of the *Criminal Procedure Act* provides that "...the Ombudsman is to keep under scrutiny the operation of the provisions..." of Part 8 of the *Criminal Procedure Act*, the associated regulations and sections 353AC and 353AE of the *Crimes Act 1900*.

The provision also requires that, as soon as practicable following the completion of the twelve month trial of the relevant provisions, I furnish you, the Minister for Police and the Commissioner of Police, with a report in relation to the work and activities undertaken pursuant to the monitoring process.

Accordingly, this report contains an account of our monitoring activities in relation to the implementation and operation of the provisions established by means of the *Penalty Notice Offences Act*. You will note that, consistent with the monitoring and reporting provisions of the *Criminal Procedure Act*, a number of recommendations, some identifying potential legislative and procedural changes, are included in this report for your consideration.

I would also like to draw your attention to section 344 (5) of the *Criminal Procedure Act*, which requires you to lay a copy of this report before both Houses of Parliament as soon as practicable following your receipt of the report.

Yours sincerely

Bruce Barbour  
**Ombudsman**

April 2005

The Hon. Carl Scully MP  
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Yours sincerely

A handwritten signature in black ink, appearing to read "B. A. Barbour".

Bruce Barbour  
**Ombudsman**



NSW Ombudsman

April 2005

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Yours sincerely

Bruce Barbour  
**Ombudsman**

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# Foreword

In September 2002, the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002 commenced. The Act set up a 12-month trial which enabled police officers in 12 local area commands to issue Criminal Infringement Notices (CINs) for eight nominated criminal offences. These offences included common assault, shoplifting, offensive conduct, offensive language, and goods in custody. The fines for these CINs ranged between \$150 and \$400.

The primary reason for the CINs scheme was to reduce the red tape for police officers dealing with minor criminal offences. Instead of commencing a court process, such as charging a person, and then attending at court as a prosecution witness, a police officer could issue a CIN. The recipient of a CIN could then elect to challenge the CIN at court instead of paying the fine.

The Act required my office to review the implementation of the CINs scheme for the trial period. One purpose of our review was to evaluate the trial before any decision was made about extending the CINs scheme.

We have used a range of methods to evaluate the CINs scheme. For example, we have examined police data about people who have received CINs, and looked at the types of offences for which CINs were issued. We have estimated the savings to police and courts during the 12-month trial. We have also listened to police who have issued CINs and consulted with members of the community about their views of the CINs trial.

Our evaluation has recommended changes to improve the CINs scheme for police and CIN recipients. We have also made some observations and recommendations that we believe will be useful when consideration is given to extending the CINs scheme.

I trust this report will assist those determining the future use of CINs within New South Wales.



Bruce Barbour  
**Ombudsman**

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# Executive Summary

## Background to this report

Upon its commencement on 1 September 2002, the *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (the 'Penalty Notice Offences Act') amended the *Criminal Procedure Act 1986* to permit police officers to issue penalty notices, known as Criminal Infringement Notices ('CINs'), for prescribed offences in 12 local area commands for a 12 month trial period.

The Penalty Notice Offences Act required the Ombudsman to keep under scrutiny the operation of the CIN scheme for the duration of the trial and to prepare a report for the Attorney General, Minister for Police and Commissioner of Police. In preparing this report, we have undertaken various research activities including:

- a review of police records where CINs were issued, and interviews and focus groups with police officers who have issued CINs,
- an analysis of information provided by the Infringement Processing Bureau and the State Debt Recovery Office about the collection and enforcement of fines, and
- consideration of submissions received in response to our discussion paper.

## Crimes Legislation Amendment (Penalty Notice Offences) Act

The Penalty Notice Offences Act permits police to serve a CIN on a person if it appears to the officer that the person has committed a CIN offence. The notice is to the effect that if the person served does not wish to have the matter determined by a court, the person can pay a fine. When this is paid, no person is liable to any further criminal proceeding for the alleged offence.

The primary rationale of the Penalty Notice Offences Act was to provide police officers with a speedy alternative to arrest when dealing with relatively minor criminal matters. This would in turn reduce the administrative time taken, as alleged offenders would not be returned to police stations and charged, and police officers would usually not need to prepare for and appear at court. In addition to cutting red tape for police, it was thought the scheme would save the court system the costs of having to deal with these minor offences.

Similar to parking and traffic fines, CINs were permitted, during the trial, to be issued by police officers in 12 local area commands – Albury, Bankstown, Blacktown, Brisbane Water, City Central, Lake Illawarra, Lake Macquarie, Miranda, Parramatta, Penrith, The Rocks and Tuggerah Lakes – for the following prescribed penalty notice offences:

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

A CIN cannot be issued in certain circumstances, such as where the alleged offender is under 18 years old, or in relation to an industrial dispute or an apparently genuine demonstration or protest. Police procedures also provide that CINs should not be issued for matters such as domestic violence offences, or where the suspect is the subject of an outstanding first instance warrant.

Persons who are issued CINs can either pay the fine, or elect to have the matter heard before the local court. As with other infringement notices, CINs are processed and fines enforced through the Infringement Processing Bureau ('IPB') and State Debt Recovery Office ('SDRO').

CINs expand the range of options available to police when dealing with minor criminal matters. These options include issuing a warning or caution, a Field Court Attendance Notice or a summons to appear at court. In addition,

a police officer may arrest the suspect and take them into custody, where they may either be served with a Court Attendance Notice or charged with an offence.

## Use of CINs

### Offences, recipients and receipts

In the first 12 months of the CIN scheme, police officers issued 1,595 CINs – 3 CINs were also recorded as being issued prior to the commencement of the scheme. The number of CINs issued each month more than doubled from some 85 at the trial's commencement in September 2002 to 178 at its completion in August 2003.

The following table shows the offence type for which CINs were issued:

Type of offence – and examples	Number (%) issued during CIN trial, Sep 02 – Aug 03
Larceny or shoplifting, where the property or amount does not exceed \$300 – for matters including stealing a door chime, a bundle of newspapers, a carton of chocolate milk and a mobile telephone	829 (52%)
Offensive conduct – primarily for urinating in a public place	234 (15%)
Offensive language – primarily for the use of swear words	228 (14%)
Common assault – for assaults which included punches, kicks and slaps	221 (14%)
Goods in custody – for possession of stolen goods such as a school rail pass, 4 battery packs and a slab of soft drinks	68 (4%)
Unlawfully enter vehicle/boat	10 (> 1%)
Obtaining money etc by wilful false representation	5 (> 1%)
Obstruct traffic	3 (> 1%)

On most occasions – 1,070 of the 1,151 incidents where CINs were recorded as being issued – only 1 CIN was issued. Police were permitted to issue up to 4 CINs to any one person for a single incident.

Most CINs were issued to young people: about 45% of the CINs were issued to persons aged 18-24 years old, and almost two-thirds (60%) to persons aged 29 years old or less. Aboriginal and Torres Strait Islander (ATSI) persons, who make up about 2% of the population of NSW, were issued with 79 CINs or almost 5% of all CINs.

During the trial, only 41 CINs, or 2.6 per cent of the total number issued, were challenged before the courts. Fourteen CINs (0.9 per cent) were withdrawn after being issued.

At the end of the trial, the IPB reported having received payment for 684, or 43 per cent, of the total CINs issued. Of these 684, 65% were paid in less than four weeks of the notice having been issued – the time permitted for payment before follow-up and enforcement action can commence.

During the 12 month trial, the SDRO acknowledged receipt of 543 CINs for enforcement action, of which 70 (13 %) resulted in the payment of the fine in full and 34 (6%) in an agreement with the CIN recipient for delayed or time payment. The SDRO also identified 373 CIN matters that had progressed to sanctions and a further 84 matters that were not yet overdue.

For the first nine months of the trial the IPB reported receiving \$130,950 from the payment of fines for CIN prescribed offences. The SDRO reported having received a further \$17,350 for CINs processed from 1 September 2002 to 31 October 2003. The 34 CINs with approved 'time to pay' arrangements accounted for an additional combined worth of \$10,550.

## Estimated savings from the CINs scheme

The review closely considered the extent to which the Penalty Notice Offences Act achieved one of its primary objectives, administrative savings for the police and the courts. These savings mostly accrue after an offence has been investigated by police, as inquiries up to this point are necessary to determine whether a CIN should be issued, and gathering sufficient evidence to prosecute the matter should the offender elect to take the matter to court.

We estimate that, during the trial, initial savings of \$31,810 accrued to NSW Police as a direct result of the reduced amount of time to issue a CIN compared to the time involved in charging an alleged offender.

Further savings of \$183,138 were calculated from reduced time by police officers in preparing for and attending court. We also estimate savings in excess of \$430,000 for the local courts, representing criminal matters not otherwise heard.

Total estimated savings for NSW Police and the local courts is approximately \$647,015 for the 12 months of the CIN scheme's trial. In effect, this means police resources can be directed to other activities (such as front-line policing) and courts to more timely disposition of matters.

## Offences

Our review considered two concerns identified at the advent of the CINs trial:

- 'net widening' – when a CIN is issued in circumstances where the offence would not be considered criminal if the behaviour in question was determined by the courts, or police would otherwise have determined to warn or caution a suspected offender. Our audit of police records and examination of charging data led us to focus on the offence of offensive language as a possible area of net widening.
- diminution of the seriousness of the criminal acts – whether the issue of a CIN for an alleged act was a reasonable sanction. In this respect we focused on the offence of common assault.

### Offensive language

Section 4A (1) of the Summary Offences Act prohibits the use of offensive language in or near, or within hearing from, a public place or a school. An examination of the relevant court decisions for offensive language charges suggest that judges are prepared to consider the content of language alleged to be offensive against contemporary community standards and the incorporation of certain swear words into everyday conversations.

Our audit considered 20% of the police records where offensive language CINs were issued. We found that, when compared to the courts' criteria, the language recorded in almost two of every three police records may not have been considered offensive. Typical of the features of these matters was the use of common swear words by persons at least moderately affected by alcohol, at or near licensed premises, late at night. These are very much the circumstances where courts have been reticent to convict a person of this offence.

We have recommended better guidance to front line police as to what is offensive language, and more thorough reviews by supervisors of offensive language CINs, to reduce the likelihood of a CIN being inappropriately issued or enforced. We have also recommended police closely monitor data about the issuing of CINs to Aboriginal and Torres Strait Islander (ATSI) persons for offensive language and conduct offences.

### Common assault

Section 61 of the Crimes Act establishes the offence of common assault as any assault not occasioning actual bodily harm.

We audited 20% of police records where CINs had been issued for common assault. While some matters were relatively minor, others involved apparently random, unprovoked and surprise attacks with a substantial element of violence, or assaults on police officers.

- Two matters involved a number of punches to the head by persons apparently unknown to the victim.
- One matter concerned an alleged 'king hit' of a victim from behind by a party gatecrasher.
- One matter involved an offender, who was behind the woman victim, grabbing her around the neck and dragging her to the ground.
- Another involved the kicking, punching and bashing of two victims, one who was deaf, on a railway concourse.

- One matter involved a person slapping a police officer in the face with an infringement notice he had just issued to her.

Our view is that these assault matters, dealt with by way of a CIN, may have required a more significant sanction than a fine. As a result of our review, we have recommended that the inclusion of common assault offences in the CIN scheme be reconsidered.

### **Expanding CINs prescribed offences**

We outline various submissions and views we have received about which prescribed offences should remain within the CINs scheme, and whether there should be additional CINs offences. Although this is ultimately a matter for the government and Parliament to consider, we have identified principles from these submissions and our own research, which may provide a framework when considering what type of offences should be included in the CIN scheme:

- the offence is relatively minor
  - there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN
  - other diversionary options are not available to police to effectively and appropriately deal with the conduct in question
  - a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence
  - specific and general deterrence can be adequately conveyed by police rather than by a court
  - the physical elements of the offence are relatively clear cut
- the issuing of a CIN for the offence would generally be considered a reasonable sanction by the community, having due regard to the seriousness of the offence.

## **Police procedures**

Our review closely considered practical policing issues arising from the implementation of the Penalty Notice Offences Act.

### **Fingerprinting to verify identity**

The Penalty Notice Offences Act provides police with a discretionary power to require a suspect to submit to having finger and/or palm prints taken in order to confirm their identity. Any prints obtained are required to be destroyed upon payment of the CIN fine. Practical issues which arose during the trial included:

- uncertainty about whether fingerprints could be taken before the issuing of a CIN. We have recommended that the Penalty Notice Offences Act be clarified to permit a request for fingerprints to be made at any time during the serving of a CIN.
- a low rate of destroying fingerprints where CINS were paid - of the 506 prints collected from 1 September 2002 to July 2003, only 12 per cent or 63 were destroyed as at July 2003, with more than 400 outstanding. We support the current requirement that any prints collected by police should be destroyed upon payment of the CIN. We also support, on the grounds of fairness and equity, an extension to destroying fingerprints to include instances where a court dismisses a CIN offence, or arrives at a 'not guilty' verdict.

### **Service by mail**

The Penalty Notice Offences Act requires that a CIN must be served on the offender personally. Our review of CINs events found multiple instances where police had issued CINs by mail. In many of these, police officers did not issue the CIN 'on the spot' as the offender was moderately to heavily affected by alcohol. There may be other reasons for delaying the service of a CIN, including the need to make further inquiries. In these circumstances, it is more efficient for police, and more appropriate for the CIN recipient, that the CIN be served by mail. We have therefore recommended that service of a CIN by post be permitted where the issuing officer considers this reasonable.

## CIN records

It was an express intention of the CIN scheme that payment of a CIN would not result in a criminal record. We are aware, however, of CIN records being appended to criminal records and presented to courts in criminal proceedings. Our own view, consistent with recommendations of various law reform commissions, is that this should not occur. We have therefore recommended that safeguards be put in place to prevent CINs matters from being presented as part of a person's criminal history.

However, it is clearly essential for police to have access to a person's CIN history to assist in determining whether a CIN should be issued for any subsequent matter. This includes whether the person has previously had a CIN issued to them, and if so the circumstances of the CIN and whether it was paid. We have recommended this information be made available to police officers.

A further issue is providing information to CIN recipients about matters such as:

- the different consequences arising from a decision to either pay a CIN fine or exercise the court-elect option,
- the consequences of continued non-payment of a CINs, including possible disqualification of a driver's licence or the garnishing of wages, and
- whether CINs are included in pre-employment criminal records checks.

We have recommended that CINs include information explaining these matters.

## Administration and Enforcement

All infringement notice schemes – including CINs – present particular challenges not only for the issuing agency (NSW Police) but also for the fine administration and collection agencies. During our review, the following matters were highlighted:

### Withdrawal of CINs

Sometimes it is appropriate for a CIN to be withdrawn, for example, where an offender is a juvenile and therefore by law cannot be issued a CIN. The IPB will consider representations about some infringement notices – such as traffic fines – and may withdraw the notice prior to any enforcement action. However, no such practice was permitted during the CINs trial.

Separate to this, a review of fines referred to the SDRO for enforcement has recently been formalised in the Fines Act. Arrangements include provision for annulment of fines and consideration of matters by a Hardship Board. However, these arrangements only come into effect after there has been a failure to pay the fine for a prolonged period. In addition, every application for review incurs a fee.

Our view is that representations should be permitted at the earliest possible opportunity. We have made recommendations to permit representations to police and the IPB prior to referral of a CIN to the SDRO. We have also recommended 'stopping the clock' to allow these representations to be considered by senior police officers before the CIN recipient must make an election or any enforcement action begins.

### Payment of CINs

Two significant issues arose out of the review touching on the payment of the CIN fine:

- First, a fixed penalty scheme brings with it the inability to tailor a fine having regard to the recipient's capacity to pay. This is a significant difference to a court ordered fine, where the judge must consider what an offender can afford when determining the fine. Our review has been for a limited time only, and for CINs issued in limited areas. We have therefore recommended ongoing monitoring of the CIN scheme to determine whether fines are not being paid, or subsequent enforcement action is being taken, primarily as a result of a CIN recipient's relative economic disadvantage. If this is the case, we recommend existing options and possible alternatives be closely examined.
- Second, arrangements permitting CINs payments by instalments, or deferral of payments, can only be made after a fine has been referred to the SDRO for enforcement. Consistent with our view that representations should be permitted and considered at the earliest possible opportunity, we have recommended that applications for payment arrangements be allowed much earlier, and without the need for additional fees.



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## State-wide extension

A particular purpose in trialling the use of CINs in a limited number of locations was to determine if the scheme operated as anticipated, and whether there were any operational issues to be remedied before extending the scheme on a state-wide basis.

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 ATSI 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.

Given the small compass of the trial, our view is that the use of CINs should be kept under close scrutiny. To facilitate this we have recommended measures such as:

- records of the number of CINs issued by police be maintained as a separate category from other infringement notices, and
- the Bureau of Crime Statistics and Research report the number of CINs separately from other infringement notices issued by police.

## Conclusion

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.

The trial has identified a number of legislative and procedural issues for consideration by Parliament and relevant agencies. We recommend that these be acted upon prior to any further rollout of the CINs scheme.

Should the CIN scheme be implemented state-wide, we have also identified key issues that should be kept under scrutiny into the future.

# Summary of Recommendations

A consolidated list of the recommendations deriving from the report follows. Recommendations are also located throughout the body of the report together with a discussion of the relevant issues.

	Recommendation
1	Consideration be given to developing a set of criteria or guidelines, consistent with those outlined in Recommendation 23, on the appropriate circumstances for the withdrawal of a Criminal Infringement Notice, and that these be incorporated into the Standing Operating Procedures.
2	The requirement in section 353AC (3) of the <i>Crimes Act 1900</i> , as amended, that any prints taken in conjunction with the issue of a Criminal Infringement Notice be destroyed upon the payment of the penalty fine, should remain unaltered.
3	That Parliament consider extending the requirement, in section 353AC (3) of the <i>Crimes Act 1900</i> , as amended, that any prints taken in conjunction with the issue of a Criminal Infringement Notice be destroyed upon the payment of the penalty fine, to include instances where a court, in the absence of a finding of guilt, dismisses the Criminal Infringement Notice charge or arrives at a finding of not guilty for the charge.
4	That Parliament consider amending section 353AC (1) of the <i>Crimes Act 1900</i> , as amended, to clarify that a request may be made for the taking of finger and/or palm prints at any time during the serving of a Criminal Infringement Notice.
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.
6	That the events recorded on COPS relating to offensive language and conduct offences be reviewed by supervising officers to determine whether the Criminal Infringement Notices issued are the appropriate action to take in relation to the incident.
7	That senior police officers withdraw those Criminal Infringement Notices that are considered to be an inappropriate response to a particular incident.
8	If the Criminal Infringement Notice scheme is extended statewide, that data relating to the issuing of Criminal Infringement Notices to Aboriginal persons for offensive language and offensive conduct be specifically recorded, monitored and evaluated through the systems proposed for monitoring public order offences in the NSW Police <i>Aboriginal Strategic Direction 2003-2006</i> .
9	That section 334 (2) of the <i>Criminal Procedure Act</i> be amended so as to allow the service of a Criminal Infringement Notice by post, should the issuing officer consider it reasonable to do so in preference to serving it personally.
10	If the Criminal Infringement Notice scheme is extended statewide, that records of the number of Criminal Infringement Notices issued by police be maintained separately from the number of other infringement notices issued by police.

	<b>Recommendation</b>
11	That in reporting the methods of proceeding against alleged offenders by NSW Police, the Bureau of Crime Statistics and Research report the number of Criminal Infringement Notices separately from other infringement notices issued by police.
12	If the Criminal Infringement Notice scheme is extended statewide, that clear guidance be provided to frontline officers on the suitability of using Criminal Infringement Notices in high visibility operations.
13	That the appropriateness of the inclusion of 'common assault' offences in the Criminal Infringement Notice scheme be reconsidered.
14	That the following principles form the basis of determining whether a particular criminal offence is suitable to be dealt with by way of a Criminal Infringement Notice: <ul style="list-style-type: none"> <li>• the offence is relatively minor</li> <li>• there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN</li> <li>• a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence</li> <li>• specific and general deterrence can be adequately conveyed by police rather than by a court</li> <li>• the physical elements of the offence are relatively clear cut</li> <li>• the issuing of a Criminal Infringement Notice for the offence would generally be considered by the community to be a reasonable sanction, having due regard to the seriousness of the offence.</li> </ul>
15	That education and training material for the implementation of an extended Criminal Infringement Notice scheme illustrate, by way of case studies, the appropriate and inappropriate use of Criminal Infringement Notices to deal with prescribed offences.
16	That consultation on the extension of the Criminal Infringement Notice scheme take place with affected government agencies, in particular the Infringement Processing Bureau and the State Debt Recovery Office, with a view to developing appropriate systems and processes for administering the Criminal Infringement Notice scheme.
17	That education and consultation on the extension of the Criminal Infringement Notice scheme occur at the local level, particularly in rural and remote communities, and communities with a significant Aboriginal population to address concerns about the use of Criminal Infringement Notices, and consequences arising from the failure to pay.
18	That the use of Criminal Infringement Notices be kept under regular review by Local Area Commands as well as generally across NSW Police to ensure the continuing fair, proper and effective use of the scheme.
19	That Parliament establishes safeguards, by means of legislation, against the presentation to the courts of Criminal Infringement Notice histories where those matters have been satisfied by the payment of the prescribed penalty

	<b>Recommendation</b>
20	That records of Criminal Infringement Notices issued, and whether they have been paid or not, be maintained and police have access to those records to determine whether or not it is appropriate to issue a Criminal Infringement Notice to an offender
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.
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.
23	<p>That consideration be given to further developing the Infringement Processing Bureau's internal capacity to review Criminal Infringement Notices prior to court election or referral to the State Debt Recovery Office and that such a review facility incorporate the following elements:</p> <ul style="list-style-type: none"> <li>• provision for a person to make a representation about a Criminal Infringement Notice within 21 days of its issue, either to NSW Police or the Infringement Processing Bureau</li> <li>• a requirement that the representation be considered, including appropriate consideration by a senior police officer</li> <li>• 'stopping the clock' whilst this process occurs, so that at the end of the considerations the person retains the capacity to either pay the fine or elect to proceed to court</li> <li>• clear guidelines which specify the relevant matters to be considered in reviewing a Criminal Infringement Notice.</li> </ul>
24	That the Criminal Infringement Notice scheme be monitored to determine whether fines are not being paid, or subsequent enforcement action is being taken, as a result of an offender's relative economic disadvantage.
25	That, if there is evidence that the failure to pay the fine imposed by a Criminal Infringement Notice is resulting in adverse consequences for Criminal Infringement Notice recipients, consideration be given to the effectiveness of current options and any alternative, including fine option orders, to assess those consequences.
26	That the <i>Criminal Procedure Act</i> be amended to permit the Infringement Processing Bureau to receive and consider - or alternatively, to refer to the State Debt Recovery Office for consideration, without the person being fined incurring additional administrative costs - applications for the payment of a Criminal Infringement Notice by instalments or deferral to such time as agreed with the agency.
27	That the Infringement Processing Bureau and the State Debt Recovery Office introduce a standard form setting out the various arrangements that will be given consideration by the agency, that invites the applicant to select one of the arrangements to form the basis of an application for payment to be made by instalments and/or deferred.

# Glossary and Abbreviations

ABS	Australian Bureau of Statistics
Aboriginal Strategic Direction	NSW Police <i>Aboriginal Strategic Direction 2003-2006</i>
'the Act'	<i>Criminal Procedure Act 1986</i> , as amended by the <i>Crimes Legislation Amendment (Penalty Notice Offences) Act 2002</i> .
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
ATSI (status)	Aboriginal or Torres Strait Islander (status)
ATSIS	Aboriginal and Torres Strait Islander Services
BOCSAR	NSW Bureau of Crime Statistics and Research
CAN	Court Attendance Notice
C@tsi	Customer assistance tracking system (NSW Police)
CCS	Cannabis Cautioning Scheme
CIN(s)	Criminal Infringement Notice(s)
CIN scheme trial	The trial of Criminal Infringement Notices by NSW Police, established by Part 3A of the Criminal Procedure Regulation 2000.
COPS	Computerised Operational Policing System. A centralised database maintained and operated by NSW Police, used to record incidents and events involving police.
CRIME	Custody, Rights, Investigation, Management, Evidence (NSW Police Code of Practice for arrest, detention and investigation).
CRS	Criminal Records Section (NSW Police)
CSO	Community Service Order
EDO(s)	Education and Development Officer(s) (NSW Police)
ERISP	Electronic Recorded Interview [of a] Suspected Person
FCAN	Field Court Attendance Notice
FSG	Forensic Services Group (NSW Police)
GBB	Good behaviour bond
IMPS	Infringement Management Processing System, employed by IPB.
IPB	Infringement Processing Bureau. An agency administered by the NSW Treasury and responsible for the initial administration of infringement notices issued by NSW Police, other government departments and local government. See also SDRO.
LAC(s)	Local Area Command(s) (NSW Police)
LGA(s)	Local Government Area(s)

LMI(s)	Local Management Issue(s) (NSW Police)
MLC	Member of the Legislative Council
MP	Member of Parliament
NC/NF	Non-custodial or non-financial (penalty or sentence)
NP/NC/NF	No penalty or non-custodial or non-financial (penalty or sentence)
NSWLRC	New South Wales Law Reform Commission
OSR	Office of State Revenue (NSW Treasury)
PACT(s)	Police Accountability Community Team(s) (NSW Police), a forum for community representatives to express views about police visibility, police deployment and crime generally.
Part 10A	Part 10A of the <i>Crimes Act 1900</i> , governing the arrest and detention of suspects.
Penalty Notice Offences Act	<i>Crimes Legislation Amendment (Penalty Notice Offences) Act 2002</i>
PERIN	Penalty Enforcement by Registration of Infringement Notice system (Victoria)
PIN	Parking Infringement Notice
PNC	Police National Computer (UK)
PND(s)	Penalty Notice(s) for Disorder (UK)
POI	Person of Interest, generally used by police to describe the suspect/defendant/offender.
Police Association	Police Association of New South Wales, a trade union open to all sworn members of NSW Police, including Student Police Officers, Probationary Constables, Sergeants, Senior Sergeants and Commissioned Officers.
RCIADIC	Royal Commission Into Aboriginal Deaths in Custody
'the Regulation'	Criminal Procedure Regulation 2000
SDRO	State Debt Recovery Office. An agency administered by NSW Treasury and responsible for enforcing unpaid fines and infringement notices referred to it by the Infringement Processing Bureau.
SOPs	Standing Operating Procedures
SPER	State Penalties Enforcement Registry (Queensland)
TIN	Traffic Infringement Notice
VCT	Victims Compensation Tribunal
VCB	Victims of Crime Bureau

#### Notes

Figures reported have been rounded up to the nearest whole number or to one decimal point. Percentages may not add up to 100 due to rounding.

In the course of the report, we occasionally use "offender" to describe a person who has been issued with a CIN.

This is done to provide variety in the description of such persons, and is done on the assumption that the person issued with the CIN behaved or conducted himself or herself in the manner required to establish the offence.



# Chapter 1. Introduction

Police officers in NSW have, for a considerable period of time, had access to a range of options when dealing with a person suspected of having committed a criminal offence. Before the trial of on the spot penalty notices these included, in ascending order of severity and intrusiveness:

- issuing a warning or caution
- issuing a Field Court Attendance Notice (FCAN) or a summons to appear at court
- taking the suspect into custody and arrest where they may be served with a Court Attendance Notice (CAN) or charged.<sup>1</sup>

Upon its commencement on 1 September 2002, the *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (the 'Penalty Notice Offences Act') amended the *Criminal Procedure Act 1986* ('the Act') to enable police officers to issue Criminal Infringement Notices (CINs<sup>2</sup>) for prescribed offences in selected trial locations for a twelve month period. Section 334 (1) of the Act states:

*The regulations may limit the application of the provisions of this Part to offences dealt with in a specified part or parts of New South Wales for a specified period or periods.*

Amendments to the Criminal Procedure Regulation 2000 ('the Regulation') by the Act established the trial locations, the duration of the trial, the offences for which CINs could be issued, and the penalties for those prescribed offences. This report refers to these arrangements, established by Part 3A of the Regulation, as the 'CIN scheme trial'.

Amendments to the *Crimes Act 1900* made by the *Penalty Notice Offences Act* enables police to undertake identification and fingerprinting procedures to verify the identity of the person being issued with a CIN.

Minor administrative amendments were made to the *Crimes (Forensic Procedures) Act 2000* and the *Fines Act 1996*.

The Act provides for the Ombudsman to scrutinise the operation of the amended provisions of Part 8 of the Act, the associated regulations and sections 353AC and 353AE of the *Crimes Act* for the twelve month period of the CIN scheme trial, and thereafter, to report to the responsible Minister,<sup>3</sup> the Minister for Police and the Commissioner of Police.

Our review is the subject of this report, which is divided into the following chapters:

- 1) Introduction
- 2) Background
- 3) Methodology
- 4) Infringement notice schemes: A legislative and literature survey
- 5) The *Crimes Legislation Amendment (Penalty Notice Offences) Act*
- 6) Implementation of the Act by NSW Police
- 7) The Criminal Infringement Notices scheme trial
- 8) Results of the CIN scheme trial
- 9) Offences for which CINs were issued - Case studies
- 10) Fingerprinting to verify identity
- 11) Responses to the trial
- 12) Implications for the community, offenders and crime
- 13) Implications for NSW Police and the Courts
- 14) The future of the CIN scheme
- 15) Conclusion



This report:

- summarises the amending provisions
- reviews similar legislation in other jurisdictions
- discusses the major issues identified during the review period
- considers submissions received in response to an invitation for public comment on the operation of the CINs trial
- presents a statistical summary relating to the use of the powers during the trial period
- presents and analyses the feedback received from focus groups conducted in relation to the trial
- addresses issues arising from the use of the powers during the trial period
- canvasses whether the CIN scheme should be extended statewide on a permanent basis, and suggests legislative and administrative changes should the powers be extended.

Where appropriate, recommendations are provided following the relevant discussion of each chapter. A summary of recommendations is also provided at the beginning of the report.

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## Endnotes

- <sup>1</sup> Since July 2003 all matters that are to be prosecuted before the local courts are commenced by way of one of four forms of Court Attendance Notice. While not relevant for this discussion, the form of each of the notices are described in Chapter 13 under “Discretion to Intervene”.
- <sup>2</sup> The first authoritative source of the term ‘Criminal Infringement Notice’ occurs in the NSW Police SOPs which state, “NSW Police has named these penalty notices Criminal Infringement notice (CINs)”. NSW Police, Education Services, Crimes Legislation Amendment (Penalty Notice Offences Act 2002: *Policy and Standing Operating Procedures*, Sydney, 2002, p.7.
- <sup>3</sup> The Minister responsible for administering the *Criminal Procedure Act* is the Attorney General. (See *Allocation of the Administration of Acts 2004* (Number 42)).

# Chapter 2. Background

This chapter outlines the background to the introduction and implementation of the *Penalty Notice Offences Act*.

## Structure of NSW Police

For the purpose of managing policing in New South Wales, NSW Police divides the state into five operational policing geographical regions. These five policing regions are subdivided into a total of 80 Local Area Commands ('LACs'), essentially, centres of service that contain specialist commands and promote community policing.<sup>4</sup> LACs are the primary management units of NSW Police.

The powers conferred by the *Penalty Notice Offences Act* were trialled in twelve LACs. Those LACs and the Local Government Areas (LGAs) on which those LACS are based are as follows:

Local Area Command	Local Government Area(s)
Albury	Albury, Corowa, Greater Hume, Tumbarumba
Bankstown	Bankstown
Blacktown	Blacktown
Brisbane Water	Hawkesbury, Wyong
City Central	City of Sydney
Lake Illawarra	Shellharbour, Kiama
Lake Macquarie	Lake Macquarie
Miranda	Sutherland
Parramatta	Parramatta
Penrith	Penrith
The Rocks	City of Sydney
Tuggerah Lakes	Wyong, Lake Macquarie

### Specialist commands

NSW Police specialist commands and committees with a role in the implementation of the *Penalty Notice Offences Act* included:

**Court and Legal Services:** A branch of Corporate Services, Court and Legal Services provides a range of specialist and operational legal functions and services for NSW Police in such areas as legislative and policy review, complex investigations, court matters and internal affairs.

**Education Services:** A branch of Corporate Services, Education Services provides education, training and professional development programs and material for NSW Police officers.

**Forensic Services Group:** A branch of Support Services, the Forensic Services Group ('FSG') is responsible for the location, collection and recording of physical evidence at crime scenes, related locations, or on suspects, witnesses and victims. FSG is also responsible for the correct processing of physical evidence to minimise the risk of contamination, misinterpretation or loss of evidence.

**Project Management Unit:** A branch of Executive Support, the Project Management Unit assists NSW Police with the delivery and dissemination of project outcomes by providing training in project management and a project management consultancy, whilst managing a range of major and minor corporate projects.

**NSW Treasury:** The administration of infringement fines collection within NSW is the responsibility of the following two agencies within the NSW Treasury:

**Infringement Processing Bureau:** Originally administered by NSW Police, the Infringement Processing Bureau ('IPB') was transferred to the NSW Office of State Revenue ('OSR') on 1 October 2003. It performs an integral role in the processing of infringements for offences in NSW pursuant to some 160 items of legislation and regulation and is the government agency responsible for collection of fines. Outstanding fines are then referred to the State Debt Recovery Office for recovery under the *Fines Act*.

**State Debt Recovery Office:** Originally administered by the Attorney General's Department, the State Debt Recovery Office ('SDRO') was transferred to OSR in April 2002. The SDRO administers the NSW fine enforcement system and is responsible for the receipt and collection of outstanding fines and penalties. The SDRO provides fine enforcement services to state and local government agencies.

## Role of the Ombudsman

The Ombudsman is an independent review body responsible to the NSW Parliament for the receipt and handling of complaints about public authorities in NSW. The Ombudsman receives a significant number of complaints and telephone enquiries regarding NSW Police each year.

The *Penalty Notice Offences Act* provided for the Ombudsman to scrutinise the operation of the amended provisions of the Act and its associated regulations, and the amended sections of the *Crimes Act* for a twelve-month trial period, and thereafter, to report to the Attorney General, the Minister for Police and the Commissioner of Police.<sup>5</sup>

In his second reading speech of the bill, The Hon. Michael Costa MLC, (then) Minister for Police, specifically identified the following three issues for inclusion in the review:

- the possibility that notices would be used in circumstances where a caution or warning without further action would have been more appropriate
- any net-widening effect of the legislation
- that any operational issues be identified.<sup>6</sup>

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## Endnotes

<sup>4</sup> NSW Police website - [www.police.nsw.gov.au/lac/localpolice-a.cfm](http://www.police.nsw.gov.au/lac/localpolice-a.cfm)

<sup>5</sup> s44, *Criminal Procedure Act*.

<sup>6</sup> NSWPD, 18 June 2002, p. 3203.

# Chapter 3. Methodology

The design of the CIN scheme trial, incorporating as it did multiple LACs (some covering large geographical areas) with numerous police able to issue a CIN for a set of prescribed offences which traditionally have accounted for a significant portion of the matters finalised in the Local Court, resulted in a research approach that emphasised the collection of quantitative, comparative and qualitative data.

Much of the quantitative information contained in this report derives from records supplied by the:

- NSW Police (using its Computerised Operational Policing System ('COPS') database)
- IPB
- SDRO.

Sources of qualitative information included interviews with police officers both individually and in small groups. The views of the community and of individuals having had direct experience with the Act were sought through the publication of a Discussion Paper,<sup>7</sup> which, in addition to a direct mail-out to identified stakeholders, was advertised in the print media.<sup>8</sup> The Discussion Paper and associated newspaper advertisements invited submissions “... on any aspect of the Act from individuals and organisations, including (where possible) details of any experiences with the operation of the Act”.<sup>9</sup> An electronic version of the Discussion Paper was also available on the Ombudsman website.<sup>10</sup>

We also reviewed reports and research on infringement notice systems, including those in comparable jurisdictions.

An additional source of information was to be complaints and inquiries received by NSW Police and the Ombudsman from members of the public and police officers in relation to the implementation of the CIN scheme. In the course of the trial, however, only one such complaint was received and this is discussed later in this report.

## NSW Police

Information from NSW Police's (COPS) database was central to the monitoring of the use of the Act. The COPS database provides a structure for police to record event details such as date, location, offence, local area command, offender details and other factors. COPS also contains a 'narrative' field which allows officers to describe an event in their own words and to record important features of the incident which may not fit under other category headings.

NSW Police Standing Operating Procedures ('SOPs') instruct that, upon returning to the station, an officer who has issued a CIN is to create an event on COPS and include:

- suspect's details
- details of the offence
- CIN number
- suspect status under the Legal Process Field
- indication whether the suspect is of Aboriginal or Torres Strait Islander origin.<sup>11</sup>

Extracts from narratives recorded on COPS are quoted in this report. These extracts, as with all quotes, have been transcribed literally and have not been corrected for spelling, grammatical or other such errors. In considering the entries as recorded it should be appreciated that COPS narratives are made from notebook entries and the recording officer's recollection, are often entered in relatively unfavourable circumstances such as at the end of a shift following hours on patrol, and often contain idiosyncratic spelling and usages.

Arrangements were made with NSW Police to advise the Ombudsman of all COPS events that documented a use of the Act. Event numbers for a total of 1,598 COPS events, where the use of the Act was recorded during our review period, were provided in accordance with these arrangements.<sup>12</sup> Three of these were issued prior to the trial period, but, unless otherwise stated, we have not excluded them from our analysis. This data is sourced as 'NSW Police COPS data'.

During the course of the CIN scheme trial, NSW Police also provided us with extensive documentation of the planning for and implementation and administration of the trial, including SOPs, education and training materials and legal advice. As we describe later in the report, we were also afforded an opportunity to observe planning meetings convened before and during the trial period. While there were occasional delays in obtaining some data, we did receive all of the information that we sought from NSW Police.

## IPB and SDRO

Similarly, the IPB and SDRO also agreed to provide the Ombudsman with details of CINs matters referred to each of those agencies for enforcement action. At the expiration of the trial period the IPB and SDRO reported receiving payment in full on a total of 684 and 104 CINs matters, respectively.<sup>13</sup> We have sourced this data as coming from the 'Infringement Processing Bureau' and 'State Debt Recovery Office'.

## Other data sources

The NSW Bureau of Crime Statistics and Research ('BOCSAR') provided us with data relating to matters heard before the local courts in the trial locations, and we have made use of data publicly reported by the BOCSAR relating to crime trends, alternatives to arrest, public order policing and modelling to simulate the outcomes for different processes used by the criminal justice systems. The Director, Local Courts, provided us with data relating to administrative issues for local courts.

## Consultation with police officers

To obtain the views of those officers with direct experience of the operation and administration of the legislation, we invited several LACs to participate in focus group discussions. Two metropolitan and two country localities were randomly selected from the twelve trial LACs.

The Police Association of New South Wales provided a liaison function between our review and the selected LACs to facilitate the discussions and also introduced our review officer to the police participants. This process was adopted so as to offer a knowledgeable contact – the Police Association participated on the CINs Steering Committee - between the participants and our review and thereby maximise participant numbers. We placed no restrictions as to which police officers participated in the discussions other than requiring that they have direct experience in issuing CINs during the trial.

The discussions followed a semi-structured questionnaire format comprising 30 questions designed to address each of the issues of interest raised in the Discussion Paper.<sup>14</sup> The format provided for participants to determine, within reason, the emphasis they wished to place on the discussion of individual questions. Discussion sessions ran between 1.25 to 1.5 hours.

A total of 36 police officers participated in the four focus groups. To encourage candid and comprehensive responses from participants, each group was informed that the content of the discussions would be reported in a manner that afforded individual and command anonymity.

With the consent of the group participants and for the purpose of verifying the longhand transcript, each of the discussions was (audio) tape-recorded.<sup>15</sup>

## Submissions

In September 2003, we released a Discussion Paper, *Put on the Spot – Criminal Infringement Notices Trial*, in which we described the new police powers, the conditions of the trial and identified some of the issues that might be considered by NSW Police, other affected agencies and the community during the course of the trial.<sup>16</sup>

The Discussion Paper was aimed at a wide range of stakeholders and interested persons, in particular those members of the community with direct experience of the legislation in action, such as the victims of crime and offenders, as well as government and non-government agencies involved in the criminal justice system.

We invited comments on any aspect of the new powers and their application and were particularly keen to receive first hand experiences, impressions and views – whether positive or negative – of the legislation in operation, so as to inform and add to our observations and final recommendations.

Eighteen submissions were received by the review. The respondents, listed in Appendix B, included Aboriginal services, concerned individuals, law enforcement and legal advocacy agencies, and practitioners within the judicial and justice administration systems.

## Complaints to the Ombudsman and NSW Police

NSW Police and the Ombudsman receive a range of complaints and inquiries from members of the public and police officers in relation to police conduct.

As part of our review, we proposed to examine those CINs-related complaints received by the Ombudsman and NSW Police and those complaints, related to CINs, which were lodged with the LACs and only indirectly brought to the Ombudsman's attention.

The latter complaints, referred to as Local Management Issues ('LMIs'), are those complaints that have been received, and following assessment, investigated by an LAC. A police 'complaint management team' within the command generally manages the response to these LMIs. In these matters, the Ombudsman provides an oversight role, and where necessary, identification of inherent procedural deficiencies, into the handling of the complaint by police.

In the course of our review, NSW Police received only one complaint involving the use of a CIN.

## Limitations to the methodology

In conducting our legislative reviews, we always try to capture as much relevant information from as many sources as possible, but we are also aware of the limitations that may arise with respect to any particular source or methodology. In our 1999 review of the *Crimes Legislation (Police and Public Safety) Act 1998*, we described some of those limitations in extensive detail.<sup>17</sup> To the extent that the same or similar methodologies were used during this review, similar caveats apply.

As with all our other reviews of police powers and practices, we relied heavily on numbers and events sourced from the COPS database maintained by NSW Police. It should be appreciated that COPS is first and foremost an incident and case management tool for the day to day work of police: it is not designed to be a research tool. The quality of information obtained from COPS is only as good as the information entered. As an information management system for an organisation employing nearly 15,000 sworn officers and more than 3,000 support staff in over 90 local and specialist commands across NSW, each containing one or more stations, there is a myriad of ways for information to be recorded and captured on COPS. For instance, rail, traffic and parking infringement notices were sometimes recorded as CINs, and undoubtedly there were CINs recorded under those other notice types. After the trial concluded, we were provided with event numbers for 185 CINs that had not been properly recorded as the use of CINs. While it is likely that the type of recording errors that do occur on COPS cancel each other out to the extent that a useful, reasonably accurate picture might be obtained, it should not be mistaken for a complete picture.

It is possible to obtain some demographic data from COPS, particularly age distribution and Aboriginal and Torres Strait Islander ('ATSI') status. The details for a person that are recorded on COPS will, in most cases, be obtained from the person's driver license or similarly authoritative identification, and consequently the age distribution data that we report is reliable, particularly because CINs could only be issued to persons over the age of 18 years (being persons who, more likely than not, would be carrying sufficient identification). To complete a COPS entry police are required to record the ATSI status of the person, and such recording usually occurs. There is, however, a risk that because CINs are issued in the field police may not ask the person receiving the CIN whether they are of Aboriginal or a Torres Strait Islander descent - a question usually asked when the custody manager is processing a detainee after arrest.

Occasionally police will record whether a person is from a non-English speaking background, but this is not consistently (or even frequently) carried out and, accordingly, no reliable data concerning the ethnic or cultural background of a CIN recipient can be obtained.

As the IPB and SDRO require accurate records to properly enforce unpaid infringement notices and fines, confidence in the completeness and accuracy of the data provided by those agencies is reasonably justified. Similar confidence can be had with respect to the data supplied to the review by local courts. Other data, sourced from such agencies as BOCSAR, can again be relied on with considerable confidence, although again, and for BOCSAR in particular, they are sometimes as dependent as we are on the quality of the data provided to it by such agencies as NSW Police.

As CINs are intended to be an option for relatively minor offences in tightly defined circumstances, community awareness and experience was likely to be very limited and accordingly, we do not have much in the way of feedback from the community on any aspects of the trial. Similarly, complaints were not used in any significant way in the course of our review.

In many of our other legislative reviews in the policing area we have conducted observational research to see how police exercise their powers and functions in an operational setting. This is often a good opportunity to observe and assess police practice against the relevant legislative and procedural requirements. It may have been useful to observe the circumstances in which police used CINs, and the procedures they observed in issuing the CIN. However as the use of CINs was merely one option for police to apply in respect of minor offences that they might encounter in their day to day policing, there was no practical or cost effective way of arranging observational research in such a way that would have ensured we observed police officers issuing CINs. Accordingly, observational research is not a feature of this review.

With the sources and methodologies that we did use, however, we believe that a comprehensive and detailed assessment of the use of CINs during the trial period, and the issues arising, are reported in the ensuing chapters of this report.

## Consultation on final report

To ensure fairness to agencies, and that all of the information in the report was accurate, a consultation draft was supplied to each of the Attorney General's Department (from where it was forwarded to the Chief Magistrate of the Local Court), the Commissioner of Police, Ministry for Police and the Office of State Revenue.

The majority of the feedback received was directed toward the draft recommendations and has been incorporated into the report. Comments received from the consultation process, whether in support of a recommendation or otherwise, have been included. Where the feedback was directed toward the data or the main body of the report's text the relevant section has either been edited to reflect the information received and/or footnoted.

In its response to the consultation draft of the report, NSW Police also supplied the following comment which, due to its relevance to the CIN scheme generally and the future of the scheme specifically, is reproduced verbatim:

*"Throughout the CINs trial NSW Police has identified issues relating to operation of the legislation that have also been addressed in the NSW Ombudsman's draft report. These issues have been considered in the planning undertaken in relation to potential state-wide implementation. The business case prepared to seek funding for such includes costs for a number of technology solutions. These solutions will assist significantly in accommodating some of the suggestions and recommendations raised in the draft report".*

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## Endnotes

- <sup>7</sup> NSW Ombudsman, Put on the Spot – Criminal Infringement Notice Trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper, Sydney, 2003.
- <sup>8</sup> ‘Have your say ....’ Advertisement were published in the 27 September 2003 editions of the *Daily Telegraph* and the *Sydney Morning Herald*.
- <sup>9</sup> *Ibid.*
- <sup>10</sup> [www.ombo.nsw.gov.au/legislative/index.html](http://www.ombo.nsw.gov.au/legislative/index.html)
- <sup>11</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 16.
- <sup>12</sup> CINs-related data was collated and supplied through the Project Management Unit, NSW Police. Events may have recorded the issuing of multiple CINs, either by a person receiving more than one CIN or more than one person being issued with one or more CINs arising from the same incident.
- <sup>13</sup> The SDRO reports receiving payment in full on 70 matters with another 30 (34 to end of October 2003) matters granted ‘Time to Pay’ approval.
- <sup>14</sup> The questions and a summary of the responses are attached at Appendix A.
- <sup>15</sup> One tape later proved to be inaudible.
- <sup>16</sup> NSW Ombudsman, Put on the Spot – Criminal Infringement Notices Trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper, Sydney, 2003.
- <sup>17</sup> NSW Ombudsman, *Policy Public Safety: Report under Section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act*, Sydney, 1999, see Chapter 3





# Chapter 4. Infringement notice schemes: A legislative and literature survey

Historically infringement or penalty notices have been used for a myriad of relatively minor offences of a regulatory nature such as parking offences; minor traffic offences; fare-evasion; littering; breaches of requirements for heavy vehicle drivers, cyclists and dog owners; and breaches of business registration and reporting requirements.

More recently there have been moves in Australia and the United Kingdom to expand the use of infringement notices for offences usually characterised as criminal in nature. For example, in South Australia and Western Australia police are able to exercise their discretion not to prosecute persons found in possession of small amounts of cannabis by instead issuing an expiation or infringement notice.<sup>18</sup> Similarly, in the United Kingdom summary or public order offences such as being drunk and disorderly and threatening behaviour may be dealt with by way of a Penalty Notice for Disorder.<sup>19</sup>

The arguments for the transition of infringement notice schemes from offences of a regulatory nature into areas traditionally viewed as being the province of the criminal justice system have largely focused on the potential administrative and economic savings for police and the criminal justice system, with the attraction for offenders being a quick and relatively simple process whereby the payment of a fixed penalty expiates the offence with (usually) no record of a conviction notwithstanding the implied admission of culpability.

Critics of the use of infringement notices for criminal offences variously argue that the practice of issuing tickets for offences that previously required the laying of a charge and a court hearing trivialises or diminishes the seriousness of the offence in question, and removes impartial judicial scrutiny of the decision by police to prosecute an offence.

Indeed, a recent comprehensive study of the infringement notice scheme operating in Victoria found that a majority of individuals, whilst complaining about the levels of infringement notices, accepted the *convenience* and *expediency* of paying a monetary penalty in preference to appearing in a Magistrates' Court. However, the authors of the study noted that the convenience factor is vulnerable to a cynical critique of the infringement scheme, namely, that the underlying purpose of the infringement notice scheme has more to do with revenue raising than prevention of offences.<sup>20</sup>

Another oft-heard criticism of infringement notice schemes aimed at criminal offences is that they may have a 'net-widening' effect. That is to say, police may be less inclined to use their discretion to issue a caution or warning, instead preferring to issue an infringement notice for what might otherwise be considered to be a minor offence.

## Law reform initiatives

In 1989 the Australian Law Reform Commission ('ALRC') looked at the possibility of converting minor criminal offences into 'administrative illegalities' called 'contraventions'. It suggested this would have the effect of avoiding the *"trauma, stigma and adverse consequences of a prosecution for a criminal offence"*. However, the ALRC noted the difficulty in establishing a basis for distinguishing between crimes and contraventions and opined that infringement schemes may reduce the authority of the criminal law and weaken the safeguards it provided accused persons. The ALRC recommended that particular offences could become infringement notice offences on an *ad hoc* basis without formally defining the distinction between a crime and a contravention.<sup>21</sup>

In 1995 Professor Richard Fox completed the first major Australian study of infringement notices in which he acknowledged that infringement notice systems are now a permanent feature of our system of criminal justice.<sup>22</sup> This being the case he argued that model legislation should be developed due to uncertainty about offence classification and procedures. Professor Fox proposed that model legislation should include the following features:

- it should apply only to offences triable summarily
- the infringement must be completely expiated by payment of a legislatively fixed sum of money, but the issue of the notice may also lead to the suspension or withdrawal of a right or licence to undertake an activity to which the alleged offence relates

- the maximum amount of any single infringement penalty should not exceed \$500 (or the equivalent in penalty units), or one-quarter of the maximum statutory penalty that applies if the offence is dealt with summarily by a court
- any right or licence withdrawn because of the infringement should be suspended rather than cancelled and, ordinarily, for a period of no longer than six months. Longer suspension, or outright cancellation, should be imposed only upon a court order
- the scheme should be administered by the police or officers of the public authority ordinarily responsible for enforcing the particular legislation creating the offence
- the official empowered to enforce the legislation and to issue infringement notices must also retain and exercise a discretion to issue a warning or a caution in less serious cases, or a summons to court in more serious ones, instead of automatically issuing an infringement notice. Guidelines for exercising that prosecutorial discretion should be drawn up and disseminated to those making the enforcement decisions
- each infringement notice should be in plain English with foreign language warnings of its significance
- the infringement notice must make it clear that the alleged offender has the right to elect to go to court to contest the accusation, but that the matter may be disposed of in a court by way of 'hand-up-brief' procedure whereby both the informant and the defendant are compelled to state their case in writing before the hearing
- a person against whom an infringement notice has been issued should not be treated as having been convicted of the alleged offence, except upon a court order. Expiation of payment should not lead to a conviction. Even if the matter is defended in court, and the grounds on which the notice was issued are established beyond a reasonable doubt, the court should still have the right not to record a conviction. An alleged offender should not be penalised, other than in costs, for exercising their right to have the court determine the matter
- the infringement notice should give the alleged offender a formal opportunity in writing to advise the agency which issued the notice of any factual matters which the person considers ought to be taken into account in relation to the alleged offence. These matters should be taken into account in exercising the discretion to withdraw the notice absolutely, or with a warning.

In 1996 the New South Wales Law Reform Commission ('NSWLRC') invited comment on the desirability of expanding the use of infringement notices and suitable modes of regulation.<sup>23</sup> Submissions indicated support for the expansion of infringement notices to summary offences, or for all offences where imprisonment is not an available option, as well as offences where the usual penalty for a first offence is a fine, for example, offensive behaviour or possession of a prohibited drug.<sup>24</sup>

The NSWLRC recommended the introduction of uniform legislation to regulate the power to issue, and procedures to enforce, infringement notices.<sup>25</sup> In doing so they cautioned about certain dangers that they felt were inherent in the use of infringement notices, namely:

- 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.<sup>26</sup>

With these potential dangers in mind a majority of commissioners of the NSWLRC nevertheless recommended the expansion of the infringement notice system in recognition of potential benefits to individuals wishing to avoid the stigma and trauma of court proceedings, as well as the economic and administrative advantages of diverting minor offenders from the court system.<sup>27</sup> The recommendation was not unanimous and two commissioners opined that any expansion carried too great a risk of abuse by authorities and may result in oppression of particular groups in society such as young and Aboriginal people.<sup>28</sup>

In recommending the expansion of the use of infringement notices the commissioners noted the need for proper safeguards to minimise the risks of abuse of the system. These included:

- 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.<sup>29</sup>

## Australian research on infringement notices

As noted earlier, much of the literature on infringement notices in Australia generally derives from the work of Professor Richard Fox, and in particular, his 1995 Criminology Research Council study on the Victorian scheme, which was the first significant review of the importance of infringement notices as a means of policing and punishing minor offences and diverting people who had committed relatively minor offences away from the formal criminal justice system.<sup>30</sup> Further commentary on these issues is contained in the work of Mirko Bagaric of Deakin University, who has called for infringement notices to be issued for a greater range of offences, and argues that greater consistency and fairness would come from fixing penalties for offences.<sup>31</sup>

In December 2003, the Victorian Department of Justice released a new study drawn from more recent research by Professor Fox.<sup>32</sup> This research endeavoured to gain insights into the Victorian community's understanding of, and attitude towards the infringement notice system.

In general the study found a high level of awareness and knowledge of offences that attracted an infringement notice but there was little understanding of the reasons for its existence or utility. The study noted a poor understanding of the options open to alleged offenders upon receiving an infringement notice and two-thirds did not appear to know that they could elect for a court hearing.

The study revealed a high level of compliance with the requirement of timely payment. In excess of 80 per cent of fines were paid within 28 days, or within the additional 28 days that follow a courtesy reminder letter. A further 10 per cent of fines were discharged after the first Penalty Enforcement via Registered Infringement Notice (PERIN) Court Notice. There was a general sense that non-payment of fines was due to the fact that offenders could not afford to pay rather than their not being inclined to pay. A sense of unfairness arising from the circumstances of the offence, the procedures for enforcing the fine and the level of penalty, were also considered to contribute to non-payment.

The study describes the infringement notice scheme as 'bargain basement justice' and notes the fundamental paradox that it represents for the administration of criminal justice. That is, the process is largely streamlined and is deliberately designed to take little or no account of individual circumstances. For example, monetary penalties are fixed and are not tailored to individual means. Further, the moral culpability of the alleged offender is generally not considered and the opportunity for individual discretion, such as informal or formal warnings, or tailored sentences is reduced when compared to conventional criminal processing.

Notwithstanding some perceived shortcomings of the infringement notice system, the study concluded that the system is basically sound and needs to build on existing strengths and attend to the weaknesses such as the lack of a "gatekeeper" and dealing with unpaid fines.

## Infringement notices in New South Wales

In New South Wales, the most widely recognised (and issued) infringement notices are for parking and traffic offences. However, pursuant to the *Fines Act*, penalty notices can also be issued for offences prescribed by over 70 separate items of legislation.<sup>33</sup>

Penalty notices are defined by section 20 of the *Fines Act* as:

*a notice ... to the effect that the person to whom it is directed has committed a specified offence and that, if the person does not wish to have the matter dealt with by a court, the person may pay the specified amount for the offence to a specified person within a specified time.*

Section 19 of the *Fines Act* provides a summary of the existing penalty notice procedures:

- a) Breach of statutory provision  
A person is alleged to have committed an offence under a statutory provision for which a penalty notice may be issued.
- b) Issue of penalty notice  
A penalty notice is issued under the relevant statutory provision. The notice requires payment of a specified monetary penalty, unless the person alleged to have committed the offence elects to have the matter dealt with by a court.
- c) Penalty reminder notice  
If the penalty is not paid, a penalty reminder notice is issued. The person who is alleged to have committed the offence may elect to have the matter dealt with by a court
- d) Enforcement order  
If payment of the specified monetary penalty is not made and the person does not elect to have the matter dealt with by a court, a penalty notice enforcement order may be made against the person. If the person does not pay the amount (including enforcement costs) within 28 days, enforcement action authorised by this Act may be taken in the same way as action may be taken for the enforcement of a fine imposed on a person after a court hearing for the offence.
- e) Withdrawal of enforcement order  
A penalty notice enforcement order may be withdrawn if an error has been made.
- f) Annulment of enforcement order  
A penalty notice enforcement order may, on application, be annulled by the State Debt Recovery Office or, if the Office refuses the application, by a Local Court. If the order is annulled, the alleged offence is to be heard and determined by the Local Court.

## Infringement notice schemes in other jurisdictions

Several examples of criminal infringement notice schemes are to be found in other states, including the PERIN system in Victoria, the State Penalties Enforcement Registry (SPER) in Queensland and an expiation scheme in South Australia for 'simple cannabis offences' and other offences. In the United Kingdom a pilot scheme, similar to the NSW trial, took place in 2002-03. This pilot allowed police to issue a 'Penalty Notice for Disorder' in relation to a number of specified public order offences.

### Victoria<sup>34</sup>

Victoria has had an integrated penalty enforcement system since 1987 when the PERIN Court was established. This system was primarily designed to enforce penalty notices issued for local government, traffic and parking infringements. The number of offences that can be dealt with by way of infringement notice in Victoria has increased from 11 in 1965 to over 1,000 in 2002. Unlike the SDRO in NSW, which operates as an administrative means of enforcing unpaid penalties, the PERIN system involves the registration of unpaid fines with the Magistrates' Court with subsequent enforcement of those fines carried out as if they were orders actually made by a magistrate.

Using similar comparisons utilised in that research, in 2001-02 for every offence for which a charge was brought to trial in the Supreme Court or County Court of Victoria (4,521 criminal cases lodged), twenty five were heard before the Magistrates' Court (114,311 criminal cases lodged) and a further seven hundred and sixty four (3,454,946 infringements) were handled by way of an 'on-the-spot ticket'.<sup>35</sup>

With a ratio of 'on-the-spot tickets' issued to the number of conventional summary charges laid in a Magistrates' Court exceeding 30:1, issuing infringements clearly out stripped all other means of dealing with offending.

Victorian data demonstrates a change over time in the proportions of matters dealt with by infringement notice. In 1990-91, local government rather than the police were the principal issuers of infringement notices, with local government authorities accounting for over 56 per cent of the 2.3 million infringement notices issued that year compared to police with 41.4 per cent. In 2001-02, 3.4 million infringement notices were issued (a 48 per cent increase on 1990-91), with 58 per cent issued by police.

Figures for subsequent enforcement action for non-payment of penalty notices in 2001-02 showed a weighting to notices issued by police. Police accounted for 53.9 per cent of the 664,509 infringements registered with PERIN

for enforcement in 2001-02, while local government accounted for 41.2 per cent. Parking offences (issued by local government) accounted for 40.6 per cent of the notices registered for enforcement in 2001-02, while the police-issued notices for speeding and traffic offences accounted for 33 per cent and infringements on Victoria's CityLink tollway accounted for 21 per cent.<sup>36</sup>

## Queensland

In Queensland debts are referred to the (SPER) when they become overdue. While debts from other public sector agencies can be registered, the majority of enforcement items are notices arising from camera detected offences, manually issued traffic infringement notices, and court orders.

A variety of enforcement options are available to SPER, however non-payment may lead to the issue of enforcement orders resulting in enforcement warrants (where property may be seized), fine collection notices (for payroll deductions and deductions from bank accounts), licence suspensions, or even arrest and imprisonment warrants.

## South Australia

South Australia was the first Australian jurisdiction to establish an infringement notice scheme as an alternative to arrest and charge, with the *Police Act Amendment Act* in 1938 allowing for the expiation of offences against local government regulations and by-laws. Since 1987, South Australia has had an expiation scheme for offenders found in possession of small amounts of cannabis for personal use. In 1996, a broad statutory scheme was established under the *Expiation of Offences Act* 1996, while additional expiation provisions are contained in another 15 statutory instruments.<sup>37</sup>

With regard to the *Expiation of Offences Act*, the distinction has been made on several occasions in Second Reading Speeches dealing with the legislation that the prescribed amount to expiate the offence is not a fine but instead "a fee charged to avoid Court".<sup>38</sup>

*Expiation notices are not the same as fines. An expiation notice is not a notice that the recipient must pay the sum on the notice. It is not a criminal sanction. It is not an on the spot fine for it is not a fine at all. It is a notice that an official is going to make an allegation that the recipient has committed a criminal offence and that, in the interests of expediting justice, if the recipient wants to plead guilty to that allegation, he or she can do so by the payment of a very rough minor version of the fine that would otherwise have been applied.*<sup>39</sup>

The *Expiation of Offences Act* provides for the expiation amount to be paid in instalments or by means of deferred payment upon an application made on the grounds of hardship.<sup>40</sup>

## Commonwealth

At the Commonwealth level, constitutional prohibitions do not allow non-judicial officers to consider, decide on or impose penalties. Accordingly, non-judicial officers:

*simply put into effect a process of issuing penalty notices that is triggered automatically by a particular set of facts... The penalty is predetermined by law; all the regulator does is to document the breach and the penalty.*<sup>41</sup>

As a consequence of the constitutional barriers, there is no meaningful way for administrators to enforce penalty notices upon non-payment:

*... federal schemes do not have a 'fallback' penalty that will be imposed if the person fails to pay the amount specified in the infringement notice (such as licence suspension or cancellation commonly used in State and Territory schemes).*<sup>42</sup>

The ALRC, in its 2002 report on civil and administrative penalties, recommended a uniform, model scheme across federal regulatory law introducing criminal infringement notices as a diversionary procedure for minor offences of strict or absolute liability.<sup>43</sup>

The ALRC recommended against retaining records of such penalty notices once payment of a fine had been made, on the basis that retention of such records would encourage offenders to opt for the court-elect option in the hope of erasing the incident from their police/criminal record. It considered that such a tendency would adversely undermine the main aim of such notices, namely, to improve the efficiency of the criminal justice system.

In addition, the ALRC expressed concern that the use of penalty notices might impact adversely on non-English speakers, particularly if it were intended to accept a CIN history in court as part of a suspect's antecedents. In relation to this issue, the ALRC recommended that notices should include warnings and/or information in foreign languages.

## United Kingdom

The *Criminal Justice and Police Act 2001* (UK) introduced a fixed penalty notice system for a range of offences. The offences for which a Penalty Notice for Disorder ('PND')<sup>44</sup> may be issued include:

- being drunk in a highway, other public place or licensed premises
- throwing fireworks in a thoroughfare
- knowingly giving a false alarm to a fire brigade
- trespassing on a railway
- throwing stones, etc., at trains or other things on railways
- buying or attempting to buy alcohol for consumption in a bar in licensed premises by a person under 18
- disorderly behaviour while drunk in a public place
- wasting police time or giving false report
- using public telecommunications system for sending message known to be false in order to cause annoyance
- consumption of alcohol in designated public place.

What is readily apparent from this listing is that PNDs are generally limited to public order offences or anti-social behaviour rather than the more obviously criminal matters prescribed under the NSW scheme where CINs may be issued for non public order offences (assault, larceny and retail theft, custody of goods, etc) where there is typically a victim.

### Interim findings of the United Kingdom Penalty Notice for Disorder pilot<sup>45</sup>

Early results covering the first eight months of the PND pilot revealed that 3,040 PNDs<sup>46</sup> were issued across the four pilot force areas, namely, Essex, Metropolitan Police (Croydon Division), North Wales and West Midlands.

PNDs were predominately issued for two offences, namely, 'causing harassment, alarm or distress' (49 per cent) and 'disorderly behaviour while drunk' (41 per cent). Interestingly, these two offences require the PND to be issued at a police station rather than 'on-the-spot' and thus savings of police time, which was one of the main aims of the pilot, were minimal. That said there has inevitably been savings on police time in that court attendance was avoided in all but 2 per cent of cases where a PND was issued.

Apart from the offences of 'wasting police time' (5 per cent) and 'drunk in highway' (3 per cent), the interim findings demonstrate relatively few PNDs were issued for the seven remaining offences in which a PND was available. Namely, 'trespassing on a railway', 'throwing fireworks', 'sending false messages', 'drinking in a designated public place', 'throwing stones on a railway', 'buying alcohol for person aged under 18' and 'knowingly giving false alarm to fire brigade'. It is suggested that these low rates reflect the type of offence and the typical offender. For example, juveniles, who were not part of the pilot as it was limited to persons 18 years and over, might be more likely than adults to throw fireworks or throw rocks at trains.<sup>47</sup>

Figures available for the first six months of the pilot reveal that payment of PNDs within the statutory time period of 21 days stands at 53 per cent which, whilst at first glance may seem low, is comparable to payment of fixed penalty notices for motoring offences in the United Kingdom. Forty-three per cent of PNDs issued had been fine registered due to non-payment and thus it is estimated, based on other research into payment of registered fines, that the total payment and recovery rate will be 79 per cent.<sup>48</sup> It is worth noting that measures aimed at improving fine enforcement in the United Kingdom came into force in January 2004<sup>49</sup> whereby recipients who do not pay their PNDs will be fast-tracked into the enforcement process with the objective of increasing compliance with fixed penalties.

Preliminary analysis of data from two pilot areas reveals a reduction in the number of cautions and prosecutions for 'drunk and disorderly' and 'causing harassment, alarm or distress' which suggests that many of these cautions and prosecutions have been diverted to PNDs. However, the larger number of PNDs (when compared to previous levels

of cautions and prosecutions) appears to indicate a net widening effect so that there were persons receiving a penalty notice, who may not even have been previously dealt with by either a caution or prosecution.<sup>50</sup>

A survey of 100 police officers from the four pilot force areas was carried out for the purposes of the Home Office review. Eighty two per cent of respondents were either 'very' or 'fairly' satisfied with the PND scheme and most issues arising from the questionnaire related to ways in which the scheme could be improved or extended. The respondents reported that there was a general acceptance of the PND scheme by recipients. It was generally felt that the scheme should be extended to juveniles and other offences. One-third of respondents reported that they could have issued PNDs to persons aged under 18 years if permitted to do so.

Many officers were concerned about the issue of repeated PNDs to the same recipient and suggested the tracking of PNDs on the Police National Computer ('PNC') or a database of recipients. Most respondents who commented on this issue supported the gathering and recording of DNA, fingerprint or photographic evidence.

The Home Office declared the pilot PND scheme to be a success in allowing frontline officers to deal speedily and effectively with public disorder offences. The Policing Bureaucracy Task Force examined the scheme and found that on average it took 30 minutes to complete a PND compared to 180 minutes for an evidentiary case file thus demonstrating time savings for officers notwithstanding the fact that more than 90 per cent of PNDs were issued at police stations rather than 'on-the-spot'. As a result, the Home Office has extended the scheme to all forces in England and Wales.<sup>51</sup>

Most of the issues raised by police officer respondents have been addressed by amendments to the PND scheme. The taking of DNA, fingerprints or photographs in the course of the issue of a PND is now to be tagged to a PNC record.<sup>52</sup> This ensures that in most circumstances (currently 90 per cent of PND offences) tracking of PNDs issued and collection of identification evidence is achieved. Interestingly this means that the offender is arrested for the purpose of issuing the PND, appearing to be at odds with one of the stated objectives for the PND scheme, namely, the provision of an additional and quick alternative to arrest.

The *Anti-Social Behaviour Act 2003* (UK) amended the *Criminal Justice and Police Act* to extend the application of the PND scheme to 16 and 17 year olds. Offences that are being considered for future inclusion in the PND scheme include littering, obstructing a police officer, common assault, minor theft and criminal damage at the low end of the scale.



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## Endnotes

- <sup>18</sup> Cannabis Expiation Notice (CEN) pursuant to s5A of the Controlled Substances Act 1984 (SA); Cannabis Infringement Notice (CIN) pursuant to the Cannabis Control Act 2003 (WA). Provision has also been made in the Australian Capital Territory for the introduction of the cannabis related Offence Notices pursuant to s71A of the Drugs of Dependence Act 1989 (ACT).
- <sup>19</sup> Sections 1-11 of the Criminal Justice and Police Act 2001 (UK).
- <sup>20</sup> R. Fox, *On-the-Spot Fines and Civic Compliance: Final Report*, Faculty of Law, Monash University and Department of Justice, Victoria, 2003. Executive Summary at paragraph 52.5.
- <sup>21</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Canberra, 1992, at chapter 9.
- <sup>22</sup> R. Fox *Criminal justice on the spot: infringement penalties in Victoria*, Australian Institute of Criminology, Canberra, 1995; and R. Fox, *Infringement Notices: Time for Reform? Trends and Issues No.50*, Australian Institute of Criminology, Canberra, 1995.
- <sup>23</sup> NSW Law Reform Commission, *Sentencing*, Discussion Paper No. 33, Sydney, 1996 at [10.23].
- <sup>24</sup> NSW Law Reform Commission, *Sentencing, Report No. 79*, Sydney, 1996, at [3.46]. After a recommendation from the NSW Drug Summit in 1999, NSW now has a "Cannabis Cautioning Scheme". Under the scheme, adults found using or in possession of not more than 15g of dried cannabis and/or equipment for using the cannabis may receive a formal police caution rather than face criminal charges and court proceedings. A person can only be cautioned twice and cannot be cautioned at all if they have prior convictions for drug offences or offences of violence or sexual assault. Source: [www.druginfo.nsw.gov.au](http://www.druginfo.nsw.gov.au)
- <sup>25</sup> *Ibid.*, at [3.48].
- <sup>26</sup> *Ibid.*, at [3.49].
- <sup>27</sup> *Ibid.*, at [3.50].
- <sup>28</sup> *Ibid.*, at [3.50].
- <sup>29</sup> *Ibid.*, at [3.51].
- <sup>30</sup> R. Fox, *Criminal justice on the spot: infringement penalties in Victoria*, Australian Institute of Criminology, Canberra, 1995.
- <sup>31</sup> See M. Bagaric, *Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot*, *Monash University Law Review*, 1998, 24 (2), pp. 231-271 & *The Splendour of Fixed Penalties - Consistency and Fairness in Sentencing*, *The California Criminal Law Review*, 2000, pp. 1-25.
- <sup>32</sup> R. Fox, *On-the-Spot Fines and Civic Compliance: Final Report*, Faculty of Law, Monash University and Department, Victoria, 2003.
- <sup>33</sup> B. Schurr, *Criminal Procedure (NSW)*, Lawbook Company Service, at [28.500]. A listing of those offences from Schedule 1 of the Fines Act, for which penalty notices may be issued, can be found at Appendix C of this report.
- <sup>34</sup> Unless otherwise indicated, information on Victoria in this section is derived from the work of Richard Fox described above.
- <sup>35</sup> In his 1995 study, Fox reported that he had calculated these ratios for the first time from data for 1991, where the ratios were 1:45:337 (Supreme or County Court: Magistrates Court: Local Court). See R. Fox, *Criminal justice on the spot: infringement penalties in Victoria*, Australian Institute of Criminology, Canberra, 1995. Our calculations for 2001-02 are based on figures reported in Steering Committee for the Review of Government Service Provision, *Report on Government Services 2004*, Productivity Commission, Canberra, 2004 and R. Fox, *On-the-Spot Fines and Civic Compliance: Final Report*, Faculty of Law, Monash University and Department of Justice, Victoria, 2003.
- <sup>36</sup> R. Fox, *On-the-Spot Fines and Civic Compliance: Final Report*, Faculty of Law, Monash University and Department of Justice, Victoria, 2003.
- <sup>37</sup> See the Bench book for magistrates in South Australia at: [http://www.courts.sa.gov.au/lawyers/magistrates\\_benchbook/chapter01\\_acts\\_and\\_penalties/expiation\\_of\\_offences\\_act.htm](http://www.courts.sa.gov.au/lawyers/magistrates_benchbook/chapter01_acts_and_penalties/expiation_of_offences_act.htm)
- <sup>38</sup> Second Reading Speech on the Expiation of Offences Bill (SA) by The Hon. S. Barker MP, Hansard, House of Assembly, South Australia, 19 March 1996, at p. 1112.
- <sup>39</sup> Second Reading Speech on the Statutes Amendment (Fine Enforcement) Bill by The Hon. M. Armitage MP, Hansard, House of Assembly, South Australia, 19 August 1998, at p. 1805.
- <sup>40</sup> s 9, Expiation of Offences Act (SA).
- <sup>41</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No. 95, Canberra, 2002, p. 431.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, p. 462

<sup>44</sup> These offences are prescribed by s 1 of the *Criminal Justice and Police Act 2001* (UK).

<sup>45</sup> K. Spicer & P. Kilsby, *Penalty notices for disorder: early results from the pilot*. Home Office – Research, Development and Statistics Directorate, Findings No. 232, London, 2004.

<sup>46</sup> The total figure for the pilot was put at more than 6,000 in 'Paperwork gets the boot' (Home Office Police Briefing, January 2004) <http://www.policereform.gov.uk/docs/policebriefingjan3.html>

<sup>47</sup> Spicer & Kilsby, *Penalty notices for disorder: early results from the pilot*, Home Office – Research, Development and Statistics Directorate, Findings No. 232, London, 2004.

<sup>48</sup> *Ibid.*, at pp. 1 and 3. It is estimated that the payment rate for a national rollout may be around 75 per cent (at p. 4)

<sup>49</sup> *Courts Act 2003* (UK).

<sup>50</sup> Spicer & Kilsby, *Penalty notices for disorder: early results from the pilot*, Home Office – Research, Development and Statistics Directorate, Findings No. 232, London, 2004.

<sup>51</sup> 'Fixed Penalty Home Office Scheme to begin nationwide by 2004 – Home Secretary' (Home Office Press Release, Ref: 134/2003, 14 May 2003). <[http://www.homeoffice.gov.uk/n\\_story.asp?item\\_id=476](http://www.homeoffice.gov.uk/n_story.asp?item_id=476)>

<sup>52</sup> *Criminal Justice Act 2003* (UK).



# Chapter 5. The Crimes Legislation Amendment (Penalty Notice Offences) Act

The Crimes Legislation Amendment (Penalty Notice Offences) Bill was first introduced and read to the Legislative Council on 18 June 2002. On 26 June 2002, the Bill received a second reading and, following the Committee stage where an amendment to correct a drafting error was passed, was read a third time prior to being sent to the Legislative Assembly. The Bill was received into, and read a first time by, the Legislative Assembly on 26 June 2002. In the Legislative Assembly it was read a second and third time, after which it was passed on 27 June 2002. The Bill received assent on 4 July 2002.

The *Penalty Notice Offences Act* amended the:

- *Crimes Act*, in part, to enable police officers to take finger and/or palm prints in relation to the service of a penalty notice offence
- *Criminal Procedure Act*, enabling police officers to issue penalty notices for prescribed offences under any Act or regulation and to prescribe offences
- Criminal Procedure Regulation 2000, to prescribe the offences for which police officers may issue penalty notices and the penalties that may be imposed under the notices.

The *Penalty Notice Offences Act* also made consequential amendments to the:

- Crimes (Forensic Procedures) Act
- Fines Act.

Clause 11C of the Criminal Procedure Regulation 2000 provided for the termination of the trial on 31 August 2003, following the conclusion of the twelve month trial period. By amendment to clause 11C, Criminal Procedure Regulation 2000, the CIN scheme trial was extended on 29 August 2003 for a further 12 months.<sup>53</sup> The trial specifications remained the same and it continued to operate only in the twelve original trial LACs and with the same prescribed offences as originally determined.

On 7 July 2003 amendments to the Act made by Schedule 1 [2] of the *Penalty Notice Offences Act* came into force. These amendments had the effect of renumbering the penalty notice provisions in the Act. In this report we will use the current numbering. The following table sets out the current section numbering with the original numbering in the Act:

<b>Current section numbers in the <i>Criminal Procedure Act</i></b>	<b>Original section numbers in the <i>Criminal Procedure Act</i> (until 7 July 2003)</b>
s 332 Definitions	s 160
s 333 Police may issue penalty notices for certain offences	s 161
s 334 Penalty notices	s 162
s 335 Penalty notices may not be issued to children	s 163
s 336 Penalty notice offences	s 164
s 337 Penalties	s 165
s 338 Effect of payment of penalty	s 166
s 339 Limitation on exercise of penalty notice powers	s 167
s 340 Withdrawal of penalty notice	s 168
s 341 Powers relating to identity	s 169
s 342 Effect of Part on other procedures and powers	s 170
s 343 Limited implementation of penalty notice provisions	s 171
s 344 Monitoring of Part by Ombudsman	s 172

With the amendments to the affected legislation in place, the *Penalty Notice Offences Act* was repealed in its entirety<sup>54</sup> by the *Statute Law (Miscellaneous Provisions) Act (No. 2) 2003* No. 82 on 27 November 2003.

## Rationale for penalty notice offences

The second reading speech introducing the Penalty Notice Offences Bill provided the rationale behind the use of penalty notices, and their potential value, in citing the following excerpt from the NSW Law Reform Commission report on Sentencing:

*... the infringement notice system should be expanded, in recognition of the benefits to individuals who wish to avoid the trauma of court proceedings, as well as the economic and administrative advantages of diverting minor offenders from the court system.*<sup>55</sup>

The second reading speech noted the effectiveness and efficiency of penalty notices in other jurisdictions, by citing an unidentified “recent Victorian report”<sup>56</sup> which reportedly found:

*... that the overwhelming majority of persons receiving infringement notices opt to pay the amount set out in them.*<sup>57</sup>

The second reading speech also suggested that the higher rates of compliance reported could be attributed to offenders’ advance knowledge of:

- the penalty quantum
- the fixed and lesser amount of that penalty quantum compared to the ‘normal’ statutory maximum fine for the offence
- the offenders’ capacity to avoid the ‘social stigma and legal disabilities’, which attach to a criminal conviction because payment of a (fixed) penalty notice does not incur either a criminal conviction nor a criminal record.<sup>58</sup>

The inspiration behind the introduction of the legislation has been attributed, in part, to suggestions received by the then Minister of Police, The Hon. Michael Costa MLC, from frontline police officers. The Attorney General told the Legislative Assembly:

*I am told by my colleague the Minister for Police that he has visited dozens of police stations during his time in office, and he has been told on dozens of occasions not only that officers would like to be less involved with*

*paperwork and red tape but also that officers have consistently supported a scheme of this nature is a way of cutting down on paperwork.*

*An officer who has in the past been engaged for hours preparing a charge for, say, a dollar's worth of sugar stolen from a shop does not regard this scheme as some flight of ministerial fancy. The Minister for Police assures me—and I certainly believe him—that such an officer is extremely supportive of this initiative.<sup>59</sup>*

## Objectives of the legislation

The objectives for the legislation were outlined in its introductory reading speeches<sup>60</sup> the main elements of which were described in the Discussion Paper<sup>61</sup> to this review, and include:

- reducing the administrative demands on police in relation to relatively minor offences by providing a quick alternative to arrest for police officers in dealing with minor matters
- 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 the 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.

It was also intended that the legislation would satisfy these objectives whilst retaining the capacity for an alleged offender to contest the facts of a case in a court should they wish to do so.<sup>62</sup>

In addition to the statutory objectives identified during the Bill's passage into statute, NSW Police, when formulating SOPs in preparation for the *Penalty Notice Offence Act's* implementation, articulated further objectives for the legislation. The SOPs described the objectives of the legislation's trial to be:

- reduce the amount of police time spent in processing minor criminal offences
- reduce problems which can arise when suspects are arrested and taken to the police station
- reduce injuries to persons arrested and to police
- reduce the risk of self harm in custody
- provide a process which balances the inconsistencies between loss of liberty and the final outcome at court
- provide an increased non-custodial alternative when dealing with Aboriginal and Torres Strait Islanders.<sup>63</sup>

Several of the objectives identified within the SOPs, in particular those concerned with:

- reducing the problems associated with, or injury arising from, a person's arrest and transport to a police station or holding cells
- increasing non-custodial alternatives when dealing with Aboriginal and Torres Strait Islanders

indicated additional and significant benefits offered by the legislation being anticipated by those responsible for its implementation.

Therefore, although not specified in the legislation, the objectives identified within the SOPs were considered and are discussed in this report.

## Parliamentary debate

Concerns about the Bill expressed during the Parliamentary debate on the legislation focused on two main issues,<sup>64</sup> namely, that it:

- provided an inadequate response for dealing with offenders who had committed, what were considered to be, serious crimes<sup>65</sup>
- had potential for a disproportionate impact on particular communities, especially Aboriginal and Torres Strait Islanders and people from non-English speaking backgrounds.<sup>66</sup>

Other issues arising in the course of the Bill's passage through Parliament included:

- the potential that offenders of the prescribed offences would be the least likely to pay an on-the-spot penalty<sup>67</sup>
- the actual extent of administrative savings for police that could be achieved by the legislation given that sufficient evidence would still be required to prosecute the offence in the event that the fine was not paid.<sup>68</sup>

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## Endnotes

<sup>53</sup> Clause 11C was amended by the Criminal Procedure Amendment (Penalty Notices) Regulation 2003.

<sup>54</sup> Generally, NSW legislation that solely amends other legislation is eventually repealed as part of a regular statute law review process, culminating in the pages of at least one Statute Law (Miscellaneous Provisions) Act each year)

<sup>55</sup> NSWPD, Legislative Council, 18 June 2002, p. 3202, citing NSW Law Reform Commission, Sentencing, Reporting No. 79, Sydney, 1996, p. 11.

<sup>56</sup> This finding (using this phrasing) is reported in Fox R., *Criminal Justice on the Spot: Infringement penalties in Victoria*, Australian Institute of Criminology, 1995, p. 11.

<sup>57</sup> NSW Legislative Council, 18 June 002, p. 3202.

<sup>58</sup> *Ibid.*

<sup>59</sup> The Hon. R Debus MP, NSWPD, Legislative Assembly, 27 June 2002, p. 4109.

<sup>60</sup> Note that the Explanatory Memorandum accompanying the Bill lists its objectives as:

to enable police officers to issue penalty notices for certain offences for a trial period, and

to enable police officers to require persons who are to be issued with penalty notices under the new provisions while in force to disclose their identity, and

to confer on police power to take finger-prints from offenders when serving penalty notices and court attendance notices,

<sup>61</sup> NSW Ombudsman, Put on the Spot – Criminal Infringement Notices Trial, Review of Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper, Sydney, 2003, p. 6.

<sup>62</sup> *Ibid*

<sup>63</sup> NSW Police, Education Services, Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: *Policy and Standing Operating Procedures*, Sydney, 2002, p. 6.

<sup>64</sup> NSW Ombudsman, Put on the Spot – Criminal Infringement Notices Trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper, Sydney, 2003, p.7. This section presents the debate surrounding these issues in greater detail.

<sup>65</sup> Mr A. Tink MP, NSWPD, Legislative Assembly, 27 June 2002, p. 4109.

<sup>66</sup> The Hon. Peter Wong MLC, NSWPD, Legislative Council, 26 June 2002, p.3787.

<sup>67</sup> Mr A. Tink MP, NSWPD, Legislative Assembly, 27 June 2002, p. 4109.

<sup>68</sup> The Hon. M. Gallacher MLC, NSWPD, Legislative Council, 26 June 2002, p. 3787.

# Chapter 6. Implementation of the Act by NSW Police

Although the Attorney General formally administers the Act, given that its powers and functions are primarily conferred on police officers, the implementation of the Act was largely the responsibility of NSW Police. This chapter details the steps taken by NSW Police to put the CIN scheme trial into place.

## Standing Committee and working groups

Alongside the passage of the *Penalty Notice Offences Act*, NSW Police prepared for its implementation by convening a 'Criminal Infringement Notices Standing Committee' with responsibility for the implementation and operation of the legislation by NSW Police. This forum was made up of senior generalist and specialist officers from within NSW Police and affected agencies who met regularly to monitor the implementation of the legislation during the period of the trial.

The core members of the Standing Committee included: a NSW Police Project Manager, senior operational police, and representatives from Education Services, Forensic Services Group (FSG), Legal Services, Strategic Development Unit, the IPB and Police Association of NSW. A representative of the Attorney General's Department attended these meetings, as did an observer from our Office. Our role is detailed at the end of this chapter.

Members of the Standing Committee charged with specific tasks toward facilitating the Act's implementation formed working groups of specialist officers for the purpose of analysing and resolving particular issues identified during the implementation process. These working groups included:

- Evaluation Working Group, which was responsible for the identification of data fields (generated across several agencies, e.g., the IPB, FSG, Criminal Records Section ('CRS') and the Courts), and ensuring their mechanisms for data collection, which would be required for monitoring and evaluating the trial
- Infringement Processing Working Group, tasked with identifying and securing processes for the exchange of information and procedures between the enforcement agencies (IPB, FSG, CRS, SDRO and the Courts) involving penalty notices
- Policy/SOPs/Operational Process Working Group, charged with the development of policy, SOPs and administrative items, such as the design and production of finger-printing forms and the acquisition of field finger-printing pads
- Systems Process Working Group, which in conjunction with relevant agencies (IPB, FSG, CRS and the Courts) designed the processing aspects of the Act's implementation, including the various alternatives provided by the legislation (payment, court-election, non-payment and withdrawal) for discharging a CIN once it was issued
- Training / Communications Working Group, which developed and published a range of training and educational materials for dissemination to the trial LACs and the wider police service. This material included production and publication of hard copy materials and newsletters, the various SOPs, journal articles, Intranet sites and a training video.

## Computerised Operational Policing System

NSW Police, Operational Systems Support, incorporated relevant CIN specific recording fields into the COPS database and case management system operated by NSW Police.<sup>69</sup>

## Standing Operating Procedures

The Education Services, NSW Police, developed CINs specific SOPs titled, '*Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*' to assist with the training of officers for the implementation of the Act during the trial.<sup>70</sup>

CRS incorporated procedures related to the collection, storage and destruction of finger/palm-prints, in accordance with the Act, into their SOPs.<sup>71</sup>



The NSW Police Communications Group incorporated CIN specific actions into their SOPs. These prompt radio operators to perform certain additional computer related checks to inform police where an officer is assessing an individual's eligibility for a CIN.

## Training

By mid-August 2002, NSW Police Education and Development Officers ('EDOs') at each of the trial LACs had been provided with "training and marketing material to help them inform police of the trial and train them in what they should do."

This material included:

- CIN specific SOPs
- a flowchart detailing the notice issuing process
- pocket cards –*aide memoirs* - for use by individual police officers
- a new and separate P23C CINs card
- a training video.

The EDOs were then responsible for providing training in the administration of CINs to the staffing compliment of their respective trial LACs. Our review was informed that training in the use of CINs had been provided to the trial LACs by 6 September 2002.<sup>72</sup>

## Flowchart

NSW Police SOPs include a schematic flowchart of the CINs issuing process, which has been re-produced at Appendices I, J and K.<sup>73</sup>

## NSW Police intranet

For the period of the trial, the NSW Police Intranet hosted a 'Criminal Infringement Notices – trial (icon)' site, which provided a description of the legislative objectives and enabling provisions of the Act in addition to a *Criminal Infringement Notices: Frequently Asked Questions* section.<sup>74</sup> After its release, our Discussion Paper was also included on this site.

## NSW Police publications

The NSW Police Public Affairs Branch and the Education Services Branch produce regular publications for communicating news and relevant administrative information to police officers and employees.

The Public Affairs Branch publishes the *Police Weekly*, which is an operational journal, restricted in circulation to police officers. It provides NSW Police employees with information and developments on new technology and legislation, policies and procedures and feature articles on policing activities, such as taskforces and operations.

The Education Services Branch issues the *Policing Issues and Practice Journal*, which is an education and professional development journal, providing detailed advice on police policies, procedures and operational issues.

Articles concerning the CIN scheme trial published in either the *Police Weekly* or the *Policing Issues and Practice Journal* included:

- 'Fines for minor offences', *Police Weekly*, 17 June 2002
- 'Intranet site for infringement notices trial', *Police Weekly*, 15 July 2002
- 'Penalty notices: trial for minor criminal offences', *Police Weekly*, 29 July 2002
- 'Trial of penalty notices for minor criminal offences: Standing operating procedures', *Police Weekly*, 12 August 2002
- 'Penalty Notices trial for minor offences: Less than a fortnight away', *Police Weekly*, 19 August 2002
- 'Trial of penalty notices for minor criminal offences', *Police Weekly*, 30 September 2002

- 'Crimes Legislation Amendment (Penalty Notice Offences) Act 2002', *Policing Issues & Practice Journal*, v 10, October 2002
- 'Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Extension of the penalty notices trial', *Police Weekly*, 29 September 2003.

## Implementation of the Act and CIN scheme trial by the SDRO

In preparation for the implementation of the Act, the SDRO developed a CINs specific procedure manual, *SDRO – Fine Enforcement Procedure Manual: Criminal Infringement Notice Scheme (CINS)*.<sup>75</sup>

### Data requirements

Separate agreements were reached with NSW Police, the IPB (at that time, a unit within NSW Police), and the SDRO for our office to receive regular reports concerning the use and/or administration of CINs matters by those agencies.

### Ombudsman involvement in the trial planning process

A representative of our office was invited to attend the first CIN Standing Committee meeting in June 2002 and provide input into the implementation process. We were also invited to attend the first of the Criminal Infringement Notice Process and Systems Mapping Working Party ('the Working Party') meetings. Thereafter, we attended meetings of the Standing Committee as well as some of the meetings of individual working groups as observers. Our participation in these meetings primarily focused on establishing adequate systems to capture and report data for the purposes of our review.

Regular contact and liaison was maintained with the IPB, SDRO and the Project Management Unit (NSW Police) throughout the duration of the trial period, and afterwards to assist the preparation of this report.

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## Endnotes

<sup>69</sup> See NSW Police, Operational Systems Support, 'Criminal Infringement Notices: COPS User Guide', August 2002.

<sup>70</sup> NSW Police, Education Services, '*Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*', Version 2, September 2002.

<sup>71</sup> NSW Police Criminal Records Section, *Standard Operating Procedures: Crimes Legislation Amendment (Penalty Notice Offences) Act 2002*, September 2002.

<sup>72</sup> Email correspondence from NSW Police to our office, dated 6 September 2002.

<sup>73</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, Annexure B, p. 24.

<sup>74</sup> [http://nswpsintranet/bizunits/project\\_mgt/projects/criminal\\_infringement\\_notices/index](http://nswpsintranet/bizunits/project_mgt/projects/criminal_infringement_notices/index).

<sup>75</sup> State Debt Recovery Office, *Fine Enforcement Procedure Manual: Criminal Infringement Notice Scheme (CINS)*, October 21, 2002.

# Chapter 7. The Criminal Infringement Notices scheme trial

CINs are similar in form to parking and traffic infringement notices. They consist of a description of the offence, the particulars of the offender, the nominated penalty, and instructions on how to pay the fine together with an option (and details describing how) to elect to take the matter to court.

The Act and the associated Regulation enabled police to issue CINs for a pilot period from 1 September 2002 to 1 September 2003<sup>76</sup> in the following twelve LACs:

Albury	Lake Macquarie
Bankstown	Miranda
Blacktown	Parramatta
Brisbane Water	Penrith
City Central	The Rocks
Lake Illawarra	Tuggerah Lakes

During the trial period CINs could only be issued within these trial locations. Officers from other commands working in these locations could issue CINs only after receiving training on the correct procedures for issuing a CIN.

The offences for which a CIN may be issued, and the fixed penalty for each of those offences, as prescribed by regulation,<sup>77</sup> are as follows:

## Crimes Act

Section	Offence	Penalty
s 61	Common Assault	\$400
s 117	Larceny or shoplifting, where the property or amount does not exceed \$300	\$300
s 527A	Obtaining money etc by wilful false representation	\$300
s 527C	Goods in Custody	\$350

## Summary Offences Act

Section	Offence	Penalty
s4(1)	Offensive conduct	\$200
s 4A (1)	Offensive language	\$150
s 6	Obstructing traffic	\$200
s 6A	Unauthorised entry of vehicle or boat	\$250

A detailed description of the prescribed offences is provided in Appendix E.

The Act precludes the issue of a CIN in relation to:

- an industrial dispute
- an apparently genuine demonstration or protest
- a procession
- an organised assembly.<sup>78</sup>

These are similar to the protections enacted for the 'move on powers' under s28F of the *Summary Offences Act 1988*, enacted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*.

Although not specifically provided for in the Act, NSW Police SOPs, prepared for the CIN scheme trial, extend the circumstances in which a police officer cannot issue a CIN, to include:

- domestic violence offences
- seriously intoxicated or drug affected persons (such that the suspect cannot comprehend the procedure)
- continuing offences - when the suspect refuses police requests to stop the offence (offensive language or offensive conduct)
- when the suspect is the subject of an outstanding first instance or apprehension warrant
- in cases where there are circumstances requiring further investigation.<sup>79</sup>

NSW Police also made a policy decision to the effect that police officers alleged to have committed offences for which a CIN could be issued would *not* have the matter dealt with by way of a CIN.<sup>80</sup>

The SOPs instruct police to deal with all offences in the same manner when a suspect has committed multiple offences. Thus, it is not possible to be charged for one offence and given a CIN for another offence. However, should an offender commit multiple offences for which a CIN can be issued, up to four CINs may be issued on the one occasion.<sup>81</sup>

There is no prohibition on a CIN being issued to repeat offenders, but police are advised to use their discretion, giving balance to the time saved "with the need to have an appropriate penalty imposed or indicate community condemnation of the behaviour".<sup>82</sup>

## Issuing a CIN

### NSW Police SOPs state:

*A CIN can only be issued to an adult whose identity has been confirmed and who meets the offence criteria ... Police must be certain of the identity of the suspect prior to issuing a CIN.*<sup>83</sup>

While not a requirement of the Act, the adoption of the identity confirmation procedure by NSW Police may have had its source in the requirement of s334(2) of the Act that “a penalty notice must be served personally”. Satisfying the ‘personal’ service requirement presumably necessitates establishing the actual identity of the suspect.

To confirm the identity of a suspect, the Act provides police with a discretionary power to request the name and address of a suspect and to request proof of those particulars.<sup>84</sup> Amendments to the *Crimes Act* made by the *Penalty Notice Offences Act* provide police with a discretionary power to require a suspect to submit to having finger and/or palm prints taken in order to confirm a suspect’s identity.<sup>85</sup>

The Act states that a CIN may not be issued to a person under the age of 18 years.<sup>86</sup>

## Paying a CIN

Recipients of a penalty notice have the option of either paying the penalty, with payment made to the IPB, or, within 21 days of the CIN being issued, indicating their selection of a ‘court elect’ preference.

Pursuant to the *Fines Act*, unpaid penalties are referred to the SDRO for further enforcement action.<sup>87</sup>

Payment of the penalty precludes any further proceedings being taken against a person for the alleged offence.<sup>88</sup> A criminal record of the offence is not maintained and payment of the penalty is not to be regarded as an admission of liability for the purposes of any civil claims, action or proceeding arising from the same occurrence.<sup>89</sup>

Where the payment of the penalty remains outstanding finger and/or palm prints taken from the offender are retained. If the CIN is paid, the Commissioner of Police is required to ensure that the relevant finger/palm prints are destroyed.<sup>90</sup>

## Verification of identity

The Act enables a police officer intending to issue a CIN, to a person whose name and/or address is unknown to the officer, to request the name and/or address of a suspected offender.<sup>91</sup>

These powers are subject to the same conditions that have featured in recent legislation creating or enhancing police powers. Before asking for a person’s particulars, an officer is required to establish their police credentials (unless they are in uniform), give their name and place of duty, inform the person of the reason for the request, and warn that failure to comply with the request may be an offence.<sup>92</sup>

A person who, without reasonable excuse, fails or refuses to comply with a request, or states a name that was false in a material particular, or states an address other than the full and correct address of their residence is liable to a maximum penalty of 2 penalty units (1 penalty unit currently equates to \$110).<sup>93</sup>

These provisions also enable a police officer to request that a person provide proof of their name and address.<sup>94</sup> The Act does not provide a penalty for failing to provide this proof.

NSW Police reports that no legal proceedings alleging a failure to comply with these provisions were commenced during, or as a result of, the trial.<sup>95</sup> This may, in part, be explained by comments, received during our focus groups with police officers, to the effect that a suspect’s reluctance to provide information of this nature, or a suspicion by the issuing police officer that the information might be unreliable, would cause them to apply a more intrusive intervention, such as arrest and/or the laying of a charge.

Similar provisions, enabling police to request, and require proof of, the identity and place of residence of a person reasonably suspected of committing or involvement in an offence, are also found in the *Crimes Act*<sup>96</sup> and the *Police Powers (Vehicles) Act 1998*.<sup>97</sup>

The *Crimes Act* contains similar penalty provisions for non-compliance or supplying false particulars in response to a request for identity and residence details as those provided in the *Penalty Notice Offences Act*.<sup>98</sup> The penalty provisions for the comparable supply name and residence information provisions in the *Police Powers (Vehicles) Act*, however, are far heavier in that refusing, without reasonable excuse, to supply personal details or providing false particulars renders a suspect liable to a maximum penalty of 50 penalty units (currently \$5,500) or 12 months imprisonment or both.<sup>99</sup>

It is important to appreciate that the power conferred by s341 of the Act, allowing police to demand the name and address in order to issue a CIN, represents a fundamental curtailment of the long established right to silence. Until the passage of the *Penalty Notice Offences Act*, the statutory abrogation of the right to silence has generally been confined to facilitating investigations of alleged *indictable* offences, as indicated by the provisions in the *Crimes Act*

and the *Police Powers (Vehicles) Act*, or have been available only in respect of road transport legislation, such as the power to ask for the licence and name and address of a driver.<sup>100</sup> For the first time, the right to silence has been curtailed for certain *summary* offences, being those offences for which a CIN may be issued.<sup>101</sup>

It might be suggested that a potential CIN recipient is still able to exercise his or her common law right to silence by refusing to supply name and address details once requested, knowing that by exercising this right they will in all likelihood be arrested and charged for the alleged offence rather than be given the opportunity to expiate the offence by means of payment of a CIN. However, s341(3) of the Act, allowing a maximum penalty of 2 penalty units for non-compliance, makes such a suggestion untenable.

While the argument might be mounted that to not confer police with the power to request the name and address of a person to whom it is intended to issue a CIN would leave the scheme at great risk of being undermined through the absence of means to properly enforce the payment of the penalty, it nevertheless should be fully appreciated that the provision is a significant abrogation of the right to silence – one made all the more apparent by the fact that it does not have general effect on summary offences, but rather affects the small number of those summary offences in NSW for which police are able to issue a CIN.

## Withdrawal of a penalty notice

The Act provides for the withdrawal of a penalty notice by a senior police officer before the due date for payment, either at his or her own discretion or at the direction of the Director of Public Prosecutions.<sup>102</sup> If the notice is withdrawn but the penalty has already been paid then the payment is to be refunded.<sup>103</sup> If a penalty notice is withdrawn in this manner it is then possible for other proceedings to be commenced.<sup>104</sup>

The circumstances that might see a penalty notice withdrawn after it has been issued include either a lack of legislative or procedural compliance underpinning the notice. An example of where the former would occur is where, contrary to the legislation, a penalty notice had been issued to a juvenile,<sup>105</sup> for a non-prescribed offence or within a non-trial LAC. Procedural non-compliance might result where, for example, following the issue of a CIN it was discovered that the CIN had not been issued in accordance with the SOPs, or the CIN itself had been completed incorrectly.

The legislative provisions enabling the withdrawal of a CIN, together with the procedural steps to be followed once a decision has been taken to withdraw a CIN, are described in the SOPs developed for the trial.<sup>106</sup>

Although the 'Withdrawal of CIN' section in the SOPs provides some advice on when it might be appropriate to withdraw a CIN (such as a senior officer deciding that the issuing of multiple CINs with respect to the one incident was inappropriate), a set of criteria or guidelines illustrating the circumstances and/or events for which a CIN might be withdrawn might be useful to include in the SOPs.

For the period of the trial, responsibility for deciding to withdraw a notice once issued remained with the individual LACs. For the first seven months of the trial the IPB and the Project Management Unit (NSW Police) provided a support and oversight role in respect of issuing and withdrawing CINs, a role that reverted to the individual trial LACs in April 2003.<sup>107</sup>

Withdrawal of a CIN, once issued, was also sought by some recipients making representations to either NSW Police or IPB. Such representations generally claimed either extenuating circumstances or mitigation, and sought dismissal of the offence. Similar representations are permitted by the IPB as a means of appealing an infringement arising from a traffic offence:

*You can ... write to the Infringement Processing Bureau outlining your situation. For traffic offences consideration may be given to your case if you have a clear driving record in the prior consecutive 10 years. If there was found to be an error by the reporting officer, or if there are extenuating circumstances that can be properly supported by documentation, consideration may also be given.*<sup>108</sup>

In the absence of a statutory provision to provide guidance on requests to have a CIN withdrawn, a CINs Steering Committee meeting decided that neither NSW Police nor the IPB would consider recipient representations seeking a notice's withdrawal and that the notice recipient should be referred to the court-elect option should "... they wish to contest any aspect of it [the notice]".<sup>109</sup>

Further discussion on representations by a CIN recipient and the circumstances in which a CIN may be withdrawn is contained in Chapters 8 and 14.

**RECOMMENDATION 1:** Consideration be given to developing a set of criteria or guidelines, consistent with those outlined in Recommendation 23, on the appropriate circumstances for the withdrawal of a Criminal Infringement Notice, and that these be incorporated into the Standing Operating Procedures

In relation to this recommendation, the Office of State Revenue<sup>110</sup> commented that:

*“The Infringement Processing Bureau (IPB) has established procedures for the dealing with representations on Penalty Notice matters. NSW Police would have to provide guidelines outlining the criteria for considering withdrawal of criminal matters. Currently IPB do not consider any correspondence from persons in relation to these matters. We respond advising that there is no provision within the legislation”.*

NSW Police commented that:

*“Supported, guidelines will be incorporated into NSW Police SOPS. The section on withdrawal of CIN in the Policing Issues and Practice Journal October 2002, and the Police Handbook in relation to withdrawal of infringement notices further satisfies this request”.*



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## Endnotes

- <sup>76</sup> Extended to 1 September 2004 by amendments to the Criminal Procedure Regulation 2000.
- <sup>77</sup> Schedule 2, Criminal Procedure Regulation 2000.
- <sup>78</sup> s339, *Criminal Procedure Act*.
- <sup>79</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 9.
- <sup>80</sup> *Ibid.*, p.8.
- <sup>81</sup> *Ibid.*, p.10.
- <sup>82</sup> *Ibid.*, p.10.
- <sup>83</sup> *Ibid.*
- <sup>84</sup> s341, Criminal Procedure Act.
- <sup>85</sup> s353AC, Crimes Act.
- <sup>86</sup> s335 (1), Criminal Procedure Act.
- <sup>87</sup> State Debt Recovery Office, *CINs Procedure Manual*, October 2002, p. 3.
- <sup>88</sup> s338(1), *Criminal Procedure Act*.
- <sup>89</sup> s338(2), *Criminal Procedure Act*. This is consistent with legislative policy in relation to the payment of penalty notice fines as notes in s23(2), *Fines Act: Payment of that amount results in there being no further liability for further proceedings for the offence to which the notice relates. Note: The statutory provisions under which mechanisms for the issue of penalty notices are provided also provide for the effect of payment in accordance with the notice. The effect of payment in accordance with a penalty notice generally is that no further proceedings will be taken for the alleged offence. Payment generally does not have the effect of an admission of any liability in relation to the events out of which the offence arose.*
- <sup>90</sup> s353AC(3), *Crimes Act*.
- <sup>91</sup> s341(1), *Criminal Procedure Act*.
- <sup>92</sup> s342(2), *Criminal Procedure Act*.
- <sup>93</sup> s341(3), *Criminal Procedure Act*.
- <sup>94</sup> s341(4), *Criminal procedure Act*.
- <sup>95</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.
- <sup>96</sup> s563, *Crimes Act*.
- <sup>97</sup> ss6-9A, *Police Powers (Vehicles) Act*.
- <sup>98</sup> s563 (3), *Crimes Act*.
- <sup>99</sup> ss7(1), (2), 7A(1), (2), 8(1), & 9, *Police Powers (Vehicles) Act*.
- <sup>100</sup> s19, *Road Transport (General) Act 1999*.
- <sup>101</sup> ss4(1), 4A(1), 6 & 6A (offensive conduct, offensive language, obstructing traffic and unauthorised entry of vehicle or boat, respectively), *Summary Offences Act*. Two notable exceptions to this general rule exist, namely, s11 of the *Summary Offences Act* and s27 of the *Children (Protection and Parental Responsibility) Act 1997*. Both provisions enable police to require identification and address details from children in certain circumstances. These provisions might be distinguished from the provisions presently under discussion as they have the primary objective of ensuring the welfare of children rather than assisting in the investigation or processing of an offence.
- <sup>102</sup> ss340(1) & (2), *Criminal Procedure Act*.
- <sup>103</sup> s340(3), *Criminal Procedure Act*.
- <sup>104</sup> s340(3)(c), *Criminal Procedure Act*.
- <sup>105</sup> See, for example, s335 (2), *Criminal Procedure Act*.
- <sup>106</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p.18.
- <sup>107</sup> The decision to transfer responsibility to the LACs for monitoring CINs to ensure procedural compliance was taken at the CINs Steering Committee meeting of 9 April 2003.
- <sup>108</sup> Information obtained from [www.ipb.nsw.gov.au](http://www.ipb.nsw.gov.au) at the "FAQs" page.
- <sup>109</sup> Decision of the CINs Steering Committee meeting of 9 April 2003.
- <sup>110</sup> In their reply to the draft report, the Office of State Revenue advised that the Infringement Processing Bureau had merged with the State Debt Recovery Office on 1 October 2003.

# Chapter 8. Results of the CIN scheme trial

A large amount of information about the issuing and processing of CINs was provided to our review by agencies having a direct role in the implementation of the new criminal infringement notice powers, namely, NSW Police, the IPB and the SDRO.

Our review also sought, and received, information from the NSW Bureau of Crime Statistics and Research ('BOCSAR')<sup>111</sup> related to the quantum and type of matters processed by the NSW local courts in order to gauge the potential impact of the legislation's implementation on the courts' administration.

The following 'profile' of the CINs trial is derived from the information supplied by those agencies and identifies:

- the utilisation rates and trends, where applicable, in the manner that CINs were issued, by month, LAC and offence type
- recipient characteristics
- the manner in which CINs were disposed of
- financial returns.

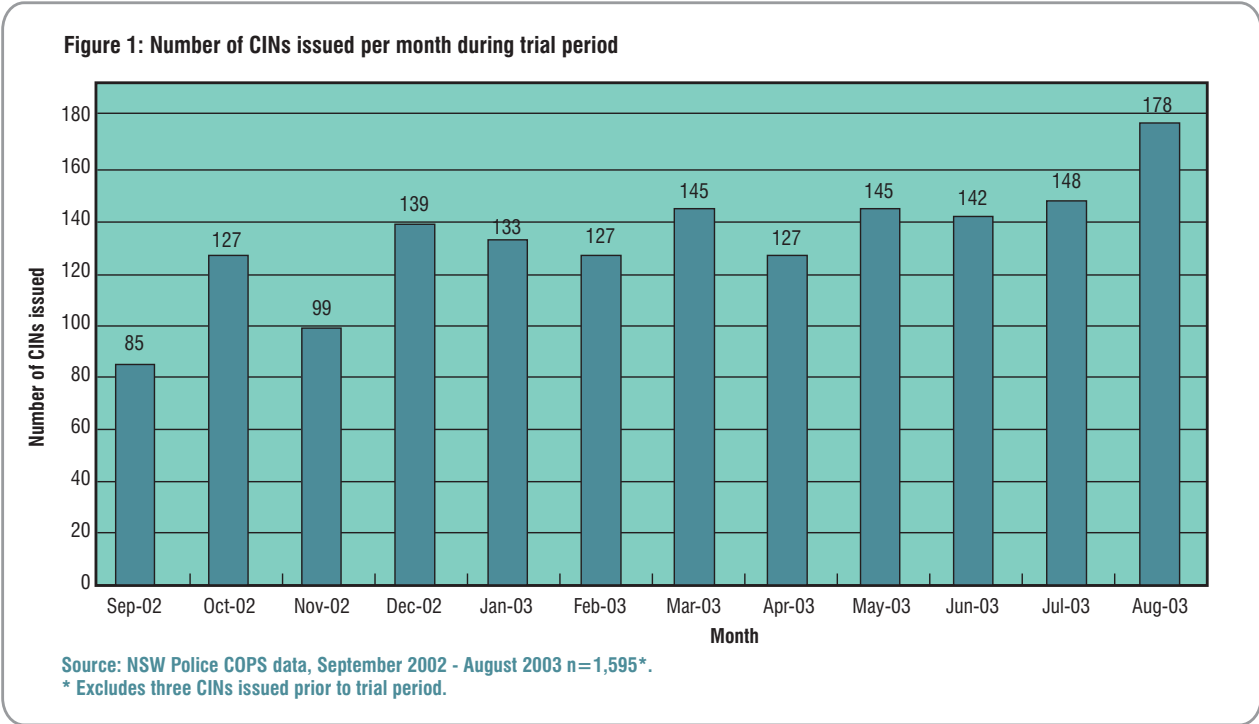
The data presented to the review and from which the profile was developed is also assembled in Appendix D.

## CINs issued

### Rate at which CINs were issued by Month<sup>112</sup>

For the period 1 September 2002 to 31 August 2003, a total of 1,595 CINs were issued.<sup>113</sup> Three CINs were also recorded as having been issued prior to the trial's commencement, being one each in December 2001, July 2002 and August 2002.<sup>114</sup>

There was a gradual yet consistent increase in the number of CINs issued from the commencement of the trial (n=85, September 2002) to in excess of twice that amount at the trial's completion (n=178, August 2003). The average number of CINs issued was 133 per month.



The average number of CINs issued by the twelve participating LACs during the trial was 132.4, ranging from a high of 270 CINs (16.9 per cent of the total issued) at City Central to 70 CINs (4.4 per cent) at Bankstown. The seven metropolitan LACs (Bankstown, Blacktown, City Central, Miranda, Parramatta, Penrith and The Rocks) combined accounted for 58.1 per cent of the total number of CINs issued, whilst the five non-metropolitan LACs (Albury, Brisbane Waters, Lake Illawarra, Lake Macquarie and Tuggerah Lakes) represented 41.3 per cent of the total.

The rate at which CINs had been issued by the participating LACs was an item for discussion at the CINs Review Meeting conducted in April 2003, approximately two-thirds the way through the trial.<sup>115</sup> The meeting was attended by NSW Police's CIN scheme project sponsor and support officers, commanders or senior managers from the participating LACs and the IPB's representative. The relatively low usage of CINs in a number of the LACs was the subject of some discussion, explanations and rationalisations. Among the factors cited by LAC managers were:

- the bulkiness of the fingerprinting equipment
- the non-recording of a CIN in the criminal history of an offender
- the destruction of fingerprints. It was suggested by one LAC representative that a large number of property offences took place in the LAC and that fingerprints obtained from offenders taken into custody often led to identification for these offences
- the impracticality of having to serve a CIN personally
- operational police did not believe that CINs provided time savings
- that for two of the LAC representatives, their commands were dealing with a high number of recidivist offenders and domestic violence related offences, making CINs inappropriate
- considering the offences for which CINs could be issued, there were a minimal number of incidents in the LAC where the option of using a CIN would have been appropriate
- two representatives said that there was a reluctance to use CINs within the LAC due to concerns in relation to the application of Part 10A of the *Crimes Act*<sup>116</sup>
- that for one representative, minimal use might be explained by the LAC dealing with a large number of recidivist offenders and juveniles
- established police practice where an officer was more accustomed to taking a person into custody and returning to the station with them to address an alleged offence.

Conversely, those LACs that had been recording the highest rates of CINs notifications at that time accounted for their usage by noting that there had been an emphasis "*on the availability of CINs at all levels of the Command*" with one LAC having an extremely active beats unit, with CINs emphasised for use in large police operations in the area, such as Vikings.<sup>117</sup>

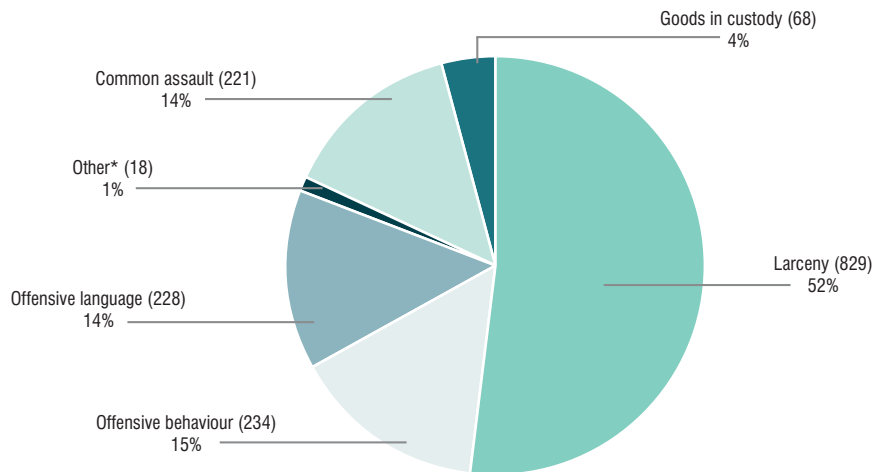
Operational police also saw CINs as a positive option for remaining on the street compared to the time involved in taking a suspect into custody.

## Offences for which CINs were issued

Accounting for 52 per cent, or 829 of the 1,598 CINs issued, the prescribed property offence of 'larceny' (which includes 'shoplifting' offences) attracted the greatest number of CINs as evidenced below in Figure 2.

With a combined notification rate of 42.7 per cent of the total 1,598 CINs issued, the anti-social offences of 'offensive behaviour' (234 or 15 per cent), 'offensive language' (228 or 14 per cent) and the personal violence offence of 'common assault' (221 or 14 per cent) were also highly represented in the CIN trial. Relatively few CINs were issued for the remaining (property) offences of 'goods in custody' (68 or 4 per cent), 'unlawfully enter vehicle/boat' (10 or 0.6 per cent), 'obtain money, etc., by false representation' (5 or 0.3 per cent) and 'obstruct person/vehicle/vessel' (3 or 0.1 per cent) which amounted in total to 5.3 per cent.

Figure 2: Types of offences for which CINs were issued



Source: NSW Police COPS data, December 2001 - August 2003 n=1,598.

\* 'Other' includes the following offences: 'Obstruct person/vehicle/vessel', 'Obtain money etc by false representation' or 'Unlawfully enter vehicle/boat'.

## CINs recipients

Although 1,598 CINs were issued during the trial for prescribed offence events, these relate to a total of only 1,528 persons, suggesting that 70 CINs (4.4 per cent) were either issued in respect of multiple offences arising from a single incident<sup>118</sup> or, alternatively, to offenders for multiple incidents.<sup>119</sup>

### People of Aboriginal or Torres Strait Islander descent

The SOPs prepared for the trial instruct officers issuing a CIN to "indicate whether the suspect is of Aboriginal or Torres Strait Islander descent".<sup>120</sup> A total of 79 CINs, representing 4.9 per cent of the total, were identified as having been issued to individuals of 'ATSI status'.<sup>121</sup>

Later chapters of this report expand upon the incidence, and potential impact, of issuing CINs to this and other minority groups.

### Age

The information demonstrates a substantially high rate of CINs having been issued to recipients in the '15-19' years (n=234) and '20 - 24' years (n=480) age categories, with a gradually declining rate of the issue of CINs to recipients beyond those ages.

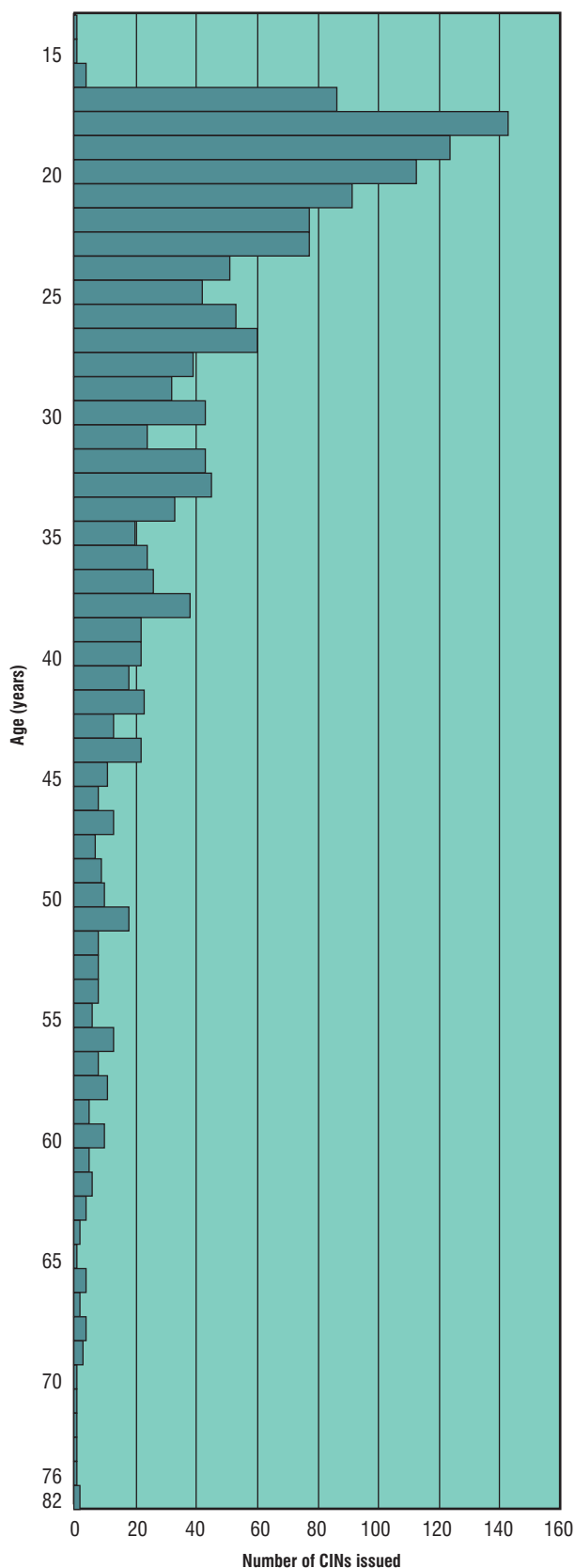
The marked tendency for CINs to be issued to younger people becomes more apparent when the CINs recipients' age is compared, proportionally, to the age population of NSW, as evidenced in Figure 4, below. The figure, which includes Australian Bureau of Statistics (ABS) population data as at 30 June 2002, shows that at 45 per cent (n=714), slightly less than one half of all CINs were issued to persons within the age ranges '15-19' and '20 - 24' years who, combined, accounted for only 13.5 per cent of the NSW population.

It should also be noted that the legislative provisions operated to specifically exclude those persons younger than 18 years of age from being issued with CINs. Removing juveniles aged 15-17 years from this sample would, therefore, effectively reduce the '18-24' years old portion of the population below the 13.5 per cent mark.<sup>122</sup>

Slightly less than two-thirds, 60 per cent (n=959), of all CIN recipients are aged between 15 and 29 years, which accounts for less (when 15 to 17 years olds are removed) than 20.6 per cent, or one-fifth, of the NSW population.

This disparity of age and offending rates, however, is not unique to this trial. Persons aged 15 to 19 years comprise the group most likely to be dealt with by police. The ABS reports that in 2001-02 the offending rate for persons aged 15 to 19 years was more than four times the offender rate for the rest of the population. The next highest offender rate was for the population aged between 20 and 24 years of age, at nearly double that for the remainder of the population.<sup>123</sup>

Figure 3: Age of CINs recipients



Source: NSW Police COPS data, December 2001 - August 2003 n=1,598.

A final note in relation to the trial’s profile age factor, is that despite the legislative prohibition to the contrary,<sup>124</sup> ten CINs were issued to people below the age of 18 years during the trial period.<sup>125</sup> The Act provides that where a CIN is inadvertently issued to a person below the age of 18 years, the amount of the fine is not payable, or, if the amount has been paid, it is refundable. It also provides that, while not required, further action (the SOPs suggest in accordance with the *Young Offenders Act*<sup>126</sup>) may be taken against the young person.<sup>127</sup>

Of the ten CINs issued to youths below the age of 18 years, 7 have been withdrawn and 3 had been referred to the SDRO for enforcement. We are informed that action has since been commenced to also withdraw these notices.

### ‘Court-elected’ CINs

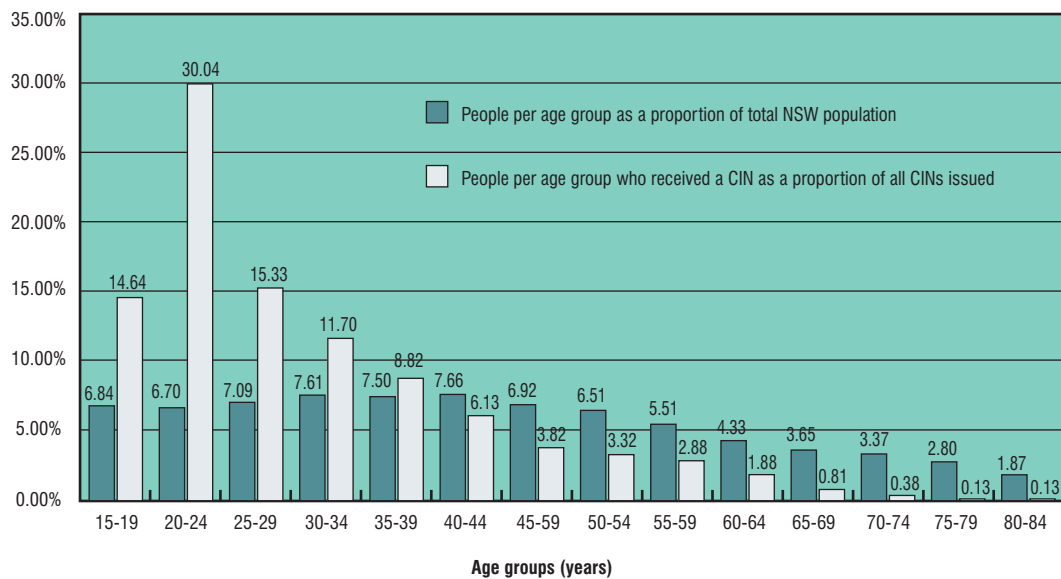
The rate at which CIN recipients chose to exercise an alternative to paying the penalty notice, such as the ‘court-election’ option, may provide an attitudinal ‘barometer’ of the level of acceptability of the CIN scheme. Forty one CINs were the subject of ‘court-election’ during the trial (2.6 per cent of the total 1,598 CINs). That the number of ‘court-elections’ exercised during the trial was consistently low throughout the trial period may act as one measure, albeit roughly, of the scheme’s acceptance for most recipients.

#### Rate at which CINs were ‘court-elected’ by offence type

Figure 5 illustrates the rate at which CINs recipients opted to exercise the ‘court-elect’ option, and how often the relevant authorities exercised their discretion to ‘withdraw’ a notice, in each of the offence-type categories.

Twenty, or 49 per cent, of the 41 ‘court-elected’ CINs, involved recipients who received notices for the offence of ‘common assault’. This figure contrasts with the breakdown of the number of CINs issued, where the offence of ‘common assault’ accounted for only 221, or 14 per cent, of the total number of CINs issued. Recipients of CINs involving ‘larceny’, which attracted 52 per cent or 829 of all infringement notices, utilised their right to have the matter determined before a court in only ten instances.

**Figure 4: Proportion of CINs issued by age and proportion of NSW population by age**



Source: NSW Police COPS data and '2004 ABS Regional Profile: 1.1.2 Estimated resident population by age and sex, by Local Government Area, 30 June 2002, Canberra, 2004'.

**Figure 5: Offences for which CIN recipients elected court or the CIN was withdrawn**

Offence	Court elected CINs	Withdrawn CINs
Common assault	20	3
Goods in custody	2	1
Larceny	10	5
Offensive behaviour	6	2
Offensive language	2	3
'Obstruct person/vehicle/vessel', 'Obtain money etc by false representation' or 'Unlawfully enter vehicle/boat'	1	0
<b>Total</b>	<b>41</b>	<b>14</b>

Source: NSW Police COPS data, December 2001 - August 2003

### 'Court-elect' outcomes

In its submission to our review, NSW Police provided information on the outcomes of CIN matters where the 'court-elect' option had been exercised. The information concerned 28 'court-elected' CINs of which NSW Police were aware, as at 31 May 2003. The submission advised that ten of the 28 matters "have not yet been finalised at court".<sup>128</sup>

The information is reproduced in the following table. It is difficult to distinguish the defended outcomes from the outstanding, unfinalised, matters since the information, as supplied, combines the 28 defended and undefended matters, together.

Of the 18 matters that had been finalised, the information, as supplied, is also imprecise as to the quantum of matters that resulted in either, a section 10 dismissal, a section 10 bond, a fine, or an alternate sentence. It is interesting to note from the information, however, that at least three (16 per cent) cases were dismissed by a court and another resulted in the imposition of a bond (although it is not known whether this was as a stand alone or a partial outcome).

**Figure 6: Outcomes where CIN recipients elected court**

Offence	Number of defended matters	Average fine imposed	Other outcomes
Common assault	13	\$433	Section 10 Bond*
Goods in custody	1	N/A	Dismissed
Larceny	8	\$317	N/A
Offensive conduct	4	\$100 (only one fine)	Section 10 Dismissal
Offensive language	2	\$50 (only one fine)	Dismissed
'Obstruct person/ vehicle/vessel', 'Obtain money etc by false representation' or 'Unlawfully enter vehicle/ boat'	0	N/A	N/A

Source: D Madden, Deputy Commissioner Operations, NSW Police, Submissions dated 12 November 2003, Attachment, p.5  
 \* Although not stated, this possibly refers to s10 'Dismissal of charges and conditional discharge of offender', Crimes (Sentencing Procedure) Act 1999

A detailed comparison and discussion of court outcomes and penalties for CINs prescribed offences is included in Chapters 7, 12, 13 and 14 of this report.

## 'Withdrawn' CINs

Another possible indicator of the operational efficacy of the CIN scheme is the rate at which notices are required to be withdrawn, once issued, by the issuing authority. In this instance the number of CINs 'withdrawn' from the fine enforcement process during the trial remained consistently low. Only 14, or 0.9 per cent of the total number of CINs issued have been confirmed as being withdrawn.<sup>129</sup>

Reasons for withdrawal have included that CINs were issued for non-participating LACs, or the alleged offenders were juveniles, or the alleged offences were not prescribed offences for the purposes of the trial.<sup>130</sup>

### Rate at which CINs were 'Withdrawn' by Offence Type

As indicated in Figure 5, the number of withdrawals, per offence type, ranged from five for the offence of 'larceny' to zero for each of the offences of 'obstruct person/vehicle/vessel', 'obtain money etc by false representation' and 'unlawfully enter vehicle/boat'.

## CINs enforcement

CINs are required to specify, *inter alia*, the offence, an amount payable for the offence, to whom the amount is payable and the time within which it is payable.<sup>131</sup> For the purposes of the trial, CINs recipients were afforded a period of 28 days within which to pay a fine, similar to the time period provided for the majority of penalty notices. Payments are to be made to the IPB.

If a fine remains unpaid at the end of the 28 day period specified on the CIN, the IPB will forward the recipient a reminder notice.<sup>132</sup> Reminder notices are also required to specify certain information, including, that the recipient has until the due date specified in the notice to make the payment for the offence specified in the notice, and the enforcement action that may be taken if the amount is not paid by the due date.<sup>133</sup> Again, in accordance with established procedure for penalty infringement notice reminders, CINs reminder notices specified a further

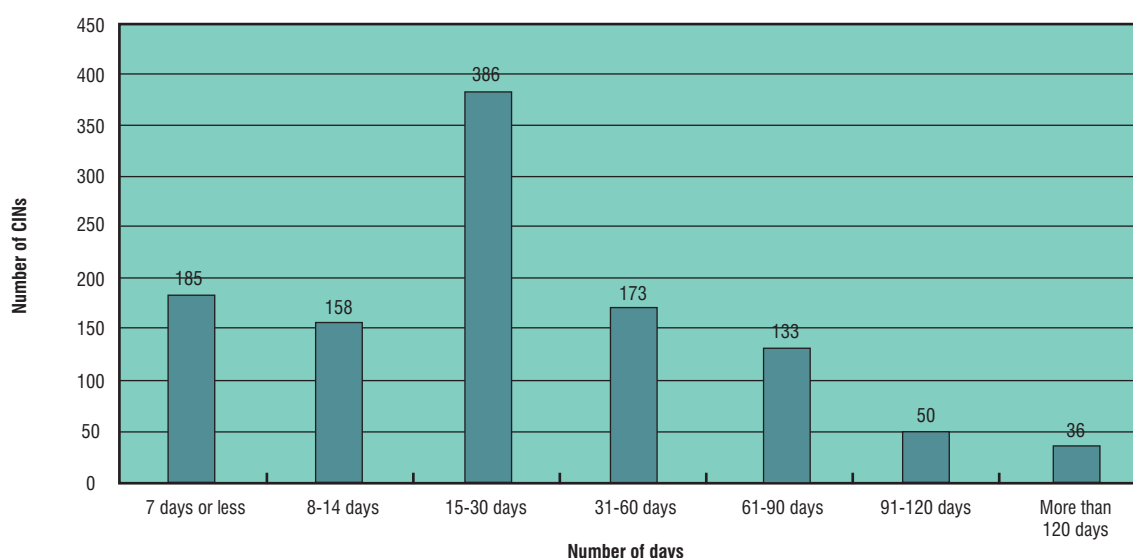
period of 28 days within which a recipient might pay the due amount in order to avoid the matter being dealt with by a court.<sup>134</sup>

As at 21 November 2003, the IPB reported having received payment for 684, or 43 per cent, of the total 1,598 CINs issued.

As at March 2004, the number of CINs for which payment had been received increased to 1,121, although this also includes CINs issued outside the twelve-month review period. An indication of the relationship between time, measured in days, and the proportion of CINs paid is provided in Figure 7.

Of those CINs paid, 31 per cent had been finalised by receipt of payment within two weeks. In excess of a further one-third (34 per cent) of CINs fines were paid after two but less than four weeks following the notice having been issued. The proportion of CINs being settled in the following weeks decreases dramatically with 15 per cent being settled in the subsequent four-week period and 12 per cent in the month following that.

**Figure 7: The number of days taken to pay a CIN fine\***



Source: NSW Police COPS data, September 2002 - March 2004 n=1,121.

\* Including fines paid outside the review period.

### CINs paid (No. and percentage) by offence type

Figure 8 illustrates the number and percentage of CINs, for which payment had been received, categorised by the prescribed offence type.

The offences of 'common assault' (42 per cent), 'goods in custody' (35 per cent), 'larceny' (46 per cent), 'offensive behaviour' (47 per cent) and to a lesser extent 'offensive language' (32 per cent), approximate the overall proportion of all CINs paid during the trial (43 per cent).



Figure 8: The offences for which CINs were paid

Offence	Number of CINs issued	No. CINs paid	Proportion of CINs paid
Common assault	221	92	41.6%
Goods in custody	68	24	35.3%
Larceny	829	379	45.7%
Offensive behaviour	234	110	47.0%
Offensive language	228	72	31.6%
'Obstruct person/ vehicle/vessel', 'Obtain money etc by false representation' or 'Unlawfully enter vehicle/ boat'	18	7	38.9%
<b>Total</b>	<b>1,598</b>	<b>684</b>	<b>42.8%</b>

Source: NSW Police COPS data, September 2002 - March 2004

### SDRO Enforcement

Should a fine remain unpaid by the due date shown on the reminder notice (that is, after 56 days following the receipt of the CIN), the IPB will refer the matter to the SDRO for enforcement action to recover the debt. In the absence of the offender initiating alternate action to finalise the matter, such as exercising the court-elect option, the SDRO will issue the recipient with a penalty notice enforcement order.<sup>135</sup> Continued non-payment of this enforcement order by the specified time, a third period of 28 days, enables the SDRO to impose prescribed sanctions, including suspension of a driving licence, cancellation of a vehicle registration, seizure of goods or property, garnishment of wages or bank accounts, etc.<sup>136</sup> Additional administrative costs are added to the original fine once it has been received by the SDRO and for each sanction imposed.<sup>137</sup>

The *Fines Act* also makes provision for the withdrawal<sup>138</sup> or annulment<sup>139</sup> of an enforcement order and for an extension of time to pay a fine.<sup>140</sup>

NSW Police reports that as at November 2003, 695<sup>141</sup> CINs matters had been referred to the SDRO for follow-up enforcement action.<sup>142</sup>

**Figure 9: Number of CINs referred to SDRO by offence type**

Offence	Number of CINs referred to SDRO	Proportion of total CINs referred to SDRO
Common assault	79	11.4%
Larceny	367	52.8%
Goods in custody	34	4.9%
Offensive behaviour	84	12.1%
Offensive language	124	17.8%
'Obstruct person/vehicle/vessel', 'Obtain money etc by false representation' or 'Unlawfully enter vehicle/boat'	7	1.0%
<b>Total</b>	<b>695</b>	<b>100%</b>

Source: NSW Police COPS data, December 2001 - August 2003

In 2002-03, according to its figures, NSW Police referred 242,354 outstanding fines to the SDRO while it issued 1,349,000 infringement notices resulting in an overall referral rate of approximately 18 per cent.<sup>143</sup> According to the SDRO, it received 344,600 referrals from NSW Police, which means a referral rate of 25.5 per cent.<sup>144</sup>

In any event, whichever is the more accurate figure, the rate of payment for CINs prior to referral to the SDRO is much lower than for other infringement notices issued by NSW Police. Using both the disputed figures, that means that nearly one in every two ( $695/1,598 = 0.43$ ) CINs were referred to the SDRO for further enforcement action while only one in five or one in four infringement notices for other breaches are referred to the SDRO.

An examination of the proportion of CIN referrals to the SDRO according to the originating LAC suggests that the issuing locality of a CIN is not a strong determinate of payment non-compliance.<sup>145</sup> In addition, the referral rates by age range broadly correlates with the proportion of CIN recipients within each age range.

Of the CINs ( $n=543$ )<sup>146</sup> reported to have been received by the SDRO for follow-up enforcement action in the period September 2002 to October 2003, 70 (13 per cent) resulted in the payment of the fine in full, nine (2 per cent) in withdrawal of the CIN and 34 (6 per cent) in an agreement with the CIN recipient that payment would be effected within a specified time. In its submission to the review, the SDRO also identified one CIN matter that had been waived, 373 that had progressed to 'sanctions', in accord with the *Fines Act*, and 84 matters that were, at the time, 'not yet overdue'.<sup>147</sup>

As might be expected given the increase in the issuing of CINs over the course of the trial, the overall trend for the period of the trial suggests an increase in the number of CINs referred to the SDRO for follow-up enforcement action.

A similar, steadily increasing trend over the course of the trial is apparent for the number of referred CINs that were paid.

### **CINs financial return**

Although the trial period was completed on 31 August 2003, the method adopted by the IPB for processing CINs fines, by date of offence and issue, meant that as at November 2003, information in relation to payments received by the Bureau was only available for the period ending May 2003. The following discussion therefore derives from CINs payments received by the IPB for the abridged period from 1 September 2002 to 31 May 2003, of the trial.

For the first nine months the IPB reported that they had received \$130,950 in the payment of fines for CIN prescribed offences.<sup>148</sup> The IPB also reported that the payment of CINs fines processed by them was averaging 43 per cent of the total number of notices issued during the trial.

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In addition, for the period 1 September 2002 to 31 October 2003, the SDRO reported the receipt of \$17,350 in revenue from the enforcement of CINs fines referred to them from the IPB that were subsequently paid in full.<sup>149</sup> The SDRO also report having approved 'time to pay' arrangements for a further 34 CINs matters where enforcement orders had been issued and which had a combined worth of \$10,550.

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## Endnotes

- <sup>111</sup> The NSW Bureau of Crime Statistics and Research is a statistical and research agency within the New South Wales Attorney General's Department.
- <sup>112</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.
- <sup>113</sup> Nine (0.6%) notices were issued within non-prescribed trial LACs or incorrectly identified as CINs matters. NSW Police ascribe the former to the possibility that a CIN notice may have been issued by an officer who recorded their "home station code" (from a non-trial LAC) when issuing the notice and the latter to the manner in which CIN offences, that is similar law part codes, are classified in COPS (see Appendix E).
- <sup>114</sup> Two of these CINs were later withdrawn as improperly issued.
- <sup>115</sup> CINs Project, Review Meeting Minutes for 16 April 2003.
- <sup>116</sup> Part 10A of the *Crimes Act* establishes the procedures to be followed in detaining a person after arrest. The relevance of it to the CIN scheme trial is explored later. However, the Minutes of the Review Meeting noted that "... *the issue of Part 10A had been addressed previously and that it did not apply to CIN usage unless the suspect was returned to the station*".
- <sup>117</sup> Operation Vikings is a series of highly visible saturation policing operations employed across NSW since 2002 as a strategy to target anti-social behaviour, street crime, violence, drugs and concealed weapons.
- <sup>118</sup> The SOPs noted that "*Up to four (4) on the spot infringements can be issued to a suspect at any one time*" as long as all offences within a multiple offence situation were dealt with in the same manner: NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p.10.
- <sup>119</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.
- <sup>120</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p.16. Following a recommendation from the Royal Commission into Aboriginal Deaths in Custody in 1991, NSW police officers have had to record whether or not the person in question is an Aboriginal or Torres Strait Islander. The COPS database does not allow the record to be finalised unless this question is answered.
- <sup>121</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.
- <sup>122</sup> Additional age related data is provided in Appendix D.
- <sup>123</sup> Australian Institute of Criminology, *Australian Crime: Facts and Figures 2003*, Canberra, 2004, p. 46.
- <sup>124</sup> s335 (1), *Criminal Procedure Act*.
- <sup>125</sup> Information supplied in an attachment to a letter from the Minister for Police, 30 November 2004.
- <sup>126</sup> *Young Offenders Act 1997*.
- <sup>127</sup> ss335 (2) and (3), *Criminal Procedure Act*.
- <sup>128</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 5.
- <sup>129</sup> Information since supplied in an attachment to a letter from the Minister for Police, dated 30 November 2004, cites the withdrawal of twenty CINs during the trial period.
- <sup>130</sup> This withdrawal rate should be viewed with some caution given the NSW Police qualifier, "*Numbers [of CINs] provided may include CINs that have been withdrawn or are to be withdrawn*": Statistical note to information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.
- <sup>131</sup> s20 (1), *Fines Act*.
- <sup>132</sup> s26, *Fines Act*.
- <sup>133</sup> s27 (1), *Fines Act*.
- <sup>134</sup> The period of time accords with the requirements of s30 of the *Fines Act*.
- <sup>135</sup> s42, *Fines Act*.
- <sup>136</sup> s58, *Fines Act*. A flow chart describing the methods presently employed by the SDRO as standard practice is contained in Appendix K.
- <sup>137</sup> s44, *Fines Act*.
- <sup>138</sup> s46, *Fines Act*.
- <sup>139</sup> s48, *Fines Act*. A withdrawal has the effect of cancelling the relevant order, while leaving open the option of making another order, in relation to the penalty (s46 of the *Fines Act*). An *annulment* has the effect of cancelling the enforcement order, and the matter must be remitted to the Local Court to determine as if the enforcement order had not been made (s51 of the *Fines Act*).
- <sup>140</sup> s100, *Fines Act*.
- <sup>141</sup> This figure is at odds with the number of CINs reportedly received by the SDRO (discussed below). Each agency has since confirmed the information provided by them to the review despite the disparity between the data.

<sup>142</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.

<sup>143</sup> NSW Police, *Annual Report 2002-03*, p. 145.

<sup>144</sup> Office of State Revenue, *Annual Report 2002-03*, p. 12.

<sup>145</sup> See Figure 9.1, Appendix D.

<sup>146</sup> The inconsistency between the number of CINs reportedly referred to, and the number received by, the SDRO from NSW Police is noted. Each agency has since confirmed the validity of the information provided by them to the review despite the disparity between the data.

<sup>147</sup> Director, State Debt Recovery Office, undated Submission, received 31 October 2003.

<sup>148</sup> This amount includes a sum of \$400 received for an offence(s) occurring in August 2002, prior to the commencement of the trial period, and a sum of \$300 for an offence(s) registered in The Hills, a non-trial LAC. NSW Police have since advised that this entry may result from CIN notices being issued by officers who recorded their "home station code" (from a non-trial LAC) in COPS.

<sup>149</sup> Information supplied by, and by arrangement with, the SDRO, as at November 2003.

# Chapter 9. Offences for which CINs were issued – Profile

This chapter describes some of the offences where police thought it appropriate to issue a CIN. While it is a relatively small sample of the total number of offences for which CINs were issued, the matters selected for reporting in this chapter are either representative of the matters we reviewed or raise questions about the use of CINs in the circumstances described. Where appropriate, issues raised by these case studies are dealt with in later chapters.

For the matters described in this chapter we reviewed the narratives entered on to COPS for those offences. To do this we asked NSW Police for all the Event Numbers for CINs issued during the trial period, ordered by Law Part Code so that they could be sorted by offence. NSW Police provided us with 1,151 event numbers, which were created for 1,253 CINS, with some events recording that more than one CIN was issued. This data showed that of the 1,151 events:

- one CIN was issued in 1,070 events
- two CINs were issued in 67 events
- three CINs were issued in nine events
- four CINs were issued in three events
- five CINs were issued in two events.

We reviewed both Events where five CINs were issued to ensure that these had not been issued in breach of the SOPs requirement that no more than four CINs be issued to any one person. In both cases, five individuals were each issued with a CIN; one incident involved unlawful entry of a boat while the other CINs were issued for common assault.

For the purposes of this section, we excluded the matters recorded as ‘offensive language’ and ‘common assault’ because separate audits were conducted for these offences, and are reported and discussed in later chapters.

We then selected 20 per cent of the total number of event numbers received for each offence to review the COPS narrative for each event, except in the case of ‘larceny’ (632 events in total), where due to the number and similarity of events (most involving retail theft), we selected 10 per cent of the event numbers. In total, we reviewed approximately 165 records, obtaining the ‘narrative’ for each event, which is a particular field in COPS where police generally describe what happened to constitute the offence in question and their response.

All material in italics is directly quoted from the COPS narrative.

## Larceny (including retail theft)

What was evident from a brief survey of those events recording the issuing of a CIN for ‘larceny’ is that most of them were issued for the theft of goods from a retail store, with only a small number of events showing that the theft was from another person or business.

- ◇ A man was apprehended on suspicion of retail theft by store security at a major retail store, and police were called to attend. A notebook interview<sup>150</sup> was conducted, and the offender admitted taking the goods, which were valued at \$20. As the offender produced sufficient identification and had no prior offences, the officer thought it appropriate to issue a CIN. The offender was fingerprinted, and a car crew took the prints back to the police station.
- ◇ A 61-year-old man walking through the electrical section of a hardware store noticed that the packaging for a door chime was open. He took the chime out and put it in his pocket, and walked out of the store without paying for the chime. He was then approached by store security and asked to produce any items that had not been purchased. He produced the chime, and was taken back to the security office to wait for police. After admitting he had stolen the chime, and as it was his first offence, he was issued with a CIN.

- ◇ Police were called to a major retail store, where the loss prevention officer told them that she had observed the offender pick up a bottle of chocolate milk, drink it and return the empty bottle to the shelf. Police interviewed the offender who admitted drinking the milk without paying for it, because he did not have any money on him. He was then issued with a CIN (for \$300).
- ◇ A woman was detained by store security at a store of a major discount retailer after she had been observed leaving the fitting room wearing one of the jackets that she had tried on, with her own jacket on a hanger that she returned to a rack. When police attended she was cautioned and arrested. During questioning she became agitated, moving towards the officers and demanded that they shoot her. She started swinging her arms in the direction of the officers, who then handcuffed her and took her to a police station. She was issued with a CIN and then released from custody.
- ◇ A newsagent opening her shop at 6.30 am observed a man stealing a bundle of 26 *Daily Telegraph* newspapers from the footpath outside the store, who then got into the passenger side of a car, which was then driven away. The newsagent recorded the car's model and registration number and gave these details to the attending officers. Police went to the address for the registered owner of the vehicle, where the owner's mother greeted them, but the owner was not present.

Later in the day the owner contacted police and confirmed that he and a friend had been outside the newsagent. The owner/driver and his friend attended the police station, where they were interviewed separately. The owner admitted driving the car and stopping outside the newsagent, but did not know that his friend intended to take the newspapers.

The friend said that he had only wanted one newspaper, but was unable to undo the bundle before the newsagent observed him. He said he then panicked and took the whole bundle into the car. He was issued with a CIN for larceny, while no action was taken against the owner of the vehicle because of his co-operation and stated lack of knowledge about his friend's intentions.

- ◇ Store security at a major retail store observed two men remove DVDs from their packaging and place four disks each down the front and back of their pants. Once they left the store, the two men were detained and escorted back to the security office. When police arrived the men were cautioned, arrested, searched and taken back to the police station. One of the men was issued with a CIN, while the other was issued with a court attendance notice due to his record of previous offending.
- ◇ A sub-contractor got into an argument with the contractor over late payment of wages. He took approximately \$250 worth of screws, rivets and paint cans from the work site. When interviewed by police the sub-contractor told them that he had taken the items to teach the victim a lesson, and said that he had no intention of permanently depriving the contractor of the items. He was informed that his actions constituted stealing, following which he gave the items back to police, and was issued with a CIN and fingerprinted.
- ◇ While leaving a pay phone at a railway station after making an international call, a backpacker felt someone reaching into her back pocket and take her mobile phone. She noticed a woman who had been hassling her while she was on the pay phone start to run away. The backpacker took a step forward and kicked the woman's foot to trip her over. The offender fell, and dropped the backpacker's phone, which broke into four pieces. The offender was taken back to the station office to wait for police. The offender made full admissions, and was then arrested, cautioned and questioned further. The backpacker was able to put the phone back together so that it worked and the offender was issued with a CIN.
- ◇ An employee of a major retail store was observed by store security taking five games for an electronic gaming console and leaving the store at the end of his shift without paying for the games. He was stopped outside the store and asked to return to the store where he admitted the offence and returned the items. Police attended and issued the employee with a CIN for larceny.

All but three of the larceny events that we reviewed involved instances of retail theft. There were instances where the offence involved the theft of between \$200 and \$300 worth of goods. There were also incidents where items of lesser value were taken but potentially had at least some resale value (and accordingly are sometimes the target of organised retail thefts), such as DVDs, razor blades, cosmetics and shampoo. There were other instances where the value of the items was much lower, including instances involving items valued at \$15.90 (three confectionary items and a flea collar), \$15.20 (four punnets of berries), \$28.00 (two sets of children's pyjamas) and \$33.45 (two boxes of confectionary).

## Goods in custody

- ◇ During a Vikings operation<sup>151</sup> a man's vehicle was observed parked in a car space reserved for people with a disability. He was approached and asked why he was parked in the space, he replied that he had no reasonable excuse after which he was issued with a Parking Infringement Notice (PIN). As police were talking to the man, they observed what appeared to be "*drug paraphernalia*" in the car, and accordingly, conducted a search of the vehicle. In a black bag they found a six pin plug socket<sup>152</sup> which was marked with "[name of high school] *Music Department*" on the back, and a Leatherman tool with an eight centimetre blade. Asked about the socket, the man said that he had found it near a bin earlier that day. In addition to getting a PIN, for the socket he was issued with a CIN for \$350 for goods in custody, and for the Leatherman, a \$550 infringement notice for carrying a knife in a public place.
- ◇ A man came to police attention for wheeling a shopping trolley along a street. A Criminal Names Index (CNI) check established that the man was known for "*drug matters and stealings*". As a result, the man was searched and was found to be carrying four packets of AAA batteries. The man said that he had been offered them in the shopping area as a swap for a cigarette. Believing that "*the property was most likely stolen*", the officer issued the man with a CIN for goods in custody.
- ◇ Police in an unmarked vehicle observed two men on a highway kicking aluminium cans and spraying the contents from additional cans. When police pulled up beside the men, they noticed that one of them was carrying a cardboard tray of soft drink cans covered in plastic. Police asked where they got the cans and the man holding the tray pointed to a service station along the highway, and said that the cans were purchased. After further questioning, the man admitted to taking the cans without paying for them. His friend admitted that he waited across the road for his friend to return from the service station. The first man was issued with a CIN for larceny and the second man received a CIN for goods in custody.
- ◇ Two men were observed loitering near an automatic teller machine at 4.30 am. As a result police stopped and spoke to both of them. On searching one of the men, police found a Cityrail school pass issued to another name. The man said that he had found it a month before and was intending to hand it in. Police retained the school pass, and the man was issued with a CIN for goods in custody.

## Offensive conduct

The vast majority of CINs issued for offensive conduct were for incidents where the offender was urinating in a public place, usually late at night and where the offender was at least moderately affected by alcohol. Other instances where CINs for offensive conduct were issued included:

- ◇ A man was seen to be exhaling and inhaling into a plastic shopping bag in a shopping precinct in the mid-afternoon. People were crossing to the other side of the street to avoid the scene, and complaints were made to police. They approached the man, taking the bag from him and examining its contents. A strong chemical odour emanated from the bag, and police believed the bag to contain lacquer. Police issued a CIN and asked the man to move along.
- ◇ At 1.30 am a man entered a police station adjacent to a busy train and bus interchange and started to verbally abuse the officers in attendance. He was asked to leave but he continued to swear at police. He left the station but continued to call out to police from the bus stop. After he made masturbating gestures with his hands he was arrested, taken back to the station, searched and told that a CIN for offensive behaviour would be mailed to him.
- ◇ At 3.15 am a man was seen walking through an entertainment precinct with two friends, and seen to kick an advertising hoarding several times. The precinct's rangers apprehended the man. Police attended the scene and issued the man with a CIN for offensive behaviour.
- ◇ At 4.15 am police observed a man urinating against the window of a building. He was asked for identification, and after providing it, he was advised by police that he would be receiving a CIN for offensive conduct. The man responded by asking "*for fucking what?*" He was warned about his language and told to leave the area. The man continued to swear and was arrested and taken to the police station. His identity was established and it was thought appropriate to issue him with CINs for offensive conduct and offensive language, after which he was released. After he left the station police observed him removing his CINs from his pocket, scrunching them up and throwing them into the garden at the front of the station. He was again detained and issued with a further infringement notice for littering.<sup>153</sup>



- ◇ Officers from a bike squad were patrolling a toilet block, which was “a well known area for offensive conduct amongst males”. Upon entering the block, one man (“A”) was observed masturbating another man (“B”). The two men were asked to come out of the toilet block to talk to the officers. “A” was told that the block was “one of our taskings due to the activity that goes on in the males public toilet”. He was then issued with a CIN for offensive conduct. As “B” had been issued with a CIN for the same offence in the same location several months before, he was given a summons to appear before court, found guilty, and fined \$400 and ordered to pay court costs of \$59.

## Obstructing traffic

- ◇ In the middle of the afternoon of Palm Sunday 2003, a man was observed pushing a wooden cable wheel and a shopping trolley along one of the traffic lanes in Pitt Street, Sydney, preventing the free flow of traffic along that lane. Responding to police enquiries, the man said, “I’m in the march, the streets were blocked off for us”. He was asked to remove the wheel and trolley from the roadway, and after he refused, police and RTA workers on the scene confiscated the items. The man was then told that the Palm Sunday march was now at the Domain and that Pitt Street was never blocked for the march. He was arrested for a breach of the peace and issued a CIN for “wilfully prevent free passage of vehicle”.

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## Endnotes

<sup>150</sup> A ‘notebook interview’ is conducted by police officers when in the field, and involves recording his or her questions and the answers from the involved party in the officer’s notebook. Generally these records are not verbatim, but instead record the gist of the questions and answers. The person being interviewed is then asked to sign his or her name to confirm the accuracy of the record.

<sup>151</sup> A rolling series of high profile street policing operations conducted by NSW Police since May 2002. These are further discussed in Chapter 13.

<sup>152</sup> An internet search of Australian outlets for an estimated value of the plug indicated that such an item could be purchased for between \$1.95 and \$3.50.

<sup>153</sup> From the advice of NSW Police and the SDRO, we understand that these infringement notices were discharged by means of payment.

# Chapter 10. Fingerprinting to verify identity

The *Penalty Notice Offences Act* also made amendments allowing police to take finger and/or palm prints on the spot, where it is intended to issue a CIN or a notice to attend court, rather than having to take the alleged offender back to a police station. Our review was limited to considering the use of these powers in respect of CINs, and was excluded from looking at the taking of prints for the purpose of issuing a notice to attend court.<sup>154</sup>

This chapter examines the relevant statutory amendments, the procedures adopted by police for taking prints<sup>155</sup> in the field and the use of these powers during the period of the CIN scheme trial.

## Statutory provisions

The *Penalty Notice Offences Act* amended the *Crimes Act* to enable police officers to require a person served with a CIN to submit to having their prints<sup>156</sup> taken. That provision did not, however, apply to persons under the age of 18 years.<sup>157</sup>

The amending provision of the *Penalty Notice Offences Act* also required that the Commissioner of Police *must ensure* that a print taken in pursuance of the provision be destroyed upon payment of the fine imposed under the penalty notice.<sup>158</sup>

The amended *Crimes Act* also allows the same printing procedures to be used with respect to a person, who is not in lawful custody, who is being served with a notice to attend court (usually a Field Court Attendance Notice ('FCAN')).<sup>159</sup>

As with the verification of identity provisions,<sup>160</sup> the amendments to the *Crimes Act* include procedural requirements for police to follow when obtaining prints without an arrest. The officer must provide evidence that they are a police officer (unless they are in uniform), give their name and place of duty, inform the person of the reason for the request, and warn that failure to comply with the requirement may result in the person being arrested for the offence concerned and that whilst in custody, their prints may be taken without the person's consent.<sup>161</sup>

## SOPs

The *Crimes Act* enables, but does not require, the taking of prints from persons issued with a CIN.<sup>162</sup>

The SOPs identify the following steps for officers when issuing a CIN:

- *Verify the suspect's identity. The suspect's identity should be confirmed, so 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 in full. It is not an offence if the suspect fails to supply confirmation of personal details*
- *Request the suspect to consent to having fingerprints and palm prints taken (SOPs have been developed for taking fingerprints in the field)*
- *Issue a warning that if the suspect does 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 senior police officer in cases of uncertainty relating to fingerprinting.*<sup>163</sup>

Although the SOPs describe each of the processes of verifying the identity of a potential CIN recipient and requesting a suspect to submit to having prints taken, it is not entirely clear whether the two processes are always to be actioned in combination or as substitutes for each other.

The situation in practice seems best summarised by an excerpt from a submission received from the Acting Local Area Commander of one of the trial LACs:

*In most circumstances, there appears to have been very little need to take fingerprints, as police state that they are satisfied with the identity of the offender and further verification, ie fingerprints is of little consequence. Where identity is an issue, a CIN is perceived as inappropriate and the offender is usually arrested and brought into the police station where other legal processes are adopted.*<sup>164</sup>

## Practice

Since, for the purposes of the CINs trial, prints would normally be taken 'in the field', away from a police station, police had been issued with special forms and ink pads for this purpose. These resources are a portable alternative to standard fingerprint forms and ink and 'Livescan' units (for electronic printing), which are generally used when alleged offenders are processed at a police station.

NSW Police provided our review with CINs-related prints information, summarised in Figure 10, from the commencement of the trial to July 2003. During that period 506 prints were obtained, or prints for 32 per cent of the persons to whom CINs were issued (n= 1,598).

The destruction of a set of prints is triggered by either, payment of the outstanding fine and receipt by CRS of notice to that effect or, in the event of a CINs recipient exercising the court-elect option, the dismissal of the charge *and* the recipient formally requesting the CRS to destroy their prints.<sup>165</sup>

As Figure 10 illustrates, only 63 (relating to 59 fines collected by the IPB and four fines collected by the SDRO), or 12 per cent of the prints, collected to July 2003 had been destroyed as at that date. The information supplied suggested that the majority of CINs matters for which prints had been obtained, 422 (83 per cent), had not been destroyed by July 2003.

NSW Police identified several reasons for the relatively large number of prints that remained 'outstanding', namely:

- *The length of time applicable to disposal of a CIN and an [SDRO] enforcement order has resulted in the prints being destroyed subsequent to July 2003*
- *A significant number of obtained prints relate to CINs that have progressed to enforcement orders and are the responsibility of the SDRO. These prints are retained for a lengthy, somewhat indefinite period. This is evident in the large percentage of fingerprints which have not been destroyed. This is consistent with the intention of the legislation that those offenders who pay promptly receive the benefit of the destruction of their fingerprints; and*
- *Currently there are manual processes in place between IPB (which includes SDRO) and the NSW. This involves the transfer of hard copy information and manual searching to locate whether fingerprints have been taken then the implementation of destruction procedures. The manual notification by IPB is done once a month (batch referrals). This process has been a matter highlighted during the trial and IT system improvements have been proposed which, if CINs becomes a permanent policing option, would then be implemented'.<sup>166</sup>*

Figure 10: Status of CINs where fingerprints were taken

Status*	Number of CINs where fingerprints were taken	Proportion of all CINs where fingerprints were taken
Court elect (ongoing)	14	2.8%
Fine paid (prints destroyed)^	59	11.7%
Matter outstanding	422	83.4%
No action	1	0.2%
SDRO	6	1.2%
SDRO - paid (prints destroyed)	4	0.8%
<b>Total</b>	<b>506</b>	<b>100%</b>

Source: NSW Police COPS data, September 2002 – July 2003

\* Data was not available for the entire review period.

\*\* It is noted that the information package provided by NSW Police - discussed in Chapter 8 - identifies 14 CINs that were withdrawn and for which the prints, if they were taken, should have been destroyed. It is possible that no prints were taken in relation to the withdrawn CINs, however, in that event the possibility of 'Withdrawn' as an outcome with a null entry should have been included in this data.

^ Four double payments.

## Police officers' attitudes toward printing

The reluctance of some general duties police officers to take prints in conjunction with the issue of a CIN was noted in the Discussion Paper for this review.<sup>167</sup> At that time, it was noted, only about one quarter of all CINs recipients had had their prints taken.

The taking of prints for CINs purposes was, therefore, raised with the police officer participants in the focus groups conducted as part of our review.<sup>168</sup> Interestingly, there was a clear divide between the metropolitan and the rural LACs as to whether the SOPs required prints to be taken or not. Participants from the rural LACs expressed the unanimous belief that prints were required to be taken prior to issuing a CIN. The majority of metropolitan-based participants, however, were equally steadfast in their belief that prints were only required in the event that an individual's identity was not ascertainable by other means.<sup>169</sup>

The officers in our focus groups offered a number of reasons for not taking prints:<sup>170</sup>

- the print-taking process is cumbersome and defeats the CINs objective of efficiency and time savings
- obtaining prints is not standard procedure in the LAC
- if identification is not verifiable by other means, for example, photo identification, radio check, identifying marks, etc., the suspect is usually returned to the station and charged
- a large number of officers reported practical difficulties experienced obtaining prints, including –
  - a shortage of printing kits or the awkward location of such kits, for example, *'only the supervisor's car carries a kit'* and *'the initial issue [of field print pads] was inadequate and little (no) assistance was able to be found to obtain more'*
  - difficulties finding a suitable *'hard'* surface on which to take the prints
  - people get very upset about being printed plus it is often inconvenient for them to clean up after the printing process.

## Incidence of 'false particulars' provided to police

In addition to the printing provisions discussed above, the *Penalty Notice Offences Act* also amended the *Criminal Procedure Act* to include a set of provisions enabling a police officer, who intends to issue a penalty notice, to require a potential CIN recipient to state their name and/or address.<sup>171</sup> The section includes a penalty provision for failure or refusal, without reasonable excuse (proof of which lies upon the person), to comply with such a request or for stating a false name or address.<sup>172</sup>

The Deputy Commissioner, Operations, NSW Police has advised us that:

*At present there is no record of persons issued with CINs providing false particulars ... [it] is the NSW Police's understanding that officers have been thorough in establishing identification of individuals through other available legitimate means.*<sup>173</sup>

## Failure to submit to printing and its consequences

We also note the advice from NSW Police that there have been no reported incidents of individuals failing to submit to a request for prints, and subsequently being arrested, for an offence for which it had originally been intended to issue a CIN.<sup>174</sup> Similarly, an audit of police officers' experiences with CINs by the Police Association of NSW in relation to this issue found no such reported incidents.<sup>175</sup>

## Destruction of prints on payment of the penalty

As the Discussion Paper noted, the fact that there is a statutory requirement, upon the payment of the penalty fine, to destroy any prints taken in conjunction with the issue of a CIN<sup>176</sup> also generated reluctance on behalf of police officers to take prints.<sup>177</sup> Amending the *Crimes Act* to allow these prints to be retained for future reference was one suggestion made by officers at that time.

Several of the submissions made to our review also offered opinion on the subject of the retention or destruction of prints post fine settlement, predominantly supporting the former option. NSW Police, the Police Association and two citizen submissions<sup>178</sup> advocate for the retention on the fingerprint database of prints obtained in the course of issuing a CIN.<sup>179</sup> The common central tenet being:

*... the retention of fingerprints to ensure that the opportunity to identify people who may have committed serious unsolved crimes is not lost.*<sup>180</sup>

An ancillary rationale, one submission suggested, was that the CIN scheme was not designed to alter the nature of the prescribed offences, *per se*, rather it is aimed at obtaining administrative efficiencies through the prompt receipt by offenders of a penalty. That being the case, the proponents of this rationale suggest, the established practice for the prescribed offences, where prints are usually obtained and recorded on a database should continue unchanged.<sup>181</sup>

Similarly, a majority of the police officer participants in our focus groups also supported the retention of prints even after the discharge of a CIN by payment. The following reasons, consistent with the preceding discussion, were offered in support of this suggestion:

- prior to the trial, an individual charged with a CIN prescribed offence would have had a print record created, which would have been retained for future reference
- even during the trial, should an officer have chosen to progress a CIN prescribed offence by way of charge, rather than issuing the suspect with a CIN, the person would have been printed and those records retained
- payment of the fine is tantamount to an admission of guilt to the crime, therefore, consistency is achieved by retaining the [guilty] person's criminal and print records<sup>182</sup>
- the creation of a viable prints database increases the probability of solving future criminal activity.<sup>183</sup>

A contrary view on the question of keeping prints, however, was offered by a minority of focus group participants, indicated by the following views:

- CIN prescribed offences are relatively minor in nature, therefore, the risk created by not taking or retaining prints is not great
- the majority of people to whom a CIN would be issued have probably offended previously, thus, their prints would most likely be on record
- objections to the printing process were usually overcome once it was explained that the prints would be destroyed after payment of the fine
- CINs could be compared with TINs and other forms of penalty notices, which do not require that prints be taken or kept on record.

NSW Police acknowledges that “... the intention of the fingerprinting power pertains to safeguarding against the provision of false particulars”.<sup>184</sup> NSW Police also advises that:

...currently, obtained fingerprints are only compared against databases of the National Automated Fingerprint Identification System (NAFIS) where a CIN matter is court elected.<sup>185</sup>

We note the consistency between this practise and the prevailing precedent which establishes that any identification taken by police is for the use of a court which tries the offence and is not identification for the purposes of the arresting police: *R v Carr* [1972]<sup>186</sup>; *R v McPhail* (1988).<sup>187</sup>

In relation to the retention of prints, the *Crimes Act* currently requires that prints be destroyed once identity has been confirmed and upon payment of the penalty notice. Consistent with this approach, once the penalty is discharged through payment, no criminal record of the offence is kept, nor is the CIN history admissible in court as an antecedent. In relation to the prescribed CIN offences then, the offender is effectively dealt with in a manner akin to that carried out for other penalty notice offences, a point that was raised in submissions:

... if police are able to issue thousands of dollars in traffic fines without printing, then why should they not do the same with the issuing of CINs?

... as police are not required to fingerprint for FCANs, which are a more drastic legal process, then they should not be required to take prints for the purpose of CINs.<sup>188</sup>

Having regard to the objective of the CIN scheme, Parliament's unequivocal intentions in relation to the matter and the prevailing common law precedent, we believe it appropriate for the current requirement, that is, destruction of any prints collected in the service of an infringement notice upon payment of the fine, to continue.

**RECOMMENDATION 2:** The requirement in section 353AC (3) of the *Crimes Act 1900*, as amended, that any prints taken in conjunction with the issue of a Criminal Infringement Notice be destroyed upon the payment of the penalty fine, should remain unaltered.

In relation to this recommendation, the Chief Magistrate of the Local Court commented that:

*In relation to Recommendations 2, 3 and 4, the Chief Magistrate wrote, "These recommendations concern the taking of finger prints and palm prints from persons issued with penalty notices. It is in my view inappropriate that a persons prints be taken for offences considered to be "relatively minor" and for which a fine for the offence is considered a sufficiently effective means of addressing the conduct .... A section in similar terms to section 3ZL Crimes Act 1914 (Cth) would provide the necessary identification for a person served with a CIN who elects to have the offence dealt with by a court".*

The Chief Magistrate offers his support for Recommendation No. 2. NSW Police also advised of their support for the recommendation.

*Destruction, upon request, of prints following dismissal of a CIN charge or a finding of not guilty by a court*

The CRS has responsibility for the secure storage of all CIN related prints and, in accordance with the provisions of the *Crimes Act*, the subsequent destruction of those prints in certain prescribed circumstances.

For operational purposes, these circumstances are listed in the SOPs developed for the implementation of the *Penalty Notice Offences Act* by the CRS. Section 2.3 of those SOPs states:

*Destruction is only permissible if ALL CINs recorded on a CIN Fingerprint form have the status of either:*

- Penalty paid
- SDRO – penalty finalised
- Withdrawn
- Court dismissed (POI [Person of Interest] requests destruction)
- SDRO court dismissed (POI requests destruction).<sup>189</sup>

In accordance with the amended *Crimes Act*,<sup>190</sup> the CRS SOPs describe a process for the *automatic* destruction (in the absence of a 'determination' that destruction is not permissible) of CINs-related prints for each of the listed outcomes, 'Penalty paid', 'SDRO – penalty paid' and 'Withdrawn'.

The CRS SOPs also provide processes for each of the outcomes, ‘Court dismissed (POI requests destruction)’ and ‘SDRO court dismissed (POI requests destruction)’.<sup>191</sup> In effect the same procedures operate for each of these outcomes and they can be summarised by:

*CIN Fingerprint forms (and any copies) relating to a CIN that is contested at court are not to be destroyed unless the CIN is dismissed and an application to destroy the print is received from the POI.*<sup>192</sup>

No mention is made within the CRS SOPs of the method or means by which a ‘POI’ is, or would be, informed of their entitlement to have their CIN-related prints destroyed, or of the processes that they are required to follow in order for them to achieve this outcome. Given that the comments of many of the police officers participating in the focus groups conducted for this review suggests that a high level of emotion is frequently attached by CIN recipients to their prints being taken, it is unfortunate that there is not a standard procedure of advising them of their rights in this situation.<sup>193</sup>

The CRS SOPs are also silent on the procedures to be followed for the destruction, or otherwise, of CIN-related prints in the event that an election to have a matter heard before a court results in a finding of not guilty.

The possibilities for dealing with a CIN recipient’s prints in relation to the various options for discharging the CIN are as follows:

CIN option	Outcome
CIN penalty paid	Automatic destruction of prints
Court elect and dismissal	Prints retained until POI requests destruction
Court elect and finding of not guilty	

In terms of the deletion of CIN-related print records, therefore, these outcomes appear to offer a definite advantage for those individuals choosing to settle a CIN matter by payment of the prescribed penalty, since their print record will *automatically* be destroyed.

The anomaly that presents itself, however, is that those persons who choose to defend the matter by exercising their entitlement to have it adjudicated before a court, will, if the charge is dismissed or they are found to be not guilty, still have their print records retained *unless* they request its destruction. It is arguable that these individuals, by virtue of the court finding them not guilty of the charge, should have an equal claim to the automatic destruction of their CIN-fingerprint records and that they should not be disadvantaged as a result of exercising their rights, and succeeding in their action.

**RECOMMENDATION 3:** That Parliament consider extending the requirement, in section 353AC (3) of the *Crimes Act 1900*, as amended, that any prints taken in conjunction with the issue of a Criminal Infringement Notice be destroyed upon the payment of the penalty fine, to include instances where a court, in the absence of a finding of guilt, dismisses the Criminal Infringement Notice charge or arrives at a finding of not guilty for the charge.

In relation to this recommendation, the Chief Magistrate of the Local Court made the following comments:

*“I support the inclusion of the destruction of prints taken in conjunction with the issue of a CIN to include instances where a court arrives at a finding of not guilty for the charge. Prints however should not be destroyed when a court finds a person guilty of an offence and without proceeding to a conviction makes an order that the charge be dismissed or discharges the person on conditions [vide s10 (1) (a) (b) (c) Crimes (Sentencing Procedure) Act 1999].*

*The retention of prints in these instances is necessary to ensure that the person is appropriately sentenced for any subsequent offence”.*

It is noted that the recommendation has been altered to reflect the Chief Magistrate's comments. NSW Police advised that they did not support the recommendation:

*"Once the election to court has been taken by an offender, the process should be treated as if a Court Attendance Notice had been issued. Fingerprints currently are not destroyed after a finding of not guilty by a court regardless of how court proceedings were initiated".*

## The provision for the taking of prints for identification purposes

In the Discussion Paper for our review a potential for confusion arising from the construction of the finger- and palm-printing provision of the amended *Crimes Act* was identified.<sup>194</sup> In essence, the amending provisions enabled police to require prints to be taken, and provided that failure to comply with the requirement may result in arrest for the offence concerned.<sup>195</sup> This is reflected in the SOPs, which state that suspects are to be given a warning that if they do not co-operate by providing their prints, then the CIN cannot be issued and the person may be arrested for the original offence and whilst in custody their prints may be taken without their consent.<sup>196</sup>

However, as currently constructed, the provision could be interpreted to mean that police may only require prints to be taken *after* the CIN has been served:

*A police officer who serves a penalty notice on a person under the Criminal Procedure Act 1986 may 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.*<sup>197</sup>

This interpretation appears to be reflected in the SOPs, where the suggested form of request for the prints is:

*I require your prints in case the need arises later to confirm you're the person who received this/these notice/s ...*<sup>198</sup>

The interpretation adopted in the SOPs could potentially call into question the legality surrounding the issue of a CIN for an offence, then requiring a person to submit to having their prints taken, and then arresting that person for the offence, for which a CIN has already been issued, should they decline the request for prints.

In our view, the use of the technical legal term 'serve(s)', as in to make a legal delivery of a process or writ, in the provision could encompass any and all steps required within that process to achieve the delivery of the document to the intended recipient and not only, as has apparently been interpreted in the SOPs, to mean the completion of that process. In addition, such an approach, in our view, gives effect to the clear intention of Parliament that finger- or palm-prints can be collected from CINs recipients.

So that the matter is free from doubt, it is recommended that the terminology used in the provision be clarified by amendment.

**RECOMMENDATION 4:** That Parliament consider amending section 353AC (1) of the *Crimes Act 1900*, as amended, to clarify that a request may be made for the taking of finger and/or palm prints at any time during the serving of a Criminal Infringement Notice.

The Chief Magistrate of the Local Court advised that he did not support the recommendation. NSW Police advised that they supported the recommendation.



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## Endnotes

- <sup>154</sup> s344(1), *Criminal Procedure Act*.
- <sup>155</sup> s353AC(1), *Crimes Act*.
- <sup>156</sup> For convenience and clarity, "print(s)" will be used in this discussion to mean finger- and/or palm-prints.
- <sup>157</sup> s353AC(2), *Crimes Act*.
- <sup>158</sup> s353AC(3), *Crimes Act*.
- <sup>159</sup> s353AD, *Crimes Act*.
- <sup>160</sup> s341, *Criminal Procedure Act*.
- <sup>161</sup> s353AE, *Crimes Act*.
- <sup>162</sup> s 353AC (1), *Crimes Act*.
- <sup>163</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 13.
- <sup>164</sup> A/Local Area Commander, Penrith Local Area Command, NSW Police, Submission dated 7 October 2003.
- <sup>165</sup> NSW Police Criminal Records Section, *Standard Operating Procedures (V3.0), Crimes Legislation Amendment (Penalty Notice Offences) Act 2002*, September 2002, p. 8.
- <sup>166</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 8 September 2004.
- <sup>167</sup> NSW Ombudsman, *Put on the Spot – Criminal Infringement Notices Trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper*, Sydney, 2003, p. 13.
- <sup>168</sup> The focus group process and responses are provided in Appendix A, questions 1-4.
- <sup>169</sup> A similar account of diversified policing practices in the collection of fingerprints was described to the review in a submission supplied by the Police Association of NSW: I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, attachment, p. 5.
- <sup>170</sup> Appendix A, Qn 1.
- <sup>171</sup> s169, *Criminal Procedure Act 1986*.
- <sup>172</sup> s169(3), *Criminal Procedure Act 1986*.
- <sup>173</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, attachment, p. 1.
- <sup>174</sup> *Ibid*.
- <sup>175</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 6.
- <sup>176</sup> s353AC(3), *Crimes Act*.
- <sup>177</sup> NSW Ombudsman, *Put on the Spot – Criminal Infringement Notices Trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper*, Sydney, 2003, p. 13.
- <sup>178</sup> Each of whom identified themselves as retired police officers.
- <sup>179</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Cover letter and Attachment, p. 2; I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, pp. 1 and 7; R. Lyon, Submission dated 16 October 2003; and J. Bourke, Undated submission received 27 October 2003.
- <sup>180</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Cover letter.
- <sup>181</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 7.
- <sup>182</sup> 338 (1) & (2), *Criminal Procedure Act*, specifically precludes the receipt and payment of a CIN from being considered as an 'admission of liability':
- 338 Effect of payment of penalty**
- 1) *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.*
  - 2) *Payment of a penalty under this Part is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.*
- <sup>183</sup> Appendix A, Qn 3.
- <sup>184</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Cover letter.
- <sup>185</sup> *Ibid*.
- <sup>186</sup> 1 NSWLR 608.
- <sup>187</sup> 36 A Crim R 390. We also note that the use, for unrelated criminal matters, by police of fingerprints lawfully obtained would not normally be determined unlawful: *R v Kelt* [1994] 2 ALL ER 780; *King v R* 26 August 1996, WA, CCA, unreported.
- <sup>188</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p 6.

- <sup>189</sup> NSW Police Criminal Records Section, *Standard Operating Procedures (V3.0), Crimes Legislation Amendment (Penalty Notice Offences) Act 2002*, September 2002, p. 8.
- <sup>190</sup> s353AC (3), *Crimes Act*.
- <sup>191</sup> NSW Police Criminal Records Section, *Standard Operating Procedures (V3.0), Crimes Legislation Amendment (Penalty Notice Offences) Act 2002*, September 2002, sections 2.5, 2.5.1 and 2.6.1.2, pp. 9 & 10.
- <sup>192</sup> *Ibid.*, section 2.5, p. 9. Underline added.
- <sup>193</sup> The Focus Group process and responses are provided in Appendix A.
- <sup>194</sup> NSW Ombudsman, *Put on the Spot – Criminal Infringement Notices Trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper*, Sydney, 2003, p. 12.
- <sup>195</sup> ss353AC (1) and 353AE (1) (d), *Crimes Act*.
- <sup>196</sup> The taking of prints in this fashion is authorised by s353A of the *Crimes Act*.
- <sup>197</sup> s353AC (1), *Crimes Act*. Our emphasis.
- <sup>198</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 15. Our emphasis.



# Chapter 11. Responses to the trial

This chapter examines the community reaction to the CIN scheme trial and its implementation and the response of the SDRO to certain aspects of the implementation. This discussion is based on feedback provided to our review or to involved agencies, as well as media coverage of the trial.

## Implementing the CIN scheme trial

Formal feedback in relation to the implementation of the trial was received in submissions from each of the State Chamber of Commerce and the SDRO.

At the time the *Penalty Notice Offences Act* was passed, Ms Margy Osmond, Chief Executive Officer, State Chamber of Commerce, told the *Sydney Morning Herald* that “the trial was ‘a great step forward’ but would need careful monitoring”.<sup>199</sup>

The State Chamber of Commerce subsequently advised our review that its attempts to assemble feedback from its members and networks proved unsuccessful because the:

*... overwhelming response from the Chamber’s Executive Officers and Presidents was that they were not aware that the trial had taken place in their Local Area Command.*<sup>200</sup>

Noting the lack of publicity and community liaison associated with the trial’s implementation at the local level, the State Chamber of Commerce expressed particular concern that:

*... many of the Presidents of the local Chambers of Commerce are also members of their local Police Accountability Community Team (PACT). This lack of information is a concern given that PACT is aimed at improving communications between Police and the wider community.*<sup>201</sup>

The State Chamber of Commerce’s submission lamented the lost opportunity to play “... a key role in communicating the purpose and status of the CIN trial to the community”, particularly since PACTs operate in each of the trial LACs.<sup>202</sup>

Information supplied to our review indicates that 52 per cent of all CINs issued were for the prescribed property offence of ‘larceny’ (which includes ‘shoplifting’ offences). A further four per cent of CINs were issued for the prescribed offence of ‘goods in custody’, thus, when combined, property offences involving theft constituted 56 per cent of the total number of CINs issued during the trial.

Our review of a selection of COPS entries suggests that at least 80 (and more likely up to 90) per cent of larceny offences for which CINs were issued involved retail theft, which might be of considerable interest to many of the State Chamber of Commerce’s members. Given the quantity of offences relevant to that organisation and the significant impact of the *Penalty Notice Offences Act* on the disposition of those offences it is unfortunate that the cumulative experiences and responses of this representative body’s members with respect to implementation of the *Penalty Notice Offences Act* was not available to us. They should certainly be consulted and informed at the general and local levels should the CIN scheme be extended and made permanent.

The SDRO’s submission underscored the omission of its Minister from the *Penalty Notice Offences Act*’s genesis and development. Having become aware of the legislation following an invitation from the IPB to contribute to the working party for the legislation’s implementation, the SDRO was reluctant, saying that:

*The original discussions concerning this proposed legislation and the Cabinet Minute should have involved the Treasurer as Minister responsible for the SDRO, particularly as funding was allocated to the NSW Police to enhance systems to enable the process to work.*<sup>203</sup>

The SDRO submission identifies the necessity of making a number of ‘key changes’ to its systems and processes, particularly in regard to the notification requirements associated with the destruction of fingerprints upon payment of a fine, for which it has borne the costs to date. It also raises the prospect of requiring “... further resources and/or funding to implement and maintain processing and reporting requirements” should the trial be extended beyond the trial coverage and seeks “... to contribute to discussions to achieve this”.<sup>204</sup>

With the IPB and the SDRO now located within NSW Treasury, it is highly likely that these agencies will be involved in any future planning and implementation relating to the rollout of the CIN scheme across NSW. This should certainly occur given the importance of their role in administering the scheme.

## Media response

The introduction of the CIN scheme trial received wide coverage, particularly in the print media, which continued to report on the scheme and the new powers that it provided to police several months into its implementation.<sup>205</sup> The reporting initially described the objectives of the trial scheme, legislative impact, prescribed offence types, and the duration and locations of the trial.<sup>206</sup>

The tone of the media reporting was generally favourable to the legislative amendments and the scheme overall, as exemplified by one editorial:

*Issuing on-the-spot fines for minor offences is a concept worthy of support. Outside of freeing up police for more pressing matters, it is a deterrent probably more effective than the current system.*<sup>207</sup>

The concept of infringement notices for criminal offences also drew notes of caution, however, evidenced by these comments from the same editorial:

*... the decision to also allow police to take fingerprints from fine recipients needs to be properly justified ... While a recipient can still take the matter to court, the fines represent a significant shift in the presumption of innocence.*

A second, still supportive, wave of media reporting<sup>208</sup> in relation to the CIN scheme trial occurred following an announcement by the (then) Minister for Police, the Hon. Michael Costa MLC, on 13 February 2003, that:

*Frontline police across NSW will be able to issue Criminal Infringement Notices (CINs) for minor, non-violent offences after a trial which has slashed red tape and put more police on the streets.*<sup>209</sup>

## Community responses

While we prepared a *Discussion Paper*, which was circulated to a wide range of individuals and community groups, and advertised the review in the *Daily Telegraph* and the *Sydney Morning Herald*, we received few submissions from members of the community in those locations where the CINs trial occurred.

Community experiences and reactions to the trial, however, were conveyed, directly and indirectly, in submissions supplied to our review by individuals and advocacy organisations and during the focus groups conducted with the police officer members of those LACs implementing the legislation.

In its submission to our review, NSW Police referred to the feedback received by its officers from community members of LACs where the scheme was operating. The majority of pilot LACs reported community perceptions of:

*... police [being] able to deal more quickly with suspects thus allowing them to resume operational duties more promptly.*<sup>210</sup>

Three trial LACs reported their impressions that “... the community was generally unaware of the trial”.<sup>211</sup> Those reports, NSW Police suggests, indicated that the CINs concept was generally accepted and supported within the trialled communities, provided that “powers were not abused, and recipients had the option of taking the matter to Court”.<sup>212</sup>

When asked about the ‘general community’ reaction to CINs, our focus groups suggested that the scheme had not been operating for a sufficient length of time for community members to develop hard and fast attitudes either for or against the scheme at that time.<sup>213</sup>

The police officer participants of the focus groups conducted in the Sydney metropolitan LACs offered interesting observations in relation to community perceptions of the CIN scheme trial. These inner city LACs included a large commuter population who worked in the city but resided in the suburbs, which hindered attempts to assess the overall ‘community’ attitude toward the trial. These group members also suggested that with relatively few CINs issued at each location,<sup>214</sup> there was little scope for an extensive evaluation of the trial’s impact on the community.<sup>215</sup>

## CIN recipients

While the risks of relying on police to report the perceptions of persons receiving a CIN for a prescribed offence are obvious, in the absence of direct feedback to us from recipients, police are well placed to observe any significant resistance or opposition to the concept and practice of issuing CINs.

The focus groups reported that the reaction of CINs recipients at the time they received a notice was generally positive, with little rancour or argument over the CIN. The following comments from the focus groups are typical of the nature and tone of the descriptions of the reactions of CINs recipients:

*If people commit an assault or shoplifting offence they are usually happy that they have been issued with a CIN rather than being charged because they don't have to go to court.*

*Most people are happy to receive a CIN when they realise that they are not going to receive a criminal record.<sup>216</sup>*

Officers in our focus groups attributed the largely positive reception from most CIN recipients to the following considerations for the offender:

- not being taken to a police station
- not being charged and required to appear before a court
- not acquiring a criminal record
- receiving assurance that any prints taken in the process are destroyed upon payment of the fine.

The capacity of these factors to be utilised as leverage toward influencing an offender's decision to accept a CIN became apparent to us when, on numerous occasions, officers described how they would present the alternatives of 'arrest, charge and court appearance' or 'CIN plus benefits' in order to obtain agreement to accept an infringement notice.

Another perspective on the attitude of CIN recipients to the scheme was provided in a submission supplied by The Shopfront Youth Legal Centre, a free legal service for homeless and disadvantaged people aged 25 years and under, which commented in part:

*There are many people who would prefer to save the time and trouble of going to court, and avoid the stain of a conviction. For many types of offences and offenders, an infringement notice is an appropriate response.<sup>217</sup>*

This comment was, however, qualified in relation to the (disadvantaged) economic capacity of those who used the services made available by The Shopfront and the consequences that would be likely to flow from their inability to pay a fine. The issue of financial capacity in relation to the payment of CINs will be discussed more thoroughly in Chapter 12.

The Shopfront submission also made reference to the absence of judicial scrutiny over the offences for which a CIN has been issued:

*Many people who are issued with infringement notices may have a valid defence to the charge. This is particularly the case with offences such as goods in custody and offensive language. In our experience, people are often prosecuted for goods in custody in circumstances where the property was in fact legitimately acquired. There are also many cases in which people are charged for offensive language for using words which the courts have found not to be offensive. Whilst issuing infringement notices for such offences does not deprive people of the opportunity to defend the allegations, it does make it less likely that the allegations will be subject to the scrutiny of a court.<sup>218</sup>*

Prior to the CIN scheme trial, the offences to which the submission refers would have been presented before a criminal court for adjudication, not only of the facts, but also of the legal status of the behaviour or language. However, as this submission notes, the opportunity to contest a CIN, and challenge its appropriateness in fact and law, is still available, even if the recipient declines the opportunity in preference to having the matter dealt with by means of a CIN.

## Victims

Seventy one per cent of CINs issued during the trial period were for those offences, including 'common assault', 'larceny', and 'goods in custody' where there was a readily identifiable victim while 29 per cent were for the public order and anti-social offences, including 'offensive behaviour' and 'offensive language'.

The police officers in our focus groups were asked about the response from the victims of those crimes where a CIN was issued. Again, the consensus at each of the focus groups suggested reasonably high levels of satisfaction expressed by victims of crime toward CINs, regardless of whether the offence was against a person (for example, assault) or property related (for example, shoplifting). The focus group participations offered the following explanations for this reaction:

- satisfaction that the incident is finalised
- the victim is generally not required to provide a written statement or attend a court hearing
- the monetary value of the infringement notice often exceeds that of a fine imposed by the courts.

While the State Chamber of Commerce thought most of its members in trial locations were unaware of the trial, the submissions from the NSW Police and the Police Association of NSW each reported the view that retailers in the trial LACs who were the victims of crime were:

*... generally satisfied once the procedure and outcomes of the CINs were fully explained i.e. knowing that the matter had been dealt with formally and swiftly.*<sup>219</sup>

The officers in our focus groups presented a similar perception of the supportive attitude to the CIN scheme from the business community in their particular locality:

*[The retailer was] initially peeved because shoplifters just walked away with a ticket as if they'd committed a parking offence. However, when police explained that repeat offenders were not given a CIN, but charged, they were usually quite happy.*

*Retailers were happy with the issuing of a CIN when they were informed that if the matter went to court they would need to write a statement, and take time off to attend court.*

*Shopkeepers in particular are happy with CINs once its explained that the actual infringement notice is a monetary value that is usually in excess of what they're going to get at court ... they sort of feel some sort of satisfaction in that.*

*Shopkeepers are happy with such an outcome, especially because of the consistent penalty CINs offered and because they saw the police get back on the street quickly.*

*A shopkeeper's familiarity with CINs strongly influenced their reaction to the scheme.*<sup>220</sup>

The focus groups reported similar views from the victims of assaults:

*Victims of assault are usually satisfied when the offender gets issued with a CIN.*

*Victims were generally happy that some action had been taken regardless that it was the issue of a CIN.*

*[Particularly with] assaults as they were spared the ordeal of appearing before a court.*<sup>221</sup>

The factors, therefore, which reportedly appealed to those victims of offences made the subject of a CIN, included the:

- timeliness and decisiveness of the consequence to the offending behaviour
- consistency and weighting of the monetary penalty for the prescribed offences which had been "set at the median fine amount for the [prescribed] offence"<sup>222</sup>
- retention of the capacity for repeat offenders to be charged and brought before the courts
- removal, in uncontested matters, of the need for the victim to attend at a police station for the purpose of preparing a statement and at court in the capacity of a witness
- knowledge that the attending police officers are freed up to return to their patrol duties.

## Responses from the police focus groups

As for the views of those police officers who were instrumental in implementing the CIN scheme trial, the vast majority of police participants in our focus groups expressed very positive attitudes towards the CIN scheme, its retention and state-wide expansion. They considered CINs to be an additional resource for them to draw upon in dealing with an offence. Typically the participants commented that they were:

- 'very happy' with the availability of CINs as an alternative consequence for less serious crime
- unanimous in their support for the statewide extension of CINs with an increased number of prescribed offences, for example, 'malicious damage' (although they recognised potential difficulties with compensation) and 'trespass'.

These issues will be examined in further detail in later chapters.

## Complaints arising from the trial

Feedback from members of the public, an agency's clientele, or staff, may be received in the form of compliments, concerns based on experience or speculation, or complaints. Frequently, and regardless of the form of the feedback, much useful information concerning the implementation or operations of an agency's processes or systems may be gleaned from individuals' comments about how an agency is performing.

NSW Police, the IPB and the SDRO each maintain complaint handling systems. In an attempt to gauge the level of satisfaction of or issues raised by recipients of CINs during the trial period, each of these agencies agreed to supply us the content of complaints, and compliments wherever received, relating to criminal infringement notices.

This section outlines the content of those complaints and compliments as forwarded by each of the participating agencies to our review.

### Infringement Processing Bureau

The IPB advertises a mechanism for internal review of infringements:

*The Adjudication Unit of the Bureau provides an opportunity for review of infringements in terms of good driving records or extenuating circumstances. People may elect to have their matter determined by a court, which always remains an option if unsatisfied with the review result*

*The adjudication of client issued infringements is a co-operative process between the IPB and the client agency.<sup>223</sup>*

NSW Police is a client agency of IPB, which customarily provides a review facility for police-related infringement matters.

However, as discussed in the section titled 'Withdrawal of a Penalty Notice', above, the CINs Steering Committee took the decision not to consider CINs-related 'representations' on the basis that the legislation provided notice recipients with a 'court-elect' option for hearing and adjudicating contested infringements.<sup>224</sup> This decision may be problematic for several reasons:

- the public invitation to make representations on other types of infringement notices to the IPB's Adjudication Unit contained on their website and published brochures
- the precedent established by their consideration, over a substantial history, of representations which presently number "over 200,000 items of correspondence per annum"<sup>225</sup>
- the existence of administrative law principles and associated practices that require or encourage the use of internal methods of review before having it dealt with by an external oversight or complaint handling agency.

In relation to the trial period, the IPB provided us with copies of 41 representations sent to it concerning CINs.<sup>226</sup> Twenty-one (51 per cent) of the representations sought either a dismissal of the notice or waiver of the fine, 11 (27 per cent) were requests for extensions of time to pay or approval to pay by instalments, and 2 (five per cent) were requests to withdraw and return the notice received from the LACs where the CINs' were issued. These withdrawals were submitted on the basis that a review by a senior police officer had determined it to be an inappropriate disposition for the offence in question.<sup>227</sup> Seven (17 per cent) were of a miscellaneous nature.



Four of the representations claimed that the offenders had received their CINs in the mail despite the legislative requirement that a notice be served personally.<sup>228</sup>

### **State Debt Recovery Office**

For the purposes of the CIN scheme trial and by arrangement with the SDRO, arrangements were made for monthly reports containing the number and outcome of applications for annulment of penalty notice enforcement orders,<sup>229</sup> and the details of each of Ministerial and non-Ministerial complaints processed by SDRO to be forwarded to our review.

The SDRO reported no complaints or applications for annulment of an enforcement order received in respect of CINs issued during the trial period.<sup>230</sup>

### **Ombudsman**

In relation to complaints concerning NSW Police, one aspect of the Ombudsman's role is essentially to oversight how well NSW Police and its commanders are handling and investigating these complaints, managing officers who are the subject of complaints, and taking action to address any broader issues of police management that have been raised.

In relation specifically to the CIN scheme trial, the Ombudsman did not receive any direct complaints concerning the implementation or operation of the *Penalty Notice Offences Act* either during the trial period or thereafter.

### **NSW Police**

Under the scheme established by the *Police Act 1990*, NSW Police have the primary responsibility for dealing with police complaints. This is consistent with the responsibility of any government agency to handle complaints about the conduct of its staff. In the area of complaints about police, a particular obligation falls upon Local Area Commanders to take responsibility for the effective investigation of complaints about officers under their command.

NSW Police's computerised 'customer assistance tracking system' (known as 'c@tsi') was designed to provide police investigators, commanders and the Ombudsman's police complaints team with immediate access to information about each police related complaint simultaneously. It was also intended to facilitate the compilation of statistics for police complaints and their management based on mutually agreed reporting parameters.

Although c@tsi contains a single recorded instance of a CIN having been issued in partial response to a criminal behaviour ('offensive language') which was the subject of an internal NSW Police complaint, no complaints relating to the implementation or operation of the CIN scheme trial or the issue of a CIN *per se* were found recorded on c@tsi.<sup>231</sup>

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## Endnotes

- <sup>199</sup> S. Gibbs. *On-the-spot fines for theft and assault*. *Sydney Morning Herald*, 4 June 2002.
- <sup>200</sup> M. Osmond, Chief Executive Officer, State Chamber of Commerce (NSW), Submission dated 24 October 2003.
- <sup>201</sup> *Ibid.*
- <sup>202</sup> Information since supplied in an attachment to a letter from the Minister for Police, dated 30 November 2004, advises, “The CINs trial was discussed in PACT meetings for three of the trial LACs prior to, and shortly after, the commencement of the trial. In three LACs, PACT members indicated that the CINs trial was of no interest to them”.
- <sup>203</sup> Director, State Debt Recovery Office, Undated Submission, Received 31 October 2003.
- <sup>204</sup> *Ibid.*
- <sup>205</sup> The CIN trial’s introduction was heralded by a media release from the (then) Minister for Police, The Hon. Michael Costa MLC, titled *Less paperwork for police means more time on streets*, on 3 June 2002. The release was disseminated through the NSW Police Media Unit.
- <sup>206</sup> *Daily Telegraph, Instant Justice*, 4 June 2002, p. 1; *Sydney Morning Herald, On-the-spot fines for theft and assaults*, 4 June 2002; *Illawarra Mercury, New powers mean less paperwork for police*, 4 June 2002.
- <sup>207</sup> *Daily Telegraph, Editorial*, 4 June 2002, p. 14.
- <sup>208</sup> *Daily Telegraph, Fines trial spot on, says Costa*, 14 February 2003; *Sydney Morning Herald, Fines for crimes to be tested statewide*, 14 February 2003.
- <sup>209</sup> Minister for Police, *Less red tape and more street policing as criminal infringement notices trial goes statewide*, Media Release, 13 February 2003.
- <sup>210</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, attachment, p. 2.
- <sup>211</sup> *Ibid.*
- <sup>212</sup> *Ibid.*, p.3.
- <sup>213</sup> Appendix A, Qn 5.
- <sup>214</sup> The number of CINs issued per LAC over the trial period ranged from 270 (City Central) to 70 (Bankstown).
- <sup>215</sup> Appendix A, Qn 5.
- <sup>216</sup> Appendix A, Qn 6.
- <sup>217</sup> J. Sanders, Principal Solicitor, The Shopfront, Youth Legal Centre, Submission dated 23 October 2003, pp. 1 - 2.
- <sup>218</sup> *Ibid.*
- <sup>219</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, attachment, p. 2.
- <sup>220</sup> Appendix A, Qn 7.
- <sup>221</sup> *Ibid.*
- <sup>222</sup> The Hon. M. Costa MLC, *NSWPD*, Legislative Council, 18 June 2002, p. 3202.
- <sup>223</sup> <http://www.police.nsw.gov.au/ipb/ipb.cfm>, NSW Infringement Processing Bureau, Office of State Revenue, NSW Treasury, April, 2004.
- <sup>224</sup> A decision of the CINs Steering Committee meeting of 9 April 2003, Agenda item No. 7.
- <sup>225</sup> <http://www.police.nsw.gov.au/ipb/ipb.cfm>, NSW Infringement Processing Bureau, Office of State Revenue, NSW Treasury, April, 2004.
- <sup>226</sup> Details of the representations are provided in Appendix F.
- <sup>227</sup> s340, *Criminal Procedure Act*.
- <sup>228</sup> s334 (2), *Criminal Procedure Act*.
- <sup>229</sup> Section 48 of the *Fines Act* provides for the recipient of a penalty notice, or a person acting on their behalf, to apply for the annulment of an enforcement order made against the person in relation to that penalty notice. Application for annulment must be made in writing within one year of the making of the enforcement order.
- <sup>230</sup> Director, State Debt Recovery Office, Office of State Revenue, Undated submission received on 31 October 2003, p. 1.
- <sup>231</sup> The complainant police officer was allegedly the subject of verbal abuse from another, off-duty, intoxicated, police officer. The matter was investigated by a senior police officer and a CIN subsequently issued as a partial consequence of the offence. This outcome is inconsistent with the NSW Police SOPs prepared for the trial, which state, “CINs are not to be issued to a serving police officer”, *NSW Police, Education Services, Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p.8.. This position was affirmed by the CINs Steering Committee Meeting Minutes, 7 February 2003. The Act is, however, silent in relation to the issue of CINs to police officers. Information since supplied in an attachment to a letter from the Minister for Police, dated 30 November 2004, advises that at the time of the instant matter the second of two versions of SOPs was in effect, however, “At the time the subject matter was dealt with the first version of the SOPs was the only available on the NSW Intranet. Although the second version had been released it had not been uploaded. As such the decision to issue a CIN was based on the SOPs available at the time”.



# Chapter 12. Implications for the community, offenders and crime

In our Discussion Paper we foreshadowed that we would consider some of the issues arising from the use of CINs as an alternative option for police to deal with criminal offending. We advised that the following questions would be given particular consideration:

- Was there any net widening effect from the use of CINs, where people were now being penalised for offences so minor that they would not have previously come into contact with the formal criminal justice system?
- Does the CIN scheme amount to a diminution in the seriousness attached to the prescribed offences?
- Was there any adverse impact on any particular population groups, such as people of Aboriginal and Torres Strait Islander descent, people from non-English speaking backgrounds and young people?

This chapter considers the issues raised by these questions in detail.

## Is there any evidence of ‘net widening’?

One concern expressed in the legislative debate on the Penalty Notice Offences Bill was that making it easier for police officers to ‘prosecute’ matters – in this case, not having to go to court unless the offender elected to do so – might increase the likelihood that police would formally intervene in situations where previously they may not have intervened or instead issued a caution or warning to the offenders. One Member summed up these concerns as follows:

*My concern is that we will end up with a situation in which police may use their discretion to issue fines in preference to choosing to issue cautions, especially when it comes to members of certain ethnic communities.*<sup>232</sup>

Proposals for initiatives aimed at diverting people from the formal criminal justice system will almost inevitably raise concern about ‘net widening’. For example, the Aboriginal Justice Advisory Council identified the risks of net widening in an issues paper on diversionary schemes:

*Net widening is a significant risk and may be more apparent for diversion schemes aimed at the front end of the criminal justice process, such as diversion from arrest and charge. Any attempt to formalise the use of police discretion to divert people from the criminal justice system may be particularly susceptible to this criticism.*

*Net widening can have the reverse effect of diversion by increasing the number of people in the justice system and increasing the level of intervention those people are subject to.*<sup>233</sup>

One example of net widening from the use of diversionary options by police occurred in South Australia with the introduction of ‘Cannabis Expiation Notices’ as an alternative to prosecution. From 1987-88, when the scheme was introduced, to 1993-94 the number of notices issued for cannabis offences rose from 6,200 a year to 17,000.<sup>234</sup> Interestingly, from 1997 to 2001, the number of expiation notices issued annually fell from 13,238 to 8,356. Both trends have been attributed to “changes in police practice and in particular the allocation of resources to deal with these offences”.<sup>235</sup>

In Queensland, after the introduction of ‘Notices to Appear’<sup>236</sup> in 1998, a comparison of the July–September quarters for 1997 and 1998 showed an increase of 41 per cent in the number of ‘public order’ offences,<sup>237</sup> with the entire increase attributed to police having the option to issue the notices as an alternative to arrest.<sup>238</sup>

In response to our Discussion Paper, the NSW State Office of the Aboriginal and Torres Strait Islander Services (‘ATSIS’) noted recommendations by the Royal Commission Into Aboriginal Deaths In Custody (‘RCIADIC’) that police officers be given “greater encouragement to proceed by way of caution rather than by arrest, summons or attendance notice”. ATSIS expressed concern that:

...the practise of police issuing fines for minor criminal offences will replace or diminish the previous recommended practice of issuing cautions or warnings to indigenous people. Of major concern is that the practise of issuing fines for minor criminal offences may lead to a further accumulation of debt.<sup>239</sup>

The Legal Aid Commission submitted that there was an argument that the CINs system:

...may operate unfairly against more visible groups in the community eg Aboriginal people in more remote areas of New South Wales. This may be addressed by appropriate training, but unless it is, the net widening effect is a matter of concern.<sup>240</sup>

The interim evaluation of the PND pilots in the United Kingdom found that an increase in the total number of cautions, prosecutions and PNDs during the trial period compared to the number of cautions and prosecutions in the time prior to the pilots indicates a net widening effect from the availability of PNDs.<sup>241</sup>

In its submission to our review, NSW Police said that:

It is too early for NSW Police to identify established patterns in changes to the number of charges as they are either negligible or could be attributable to other variables.<sup>242</sup>

The Police Association advised us that based on the advice of their members:

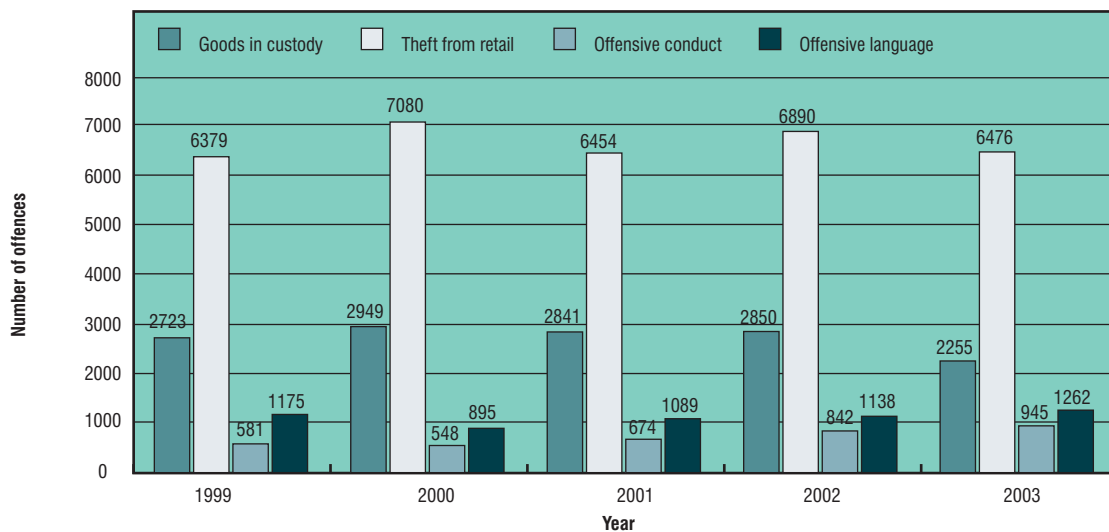
...there has not been any significant change in the police use of their discretion to intervene in incidents by allowing the issuing of CINs.<sup>243</sup>

To examine whether there has been any net widening effect arising from the use of CINs in the trial locations, we examined the number of selected offences in those locations, the trends for these offences and compared these to state-wide numbers.

The selected offences are 'goods in custody', 'steal from retail store', 'offensive conduct' and 'offensive language'. These offences make up 85 per cent of the offences that attracted a CIN during the trial period. Furthermore, these offences generally involve different modes of policing: police are most likely to be called by the victim where a retail theft has occurred; offensive conduct and language are most likely to be observed in the course of policing public places; and charges of goods in custody are likely to arise from the investigation of another offence.

In LGAs covered by the trial LACs, there was a decrease in the number of goods in custody and steal from retail store offences from 2002 to 2003, while there was a significant increase in the number of offensive conduct offences between 2001 and 2002, and 2002 and 2003. An increase also occurred in the number of offensive language offences during this period.

Figure 11: The frequency of selected offences in locations included in the trial\*

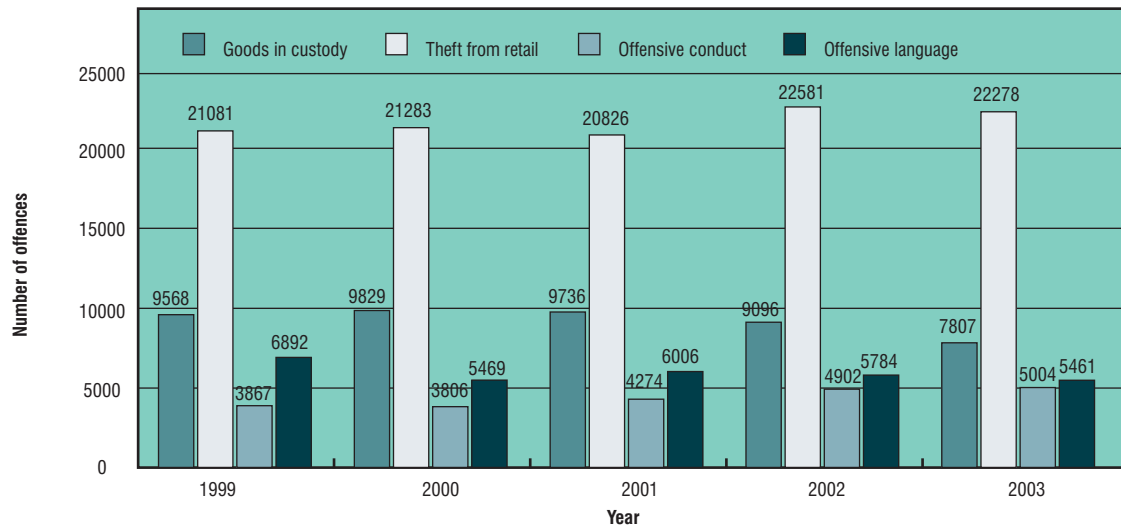


Source: BOCSAR, 1999-2003.

\* This information is based on local government areas roughly corresponding to commands included in this trial.

The state-wide figures showed similar trends in the number of offences:

**Figure 12: Frequency of selected offences across NSW**

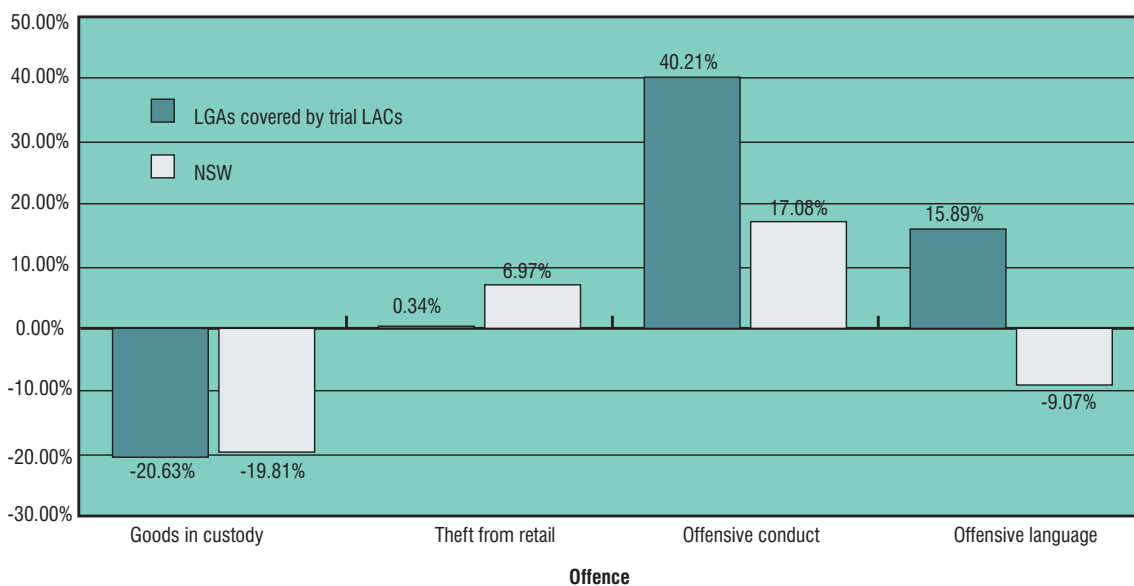


Source: BOCSAR, 1999-2003.

The percentage change between 2001 (the last full year where no CINs were issued) and 2003 (where the trial LACs had the CINs option for the entire year) indicates significant increases in the number of charges for offensive conduct in the trial locations with a 40.2 per cent increase (compared to a statewide increase of 17.1 per cent) and for offensive language with a 15.9 per cent increase (compared to a statewide decrease of 9.1 per cent).

There was a significant decrease in the number of goods in custody charges both statewide and in the trial areas, while the increase in the number of theft from retail store offences was at a lower rate in the trial areas than the increase across NSW.

**Figure 13: Change in frequency of selected offences from 2001-2003**



Source: BOCSAR

## Illustration: Offensive language and net widening

To examine the possibility that the availability of CINs as an option to deal with certain offences might cause net widening, we specifically considered the use of CINs in relation to offensive language offences. This was done for a number of reasons. First, it can be a useful measure to determine the extent of public order policing in a particular area. BOCSAR has found that changes in the number of recorded offensive language incidents generally reflects changes in policing activity rather than changes in the incidence of the offence.<sup>244</sup>

Second, we wanted to examine the possibility that issuing CINs for offensive language might see increases in the number of instances where there is formal intervention by police to deal with the offence.

Third, that, in line with previous trends in public order offences, we wanted to examine whether these increases might disproportionately and adversely affect Aboriginal and Torres Strait Islander people in particular.

As the following table shows, there was no consistent trend across the LGAs covering the trial LACs in the changing rate of offensive language between 2001 (the last year where CINs was not an option for the whole year) and 2003 (the first year where CINs was available as an option for the whole year), with changes in the rate ranging from an increase of 73.9 per cent (Albury) to a decrease of 17.6 per cent (Kiama). However with the change in the rate for all of NSW being a 10 per cent decrease from 2001 to 2003, ten of the 12 LGAs saw either an increase in offending rates or a smaller decrease than the rate for NSW.

**Figure 14: Change in rates of offensive language offence from 2001 to 2003**

Local Government Area (Trial LAC which covers similar area)	Offences per 100,000 residents (2001)	Offences per 100,000 residents (2002)	Offences per 100,000 residents (2003)	% change from 2001 to 2003
New South Wales (N/A)	91.3	87.1	82.2	-9.97%
Albury (Albury)	234.1	332.9	407.1	73.90%
Bankstown (Bankstown)	30.2	29.4	28.8	-4.64%
Blacktown (Blacktown)	102.7	88.1	91.8	-10.61%
Hawkesbury (Brisbane Water)	70	61.6	64.7	-7.57%
Kiama (Lake Illawarra)	30.1	29.8	24.8	-17.61%
Lake Macquarie (Lake Macquarie)	28.2	41.9	35	24.11%
Parramatta (Parramatta)	69.7	62.7	65.4	-6.17%
Penrith (Penrith)	82.9	77.4	103.2	24.49%
Shellharbour (Lake Illawarra)	18.4	24.7	24.7	34.24%
Sutherland (Miranda)	45.4	47	46.5	2.42%
Sydney (The Rocks)	466.4	541.1	658.4	41.17%
Wyong (Tuggerah Lakes)	57.6	57.2	63.7	10.59%

Source: BOCSAR, 2001-2003

It is difficult at this stage, on these figures alone, to conclusively determine if the concerns about significant net widening from the introduction of CINs are founded. In fact, the existence or not of net widening is likely to be determined only after the CIN scheme has been extended and in operation for some years. However, that does not preclude us from identifying some issues that should be kept under scrutiny should the scheme be extended.

## Illustration: Police determining what is considered to be offensive language

Police discretion in deciding to formally intervene in a matter they consider to involve offensive language is a significant issue, not least because of the possibility that an infringement notice may be issued for language that might not be considered by the courts to be offensive.

The issue of bringing judgement to bear on whether the language in question is offensive or not led to the ACT Attorney General's Department recommending against the use of on the spot fines for offensive language charges in that jurisdiction:

*... in the past the Courts have rejected police interpretations as to what is offensive behaviour. At present a Magistrate, sitting in open Court and subject to media reporting, supplies the community understanding of what behaviour is offensive to the public. It is not in the public interest for the function of determining the boundaries of community tolerance to be transferred to police...*<sup>245</sup>

It would be unfortunate, to say the least, if a CIN was issued in respect of language that would not be considered offensive if the conduct in question were to be referred to the courts. To determine whether there was any evidence of this occurring, we conducted a random audit of the CINs issued for offensive language.

Twenty percent of the CINs for offensive language issued during the trial period were reviewed, and considered against the judgement in *Police v Butler*,<sup>246</sup> determined in the Local Court in 2002.

In deciding this matter, the magistrate considered case law going back to 1966,<sup>247</sup> including a number of unreported cases in the NSW Supreme Court,<sup>248</sup> and analogous matters in other Australian jurisdictions.<sup>249</sup> This judgement, by Magistrate David Heilperin, has been highlighted by the local courts as an aid to determining the question of offensive language.<sup>250</sup>

The charge concerned an intoxicated person and an incident where she uttered the word "fuck" and its derivatives 12 times in the course of 10 sentences directed at police and the defendant's neighbours. In considering the case, Magistrate Heilperin noted an unreported Supreme Court case (*McNamara*) in 1988 where the decision was to uphold a magistrate's view that the words "get fucked" and "cunt" were not "intrinsicly 'offensive' in the requisite legal sense of the word".<sup>251</sup> He also considered a 1991 Supreme Court decision (*McCormack*), which held that the language in that matter was offensive.<sup>252</sup> He argued that the latter judgement might not stand up in view of subsequent decisions and current standards:

*... it is fair to say that the only authority [ie McCormack] that the word "fuck" or its derivatives is offensive is distinguishable on its facts, is inconsistent with McNamara, is now some eleven years old and is inconsistent with the obiter comments in Anderson. It is not a situation where I feel bound to follow McCormack.*<sup>253</sup>

Magistrate Heilperin stated that:

*In short, one would have to live an excessively cloistered existence not to come into regular contact with the word [fuck], and not to have become somewhat immune to its suggested previously legally offensive status. It is perhaps...that standards have slipped. It may also be that they have simply changed.*<sup>254</sup>

He acknowledged that the language used might run against standards of good taste or good manners, and that some people may be offended by the words, however he was not free of doubt that a "reasonably tolerant and understanding and contemporary person in his or her reactions would be wounded or angered or outraged".<sup>255</sup> Such language, he went on to say, might be viewed as regrettable but not uncommon.

The essential test for Magistrate Heilperin then was:

*... what difference would it make to the reasonably tolerant person if swear words were used or not. I answer that there would be little difference indeed. In short, my view is that community standards have changed and that I am not satisfied beyond a reasonable doubt that the language used was offensive within the meaning of the Act in the factual circumstances of this case.*<sup>256</sup>

We obtained all the events numbers where a CIN was issued for 'offensive language' during the trial period to consider them against the decision in *Police v Butler*. We then selected 37 matters at random (being 20 per cent of the total number of records) and reviewed the narrative recorded by police on COPS. In most cases the narrative recorded the words used, and the circumstances in which they were used. However, the narrative for one record



did not contain any description of the circumstances in which the CIN was issued for 'offensive language', and it was not considered any further during the audit.

Of the 36 valid events there were:

- 32 events (89 per cent of all valid events) involving the use of the word "fuck" and its derivatives, with 8 events (22 per cent) recording that the word had been used at least five times in the incident
- 9 events (25 per cent) involving the use of the word "cunt", with only 2 of these events not involving the use of the word in combination with "fuck" or its derivatives
- 1 event (3 per cent) where there was no recorded use of either of the words "cunt" or "fuck" or its derivatives. The word used was "bullshit", which was said twice
- 32 events (89 per cent) where the language was directed at police or security guards
- 27 events (75 per cent) involving another offence or incident to which the police had responded
- 17 events (47 per cent) where it was clear that the offender was at least moderately affected by alcohol, with 7 of those events (19 per cent) recording that the person was heavily or extremely affected by alcohol
- 10 events (28 per cent) where the offence had occurred in or near licensed premises
- 18 events (50 per cent) where the offence had taken place between midnight and 6.00 am, and 23 events (64 per cent) where it occurred between 9.00 pm and 6.00 am
- 3 events (8 per cent) where the presence of children nearby was noted in the narrative, and 3 events where the presence of elderly persons nearby was noted.

A positive aspect of the administration of the CIN occurred with respect to warning the offender prior to issuing a CIN even though there is no legislative requirement to do so, with:

- 31 events (86 per cent) where the narrative recorded that the officer(s) involved had given a warning prior to issuing a CIN
- 16 events (44 per cent) where the narrative recorded that the officer(s) involved had given two or more warnings prior to issuing the CIN.

However four events (11 per cent) recorded that the CIN was issued to the offender by mail, in spite of the requirement of s 334(2) of the Act that the CIN be served in person. This failure to adhere to legislation is of some concern, and should be addressed in future education and development initiatives concerning CINs.

The SOPs stipulate that CINs are not to be issued to persons who are so seriously intoxicated that the officer believes them to be unable to comprehend the procedure. While it is not clear that the offenders in question were unable to comprehend the procedure, nearly one in five events involved persons who were heavily or extremely affected by alcohol.

What becomes apparent from examining the event records is that the vast majority of offences arise from the offender swearing at police or security guards, where the police are in attendance to deal with another offence or incident. A significant number of incidents occurred late at night or early morning with half of the persons concerned at least moderately affected by alcohol.

The description of these circumstances in many of the narratives lends weight to an argument that the words spoken would not be considered offensive if the matter was to be determined by a court. The characteristics of many of these offences, involving as they do alcohol, licensed premises and/or a late hour, seem at least analogous to the circumstances in one of the cases favourably considered by Magistrate Heilpern, *Saunders v Herold*,<sup>257</sup> where the use of "fuck" and "cunt" were not held to be offensive because:

*in the absence of a group of school children, aged pensioners or a congregation of worshippers gathered outside the Canberra Workers Club, there was not likely to be present anyone who would, rightly or not, be considered by the reasonable bystander to be offended so as to indirectly offend that bystander.*

Using the tests established in *Police v Butler*, three of our officers, independently of each other, reviewed the 36 event narratives to determine whether, in their opinion, the language used would have resulted in a conviction at court. Of the 36 records, the three officers agreed that if a court decided these matters it would be unlikely to find the defendant guilty of offensive language in 22 matters (61 per cent) if *Police v Butler* were applied to the incidents under review.

While there is no doubt that the language complained of in these incidents was frequently ill mannered, crude and belligerent, it was not clear that the offender intended the language to offend. In some instances the swearing seems to be an unwitting expression of anger, frustration or bravado, or it seems to serve the function of punctuation or emphasis. What is not apparent in these cases is the presence of other individuals who are or would be offended by the language.

Among the incidents under review were the following:

- ◇ A man, moderately affected by alcohol, attended a police station at 4.50 am to complain that earlier that night police had taken his details when he informed them of an incident of malicious damage. The explanation offered in reply by police did not placate him, and he started to become more hostile, yelling and swearing at police as he left the station. Two officers chased him from the station, and after catching up with him, ordered him to lie on the ground, which he failed to do. Fearful that he might physically resist arrest, one of the officers discharged a burst of OC spray in his direction. He was returned to the station where ambulance personnel decontaminated him, following which, he was given a CIN for offensive language.
- ◇ Outside a football ground where a match was underway, a man was heard to yell, at the top of his voice, “*Yeh fucken oath fellas, fucken oath*”.<sup>258</sup> As the officers did not have their CIN book at the scene, he was advised that he would be receiving a CIN. A CIN was subsequently issued.
- ◇ Police were called to a caravan park where a small group of men had been yelling abuse at and threatening the park security. After one of the men was told to desist by the officer, he yelled “*you carn’t fucken do this*”. He was issued with a CIN.
- ◇ A male driver reversed his car into a parked taxi. He started to drive away but was pursued by the police, and stopped after a short distance. When police advised the driver that he had reversed into the taxi, causing some damage, he shouted “*bullshit*”, and when shown the damage, he shouted “*That’s bullshit! I did not hit him. You know taxis are always wrong*”. He was issued with a number of traffic infringement notices, and a CIN for offensive language.
- ◇ After being removed from a railway station by CityRail security and taken to a nearby police station, the person of interest called police “*fuckin’ dopes*”, and was told that a CIN for offensive language would be sent to him.
- ◇ At 11.40 pm a patron was removed from a nightclub but he refused to leave the front of the club premises when asked to do so by security. Police attended and asked him to move on. He used the word “*fuck*” on numerous occasions, inserting it into most of his conversations, such as “*fuck this, your fuckin’ kidding, this is really fucked*.” He was advised that he was under arrest for offensive language, and was taken back to the police station where a CIN was issued. The CIN was apparently not issued at the scene as the officers did not have a CIN kit available to them.
- ◇ A woman was present at a police station at 4.20 am, where she was heard to yell at her boyfriend “[boyfriend’s name] *your a fuck head*” and “*fuck you*”. After being told to stop swearing, she was made to leave the station, and yelled back at police “*well fuck you’s*”. She was then detained, asked for identification, finger printed and issued with a CIN.
- ◇ A customer returned to a service station to complain that he had not been given a phone card for which he had paid. The console operator was adamant that he had been given the card, and told him to return in the morning. The customer continued to argue with the operator for about an hour. The operator activated his alarm, and police attended the scene. The customer was asked to leave the scene, but he apparently refused, telling police to “*just fuckin’ lock me up*”. He was physically restrained, handcuffed and arrested. He was taken back to the police station and was issued with a CIN for offensive language and an infringement notice for failing to comply with a direction to move on.
- ◇ At 4.35 am outside a police station adjacent to a busy railway station/bus stop, a man was talking on his mobile phone. In the course of his phone conversation he used the word “*fuck*” on numerous occasions and was warned by police twice to cease the swearing. On the third occasion he was asked to provide identification, and was told that an infringement notice would be posted to him. A CIN was subsequently issued, and posted to him.

Again, there is no doubt that the language used in these incidents was intemperate and ill mannered. What is in doubt is the present capacity of those words to offend, in the sense that they might wound, anger or outrage the reasonable person. With a popular culture where the same words frequently punctuate movies and late night television, where three songs, heavily featuring the word “fuck”, have each been in the top 50, with two of them number one,<sup>259</sup> in the Australian music charts during this year, and the music videos for these songs (where the actual swear words are heavily edited out for children’s viewing hours but the missing words are obvious) are played on television on Saturday and Sunday mornings, the capacity of the words to be regarded as offensive as they once were must come into question. Even recent controversy about the use of the word in an address to high school students focussed on the appropriateness of using it in that context, with no serious suggestion that offensive language charges be laid for its use.

We are aware that formal interventions for offensive language or conduct are often used by police to prevent a more serious offence from occurring, or in response to a complaint from a member of the public who may be frightened or intimidated by the behaviour of the offender:

*... police often find themselves in situations where intoxicated persons, Aboriginal and non-Aboriginal, are behaving in such a violent or threatening manner that it is imperative that they be removed from the area before their conduct escalates to more serious offending. In carrying out their duty to prevent further offending, or injury to themselves, other persons or property, police are often resisted, usually due to the intoxicated state of the person being arrested.<sup>260</sup>*

While the rationale for this approach is valid, it is perhaps equally possible that formal intervention for offensive language by means of issuing a CIN will escalate any conflict between the police and the offender, especially when the offender realises that they are now liable to pay a fine of \$150, with the only alternative for them is to take the matter to court. It is possible that such situations might be adequately and sufficiently addressed without having to impose a fine by moving the person on, either by using the reasonable directions provision of the *Summary Offences Act*<sup>261</sup> (where a person can be requested to move on if their conduct is causing or likely to cause fear to another person) or by dealing with the situation more broadly as a breach of the peace.

The fact that police issued a warning prior to issuing a CIN in 89 per cent of the events that we reviewed indicates that CINs are generally not the first option for police when intervening in these situations. However the extent to which they are issued for matters that are unlikely to result in a conviction if they were taken to court is evidence of an undesirable net widening effect.

A possible remedy for this net widening effect would involve two approaches: clear guidance to police officers on what constitutes offensive language (or more to the point, what does not constitute offensive language), and subsequent monitoring and review of the events for which CINs have been issued. This monitoring and review should occur as part of the general supervisory process, as it provides an opportunity away from the scene of the offence to dispassionately review whether the CIN was the appropriate course of action. The power given to senior police officers to withdraw CINs that have been incorrectly issued should be exercised in those cases where a review of the event indicates that the CIN was too harsh a response to the incident.

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.

RECOMMENDATION 6: That the events recorded on COPs relating to offensive language and conduct offences be reviewed by supervising officers to determine whether the Criminal Infringement Notices issued are the appropriate action to take in relation to the incident.

RECOMMENDATION 7: That senior police officers withdraw those Criminal Infringement Notices that are considered to be an inappropriate response to a particular incident.

NSW Police advised that they did not support Recommendation No. 5:

*“The Portfolio believes that in deciding whether the language used is offensive should be guided by current case law. NSW Police will be issuing a Law Note providing guidance on existing case law. The decision, however, 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”.*

In our view, this response is consistent with our recommendation.

In relation to Recommendation No. 6, NSW Police identified a potential source of confusion in that the recommendation does not adequately stipulate whether the proposed review, by supervising officers of the appropriateness of issuing a CIN, should be retrospective, for the period of the trial past, or prospectively applied to future infringements.

Although the issues identified in the review were derived from the operations of the legislation during the trial period, the recommendations developed from those issues are intended and offered only for future applications of the legislation. The recommendation's wording has been altered to make this clear.

Further to Recommendations No. 6 and 7, NSW Police offered that *"All events irrespective of their nature, whether a charge was made or not, are reviewed by supervising officers to determine if NSW Police action was appropriate"*.

This Office is aware that some, but not all, events are reviewed by supervisors. The nature and quality of that review, we believe, is variable. These recommendations are directed at particular events where CINs are issued for offensive conduct and language offences, and the available information demonstrates a need for more comprehensive supervision of these matters vis a vis over CINs or general police events.

In relation to recommendation No. 7, the Office of State Revenue advised that, *"Withdrawal procedures would need to be established to ensure the communication of such instances expediently to IPB. Fines Enforcement Branch of SDRO has previously undertaken not to withdraw fines under Section 46 (1) unless directed to do so by IPB"*.

## Diminution of the seriousness of offences

The Discussion Paper for this review addressed the concern, expressed during the passage of the *Penalty Notice Offences Act*, that the seriousness accorded to the prescribed criminal offences might be 'downgraded' as a consequence of the new regime. This view appears based on the apprehension that the offender will not fully appreciate the seriousness of the offence if they are issued a 'ticket' for an offence, which in other circumstances, would warrant punishment by a significantly larger fine and/or a term of imprisonment had the matter been prosecuted in a criminal court.

Several of the submissions received by our review addressed this issue, most of them expressing concern about the possible diminution of the seriousness of the offences for which a CIN might be issued.<sup>262</sup> In particular, the Chief Magistrate of the local court, Judge Derek Price, expressed objection to the possible adverse impact of CINs on communicating the seriousness accorded by the community to some of the prescribed offences:

*It is my submission that the offences under the Crimes Act (s. 61, s. 117, s. 527A, s. 527C) should not be offences for which a CIN may be issued. The offence of common assault was the second most common offence in the Local Court in 2002. The offence of larceny the third most common and the offence of goods in custody ranked 17<sup>th</sup>. Specific and general deterrence are significant factors for a Court to consider in imposing a sentence for these offences. Arrest, charge, appearance at court and conviction are part of the process by which the objective seriousness of an offence is brought home to an offender. These factors are absent when an offender receives a CIN.*

*There were 29,669 charges of non-aggravated assault finalised in the Local Court [during 2002]. A penalty by way of a CIN of \$300 is in my view an inappropriate method of dealing with an offence involving violence.*

*The downgrading of the offence of shoplifting by the use of a CIN was brought home to me when sitting as District Court Judge on hearing an appeal against the severity of a sentence imposed by a Magistrate. The appellant who had been sentenced to a term of imprisonment for shoplifting (it was from recollection the appellant's fifth offence of shoplifting) said in evidence he could not understand how he could be going into prison for shoplifting as "you now only receive an infringement notice for it".*

*It is however, in my view appropriate that offences under the Summary Offences Act be dealt with by CIN.*<sup>263</sup>

The courts' general deterrent role, together with the potential impact upon that role from the *Penalty Notice Offences Act*, was also considered in a submission received from the Legal Aid Commission:

*The general point can be made that the sentencing process consists of punishment, deterrence, rehabilitation and denunciation. It is fair to say that deterrence and denunciation are more effectively implemented when a person is required to attend an open Court where the facts alleged against them are presented to a Court open to the public. Given that a Magistrate has a greater opportunity to hear reasons why an offence was committed,*

*a Court also has a greater capacity to determine whether some form of rehabilitation is appropriate. If the likely punishment was always going to be a fine, the punishment aspect of sentencing is addressed equally in Court or by an on-the-spot fine. Although, as indicated above, the imprimatur of the Court may encourage more people to comply with the imposition of a fine. The implications are sufficiently serious to make this an important measure of the success of the trial. It should certainly be very carefully weighed before the trial is extended.*<sup>264</sup>

The criminal codes frequently recognise the existence of 'shades' of culpability by providing police officers with the capacity to exercise discretion in their choice of enforcement options, as is the situation with the Act. Equally, there should be no disputing the criminal justice system's recognition of the existence of a spectrum of less to more serious offending behaviours and offenders, since courts have long since possessed sentencing discretion based on general and specific mitigating factors.

An alternative approach, therefore, might be to target the use of the courts' valued resources toward those offences and offenders, measured in terms of both offending frequency and severity, that would benefit by increased levels of judicial intervention and scrutiny. Such filtering might, for example, be applied to the majority of first offenders, or to those offences that reside at the lower end of a spectrum measured by offence outcome. This is, of course, merely reiterating one of the central objectives of the CIN scheme trial as stated during the debate on the Penalty Notice Offences Bill:

*The proposal to issue penalty notices for an extended number of offences provides police with an additional enforcement tool. It allows police to use their discretion to deal with minor matters in an appropriate way. The scheme is not mandatory. It does not exclude the exercise of discretion to dispose of an offence by administering a warning or to file a charge. The courts will still deal with more serious offences and offenders. Police will continue to exercise their discretion to caution and warn where appropriate in very minor matters.*<sup>265</sup>

Courts customarily assess offences and offenders against such criteria as offence severity and offending history and focus their judicial attention and sentencing practices accordingly. This conduct is evidenced by the nature and weight of the penalties imposed following a determination of guilt. For instance, Judicial Commission of NSW analysis of the sentencing patterns of offences dealt with in the local courts of NSW in the calendar year 2002 indicates that for the offence of common assault:<sup>266</sup>

*The most common penalty imposed was a s. 9 GBB [Good behaviour Bond] (32.5% of offenders), followed by a fine (28.6%). The median fine amount imposed was \$400 and the mode was \$500. Section 10 dismissals were also common, with 14.8% of offenders dismissed with GBB and 6.8% without.*<sup>267</sup>

Similarly, for the CIN prescribed offence of larceny<sup>268</sup> the Judicial Commission reports:

*Most offenders (43.1%) were dealt with by way of fine only, with a median and mode fine amount of \$300. Almost three-quarters (72.5%) of fines were in the range of \$200 to \$500. Of the remaining offenders, 19.2% received a dismissal without conviction under s. 10 (11.5% with GBB and 7.7% without). A further 16.1% received s. 9 GBB, and 3.3% received CSO [Community Service Order].*<sup>269</sup>

Nor are these isolated examples as demonstrated by the Judicial Commission data for the other CIN prescribed offences of:

- 'Goods in custody'<sup>270</sup> – Fines were the most common outcome (42%, median fine amount \$400, mode \$500). The majority of fines (82.5%) were in the range of \$200 to \$500
- 'Offensive language'<sup>271</sup> – Fines (80.3%: median fine amount \$200, mode \$100) and s. 10 dismissals (3.0% with GBB and 15.2% without) accounted for nearly all offenders sentenced. Almost three-quarters of fines (72.6%) were in the range of \$100 to \$300; and
- 'Offensive conduct'<sup>272</sup> – ... even more offenders were dismissed without conviction under s. 10 (7.1% with GBBs, 19.1% without). This meant that fines, while still representing the majority of offenders (68.5%, median and mode fine amount \$200) were less common than for the offence of "offensive language". Again, almost three-quarters of fines (71.5%) were in the range of \$100 to \$300.<sup>273</sup>

In summary, the Judicial Commission reports that for these and other non-CIN prescribed offences the local courts relied on fines as the primary form of punishment with just over half (50.2 per cent) of all offenders punished in this way.<sup>274</sup> As a sentencing disposition applied to all offenders appearing in the local courts during 2002, fines were characterised by:

- the median fine amount being \$400
- the mode fine amount being \$500, imposed on 13.8 per cent of offenders who were fined
- the majority of fines (56.7 per cent) being in the range of \$200 to \$500.<sup>275</sup>

This information suggests that, at least in relation to the CIN prescribed offences, there exists a large degree of similarity between the sentencing dispositions imposed by the local courts and those received by offenders by means of a CIN. Although the latter process excludes the elements of personally presenting oneself before a judicial officer in order to establish accountability, in a sizeable proportion of, for example, first offence and less serious matters it may be sufficient that such outcomes are achieved during the process of interaction with the issuing police officer.

Further, in relation to the proposition that 'condemnation' is not fully effected when an offender is issued an immediate sanction, that can be discharged upon payment of a fine, and the proposition that this conveys a view that the matter is less serious than would otherwise be the case if the matter proceeded to court, the NSW Police submission stated:

*... there is no statute of limitations for fines referred to the SDRO for fines enforced under the Fines Act. The SDRO uses a number of options beyond seeking payment or increasing the amount payable to conclude fines. This includes cancelling driver's licences or vehicle registrations, or imposing a Community Service Order, or gaol sentences – depending on when, and if, the outstanding fine is paid. As CINs was only introduced in September 2002, it would be premature to make an assessment of the outcomes of enforcement actions.<sup>276</sup>*

There is some evidence even in the early stages of the use of CINs as a means of dealing with offences that there is some diminution in the seriousness of the matter, at least in the mind of some offenders. As we noted earlier, 43 per cent of CINs were referred to the SDRO for enforcement action after they had not been discharged within the 56 day timeframe allowed by the IPB. For other infringement notices, such as traffic infringements, the proportion of fines referred was more in the order of 20 to 25 per cent. One explanation for the disparity in the numbers who discharge their fine by payment is that a person who receives a traffic infringement notice is more likely to be cognisant of the risk of losing his or her driver's licence or vehicle if he or she was not to pay the fine. Some offenders may not readily make the connection between an unpaid CIN and the offence for which it was issued on the one hand and subsequent enforcement action on the other.

If an expanded CIN scheme is not to encourage a mentality that certain offences have now been downgraded, then enforcement of fines arising from those offences where the response is a CIN is a necessity. If nearly half of the CINs recipients in the first year of a trial have not paid their fines prior to the SDRO taking over the matter to enforce, then there are some grounds for thinking that these offenders are prepared to take their chances and not pay the fine.

We put the question of the possible diminution of seriousness attached to the offences to the officers participating in the focus groups, and they were largely adamant that no such effect would occur:

*Whilst an officer has a discretion to either issue a CIN or charge a perpetrator, then there is no basis for the view that offences were being downgraded.*

*CINs were simply an alternative form of dealing with offenders.*

*The [quantum of] penalties provided under CINs reflected that the offences were not being downgraded, and that the decriminalising attitude was unfortunate.*

*A monetary penalty is just as effective (especially since the offender had to agree to the CIN prior to it being issued).*

*The decriminalisation argument sounded like certain stakeholders, e.g., solicitors and civil libertarians, were fearful of losing territory.<sup>277</sup>*

The main theme that seems to emerge from these comments is the police officers' desire to retain the relationship between the CIN scheme and the range of alternate options presently available to them when dealing with a criminal offence. Participating officers said that they were satisfied with the CIN scheme, with the *proviso* that it was in addition to, rather than a substitute for, their discretionary capacity to caution, or in more serious or complicated matters, charge an alleged offender with any of the prescribed CINs offences. Officers were unanimous in their preference that they retain the capacity to charge alleged offenders, thus ensuring that judicial scrutiny for the most severe of matters was not lost.

## Proportionality to court imposed sanctions

The penalties for each offence for which a CIN may be issued were determined by calculating the median fine issued by the courts for the particular offence.<sup>278</sup>

During the Parliamentary debate on the Penalty Notice Offences Bill, it was argued that the legislation would be particularly beneficial for first time offenders. The Attorney General said:

*... it is an advantage for first-time offenders if they can expiate their offences by paying fines rather than going to court. That also means that they will think twice before reoffending. The scheme offers a powerful incentive for one-off offenders not to reoffend by hitting people where it hurts: in their hip pocket. The scheme applies to less serious offences and the idea is that, through this mechanism, offenders will be encouraged not to reoffend.*<sup>279</sup>

For the CIN scheme to succeed in its objective of delivering benefits for police and the courts, an offender has to believe that there is a greater benefit in receiving and paying a CIN than electing to take the matter to court. To consider one aspect of this, whether there is a financial benefit for an offender, we compared the penalties imposed by the local court from January 2002 to December 2003 for those offences that may be dealt with by way of a CIN against the CIN penalty.

During the period under consideration, the local court sentenced 15,637 persons for common assault.<sup>280</sup> Sixty four per cent of these offenders were given either no penalty or a penalty that was neither custodial nor financial in nature.<sup>281</sup> Of those fined (n = 4,198), approximately one half were given a fine equal to or lesser than the CIN penalty of \$400. Where a first offender was found guilty of common assault (n= 2,661), 72 per cent were given either no penalty or a non-custodial/non-financial penalty. Of those first offenders fined (n = 713), 57 per cent were given a fine equal to or lesser than the CIN penalty of \$400, while 38 per cent were given a fine equal to or less than \$300.

**Figure 15: Penalties for trial offences resulting from Local Court convictions in 2002 and 2003**

	Number given no penalty, or non-custodial / non-financial penalty*	Proportion of total number	Number fined	Proportion of total number	Number given other sentence*	Proportion of total number	Total number
Common assault	10,282	65.75%	4,198	26.85%	1,157	7.40%	15,637
Goods in custody (not motor vehicle)	921	40.47%	979	43.01%	376	16.52%	2,276
Larceny (up to \$2,000)	4,050	46.06%	3,805	43.27%	938	10.67%	8,793
Offensive language	717	19.74%	2,914	80.23%	1	0.03%	3,632
Offensive conduct	1,099	30.74%	2,447	68.45%	29	0.81%	3,575
Entering vehicle /boat without consent of owner/ occupier	30	25.21%	85	71.43%	4	3.36%	119
Goods in customer (motor vehicle) ^	387	44.38%	365	41.86%	120	13.76%	872

Source: Judicial Commission of New South Wales 2004 and 2005

\* 'No penalty, or a non-custodial/non-financial penalty' = s10 dismissal, s10 bond, rise of court, s9 bond, s9 bond and supervision, other bond, community service order, suspended sentence, suspended sentence and supervision. 'Other sentence' = periodic detention, home detention and prison.

^ This is based on convictions between December 2001 and June 2004.

**Figure 16: Penalties for trial offences resulting from Local Court convictions in 2002 and 2003, where the offender had no prior convictions (a first offender)**

	Number given no penalty, or non-custodial / non-financial penalty*	Proportion of total number	Number fined	Proportion of total number	Number given other sentence*	Proportion of total number	Total number
Common assault	1,931	72.57%	713	26.79%	17	0.64%	2,661
Goods in custody (not motor vehicle)	109	50.93%	100	46.73%	5	2.34%	214
Larceny (up to \$2,000)	835	55.08%	668	44.06%	13	0.86%	1,516
Offensive language	737	43.20%	969	56.80%	0	0.00%	1,706
Offensive conduct	393	55.20%	319	44.80%	0	0.00%	712
Entering vehicle /boat without consent of owner/ occupier	8	66.67%	4	33.33%	0	0.00%	12
Goods in customer (motor vehicle)	112	49.34%	109	48.02%	6	2.64%	227

Source: Judicial Commission of New South Wales 2004 and 2005

\* 'No penalty, or a non-custodial/non-financial penalty' = s10 dismissal, s10 bond, rise of court, s9 bond, s9 bond and supervision, other bond, community service order, suspended sentence, suspended sentence and supervision. 'Other sentence' = periodic detention, home detention and prison.

^ This is based on convictions between December 2001 and June 2004.

During the same period, the Local Court sentenced 8,793 persons for larceny (up to \$2000).<sup>282</sup> Forty six per cent of these offenders were given either no penalty or a non-custodial/non-financial penalty. Of those fined (N = 3,805), 43 per cent were given a fine equal to or less than the CIN penalty of \$300, with 31 per cent being given a fine equal to or less than \$200. Fifty five per cent of the 1,516 offenders with no prior convictions were given either no penalty or a non-custodial/non-financial penalty. Eighty five per cent of first offenders who were fined were given a fine equal to or less than \$300, with 40 per cent given a fine of less than \$200.

For the offence of goods in custody (not a motor vehicle), 2,276 offenders were sentenced by the Local Court. Forty per cent were given either no penalty or a non-custodial/non-financial penalty. Of the 979 offenders fined, 30 per cent were given a fine equal to or less than the CIN penalty of \$300. Of the 214 first offenders, 51 per cent were given either no penalty or a non-custodial/non-financial penalty, while of those first offenders fined (n = 100) 40 per cent were given a fine equal to or less than \$300, with 24 per cent given a fine equal to or less than \$200.

For the offence of goods in custody (motor vehicle), 709 offenders were sentenced by the Local Court. Fifty six per cent were given either no penalty or a non-custodial/non-financial penalty. Of the 314 offenders fined, 41 per cent were given a fine equal to or less than the CIN penalty of \$300. Of the 182 first offenders, 50 per cent were given either no penalty or a non-custodial/non-financial penalty, while of those first offenders fined (n = 92) 40 per cent were given a fine equal to or less than \$300, with 16 per cent given a fine equal to or less than \$200.

There were 3,575 people sentenced for offensive conduct. Thirty one per cent were given either no penalty or a non-custodial/non-financial penalty, while 68 per cent were fined. Fifty four per cent were fined up to \$200, the CIN penalty, while 21 per cent were fined \$100 or less. Fifty five per cent of the 712 first offenders were given either no penalty or a non-custodial/non-financial penalty, and of the 319 first offenders fined, 58 per cent were fined \$200 or less, with 23 per cent fined \$100 or less.



For the offence of offensive language, 3,632 persons were sentenced by the Local Court from January 2002 to December 2003. A fine was the most likely penalty, with 80 per cent of offenders fined. Only 19 per cent of offenders were given no penalty or a non-custodial/non-financial penalty. Forty seven per cent were given a fine of \$150 (the CIN penalty) or less. Of the 1,706 offenders for whom this was their first offence, 43 per cent were given either no penalty or a non-custodial/non-financial penalty, while 59 per cent were fined \$150 or less. Eleven per cent of first offenders were fined \$50 or less.

For the offence of entering a vehicle or boat without the consent of the owner or occupier 119 people were sentenced during the time period under consideration. Seventy one per cent of offenders were fined, with 51 per cent of those offenders being fined up to \$250, the CIN penalty. There were only 12 first offenders, with four fined and eight given no penalty or non-custodial/non-financial penalties.<sup>283</sup>

Receiving a CIN as against having the matter taken to court offers a number of financial and non-financial benefits. These include not having to pay for legal representation, forgoing the time and expense involved in attending court and not having a CINs offence included on a criminal record. Our analysis indicates that there is a possible financial incentive, particularly for first offenders, in electing to have a court hear a matter that is the subject of a CIN, particularly if they act on their own behalf in the court proceedings. Significant numbers of offenders are given penalties where they do not have to pay any fine, or are given a fine that is at least 50 per cent less than the amount of the CIN penalty for the offence. At least half of the sentences imposed on first offenders by the Local Court during 2002-03 for each of the CINs offences under discussion involved no penalty, a non-custodial/non-financial penalty or a fine of up to 50 per cent of the fixed penalty set for CINs offences. It is also worth noting that one reason offered in our police focus groups for officers' enthusiasm in using CINs was their belief that CINs fines were greater than court sanctions.<sup>284</sup>

When consulting with NSW Police, the Chief Magistrate of the local court and the OSR about our draft findings and recommendations, we canvassed whether some reduction in fine for first offenders may be appropriate. None of the agencies supported such an approach. The Chief Magistrate was against it, especially given the application of the CINs scheme to offences under the Crimes Act. NSW Police noted the added complication to the CINs scheme if such an approach was applied.

Given these views, and the other benefits which accrue to persons issued CINs on balance there is at this time insufficient evidence to justify the costs and complications of a two tiered fine system, with a lesser fine for first offenders.

It is a matter, however, that should remain under close scrutiny if the CINs scheme is extended across NSW.

## **Is there any evidence of adverse impact on particular segments of the population?**

A concern expressed during the legislative debate was that there might be a disproportionate impact on particular groups in the community, such as people of Aboriginal and Torres Strait Islander descent or people from non-English speaking backgrounds.

This relates to the 'net widening' argument examined earlier in this chapter, in that it is suggested that people from particular groups or communities might receive CINs in situations that might have otherwise been dealt with by a caution or warning. One suggestion was that police may find it easier to issue a penalty notice for an offence that might otherwise be appropriately dealt with by a caution or warning, particularly if the latter involved having to explain the offence and warning to a person with difficulties in communicating.<sup>285</sup>

As we noted in our methodology chapter, the data contained on COPS is not sufficient to adequately identify offenders from non-English speaking backgrounds, and we did not receive any information from other sources that raised specific instances involving people from non-English speaking backgrounds that were of concern.

While any consideration of the adverse impact of new police powers on particular groups in the community might ordinarily involve examining the effects on young people, the CIN scheme does not apply to people under the age of 18 years, and again, we were not advised of specific concerns arising from the instances of police issuing CINs to people aged between 18 and 25 years during the trial period. Furthermore, while the figures we reported earlier concerning the age spread for the CINs issued indicate that younger people were more likely to be recipients, this can be reasonably explained that the sort of offences for which CINs can be issued, the fact that CINs should only be issued in instances where the offending is relatively minor, and that CINs should not be issued to persons with a substantial history of offending, make it more likely that CINs will be issued to younger rather than older people.

## Aboriginal and Torres Strait Islander people

With respect to the impact on people of Aboriginal and Torres Strait Islander descent, there are more substantial concerns that need to be considered and reviewed should the CIN scheme be extended.

As we reported earlier, 79 CINs, representing 4.9 per cent of the total, were recorded as having been issued to individuals of 'ATSI status'.<sup>286</sup>

The five-yearly Census of Population and Housing conducted by the ABS provides an essential source of descriptive information about Australia's population, including its indigenous peoples.

The most recent census, conducted on 30 June 2001, estimated the indigenous population to be 460,140 identified ATSI individuals, or 2.4 per cent, of the total estimated resident population of Australia. New South Wales recorded the highest indigenous population amongst the states and territories with an estimated 135,319 residents, or 2.0 per cent, of the total population.<sup>287</sup>

Whether compared to the national (2.4 per cent) or state (2.0 per cent) proportions of the population that are indigenous, the seventy-nine (79) CINs issued to identified 'ATSI' individuals during the trial, representing as it does 4.9 per cent of the total number of assigned CINs, suggests a disproportion, in the order of 200 per cent (compared with the national), or 245 per cent (compared with the state-based representation) against the NSW indigenous population.

The 79 CINs identified as having been issued to ATSI individuals did not include identifiers to enable detection of the originating LAC. The ABS indigenous population data did, however, include information concerning several 'Census Indigenous Areas', the geographic boundaries of which approximate some of the trial LACs.

The LACs for which ABS indigenous population (proportion) statistics are available are as follows:

**Figure 17: Proportion of population who are ATSI in locations included in the trial\***

Local Government Area (Trial LAC which cover similar area)	Proportion of population that is indigenous
Albury (Albury)	2.0%
Bankstown (Bankstown)	0.8%
Blacktown (Blacktown)	2.6%
Gosford (Brisbane Water)	1.5%
Kiama (Lake Illawarra)	1.1%
Lake Macquarie (Lake Macquarie)	2.0%
Miranda (Miranda)	-
Parramatta (Parramatta)	0.9%
Penrith (Penrith)	2.2%
Sydney (City Central and The Rocks)	1.1%
Wyong (Tuggerah Lakes)	2.1%

Source: 2004 ABS NSW Regional Profile: 2.4.1 Experimental estimates of Aboriginal and Torres Strait Islander populations by age group, by Local Government Area, June 2001, Canberra, 2004.

\* This information is based on local government areas roughly corresponding to commands included in this trial.

With the exception of Bankstown (0.8 per cent), Brisbane Waters (1.5 per cent), City Central (1.1 per cent), Lake Illawarra (1.1 per cent), Parramatta (0.9 per cent) and The Rocks (1.1 per cent) the proportion of indigenous population by LAC for each of Albury (2.0 per cent), Blacktown (2.6 per cent), Lake Macquarie (2.0 per cent), Penrith (2.2 per cent) and Tuggerah Lakes (2.1 per cent) roughly approximates the State or national ratios of 2.0 and 2.4 per cent, respectively.

The import of this information is twofold. First, the knowledge that five of the trial LACs for which ABS indigenous population data is ascertainable, approximate either the NSW or the national indigenous population ratios, should reduce the potential for criticism that the choice of trial LACs did not include, at least, proportional ATSI representation. Conversely, however, the data is likely to be less helpful toward curbing the potential criticism that, within NSW there are several rural centres where the proportion of indigenous residents far exceeds each of the NSW and national ratios, yet the LACs containing these populations were not involved in the trial.<sup>288</sup>

We did, in fact, receive two such comments.<sup>289</sup> Further, these comments included reference to the fact the trial's prescribed offences were of a type that had traditionally included a substantial number of ATSI identified individuals amongst the charge recipients.

Secondly, amongst the LAC indigenous population ratios for the trial locations, none, including the highest of 2.6 per cent (Blacktown) approaches the rate of 4.9 per cent at which CINs were issued to ATSI persons. This disproportionate notification rate, therefore, cannot be justified by suggesting a skew effect due to the existence of higher than usual indigenous populations within individual LACs.

The disparate rate at which CINs were issued during the trial has the potential to further disenfranchise a community that is already over-exposed to the criminal justice system, according to the ATSI:

*ATSI is concerned that the practise of police issuing fines for minor criminal offences will replace or diminish the previous recommended practise of issuing cautions or warnings to indigenous people. Of major concern is that the practise of issuing fines for minor criminal offences may lead to a further accumulation of debt. Anecdotal evidence suggests that indigenous people who receive fines often have little or no capacity to pay and thus simply accumulate debts. The failure to pay fines is in itself a criminal offence; it can lead to the cancellation of a driver's licence and loss of employment or employment opportunities and, driving without a licence is an offence for which the individual can be fined. This cascading effect must be avoided and research through the Pilot Program should give an indication if this is in fact occurring.*<sup>290</sup>

A similar appeal for caution was delivered in a submission supplied by The Shopfront Youth Legal Centre:

*Many of the offences subject to the trial could be described as offences of poverty. In our experience, the majority of people charged with offensive language, offensive conduct, goods in custody and petty theft are unemployed or otherwise economically disadvantaged.*

*The proportion of indigenous people charged with offences such as offensive language and offensive conduct is also disturbingly high (see for example, "Race and offensive Language Charges" published by the NSW Bureau of Crime Statistics & Research in August 1999). Indigenous people are also likely to be over-represented when it comes to allegations of common assault.*

*The detrimental effect that unpaid fines can have on disadvantaged people is well known to us. Fine defaulters face consequences that are usually vastly out of proportion to the seriousness of the offence for which they were fined. Among our clients, the most serious of these consequences is licence suspension and eventual cancellation, which often results in a charge of driving whilst suspended or cancelled, a further fine and a court imposed disqualification. This in turn may lead to further driving charges and may culminate in a "habitual traffic offender" declaration. We understand that this phenomenon is particularly common in Aboriginal communities, where private vehicles are often the only mode of transport available and where driving (with or without a licence) is a practical necessity.*<sup>291</sup>

The practical effect of increasingly stringent consequences, including 'accumulated debt', arising from an offender's incapacity to settle an outstanding fine has been raised in relation to penalty schemes previously.<sup>292</sup> In order to monitor the possibility that this might occur within the trial, we sought information that would enable the tracking of the payment collection rates of ATSI identified CINs recipients through each of the IPB and SDRO collection agencies. We were informed that a classification of monies received according to ATSI status is not a routine data field maintained by the collecting agencies, nor was it possible to generate a data pool against those criteria for the purpose of the trial.

These issues, the disproportionate representation of indigenous peoples within the criminal justice system generally and for certain offence types specifically, and the appropriateness of particular penalties as sanctions for this population, are not dissimilar to those previously identified as issues of concern in the RCIADIC.<sup>293</sup> As a partial response to the recommendations contained within that report, NSW Police has developed, and continues to implement and monitor, specific policing strategies to guide police and Aboriginal interactions. The third and most recent of these strategies, the *Aboriginal Strategic Direction 2003 – 2006* (the '*Aboriginal Strategic Direction*'),<sup>294</sup> is the current operational framework for NSW Police "*to manage Aboriginal affairs*".<sup>295</sup>

The discussion of the over representation of indigenous persons within the criminal justice system, and the potential for their over representation in the CIN scheme should it be extended statewide, together with the strategies identified by NSW Police for addressing these issues by way of the *Aboriginal Strategic Direction*, is further discussed below.

### **Aboriginal and Torres Strait Islanders and public order policing**

A significant concern arising from an increase in offensive language charges (and also with offensive conduct offences) is that they tend to have a disproportionate impact on Aboriginal and Torres Strait Islander people, particularly in non-metropolitan NSW. BOCSAR has previously found that the over-representation of indigenous Australians in the criminal justice system “*is especially pronounced for offensive language offences*”.<sup>296</sup> In 1999, it reported that:

*ATSI persons account for 15 times as many offensive language offences as would be expected by their population in the community.*<sup>297</sup>

In our 1999 review of the *Crimes Legislation Amendment (Police and Public Safety) Act*, we found that the highest rates of directions to move on occurred in four LACs in the Far West and North-West of NSW. The LACs of Darling River (73.5 directions given per 1,000 residents), Castlereagh (53.0), Barwon (22.9) and Barrier (16.6) had much higher rates than any other LAC in NSW.<sup>298</sup> In fact, the LAC with the next highest rate was Parramatta with 6 directions given per 1,000 residents. These rates corresponded to similarly high rates for offensive conduct, hinder and/or resist police and offensive language. These findings reinforced earlier BOCSAR research on the use of offensive language and offensive conduct charges in those areas with a high proportion of Aboriginal and Torres Strait Islander residents.<sup>299</sup>

To address the risk that the availability of CINs to police as an option to deal with offensive language might have a disproportionate and adverse impact on Aboriginal and Torres Strait Islander people it would have been desirable to examine their use in areas with substantial Aboriginal populations. However, as we have noted previously, the areas where the CIN scheme was trialled do not have sizeable Aboriginal populations (the proportions running from 0.8 to 2.6 per cent of the population).

Net widening arising from offensive language charges is a distinct possibility in those areas where the impact of public order policing falls heavily on Aboriginal populations. To identify where these risks might be more likely to occur we identified those LGAs where indigenous peoples make up 10 per cent or more of the population, and ascertained the rate of offensive language offences in those areas. These LGAs are generally located in the Far West, North, North West and Central West of NSW. They have offensive language rates higher than, and in some cases far in excess of, those in the trial LACS.

Reporting these figures is not intended to suggest that these locations are the only areas where net widening might occur as a consequence of public order policing generally, and the use of CINs to deal with offensive language in particular, but rather to establish that these are live issues to consider and keep under scrutiny should the CIN scheme be extended.

**Figure 18: Frequency of offensive language charges in Local Government Areas where ATSI people constitute at least 10% of the population and in all NSW\***

Local Government Area	Offensive language charges per 100,000 residents in 2002	Offensive language charges per 100,000 residents in 2003	Proportion of population that is indigenous
<b>New South Wales</b>	<b>87.1</b>	<b>82.2</b>	<b>2.1%</b>
Brewarrina	551.7	413.8	53.5%
Central Darling	2269.0	577.14	35.9%
Walgett	832.4	784.6	25.1%
Bourke	633.4	684.1	24.6%
Coonamble	354.1	125	22.5%
Moree Plains	400.2	424.8	19.7%
Narromine	197.2	84.5	15.5%
Wellington	102.7	148.4	14.3%
Lachlan	702.7	198.9	13.1%
Bogan	474.4	286.6	11.6%
Gunnedah	231.9	247.9	11.0%
Gilgandra	188.4	125.6	10.8%
Guyra	200.5	66.8	10.7%
Wentworth	235.5	194.0	10.6%
Cobar	193.9	77.6	10.1%

Source: ABS data, 2001 Census; and 2002 and 2003 BOCSAR Recorded Crime Statistics

\* BOCSAR advises that as Brewarrina and Central Darling have populations of less than 3,000, crime rates in these areas may be unreliable due to the recorded crime rates in these LGAs being sensitive to small population sizes.

Since the time of the RCIADIC there has been widespread support for the policy of using arrest and subsequent custody as the last resort in the policing of Aboriginal and Torres Strait Islanders, particularly in respect of public order offences. There is a risk that issuing a CIN for a public order offence might be justified by issuing police on the grounds that they were employing an alternative to arrest.

In these circumstances the financial obligations arising from the CIN, and any subsequent failure to pay the original amount, may impose significant hardship for indigenous peoples. Similarly, should the fine not be paid and have to be enforced by the SDRO, the consequences arising from the enforcement action, such as suspension or cancellation of a driver's licence, may expose individuals to other offences, such as driving while disqualified. Obviously, these risks exist for any individual receiving a CIN, but the potential consequences and knock-on effects in the case of Aboriginal offenders are of particular concern.

While the alternatives to arrest remain preferable to arrest and custody, care needs to be taken that using the option of issuing a CIN does not occur where previously the response to the offence may have been a warning or caution.

As we noted earlier, NSW Police has adopted the *Aboriginal Strategic Direction 2003-2006* to manage its relationship with Aboriginal communities in NSW. One of the objectives is to reduce Aboriginal people's contact with the criminal justice system. Some of the strategies to give effect to this objective include NSW Police addressing recurring issues that bring Aboriginal people to the attention of police, including the perception of over-policing of Aboriginal communities, and encouraging the appropriate use of discretionary police powers. These strategies were to be developed and delivered at the LAC level through planning and training.<sup>300</sup>

Before the adoption of the *Aboriginal Strategic Direction*, NSW Police was working to the *Aboriginal Policy Statement and Strategic Plan 1997-2000*, which was evaluated in 2000. The evaluation called for improvements in the use of police discretion to intervene in public order offences, as well as monitoring and performance reporting of formal interventions for offensive language and conduct offences.<sup>301</sup>

In its *Aboriginal Strategic Direction*, NSW Police has indicated that it will act upon the recommendations from the evaluation, and has specified the initiatives it will adopt to address this issue, including:

- improving the examination and monitoring of the use of offensive language and conduct charges
- monitoring performance indicators on the proportion of Aboriginal adults/juveniles arrested and charged with offensive language, conduct, resist or hinder officer, assault officer and/or intimidate officer
- improving the recording, monitoring and analysis of data information on COPS regarding performance indicators of police charges for public order offences against Aboriginal and non-Aboriginal persons
- supporting an independent assessment of the impact of the legislative provisions on offensive language and conduct in the maintenance of public order and safety
- developing appropriate indicators and methodology to assess the circumstances surrounding these arrests
- incorporating a review of a range of offensive language and conduct matters in training at the Police Academy and at LACs.<sup>302</sup>

On the question of legal processes generally, NSW Police has also committed itself to examining and monitoring performance indicators on the use of different legal treatment processes.

These initiatives offer a significant opportunity to develop meaningful performance information on the policing of public order generally, and its impact on Aboriginal communities in particular. In view of the issues raised in this report, we would recommend that the issuing of CINs for offensive language and offensive conduct be specifically kept under scrutiny through the processes that NSW Police has identified in the *Aboriginal Strategic Direction* for monitoring and evaluating issues associated with policing public order.

RECOMMENDATION 8: If the Criminal Infringement Notice scheme is extended statewide, that data relating to the issuing of Criminal Infringement Notices to Aboriginal persons for offensive language and offensive conduct be specifically recorded, monitored and evaluated through the systems proposed for monitoring public order offences in the NSW Police *Aboriginal Strategic Direction 2003-2006*.

NSW Police supported the recommendation, whilst informing that “...there are resource implications in that modification of COPS will be required to facilitate data recovery”.

The Office of State Revenue advised that, “IMPS has no field for identifying Aboriginal persons. COPS would have to be used to capture this information”.

Our recommendation here reinforces the need for ongoing monitoring of the use of CINs to deal with offensive language and conduct matters, and the withdrawal of CINs in appropriate circumstances, which we have recommended earlier in this chapter.

Furthermore, in Chapter 14, we consider the future of the CIN scheme and make recommendations for changes to procedures and practices in a number of areas. Of relevance here is our discussion on the necessity for consultation with local communities, particularly in rural and remote communities and communities with significant Aboriginal populations to address concerns about the use of CINs and the consequences arising from the failure to pay. We are of the view that all these recommendations need to be adopted as part of an effective strategy to ensure that Aboriginal people are not unfairly or improperly issued with CINs.

## Other vulnerable persons

While the SOPs provide that a CIN cannot be issued to seriously intoxicated or drug affected persons where the person cannot comprehend the procedure, they are silent as to whether a CIN can be issued to a person with an intellectual or developmental disability or a mental illness. While we were aware of only a few events in the course of the CIN scheme trial where this issue may have been a relevant factor for police to consider, and it was not substantially raised in any of the submissions or focus groups for this review, we are mindful that it may become a more significant issue should the CIN scheme be extended and accordingly set out the following issues as matters to be considered in the further implementation of the scheme.

The Crimes (Detention After Arrest) Regulation 1998 provides guidelines to follow in identifying people who may be vulnerable and the procedures to be followed in those circumstances.<sup>303</sup> The NSW Police CRIME Code of Practice, which governs police procedure with respect to arrest, detention and investigation, also sets out a number of steps to be followed if the person under arrest is considered to be a vulnerable person by reason of, among other things, impaired intellectual functioning, impaired physical functioning or being from a non English speaking background.<sup>304</sup>

With respect to vulnerable persons police are told in the CRIME Code of Practice that:

*If you suspect the person is a vulnerable person take immediate steps to contact a support person. If a vulnerable person falls into more than one category all requirements regarding the categories into which the person falls must be met. If reasonably practicable, provide any physical needs for someone with impaired physical functioning.*<sup>305</sup>

[...]

*If you caution a vulnerable person in the absence of their support person repeat it in front of the support person. Give a copy of the Caution and Summary form to the support person and any interpreter who attends.*<sup>306</sup>

[...]

*In the case of other vulnerable persons you must, as soon as possible, attempt to contact someone responsible for the person's welfare and tell them of the arrest, the reason for it and where the person is.*

*When a support person arrives tell them they are there to assist and support the person during an interview; observe whether the interview is being conducted properly and fairly; and to identify any communication problems. Where possible allow the support person and person in custody to consult privately at any time, but within view of police.*

*If someone is visually impaired or unable to read, ensure their legal representative, relative or support person is available to help check documentation. Where the detained person is required to give written consent or a signature ask the support person to sign instead, provided the detained person agrees.*<sup>307</sup>

[...]

*Consider whether action should be taken against the person and by which method (caution, charge, summons or court attendance notice) ... Take any resulting action (eg: charging etc) in the presence of the support person if the person is a child or does not understand the process (eg: vulnerable person). When people are charged tell them what the charges are and give them copies of the charge sheets (if they are a vulnerable person give the sheets to the support person).*<sup>308</sup>

[...]

*Remember, if the person you are interviewing is a child or vulnerable person you must still ensure an appropriate support person is present before continuing your questioning.*<sup>309</sup>

Further advice on these issues is contained in the "Guidelines for Police when interviewing people with an impaired intellectual function":

*Whether people with impaired intellectual functioning come into contact with the police as victims, alleged offenders or witnesses, some communicative adjustments need to be made. The consequence of failing to adjust may be that the person being interviewed remains isolated, offenders are either not brought to account or fail to fully access their rights and witnesses remain unheard. Good communication in all this is essential. If you are having difficulty communicating with a person who has a mental illness or an intellectual disability, it is your duty to ensure the person understands what is happening and what is being said. With each stage of questioning, you will need to make two kinds of decisions:*

*What adjustments do you need to make in order for this communication to proceed effectively?*

*Do you and/or the person being interviewed need the attendance of a third party for either general support or to help with communication?*

*In the case of accused with impaired intellectual functioning, arrangements should be made for a support person to be present. Support people should not be witnesses in the matter under investigation or likely to become one.*<sup>79</sup>

Adhering to these guidelines provides some assurance that the rights and interests of a vulnerable person are given due regard in respect of dealing with them as a suspect in a criminal matter. However it is not clear that these safeguards can be given full effect in situations where a support person is not present or immediately available and it is proposed to issue a CIN on the spot as an alternative to arrest.

Certainly, it would not be an appropriate outcome of the CIN scheme if there were a lessening of the safeguards afforded to vulnerable persons. However, being in a position to observe detailed or onerous safeguards might mean that police arrest the vulnerable person and take them to a police station in order for the custody manager to make arrangements for the presence of a support person.

We are mindful of the possibility that, in the absence of a support person, a vulnerable person may not be able to communicate with police sufficiently to satisfactorily explain his or her conduct to avoid any further action being taken. The suggestion that the vulnerable person, after consulting with a support person, still has the option of taking the matter to court in these circumstances may not be satisfactory. This is exemplified by those cases where an explanation that could have been given with the assistance of a support person might have been sufficient to avoid any further action by police in the first instance. There may also be questions as to the person's capacity to consent to receiving a CIN.

We appreciate that there appear to be limited options available. If the vulnerable person is unable to fully comprehend the effect of a CIN being issued, there is a risk that they will not act upon the CIN, either by payment or electing to go to court, and thereby leave themselves open to having further enforcement action taken against them. Alternatively, police may have to effect an arrest to allow the safeguards in the various guidelines to be observed, which may place vulnerable people at a disadvantage *viz-a-viz* other persons. It may be appropriate, where an arrest has to be made in these circumstances, that consideration should still be given to issuing a CIN, where it would be otherwise warranted given the nature of the offence, with the reasons for issuing the CIN and the options for discharging it being explained to the support person.

Given the potential for vulnerable persons to be either denied access to a support person in a situation where a CIN is issued, or alternatively not be afforded the benefits of being issued with a CIN should they be arrested, we would recommend that this issue be monitored at the local and corporate levels. It may be appropriate, over time, to establish guidelines that enable vulnerable persons to have appropriate access to a support person in relation to an offence for which a CIN may be issued. Such guidelines could assist police on the appropriate procedures to follow when it appears that a vulnerable person has committed an offence for which it is possible to issue a CIN. Clearly, any guidelines should be the subject of appropriate consultation with relevant stakeholders, including the Guardianship Tribunal.



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## Endnotes

- <sup>232</sup> The Hon. Dr P. Wong MLC, *NSWPD*, Legislative Council, 26 June 2002, p. 3790.
- <sup>233</sup> Aboriginal Justice Advisory Council (NSW), *Diverting Aboriginal Adults from the Criminal Justice System, some background and issues for consideration*, date not specified.
- <sup>234</sup> A. Sutton and E. McMillan, *A Review of Law Enforcement and Other Criminal Justice Attitudes, Policies and Practices Regarding Cannabis and Cannabis Laws in South Australia, National Drug Strategy Monograph Series No. 38*, Canberra, 1998, p. 6.
- <sup>235</sup> N. Hunter (with C. Castle), *Cannabis Expiation Notices (CENS) in South Australia 1997 to 2000, Information Bulletin No. 27*, Office of Crime Statistics, South Australia, Adelaide, 2001.
- <sup>236</sup> These are similar to the Court Attendance Notices issued in New South Wales. See “*Discretion to intervene*” discussion later in this report.
- <sup>237</sup> Disorderly behaviour, indecent behaviour and insulting or offensive language.
- <sup>238</sup> Criminal Justice Commission, *Police Powers in Queensland: Notices to Appear, Research Paper Series, Volume 5, No. 2*, May 1999, p. 7.
- <sup>239</sup> B. Johnson, State Manager, ATSI State Office NSW, Submission dated 31 October 2003. p.2.
- <sup>240</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 2.
- <sup>241</sup> K. Spicer & P. Kilsby, *Penalty notices for disorder: early results from the pilot, Home Office – Research, Development and Statistics Directorate, Findings No 232*, London, 2004, p. 4.
- <sup>242</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 4.
- <sup>243</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 3.
- <sup>244</sup> Bureau of Crime Statistics and Research (NSW), *Race and Offensive Language Charges, Crime and Justice Statistics Bureau Brief No. 2*, Sydney, 1999, p. 1.
- <sup>245</sup> ACT Law Reform Commission, *Street Offences, Report No. 15*, Canberra, 1997. Appendix A.
- <sup>246</sup> [2003] NSWLC 2.
- <sup>247</sup> *Ball v McIntyre* (1966) 9FLR 237; *Saunders v Herold* (1991) 105 FLR 1; *Burns v Seagrave* (2000) NSWSC 77; *Connors v Craigie* (1994) 76 A Crim R 502; *Hortin v Rowbottom* (1993) 63 A Crim R 381.
- <sup>248</sup> *McNamara v Freeburn* (NSWSC unreported Yeldham J, 5 August 1988); *McCormack v Langham* (NSWSC unreported Studdert J, 5 September 1991); *Thonnerly v Humphries* (NSWSC unreported Foster J, 19 June 1987); *Evans v Frances* (NSWSC unreported Lusher A-J, 10 August 1990; *Anderson* (NSWCA unreported CA40469/95).
- <sup>249</sup> *Dalton v Bartlett* 3 SASR 1972; *Bills v Brown* Tas SC 54/1974.
- <sup>250</sup> See <http://www.agd.nsw.gov.au/caselaw/caselaw.nsf/pages/lc>. The front page of this site states: *The Local Court Caselaw database contains a selection of judgments of decisions made by magistrates in the Local Court. The judgments published provide interpretations of legislation and legal principles relevant to criminal, civil and other matters determined in the Local Court.*
- <sup>251</sup> *McNamara v Freeburn* (NSWSC unreported Yeldham J, 5 August 1988).
- <sup>252</sup> *Ibid.*
- <sup>253</sup> *Police v Butler* at paragraph 17.
- <sup>254</sup> *Police v Butler* at paragraph 34.
- <sup>255</sup> *Police v Butler* at paragraph 36.
- <sup>256</sup> *Police v Butler* at paragraphs 36 and 37.
- <sup>257</sup> (1991) 105 FLR 1.
- <sup>258</sup> Excerpts from COPS narratives in this discussion have been transcribed literally.
- <sup>259</sup> Eamon, “*Fuck it (I don’t want you back)*”; Frankee’s riposte to the previous song, “*F U Right Back*” (which uses the word in full in the lyrics); and Spiderbait “*Fucken Awesome*”. Source: Australian Recording Industry Association charts.
- <sup>260</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Canberra, 1994, p. 161. Quoted in R. Jochelson, *Aborigines and Public Order Legislation in New South Wales, Crime and Justice Bulletin No. 34*, Bureau of Crime Statistics and Research (NSW), Sydney, 1997, p. 1.
- <sup>261</sup> s28F, *Summary Offences Act*.
- <sup>262</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 2; R. Lyon, Submission dated 16 October 2003; and J. Bourke, Undated submission received 27 October 2003.
- <sup>263</sup> Judge D. Price, Chief Magistrate of the Local Court, Submission dated 13 October 2003, p. 1.
- <sup>264</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 2.

- <sup>265</sup> The Hon. M. Costa MLC, *NSWPD*, Legislative Council, 18 June 2002, p.3202. Emphasis added.
- <sup>266</sup> s61, *Crimes Act*, maximum penalty in Local Court: 12 months imprisonment/20 penalty units.
- <sup>267</sup> J. Keane and P. Poletti, *Common Offences in the Local Court, Sentencing Trends and Issues No. 28*, Judicial Commission of NSW, Sydney, 2003, p. 7.
- <sup>268</sup> s117, *Crimes Act*, maximum penalty in Local Court: 12 months imprisonment/20 penalty units if value does not exceed \$2000.
- <sup>269</sup> J. Keane and P. Poletti, *Common Offences in the Local Court, Sentencing Trends and Issues No. 28*, Judicial Commission of NSW, Sydney, 2003, p 7.
- <sup>270</sup> s527C(1)(a), (b), (c) & (d), *Crimes Act*, maximum penalty in Local Court: 6 months imprisonment/5 penalty units.
- <sup>271</sup> s4A, *Summary Offences Act*, maximum penalty in Local Court: 6 penalty units.
- <sup>272</sup> s4A, *Summary Offences Act*, maximum penalty in Local Court: 3 months imprisonment/6 penalty units.
- <sup>273</sup> J Keane and P Poletti, *Common Offences in the Local Court, Sentencing Trends and Issues No. 28*, Judicial Commission of NSW, Sydney, 2003, p. 11.
- <sup>274</sup> *Ibid.*, p. 11.
- <sup>275</sup> *Ibid.*, p. 4.
- <sup>276</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 3.
- <sup>277</sup> Appendix A, Qn 8.
- <sup>278</sup> The Hon. C. Tebbutt MLC, *NSWPD*, Legislative Council, 26 June 2001, p. 3787.
- <sup>279</sup> The Hon. R. Debus MP, *NSWPD*, Legislative Assembly, 27 June 2001, p. 4109.
- <sup>280</sup> The data in this part of the report was obtained from the NSW Judicial Commission's sentencing profile.
- <sup>281</sup> The non-custodial and non-financial penalties issued were: dismissal, dismissal with a bond, good behaviour bond, supervised good behaviour bond, suspended sentence, supervised suspended sentence, community service order and rise of court. While a sum of money may be expended to provide for a bond, this need not be a financial penalty providing that the offender is of good behaviour for the specified time, whereupon the bond will be returned.
- <sup>282</sup> A CIN can only be issued where the larceny involved an amount not exceeding \$300. It is highly likely that the figures and percentages reported here would be higher if they were limited to larceny offences where the value of the goods involved was no more than \$300.
- <sup>283</sup> As the number of offenders sentenced for obtain money by false representation (N = 8) and obstruct traffic (N = 23) for the period of 2002-03 are so few, they have not been considered for this discussion.
- <sup>284</sup> Appendix A, Qn 17.
- <sup>285</sup> NSW Ombudsman, *Put on the Spot – Criminal Infringement Notices trial, Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002, Discussion Paper*, Sydney, 2003, p. 14.
- <sup>286</sup> Information supplied by, and by arrangement with, the Project Management Unit, NSW Police, 21 November 2003.
- <sup>287</sup> Australian Bureau of Statistics, '4705.0 Population Distribution, Indigenous Australians', <http://www.abs.gov.au/ausstats/>, 2004.
- <sup>288</sup> These include, for example, Bourke (29.0 per cent), Brewarrina (57.5 per cent), Coonamble (22.5 per cent), Moree Plains (19.7 per cent), Narromine (15.5 per cent) and Walgett (25.1 per cent).
- <sup>289</sup> Telephone conversation dated 8 October 2003 and submission from B. Johnson, State Manager, ATSI State Office (NSW), dated 31 October 2003.
- <sup>290</sup> B. Johnson, State Manager, ATSI State Office NSW, Submission dated 31 October 2003, p. 2.
- <sup>291</sup> J. Sanders, Principal Solicitor, The Shopfront, Youth Legal Centre, Submission dated 23 October 2003, p. 2.
- <sup>292</sup> See, for example, Australian Law Reform Commission, *Multiculturalism and the Law, Report No. 95*, Canberra, 1992 & NSW Law Reform Commission, *Sentencing, Report No. 79*, Sydney, 1996.
- <sup>293</sup> Royal Commission Into Aboriginal Deaths In Custody, *National Report*, 5 Volumes, AGPS, Canberra, 1991.
- <sup>294</sup> NSW Police, *Aboriginal Strategic Direction 2003 – 2006, Version 3*, Sydney, 2003.
- <sup>295</sup> *Ibid.*, p. 4
- <sup>296</sup> Bureau of Crime Statistics and Research (NSW), *Race and Offensive Language Charges, Crime and Justice Statistics Bureau Brief No. 2*, Sydney, 1999, p. 1.
- <sup>297</sup> *Ibid.*
- <sup>298</sup> NSW Ombudsman, *Policing Public Safety, Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act*, Sydney, 1999, p. 232.
- <sup>299</sup> R. Jochelson, *Aborigines and Public Order Legislation in New South Wales, Crime and Justice Bulletin No. 34*, Bureau of Crime Statistics and Research (NSW), Sydney, 1997.
- <sup>300</sup> NSW Police, *Aboriginal Strategic Direction 2003 – 2006, Version 3*, Sydney, 2003, pp. 17-18.

<sup>301</sup> C. Chan and C. Cunneen, *Evaluation of the Implementation of NSW Police Service Aboriginal Strategic Plan*, Institute of Criminology, Sydney, 2001, pp. 228-229.

<sup>302</sup> NSW Police, *Aboriginal Strategic Direction 2003 – 2006, Version 3*, Sydney, 2003, p. 36.

<sup>303</sup> Crimes (Detention After Arrest) Regulation 1998. See cl. 3, cl. 5, Part 4, Part 5 and Schedule 1.

<sup>304</sup> NSW Police, *Code of Practice CRIME (Custody, Rights, Investigation, Management, Evidence)*, Sydney, 1998 (Updated 2002), p. 98.

<sup>305</sup> *Ibid.*, p. 17.

<sup>306</sup> *Ibid.*, p. 18.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*, p. 43.

<sup>309</sup> *Ibid.*, p. 47.

<sup>310</sup> Accessed from NSW Police Intranet.

# Chapter 13. Implications for NSW Police and the courts

In addition to looking at the consequences of the CIN scheme trial for offenders and the community, we foreshadowed in our Discussion Paper that we would be looking at the impact of the CIN scheme trial on police, courts and the administration of justice. In this section we will examine whether the touted administrative savings have been achieved, the impact on policing and crime, and the use of the powers in high visibility policing operations.

## Are there administrative savings for police and the courts?

One of the primary objectives for the *Penalty Notices Offences Act* was to achieve administrative savings for police and the courts. In his second reading speech on the legislation, the Attorney General said:

*Under the scheme, police will be able to issue a notice and move on to other front-line policing duties. The proposed trial of the scheme is advantageous for the State administratively and structurally. The prosecution and the court system are saved the cost of having to deal with more minor offences. The more effective manner of penalising people proposed in this scheme will also assist with court time and trial backlogs.*<sup>311</sup>

After the first six months of the trial, NSW Police said that the trial to that time had seen police officers save up to 267 minutes in processing a “minor non violent offence”. The amount of time saved was calculated on the basis that “each CIN took police 50 minutes to process compared to 317 minutes for every charge.”<sup>312</sup>

A review of the comparable scheme trialled in the UK found that there was a time saving of up to 150 minutes for each notice issued.<sup>313</sup>

Our focus group participants made varying estimates of the time involved in issuing a CIN in comparison with other options to deal with the offence:<sup>314</sup>

*Generally, CINs take 10 – 15 minutes to process, sometimes longer if the offender wants to be interviewed. An FCAN takes about 30 – 40 minutes to process and to charge someone takes between 1 – 2 hours, plus court time, etc.*

*Processing of CINs usually takes about 20 minutes (depending on the offence and the adequacy of police notes). It usually takes about 2 hours to charge someone.*

*The benefits include – no worries about placing someone in custody; there is the administration time saved by the station staff who would normally have to process the person charged; and, depending on the offence, there’s the difference of writing a 5 minute CIN compared to processing someone for up to an hour if charged.*

*The processing of CINs and writing ‘proofs’ of evidence takes approximately 10-40 minutes (depending on the nature and complexity of the offence). By comparison, it takes between 2-4 hours to bring someone back to the station to charge him or her. However, these times can be extended depending on where in the LAC the offence is committed.*<sup>315</sup>

However, some of the participants noted the administrative demands associated with the issuing of a CIN. Some officers in one focus group complained that CINs documentation took too long, while others commented that all the information obtained in relation to the offence still needed to be placed on the computer in case an offender opted to have the matter determined by a court. A participant in another focus group said that:

*At the end of a shift it usually takes about 10 – 15 minutes to write up each CIN on the computer. If 5 or 6 CINs are issued in a shift this can take a lot of time.*<sup>316</sup>

Another focus group participant said that there were savings not only of time, but of costs as well:

*The reality is that, it usually costs the taxpayer thousands of dollars to process what is a potentially serious offence, e.g., common assault, but in reality they’re fairly minor matters.*<sup>317</sup>

In its submission to our review, NSW Police said that it believed that:

*The CINs trial is providing administrative savings for NSW Police and courts...CINs provide an efficient alternative to charging that minimises post-investigation time for high frequency offences...CINs that are not*

*court elected provide considerable savings for courts and police. For operational police the time saving is in the non requirement to attend court as a witness. For courts the time saving is in the non requirement to hear the matter.<sup>318</sup>*

It is important to appreciate that any time savings for police should really only be realised in what occurs after the offence has been investigated, the inquiries up to that point being necessary to determine the appropriateness of issuing a CIN and to gather sufficient evidence to prosecute the matter should the offender elect to exercise that option.

In response to a question in the Discussion Paper dealing with the nature of the inquiries that had to be undertaken by police prior to issuing a CIN, NSW Police advised that:

*The SOPs guide operational police in relation to inquiries to be undertaken prior to issuing a CIN:*

- *Interview the complainant (if relevant) and the suspect.*
- *Investigate the incident (take statements, collect exhibits, etc.) to establish an offence has been committed.*
- *Consider all available alternatives.*
- *Ensure the offence can be dealt with by issuing a CIN (if not, consider the use of an FCAN).*
- *Undertake a Criminal Names Index (CNI) check of the suspect.*
- *Ensure a Legal Process check is undertaken. This check will also confirm the date of birth of the suspect.<sup>319</sup>*

The Police Association submitted that the indications were that:

*The nature and extent of inquiries undertaken by police prior to issuing a CIN has remained unchanged. The extent of inquiries appears to be the same as that of any other offence, whether the outcome is a CIN or charge.<sup>320</sup>*

The Association also advised that:

*The new powers greatly assist police in their duties as all respondents agree that there is less paperwork in the processing of CINs than for an FCAN, Summon or Charge. One should not be mistaken, however. The CIN process is still time consuming. Officers are still required to obtain all statements and any other evidence and this takes time, no matter what system is put in place.*

*Officers seem to like the new powers due to the reduction of paperwork it creates on returning to the station...<sup>321</sup>*

The officers participating in our focus groups offered similar views, and some suggested that the time involved in issuing a CIN was sometimes a factor in deciding whether or not to use that option:<sup>322</sup>

*Some officers choose to issue a caution rather than a CIN because it takes too much time to issue a CIN. When you issue a CIN you still need to gather prosecutorial evidence and take evidence and witness statements.*

*When officers use CINs they still need to get statements from witnesses, etc., because otherwise if the offender elects to go to court the officer will have no evidence to show to the court. This is especially important for assault and shoplifting offences. For offensive conduct offences, often the officer's notes are sufficient. Officers also have to ask the offender if they wish to be interviewed. It is the job of supervisors to ensure officers are taking statements.*

*For some offences, like offensive language and offensive conduct, most of your details are written on the ticket - time, place and that sort of thing, and it's up to you how detailed you make the narrative on the ticket, so essentially it's up to the officer.*

One group suggested that evidence gathered in the field for a CIN may not be of the same quality as the evidence gathered if an alleged offender was taken back to the station:

*... but if you take people back to the station to record the interview you may as well charge them.*

*Taking statements increases the time taken to issue CINs, and sometimes it can be just as quick to take the person down to the station to charge them because at the station one officer can do the charging and his or her partner can take the statements.<sup>323</sup>*

In addition to the savings for police, we also sought information on the savings, if any, for affected courts. The Director, Local Courts advised us that figures for the first nine months of the CIN scheme trial:

*... suggest that the use of the [CINs] option resulted in 1,079 cases not coming before the Local Court ... the 12 trial location Local Courts experienced a reduction of approximately 1600 cases from the equivalent time frame of the previous year. It seems likely that a large part of this reduction is attributable to the [CINs] system...*

*Matters dealt with by way of [CIN] are by their nature minor straightforward pleas of guilt. The Local Court has the capacity to deal with these matters quickly and effectively either by accepting an immediate plea from the defendant present in court or by acceptance of a written note of pleading. The time allocated for dealing with such matters is approximately 10 minutes for each case. On this basis the Local Court saved an estimated 180 hours hearing time during the trial period.<sup>324</sup>*

### **Estimated value of administrative savings for police and the courts**

It is clear that both NSW Police and Local Courts believe that the trial CIN scheme has resulted in substantial administrative savings in the amount of time spent on processing and charging offenders and hearing matters involving those offences.

While neither NSW Police nor Local Courts quantified the savings in monetary terms, we note that BOCSAR has only recently reported on its evaluation of the Cannabis Cautioning Scheme ('CCS') including an estimate of the savings achieved by it.<sup>325</sup>

In the absence of a full cost-benefit analysis of the scheme, BOCSAR estimated the time and cost efficiencies achieved by the CCS by way of establishing its opportunity costs. That is, what was the value of the time saved for police and the courts in not having to arrest and charge a person and put him or her before a court for minor cannabis offences. In doing so BOCSAR clearly states that its calculations regarding the value of the time saved is intended to be a *guide* as to the potential savings, not a definitive costing. Notwithstanding that caveat, BOCSAR's costings are a useful guide and we have modelled our own costings of the CIN scheme trial on their formulae and assumptions, and accordingly, the same caveat about it being a guide also applies here.

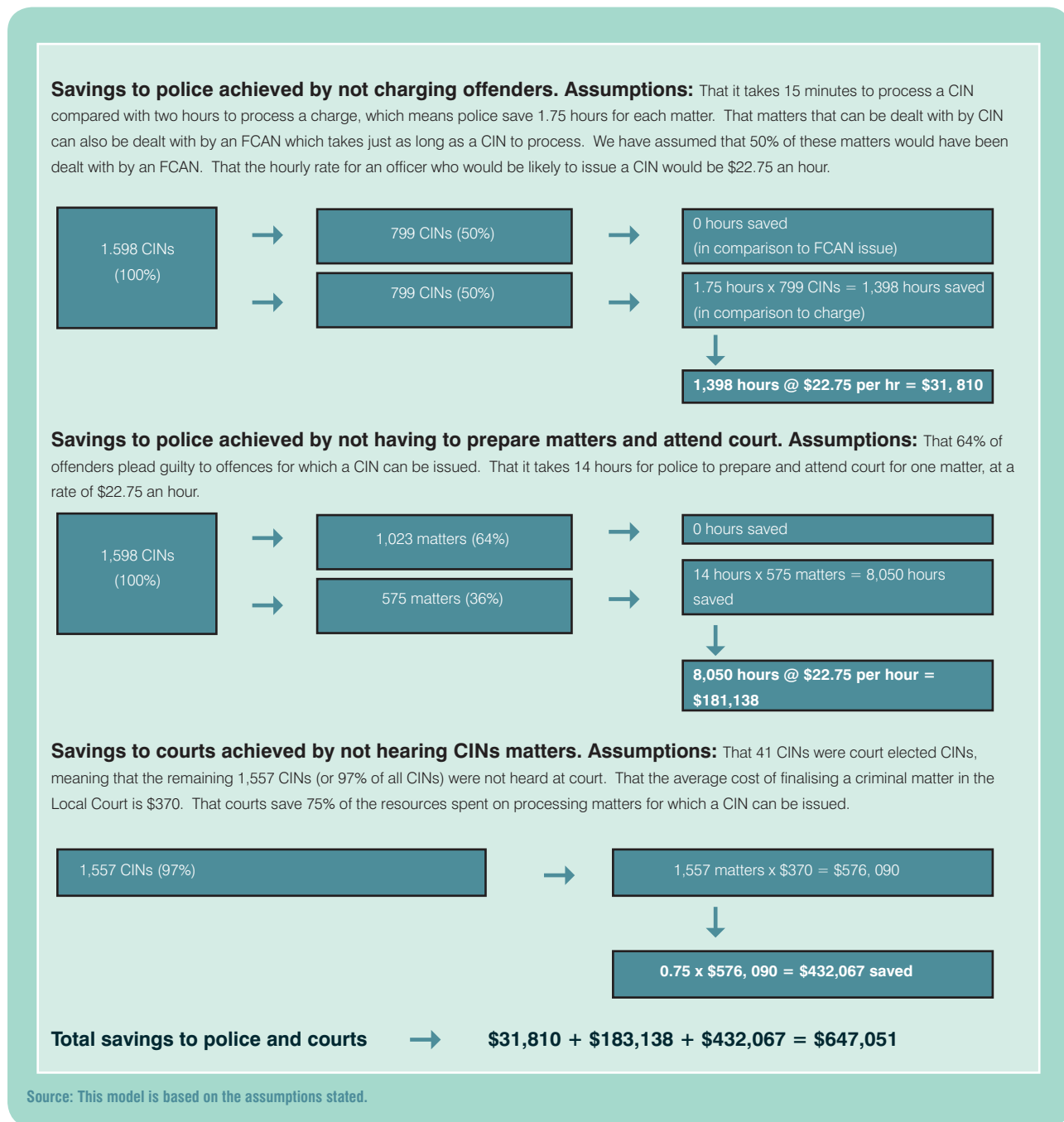
To determine the potential value of the savings, we have used the basic structure of the BOCSAR model, and we have incorporated data supplied to our review or obtained from other authoritative sources. For instance, as reported earlier, the majority of police officers suggested to us that a CIN required 15 minutes to issue compared to two hours to process a charge. The savings, therefore, are calculated on the basis that each CIN issued in preference to a charge resulted in a time saving to police of 1.75 hours compared to the alternate process of charging. However, we also note that not all offences for which CINs were issued would have previously resulted in arrest and charge. These offences instead may have been processed by issuing an FCAN, which for all intents and purposes, takes as long to issue as a CIN, thereby resulting in no savings. For the purposes of this model, we assume that 50 per cent of matters would have previously been processed by way of an FCAN.

As we reported earlier, 41 (2.6 per cent) of CINs matters utilised the statutory court-elect option, hence the 'savings to court' calculation was premised on 97 per cent of the total numbers of CINs issued. We also established from the Judicial Commission's database on sentencing that between 2000 and 2004, 64 per cent of offenders before the Local Court pleaded guilty in respect of those offences for which a CIN can be issued.

Several of the figures used in our model draw on data obtained, calculated or assumed by BOCSAR.<sup>326</sup> BOCSAR estimated that it takes 14 hours for police to prepare for and attend court, and that the hourly rate of pay for a 'top level Constable', assumed to be the rank most likely in this scenario to issue a CIN, to be \$22.75, based on an annual salary of \$44,955. We also rely on BOCSAR's assumption that up to 75 per cent of the resources that were not expended on CINs matters could be reassigned by the courts to deal with other matters.<sup>327</sup>

Finally, according to the Steering Committee for the Review of Government Service Provision's *Report on Government Services 2004*, the average cost of finalising criminal matters in the Local Courts in 2002-03 was \$370.<sup>328</sup>

Figure 19: A model estimating the time and cost savings to the police and the court as a result of the CINs trial



Based on the total number of CINs issued during the trial period, our modelling suggests initial savings of \$31,810 to NSW Police, resulting from the reduced amount of time to issue a CIN compared to the time involved in charging an alleged offender. Further savings to NSW Police of \$183,138 is calculated from the time saved in preparing for and attending court. Based on an average unit cost to process criminal matters before the local courts, the model also estimates savings for the local courts to be over \$430,000.

Cumulatively, the model suggests total savings for NSW Police and the local courts of approximately \$647,015 for the twelve months of the CIN scheme's trial. As we noted earlier this figure represents a saving against opportunity costs, meaning that it is assumed that, rather than realising the savings as a surplus, the savings are realised by the police and the courts in being able to attend to more matters.

## Redeployment of police and courts' resources

Given the significant administrative savings available to police and the courts, we asked how these savings might be redeployed. NSW Police advised that the “savings are redeployed into increasing proactive policing... The time saved by processing minor summary matters by way of a CIN, allows police to undertake more ‘out of the station’ policing work, improving police visibility and deterring crime”.<sup>329</sup>

The officers in our focus groups confirmed this:

*CINs are seen to be a good thing by some people because police get to spend more time on the street, rather than charging people back at the police station.*

*People see you dealing with it [an alleged offence] on the street. They can't see it if you're back at the station.*

*On busy nights police may also be more likely to issue a CIN rather than charge someone. For example, on a busy Friday or Saturday night officers would be more likely to issue a ticket which would take up to 40 minutes rather than charge someone which would take up to 4 hours.*

*Allows police to remain on the streets, maintaining a higher profile in the community.*<sup>330</sup>

In relation to the potential benefits for courts, the Director, Local Courts advised that:

*The reduction of approximately 1,079 cases coming before the Local Court will have a positive effect on average waiting times for defended hearing allocations. The absence of these additional matters for determination by the Court will free available sitting times to allow Magistrates to provide an earlier allocation for other cases. The significance of the impact of the diversion of these cases from the Local Court may be estimated from the court sitting time saved.*<sup>331</sup>

## Personal service

Section 334(2) of the Act requires that a CIN must be served on the offender personally. While there was no explanation for this requirement in the Parliamentary debate or in the SOPs, it can be reasonably assumed that this was done with the intention that CINs be an “on-the-spot” means of dealing with the offence, and indeed, the SOPs do say that it is preferable that the CIN be served at the time of detection.<sup>332</sup>

In support of this notion, the Act provides police with a discretionary power to request the name and address of a suspect and to request proof of those particulars.<sup>333</sup> Further, where an officer considers it necessary to confirm the identity of a suspect, amendments to the *Crimes Act* enable police to require a suspect to submit to having finger and/or palm prints taken in order to confirm their identity.<sup>334</sup>

However, our review of CINs events on COPS indicated that in a number of instances police did issue CINs by mail. In most of the instances that we reviewed, the offender was moderately to heavily affected by alcohol at the time of the offence. It may have been, therefore, that the police officers involved thought that the offender may lose or forget about the CIN if it were to be issued on the spot. If this were the case, it seems a reasonable explanation for proceeding in this fashion, but presently service of CINs by post is a contravention of the legislation. There may be other reasons for delaying the service of a CIN, including the need to make further inquiries, with the consequent assessment that a CIN is the appropriate response to the offence, and that it is more efficient to despatch the CIN by mail.

Although not directly raised as an issue for the consideration of the police officer focus groups that were conducted during the review, the inflexibility of the CINs serving process was raised by the participants of those groups together with the suggestion that greater efficiencies might be achieved by amending the legislation to permit either personal or postal service of CINs.<sup>335</sup>

Accordingly, we recommend that the Act be amended so that personal service of a CIN is the preferred approach, but that it may be served by post if the officer concerned reasonably believes it preferable to issuing the CIN in person.

**RECOMMENDATION 9:** That section 334 (2) of the *Criminal Procedure Act* be amended so as to allow the service of a Criminal Infringement Notice by post, should the issuing officer consider it reasonable to do so in preference to serving it personally.



The Chief Magistrate of the Local Court proposed that “Part 6 Local Courts (Criminal and Application Procedure) Rule 2003 deals with the service of court documents including court attendance notices (CANS). As CINS are intended to deal with less serious matters, there is no good reason why services of CINS may not be effected in accordance with clause 31(3) of the above Rule”.

NSW Police support the recommendation.

## Impact on policing and crime

The administrative savings obtained from the introduction of CINS as a policing tool enables police to allocate more time to other policing activities. The redeployment of police resources, particularly officers, will presumably have some impact on crime prevention and reduction.

NSW Police submitted that it was too early to draw any useful conclusions as to the impact on crime figures. It advised us that:

*CINs were not directly intended to reduce crime but rather streamline the administrative and legal process to facilitate more “on street” time for officers. This might indirectly contribute to improvements in crime reduction efforts, ie better tasking at hot spots, targeting of High Risk Offenders etc.*<sup>336</sup>

The officers participating in our focus groups also said that it was too early to draw any conclusions on the impact of CINS on crime prevention and reduction. However, some officers felt that the major benefit from being able to issue CINS was that it freed them up to work on other tasks, while it would have little or no impact on crime rates:

*CINs have no effect at all on crime rates. They are just a different way of processing the offender.*<sup>337</sup>

The Police Association advised us that:

*...the new powers assist [police] in their duties insofar as allowing them to redirect time saved on paperwork, on more proactive duties. It allows police more time for “out of station” policing and for the preparation of briefs for offenders of a more serious nature.*<sup>338</sup>

## Discretion to intervene

In recent years, police have been conferred with a greater range of options to deal with criminal behaviour. If the offender is a young person, the *Young Offenders Act* offers a number of options to deal with offending behaviour: in increasing levels of severity, police can issue a warning or caution, or seek a conference involving the offender, her or his family, the victim and other invited persons. Should it not be appropriate to utilise these options, the police still have the option to have the matter put before a court.

For offences involving adults, police still have the (unlegislated) option of issuing a warning or caution, or should the offence be more serious, proceeding by way of charge, summons or CAN.<sup>339</sup> If appropriate, police may issue a FCAN away from the police station, for example, at the place where the offence has occurred or the alleged offender has been apprehended.

The NSW Police CRIME Code of Practice instructs police to:

*Be mindful of competing requirements between the rights of individuals to be free and the need to use the extreme action of arrest so you can charge people who break the law. Do not, for the purpose of charging, arrest for a minor offence when it is clear a summons or court attendance notice (field) will ensure attendance at court. Also keep in mind your ability to issue infringement notices for many offences.*<sup>340</sup>

The SOPs instruct police that:

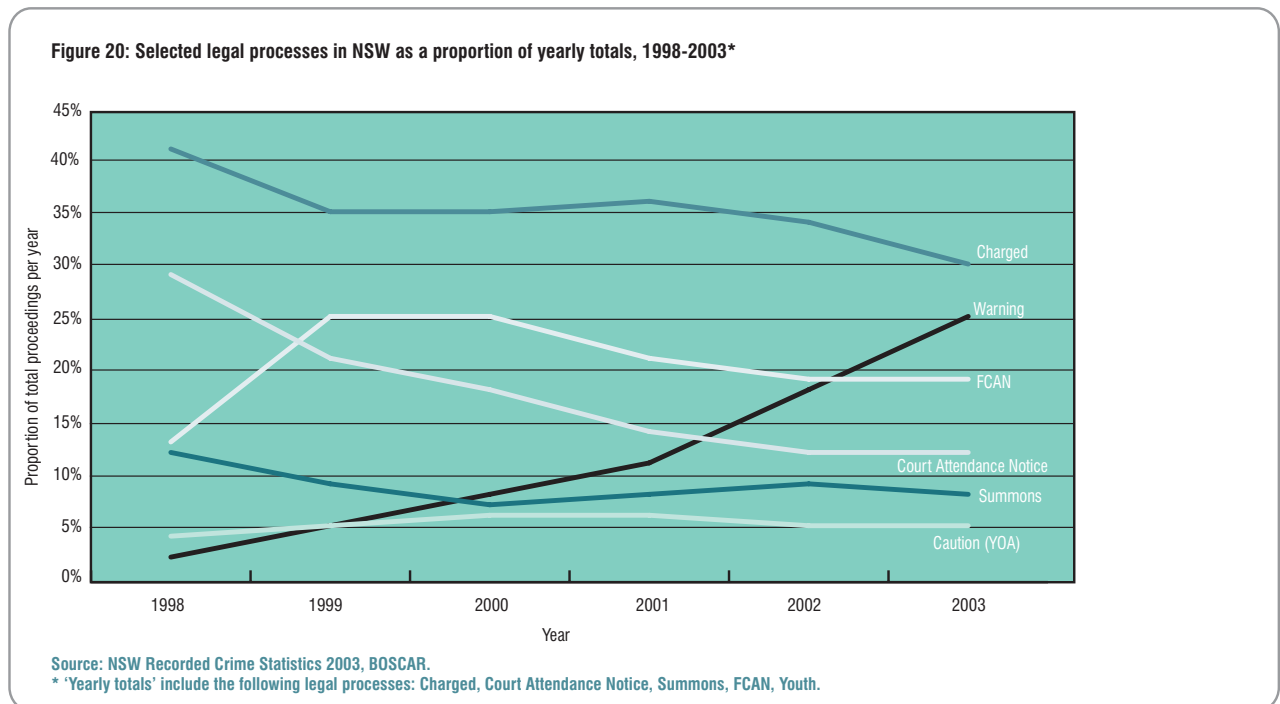
*The introduction of penalty notices does not remove the discretion police officers currently have to deal with minor offences ... Each incident faced by police officers will differ and the use of discretion when considering the action to be taken against a suspect is vital to the success of the trial program.*<sup>341</sup>

In recent years there has been a sizeable shift in the way in which police intervene in criminal matters. For example, in 1994 over 95 per cent of proceedings in the Local Court were commenced by way of police charge.<sup>342</sup> Since 1998, the percentage of court proceedings commenced by charge has ranged from 39 to 46 per cent. In 1998 CANS,

which were issued from the police station, accounted for the initiation of 30 per cent of Local Court proceedings, while FCANs accounted for 13 per cent. FCANs have since initiated between 26 and 30 per cent of proceedings between 1999 and 2003, while in 2003, CANs accounted for less than 17 per cent of proceedings.<sup>343</sup>

While there has been a shift between 1998 and 2003 in the method of initiating proceedings in the Local Court from proceeding by charge to using CANs, with a further shift in the use of CANs to FCANs, there has also been a significant shift to using non-court proceedings for offences. From 1998 to 2003, there was an increase of 586 per cent in the number of persons proceeded against by way of an alternative to court.<sup>344</sup> This expansion is largely accounted for by an increase in the number of warnings issued, from 2,537 in 1998 to 46,591 in 2003.

The options for dealing with young offenders established by the *Young Offenders Act* in 1998 and the option of using FCANs has seen the police intervene in more incidents overall during that time, with an increase in the use of



processes that do not lead to court attendance.<sup>345</sup> The discretion afforded by the availability of these options has seen police increase the use of less formal proceedings against offenders.

The Government made it clear that it did not expect the *Penalty Notice Offences Act* to have an adverse impact on the use of police discretion:

*The proposal to issue penalty notices for an extended number of offences provides police with an additional enforcement tool. It allows police to use their discretion to deal with minor matters in an appropriate way. The scheme is not mandatory. It does not exclude the exercise of discretion to dispose of an offence by administering a warning or to file a charge. The courts will still deal with more serious offences and offenders. Police will continue to exercise their discretion to caution and warn where appropriate in very minor matters.*<sup>346</sup>

The availability of CINs as a less formal means of proceeding against an offender, where a financial penalty can be issued without the matter proceeding to court may impact on the use of police discretion, particularly in the use of warning and cautions when intervening. It might be regarded as unfortunate that where a matter was previously and appropriately dealt with by way of caution or warning is now dealt with by way of CIN because of its ready availability to police.

With the relatively small number of CINs issued compared to the other means of proceeding against an offender, it is not possible to draw any conclusions at this time on the impact of CINs on an officer's decision to intervene in an incident, and his or her preferred means of intervening.

We raised this issue in our Discussion Paper and in our focus groups with police officers, and the consistent theme of responses on this issue is that CINs represent just another option for police, and will not greatly influence their discretion to intervene or how they choose to intervene.

The response from the Police Association indicated that the availability of CINs is more likely to have an impact on the decision to proceed against a person through the courts rather than influence their decision to use less formal means:

*Front line police like having another option for legal process; especially one that caters for the less serious offenders in society and one that potentially saves police a significant amount of time processing these less serious offenders.*<sup>347</sup>

The Association advised us that one officer had commented on the impact of CINs as an option for police:

*... police from his LAC are now extremely confident in using the CIN system and view it as a simple and effective tool to intervene in street related incidents. Officers in this LAC apparently do not hesitate to use the CIN system where appropriate.*<sup>348</sup>

The officers in our focus groups said that they saw CINs as just one more tool to deal with criminal offences, and that it was more likely to be used as an alternative to charging the offender:

*Generally for a minor offence, usually a caution will be given, then if one or more offences are committed CINs are issued. If the offender commits offences after this they will be charged. They usually start listening when they get slapped with a \$250 ticket.*<sup>349</sup>

Some participants suggested that a sliding scale of interventions be created indicating where the use of CINs would be appropriate. An analogy was made with the scheme established by the *Young Offenders Act* where the interventions in order of severity are warnings, formal cautions, and youth conferencing, with criminal proceedings to be commenced only if there is no other alternative and appropriate measure for dealing with the matter.<sup>350</sup>

*One option could be to use a sliding scale like that in the Young Offenders Act – first a warning, then a CIN, then a charge etc.*

*[CINs] should be consistent with the Young Offenders Act, that is, incremental interventions.*<sup>351</sup>

However, the general view was that police continue to have the discretion that they have now to issue a CIN:

*Police have always had discretion in dealing with offenders, with or without CINs. We're happy with the status quo.*<sup>352</sup>

There was some concern that the diversionary options available to police were not universally or consistently available. The Legal Aid Commission submitted that:

*The Police already have a number of discretions in relation to juveniles (whether to charge or caution) and in relation to adults. There are also a number of diversionary programs which are available through the Courts and which are being trialled in various areas of the State. The general point should be made that until these diversionary programs are uniformly available, there is a potential for lack of uniformity and hence unfairness, particularly in more remote parts of the State.*<sup>353</sup>

Should CINs be implemented statewide, there is nothing in the trial to form the basis of a view that police discretion, and in particular their discretion to use CINs be formalised or codified. However, the use of CINs in preference to issuing a caution or warning where the latter is warranted should be kept under review. Keeping the use of CINs under scrutiny at a broad level will be made difficult if the current practice of reporting the number of proceedings initiated by police is carried out by capturing all infringements, including traffic infringements, under the single heading of "infringements". As we noted previously, this practice has seen the recorded number of infringement notices issued by police jump from 12,135 in 2000 to 544,306 in 2003.

For these reasons, it is recommended that records of the number of CINs issued be maintained as a separate category from other infringement notices. This would, among other things, allow BOCSAR, in its annual release of recorded crime statistics, to report on the numbers of CINs issued and any trends in their usage compared to other methods of police intervention.

NSW Police advised that they supported these recommendations.

In relation to Recommendation No. 10, OSR informed that, "Currently under scope is a system change to IMPS to enable us to identify CIN matters separately. COPS has this facility but it relies heavily on officers selecting the correct criteria. IMPS functionality will count the penalty notices as a separate type of infringement at load and could therefore provide more accurate data".

RECOMMENDATION 10: If the Criminal Infringement Notice scheme is extended statewide, that records of the number of Criminal Infringement Notices issued by police be maintained separately from the number of other infringement notices issued by police.

RECOMMENDATION 11: That in reporting the methods of proceeding against alleged offenders by NSW Police, the Bureau of Crime Statistics and Research report the number of Criminal Infringement Notices separately from other infringement notices issued by police.

### Impact on high visibility policing

Since May 2002, NSW Police has been conducting a series of high profile street policing operations called Operation Vikings. These operations, which are variously run at a central, regional or local area level, target:

*... street offences and hoodlum/criminal activity such as anti-social behaviour, alcohol related crime, street level drug possession and traffic offences...*

*Vikings puts significant numbers of police at the frontline and supports them with intelligence, resources, leadership and motivation. Its philosophy is firm but fair, honest and ethical policing, coupled with the effective use of police powers and legislation.*<sup>354</sup>

From 24 May 2002 to the end of June 2003, 250 Operation Vikings were conducted. There is an emphasis on police maintaining high visibility during these operations, which means that options such as cautions, warnings, infringement notices and FCANs for dealing with offences without having to return to the station are preferred. The issuing of infringement notices, generally for traffic and parking offences, is a significant outcome from these operations, with almost 19,000 notices issued during that time.

We asked to what extent CINs were being issued during these high profile operations. NSW Police advised us that there was no capture of data that would allow a distinction between CINs issued during normal policing duties and those issued during operations such as Vikings. NSW Police said that it was its understanding that CINs had not been specifically used for Vikings operations because the operations drew on officers from a number of commands, and only officers who had been trained in using CINs in the trial locations were able to issue them.

The officers in our focus groups provided the same feedback:

*[CINs] doesn't have a major effect with large scale ops as these often use officers from other LACs, not all of whom have been trained in the use and administration of CINs.*

*CINs are not used for High Visibility Policing Operations, such as Viking Operations. This is because officers are usually from another station and are not able to issue CINs and are not familiar with CINs.*<sup>355</sup>

The officers had differing views on the prospects of using CINs in these high profile operations. One officer who thought they may be of value said:

*[CINs] reduce people in custody and use of vehicles so could help, especially by way of keeping those officers within the operation and not having to send them back to the station to process and charge an individual.*<sup>356</sup>

Another officer felt that measuring the success of Vikings might prevent CINs from being used:

*Vikings are statistically driven, therefore they are not interested in CINs, only charges.*<sup>357</sup>

One of the focus groups said that the proactive nature of Vikings meant that CINs, which were seen as a reactive tool, were not really suited.<sup>358</sup>

The Police Association said that:

*Members from two different LACs who were part of the trial, however, are able to attest to a high degree of CINs being issued in high profile policing operations in their own LACs. One member [explained] that the CIN system has been used extensively in high profile policing operations ... where FCANs, CINs and field fingerprinting are encouraged. The officer had described CINs as a "great asset" in these types of operations, allowing police to use the extra downtime for related COPS events and brief preparation.*<sup>359</sup>

In its submission, NSW Police said that:

*The philosophy of Vikings is 'High Visibility' and the use of CINs would thus assist police to spend more time on the 'street' and thus increase visibility.<sup>360</sup>*

With the Government committing itself last year to spend \$20 million on Operation Vikings over four years, high visibility policing strategies will continue to be employed by NSW Police. It is apparent that there are different views among the officers about the utility and appropriateness of using CINs in such operations.

Should CINs be made available to officers on a statewide basis, it is clear that officers will need clear guidance on the appropriateness of using CINs in high visibility policing operations. However, if their use is to be encouraged it is important to warn against permitting any perception to arise that there are quotas for issuing CINs or that they are issued to raise revenue. Public confidence in the fairness of the CIN scheme will quickly be undermined if such perceptions are allowed to take hold. This is apparent in the research of Professor Fox, which indicates that there is a significant portion of the population that is “*suspicious about the revenue motives of the issuing agencies*”, which in turn can diminish confidence in the criminal justice system generally:

*Lack of confidence in the fairness of this component of the criminal justice system in the state may well contaminate their views about the workings of other parts of the justice system.<sup>361</sup>*

**RECOMMENDATION 12:** If the Criminal Infringement Notice scheme is extended statewide, that clear guidance be provided to frontline officers on the suitability of using Criminal Infringement Notices in high visibility operations.

NSW Police advised that they support the recommendation.

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## Endnotes

- <sup>311</sup> The Hon. R. Debus MP, *NSWPD*, Legislative Assembly, 27 June 2002, p. 4109.
- <sup>312</sup> NSW Police, *Police Service Weekly*, v 15, No. 8, 3 March 2003, p. 7.
- <sup>313</sup> K. Spicer and P. Kilsby, *Penalty notices for disorder: early results from the pilot*, Home Office Research Findings, No. 232, p. 4.
- <sup>314</sup> Appendix A, Qn. 13.
- <sup>315</sup> *Ibid.* The LAC in question was in non-metropolitan NSW and geographically large.
- <sup>316</sup> *Ibid.*
- <sup>317</sup> *Ibid.*
- <sup>318</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 4. Emphasis added.
- <sup>319</sup> *Ibid.*
- <sup>320</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 3.
- <sup>321</sup> *Ibid.*, pp. 1-2.
- <sup>322</sup> Appendix A, Qn. 15.
- <sup>323</sup> *Ibid.*
- <sup>324</sup> A. Anderson, Director, Local Courts, Submission dated 17 November 2003, p. 2.
- <sup>325</sup> J. Baker & D. Goh, *The cannabis cautioning scheme three years on: An implementation and outcome evaluation*, Bureau of Crime Statistics and Research (NSW), Sydney, 2004.
- <sup>326</sup> See J. Baker & D. Goh, *The cannabis cautioning scheme three years on: An implementation and outcome evaluation*, Bureau of Crime Statistics and Research (NSW), Sydney, 2004, pp. 35-37.
- <sup>327</sup> BOCSAR made their calculations using an assumption that 50 per cent of resources could be redirected to other matters but advised that 75 per cent was a more likely figure.
- <sup>328</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2004*, Productivity Commission, Canberra, 2004. Attachment 6A, Table 6A.30.
- <sup>329</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, pp. 4 & 6.
- <sup>330</sup> Appendix A, Qn. 14.
- <sup>331</sup> A. Anderson, Director, Local Courts, Submission dated 17 November 2003, p. 2.
- <sup>332</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 13.
- <sup>333</sup> s341, *Criminal Procedure Act*.
- <sup>334</sup> s353AC, *Crimes Act*.
- <sup>335</sup> Appendix A, Qn. 13.
- <sup>336</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 6.
- <sup>337</sup> Appendix A, Qn. 18.
- <sup>338</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 2.
- <sup>339</sup> Legislative changes to the procedures of the Local Court means that since July 2003 all criminal proceedings are now commenced by way of some form of court attendance notice. Charges have been replaced by Bail Court Attendance Notices, while summonses have been replaced by Future Court Attendance Notices. The Court Attendance Notices, which were previously issued at the station instead of proceeding by way of charge or summons, are now called No-Bail Court Attendance Notices. Field Court Attendance Notices remain unchanged. As these changes were only in effect from July 2003 onwards, in its most recent annual release of recorded crime statistics for NSW (S. Moffatt, D. Goh and J. Fitzgerald, *New South Wales Recorded Crime Statistics 2003*, Bureau of Crime Statistics and Research (NSW), Sydney, 2004), BOCSAR has reclassified these proceedings under their former category label. This report adopts that convention.

- <sup>340</sup> NSW Police, Code of Practice CRIME (Custody, Rights, Investigation, Management, Evidence), Sydney, 1998 (Updated 2002), pp. 8-9. Emphasis added.
- <sup>341</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 5.
- <sup>342</sup> B. Lind, M. Chilvers and D. Weatherburn, *Simulating the New South Wales Criminal Justice System: A Stock and Flow Approach*, Bureau of Crime Statistics and Research (NSW), Sydney, 2001, pp. 14-15.
- <sup>343</sup> Some of the trends here and in the associated figures can be accounted for by the increased recording of less formal options exercised by police, particularly warnings and cautions under the *Young Offenders Act*. However, working graphs prepared to take into account for the *Young Offenders Act* options show similar trends to those presented here.
- <sup>344</sup> These options are youth conference (under the *Young Offenders Act*), caution, cannabis caution and warning. The figures do not include infringement notices issued by police, due to a change in police recording procedures in December 2000 where traffic infringement notices were included in the category for the first time. Consequently, the number of infringements recorded in this category rose from 12,135 in 2000 to 544,306 in 2003.
- <sup>345</sup> M. Chilvers, *Trends in formal charges and the use of alternative processes by NSW Police, Crime and Justice Statistics Bureau Brief*, Bureau of Crime Statistics and Research (NSW), Sydney, 2001, p. 5.
- <sup>346</sup> The Hon. M. Costa MLC, NSWPD, Legislative Council, 18 June 2002, p. 3202.
- <sup>347</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 1.
- <sup>348</sup> *Ibid.*, p. 3.
- <sup>349</sup> Appendix A, Qn 19.
- <sup>350</sup> See section 7(c), *Young Offenders Act*.
- <sup>351</sup> *Ibid.*
- <sup>352</sup> *Ibid.*
- <sup>353</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 2.
- <sup>354</sup> NSW Police, *Annual Report 2002-03*, p. 36.
- <sup>355</sup> Appendix A, Qn. 21.
- <sup>356</sup> *Ibid.*
- <sup>357</sup> *Ibid.*
- <sup>358</sup> *Ibid.*
- <sup>359</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 2.
- <sup>360</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 6.
- <sup>361</sup> R. Fox, *On-the-Spot Fines and Civic Compliance: Final Report*, Faculty of Law, Monash University and Department of Justice, Victoria, 2003, p. 121.

# Chapter 14. The future of the CIN scheme

The purpose of trialling the use of CINs in a limited number of locations was to determine if the scheme operated as anticipated and whether there were any operational issues to be remedied before extending the scheme on a statewide basis:

*... the Government has quite deliberately set the scheme up as a trial. Not only will the Ombudsman be able to examine the operation of the scheme to ascertain whether it is working properly from the point of view of the rights of citizens, but, just as importantly, the police department will be in a position to continue to monitor the scheme in order to ascertain whether it is operating as anticipated and is in the interests of law enforcement.*<sup>362</sup>

In our Discussion Paper and in our focus groups with officers, we sought views on making the CIN scheme permanent and extending it statewide, and whether there should be any other offences for which CINs may be issued. We also considered how the implementation and administration of the CIN scheme could be improved if it were to be made permanent. This chapter considers these issues, and accordingly, makes some recommendations for the future of the CIN scheme.

## Making the CIN scheme permanent and extending it statewide

On the question of extending the operation of the scheme on a statewide basis, NSW Police submitted that the:

*... powers should be extended state-wide based on the benefits experienced to date. The powers provide police with another tool to address their work which, where circumstances permit, provides an efficient means for processing high frequency offences. Undoubtedly, police will continue to apply discretion and assess the appropriateness of a CIN on a case by case basis.*<sup>363</sup>

The Police Association provided an unequivocal response to this question:

*Our members have answered this question with a resounding YES. There is total agreement that the powers should be extended statewide. It is generally agreed that the CINs process is a very fast way of dealing with offenders of minor offences ... In the words of one member when posed with this question:*

*Yes definitely. We were hesitant to change but seeing the saving in time etcetera, it's worth the effort changing.*<sup>364</sup>

NSW Police also noted that there had been some reluctance in adopting the new powers at the outset:

*At LAC level, there was some initial resistance to the trial, however, operational police are now confident in its use. It is a simple, effective method in dealing with listed offences.*<sup>365</sup>

The participants in our focus groups were unanimous in their support for making the scheme permanent and extending it statewide.

However, other submissions from outside policing were not so enthusiastic about extending the CIN scheme.

The Legal Aid Commission said that the implications of transferring responsibility for “*punishment, deterrence, rehabilitation and denunciation*” from the courts to police officers “*should certainly be very carefully weighed before the trial is extended*”.<sup>366</sup>

The Shopfront Legal Service submitted that:

*It would appear that the main motivation for the [CINs] trial is cutting down on paperwork for the police. Whilst we have some sympathy for busy police officers who have to spend large amounts of time generating court papers for trivial offences, we suggest that this alone is not a good enough reason for the increased adoption of infringement notices. The interests of justice must be paramount. We would also point out that issuing a [FCAN] is a relatively quick option which does not involve a great deal of paperwork for police. Giving a warning is also an option which may (and, we suggest, should) be utilised for minor summary offences.*



*The saving of court time and resources is also an admirable aim, but again, we do not believe this should take precedence over the interests of justice.*<sup>367</sup>

Given what we have observed of the trial, and the submissions made to this review, we have come to the view that the CINs trial has substantially achieved what it was established to do: provide police with a process that allows them to deal with minor offences in a simple and timely fashion, without denying the recipient the ability to contest the matter before the courts should they wish to do so.

We have, however, made a number of recommendations for legislative and procedural changes, as well as recommendations ensuring that this significant change to the administration of criminal justice operates fairly, properly and effectively. Some of these matters are the subject of detailed discussion in this chapter, but we are of the view that all the recommendations contained in this report are essential to the fair, proper and effective operation of the CIN scheme in the future.

## CINs and detention after arrest

A significant matter that will need to be addressed if the CIN scheme is to be extended statewide is the effect of the safeguards established for the detention of a person after they have been arrested for an offence.

In 1997, the *Crimes Act* was amended to include a new part, Part 10A, which provided for an overhaul of the procedures to be followed in detaining someone for the purposes of investigating an alleged offence after they had been arrested for that offence, and the safeguards available to that person while under arrest. The need for change along these lines arose from the circumstances described by the (then) Attorney General on introducing the amendments:

*In 1986 the High Court handed down its decision in the case of Williams v The Queen. In that judgment, the High Court affirmed that there is no power to delay taking before a justice an arrested person in order to question that person or in order to complete any other investigatory procedure...*

*Accordingly, at common law, it was unlawful for a police officer, having the custody of an arrested person, to delay taking that person before a justice in order to provide an opportunity to investigate the person's involvement in an offence.*<sup>368</sup>

As a consequence of the 1997 amendments, Part 10A and the associated regulation<sup>369</sup> now provide that a person under arrest must be taken immediately to a designated police station, presented before a custody manager, advised of their rights while in police custody and given an opportunity to exercise those rights, including the right to communicate with a legal practitioner, communicate with a friend, relative, guardian or independent person, obtain an interpreter and seek medical assistance.

These provisions are to be given effect after a person has been arrested, and s355(2) of the *Crimes Act* defines "arrest" very broadly:

*A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:*

- (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or*
- (b) the police officer would arrest the person if the person attempted to leave, or*
- (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.*<sup>370</sup>

This definition of arrest makes it clear that the requirements and protections established by Part 10A are to be given effect where a person is detained for the purpose of "participating in an investigative procedure" and reasonably believes that they would be prevented from leaving the scene should he or she wish to do so. These circumstances are highly likely to occur where a police officer detains a person for the purpose of investigating an offence even though they may intend to issue a CIN as an alternative to arrest and charge.

We became aware through observing the NSW Police CIN Standing Committee meetings<sup>371</sup> that there was some reluctance on the part of police officers to issue CINs due to the perception that Part 10A might apply upon apprehending and detaining a person who was alleged to have committed an offence for which a CIN could be issued, thereby requiring the officer to take the detainee to a police station and present him or her to the custody manager for processing. The position taken at the Standing Committee was that Part 10A did not apply

in the circumstances where it was intended to issue the offender with a CIN, and that police officers should be advised of this.

After this position was adopted, we asked to receive a copy of any legal advice available to NSW Police considered in reaching this view. We were subsequently provided with a copy of an advice from Legal Services, NSW Police.

The advice considered whether the questioning of a person in relation to an offence for which it was intended to issue a CIN was an investigative procedure for the purposes of s355 (2). The advice stated that on this question:

*It could not be denied that the purpose of the officer's questioning was to determine (or investigate) the arrested person's involvement in the alleged offence. Accordingly, such a procedure is no less an 'investigative procedure' than is a 'formal' ERISP between a police officer and a suspect. I therefore conclude that questioning of an arrested person by a police officer in relation to the arrested person's involvement in the offence ... is an 'investigative procedure' for the purposes of Part 10A, whether that questioning takes place 'on the street', in the course of a 'formal' ERISP or otherwise.<sup>372</sup>*

The advice went on to state that at common law an individual is under arrest when they have been deprived of their liberty such that they are not free to leave, and cited instances of this in a person being detained by store security staff on suspicion of retail theft and a motorist stopped for a traffic offence, where police issue a penalty notice or an FCAN for the offence. While these processes are considered to be an alternative to arrest they “*nevertheless involve the 'technical' arrest of the person the subject of the procedure, albeit for a brief time.*”<sup>373</sup>

The advice then argues that because the person is being detained only for the purpose of being issued with a penalty or infringement notice then it is clear that they are not being detained for the purpose of participating in an investigative procedure. However, the advice goes on to state that even brief questioning of a suspect to determine the facts of the offence for which it is intended to issue a penalty notice may “[invoke] *the obligation to deal with the 'arrested' person in accordance with Part 10A.*”<sup>374</sup>

The consequences, according to the advice, of this ‘technical’ application of Part 10A are that:

*... if a police officer delays the release of a person upon whom the officer proposes to issue a CIN, FCAN or penalty notice, and during that period of detention the officer asks questions of the person, the aim of which is to obtain evidence of the person's involvement in the criminal offence, such detention will have been unlawful and any such evidence obtained will have been obtained illegally.<sup>375</sup>*

The advice then goes on to argue that such an application would defeat the purpose of the alternatives to arrest, and in any event, a magistrate would be unlikely to exclude any evidence obtained from a suspect from brief questioning when they were being detained for the purpose of issuing a CIN, FCAN or other alternative to arrest:

*Were it otherwise, the consequences, in terms of police resources, would be disastrous.<sup>376</sup>*

The advice then argues that any attempt to clarify the legislation or operating procedures on this score was not only unnecessary, but if raised would potentially:

*... invite a trend to emerge whereby legal practitioners habitually raise the issue and magistrates exclude such evidence, either in response to such submissions from the bar table or of their own initiative.<sup>377</sup>*

The advice encouraged NSW Police to adopt a risk management approach to this issue, where because there had been no problem to that point of time it need not be addressed, and that police officers exercise a risk assessment approach in detaining a suspect for the purpose of initiating one of the alternatives to arrest:

*... the longer a person is detained for investigative procedures and the more important the evidence obtained during that time will be to any subsequent prosecution, the greater the risk there will be of the exclusion of evidence.<sup>378</sup>*

In the course of our review and other legislative review activities, we have become aware of the potential impact of Part 10A on legal processes that are intended to be an alternative to arrest: that is, where the actions of police in detaining and questioning of persons for the purpose of issuing a formal caution, FCAN or an infringement notice as an alternative to arrest may in fact constitute an arrest where the procedures of Part 10A are not applied, giving rise to the risk that the evidence obtained from the brief questioning may not be admitted in court.

For instance, in the offensive language matters that we reviewed for the purposes of the earlier discussion, 27 (75 per cent) of the 36 records under review specifically stated that the offender was under arrest for the purpose of issuing a CIN, or the narrative indicated that the actions of police in detaining the offender so as to deal with the offence would be sufficient for it to be regarded as an arrest for the purposes of Part 10A.

There is an obvious risk in respect of offences for which CINs may be issued. With the offender able to exercise their right to take the matter to court, the police officer is going to have to make sufficient inquiries at the scene of the offence to be able to prosecute the matter should it come to court. The SOPs require the officer to undertake a considerable number of tasks before issuing a CIN:

- *Interview the complainant (if relevant) and the suspect.*
- *Investigate the incident (take statements, collect exhibits, etc.) to establish an offence has been committed.*
- *Consider all available alternatives.*
- *Ensure the offence can be dealt with by issuing a CIN (if not, consider the use of an FCAN).*
- *Undertake a Criminal Names Index (CNI) check of the suspect.*
- *Ensure a Legal Process check is undertaken. This check will also confirm the date of birth of the suspect.*<sup>379</sup>

Given the likely nature of some of the inquiries that would need to take place for offences such as common assault, larceny, goods in custody and obtaining a benefit by false representation, it is highly likely that adhering to the SOPs for these offences would in most cases satisfy the criteria contained in Part 10A for considering that the suspect was being detained for 'investigative purposes'.

Should a matter proceed to court at the election of the recipient, or alternatively, at the behest of a senior police officer or the Director of Public Prosecutions, there is a significant risk that the evidence obtained at the scene, including admissions or other inculpatory evidence, may not be admissible due to a failure to adhere to the requirements of Part 10A.

In our view, it would be self defeating that a legal process intended to be an alternative to arrest actually necessitated procedures that would have all the practical effects of an arrest, but that is a real risk owing to the definition of arrest in Part 10A, and the procedures to be followed before issuing a CIN.

We are also of the view that applying a risk assessment approach, without sufficient guidelines as to what is lawful given the circumstances, is a most unsatisfactory method of dealing with these matters. In particular, it presents a risk for police officers who, while acting in the spirit of the CIN scheme, may be acting unlawfully in detaining a person for the purpose of issuing a CIN. The fact that the advice acknowledges that where a person is detained in order to issue a CIN, or a similar proceeding such as an FCAN, is a technical "arrest", and carries the obligations put in place by Part 10A, should be grounds enough for sufficient concern about the potential complications.

Other than obtaining the *CINs and 10A Legal Advice* from NSW Police, this is not a matter on which we sought submissions from interested and affected parties. Accordingly, we would hesitate before making a recommendation that would adequately and appropriately deal with these issues, particularly as it is not confined to the issuing of CINs. We would also urge caution in considering changes to Part 10A or its application by NSW Police, particularly if such changes were to have the undesired effect of lessening the protections afforded by Part 10A. Accordingly, this is a matter that warrants further detailed consideration and the involvement of key stakeholders. There is presently an inter-departmental working party convened by the Attorney General's Department, and we would suggest that this might be the appropriate forum in the first instance to consider the matters we have raised in relation to the application of Part 10A on matters where it is intended to issue a CIN.

## **CINs applying to other offences**

We sought feedback on whether there should be additional offences for which CINs may be issued, and if so, which offences should be included.

NSW Police submitted that there should be additional offences for which CINs could be issued. It suggested that CINs should be considered for those indictable offences that are included in Table 2 of the *Criminal Procedure Act*, where the offences are to be dealt with summarily unless the prosecutor elects to do otherwise,<sup>380</sup> as well as all summary offences.<sup>381</sup> However, they recognised that some offences in these categories would require specific assessment for appropriateness.

There are a number of offences that fall into either of these categories for which, in our view, it would not be appropriate to consider issuing a CIN. There are a significant number of offences in the "Table 2" category that are unlikely to win community or Parliamentary support for a proposal that they be dealt with by way of a penalty notice. These offences include assault occasioning actual bodily harm, indecent assault, aggravated act of indecency, assault of a police officer or other law enforcement official, stalking and intimidation, and firearms offences.

With respect to some of the offences contained in the *Summary Offences Act*, we are also of the view that it is highly unlikely that there would be broad community or Parliamentary support for CINs to be issued. For example, the offences of loitering by convicted child sexual offenders near premises frequented by children or filming for indecent purposes. Inclusion of these sorts of offences would likely see the CIN scheme ridiculed or derided.

NSW Police advised us that at a LAC level, police had indicated that “malicious damage” offences should be among the offences for which a CIN could be issued.<sup>382</sup>

The Police Association submitted that:

*In general, operational police believe that the current list of offences is sufficient for which the legislation was designed. However, police have identified that CINs legislation could be extended to cater for the offences of Malicious Damage for matters where damage is under a certain determined amount, for example, \$300. Additional offences for which CINs may be issued could also include offences such as possession of a small quantity of cannabis; possession of housebreaking or car breaking implements; resisting or hindering an officer (for minor breaches); forging false pawn<sup>383</sup> and minor mail offences. These offences could carry fines of approximately \$550, which is in line with other infringements such as failing to quit licensed premises.<sup>384</sup>*

The officers in our focus groups expressed similar views on the types of offences for which they should be able to issue CINs. Malicious damage was suggested by each of the groups, although some groups made the observation that there may be difficulties for victims in obtaining compensation if no criminal conviction was recorded in relation to the offence. Other offences that were suggested included trespass, affray and possession of a small quantity of cannabis. It was also suggested that they be able to issue CINs to young offenders.<sup>385</sup>

If consideration was to be given to these particular suggestions, it should be appreciated that there are presently diversionary options for offences involving the possession of small amounts of cannabis and for young offenders.

As we noted earlier,<sup>386</sup> police have the discretion to issue a caution for certain cannabis offences in particular circumstances. Under the CCS, adults found using or in possession of not more than 15 grams of dried cannabis and/or equipment for using the cannabis may receive a formal police caution rather than face criminal charges and court proceedings. A person can only be cautioned twice and cannot be cautioned at all if they have prior convictions for drug offences or offences of violence or sexual assault. The scheme has the aim of diverting cannabis users from the court system and to encourage them to consider obtaining advice and/or treatment for their cannabis use.

In the first three years of the operation of the CCS, more than 9,200 cannabis cautions have been issued, representing one quarter of all formal police actions for minor cannabis offences. BOCSAR reported that the majority of cautions were first cautions, with only 239 people issued with a second caution in the first three years of the CCS.<sup>387</sup>

Since 1998, police have had a range of formal options to deal with offences committed by persons under the age of 18 years. The *Young Offenders Act* contains a “carefully graduated hierarchy of responses to young people’s offending behaviour”,<sup>388</sup> and as an alternative to court, allows police to issue and record formal warnings and cautions, and refer young offenders to a restorative justice conferencing scheme, which generally also involves the victim(s) and the offender’s family and/or other support people, to reach negotiated outcomes on such issues as restitution and preventing future offending. Between July 2002 and June 2003, 71.2 per cent of offences involving young people were dealt with by way of warning, caution or conferencing.<sup>389</sup>

It would be a most unfortunate and undesirable outcome if widely used and effective diversionary options such as the CCS and the *Young Offenders Act* were to be adversely affected by having CINs as an option to deal with such offences.

As noted earlier, the Chief Magistrate of the Local Court submitted “that the offences under the *Crimes Act* (s. 61, s. 117, s. 527A, s. 527C) should not be offences for which a CIN may be issued”, and that the penalty by way of a CIN of \$300 for a common assault offence was “an inappropriate method of dealing with an offence involving violence.” He also submitted that it was “appropriate that offences under the *Summary Offences Act* be dealt with by CIN”.<sup>390</sup>

The Shopfront Legal Service observed that:

*... there is merit in expanding the range of offences for which infringement notices may be issued. There are many people who would prefer to save the time and trouble of going to court, and avoid the stain of a conviction. For many types of offences and offenders, an infringement notice is an appropriate response.*

*However, we are concerned about the effect of infringement notices on socially and economically disadvantaged people...*

... infringement notices are best suited to "middle class" offences. By this we mean offences which are not predominantly committed by people from low socio-economic backgrounds. For example, many traffic offences (apart from unlicensed driving offences) could be described as such. For socially and economically disadvantaged people, we believe that the potential benefits of being dealt with by infringement notices are outweighed by the potentially serious consequences of inability to pay.<sup>391</sup>

The ALRC has considered the question of what offences are suitable for the use of infringement notices. It endorsed the position taken by the Commonwealth Attorney General's Department on the appropriate use of infringement notices:

*An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. An infringement notice scheme should only apply to strict or absolute liability offences. These offences should carry physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence.*<sup>392</sup>

In response to a recommendation of the Australian Capital Territory's Legislative Assembly Standing Committee on Legal Affairs, the ACT Attorney General's Department developed a series of guidelines for offences to be considered as suitable to be dealt with by way of an infringement notice.

In summary, the guidelines set out the following considerations:

- exercise of judgement, proof of intention - on-the-spot fines should be limited to offences where there is little or no scope for the exercise of judgment about whether an offence has been committed...
- seriousness of the offence - the more serious the offence, the less suitable it is for on-the-spot fines (eg. indecent exposure, weapons offences).<sup>393</sup>

Another factor should concern the extent to which non-custodial sanctions are imposed for the offence, indicating that it (in conjunction with the other tests) may be appropriate to deal with by way of an infringement notice.

Where other authorities have considered what offences might be dealt with by a CIN they have concluded that there should be a reasonably high number of offences committed to warrant the diversion of resources to a penalty notice scheme. It may be that this consideration will limit the number of offences included in a permanent and extended CIN scheme. The following table reports the number of cases dealt with by the Local Court for the 20 most common offences before the Court in 2002:

Figure 21: Most common offences sentenced by NSW Local Courts in 2002

Offence	Act	Number of cases	Proportion of the total number of cases
Mid range PCA (Prescribed Concentration of Alcohol)	Section 9(3), <i>Road Transport (Safety and Traffic Management) Act 1999</i>	11,501	11.2%
Common assault	Section 61, <i>Crimes Act</i>	7,882	7.7%
Larceny	Section 117, <i>Crimes Act</i>	6,776	6.6%
Drive while disqualified	Section 25A(1), <i>Road Transport (Driver Licensing) Act 1998</i>	4,956	4.8%
High range PCA	Section 9(4), <i>Road Transport (Safety and Traffic Management) Act</i>	4,864	4.7%
Low range PCA	Section 9(2), <i>Road Transport (Safety and Traffic Management) Act</i>	4,818	4.7%
Possess prohibited drug	Section 10(1), <i>Drug Misuse and Trafficking Act 1985</i>	4,098	4.0%
Malicious destruction/ damage	Section 195(a), <i>Crimes Act</i>	3,873	3.8%
Knowingly contravene AVO	Section 562I, <i>Crimes Act</i>	3,214	3.1%
Drive while suspended	Section 25A(2), <i>Road Transport (Driver Licensing) Act</i>	3,143	3.1%
Assault occasioning bodily harm	Section 59(1), <i>Crimes Act</i>	3,090	3.0%
Drive without being licensed	Section 25(1), <i>Road Transport (Driver Licensing) Act</i>	2,745	2.7%
Negligent driving (not causing death or grievous bodily harm)	Section 42(1)(c), <i>Road Transport (Safety and Traffic Management) Act</i>	2,263	2.2%
Drive unregistered vehicle	Section 18(1), <i>Road Transport (Vehicle Registration) Act 1997</i>	2,127	2.1%
Drive while licence refused/ cancelled	Section 25A(3), <i>Road Transport (Driver Licensing) Act</i>	2,071	2.0%
Assault with intent on certain officers	Section 58, <i>Crimes Act</i>	2,068	2.0%
Goods in custody	Section 527C(1), <i>Crimes Act</i>	2,009	2.0%
Offensive language	Section 4A, <i>Summary Offences Act</i>	1,982	1.9%
Offensive conduct	Section 4, <i>Summary Offences Act</i>	1,836	1.8%
Break, enter and steal	Section 112(1), <i>Crimes Act</i>	1,342	1.3%
Total for top twenty matters		76,658	74.4%
All remaining matters		26,346	25.6%
<b>Total</b>		<b>103,004</b>	<b>100.0%</b>

Source: Data from a table in J Keane and P Poletti, *Common Offences in the Local Court, Sentencing Trends and Issues No. 28*, Judicial Commission of NSW, Sydney, 2003.

In deciding the appropriateness of enabling a CIN to deal with a particular offence, consideration should also be given as to whether or not the community would generally consider a CIN to provide a reasonable sanction for the offence. At a minimum, this test should preclude the inclusion of offences of a sexual or violent nature, or offences where there is a risk of physical harm or injury to others.

Where such matters require formal intervention, there is a significant role for the courts in conveying the seriousness of the offence and deterring the offender and the community at large. Therefore it would be appropriate for most of the offences listed in the table, such as the drink driving offences, the general driving offences, AVO breaches and assaults, to remain matters that are brought to the courts where there is to be a formal intervention by the criminal justice system. Exclusion of these sorts of offences would leave malicious damage as one of the few offences in the table above that might be added to the existing regime. Similarly, exclusion would also require a re-assessment of the suitability of CINs as a means of dealing with common assault offences.

## Issuing CINs for ‘common assault’ offences

Including ‘common assault’ as one of the offences for which it was possible to issue a CIN was one of the more contentious aspects of the Penalty Notice Offences Bill as it was debated in the Parliament:

*It is said that under the proposed infringement notice system outlined in the bill, “common assault not occasioning bodily harm” will carry a penalty notice fine of \$400, but the penalty under section 61 of the Crimes Act for the same offence is two years in prison. Obviously that is a significant anomaly.<sup>394</sup>*

The Hon. Michael Gallacher, the Leader of the Opposition in the Legislative Council, said:

*However, I do not think that giving on-the-spot notices for assault is the answer. What message does that send to the community? Section 61 of the Crimes Act provides for common assaults and relates to assaults which do not involve any actual bodily harm—where there is no wound, no breaking of the skin, and no blood. But I have seen plenty of victims of common assault who have not had a wound but whose pretty nasty assaults are still covered by section 61.<sup>395</sup>*

Given the concerns about allowing CINs to be issued for common assault offences, this section looks at the CINs issued for assault matters during the trial period, as well as some matters arising from the inclusion of assault in the CIN scheme.

### Nature of the offence

Section 61 of the *Crimes Act* establishes the offence of common assault as follows:

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

“Actual bodily harm” is to be given its ordinary and natural meaning,<sup>396</sup> and is taken to include physical injury or wounding as well as an assault that causes a hysterical and nervous condition.<sup>397</sup>

Essentially, a CIN can be issued for an assault that does not cause the victim to be injured or wounded. NSW Police SOPs provide that CINs cannot be used for domestic violence offences,<sup>398</sup> but do not provide any further guidance or commentary as to when it may be appropriate or not appropriate to issue a CIN for a common assault offence.

### Offences for which CINs were issued

During the trial period, 221 CINs were issued for assault offences, constituting 14 per cent of the total number of CINs issued.

To determine in what circumstances police thought it appropriate to issue a CIN for an assault offence, we reviewed the narratives entered on to COPS for common assault offences. To do this we obtained all the numbers where a CIN was issued for common assault during the trial period. NSW Police provided us with 160 event numbers, and we then selected 32 matters at random (being 20 per cent of the total number of event numbers received) to review the COPS narrative for each event. Generally, the narrative recorded the nature of the offence, and the police response.

Of the 32 events under review:

- 17 events (53 per cent) recorded that the offender punched or “king hit” the victim
- 5 events (16 per cent) recorded that the offender slapped the victim
- 3 events (9 per cent) involved the victim being grabbed or placed in a grip

- 2 events (6 per cent) recorded that the victim was kicked
- 1 event recorded that the victim (a security guard) was bitten on the hand, with the bite drawing blood
- 1 event recorded that the victim had her hair pulled
- 1 event recorded that the victim was spat on
- 29 events (91 per cent) involved one offender
- 18 events (56 per cent) recorded the arrest of the offender prior to being issued with a CIN
- 6 events (19 per cent) recorded that the offender was detained by security guards prior to the police attending the scene
- 3 events (9 per cent) recorded that the offender attended the police station some time after the incident had occurred
- 17 events (53 per cent) recorded that the offence took place in or near licensed premises and/or involved an offender affected by alcohol
- 2 events (6 per cent) involved an assault on police
- 2 events (6 per cent) recorded that two people were assaulted by the offender, who was then issued with a separate CIN for each victim
- 1 event recorded a CIN being issued in relation to an incident involving domestic violence.<sup>399</sup>

Among the events under review were the following incidents:

- ◇ A woman walking down a street in the late afternoon was approached from behind by the offender, who caught the woman by the neck dragging her to the ground. After she got up, the victim went into a nearby shop while a witness alerted police to the incident, who then chased the offender and arrested him. He was taken to the store where the victim was, cautioned and interviewed, and was then escorted to the police station where he was issued with a CIN.
- ◇ A 16 year old male was travelling on a CountryLink rail service when the passenger seated in front of him got out of the seat and punched him several times in the head, causing a small cut, bruising and swelling. Train staff restrained the offender and called police to meet the train at the next stop. The offender told police that he had punched the victim *"because he was hot, uncomfortable and annoyed"*. He was then issued with a CIN for common assault.
- ◇ While travelling in the lift in an apartment complex, the victim complimented a woman on her blouse, and went to rub the blouse sleeve between his fingers. The woman's husband, who was standing behind the victim, said something to him and then slapped him on the side of the neck. Another female passenger (apparently a friend of the victim) went to intervene by standing between the victim and the offender. As his friend berated the offender, the victim became concerned that his friend might be assaulted, so he grabbed her and they got out of the lift at the next level. Police responding to the incident viewed video surveillance footage from the lift in question, and subsequently went to the offender's apartment. He admitted slapping the victim, and was issued with a CIN.
- ◇ A man boarding a train at Central station stood in the vestibule and tried to locate a friend in the carriage. The offender approached the victim from behind and, according to witnesses, punched the victim at least four times to the back of his head, and then attempted to drag him off the train and on to the platform. Several security guards intervened, and struggled with the offender for several minutes until he was overpowered. The offender, who had army identification, admitted attacking the victim but said that he had done so only because he believed the victim was hassling another passenger. Several witnesses were interviewed and CCTV [closed circuit television] footage was viewed, but it only showed the offender dragging the victim on to the platform. The offender was issued with a CIN.
- ◇ The offender was riding his bike through the country concourse at a train station, when two passers-by (brothers) made eye contact with him. After a verbal altercation, the offender kicked both victims, hit one of them (who was deaf) and got into a fight with the other. During the fight, the offender hit the first victim in the face, knocking off his glasses, after he had intervened to assist his brother. Security guards intervened, and police subsequently attended the scene. The offender was interviewed in the Transit Office where he admitted to *"kicking, punching and 'bashing' the victims"*, and was issued with two CINs for common assault.



- ◇ At a birthday function attended by 100 people, a fight broke out, involving a number of persons who had “gate crashed” the party. The victim intervened to separate the parties involved in the fight, and asked the gatecrashers to leave, without much success. The offender “king hit” the victim from behind, who fell to the ground from the force of the blow, following which the offender left the party. Police attended the scene and located some of the gatecrashers nearby. After the offender returned to the group he was identified by a number of guests, and was arrested. He was issued with a CIN for assault. On receiving the CIN he scrunched it up and threw it on to the ground as he left the police station. He was asked to pick up the CIN on pain of receiving a further notice for littering. He picked up the CIN.<sup>400</sup>
- ◇ Police stopped a vehicle after observing that the female passenger in the front was not wearing a seatbelt. As the officer wrote out a TIN the passenger repeatedly told him that she was pregnant. While he was cautioning the driver after considering the passenger’s explanation, he handed the TIN to the passenger. The passenger then slapped the officer’s face with the TIN three times, with such force as to cause the TIN to tear. The officer then advised them that in addition to not receiving a caution and receiving a TIN instead, the passenger would also be receiving a CIN for common assault.

These instances exemplify some of the difficulties in allowing CINs to be issued for common assault. While some of the matters we looked at were relatively minor cases of assault, some of the examples reported here are arguably sufficiently serious as to warrant a more substantial consideration and sanction than can be provided for by a CIN. These incidents (namely, the assault involving the women walking down the street and those, on the CountryLink train, in the vestibule area of the other train, on the Country concourse at a train station and at the birthday function) are sufficiently serious, involving, as they do, random, unprovoked and surprise attacks on the victim, to merit an argument that they should have resulted in the arrest and charge of the offender in preference to the issuing of a CIN.

### Assault of a police officer

While the actions of the offender might be considered to be relatively minor, the CIN issued to the pregnant woman being issued with the TIN is problematic on two levels. First, an assault on a police officer in the course of the officer’s duty is covered by another provision of the *Crimes Act* (s60), which is quantifiably more serious than a common assault and is not an offence for which a CIN can be issued. Second, the appropriateness of an officer issuing a CIN, for an offence where he or she was the victim of the assault, is highly questionable. In addressing these issues, it is the general proposition of an assault on a police officer being dealt with by way of a CIN that is under discussion, not the particular facts of the matter described above.

On the question of the seriousness of an assault on a police officer, s60(1) of the *Crimes Act* provides that:

*A person who assaults, stalks, harasses or intimidates a police officer while in the execution of the officer’s duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years.*<sup>401</sup>

When the legislation to amend the *Crimes Act* so as to include this provision<sup>402</sup> was before Parliament, the (then) Minister for Police said in his Second Reading speech that:

Penalties for assaults on police will be higher than those for assaults on members of the public. This recognises the special risks faced by police officers compared to ordinary members of the public.<sup>403</sup>

The seriousness of the offence was further established in a Guideline Judgement of the Court of Criminal Appeal in respect of an application by the Attorney General concerning sentences imposed for the offence of “assault police”.<sup>404</sup> Spigelman CJ, for the Court, said:

*Offences involving assault of police officers in the execution of their duty are serious offences requiring a significant element of deterrence in the sentences to be imposed. The community is dependent to a substantial extent upon the courage of police officers for protection of lives, personal security and property. The Courts must support the police in the proper execution of their duties and must be seen to be supporting the police, and their authority in maintaining law and order, by the imposition of appropriate sentences in cases where assaults are committed against police.*<sup>405</sup>

As to the effect of s60(1), he went on to state that it is:

*... part of a special Division of the Crimes Act introduced for the precise purpose of establishing substantially higher maximum sentences in the case of offences against police than is the case with the equivalent offences when committed against any other member of the community. The Parliament has made it quite clear that the traditional sentencing principles, in accordance with which assaults against police are treated as particularly serious offences, must be given full effect.*<sup>406</sup>

It is highly unlikely that the full effect referred to here would be achieved by generally allowing a CIN to be issued for the offence. In saying this and indicating that it should not be an offence for which a CIN might be issued, the courts would have due regard to the seriousness of the offence. As indicated before, the event that we cite above might be properly considered to constitute a relatively minor offence – a factor that would be given due consideration in any sentence imposed by the courts:

*Section 60(1) covers any form of common assault not leading to actual or grievous bodily harm. This encompasses a wide range of offending behaviour. An assault can be constituted merely by tapping on the shoulder or poking in the chest. On the other hand it may be constituted by pointing a gun to the head of a police officer and cocking it. There can be little doubt that in the latter case a custodial sentence would be required. In the former cases that will often not be the case. There is a wide range of behaviour capable of constituting an assault which does not involve the high public purpose of the courts supporting the authority of the police.*<sup>407</sup>

The question raised by these matters is not the appropriateness of a penalty imposed for the offence, but rather the appropriateness of who determines the penalty. Given Parliament's intentions, the seriousness of the offence merits the consideration of the courts, and the penalty being imposed by the court rather than by a police officer.

Furthermore, the appropriateness of a police officer, who is the victim of an assault, issuing a CIN for that assault must be questioned. The imposition of a penalty for an offence should be determined by a party who is impartial of the outcome. Allowing an officer to issue a CIN for an assault on him or her would offend the notion of natural justice, in having the victim determine the penalty.

### **Implications for victims**

Potentially adverse implications of the Act for victims of crime, particularly assaults, were raised in a submission to our review made by Victims Services. This agency, administered within the NSW Attorney General's Department, serves the interests of victims of crime through the activities of the Victims of Crime Bureau (VCB) and the Victims Compensation Tribunal (VCT).

Consistent with the advice to our review by other parties regarding the views of victims, the submission from Victims Services advised that the VCB:

*... has not received any feedback from victims or encountered any specific issues concerning CINs.*<sup>408</sup>

Further, the submission reports that no matters involving a CIN had been brought before the VCT during the trial period.

However, Victims Services identified two potential issues arising for the VCT as a result of the Act. The first relates to the quantum and nature of information forwarded by NSW Police to the VCT which:

*... relies extensively on COPS Event and similar material supplied from the NSW Police in relation to claims for compensation. In the absence of proper material from the Police it can be difficult for a victim to establish the alleged act of violence and/or that the incident was reported to Police. Currently, "assault" is the relevant act of violence in approximately 40% of claims before the Tribunal. If the CINs process were to result in minimalist [record keeping] by the Police in relation to common assaults, some victims of crime could be disadvantaged in pursuing a compensation claim before the Tribunal.*

*However, if CINs matters are captured through COPS, there should not be an issue.*<sup>409</sup>

The second issue raised in the Victims Services' submission concerns the potential impact of the Act on the capacity of the VCT to fulfil its role in pursuing restitution action against convicted offenders under the *Victims Support and Rehabilitation Act 1996* ('Victims Support Act').

In broad terms the *Victims Support Act* provides that a person convicted of an offence is liable to repay any compensation awarded by the VCT to the victim(s) of that offence. However s338(1) of the *Criminal Procedure Act* provides that any liability to further proceedings for an alleged offence is removed upon payment of the prescribed amount of the penalty notice. In the words of the VCT's submission:

*The payment of the penalty specified in a CIN concludes proceedings for that offence and common assaults dealt with by the issue of a CIN will not result in a conviction. As such, wide scale use of CINs would significantly impact on the Tribunal's ability to pursue restitution proceedings against offenders in common assault matters.*<sup>410</sup>

Notwithstanding the provision in subsection 338 (2) of the Act that payment of a penalty notice offence fine "... does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence" it

is the absence of a conviction for the offence that is problematic for Victims Services, since conviction status is a prerequisite for the purposes of the *Victims Support Act* with respect to restitution from the offender.<sup>411</sup>

Victims Services estimates that approximately ten per cent of the restitution action that they pursue is taken against persons convicted of the offence of common assault.

It is not entirely clear, however, as to how a common assault offence could result in an award of compensation by the VCT, and as a consequence, be the subject of a restitution order.

According to the *Victims Support Act*, a person is eligible for compensation if he or she is:

- the victim of an act of violence and is injured or dies as a result (a 'primary victim')
- the member of the immediate family of a homicide victim (a 'family victim')
- injured as a result of witnessing an act of violence
- the parent or guardian of a primary victim of an act of violence who was under the age of 18 years at the time of the act
- injured while trying to:
  - prevent someone from committing an act of violence
  - arrest someone who is committing an act of violence
  - help or rescue someone against whom an act of violence is being committed.

"Injury" is defined by the *Victims Support Act* as either actual physical bodily harm or a psychological or psychiatric disorder.<sup>412</sup> The schedule to the *Victims Support Act* then details those injuries that are compensable for the purposes of the Act. Each physical injury detailed in the schedule would constitute actual bodily harm if caused by an assault. However, the advice of the VCT is accepted at face value. There is, therefore, a good prospect that in some circumstances a victim will be prevented from claiming restitution because of a decision of a police officer to proceed by way of a CIN in preference to a CAN or charge.

### **The inclusion of common assault in the CIN scheme**

Where criminal matters warrant formal intervention, there is a significant role for the courts in conveying the seriousness of the offence and deterring the offender and the community at large. If this proposition is accepted, continuing to allow CINs to be issued for common assault offences is clearly problematic. It is evident from the examination of the discussion and recommendations for infringement notice schemes elsewhere that the idea of allowing penalty notices to be issued for acts of violence, such as assaults, has not found favour.

The NSW Law Reform Commission supported the expanded use of infringement notices as an alternative to court provided that there was:

*...careful consideration of the offences to which infringement notices are to apply, in order that expansion is limited to offences which are of a more regulatory character.*<sup>413</sup>

In considering public order offences for which it would be appropriate to issue an infringement notice, the ACT Law Reform Commission recommended against the inclusion of 'fighting' on the street because:

*Adoption of a cursory procedure may constitute a grossly inadequate response to the situation. In many cases the gravity of the situation can only be assessed after due investigation. Normal police interrogation may reveal a course of antecedent hostility between the protagonists including other offences including more serious threats, that one of the offenders has a serious record of violence or that injuries suffered were more serious than a cursory examination suggested...Any fighting incident must invite consideration whether a more serious assault has occurred. This may not be obvious 'at the scene'. An on-the-spot fine would be inappropriate because either there is a prospect that assault is involved or if the result of a minor altercation, police intervention will generally suffice to restore public order and further police action other than a caution would be inappropriate.*<sup>414</sup>

As at November 2003, 129 (58 per cent) of the 221 CINs for common assault issued during the trial had not been paid, with 79 of these referred to the for enforcement action. Furthermore, of the total number, 20 (10 per cent) were contested by means of the 'court elect' option, by far the largest proportion of those offences for which 10 or more CINs were issued.

These figures, and the quantum of the penalty imposed (\$400), indicate a sizeable risk that penalty notices for the offence of common assault might not be paid by offenders without enforcement action by the , and that the desired effect of adequately dealing with offences by means of an alternative to court might not be achieved in a significant number of cases.

As indicated elsewhere, the Chief Magistrate, among others, is of the firm view that common assault is not a suitable offence to be included in the CIN scheme:

*It is my submission that the offences under the Crimes Act (s. 61, s. 117, s. 527A, s. 527C) should not be offences for which a CIN may be issued. The offence of common assault was the second most common offence in the Local Court in 2002 ... There were 29,669 charges of non-aggravated assault finalised in the Local Court [during 2002]. A penalty by way of a CIN of \$300 is in my view an inappropriate method of dealing with an offence involving violence.*<sup>415</sup>

Given the potential administrative savings to the local courts in having some common assault offences dealt with by an alternative process, this view bears some serious consideration.

From our discussions with police it is clear that they regard CINs as just one more option to deal with assault offences, and that they will remit assaults to the courts when they believe it is warranted. They would argue that they already have the discretion to proceed or not to proceed to court for assault matters, and that it is likely that a CIN would be issued for matters at the lower end of the spectrum of seriousness, which previously may have occasioned a less formal course of action because the matter was not considered to be so serious as to warrant the involvement of the courts.

These opposing arguments cannot be regarded lightly, and serious reconsideration needs to be given as to whether it is appropriate for common assault to remain included in the CIN scheme. In light of this discussion, we would suggest that as the most contentious of the offences included in the CIN scheme, the seriousness of a substantial number of incidents for which a CIN was thought appropriate, and as the offence most likely to be the subject of significant numbers of 'court elections', the arguments that would be successfully mounted for the other offences in the CIN scheme, in terms of suitability, consistency, economy and efficiency, do not apply to the same extent for common assault matters. Accordingly, reconsideration should be given to the question of the appropriateness of the inclusion of common assault offences in the CIN scheme.

**RECOMMENDATION 13:** That the appropriateness of the inclusion of 'common assault' offences in the Criminal Infringement Notice scheme be reconsidered.

The Chief Magistrate of the Local Court reiterated his views, provided to the review in his submission to the Discussion Paper to this review, that the *Crimes Act 1900* offences prescribed in sections 61, 117, 527A and 527C “... should not be dealt with by way of a CIN”.

The Chief Magistrate also reminded that he had expressed concerns for the inclusion of common assault offences in the Criminal Infringement Notice scheme and added his support for the recommendation to reconsider the inclusion of this particular offence.

NSW Police support the recommendation, whilst adding that “Assault can be an indication of a propensity to violence and prevents, for example, a person from obtaining a security industry licence”.

## Extending the offences for which CINs may be issued

Ultimately, the decision as to what offences might be suitable to be made the subject of a CIN is one for the Government and the Parliament. Presently, s336 of the Act allows nominated offences to be prescribed by means of a regulation:

*The regulations may prescribe an offence under any Act or statutory rule made under an Act as a penalty notice offence for the purposes of penalty notices served by police officers under this Part.*

This allows the Government to prescribe offences for the CIN scheme without having to introduce legislation in the Parliament for that purpose. Prescribing penalty notice offences by means of a regulation also means that either House of Parliament may disallow the regulation<sup>416</sup> so as to prevent the nominated offence from being dealt with by a CIN. This means that there is an ongoing role for the Parliament in scrutinising any changes in the offences prescribed for the purpose of the Act.

In considering our recommendations as to which offences should be prescribed for the purposes of the Act, rather than nominating particular offences, we thought it might be of greater assistance to have consideration to the forgoing discussion and establish a series of tests to determine whether or not a particular offence could

appropriately be dealt with by issuing a CIN. The application of these tests would allow the reasoning for including or excluding a particular offence from the CIN scheme to be articulated, and form the basis of an explanation that informs the community and the police.

Should the CIN scheme be continued and expanded in NSW, the following factors might be usefully considered as criteria for prescribing additional offences for which it is possible to issue a CIN:

- the offence is relatively minor
- there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN
- other diversionary options are not available to police to effectively and appropriately deal with the conduct in question
- a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence
- specific and general deterrence can be adequately conveyed by police rather than by a court
- the physical elements of the offence are relatively clear cut
- the issuing of a CIN for the offence would generally be considered by the community to be a reasonable sanction, having due regard to the seriousness of the offence.

RECOMMENDATION 14: That the following principles form the basis of determining whether a particular criminal offence is suitable to be dealt with by way of a Criminal Infringement Notice:

- the offence is relatively minor
- there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN
- other diversionary options are not available to police to effectively and appropriately deal with the conduct in question
- a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence
- specific and general deterrence can be adequately conveyed by police rather than by a court
- the physical elements of the offence are relatively clear cut
- the issuing of a CIN for the offence would generally be considered by the community to be a reasonable sanction, having due regard to the seriousness of the offence.

The Chief Magistrate of the Local Court wrote that, whilst he agreed that the general principles for determining a prescribed CIN offence described in the recommendation were appropriate,

*“A difficulty, however, arises although an offence is “relatively minor” when the offender has a record of previous convictions. For example, an offender who repeatedly steals items of limited value from retail stores. A record of previous convictions is an aggravating factor to be taken into account by a court when determining an appropriate sentence for an offence (s. 21A (2) (d) Crimes (Sentencing Procedure) Act 1999)”.*

*“Further difficulties might arise when an offender is subject to a good behaviour bond under s. 9 Crimes (Sentencing Procedure) Act 1999 or a suspended sentence under s. 12 of the same Act or is on bail or parole. In these circumstances it will usually be inappropriate to deal with the offender by CIN. Will police be, before determining whether a particular offender is to be dealt with by CIN, required to check the offender’s criminal record? If there is no such requirement, offending conduct may be dealt with by CIN which should not be”.*

The Chief Magistrate presents a valid view, since the legislation is silent with reference to the issue of CINs notifications and their service on repeat offenders. The SOPs, however, advise police to use discretion whilst giving balance to the time saved and “... the need to have an appropriate penalty imposed or indicate community condemnation of the behaviour”.<sup>417</sup> This includes a consideration of the offending history of the suspect.

Recommendation No. 14, however, references the somewhat more narrowly defined topic of appropriately identifying those offences that might be suitable for inclusion in the list of prescribed offences for the purposes of the CINs scheme.

NSW Police advised that whilst they support the recommendation in principle, they “... do not consider high volume to be a necessary consideration for an offence to be incorporated in the scheme”.

Our view is that this is but one of the considerations, and the weight ascribed to it is a matter for the Parliament.

## Implementation of an extended CIN scheme

While we are not aware of any substantial difficulties in giving effect to the CIN scheme during the trial, this was largely due to it being implemented on a reasonably small scale and in defined and relatively restricted circumstances. Earlier we described the extensive preparation for the operation of the CIN scheme trial. We believe that implementing it state wide will involve exponentially more effort and resources, particularly in the area of education and training. Officers in our focus groups identified training as one of the important factors in implementing an extended CIN scheme.

We are conscious that the changes arising from being able to issue CINs will occur at a time when considerable time and resources will also need to be expended on educating and training officers as part of the implementation of the *Law Enforcement (Powers and Responsibilities) Act 2002* which, we understand, is due to be put into effect during the next 12 to 18 months.

While SOPs have been prepared for the CIN scheme trial, we believe that these, as well as any education and training material, might be enhanced by illustrations, using case studies from the trial, of appropriate (and inappropriate) situations where CINs have been used to deal with an offence. Such illustrations might also include the case studies we describe in Chapter 9.

We also believe that successful implementation of an extended CIN scheme will involve working with other key Government agencies, such as the IPB and the SDRO, to establish appropriate systems for the management of the scheme. It will also be necessary for NSW Police to educate and liaise with key stakeholders, both at a state and local level, including the State Chamber of Commerce, the Australian Retailers Association (NSW), the Legal Aid Commission, retailers, legal services and welfare organisations.

We would particularly urge that education and consultation occur at the local level, particularly in smaller communities and communities with sizeable Aboriginal and Torres Strait Islander populations. In the course of this report we have flagged some of the concerns that might arise in relation to the policing of these communities, and we believe that some of these issues might be forestalled by consulting local stakeholders and community representatives on the implementation and intended application of the CIN scheme, with 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.

Finally, we strongly recommend that there be ongoing monitoring of the use of CINs, both within LACs and across NSW Police. The success of the CIN scheme will depend upon the fair, proper and effective use of these powers, and this should be under regular review to ensure that this occurs.

This includes ongoing monitoring of the CINs scheme as it affects first offenders, as discussed in Chapter 12. If there is substantial evidence indicating first offenders issued CINs have little incentive to pay the CINs fine rather than elect to have the matter heard in court, further consideration of a reduced penalty may be appropriate.

RECOMMENDATION 15: That education and training material for the implementation of an extended Criminal Infringement Notice scheme illustrate, by way of case studies, the appropriate and inappropriate use of Criminal Infringement Notices to deal with prescribed offences.

RECOMMENDATION 16: That consultation on the extension of the Criminal Infringement Notice scheme take place with affected Government agencies, in particular the Infringement Processing Bureau and the State Debt Recovery Office, with a view to developing appropriate systems and processes for administering the Criminal Infringement Notice scheme.

RECOMMENDATION 17: That education and consultation on the extension of the Criminal Infringement Notice scheme occur at the local level, particularly in rural and remote communities and communities with a significant Aboriginal population, to address concerns about the use of Criminal Infringement Notices and consequences arising from the failure to pay.

RECOMMENDATION 18: That the use of Criminal Infringement Notices be kept under regular review by LACs as well as generally across NSW Police to ensure the continuing fair, proper and effective use of the scheme.

NSW Police advised that they supported each of the recommendations and that in relation to Recommendation No. 16 that, "... both IPB and SDRO are permanently represented on the CINs Project Steering Committee". They also advised that in relation to Recommendation No. 18, "All events irrespective of their nature, whether a charge was made or not, are reviewed by supervising officers to determine if NSW Police action was appropriate".

Concerning Recommendation No. 16, the OSR advise that, "IPB has had heavy representation on the CINS Steering Committee and has submitted costings to cover requirements to accommodate the state roll out of the Criminal Infringement Notice Scheme".

In relation to Recommendation No. 17, the OSR informed that "Consequences arising from the failure to pay penalty notice matters appear on all Penalty Reminder notices" and that "This could be extended to achieve the report's objective".

The OSR continued that, "The FEB, SDRO has implemented a number of initiatives to educate the types of communities described in the recommendation. The SDRO maintains a close relationship with a number of aboriginal groups throughout the state, including the Norimbah Unit (The Aboriginal Unit in the Attorney General's Department) and The Macquarie Hunter Aboriginal Interagency Conference Group".

## Use of CIN record as antecedent record in court

NSW Police and the Police Association made submissions on the issue of granting authority to use an offender's CIN history in the form of antecedents presented to courts.

NSW Police stated that "... an individual's record of paid CINs should be included as part of an offender's antecedents" for the reason that:

*The use of the CIN history would inform a sentencing court whether the relevant offence is an uncharacteristic aberration or a continuation of disobedience of the law. Paid penalty notices are pertinent in this regard and a person's antecedents should not be confined to records of convictions.*<sup>418</sup>

The Police Association also advocated for the retention and presentation, by way of antecedents before criminal courts, of records of paid and unpaid CINs. In support of this proposal the Association's submission lists the following reasoning:

- the current police practice of presenting an offender's traffic infringement record as antecedents in traffic matters before the courts
- the loss, by not presenting CIN records, of any deterrent value for the individual toward future or repeat offending that might otherwise arise from presenting CIN histories
- presentation of individual CIN histories to courts avoids the possibility of minor repeat offenders erroneously assuming the facade of a 'first-time offender'.<sup>419</sup>

The participants in our police focus groups were also unanimous in expressing support for the retention and presentation to the courts of CIN histories, offering similar reasoning to that provided by NSW Police and the Police Association.<sup>420</sup> Some members of those groups also discussed the apparent inequity and inconsistency that currently arises when individuals having elected to go to court are found guilty of the offence and have a conviction recorded against them, and thus a criminal history created, whereas those who pay the CIN fine do not.<sup>421</sup>

In relation to the outcome brought about by the payment of a CIN penalty, the NSW Police SOPs for the implementation and conduct of the CIN scheme trial state:

*A criminal record of the offence is not kept if the penalty is paid.*<sup>422</sup>

This scenario was envisaged in the Second Reading speech to the Penalty Notice Offences Bill by the (then) Minister of Police, The Hon. Michael Costa MLC, who assured the Parliament:

*... payment of the fixed penalty results in the offender acquiring neither a conviction nor a record. The offender can avoid the social stigma and legal disabilities that attach to prosecution and conviction in a criminal court.*<sup>423</sup>

Despite these assurances, information supplied to our review by the Legal Aid Commission, which also expressed its concern about the practice, indicates that records of CIN matters are already being appended to criminal records as information presented in criminal proceedings.<sup>424</sup>

It would also seem that those instances to which the Legal Aid Commission refers are not isolated examples. Information received during the course of another legislative review showed that NSW Police 'Facts Sheets', which are normally read and sometimes passed to the court, of criminal cases heard during the CIN scheme trial, also revealed 'Criminal Infringement Notice History' sheets containing updated information about the defendant's CIN records appended to the 'Criminal History – Bail Report'.

The presentation of such records to the courts may be an inadvertent breach of the Minister's assurance that neither a record nor "*the social stigma and legal disabilities*" that follow from a criminal conviction would result from payment of a CINs fine. NSW Police's current information technology practices, it seems, automatically produce an offender's CINs record whenever a criminal history is requested through the COPS system.

Putting the question of intent around this issue aside, the outcome is that the "*social stigma and legal disabilities ... attach[ed] to prosecution and conviction in a criminal court*" to which the Minister referred and which it had been the intention of the proposed legislation to avoid, may have already managed to effectively assert themselves, at least in the sentencing considerations of some criminal courts, during the relatively short period of the trial.

### **Different treatment of offenders in CIN matters**

There is a disparity in the consequences for the criminal history and antecedents of those offenders who elect to go to court in preference to paying the CIN and are subsequently convicted in comparison to those who pay the penalty prescribed by the CIN.

Australian law distinguishes criminal records from antecedents. In NSW the CRS maintains records for all court appearances, arrests and convictions for offenders aged 14 years and over, and offenders below the age of 14 years where the offender was fingerprinted. A person's criminal history remains on record permanently unless they have had a charge dismissed and have applied to the Commissioner of Police to have fingerprints destroyed and evidence of the charge removed.

Criminal records released by NSW Police to the courts are usually, although not uniformly, summarised versions of the complete record, omitting juvenile offences, arrests, dismissed charges and charges where the offence was proved but no conviction was recorded. That is, they are a record of a person's conviction(s), finding(s) of guilt of an offence by a court, and may include the resultant sentence(s) for those conviction(s).<sup>425</sup>

'Antecedent' on the other hand, is a very broad term that may include almost anything done by the accused, whether good or bad.<sup>426</sup> 'Antecedents' are relevant to the determination of character, which although possibly relevant to determining the credibility of a witness, in NSW is *not* relevant to sentencing.<sup>427</sup> It is our understanding that police routinely provide the criminal courts with an indication of their knowledge, if not the details, of the defendant's antecedents. Antecedent information presently comprises part of the NSW Police 'Facts Sheet', the content of which is customarily read and/or handed, to a court.

There is also a basis for distinguishing between the raising of criminal records for those individuals who elect to, but unsuccessfully, defend a CINs matter in the criminal court, and are subsequently convicted, and those persons who choose to pay the requisite fine.



The option to elect to defend a CINs matter before a court has the consequence, in addition to losing the benefit of expediently resolving the matter by financial payment and avoiding a criminal record, of having a charge for the original offence raised. The raising of a charge for the original alleged offence invokes, if the person is convicted, the penalty regime provided by either the *Crimes Act* or the *Summary Offences Act*. In addition to the possibility of a fine much larger than the penalty imposed by a CIN, it is possible that the court might impose a sentence of imprisonment, which ranges from a maximum of three months for those offences from the *Summary Offences Act* to a maximum of five years for a larceny offence.

The range and potential severity of penalties provided for the offences that are presently prescribed as offences for which a CIN may be issued, and the alleged offender's decision to expose themselves to the risk of receiving those penalties by virtue of their electing to have a matter adjudicated before a court, therefore, raises the bar in terms of potential legislative consequences for their behaviour. The equation, therefore, that a CIN recipient should seek to balance during their consideration of how best to settle a CIN matter, includes not only considering the creation, or otherwise, of a criminal record, but also the potential for a substantial increase in penalty, including imprisonment, should their defence of a charge fail.

We recognise that there is a perception of disparity between the recording of criminal conduct that attaches to an unsuccessful court-elected CIN matter and the non-recording of criminal conduct for those CINs matters finalised by way of payment of the penalty, but, for the reasons stated, these outcomes flow from the nature of the proceedings used to deal with the offence.

### **Should CINs be recorded and reported in criminal histories or antecedents?**

Where the suggestion that a record of infringement notices issued, paid or not paid constitute part of the offender's criminal record or antecedents has been considered in NSW and other jurisdictions, there has generally been acceptance of the proposition that payment of the fine does not constitute an admission of guilt or liability, and accordingly should not be considered to be a conviction nor permitted to form part of the offender's criminal record.

In its 1996 report on sentencing, the NSWLRC argued that infringement notices for criminal offences represented a departure of the traditional principles of criminal law:

*...determination of guilt without requiring the prosecution to present evidence before a judicial authority, and on the basis of strict and vicarious liability, represents a departure from the traditional tenets of the criminal justice system.*<sup>428</sup>

In supporting the concept of criminal infringement notices, the NSWLRC articulated several principles to ensure that there were proper safeguards, including:

*If the infringement notice system is to be expanded, the Commissioners unanimously agree that proper safeguards are needed to minimise the risks of abuse of the system. 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.*<sup>429</sup>

The Australian Law Reform Commission argued that payment of an infringement notice should not be an admission of liability or be treated as a conviction:

*Liability for the underlying offence or contravention remains untested and there is an argument that it is unjust to use the issue of an infringement notice (in effect, an unsubstantiated allegation) as a factor relevant to the compliance history...*<sup>430</sup>

Using the ALRC's report as the basis for developing infringement notice schemes, the Commonwealth Attorney General's Department has said:

*Infringement notice provisions should state that if the infringement notice penalty is paid within the required time and the notice is not withdrawn:*

- any liability of the person for the offence specified in the notice is discharged (including for any other notices issued for the same offence), and
- further proceedings cannot be taken against the person for the offence, and
- the person is not regarded as having been convicted of the offence.

*...These rules are central to the purposes of an infringement notice scheme.*<sup>431</sup>

Professor Fox stated that one of the principles of a model infringement notice scheme should be that:

*A person against whom an infringement notice has been issued should not be treated as having been convicted of the alleged offence, except by a court order. Expiation of the offence by payment should not lead to a conviction...*<sup>432</sup>

On the specific question of an infringement notice constituting part of the offender's antecedents, the ACT Attorney General's Department has stated that:

*Due to the fact that payment of an on-the-spot fine means that liability in respect of the alleged offence is deemed to be discharged and the person is not to be regarded as having been convicted of an offence, it follows as a matter of principle that the payment of previous infringement notices cannot be included as part of antecedents reports for Court cases. However, an agency is entitled to keep records of previous infringement notices and these records can assist the agency in deciding to proceed by way of prosecution rather than by way of infringement notice.*<sup>433</sup>

If a CIN has been finalised as a result of payment, and is subsequently included in a criminal record or the antecedents of an offender, then a significant incentive for an offender to accept a CIN in lieu of going to court is removed. In combination with the likelihood of a penalty less onerous than the fixed penalty for a CIN,<sup>434</sup> first offenders in particular may well consider challenging the charge in court to be preferable to receiving a CIN.

However, records of offences for which CINs have been issued should be maintained and accessible to police so as to allow an officer considering a CIN to ascertain the offender's history in respect of compliance with a CIN. Should there be repeated occurrences of the offence for which it is proposed to issue a CIN, or where there has been a record of non-payment, these factors should be made known to police in determining whether or not to issue the CIN.

RECOMMENDATION 19: That Parliament establish safeguards, by means of legislation, against the presentation to the courts of Criminal Infringement Notice histories where those matters have been satisfied by the payment of the prescribed penalty.

RECOMMENDATION 20: That records of Criminal Infringement Notices issued, and whether they have been paid or not, be maintained and police have access to those records to determine whether or not it is appropriate to issue a Criminal Infringement Notice to an offender.

NSW Police advised that they did not support Recommendation No. 19, stating that, *"It is vital that a prior history of offending be provided to courts. The inclusion of a CIN in that history would be consistent with legislation that a bond with no conviction can be included in sentencing considerations"*.

Whilst the factors which differentiate an offender's receipt of a bond, with or without a conviction being recorded, from, say, a CIN might appear subtle, the former includes the presentation of a set of facts before a judicial officer for deliberation and determination. It is suggested that the inclusion of this judicial process, together with the concepts outlined in the discussion above, fundamentally distinguishes a matter finalised by way of bond to one finalised by way of CIN, and for the reasons outlined above, this review strongly supports the original recommendation.

NSW Police also advised that they support Recommendation No. 20 adding that *"There is a resource imposition for this recommendation in terms of data input needed from IPB and SDRO"*.

In relation to Recommendation 20, OSR report that, *"An appropriate report merging FEB and IPB data would have to be developed specific for this purpose. The costings provided do not include the developing of such a report"*.

## Additional consequences

Additional concerns are raised by the likelihood that amongst the population of CIN recipients there exists minimal appreciation of the different consequences that could result from their decision-making and that their deliberations toward deciding the issue of either paying a CIN fine or exercising the court-elect option might benefit were they to be better informed from the outset.

The Legal Aid Commission raised a similar concern in its submission in relation to the general lack of awareness by the public of the implications for failing to pay a CIN penalty.<sup>435</sup> As discussed earlier, the non-payment of a CIN

results in the referral of the notice to the SDRO for enforcement. The consequences of continued non-payment of an enforcement order could result in such action as the disqualification of a driver's licence or the garnisheeing of wages. Yet, amongst the general population there appears to be little understanding of these processes and potential consequences.

Similarly, there is the potential for CIN recipients to be confused or uncertain as to whether an obligation exists to include offences for which a CIN was issued when making declarations of criminal histories in respect of applications for such things as student placements, employment and travel. For example, the following is part of a series of questions asked of medical students at the Australian National University ('ANU') as part of the screening for placement in NSW and ACT health facilities:

**Figure 22: Excerpt from "Criminal history check requirement for students undertaking clinical placements in Health facilities", Medical School, ANU (June 2003)**

**CRIMINAL/TRAFFIC CHARGE, CONVICTION OR PECUNIARY PENALTIES**

(i) Are you the subject of any traffic violation, criminal or traffic charge(s) still pending before a court?  Yes  No

(ii) Do you have any conviction(s) or finding(s) of guilt which are less than ten (10) years old, or any juvenile conviction(s) or finding(s) of guilt which are less than five (5) years old?  Yes  No

(iii) Do you have any conviction(s) or finding(s) of guilt which are over ten (10) years old, (or five (5) years for juvenile conviction(s) or finding(s) of guilt) where the sentence imposed was less than thirty (30) months imprisonment for offences of the type(s) mentioned at (i) on the reverse of this form (ie. offences for which an exclusion has been granted)?  Yes  No

(iv) Do you have any conviction(s) or finding(s) of guilt which are over ten (10) years old, (or five (5) years for juvenile conviction(s) or finding(s) of guilt) where the sentence imposed was greater than thirty (30) months imprisonment?  Yes  No

**If you answered YES to any of the above questions, please attach details:**

Source: This entire policy may be viewed at <http://medicalschoo.anu.edu.au/documents/crimhistcheckpol.pdf>

The following is from a form that has to be completed by persons wanting to be admitted as a legal practitioner by the NSW Legal Practitioners Admission Board:

Figure 23: Excerpt from 'Application for admission as a legal practitioner', Form 10, Legal Practitioners Admission Board (NSW), September 2003

<b>7</b>	<b>Declaration</b>	7.1	I have not been admitted, or been refused admission, as a lawyer in any jurisdiction in the world; and
	<b>Read instructions on page 2 first</b>	7.2	The information I have given in this form is true and complete; and
		7.3	I have never committed an act of bankruptcy or been found guilty of an indictable offence or tax offence; and
		7.4	I have not done anything likely to affect adversely my good fame and character, and am not aware of any circumstance that might affect my fitness to be admitted as legal practitioner.
<b>If any of the above statements would not be true statement for you to make, you must strike out the untrue statement(s) and attach to your application a signed disclosure providing full details of the matter(s)</b>			
<b>Signature of applicant</b>			

In asking for information relating to a person's criminal history, these forms, and others like them, could cause a person to be uncertain as to whether they have to volunteer the fact that they have previously been issued an infringement notice for a criminal offence.

This is undoubtedly a delicate area in which to develop policies and procedures. On the one hand, the fact that a person has been issued a CIN for such offences as larceny and common assault might give rise (if known) to legitimate concerns about the person's honesty and suitability for employment. On the other hand, the receipt and payment of a CIN does not represent an admission of liability by the person concerned, and does not result in a finding of guilt. As a matter of fairness, it would seem that the proper course is not to consider a CIN in the criminal records check for a potential employee or student placement.

There is the potential for unfairness to arise where a CIN recipient volunteers as part of a criminal records check the fact that they were issued with a CIN, and is consequently refused employment or placement, in circumstances where they were not required to volunteer that information. Accordingly, it would be desirable that all persons who have received and discharged a CIN by payment to know that they are not obliged to declare the CIN in any future criminal history checks. To ensure the CIN recipient is aware of the absence of an obligation to advise of any CINs issued to them, it may be best to include this information on the actual notice as this would guarantee that it is brought to the attention of the individual concerned.

**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.

NSW Police indicated their support for each of Recommendations No. 21 and 22.

In relation to Recommendation No. 21, OSR advised that:

*"Explaining the consequences referred to here would need more room than currently is available on the penalty notice. Provision to include such explanations could be either/both included on the Penalty Reminder Notice or on a separate tear off information sheet which could be developed and inserted at the back of the penalty notice book. This could be detached by the issuing officer and handed to/posted at the time of issuing the criminal infringement notice".*

*A second alternative could be the including of an insert with all Penalty Reminder Notices for CINS. The delay in receiving the information would be approximately 32 days from the date of offence. The time remaining for the settlement of the matter would be 28 days. Cost for including inserts would include form design, printing, initial set-up with Contractor plus approximately \$25/1000*

*Refer also to comment on [recommendation 17]”.*

It is suggested that, since the purpose of the recommendation is to provide a CIN recipient with sufficient information upon which to make an informed decision on their disposition of a notice, as discussed in the text above, the provision of such information within a Penalty Reminder Notice would not adequately address the concerns identified.

The OSR supplied this reply on Recommendation No. 22: *“The amount of unused space currently on penalty notices is limited and being able to accommodate this request would depend heavily on the amount of words to be used to achieve this initiative. The tear off information sheet referred to in comments on [recommendation 21] could include this advice”.*

## **Additional safeguards**

Should the CIN scheme be extended it may be necessary to consider further safeguards and systems that allow and assist CIN recipients to make representations to have a CIN withdrawn where there are reasonable grounds to do so.

In the course of our review we identified a number of issues relating to the administration of the CIN scheme after a CIN had been issued to an offender, which is now almost entirely the sole responsibility of the IPB and SDRO. Some of these matters might be resolved by the significant amendments made recently to the *Fines Act* by the *Fines Amendment Act 2004*. However, further review of the options available at earlier stages of fine enforcement may also be appropriate.

## **Withdrawal of penalty notices**

The Act provides for withdrawal of a CIN by a senior police officer.<sup>436</sup> The provision does not provide for a right of review, or indicate the matters to be considered. There also exists the option of referring to the courts for determination of the matter. Complaint handling agencies generally do not conduct administrative reviews of decisions to issue infringement notices. For instance, as a rule, our office does not investigate complaints about the circumstances in which an infringement notice is issued.<sup>437</sup>

The ALRC thought it appropriate to recommend against allowing external review of the issuing of penalty notices because it argued that the decision was not *“a final or operative determination of substantive rights”*.<sup>438</sup> It also suggested that some accountability was established through the general availability of an opportunity to seek withdrawal of the notice:

*A form of internal review of the decision to issue an infringement notice is generally available, as schemes provide a right for the person to whom the notice has been issued to request that the notice be withdrawn.*<sup>439</sup>

While such reviews may be generally available, they are by no means universal and often are not established in statute, which would make it easier for a recipient of an infringement notice to insist on their right to a review. Many infringement notice schemes do allow individuals to make representations to the appropriate agency for withdrawal of the notice, but this is occasionally at the discretion of the agency.

There are various statutory review schemes in place in comparable jurisdictions, ranging from internal review by the agency that issued the infringement notice to determination by an independent authority. Australian Customs is an example of the former, where an internal review process is established by statute for considering and determining representations:

- 1) *A person on whom an infringement notice has been served may make written representations to the CEO seeking the withdrawal of the notice.*
- 2) *The CEO may withdraw an infringement notice served on a person (whether or not the person has made representations seeking the withdrawal) by causing written notice of the withdrawal to be served on the person within the period within which the penalty specified in the infringement notice is required to be paid.*

- 3) *The matters to which the CEO may have regard in deciding whether or not to withdraw an infringement notice include, but are not limited to, the following:*
  - (a) *whether the person has previously been convicted of an offence for a contravention of this Act;*
  - (b) *the circumstances in which the offence specified in the notice is alleged to have been committed;*
  - (c) *whether the person has previously been served with an infringement notice in respect of which the person paid the penalty specified in the notice;*
  - (d) *any written representations made by the person.*
- 4) *If:*
  - (a) *the person pays the penalty specified in the infringement notice within the period within which the penalty is required to be paid; and*
  - (b) *the notice is withdrawn after the person pays the penalty;*

*the CEO must refund to the person, out of money appropriated by the Parliament, an amount equal to the amount paid.*<sup>440</sup>

At the other end of the spectrum, an example of an independent agency providing review of infringement notices is the Parking and Traffic Appeals Service in London, which is an independent adjudication service established by the Road Traffic Act 1991 (UK) for deciding disputed traffic and parking penalties issued by local authorities. This is the only appeal process open to affected motorists, as the right to go to court to dispute an infringement notice is no longer available. The Service considers 40,000 representations a year.<sup>441</sup>

With respect to most disputed infringements in New South Wales only a partial statutory scheme for review is in place (covering the withdrawal and annulment of notices and orders issued by the SDRO).<sup>442</sup> In practice, however, representations can be and are made in the first instance to the IPB to withdraw an infringement notice. Such representations generally tend to either contest the facts of the incident resulting in the notice or point to an administrative defect in the issuing of the notice. For example, the IPB will consider withdrawing a parking or traffic infringement notice:

*If there was found to be an error by the reporting officer, or if there are extenuating circumstances that can be properly supported by documentation.*<sup>443</sup>

As noted earlier while the Act enables a CIN to be withdrawn by a senior police officer,<sup>444</sup> it does not provide for representations to be made for CINs, so a policy decision was taken by NSW Police not to allow such representations to be considered during the CINs pilot. Withdrawal of a notice was to be confined to those circumstances where there was a defect in the issuing of the notice, such as it being issued to a person under the age of 18 years, by an officer from a non-trial area or for an offence not covered by the scheme.

If the CIN scheme is made permanent and extended statewide then, in our view, further consideration should be given to a more comprehensive mechanism to deal with representations for the withdrawal of a CIN.

The passage and commencement of the *Fines Amendment Act 2004* means that since 1 September 2004 there is now a statutory right to have a fine enforcement notice reviewed by the SDRO. The Parliamentary Secretary, Graham West MP, told the Legislative Assembly that a statutory review of the *Fines Act* in 2002:

*...identified a number of concerns regarding a lack of knowledge of SDRO review mechanisms and how to apply for them. The bill therefore clarifies and codifies review mechanisms in the legislation. This includes a requirement for the SDRO to specify in the notice given to a fine defaulter the review processes that are available if the fine defaulter wishes to challenge the liability for the fine, is unable to pay the fine, or has concerns about the fairness of the enforcement process. This will formalise and extend the SDRO's existing practices.*<sup>445</sup>

As a consequence of the amendments, the SDRO will now issue fine enforcement orders that will advise the recipient that they have options to seek a review of a fine enforcement, including applications for “*withdrawal, annulment, time to pay and the writing off of fines.*”<sup>446</sup>

The Parliamentary Secretary also noted that:

*The bill introduces a new process for review of fines relating to penalty notices. In some cases, evidence is provided to the SDRO to raise a doubt about the person's liability for the penalty. The bill provides an alternative*

to referral to court in cases where the available evidence suggests that the fine defaulter might not be found guilty of the offence. Prior to annulment of the enforcement order, the SDRO will be required to refer the fine back to the issuing agency or referring agency to review the matter and determine whether to withdraw the fine.<sup>447</sup>

From 1 September 2004, s49 of the amended *Fines Act* now reads:

*The State Debt Recovery Office, when dealing with an application for annulment, must grant the application and annul the 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 made, 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, [emphasis added] or*
- (c) *having regard to the circumstances of the case, there is other just cause why the application should be granted.*
- (3) *If the State Debt Recovery Office 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.*

*Note. Section 51 provides that the Local Court is to hear and determine the alleged offence as if no penalty notice enforcement order had been made.*

Should an application raise questions or doubts as to the recipient's liability for the penalty, the SDRO is to refer the matter to the agency that originally issued the penalty notice:

#### *49A Review of penalty notice where doubt as to liability*

- 1) *Before the State Debt Recovery Office 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 appropriate officer who applied for the order or the person or body on behalf of whom the penalty notice was issued (the prosecuting authority).*
- 2) *The prosecuting authority must review the matter to determine whether a penalty notice to which the penalty notice enforcement order applies should be withdrawn.*
- 3) *A review is to be dealt with in the absence of the parties, unless the prosecuting authority otherwise determines.*
- 4) *The prosecuting authority must notify the applicant for the annulment and the State Debt Recovery Office of its determination on the review of the penalty notice.*
- 5) *If the prosecuting authority determines that a penalty notice should be withdrawn (in whole or in part), the State Debt Recovery Office must withdraw the penalty notice enforcement order (in whole or in part) under section 46.*
- 6) *The State Debt Recovery Office must, if a penalty notice is not withdrawn on review or there is no decision on a review within 42 days after referral for review, grant the application for annulment and annul the penalty notice enforcement order under section 49.*

In our view, admittedly without the benefit of having seen these provisions in operation, the amended *Fines Act* establishes a means for reviewing a penalty notice enforcement order and enables a person issued with a penalty notice to make representations for the annulment of the order. It has the disadvantage, however, of only coming into play when the applicant has received a penalty notice enforcement order following non-payment of the penalty notice and cannot be used to make representations with respect to the original penalty notice before the time for payment expires. In addition, the matter must be referred to the local court for hearing, reducing the efficiencies of the CIN scheme. Further, the fee (of \$50.00) for each application, which we understand is payable regardless of the outcome, may impact on the potential use of the scheme.

In our view, there may be substantial benefits in a process that allows the recipient of a CIN to make representations at the earliest possible opportunity. This would be in addition to the SDRO processes, and could build on the senior police officer reviews already provided for in the Act. The elements of such a scheme might include:

- provision for a person to make a representation about a CIN within 21 days of its issue, either to NSW Police or the IPB
- a requirement that the representation be considered, including appropriate consideration by a senior police officer
- ‘stopping the clock’ while this process occurs, so that at the end of the considerations the person retains the capacity to either pay the fine or elect to proceed to court
- clear guidelines which specify the relevant matters to be considered in reviewing a CIN.

Our proposal to allow representations to be made with respect to CINs before the period for payment expires might arguably flow on, in the interests of fairness and equity, to other infringement notices prior to their referral to the SDRO. Those matters are beyond the scope of this review but may require further consideration having regard to the nature of the offences and notices, and any resource imposts on the relevant agencies. In this respect we note the considerations of the NSW Parliament’s Public Accounts Committee and their report: *Inquiry into Infringement Processing Bureau*.<sup>448</sup>

RECOMMENDATION 23: That consideration be given to further developing the IPB’s internal capacity to review Criminal Infringement Notices prior to court election or referral to the SDRO and that such a review facility incorporate the following elements:

- provision for a person to make a representation about a Criminal Infringement Notice within 21 days of its issue, either to NSW Police or the IPB
- a requirement that the representation be considered, including appropriate consideration by a senior police officer
- ‘stopping the clock’ whilst this process occurs, so that at the end of the considerations the person retains the capacity to either pay the fine or elect to proceed to court and
- clear guidelines which specify the relevant matters to be considered in reviewing a Criminal Infringement Notice.

NSW Police indicated their support for Recommendation No. 23 and advised that “NSW Police guidelines already allow for representations for the matter to be reviewed”.

In relation to Recommendation 23 generally, OSR commented that, *“This could require legislative amendments – penalty notice recipients “elect” to adopt this option, a method of disposal offered to them under the Division 3 of the Fines Act. We question the merit of having IPB review these matters. It would be inappropriate for IPB to review the circumstances which led to the issue of a CIN”*.

OSR also replied to each of the dot point items contained in the recommendation, as follows:

*Dot point 1 – “The IPB submits this initiative would require legislative amendment. Refer to comments on Recommendation 1. IPB could answer generic questions on matters such as payment options, methods of disposal, consequences for unpaid matters, benefits of paying etc. It is inappropriate for IPB to consider issues relating to the circumstances of the event. Concise guidelines would need to be established for the offences allowed for under this scheme and the types of matters which are to be included in such considerations. This would then ensure fair and consistent adjudication and decisions”.*

*Dot point 2 – “This seems to indicate that all representations would need to be forwarded to a senior police officer”.*

*Dot point 3 – “From 1 September 2004, the statute of limitations on all matters where the statute would otherwise be less than 12 months, has been extended to 12 months for enforcement and for the adoption of the court elect option. Provided the SOPS and guidelines include specific timeframes there could be no requirement to “stop the clock” as payment and proceeding to court would still be options”.*

*Dot point 4 – “Refer to comments on [recommendation 23], second dot point”.*



We agree that our recommendation could require legislative amendment. We also agree that the decision should generally be that of a senior police officer and not that of the IPB. Our view as to 'stopping the clock' is to preserve absolutely the options available to all parties. Our observation of the OSR response is that it is generally consistent with our recommendation.

## Capacity to pay

As we have discussed earlier, one of the disadvantages of a fixed penalty scheme is that there is no capacity to issue a fine that reflects the recipient's capacity to pay.

A significant difference between a fine issued by a court and a CIN issued by a police officer is that the court is required to consider the means of the offender in determining the quantum of the fine. Section 6 of the *Fines Act* states:

*In the exercise by a court of a discretion to fix the amount of any fine, the court is required to consider:*

- a. *such information regarding the means of the accused as is reasonably and practicably available to the court for consideration, and*
- b. *such other matters as, in the opinion of the court, are relevant to the fixing of that amount.*

The capacity of an offender to pay a fixed penalty has been the subject of a number of law reform reviews in Australian jurisdictions, including NSW,<sup>449</sup> Tasmania<sup>450</sup> and the Commonwealth.<sup>451</sup> In its 1996 review of sentencing, the NSW LRC said:

*A requirement that a convicted offender pay a particular sum, say \$500, could [mean] great hardship or be met with relative ease depending on the financial standing of the offender. The response to the inequitable operation of fines in the Australian context has, broadly speaking, been twofold: to grant the sentencing court a discretion to take account of the means of the offender in assessing quantum; and to provide for reasonable time to pay the penalty.<sup>452</sup>*

There have been some suggestions regarding possible means of determining the level of a fine so that it reflects the capacity of the person to pay, with the most prominent of these being the introduction of a 'day fine'. Such schemes have operated in Denmark, Finland, Sweden and West Germany. The amount of a day fine is determined by reference to the daily income of the offender:

*The court imposes a penalty involving a specified number of day-fine units, the amount of each unit being calculated by reference to the offender's financial circumstances. The amount of each unit is multiplied by the number of units set by the court to determine the total fine payable.<sup>453</sup>*

To illustrate how a day fine would work in practice, imagine an offence for which a penalty of 15 days is in place, and one offender whose personal income amounts to \$50 a day and another offender whose personal income amounts to \$200 a day. Under a day fine scheme, the fine for an offence carrying a 15-day penalty would be \$750 (\$50 multiplied by 15 days) for the first offender and \$3,000 (\$200 multiplied by 15 days) for the second offender.

As part of the 1996 review, the NSWLRC considered a proposal for introducing a day fine scheme and eventually recommended against it on the grounds that it:

*...places too great a restriction on the discretion of the sentencing court to impose the sentence which is most appropriate given all the circumstances of an individual case. It may also prove too complex and consequently unworkable in practice, as the experience of other jurisdictions suggests. Moreover, it may be too time-consuming for courts to make an accurate assessment of the offender's financial means.<sup>454</sup>*

To deal with the issue of the potential inequity from a fine being issued without regard to capacity to pay, the NSWLRC recommended that fine option orders be made available to offenders. Fine option orders allows an offender to make an application to the court that he or she be allowed to work off the amount of a fine by way of community service. The NSWLRC supported this proposal on the grounds that the orders:

*... are an effective means of reducing potential inequities in the fine system. They may reduce the incidence of fine default and permit the fine system to operate more efficiently. They may also avoid hardship in individual cases. They are more effective and less severe than the complicated procedures under the *Fines Act*.<sup>455</sup>*

In considering whether this option should be made available to the recipient of a CIN, we note that despite the NSWLRC's recommendation that a fine option order scheme be made available, the government has not as yet acted on this proposal. However, we recommend that the CIN scheme be carefully monitored to determine whether fines are not being paid, or subsequent enforcement action is being taken, as a result of an offender's relative economic disadvantage. If there is compelling evidence that the failure to pay the fine imposed by a CIN is resulting in significantly adverse knock on effects then existing options and possible alternatives should be closely examined.

RECOMMENDATION 24: That the Criminal Infringement Notice scheme be monitored to determine whether fines are not being paid, or subsequent enforcement action is being taken, as a result of an offender's relative economic disadvantage.

RECOMMENDATION 25: That, if there is evidence that the failure to pay the fine imposed by a Criminal Infringement Notice is resulting in adverse consequences for Criminal Infringement Notice recipients, consideration be given to the effectiveness of current options and any alternative, including fine option orders, to assess those consequences.

NSW Police indicated their support in principle for Recommendation No. 24 and that, *"NSW Police is not equipped to determine accurately an offender's economic circumstances nor is it appropriate for it to do so. This is not a matter for NSW Police"*.

The Office of State Revenue replied to Recommendation No. 24 informing that, *"There have been recent amendments to the Fines Act. One of these amendments establishes a Hardship Board. This Board could assist in achieving this objective. The collection of data required to identify this information would require a system report which would have to be developed. The costings provided do not include the development of such a report but could be included in the data required to report the information referred to in [Recommendation 20]"*.

We note that this may be a practical way to implement, at least in part, our recommendation.

Recommendation No. 25, as it was in draft form, originally stated, 'That, if there is evidence that the failure to pay the fine imposed by a CIN is resulting in adverse consequences for CIN recipients, consideration be given to the introduction of fine option orders in NSW'. In this form, it was not supported by NSW Police who commented, *"The action proposed by the recommendation is not appropriate for criminal matters. In addition there are significant costs in implementing and administering a fine option order scheme in parallel with the CIN scheme"*.

In relation to Recommendation No. 25, the OSR replied:

*"Fine defaulters are currently allowed to repay fines by doing community service work under the Fines Act 1996 providing that the SDRO is satisfied that payment is unlikely to be made. The SDRO approved 281 community service orders in the 2003-2004 financial year and a further 147 to October 21, including two where CINS fines were involved.*

*The SDRO requests that any review based on submissions made by the NSW Law Reform Commission in 1996 acknowledge that the proposals arising from the report were made prior to the operation of the Fines Act from January 1998.*

*The SDRO submits that, in fairness, reference should be made to the 1995 BOCSAR report "Enforcing Fine Payment" which was critical of the pre-1998 system of allowing clients to choose to work off a fine as well. The SDRO also submits that, in response to the criticism of the effectiveness of the operation of the Fines Act contained in the NSWLRC 1996 report mention be made of the review of the Fines Act 1996, required by section 132 of that Act, which was completed and tabled in Parliament on 21 November 2002 and concluded that the objectives of the Act are sound.*

*Also refer to comments on the Hardship Board in [Recommendation 23]. Legislation allows for the SDRO to provide payment plans (payment by instalments) for all enforcement orders"*.

Because of these comments, we have revisited and refined our recommendation to include a consideration of current options and possible alternatives, including fine option orders. This ensures recent initiatives can be assessed and all available alternatives are subject to thorough consideration.

## Deferred payments and payments by instalment

With court ordered fines in NSW there is legislative provision for the registrar of the court to approve an application for additional time to pay from a person liable to pay the fine "if it appears expedient to do so".<sup>456</sup> The registrar may then make arrangements for an extension of time to pay the whole fine, or for the fine to be paid in instalments in such amounts and at such times as specified by the registrar.<sup>457</sup> Failure to make a payment for an instalment on the due debt renders the offender liable to pay the remaining amount of the fine.<sup>458</sup>

There is no equivalent provision that allows payment for a CIN to be deferred or made in instalments. Only 43 per cent of CINs issued during the trial were paid in accordance with the initial payment instructions. It is possible that a number of these remained unpaid because of the hardship that would be caused by paying the entire fine in one go. An offender receiving a single CIN may be liable for a fine of up to \$400, but as some of the examples we have cited where CINs have been issued indicates, offenders have been issued with two CINs. Furthermore, the SOPs allow an offender to be issued with up to four CINs from the one incident. If this were to occur, the offender might be liable for up to \$1,000 and more to avoid court or enforcement action. The payment of penalties of this quantum may cause genuine hardship to a number of people. As we noted earlier, over a quarter of representations to the IPB in relation to CINs concerned applications for an extension of time to pay or payment of the amount in instalments.

The amendments to the *Fines Act* made by the *Fines Amendment Act 2004* make provision for the writing off of unpaid fines, particularly where a fine defaulter can demonstrate that their financial, medical or personal circumstances means that they are not, and are unlikely to be, in a position to pay the fine. The Parliamentary Secretary told the Legislative Assembly:

*The bill provides for a further administrative review of decisions made by the SDRO in relation to a person's capacity to pay, such as decisions on an application to allow time to pay a fine, or to write off a fine. Although the SDRO approves the overwhelming majority of such applications, the bill establishes a statutory hardship review board with the authority to review specified decisions of the SDRO. The board will have the power to direct the SDRO to allow further time to pay a fine, to defer a fine by way of write-off, or to lift a sanction in advance of full payment of the fine. Although the board will have a wide discretion to make such a direction, the board will be required to consider matters such as the fine defaulter's capacity to pay, the likelihood of successful enforcement using civil sanctions, and the fine defaulter's suitability for community service.*

*However, the board will not be limited to consideration of financial hardship and could, for example, consider factors such as serious economic and social hardship experienced by Aboriginal people or people in remote communities. The SDRO protocols will enable the board to take into account the special circumstances of people with physical or intellectual disabilities. The board as formally constituted would comprise the Secretary of the Treasury, the Chief Commissioner of State Revenue, and the Director-General of the Attorney General's Department.*<sup>459</sup>

Again, however, these arrangements can only be made when the penalty notice is the subject of enforcement action by the SDRO. While it is appropriate that the writing off of a fine should occur after other options have been exhausted, there is no provision for an application for deferred payment or payment by instalments during the period before the time for payment expires. There is also the consideration that the SDRO presently charges \$50 for applications made to it. Given that we are considering the hardship that might be caused by paying the penalty imposed by a CIN, it would be unfortunate if an applicant were to incur additional costs, particularly if the application was unsuccessful. For these reasons, and those that we set out earlier for allowing representations to be made during this period, we recommend that applications to the IPB for payment by instalments and/or deferred payment on the grounds of hardship be permitted.

In making this recommendation, we would suggest that such applications be streamlined by means of a standard form setting out the various arrangements that will be given consideration by the IPB or the SDRO, that invites the applicant to select one of the arrangements to form the basis of an application for payment to be made by instalments and/or deferred. We appreciate that at the time of writing, further consideration of this proposal will not occur until such time as the OSR is satisfied that the IMPS used by the IPB is operating satisfactorily.

RECOMMENDATION 26: That the *Criminal Procedure Act* be amended to permit the Infringement Processing Bureau to receive and consider applications for the payment of a Criminal Infringement Notice - or alternatively, to refer to the State Debt Recovery Office for consideration, without the person being fined incurring additional administrative costs - by instalments or deferral to such time as agreed with the agency.

RECOMMENDATION 27: That the Infringement Processing Bureau and the State Debt Recovery Office introduce a standard form setting out the various arrangements that will be given consideration by the agency, that invites the applicant to select one of the arrangements to form the basis of an application for payment to be made by instalments and/or deferred.

Our draft Recommendation 26 referred to the IPB having the function of considering instalment or deferment applications. NSW Police indicated that they did not support Recommendation No. 26 (in its previous form) citing, *“This is a duplication of actions already carried out by SDRO – any appeals should be the sole purview of one agency”*.

The Office of State Revenue advised, *“There is no infrastructure within the IPB as it is presently constituted to provide for time to pay arrangements. An alternative option to consider would be the referral of a fine from IPB to the FEB of the SDRO for institution of such arrangements prior to the issue of an enforcement order and the \$50-00 cost. Further investigation is required to identify issues associated with implementation of this option”*.

The suggestion of the OSR provides another avenue to achieve the objective of this recommendation, that is, that consideration of payments by instalment or deferral of payments be permitted prior to penalty notices becoming subject to enforcement action. We have amended our recommendation to reflect this submission.

NSW Police offered support for Recommendation No. 27.

In reply to Recommendation No. 27 the OSR commented that, *“The FEB of SDRO is currently required under the Fines Act 1996 to provide available options when issuing an enforcement order. This recommendation, if it is to be adopted by the IPB, would result in a significant expansion of in the number of time to pay arrangements instituted and would involve increases in administrative costs which would need to be evaluated prior to a decision being made. The IPB and FEB would need to assess the impact of this proposal prior to its agreement”*.

While the logistics of implementing our recommendation will need to be considered, the justice and equity considerations underlying it remain.

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## Endnotes

- <sup>362</sup> The Hon. R Debus MP, *NSWPD*, Legislative Assembly, 27 June 2002, p. 4114.
- <sup>363</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 7.
- <sup>364</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 9.
- <sup>365</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 7.
- <sup>366</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 2.
- <sup>367</sup> J. Sanders, Principal Solicitor, The Shopfront, Youth Legal Centre, Submission dated 23 October 2003, p. 3.
- <sup>368</sup> The Hon. J W. Shaw MLC, *NSWPD*, Legislative Council, 26 June 1997, p. 11234.
- <sup>369</sup> Crimes (Detention After Arrest) Regulation 1998.
- <sup>370</sup> s355 (2), *Crimes Act*.
- <sup>371</sup> See chapter 6.
- <sup>372</sup> *Legal Advice in relation to implications of Part 10A of the Crimes Act 1900 with regard to the use of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002 – referred to as the Criminal Infringement Notices (CINs trial)*, Legal Services, NSW Police dated 15 December 2003. (Hereafter referred to as the “CINs and 10A Legal Advice”.)
- <sup>373</sup> *CINs and 10A Legal Advice*.
- <sup>374</sup> *Ibid.*
- <sup>375</sup> *Ibid.*
- <sup>376</sup> *Ibid.*
- <sup>377</sup> *Ibid.*
- <sup>378</sup> *Ibid.*
- <sup>379</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 4.
- <sup>380</sup> A list of “Table 2” offences is set out at Appendix G.
- <sup>381</sup> A list of offences contained in the *Summary Offences Act* is set out at Appendix H. This is not intended to be an exhaustive list of summary offences as these are also created by other legislation. See, for example, s. 40 of the *Pawnbrokers and Second-Hand Dealers Act 1996*.
- <sup>382</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Attachment, p. 8.
- <sup>383</sup> The advice from the Police Association is that this description covers offences where an offender either steals goods or has custody of stolen goods and attempts to pawn them as if he or she owned the goods.
- <sup>384</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, p. 7.
- <sup>385</sup> Appendix A, Qn. 24.
- <sup>386</sup> Fn 24. This discussion draws on material included in our Discussion Paper on the use of drug detection dogs. NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, Sydney, 2004, pp. 44-45.
- <sup>387</sup> J. Baker & D. Goh, *The cannabis cautioning scheme three years on: An implementation and outcome evaluation*, Bureau of Crime Statistics and Research (NSW), Sydney, 2004, pp.8-9.
- <sup>388</sup> J Bargaen, *Training to Divert Young Offenders*. Workshop presented at *Juvenile Justice: From Lessons of the Past to a Road for the Future*, Conference convened by the Australian Institute of Criminology in conjunction with the NSW Department of Juvenile Justice, Sydney, 1-2 December 2003, p. 1.
- <sup>389</sup> J. Bargaen, *Delivering services that make a difference - Youth justice conferencing scheme*. Presentation at *Citizens and Government Getting Results*, Institute of Public Administration Australia NSW Conference, 14 May 2004.
- <sup>390</sup> Judge D. Price, Chief Magistrate of the Local Court, Submission dated 13 October 2003.
- <sup>391</sup> J. Sanders, Principal Solicitor, The Shopfront, Youth Legal Centre, Submission dated 23 October 2003, pp. 2-3.
- <sup>392</sup> Attorney General’s Department (Cth), Criminal Justice Division, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, Canberra, 2004, p. 45. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report No. 95*, Canberra, 2002, p. 447.
- <sup>393</sup> ACT Law Reform Commission, *Street Offences, Report No. 15*, Canberra, 1997, Appendix A.
- <sup>394</sup> The Hon. J. Samios MLC, *NSWPD*, Legislative Council, 26 June 2002, p. 3788.
- <sup>395</sup> The Hon. M. Gallacher MLC, *NSWPD*, Legislative Council, 26 June 2002, p. 3793.
- <sup>396</sup> *R v Metharam* [1961] 3 All ER 200; (1961) 45 Cr App R 304. This and related commentary is drawn from R. S. Watson, M. Blackmore and G. Hosking, *Criminal Law/Criminal Law (NSW)* service at LawBookCo.com.au.
- <sup>397</sup> *R v Miller* [1954] 2 QB 282; (1953) 38 Cr App R 1. See also *R v Chan-Fook* [1994] 1 WLR 689; 2 All ER 552; (1994) 99 Cr App R 147; *R v Ireland* [1997] 4 All ER 226.
- <sup>398</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 9.

- <sup>399</sup> Information since supplied in an Attachment to a letter from the Minister for Police, dated 30 November 2004, advises, “A review of the pertaining event was carried out. The relationship of the involved parties is not detailed and it is difficult to ascertain, unequivocally, that a domestic relationship exists. The narrative includes reference to advice provided by attending police about applying for an Apprehended Domestic Violence order. It is possible that this advice may have related to a personal violence order and has been described incorrectly in the Event narrative”.
- <sup>400</sup> Having sought advice from NSW Police and SDRO, we understand that this CIN was referred to SDRO for enforcement action, and was subsequently discharged by means of payment.
- <sup>401</sup> Similar provision is made in s60A of the *Crimes Act* for an assault on a “law enforcement officer” (defined by the *Crimes Act*) who is not a police officer.
- <sup>402</sup> *Crimes Amendment (Assault of Police Officers) Act 1997*.
- <sup>403</sup> The Hon. P. Whelan MP, NSWPD, Legislative Assembly, 19 June 1997, p. 10800.
- <sup>404</sup> *Attorney General’s Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515. The application to have a Guideline Judgement issued was refused.
- <sup>405</sup> *Ibid.* at [22].
- <sup>406</sup> *Ibid.* at [29].
- <sup>407</sup> *Ibid.* at [38].
- <sup>408</sup> A/Director, Victims Services, Submission dated 30 October 2003, p. 1.
- <sup>409</sup> *Ibid.*
- <sup>410</sup> *Ibid.*, p. 2.
- <sup>411</sup> Subsection 46 (1), of the *Victims Support and Rehabilitation Act*, reads:  
*If the Director is of the opinion that, before or after an award of statutory compensation is made, a person has been convicted of a relevant offence, the Director may make a provisional order for restitution against the person so convicted.*
- <sup>412</sup> Dictionary, *Victims Support and Rehabilitation Act*.
- <sup>413</sup> NSW Law Reform Commission, Report 79 (1996) – Sentencing, Chapter 3 at paragraph 3.50.
- <sup>414</sup> ACT Law Reform Commission, *Street Offences, Report No. 15*, Canberra, 1997.
- <sup>415</sup> Judge D. Price, Chief Magistrate of the Local Court, Submission dated 13 October 2003, p. 1.
- <sup>416</sup> s41, *Interpretation Act 1987*.
- <sup>417</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 10.
- <sup>418</sup> D. Madden, Deputy Commissioner Operations, NSW Police, Submission dated 12 November 2003, Cover letter and Attachment, p. 8.
- <sup>419</sup> I. Ball, President, Police Association of NSW, Submission dated 28 October 2003, Attachment, pp. 2 and 8.
- <sup>420</sup> Appendix A, Qn 26.
- <sup>421</sup> *Ibid.*
- <sup>422</sup> NSW Police, Education Services, *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: Policy and Standing Operating Procedures*, Sydney, 2002, p. 10. Our emphasis.
- <sup>423</sup> The Hon. M. Costa MLC, NSWPD, Legislative Council, 18 June 2002, p. 3202.
- <sup>424</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 2.
- <sup>425</sup> *Cobiac v Liddy* [1969] 43 ALJR 257, at 263-4 per J. Windeyer.
- <sup>426</sup> *Ibid.*, at 264 per J. Windeyer.
- <sup>427</sup> *Halsbury’s Laws of Australia*, Vol. 6, Sydney, 1992.
- <sup>428</sup> NSW Law Reform Commission, *Sentencing, Report No. 79*, Sydney, 1996, at [3.49].
- <sup>429</sup> *Ibid.*, at [3.51].
- <sup>430</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report No. 95*, Canberra, 2002, p. 455.
- <sup>431</sup> Attorney General’s Department (Cth), Criminal Justice Division, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, Canberra, 2004, p. 52.
- <sup>432</sup> Fox (1995b), p. 293.
- <sup>433</sup> ACT Law Reform Commission, *Street Offences, Report No. 15*, Canberra, 1997. Appendix A.
- <sup>434</sup> See “Proportionality to court imposed sanctions” in chapter 12, p. 106.
- <sup>435</sup> B. Grant, Chief Executive Officer, Legal Aid NSW, Submission dated 24 October 2003, p. 1.
- <sup>436</sup> s340, *Criminal Procedure Act*.
- <sup>437</sup> See Public Sector Agencies Fact Sheet 4 issued by the NSW Ombudsman in November 2003.

- <sup>438</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No. 95, Canberra, 2002, p. 437.
- <sup>439</sup> *Ibid.*, p., 735.
- <sup>440</sup> s243ZA, *Customs Act 1901* (Cth).
- <sup>441</sup> Sourced from <http://www.parkingandtrafficappeals.gov.uk/index.asp>
- <sup>442</sup> A *withdrawal* has the effect of cancelling the relevant order, while leaving open the option of making another order in relation to the penalty (see s. 46 of the *Fines Act*). An *annulment* has the effect of cancelling the enforcement order, and the matter must be remitted to the Local Court to determine as if the enforcement order had not been made (see s. 51 of the *Fines Act*).
- <sup>443</sup> From the IPB website ([www.ipb.nsw.gov.au](http://www.ipb.nsw.gov.au)) at [http://www.ipb.nsw.gov.au/portal/page?\\_pageid=369,153667&\\_dad=portal&\\_schema=OSRPTLT](http://www.ipb.nsw.gov.au/portal/page?_pageid=369,153667&_dad=portal&_schema=OSRPTLT)
- <sup>444</sup> s332(1), *Criminal Procedure Act* defines a senior police officer as a Local Area Commander of Police, a Duty Officer for a police station or any other police officer of the rank of Inspector or above.
- <sup>445</sup> Mr G. West MP, *NSWPD*, Legislative Assembly, 2 June 2004, p. 9462.
- <sup>446</sup> s61(1)(d), *Fines Act*, inserted by *Fines Amendment Act 2004*.
- <sup>447</sup> Mr G. West MP, *NSWPD*, Legislative Assembly, 2 June 2004, p. 9462.
- <sup>448</sup> New South Wales Parliament Public Accounts Committee, *Inquiry into Infringement Processing Bureau: Report*, Sydney, September 2004.
- <sup>449</sup> NSW Law Reform Commission, *Sentencing, Discussion Paper No. 33*, Sydney, 1996.
- <sup>450</sup> Law Reform Commission of Tasmania, *Report on Fines, Report No. 41*, Hobart, 1985.
- <sup>451</sup> Australian Law Reform Commission, *Sentencing: Penalties, Discussion Paper No. 30*, Canberra, 1987.
- <sup>452</sup> NSW Law Reform Commission, *Sentencing, Discussion Paper No. 33*, Sydney, 1996, at [10.4].
- <sup>453</sup> *Ibid.*, at [10.6].
- <sup>454</sup> *Ibid.*, at [3.14].
- <sup>455</sup> *Ibid.*, at [ 3.20].
- <sup>456</sup> s. 10 (2), *Fines Act*.
- <sup>457</sup> *Ibid.*, s10 (3).
- <sup>458</sup> *Ibid.*, s10 (4).
- <sup>459</sup> Mr G. West MP, *NSWPD*, Legislative Assembly, 2 June 2004, p. 9462.

# Chapter 15. Conclusion

As we noted in our Discussion Paper for this review, the opportunity to evaluate policing strategies in a controlled environment occurs rarely. We were asked by the Parliament to monitor the operation of the CIN scheme trial before it decided on whether to extend the operation of the legislation. While it would be premature to make conclusive judgements on the application of these new police powers given the limited time and circumstances, we believe that there is sufficient evidence to enable the Parliament to decide on whether it wishes to extend the CIN scheme.

Should the Parliament choose to continue the CIN scheme, we have identified a number of legislative, administrative and practical issues that should be addressed. These changes would serve to make the operation of these powers fairer and more effective. Similarly, we have also identified a number of issues that should be kept under scrutiny in the early stages of a statewide rollout of the CIN scheme.

What should be apparent from our findings and recommendations is that the use of infringement notices to deal with criminal offences is a significant change in the way we deal with criminal matters. There is enthusiasm for extending the operation of the scheme from the people in the frontline: the police officers who have to prevent and disrupt criminal offending.

We have also reported the views of those individuals and organisations who are a little more wary about the consequences of using infringement notices for criminal offences. Those views should not be ignored if the CIN scheme is to continue, for they identify real risks in the use of CINs for particular sections of the community. It is imperative that the risks we have identified and addressed in this report be fully considered, so as to ensure that a permanent CIN scheme is operated fairly, properly and effectively.

Ultimately, the Parliament and the community needs to be satisfied on one point, and one point alone: that an infringement scheme for certain criminal offences will deliver just outcomes: justice for victims, justice for offenders and justice for the community.

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# Appendix A

## CINs Focus Groups (NSW Police) – Feedback

Participating LACs	Country 1	City 1	City 2	Country 2
No. of officers present	9	9	5	13
Date	21 Jan 04	14 Jan 04	15 Jan 04	12 Jan 04

The following questions formed the basis of discussions with each of the participating LACs in the CINs focus groups. The amount of time allocated to, and depth of discussion around, particular questions was influenced by the group's familiarity with, or experience of, the presenting issue/s.

The LACs participating in the focus groups were selected to provide a representation of the metropolitan and country regions.

A single criterion existed for officer participation in the focus groups being the participant's first-hand experience in the use of CINs.

To encourage candid and comprehensive responses, members of the focus groups were informed that all information supplied to the review would be reported in an anonymous manner. For this reason, participating LACs are simply referred to as City 1, City 2, Country 1 and Country 2.

The questionnaire provided a semi-structured guide for the purposes of identifying and discussing the relevant issues. For ease of recording and comparison of responses, all responses relevant to a particular question have been tabulated under that question, even though a particular response may have been provided during a preceding or subsequent discussion.

Where the group participants offered similar or related comments these are recorded as dot-points, otherwise, the comments or experiences of individuals are recorded verbatim.

## Identified issues

### Fingerprinting

**Q1:** To what extent are finger/palm-prints taken to verify the identity of people issued with CINs?

LAC	Responses
City 1	<p>“The aim is for convenience, to make it fast”;</p> <p>“Obtaining finger/palm prints is not standard procedure in the LAC”; “If we don’t know the identification of the person, the person will usually be taken back to the police station and charged”;</p> <ul style="list-style-type: none"> <li>• One officer advised he had only obtained fingerprints once, another advised that he had never obtained an offender’s fingerprints for the purposes of a CIN;</li> <li>• Several officers commented that they usually know whom the person is that they are speaking to, or that the person is carrying sufficient identification, such as a driver’s license or pension card;</li> <li>• Officers commented that it is a “hassle” to obtain fingerprints. Problems identified included: <ul style="list-style-type: none"> <li>– “Only the supervisor’s car carries a fingerprinting kit;</li> <li>– It’s difficult to find a suitable ‘hard’ surface on which to take the fingerprints;</li> <li>– Some people get very upset about being fingerprinted, e.g., “I am only getting a ticket, why do you have to fingerprint me?”;</li> <li>– People find it a pain to wash their hands after they have been fingerprinted; and</li> <li>– The requirement to fingerprint people is contradictory to the aim of increasing efficiency”.</li> </ul> </li> </ul>
City 2	<ul style="list-style-type: none"> <li>• Officers said they wouldn’t issue a CIN unless they were 100% sure the person was who they said they were. This would be checked by photo identification, radio check, identifying marks, etc;</li> <li>• Most officers said they had never fingerprinted anyone for the purpose of obtaining identification before issuing a CIN;</li> <li>• One officer said he had tried (to fingerprint) but that it was too messy and too difficult on the street.</li> </ul>
Country 1	<ul style="list-style-type: none"> <li>• “I thought it was mandatory to do the fingerprinting”;</li> <li>• “ ... pretty much every time as a matter of course”;</li> <li>• “It’s often difficult because there are problems with the kits, but it’s a court requirement for verifying identification” .</li> <li>• All present agreed it was standard procedure, with fingerprinting actually the main way to identify offenders;</li> <li>• Estimated to be used 98% of the time.</li> </ul>
Country 2	<p>Those present were unanimous that fingerprints were always taken, offering the rationale that the SOPs required such printing, therefore, it was always undertaken.</p>

**Q2:** To what extent do you encounter refusals to submit to requests for prints?

<b>LAC</b>	<b>Responses</b>
<b>City 1</b>	This group had previously indicated that fingerprinting was not the standard procedure making this question redundant.
<b>City 2</b>	One officer related an experience where she had tried to fingerprint someone once but they had refused. The person was then taken to the station to be charged. No reason was offered why the person refused to be fingerprinted, except that he refused to do anything that he was asked.
<b>Country 1</b>	<ul style="list-style-type: none"><li>• The group suggested that for CINs related-offences people were unlikely to object to prints because:</li><li>• “when most people are given the choice between receiving a minor fine or a criminal record, they’ll probably choose the fine”;</li><li>• General agreement that those present had not encountered any refusals, since it (the CINs process) is preferential to the alternative - a court appearance.</li></ul>
<b>Country 2</b>	<ul style="list-style-type: none"><li>• None of the officers present indicated that they had encountered any refusals to submit to finger/palm printing.</li></ul>

**Q3:** Should (finger/palm) prints taken as part of the CINs process be retained for future reference? If so, should there be any limits on their use?

LAC	Responses
<b>City 1</b>	<ul style="list-style-type: none"> <li>• The majority present supported the concept that fingerprints taken whilst issuing a CIN should be retained, because the:-               <ul style="list-style-type: none"> <li>– offender had committed a chargeable (summary) offence, and</li> <li>– fingerprints could be used to identify the offender if they re-offended;</li> </ul> </li> <li>• Fingerprints, they suggested, should be retained once the fine has been paid.</li> </ul>
<b>City 2</b>	<ul style="list-style-type: none"> <li>• Most officers agreed that fingerprints should be retained;</li> <li>• One officer noted that by paying the fine, an offender was generally admitting that they were guilty and accepted the fine as a reasonable penalty. If they went to court the fingerprints would be retained so they should be kept when a CIN is issued (and paid).</li> <li>• Another officer, however, pointed out that the offences for which CINs are issued are quite minor and that the risks involved in not taking or keeping prints is not great;</li> <li>• One officer suggested that most people given a CIN had probably committed previous offences and therefore their fingerprints would most likely already be on file.</li> </ul>
<b>Country 1</b>	<p>“If you’re going to go to the trouble of fingerprinting you should be able to retain them. Particularly when people pay the fine, it is like an admission to the crime, so there’s no reason for having to destroy them when they are guilty”; “If you don’t keep the prints, the potential to help solve future criminal activity is lost. It also helps with achieving future compliance”;</p> <ul style="list-style-type: none"> <li>• One officer stated that objections to being fingerprinted were usually overcome once it was explained that the fingerprints would be destroyed after payment of the fine. “They are more inclined to allow the fingerprinting”.</li> </ul>
<b>Country 2</b>	<ul style="list-style-type: none"> <li>• It was the general consensus of the group that once fingerprints were taken they should be retained for future reference. In this regard, the group drew a comparison with CINs alternatives, that is, charging an alleged offender with an offence, in which case s/he would be fingerprinted and those records retained for future reference;       <ul style="list-style-type: none"> <li>– The group canvassed the following issues in relation to the retention of CINs fingerprints, the:-</li> <li>– (relatively) minor nature of the offences;</li> <li>– comparison with TINs (‘Traffic Infringement Notices’) (where fingerprints were not routinely required);</li> <li>– loss of valuable information by destroying prints once obtained; and</li> </ul> </li> <li>• that prior to CINs, had an individual been charged with a CINs related offence, they would have had a fingerprint record created.</li> </ul>

## False identifications

**Q4:** To what extent were false identifications provided to police officers during the CINs trial?

LAC	Responses
<b>City 1</b>	Officers present stated that they were not aware of any offenders who had provided them with false identification whilst being issued with a CIN.
<b>City 2</b>	None of the officers participating were aware of any instance when a person had attempted to use false identification whilst being issued with a CIN.
<b>Country 1</b>	<ul style="list-style-type: none"> <li>The group was unable to recall an incidence of false identification, since fingerprinting was the standard practice;</li> <li>Members of the group also relayed their experiences that proof of identification, in the absence of fingerprints, had previously proved problematic because of the large number of false forms of identity available.</li> </ul>
<b>Country 2</b>	One officer recited an instance where an individual, prior to being issued with a CIN, had attempted to produce false identification. The individual was subsequently fingerprinted which led to the 'discovery' of 4 x outstanding warrants for the person.

## Stakeholder perceptions

**Q5:** In your opinion, has the trial of the new (CINs) powers influenced perceptions of crime in the local community?

LAC	Responses
<b>City 1</b>	<p>"There was good publicity (surrounding the new powers) to start with but then it died down". "Some people in the community believe that (the) punishment of an offender means the offender should be publicly put in a police car, driven to the station and taken through the charging process. This is because the process of arresting someone may itself make the offender learn a lesson";</p> <ul style="list-style-type: none"> <li>The latter view was not supported by other officers present who suggested that members of the public don't (always) understand the cost or paperwork involved with this approach.</li> </ul>
<b>City 2</b>	The nature of the LAC (relatively small geographic area containing a highly transient – day/night, weekday/weekend – population), was offered as rationale as to the difficulty gauging local community perceptions to any legislation, let alone the CIN scheme.
<b>Country 1</b>	The group members suggested that it was too early to be measuring perceptual reactions attributable to the scheme.
<b>Country 2</b>	<ul style="list-style-type: none"> <li>In relation to any perceived impact on crime statistics attributable to the CIN scheme, the group claimed that the crime figures for the LAC remained the same, because: <ul style="list-style-type: none"> <li>– in general, people were not aware of the CIN scheme; and</li> <li>– there had been too few CINs issued (N=110) to date to have any realistic impact.</li> </ul> </li> </ul>



**Q6:** What, in your experience, has been the attitude of **those issued with a CIN?** Have they expressed any views on CINs as an alternative to the process of arrest, being charged and attendance at court?

LAC	Responses
<b>City 1</b>	<p>“People are usually happy getting a CIN because they don’t have to go to court”;</p> <ul style="list-style-type: none"> <li>• One officer stated that, “people are happy because they are getting away with a CIN but then not paying the fine”.</li> </ul>
<b>City 2</b>	<p>“If people commit an assault or shoplifting offence they are usually happy that they have been issued with a CIN rather than being charged because they don’t have to go to court”;</p> <p>“Most people are happy to receive a CIN when they realise that they are not going to receive a criminal record”;</p> <ul style="list-style-type: none"> <li>• This group suggested that the public’s reaction to CINs depended on the nature of the offence/s;</li> <li>• They also commented that first time offenders didn’t usually like being issued with a CIN, commenting, “ .. my mate got less than that when he went to court”.</li> </ul>
<b>Country 1</b>	<p>“ ... when you go and try to calm someone down you think a CIN will suffice but then a person doesn’t calm down and they’re still making threats to people and then you’ve got to take other action anyway”;</p> <p>“When it’s explained to recipients that it’s either (receiving) a CIN or being charged, they are generally happy to receive a CIN”;</p> <p>“If people are behaving that badly or really not doing something right, then it’s unlikely a CIN would be appropriate anyway, but most people are unlikely to object”;</p> <ul style="list-style-type: none"> <li>• The group opinion was that where a situation escalated it was not usually related to the issuing of a CIN, but involved other factors or precursors, e.g., alcohol.</li> </ul>
<b>Country 2</b>	<p>The group were quite definite in their opinion that offenders generally expressed positive reactions to CINs, especially once the alternative, that is, being charged and appearing before a court with the possibility of acquiring a criminal record, if convicted, was explained to them. By way of example, it was stated that some offenders receiving CINs had actually thanked the issuing officer, expressing gratitude for not having to ‘front court’.</p>

**Q7:** What, in your experience, has been the attitude of the **victims of crimes** for which CINs have been issued? Have they expressed any views in relation to the offender being issued a CIN?

LAC	Responses
<b>City 1</b>	<ul style="list-style-type: none"> <li>• The general opinion of participants was that retailers/shopkeepers who had goods stolen preferred a 'harsher penalty' including charging the shoplifter. However, there was also consensus for the suggestion that they (retailers) were usually satisfied when it was explained that 'even if the offender goes to court he or she will only get a slap on the wrist';</li> <li>• One officer commented that, initially " .. retailers didn't like CINs because they didn't understand the process, but now they understand it better and are usually satisfied when CINs are issued";</li> <li>• Similarly, the group supported the comment that " .. retailers were happy with the issuing of a CIN when they were informed that if the matter went to court they would need to write a statement, and take time off to attend court".</li> </ul>
<b>City 2</b>	<p>"In this LAC, people often shoplift in Woolworths. Staff at Woolworths were initially 'peeved' because shoplifters just walked away with a ticket as if they'd committed a parking offence. However, when police explained that repeat offenders were not given a CIN, but charged, they were usually quite happy. Shopkeepers are also usually happy when they hear that the CIN fine is higher than what would usually be imposed by the court"; "Victims of assault are usually satisfied when the offender gets issued with a CIN". In (part) support of this statement, an example was supplied where officers witnessed the victim, of a common assault matter, and offender, who was issued a CIN, retire to a public bar to continue drinking together;</p> <ul style="list-style-type: none"> <li>• The group suggested that shopkeepers preferred that police get back on the street quickly.</li> </ul>
<b>Country 1</b>	<ul style="list-style-type: none"> <li>• The participants supported the notion that victims were generally satisfied with a CINs outcome, " .. they're happy that its over and done with";</li> <li>• Adding that this was particularly the case with assaults as they were spared the ordeal of appearing before a court.</li> <li>• Shopkeepers in particular are happy with CINs once it's explained: "that the actual infringement notice is a monetary value that is usually in excess of what they're going to get at court ... they sort of feel some sort of satisfaction in that".</li> </ul>
<b>Country 2</b>	<ul style="list-style-type: none"> <li>• In relation to victims (the group claimed that common assault was the most frequently alleged offence), the group suggested that victims were generally happy that some action had been taken regardless that it was the issue of a CIN.</li> <li>• However, a minority of victims, apparently expressed a preference that the offender should have to appear before a court;</li> <li>• In relation 'victimless' offences, e.g., shoplifting, the group stated that a shopkeeper's 'familiarity' with CINs (being 'educated' about the process by Police) strongly influenced their reaction to the scheme. Overall though, the group reported positive support for the scheme, e.g., " .. shopkeepers are 'happy' with such an outcome, especially because of the 'consistent penalty' CINs offered and because they saw the police get back on the street quickly".</li> </ul>

## Decriminalisation or downgrading crimes

**Q8:** Is there any evidence/support for the suggestion that certain offences have effectively been downgraded because of CINs?

LAC	Responses
City 1	The group expressed a united view that whilst an officer has a discretion to either issue a CIN or charge a perpetrator, then there is no basis for the view that offences were being downgraded.
City 2	<p>“CINs could be seen as decriminalising some types of behaviour. However, police still have the option to take other action, for example charging the offender”;</p> <p>“Society changes, as do attitudes and CINs is simply another way of dealing with an established set of offences”;</p> <ul style="list-style-type: none"> <li>• The group emphasised the view that certain behaviours, previously considered unacceptable, were now viewed as acceptable by many people and that law enforcers had to maintain flexibility in that regard.</li> </ul>
Country 1	<ul style="list-style-type: none"> <li>• The group expressed the collective view that whilst police still had the discretion and flexibility to charge offenders, offences were not being downgraded because of CINs;</li> <li>• CINs were simply an alternative form of dealing with offenders;</li> <li>• The group was unanimous in its view that the (quantum of) penalties provided under CINs reflected that the offences were not being downgraded, and that the decriminalising attitude was unfortunate.</li> </ul>
Country 2	<p>In relation to the suggestion that CINs might contribute to a decriminalisation or downgrading of offences, the group stated that –</p> <p>“As a short/sharp consequence to offending behaviour, particularly ‘street offences’ CINs were a valuable tool for police and provided a degree of job satisfaction without a large amount of administrative paperwork;</p> <p>“That, in relation to the suggestion that offenders did not have to explain their behaviours .. a monetary penalty was just as effective (especially since the offender had to agree to the CIN prior to it being issued); and</p> <p>“That the decriminalisation argument sounded like certain stakeholders, e.g., solicitors and civil libertarians, were fearful of losing territory”.</p>

## Fine compliance

**Q9:** Are you aware of the process taken to enforce unpaid fines by the State Debt Recovery Office?

LAC	Responses
<b>City 1</b>	The group were not aware of fine enforcement success rates, but suggested that such information might be useful where particular individuals' fines remain outstanding ... " .. since it might influence a future decision whether to issue a CIN or proceed to a charge".
<b>City 2</b>	<ul style="list-style-type: none"> <li>• Most officers were not aware of the enforcement process once a CIN had been issued. One officer correctly stated that the CINs go to the Infringement Processing Bureau then to the State Debt Recovery Office for enforcement;</li> <li>• The group suggested that receiving information concerning the success rates of fine enforcement would probably influence their decision to issue CINs, since, if there was a low probability of fine enforcement, they would prefer to progress a matter by charging the offender rather than by issuing a CIN;</li> <li>• The group unanimously expressed the preference to receive feedback from the fine enforcement process in relation to fine enforcement success ratios.</li> </ul>
<b>Country 1</b>	<ul style="list-style-type: none"> <li>• The majority of officers stated that they would like to receive some feedback in terms of fine enforcement success rates;</li> <li>• In relation to whether or not he would be influenced by the success rate at which people were/ were not paying fines, one officer remarked, "we're supposed to take the least restrictive option. Just because an individual hasn't paid (a fine) before, does that mean you can just throw him in the truck? You've still got to take the least restrictive option".</li> </ul>
<b>Country 2</b>	The majority of those present were not aware of the fine enforcement process. Many officers were not concerned about the enforcement process as 'it was not within their realm of responsibility', however, when questioned whether knowledge of overall outcomes or even of individual outcomes might be useful (in order to assist with their future discretion as to issue a CIN, or not) most stated that they would like to have some feedback.

**Q10:** Are you aware of the extent to which fines remain unpaid after referral to the State Debt Recovery Office?

LAC	Responses
<b>City 1</b>	<p>"Sometimes you know they'll never be able to pay it (the fine)";</p> <p>"CINs should be means tested and if it was determined that it would not cause the offender major hardship, refusal to pay a fine should result in the offender's wages or social security payments being garnished. They could possibly be garnished in instalments";</p> <p>"Lots of people who go to court won't pay a fine anyway";</p> <p>"It would be good to know if an offender paid their CIN fine because, if not, the officer probably wouldn't issue them another CIN if they were caught committing another offence, they would be probably be charged instead".</p>
<b>City 2</b>	<p>"At the moment if people pay a CIN fine they don't get a criminal record, but if they elect to go to court and are found guilty they will have a criminal conviction recorded against their name. This inconsistency should be rectified";</p> <ul style="list-style-type: none"> <li>• One officer thought that 30 % of offenders would pay the fine, another officer thought 60% of fines would be paid. Two other officers thought that "less than half" of people probably pay their fines;</li> <li>• The majority of officers said that if they didn't think the offender would be able to pay the fine they would be more likely to charge the offender (rather than issue a CIN);</li> <li>• Some officers commented that they didn't care that CINs aren't paid, "Because CINs required a lesser workload (for the issuing officer) they would choose to issue them more often (than proceeding to charge) regardless (of the outcome)";</li> <li>• The group identified what they considered to be 'a major weakness' in the processing of CINs whereby if an offender elects to take the matter to court, the Infringement Processing Bureau, rather than the police, create the charge. By this process, neither the police nor the prosecutor can print out a 'Facts Sheet', and an electronic 'Brief' cannot be created to let the officer know that s/he must attend court. One officer advised that he had only found out that his matter was before the court after the defendant's lawyer telephoned the police and requested the court ordered brief. The group advised that this problem was unique to CINs because, unlike CINs, TINs, rail fines, etc., go through the 'Memo System'.</li> </ul>
<b>Country 1</b>	<p>The group was not aware of the fine enforcement success rate or follow-up process, but was interested to compare their LAC with the rest of NSW in terms of enforcement success ratios.</p>
<b>Country 2</b>	<p>The group stated that if they didn't think the offender would be able to pay the fine they would be more likely to charge the offender and let the court determine an appropriate outcome;The group expressed overwhelming support for the notion that non-payment of CINs should result in the issue of a 'Commitment Warrant' (and consequent court appearance).</p>

# Net widening

**Q11:** Are you aware of any evidence to suggest increases or decreases in the incidence of prescribed offences in LACs that were part of the trial? Can these changes be accounted for by the trial use of powers?

LAC	Responses
City 1	<p>“Issuing CINs won’t ever stop shoplifting”;</p> <ul style="list-style-type: none"> <li>• One officer said that she hadn’t issued a CIN to the same person so, possibly, some of those people had ceased offending;</li> <li>• One officer questioned whether any sanction really reduced offending. He said he doubted because the reasons underlying the offence were still there.</li> </ul>
City 2	<p>The group suggested that the nature of the offending population in the LAC, i.e., a highly transient population, probably wouldn’t respond in the same way as other LAC populations to criminal consequences.</p>
Country 1	<p>One group member suggested that most law-abiding citizens in receipt of an on-the-spot fine realised the illegality of their behaviours and that it was rare to see those people offend again. He suggested that this reflected a positive impact of the scheme on those citizens.</p>
Country 2	<ul style="list-style-type: none"> <li>• In relation to any perceived impact on crime statistics attributable to the CIN scheme, the group claimed that the crime figures for the LAC remained the same, and that:</li> <li>• in general, people were not aware of the CIN scheme; and</li> <li>• there had been too few CINs issued (N=110) to date to have any realistic impact.</li> </ul>

**Q12:** Are you aware of the extent to which other offences (such as assault police or hinder police) arise from police intervention in relation to the nominated (CINs) offences?

LAC	Responses
<b>City 1</b>	The group was unable to recount any situations where there had been an escalation of offence arising from the issue of a CIN.
<b>City 2</b>	<p>“Issuing someone with a CIN can sometimes heat up the situation and lead to other offences being committed. For example, once a girl was kicked out of a bar and, in the process, she hit the bouncer. We were going to issue her with a CIN, however, she started swearing and getting aggressive. She ended up being charged with 7 counts, including, offensive language and assault police”;</p> <p>“In another matter a man was going to be issued with a CIN. All his friends came over to us and started screaming. In the end the original offender was charged with 4 counts of assault”.</p>
<b>Country 1</b>	<p>“Acceptance of any outcome usually depends on how you ‘sell it’”;</p> <ul style="list-style-type: none"> <li>• No specific cases were identified, but the group commented that if a situation were to escalate, it was probably not due to the process of issuing a CIN, but more to do with the situation itself, thus deeming a CIN inappropriate anyway.</li> </ul>
<b>Country 2</b>	<ul style="list-style-type: none"> <li>• The group commented that issuing people with a CIN rather than charging them had the potential to defuse a potentially volatile situation because when they realised that they were only getting a ticket they often calmed down;</li> <li>• In relation to offences arising from the issuing of a CIN, the group was aware of only one such situation, which developed into ‘abusive language’, and then ‘hinder police’ charges where, it was suggested, alcohol was the main contributing factor.</li> </ul>

# Real administrative savings? Evaluating.

**Q13:** Has the CINs trial achieved real administrative savings for NSW Police and the courts?

LAC	Responses
<p><b>City 1</b></p>	<p>“CINs definitely has lots of benefits. They are quicker to process than charging someone and you don’t have to deal with a belligerent person in the dock. You also don’t have to worry about the person bitching, moaning and hurting themselves back at the police station”;</p> <p>“CINs are good because if you are busy you can write up the details the next day”;</p> <p>“Generally, CINs take 10 – 15 minutes to process, sometimes longer if the offender wants to be interviewed. An FCAN takes about 30 – 40 minutes to process and to charge someone takes between 1 – 2 hours, plus court time, etc”;</p> <p>“At the end of a shift it usually takes about 10 – 15 minutes to write up each CIN on the computer. If 5 or 6 CINs are issued in a shift this can take a lot of time”;</p> <p>Some officers complained that CINs documentation took too long, however, others commented that all the information was required to be placed on the computer in case an offender opted for ‘court elect’.</p>
<p><b>City 2</b></p>	<p>“Processing of CINs usually takes about 20 minutes (depending on the offence and the adequacy of police notes). It usually takes about 2 hours to charge someone”;</p> <p>“Presently, this is quite a lengthy process because there are a number of inexperienced officers at this LAC and it takes them a bit longer to do things properly”.</p>
<p><b>Country 1</b></p>	<p>“It is a more convenient and appropriate way to process minor offences”;</p> <p>“The reality is that, it usually costs the taxpayer thousands of dollars to process what is a potentially serious offence, e.g., common assault, but in reality they’re fairly minor matters”;</p> <p>“The benefits include – no worries about placing someone in custody; there is the administration time saved by the station staff who would normally have to process the person charged; and, depending on the offence, there’s the difference of writing a 5 minute CIN compared to processing someone for up to an hour if charged”;</p> <p>“It would be even more efficient if we could issue CINs by mail-out”.</p>
<p><b>Country 2</b></p>	<p>“The processing of CINs and writing ‘proofs’ of evidence takes approximately 10-40 minutes (depending on the nature and complexity of the offence). By comparison, it takes between 2-4 hours to bring someone back to the station to charge him or her. However, these times can be extended depending on where in the LAC the offence is committed (the LAC being country-based and quite large)”;</p> <ul style="list-style-type: none"> <li>• The group consensus was that there were ‘real’ savings in administration time to be had from the CIN scheme, particularly with the removal of such tasks as:             <ul style="list-style-type: none"> <li>– typing of fact sheets (although the group acknowledged that sufficient evidence to prove a case was still required);</li> <li>– no longer a requirement to bring an offender back to the station (plus the problems that ‘handling/processing’ arrested persons incorporated); etc.</li> </ul> </li> </ul>



**Q14:** If so, what level of savings has been achieved, and how have these savings been redeployed?

LAC	Responses
<b>City 1</b>	<p>“CINs are seen to be a good thing by some people because police get to spend more time on the street, rather than charging people back at the police station”; “People see you dealing with it on the street. They can’t see it if you’re back at the station”;</p> <p>The group were unanimous in stating that officers liked to have the option of using CINs, “It’s an extra option so can’t hurt”;</p> <p>By contrast, one officer suggested, “There needs to be more public education. They see us giving a ticket and think the person has got away with it because they’re not hauled away in a truck. It’s a political advantage for the public to know that something’s being done”.</p>
<b>City 2</b>	<p>“Some officers are more likely to use CINs than charge people because they don’t have to follow the CIN up. This would apply to lazy, burnt out police, etc”;</p> <p>“On busy nights police may also be more likely to issue a CIN rather than charge someone. For example, on a busy Friday or Saturday night officers would be more likely to issue a ticket which would take up to 40 minutes rather than charge someone which would take up to 4 hours”.</p>
<b>Country 1</b>	<p>“Allows police to remain on the streets, maintaining a higher profile in the community”;</p> <p>“Saves time and avoids the procedure of having to charge someone ... you bring somebody back and you’ve got to worry about custody, and the custody manager has got to do his thing and all that sort of stuff”.</p>
<b>Country 2</b>	<p>“Although the time saved was worth it, it was still not a huge amount of time that was saved by CINs”;</p> <p>“The reduced write-up, that is, not as detailed a report as required for a charge sheet, is of benefit, particularly for offences like shoplifting which has a high prevalence in this LAC”.</p>

**Q15:** In your experience, what is the nature and extent of (prosecutory) inquiries undertaken by police officers **prior** to issuing a CIN?

LAC	Responses
<b>City 1</b>	<p>“Some officers choose to issue a caution rather than a CIN because it takes too much time to issue a CIN. When you issue a CIN you still need to gather prosecutorial evidence and take evidence and witness statements”;</p> <p>The group suggested that evidence gathered in the field (per CINs) may not be as high quality as the evidence gathered if an alleged offender was taken back to the station, “... but if you take people back to the station to record the interview you may as well charge them”.</p>
<b>City 2</b>	<p>“When officers use CINs they still need to get statements from witnesses, etc., because otherwise if the offender elects to go to court the officer will have no evidence to show to the court. This is especially important for assault and shoplifting offences. For offensive conduct offences, often the officer’s notes are sufficient. Officers also have to ask the offender if they wish to be interviewed. It is the job of supervisors to ensure officers are taking statements”;</p> <ul style="list-style-type: none"> <li>• Several officers in the group advised that when issuing CINs, they “... usually didn’t give much thought to the quality of evidence being gathered because you don’t think about the court elect possibility or you don’t hear back about what has happened to the CIN so you tend to forget about it”.</li> </ul>
<b>Country 1</b>	<p>The group indicated their support for the statement that, “For some offences, like offensive language and offensive conduct, most of your details are written on the ticket - time, place and that sort of thing, and its up to you how detailed you make the narrative on the ticket, so essentially it’s up to the officer”.</p>
<b>Country 2</b>	<p>Taking statements increases the time taken to issue CINs, and sometimes it can be just as quick to take the person down to the station to charge them because at the station one officer can do the charging and his or her partner can take the statements.</p>

**Q16:** In your experience, what proportion of matters are taken to court at the election of the person who has received a CIN?

LAC	Responses
<b>City 1</b>	<p>“One problem is that, if a person elects to take the matter to court the officer never hears about it again. Whilst the officer can ring the court to chase the matter up, they can’t look it up on the system”</p> <p>One officer stated that he’d only ever had one person elect to go to court but he wasn’t aware of the result as there was no way to follow it up.</p>
<b>City 2</b>	<p>“There were four briefs that are known ... the main problems are that one had to be dismissed through lack of evidence and that it appeared as though the system was not automatically updated for CINs matters in the same manner as it was for other police prosecutions”.</p>
<b>Country 1</b>	<p>“Don’t know, haven’t thought about it, suspect none”.</p>
<b>Country 2</b>	<p>“It is very difficult to follow up what happens to a CIN that is issued”.</p> <p>The lack of CIN outcome feedback was identified as an area for potential improvement by the group.</p>

**Q17:** What, in your experience, are the outcomes, in terms of findings and penalties, for those matters taken to court?

LAC	Responses
City 1	The group suggested that the penalties imposed by the courts would probably be less than imposed under the CINs legislation.
City 2	<p>"It's very difficult to follow up what happened to a CIN that is issued. The only way you can follow it up is when you look on the computer under criminal infringements. This is unlike charges that can be looked up on 'dissemination'.</p> <p>Officers would definitely prefer to have information about CINs on 'dissemination' so they don't have to follow each CIN up individually"; Officers said that fines imposed by courts are less than those imposed with a CIN, "Obviously we believe the court fines should be increased and not the CIN fines reduced".</p>
Country 1	<p>"Probably not the highest rate of success";</p> <p>"Unsure as we haven't had that many matters go to court".</p>
Country 2	"Only one CIN matter has proceeded to court from this LAC and that was adjourned following a non-appearance".

## Impact on crime

**Q18:** Has CINs impacted on crime figures in the pilot local area commands compared to previous years and neighbouring commands?

LAC	Responses
City 1	<p>"Issuing CINs won't ever stop shoplifting";</p> <ul style="list-style-type: none"> <li>• One officer said that she hasn't ever issued a CIN to the same person so maybe some of those people have stopped offending;</li> <li>• Another officer queried whether any sanction would reduce offending, "... it's unlikely because the reasons why they committed the offence is still there".</li> </ul>
City 2	<p>"CINs have no effect at all on crime rates. They are just a different way of processing the offender. This is particularly the case given the transient nature of the population in this LAC";</p> <p>The group suggested that in a metropolitan LAC police would be more likely to get to know the community and issuing CINs may have more of an effect on the crime rate. People who live in the city are, "more likely to have a criminal record and be charged rather than be issued with a CIN".</p>
Country 1	"It's too early to tell the impact of CINs generally".
Country 2	It was generally considered to be too early to comment whether CINs had any effect on crime rates, especially since the LAC had issued only slightly more than 100.

**Q19:** What do frontline police officers think of the new powers? Do you consider it assists you in your duties?

LAC	Responses
City 1	<p>“CINs definitely have lots of benefits. They are quicker to process than charging someone and they are good because if you are busy you can write up the details the next day”;</p> <p>“Sometimes it is good to use CINs for disputes between neighbours, because the police are taking some action but the offender is not required to go to court - a process that can often escalate the dispute”;</p> <p>“Generally, for a minor offence, usually a caution will be given, then if one or two more offences are committed CINs are issued. If the offender commits offences after this they will be charged. They usually start listening when they get slapped with a \$250 fine”;</p> <p>The general view of the group was of positive support for the retention and use of CINs as one tool in their retinue of responses;</p> <p>One officer stated that it would be good to be able to give CINs to juveniles, possibly with a reduced fine. However, others pointed out that juveniles probably wouldn't be in a position to pay a fine, which would likely be dealt with by their parents. “This would mean the kids themselves wouldn't be taking any responsibility for the offence”.</p>
City 2	<p>All present suggested that CINs were good as an additional policing tool, however, they also suggested that, presently, the range of prescribed offences was limited and should include, e.g., ‘malicious damage’ (acknowledging that this might involve issues to do with victim compensation), ‘goods in custody’, ‘trespass’, ‘graffiti’, etc.</p>
Country 1	<p>The group suggested that they were, generally, happy with the CINs powers, specifically -</p> <ul style="list-style-type: none"> <li>• “In itself it's a relatively easy procedure;</li> <li>• taking a matter of minutes;</li> <li>• they enable officers to stay on the streets more, and then proceed to the station at the end of their shift to record the issued CINs in one hit; and</li> <li>• CINs are quick and easy”.</li> </ul>
Country 2	<p>The group unanimously expressed that CINs was a useful addition to the policing options, which were ‘handy’ and ‘convenient’ to have as an alternative, however, that they were ineffectual for the recidivist offender (where charging was more appropriate).</p>

**Q20:** Are you aware of any improper or unlawful uses of the CIN powers?

LAC	Responses
City 1	<p>“There is a possibility that a corrupt officer could falsely accuse someone of committing an offence and issue them with a CIN, however, this sort of corruption can happen with any police process and is not specific to CINs”.</p>
City 2	<p>“A supervisor said that no complaints had been received (within this LAC) from victims or offenders about CINs, therefore it appears that officers are using CINs appropriately”.</p>
Country 1	<p>The group stated that they were unaware of any examples of this nature.</p>
Country 2	<p>The group stated that, in relation to the ‘improper’ issue of CINs, some officers might be inclined to issue notices in order to ‘get rid of someone’ and that this was likely to occur due to (high) workloads, where there was a lack of (patrol) vehicles, etc.</p>

**Q21:** To what extent are CINs being issued in high profile policing operations such as Operation Viking? Do you think that they assist in the conduct of these operations?

LAC	Responses
City 1	<p>“Currently CINs are not really used in high visibility policing operations, such as Operation Viking, because most officers (involved with such operations) come from outside of the LAC and are neither trained to issue CINs, nor aware of them”.</p> <p>The group discussed the potential for using CINs in such operations and decided that there was potential for this to occur.</p>
City 2	<p>“CINs are not used for High Visibility Policing Operations, such as Viking Operations. This is because officers are usually from another station and are not able to issue CINs and are not familiar with CINs”;</p> <p>One officer commented, “Vikings are statistically driven, therefore they are not interested in CINs, only charges”;</p> <p>Another noted that CINs would be very suitable for Viking Operations.</p>
Country 1	<p>“(CINs) Doesn’t have a major effect with large scale ops as these often use officers from other LACs, not all of whom have been trained in the use and administration of CINs”;</p> <p>“They (CINs) reduce people in custody and use of vehicles so could help, especially by way of keeping those officers within the operation and not having to send them back to the station (to process and charge an individual)”.</p>
Country 2	<p>In relation to the issue of CINs during high profile (Viking-style) operations, the group claimed that they did conduct such operations across the LAC and that CINs were not really suited to these (‘protective’) operations, rather they were better suited to ‘reactive’ situations/events.</p>

**Q22:** Are you aware of any reduction in the number of instances where injuries occur to persons dealt with by police, or to police, during arrest, or of injury or self-harm while in custody in the pilot areas? Can this be attributed to the trial of the new powers?

LAC	Responses
City 1	<p>In replying to previous questions, the group had discussed the benefits of not having to transport offenders to the station in order to charge them and of the reduced concern for aggressive behaviour, to themselves or others, that sometimes accompanied such individuals. However, they also suggested that potentially aggressive offenders were usually identified at an early stage of intervention and would most likely not be candidates to receive a low-level consequence such as a CIN.</p>
City 2	<p>“Yes, the use of CINs could potentially lead to a reduction in the number of injuries occurring during arrest and lock-up as giving them a ticket usually calms them down once the process is explained to them”.</p>
Country 1	<p>The group agreed that it was always better to have less people in custody, especially first-time offenders who are only committing minor offences, because it reduces their contact with those committing more serious offences.</p>
Country 2	<p>This question was answered during reply to a previous question:</p> <p>“... no longer a requirement to bring an offender back to the station (plus the problems that ‘handling/processing’ arrested persons incorporated); etc”.</p>

## Future Directions

**Q23:** Should the CIN scheme be extended state wide?

LAC	Responses
<b>City 1</b>	The group was unanimous in it's the view that the CIN scheme should become permanent and extended throughout the state.
<b>City 2</b>	<p>"If CINs are adopted state-wide a method should be developed for tracking how many CINs people have been issued with. Possibly have a separate section for CINs on COPS rather than the current system where CINs are listed under 'legal processes'";</p> <p>"The CINs trial should be adopted State wide, but only if a better training package is developed";</p> <p>One officer suggested not educating the public (in the application of CINs) because (with education of the process) the public will commit more offences in the knowledge that they can "get away with it by just getting a ticket".</p>
<b>Country 1</b>	"Yes they should [make the CIN scheme permanent and extend it throughout the state]", commenting on how they referred to this in their submission [to the Review from NSW Police Association].
<b>Country 2</b>	<p>The group stated that they were 'very happy' with the availability of CINs as an alternative consequence for less serious crime;</p> <p>They were unanimous in their support for CINs state-wide extension and an increase in the number of prescribed offences, e.g., 'malicious damage' (although there was a difficulty with compensation as stated above) and 'trespass', etc.;</p> <p>Participants also identified the need to remedy the discrepancy which they considered occurred in CINs penalties issued by police and penalties imposed by the courts for the same offences (e.g., the quantum of the fine and recording/non-recording of conviction, etc).</p>

**Q24:** Should the number of offences for which CINs may be issued be increased?

LAC	Responses
<b>City 1</b>	<p>"Yes, the range of offences for which CINs applies should be extended to include, e.g., 'malicious damage', 'trespass', 'affray', 'domestic assaults';</p> <p>"Generally, CINs should be included i n the repertoire of police options consisting of 'caution', 'CIN' and 'charge';</p> <p>"Should possibly consider issuing CINs to juveniles".</p>
<b>City 2</b>	<p>"Offences that seem silly on a charge are perfect for CINs";</p> <p>The group expressed support for increasing the number of prescribed offences, e.g., 'malicious damage', however, they also identified victim compensation issues surrounding this proposal. One officer suggested that malicious damage under a certain cost threshold might be appropriate for CINs.</p>
<b>Country 1</b>	The group were in favour of extending the range of prescribed CINs offences, citing for consideration, 'possession of small amounts of cannabis', 'malicious damage', etc.
<b>Country 2</b>	The group noted that for certain offences, e.g., 'malicious damage', the issue of a CIN might create future complications for victims seeking to pursue compensation via the civil law, where no conviction resulting from a criminal offence had been recorded.

**Q25:** Should finger/palm-prints, taken as part of the CINs process, be retained and/or checked against police databases?

LAC	Responses
City 1	<p>"No, it's (the record) only for identification, they haven't committed a murder";</p> <p>"Alternatively the requirement to fingerprint people should be removed";</p> <p>"An improvement could be to require only the fingerprinting of one finger, e.g., the right forefinger";</p> <p>Although not unanimous, the group expressed majority support for the notion that, where people are fingerprinted, that record should be retained even after the CINs fine has been paid.</p>
City 2	<p>"By paying the fine the person is admitting that they were guilty (of the offence) and accepted the fine as a reasonable penalty. If they went to court (for the same offence) the fingerprints would be retained, so they should be kept when a CIN is issued";</p> <p>The majority view was that, where fingerprints were taken during the issue of a CIN, they should be retained for future reference;</p> <p>One officer suggested that most people issued a CIN had probably committed offences previously and, therefore, would most likely already have had their fingerprints recorded;</p> <p>Another member pointed out that the offences for which CINs are issued are quite minor and that the risks involved in not taking or keeping the prints was not great.</p>
Country 1	<p>The group offered mixed opinions on this issue. Some officers thought that the capacity to be able to check prints against databases for other offences might assist in crime reduction, whilst others suggested that the idea of destroying prints increases offender acceptance to be fingerprinted in the first place.</p>
Country 2	<p>The group unanimously and categorically supported the retention of fingerprint records obtained in the course of issuing CINs.</p>

**Q26:** Should penalty notices, once paid, be recorded in a person's antecedents for future court appearances?

LAC	Responses
City 1	<p>There was majority agreement within the group that an offender's CIN history should be available for the court's consideration during future court appearances.</p>
City 2	<p>Having agreed that CIN histories should be available in antecedent format for future court appearances, the group discussed, and expressed a preference to remove, the inconsistency whereby people who elected to go to court and were found guilty had a conviction recorded whereas those who paid the CIN fine (for the same offence) did not;</p> <p>The group stated that they would prefer that the CIN history is recorded and admissible, whether by payment of fine or finding of guilt by a court.</p>
Country 1	<p>The group were 'most definite' in their support for the use of paid CINs as antecedents in future court appearances, particularly for assault cases, "because if someone then comes up for a more serious charge then it is evident (that) they have behaved similarly in the past, especially where they may have received two CINs already".</p>
Country 2	<p>In relation to the use of CIN records as antecedent history in court, the group were unanimous in their support for this concept, since "... they are criminal offences, then there is no difference with any other offence and they should be used in court as antecedent criminal histories".</p>

**Q27:** Are you aware of any changes in the police use of discretion to intervene in incidents by allowing the issuing of CINs?

LAC	Responses
City 1	“CINs are not usually used in cases where there is a victim, for example, a violent offence. However, it is good to have the discretion to use it for these sorts of offences, because some assaults are very minor and a CIN could be used in that instance”.
City 2	“At the moment you gotta hope you get a lazy cop”, was the comment of one officer who suggested that the of CINs shouldn’t be discretionary and that greater guidance should be given to officers about when to issue CINs. “One option could be to use a scale like that in the Young Offenders Act – first a warning, then a CIN, then a charge etc”;  The majority opinion of the group, however, supported the discretionary capacity of police in the CIN scheme with some officers lamenting that removal of discretion would most likely render the scheme unworkable.
Country 1	The group as a whole voiced strong support for the retention of discretion by issuing officers in the CIN scheme. “Police have always had discretion in dealing with offenders, with or without CINs. We’re happy with the status quo”.
Country 2	“We’ve had no complaints from victims or offenders with CINs, therefore probably safe to assume that we’re using them appropriately”;  “(CINs) Should be consistent with the Young Offenders Act, that is, incremental interventions”;  These comments reflected the differing views of this group toward retaining the discretionary component on the one hand and removing it in favour of prescribed ‘incremental intervention’ on the other.

**Q28:** Do you believe that the capacity to issue CINs assists in the effective and efficient exercise of your duties and functions?

LAC	Responses
City 1	Throughout the discussion, the group expressed very positive attitudes toward CINs, and the retention of the CIN scheme, as an additional power for police to draw upon.
City 2	“Yes, definitely”;  As indicated by this definitive and categorical verbatim reply, this group was unqualified in the support that they voiced for the CINs option.
Country 1	Generally, the group commented that they found CINs to be very effective “ .. because they aren’t giving them out more than once and because people are realising the wrongful nature of their act”.
Country 2	“CINs are a good option to use if the person is not an habitual offender”.



## The changing role of police as gatekeepers to the criminal justice system

**Q29:** Do you think that there has been a change in the role of police by requiring them to both enforce the law and, effectively, determine culpability when issuing penalty notices for crimes? Is it appropriate for police to determine and impose penalties for criminal offences in the first instance?

LAC	Responses
<b>City 1</b>	<p>The group strongly discounted the suggestion that the CIN scheme imposed an additional – quasi-judicial and putative – role on police officers, commenting that, “It is not inappropriate for officers to be ‘enforcer, judge and jury’ when issuing CINs, because the offender can still elect to go to court”; and</p> <p>“There is no difference with current processes and they can still dispute the offence. That is the most ridiculous argument I’ve ever heard”.</p>
<b>City 2</b>	<p>One group member stated that this was a ridiculous notion because the penalty imposed (with CINs) is the average of those imposed by courts;</p> <p>Another said that the issue was not accurate because, under the scheme, people could still elect to have their matter heard before a court and would only opt for a CIN if they thought themselves guilty of the offence;</p> <p>Another officer pointed out that ‘tickets’ can be issued for “heaps of other things”.</p>
<b>Country 1</b>	<p>“No, there has always been an option for taking matters to court with any infringement process, so there’s no changed role”;</p> <p>“Recipients have to agree to the CIN process before being issued with a ticket”;</p> <p>The majority opinion likened the CIN scheme to that akin to traffic infringements, where they suggested that it was “ .. exactly the same type of power being exercised”;</p>
<b>Country 2</b>	<p>“The analogy is inappropriate”, was the response provided by the group when asked if the issuing of CINs was equivalent to officers becoming ‘enforcer, judge and jury’.</p> <p>The group consensus was that CINs were very similar to TINs (Traffic Infringement Notices) and other infringement processes which provided for the recipients’ right to appeal by choosing a court-elect option.</p>

## Court elections

**Q30:** What is your experience of the extent to which offenders elect to take matters to court rather than pay the prescribed penalty?

LAC	Responses
<b>City 1</b>	<p>The group was unaware of the number of court elects but suggested that it could not have been very high as no-one present had been required to submit a brief of evidence relating to a CIN.</p>
<b>City 2</b>	<p>“I know that we’ve had two, although that’s only because we’ve been contacted by the defendants’ solicitors”.</p>
<b>Country 1</b>	<p>“Not really aware”.</p>
<b>Country 2</b>	<p>“We’ve had two court elects, one of which was dismissed through lack of evidence and in the other one the offender didn’t appear”.</p>

## Any other comments

In reply to an invitation to offer any other comment or recommendation, which might not have been addressed above, the groups provided the following responses.

LAC	Responses
City 1	<p>“Consideration should be given to means testing offenders to see whether their wages/social security payments could be garnisheed in order to pay CINs and other fines”;</p> <p>“Police should be able to follow up the matter to see if the person has paid the fine, or elected to go to court”;</p> <p>“It would be good to have clerical people available to enter the data on the computer. This would mean police spend more time on the street”;</p> <p>“There should be a ‘CIN Create’ field on the computer with a field to enter the methods used to verify the person’s identification”;</p> <p>“Instead of putting a narrative on the computer, all details, such as the time, notebook number, person’s identification details could simply be written on the ticket”.</p>
City 2	<p>“Court officers should be (further) trained in CINs and consideration should be given to increasing the amount (quantum) of fines issued by courts”;</p> <p>“Police should be able to mail CINs to offenders”;</p> <p>“It should be made easier for police to follow up the CIN and police should be informed when offenders elect to have the matter dealt with at court”;</p> <p>“Offenders should not be able to be issued more than one CIN for the same type of offence”.</p>
Country 1	<p>This group expressed interest in the number of alcohol related offences that were appearing in the data and were keen to hear about how the LAC rated against other LACs trialling CINs.</p>
Country 2	<p>“Eliminate the inconsistency, whereby people who had been charged and found guilty before a court incur a criminal record, whereas, those receiving and paying a CIN do not”;</p> <p>“Make it easier to enable police to follow up the CIN, and inform police when offenders elect to have the matter dealt with at court”;</p> <p>“If CINs are adopted state-wide, a method should be developed for tracking how many CINs people have been issued with. Possibly have a separate section for CINs on COPS rather than the current system where CINs are listed under ‘legal processes”;</p> <p>There was a general discussion surrounding the ‘de-skilling’ of police, junior or less experienced officers (apparently it is possible to have seniority of years and yet acquire little experience in the preparation and presentation of evidence to court), by virtue of the reduction of paperwork resulting from CINs compared to processing for a ‘charge’. The issues discussed were:</p> <ul style="list-style-type: none"> <li>• that CINs might be perceived as a comparatively easy means of finalising a situation (with less administrative intensity) without sufficient regard to the potential for a matter to be brought, and prosecuted, before a court (and the appropriate level of evidentiary paperwork which that latter situation entailed),</li> <li>• that proficient preparation of court briefs required experience and practice which was not, or at least irregularly, provided within the CINs process,</li> <li>• the example was offered where minimal notes had been created out of a CINs notice, which proved inadequate when the court-elect option was exercised resulting in the case being dismissed for lack of evidence. This officer commented that it was important for issuing officers to retain sight of the worse case scenario when evidencing offences, including CINs offences.</li> </ul>

# Appendix B

## Submissions received

<b>Submission</b>	<b>Dated</b>
1) Aboriginal and Torres Strait Islander Services of New South Wales, State Office	31 October 2003
2) Attorney General's Department (NSW), Local Courts	17 November 2003
3) Attorney General's Department (NSW), Victims Services	30 October 2003
4) J.K. Bourke, APM	27 October 2003 (received)
5) Legal Aid, New South Wales	24 October 2003
6) NSW Police, Deputy Commissioner, Operations	12 November 2003
7) NSW Police, Penrith Local Area Command	7 October 2003
8) NSW State Chamber of Commerce	24 October 2003
9) NSW State Debt Recovery Office	31 October 2003 (received)
10) Police Association of New South Wales	28 October 2003
11) R.S. Lyon	16 October 2003
12) The Chief Magistrate of the Local Court, Judge D. Price	13 October 2003
13) The Hon. John Hatzistergos MLC, Minister for Justice	10 November 2003
14) The Shopfront, Youth Legal Centre	23 October 2003

## **Acknowledgements**

<b>Acknowledgements</b>	<b>Dated</b>
15) Australian Institute of Criminology	22 October 2003
16) Human Rights & Equal Opportunity Commission	24 October 2003
17) The Hon. Michael Costa, Minister for Transport Services	30 October 2003
18) The Law Society of New South Wales	23 October 2003

# Appendix C

## **Statutory provisions under which penalty notices may be issued pursuant to s. 20 of the Fines Act 1996.**

*(Schedule 1, Fines Act)*

*Business Names Act 1962, section 28A*

*Casino Control Act 1992, section 168A*

*Centennial Park and Moore Park Trust Act 1983, section 24*

*Classification (Publications, Films and Computer Games) Enforcement Act 1995, section 61A*

*Companion Animals Act 1998, section 92*

*Crimes (Administration of Sentences) Act 1999, section 97*

*Criminal Procedure Act 1986, section 161*

*Crown Lands Act 1989, section 162*

*Dangerous Goods Act 1975, section 43A*

*Electricity Supply Act 1995, section 103A*

*Enclosed Lands Protection Act 1901, section 10*

*Environmental Planning and Assessment Act 1979, section 127A*

*Fair Trading Act 1987, section 64*

*Fisheries Management Act 1994, section 276*

*Fitness Services (Pre-paid Fees) Act 2000, section 16*

*Food Production (Safety) Act 1998, section 62*

*Forestry Act 1916, section 46A*

*Futures Industry (New South Wales) Code, section 149*

*Gaming Machines Act 2001, section 203*

*Gene Technology (GM Crop Moratorium) Act 2003, section 35*

*Home Building Act 1989, section 138A*

*Impounding Act 1993, section 36*

*Industrial Relations Act 1996, section 396*

*Jury Act 1977, section 64*

*Jury Act 1977, section 66*

*Landlord and Tenant (Rental Bonds) Act 1977, section 15A*

*Liquor Act 1982, section 145A*

*Local Government Act 1993, sections 314, 647 or 679*

*Marine Safety Act 1998, section 126*

*Maritime Services Act 1935, section 30D*

*Mining Act 1992, section 375A*

*Motor Dealers Act 1974*, section 53E

*Motor Vehicle Repairs Act 1980*, section 87A

*National Parks and Wildlife Act 1974*, section 160

*Noxious Weeds Act 1993*, section 63

*Occupational Health and Safety Act 2000*, section 108

*Ozone Protection Act 1989*, section 20

*Parliamentary Electorates and Elections Act 1912*, section 120C

*Parramatta Park Trust Act 2001*, section 30

*Passenger Transport Act 1990*, section 59

*Pawnbrokers and Second-hand Dealers Act 1996*, section 26

*Pesticides Act 1999*, section 76

*Petroleum (Onshore) Act 1991*, section 137A

*Plant Diseases Act 1924*, section 19

*Plantations and Reafforestation Act 1999*, section 62

*Ports Corporatisation and Waterways Management Act 1995*, section 100

*Property, Stock and Business Agents Act 2002*, section 216

*Protection of the Environment Operations Act 1997*, section 224

*Radiation Control Act 1990*, section 25A

*Rail Safety Act 2002*, section 105

*Registered Clubs Act 1976*, section 66

*Registration of Interests in Goods Act 1986*, section 19A

*Residential Parks Act 1998*, section 149

*Retirement Villages Act 1999*, section 184

*Road and Rail Transport (Dangerous Goods) Act 1997*, section 38

*Road Transport (General) Act 1999*, Division 1 of Part 3

*Roads Act 1993*, section 243

*Royal Botanic Gardens and Domain Trust Act 1980*, section 22B

*Rural Fires Act 1997*, section 131

*Rural Lands Protection Act 1998*, section 206

*Security Industry Act 1997*, section 45A

*Sporting Venues (Pitch Invasions) Act 2003*, section 12

*State Sports Centre Trust Act 1984*, section 20B

*Stock Diseases Act 1923*, section 200

*Summary Offences Act 1988*, section 29, 29A or 29B

*Swimming Pools Act 1992*, section 35

*Sydney Cricket and Sports Ground Act 1978*, section 30A

*Sydney Harbour Foreshore Authority Act 1998*, section 43A

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*Sydney Olympic Park Authority Act 2001*, section 79  
*Sydney Water Act 1994*, section 50  
*Tow Truck Industry Act 1998*, section 89  
*Trade Measurement Administration Act 1989*, section 23  
*Transport Administration Act 1988*, section 117  
*Unlawful Gambling Act 1998*, section 52  
*Water Supply Authorities Act 1987*, section 51  
*Weapons Prohibition Act 1998*, section 42  
*Wool, Hide and Skin Dealers Act 1935*, section 12A  
*Workplace Injury Management and Workers Compensation Act 1998*, section 246

# Appendix D

## Additional results of the CIN scheme trial (see also chapter 8)

Figure D1: CINs issued per month, December 2001 – August 2003.

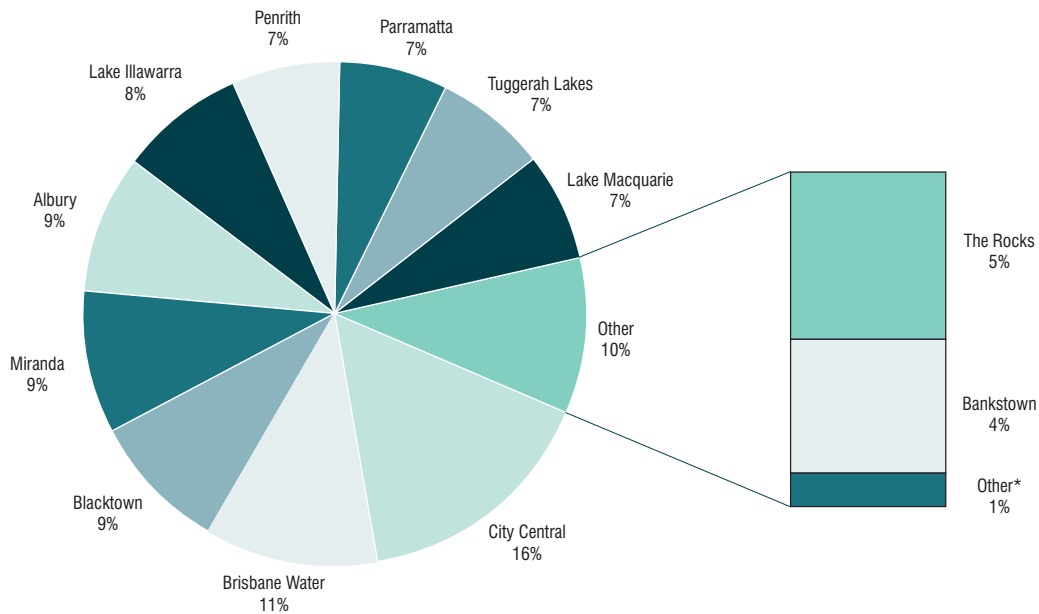
Month	No. of CINs issued
December 2001	1
July 2002	1
August 2002	1
September 2002	85
October 2002	127
November 2002	99
December 2002	139
January 2003	133
February 2003	127
March 2003	145
April 2003	127
Mayn 2003	145
Junen 2003	142
July 2003	148
August 2003	178
<b>Total:</b>	<b>1,598</b>

Source: NSW Police COPS data.

## Rate at which CINs were issued by LAC

The number of criminal infringement notices issued by each of the LACs is provided below.

Figure D2: CINs issued per LAC, December 2001 - August 2003



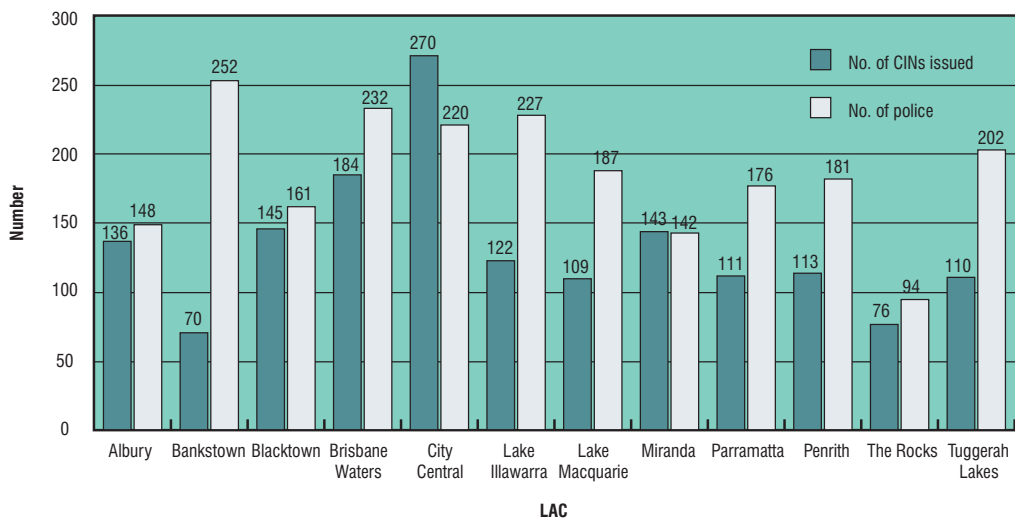
Source: NSW Police COPS data. n=1,598

\* 'Other' includes the following LACs: Far South Coast, Newcastle, Kings Cross, Blue Mountains, St Mary's, The Hills, Darling River.

## Number of police officers by LAC

The figure below illustrates that there was no consistent relationship between the quantum of CINs issued and the number of (actual) police officers available within a command.

Figure D3: Number of police officers and CINs issued per trial LAC



Source: NSW Police COPS data, December 2001 - August 2003; and Corporate SAP mainframe as shown on NSW Police internet website, August 2002.



## Rate at which CINs were issued by Offence Type

The following figure identifies the number and proportion of CINs issued for each of the prescribed offence types.

Figure D4: Offences for which CINs were issued, December 2001 – August 2003.

Offence	Number of CINs issued	Proportion of total CINs issued
Common assault	221	13.83%
Goods in custody	68	4.26%
Larceny	829	51.88%
Obstruct person/vehicle/vessel	3	0.19%
Obtain money etc by false representation	5	0.31%
Offensive behaviour	234	14.64%
Offensive language	228	14.27%
Unlawfully enter vehicle/boat	10	0.63%
<b>Total</b>	<b>1,598</b>	<b>100.00%</b>

Source: NSW Police COPS data

## Age of CIN recipients

The following figure illustrates the distribution of CINs by recipient age grouped into five yearly brackets.

Figure D5: CIN recipients and NSW population by age group

Age group	Number of CINs issued	Proportion of all CINs issued	Number of people per age group as a proportion of NSW population
15-19	234	14.64%	6.84%
20-24	480	30.04%	6.70%
25-29	245	15.33%	7.09%
30-34	187	11.70%	7.61%
35-39	141	8.82%	7.50%
40-44	98	6.13%	7.66%
45-49	61	3.82%	6.92%
50-54	53	3.32%	6.51%
55-59	46	2.88%	5.51%
60-64	30	1.88%	4.33%
65-69	13	0.81%	3.65%
70-74	6	0.38%	3.37%
75-79	2	0.13%	2.80%
80-84	2	0.13%	1.87%
<b>Total</b>	<b>1,598</b>		

Source: NSW Police COPS data (December 2001 – August 2003); and ABS NSW Basic Community Profile, Census 2001, Catalogue No. 2001.0.

## Rate at which CINs were 'Court elected' and 'Withdrawn' by LAC

The following figure lists the number of CINs that proceeded to either, the 'court elect' option, or were withdrawn according to their locality of service.

**Figure D6: Number of CINs that proceeded to 'court elect' option, or withdrawn, as a proportion of all CINs issued**

LAC	Court elected	As a proportion of all CINs issued	Withdrawn	As a proportion of all CINs issued
Albury	2	0.13%	0	0.00%
Bankstown	0	0.00%	2	0.13%
Blacktown	3	0.19%	2	0.13%
Brisbane Water	3	0.19%	0	0.00%
City Central	9	0.56%	1	0.06%
Lake Illawarra	5	0.31%	0	0.00%
Lake Macquarie	6	0.38%	0	0.00%
Miranda	0	0.00%	1	0.06%
Parramatta	2	0.13%	2	0.13%
Penrith	1	0.06%	1	0.06%
The Rocks	1	0.06%	2	0.13%
Tuggerah Lakes	9	0.56%	2	0.13%
Other	0	0.00%	1	0.06%
<b>Total</b>	<b>41</b>	<b>2.57%</b>	<b>14</b>	<b>0.88%</b>

Source: NSW Police COPS data, December 2001 – August 2003.

## CINs issued by CINs paid by LAC

The following figure presents a breakdown of the number of CINs issued and paid prior to the commencement of enforcement action in each of the trial LACs.

**Figure D7: Proportion of CINs paid per LAC**

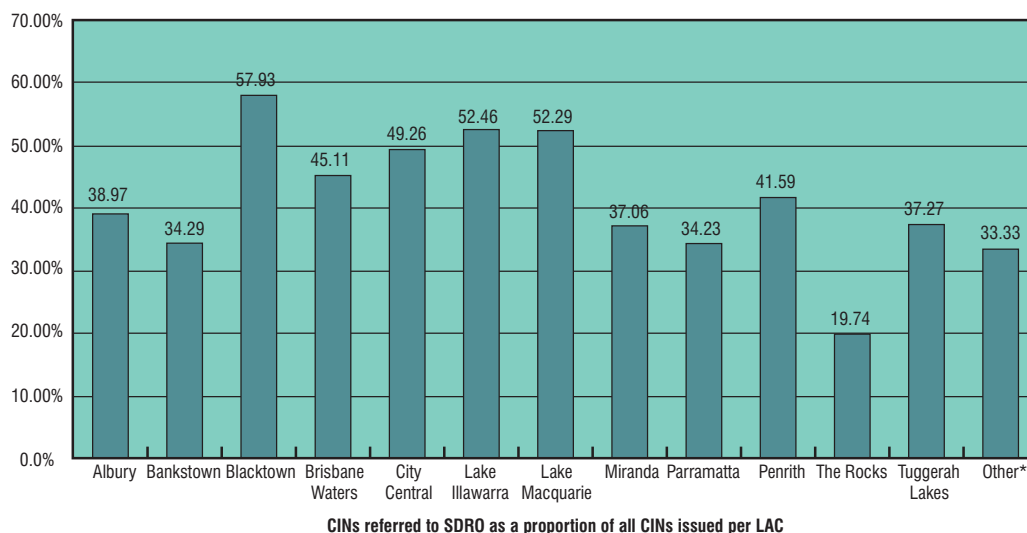
Local Area Command	Number of CINs issued	Number of CINs paid	Proportion of CINs paid
Albury	136	57	41.91%
Bankstown	70	39	55.71%
Blacktown	145	41	28.28%
Brisbane Water	184	83	45.11%
City Central	270	102	37.78%
Lake Illawarra	122	45	36.89%
Lake Macquarie	109	36	33.03%
Miranda	143	76	53.15%
Parramatta	111	60	54.05%
Penrith	113	54	47.79%
The Rocks	76	51	67.11%
Tuggerah Lakes	110	38	34.55%
Other	9	2	22.22%
<b>Total</b>	<b>1,598</b>	<b>684</b>	<b>42.80%</b>

Source: NSW Police COPS data, December 2001 - August 2003.

## SDRO Enforcement

The following figure, which identifies the proportion of CIN referrals to SDRO by originating LAC, suggests that the issuing locality of a CIN is not a strong determinate of payment non-compliance.

**Figure D8b: Proportion of CINs referred to SDRO per LAC**



Source: State Debt Recovery Office, December 2001 - August 2003. n=1,598.  
\* Other includes the following LACs: Far South Coast and Newcastle.

**Figure D8a: Number of CINs referred to SDRO per LAC**

LAC	Number of CINs referred to SDRO	Total number of CINs issued	Proportion of all CINs referred to SDRO
Albury	53	136	38.97%
Bankstown	24	70	34.29%
Blacktown	84	145	57.93%
Brisbane Water	83	184	45.11%
City Central	133	270	49.26%
Lake Illawarra	64	122	52.46%
Lake Macquarie	57	109	52.29%
Miranda	53	143	37.06%
Parramatta	38	111	34.23%
Penrith	47	113	41.59%
The Rocks	15	76	19.74%
Tuggerah Lakes	41	110	37.27%
Other	3	9	33.33%
<b>Total</b>	<b>695</b>	<b>1,598</b>	<b>43.49%</b>

Source: State Debt Recovery Office, July 2002 - August 2003.

The age of the CIN recipients whose criminal infringement notices were forwarded to the SDRO is illustrated in the figure below.

**Figure D9: Recipients of CINs referred to the SDRO and NSW population by age group**

Age group	Number of CINs referred to SDRO	Proportion of all CINs referred to SDRO	Age group as a proportion of NSW population
15-19	108	15.54%	6.84%
20-24	208	29.93%	6.70%
25-29	132	18.99%	7.09%
30-34	98	14.10%	7.61%
35-39	63	9.06%	7.50%
40-44	37	5.32%	7.66%
45-49	26	3.74%	6.92%
50-54	9	1.29%	6.51%
55-59	7	1.01%	5.51%
60-64	3	0.43%	4.33%
65-69	2	0.29%	3.65%
70-74	0	0.00%	3.37%
75-79	0	0.00%	2.80%
80-84	2	0.29%	1.87%
<b>Total</b>	<b>695</b>	<b>100.00%</b>	

Source: State Debt Recovery Office (July 2002 - August 2003) and ABS NSW Basic Community Profile, Census 2001, Catalogue No. 2001.0.

## CINs Financial Return

The figures below present the various contributions toward the IPB's CINs fines receipts for each of the factors; offence type, month of offence and age of notice recipient, respectively.

**Figure D10: Money received from the payment of CINs per offence, August 2002-May 2003\***

Offence	Total sum of money received
Common assault	\$23,600
Goods in custody	\$7,350
Larceny	\$75,900
Obstruct person/vehicle/vessel	\$0
Obtain money etc by false representation	\$1,200
Offensive behaviour	\$15,200
Offensive language	\$7,200
Unlawfully enter vehicle/boat	\$500
<b>Total</b>	<b>\$130,950</b>

Source: NSW Police COPS data

\* Data was not available for the entire review period.

Figure D11: Money received from the payment of CINs per month, August 2002-May 2003\*

Month that offence was committed	Total sum of fines per month	Number of CINs issued
Aug-02	\$400	1
Sep-02	\$8,050	85
Oct-02	\$15,600	127
Nov-02	\$13,250	99
Dec-02	\$18,400	139
Jan-03	\$15,250	133
Feb-03	\$13,500	127
Mar-03	\$16,300	145
Apr-03	\$14,700	127
May-03	\$15,500	145
<b>Total</b>	<b>\$130,950</b>	<b>1,128</b>

Source: NSW Police COPS data

\* Data was not available for the entire review period.

# Appendix E

## Prescribed CINs offences

Offence Code	Reg Code		Penalty \$	Regulation
<b>CRIMES ACT 1900</b>				
0766	HGW	Common Assault	400	s 61
0770	HHA	Larceny (Under \$ 300-00)	300	s 117
0771	HHB	Shoplifting (under \$ 300-00)	300	s 117
0775	HHF	Obtain money etc by false representation	350	s 527A
0776	HHG	Goods in person custody suspected being stolen (not motor vehicle)	350	s 527C(1)(a)
0784	HIE	Goods in person custody suspected being stolen (motor vehicle)	350	s 527C(1)(a)
0787	HIH	Goods suspected stolen in custody of another (not motor vehicle)	350	s 527C(1)(b)
0788	HIJ	Goods suspected stolen in custody of another (motor vehicle)	350	s 527C(1)(b)
0790	HIL	Goods suspected stolen in/on premises (not motor vehicle)	350	s 527C(1)(c)
0791	HIM	Goods suspected stolen in/on premises (motor vehicle)	350	s 527C(1)(c)
0792	HIN	Goods suspected stolen given other not entitled (not motor vehicle)	350	s 527C(1)(d)
0793	HIO	Goods suspected stolen given other not entitled (motor vehicle)	350	s 527C(1)(d)
<b>SUMMARY OFFENCES ACT 1988</b>				
0794	HIP	Offensive behaviour	200	s 4(1)
0795	HIT	Offensive language	150	s 4A(1)
0797	HIV	Obstruct person/vehicle/vessel	200	s 6
0800	HIZ	Unlawfully enter vehicle/boat	250	s 6A

Source: SDRO CINs Processing Manual, Appendix I, Version 1.2, November 17, 2004

# Appendix F

## CIN Recipient Representations Received by IPB

	Offence	Date	Location	Served personally	Recipients' rationale for dismissing CIN	Procedural issues
1	0766 HGW Common Assault	04-Sep-02	Windale	Y	Review by LAC deemed inappropriate way to deal with matter	Request withdrawal & return to LAC to deal with
2	0766 HGW Common Assault	15-Feb-03	Caves Beach	Y	Matter withdrawn by complainant /informant	Seek to have dismissed
3	0766 HGW Common Assault	09-Apr-03	Millers Point	Y	Contested in court	Plea entered fine confirmed with costs
4	0766 HGW Common Assault	Mar/Apr-03	The Entrance	Y	Seeks hearing date for legal action Disputes allegation Financial hardship	Extension of time pending resolution of legal action
5	0766 HGW Common Assault	17-Jan-03	(Drink Liquor on Train/Railway Land/Monorail Works)(Offensive Behaviour on Train/ Railway Land/ Monorail)(Use Offensive Language on Train/Railway Land)	Y	CCTV evidenceLegal Action	Extension of time pending resolution of legal action
6	0766 HGW Common Assault	17-Aug-03	Cronulla	Y	Unable to pay as unemployedPolice advised at time that charges would not be laid. Medical evidence CCTV evidence Misunderstanding with security guards	Seek to have dismissed
7	0766 HGW Common Assault	23-Aug-03	Blacktown	Y	Reviewed by LAC, deemed inappropriate way to deal with matter	Request withdrawal & return to LAC to deal with



	<b>Offence</b>	<b>Date</b>	<b>Location</b>	<b>Served personally</b>	<b>Recipients' rationale for dismissing CIN</b>	<b>Procedural issues</b>
8	0766 HGW Common Assault	30-Aug-03	Woy Woy	Y	Inadequate investigation by Police Police ultimatum to either take fine or go to Police Station	Seek to have dismissed
9	0770 HHA Larceny (under \$300)	27-Sep-02		Y	Financial hardship	Extension of time Instalment payments
10	0770 HHA Larceny (under \$300)	01-Oct-02		Y	Financial hardship	Extension of time Instalment payments
11	0770 HHA Larceny (under \$300)	30-Apr-03	Parramatta	Y	Medical evidence Financial hardship	Request to waive fine Extension of time to pay
12	0770 HHA Larceny (under \$300)	14-Aug-03	Toronto	Y	Mental Illness Financial hardship	Seek to have dismissed
13	0770 HHA Larceny (under \$300)		Penrith	Y	Financial hardship	Seek to have dismissed
14	0771 HHB Shoplifting (under \$300)	08-Sep-02	Penrith	Y	First offence Offence result of a misunderstanding with security guard	Seek to have dismissed
15	0771 HHB Shoplifting (under \$300)	08-Nov-02	Nepean Square	Y	Mental Illness	Seek to have dismissed
16	0771 HHB Shoplifting (under \$300)	25-Nov-02	Warrawong	Y	Financial hardship	Extension of time Instalment payments
17	0771 HHB Shoplifting (under \$300)	03-Mar-03	Wyong	Y	First offence Offence result of a misunderstanding with security guard Medical evidence	Seek to have dismissed Paid fine
18	0771 HHB Shoplifting (under \$300)	23-Apr-03	Bankstown	Y	Attempted to pay by phone but credit card not accepted	Pay by Phone options
19	0771 HHB Shoplifting (under \$300)	26-Jun-03	Bateau Bay	Y	Paid fine	
20	0771 HHB Shoplifting (under \$300)	Jun/Jul-03	Kirrawee	Y	Single mother Financial hardship	Extension of time Instalment payments

	<b>Offence</b>	<b>Date</b>	<b>Location</b>	<b>Served personally</b>	<b>Recipients' rationale for dismissing CIN</b>	<b>Procedural issues</b>
21	0771 HHB Shoplifting (under \$300)		Warrawong	N	Offence a result of an honest mistake	Seek to have dismissed
22	0771 HHB Shoplifting (under \$300)		Bligh	Y	First offence Child had goods	Seek to have dismissed
23	0771 HHB Shoplifting (under \$300)	17-Jun-03	Bankstown	Y	First offence Child had goods	Request to waive fine
24	0771 HHB Shoplifting (under \$300)		Penshurst	Y	Disputes allegation Legal Action	Elect to proceed to Court
25	0771 HHB Shoplifting (under \$300)		Mt Warrigal	Y	First Offence	Request to waive fine
26	0776 HHG Goods in personal custody suspected being stolen (not MV)	01-May-03	Blackwall	Y	Matter withdrawn by complainant/ informant	Seek to have dismissed
27	0794 HIP Offensive Behaviour	08-Sep-02	Cronulla	Y	Trivial offence Police ultimatum to either take fine be arrested Police did not explain offence	Seek to have dismissed
28	0794 HIP Offensive Behaviour	18-Jan-03	Cronulla	Y	Lack of available public facilities	Seek to have dismissed
29	0794 HIP Offensive Behaviour	22-Feb-03	Green Point	N	Trivial offence	Seek to have dismissed
30	0794 HIP Offensive Behaviour	04-Mar-03	Sydney	Y	Financial hardship Medical evidence	Request to waive fine
31	0794 HIP Offensive Behaviour	17-May-03	Cronulla	Y	Misunderstanding with security guards Medical evidence	Seek to have dismissed
32	0794 HIP Offensive Behaviour	May-03	Lavington	Y	Lack of available public facilities	Paid fine
33	0794 HIP Offensive Behaviour		Millers Point	Y	Unemployed with mental illness - unable to pay	Request to waive fine

	<b>Offence</b>	<b>Date</b>	<b>Location</b>	<b>Served personally</b>	<b>Recipients' rationale for dismissing CIN</b>	<b>Procedural issues</b>
34	0800 HIZ Unlawfully enter vehicle/boat	08-Sep-02		N	Was unaware entering private property Financial hardship (PAID FINE)	Seek to have dismissed
35		07-Mar-03	Erina Fair	Y	Financial hardship	Extension of time Instalment payments
36		22-Jul-03	Lambton heights	Y	Financial hardship	Extension of time
37		Dec-02		Y	Paid fine	Only partial notice received, some information missing regarding payment options.
38		Dec-02	Bankstown	Y	Financial hardship First Offence	Seek to have dismissed
39			Cronulla	Y	Financial hardship	Extension of time
40			Lavington	Y	Unable to pay as unemployed	Extension of time Instalment payments
41			North Parramatta	Y	Medical evidence	

# Appendix G

## Indictable offences to be dealt with summarily unless prosecutor elects otherwise

(Table 2, Criminal Procedure Act)

### Part 1 – Offences against the person under Crimes Act 1900

#### 1 Offences against the person

An offence under section 35A (2), 56, 58, 59, 60 (1), 60A (1), 60B, 60C, 60E (1) and (4), 61, 61L, 61N or 61O (1) or (1A) of the *Crimes Act 1900*.

#### 2 Stalking and intimidation

An offence under section 562AB of the *Crimes Act 1900*.

### Part 2 – Offences relating to property under Crimes Act 1900 or common law

#### 3 Larceny and certain other property offences

Any of the following offences where the value of the property or the damage, or the amount of money or reward, in respect of which the offence is charged does not exceed \$5,000:

- 1) larceny,
- 2) an offence of stealing any chattel, money or valuable security from another person (eg section 94 of the *Crimes Act 1900*),
- 3) an offence under section 3B, 125, 126, 131, 132, 133, 139, 140, 148, 150, 151, 152, 156, 157, 158, 159, 160, 178A, 178B, 178BA, 178BB, 178C, 179, 184, 185, 185A, 186, 188, 189, 189A, 190, 192, 195, 249B, 249D or 249E of the *Crimes Act 1900*,

an offence under section 249F of the *Crimes Act 1900* of aiding, abetting, counselling, procuring, soliciting or inciting an offence under section 249B, 249D or 249E of that Act.

#### 3A Possession of implement of housebreaking

An offence under section 114 (1) (b) of the *Crimes Act 1900*.

#### 4 Taking conveyance without consent of owner

An offence under section 154A of the *Crimes Act 1900*.

#### 4B False instruments

An offence under section 300, 301 or 302 of the *Crimes Act 1900* where the value of the property, or amount of remuneration, greater remuneration or financial advantage, in respect of which the offence is charged does not exceed \$5,000.

### Part 4 – Offences relating to firearms and dangerous weapons

#### 6 Crimes Act 1900

An offence under section 93G or 93H of the *Crimes Act 1900*.

#### 7 Firearms Act 1996

An offence under section 7, 36, 43, 44A, 50, 50A (1), 51 (1) or (2), 51A, 51D (1), 51E, 58 (2), 62, 63, 64, 66, 70, 72 (1) or 74 of the *Firearms Act 1996*.

#### 8 Weapons Prohibition Act 1998

An offence under section 7, 20, 23, 31 or 34 of the *Weapons Prohibition Act 1998*.

## **Part 5 – Offences relating to fires**

### **9 Rural Fires Act 1997**

An offence under section 100 (1) of the *Rural Fires Act 1997*

## **Part 6 – Miscellaneous offences**

### **10 Publishing of child pornography**

An offence under section 578C (2A) of the *Crimes Act 1900*.

### **10A Frauds concerning liens on crops and wool or stock mortgages**

An offence under section 10 or 20 of the *Liens on Crops and Wool and Stock Mortgages Act 1898*.

## **Part 7 – Ancillary offences**

### **11 Attempts**

Attempting to commit any offence mentioned in a preceding Part of this Table.

### **12 Accessories**

Being an accessory before or after the fact to any offence mentioned in a preceding Part of this Table (if the offence is a serious indictable offence).

### **13 Abettors**

Aiding, abetting, counselling or procuring the commission of any offence mentioned in a preceding Part (other than Part 3) of this Table (if the offence is a minor indictable offence).

### **14 Conspiracies**

Conspiring to commit any offence mentioned in a preceding Part of this Table.

### **15 Incitement**

Inciting the commission of any offence mentioned in a preceding Part of this Table.

## **Part 8 – Offences relating to drugs**

### **16 Drug Misuse and Trafficking Act 1985**

An offence to which section 30 (1) of the *Drug Misuse and Trafficking Act 1985* applies where the number or amount of the prohibited plant or prohibited drug concerned is not more than the applicable small quantity.

### **17 Mining Act 1992**

- 4) An offence of mining in contravention of a provision of Division 1 of Part 2 of the *Mining Act 1992*, where the value of the minerals to which the alleged offence relates is less than \$5,000.
- 5) An offence under Division 2 of Part 2 of the *Mining Act 1992*, where the value of the minerals to which the alleged offence relates is less than \$5,000.
- 6) An offence, under section 374A of the *Mining Act 1992*, of contravening a condition of a lease, licence or mineral claim under that Act that is identified in the lease, licence or claim as a condition related to environmental management.

### **18 Petroleum (Onshore) Act 1991**

- 7) An offence of mining petroleum in contravention of section 7 of the *Petroleum (Onshore) Act 1991*, where the value of the petroleum to which the alleged offence relates is less than \$5,000.

An offence, under section 136A of the *Petroleum (Onshore) Act 1991*, of contravening a condition of a petroleum title that is identified in the title as a condition related to environmental management.

# Appendix H

## Summary offences (from Summary Offences Act)

### Part 2 - Offences in public and other places

#### Division 1 – Offensive behaviour

- 4 Offensive conduct
- 4A Offensive language
- 5 Obscene exposure
- 6 Obstructing traffic
- 6A Unauthorised entry of vehicle or boat
- 7 Damaging fountains
- 8 Damaging or desecrating protected places
- 8 A Climbing on or jumping from buildings and other structures
- 9 Defacing walls
- 10A Damaging and defacing property by means of spray paint
- 10B Possession of spray paint
- 10C Sale of spray paint cans to persons under 18
- 11 Possession of liquor by minors
- 11A Violent disorder

#### Division 2 – Dangerous behaviour

- 11B Custody of offensive implement
- 11C Custody of knife in public place or school
- 11D Parents who allow children to carry knives
- 11E Wielding of knives in a public place or school
- 11F Sale of knives to children

#### Division 2A – Loitering by convicted child sexual offenders

- 11G Loitering by convicted child sexual offenders near premises frequented by children

#### Division 2B – Intimidatory use of vehicles and vessels

- 11H Intimidatory use of vehicles and vessels

#### Part 3 – Prostitution

- 15 Living on earnings of prostitution
- 15A Causing or inducing prostitution
- 16 Prostitution or soliciting in massage parlours etc
- 17 Allowing premises to be used for prostitution
- 18 Advertising premises used for prostitution

- 18A Advertising for prostitutes
- 19 Soliciting clients by prostitutes
- 19A Soliciting prostitutes by clients
- 20 Public acts of prostitution
- 21 Search warrant

**Part 3A - Minors in sex clubs**

- 21D Minors not permitted in declared sex clubs
- 21E Notices to be displayed
- 21F Police powers of entry
- Part 3B - Filming for indecent purposes
- 21G Filming for indecent purposes
- 21H Installing device to facilitate filming for indecent purposes

**Part 4A - Offences relating to places of detention**

- 27B Trafficking
- 27D Unlawful possession of offensive weapons or instruments
- 27E Miscellaneous offences
- 27K Failure to comply with search

**Part 5 - Police powers for public protection in public places and schools**

**Division 2 – Search powers**

- 28A Power to search for knives and other dangerous implements

**Division 4 – Powers to give directions**

- 28F Power to give reasonable directions in public places

**Division 5 – General**

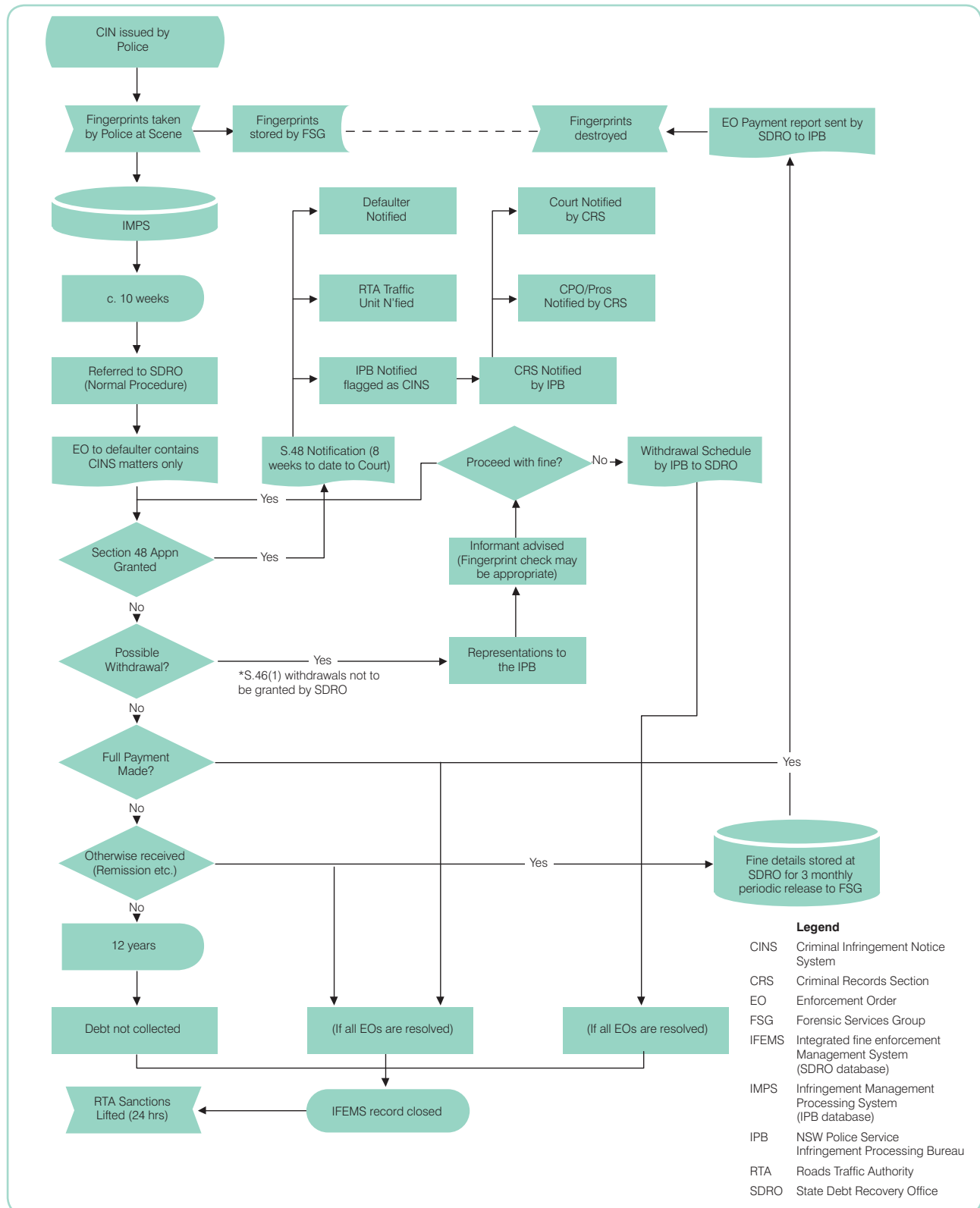
- 28J Offence of hunting on private land





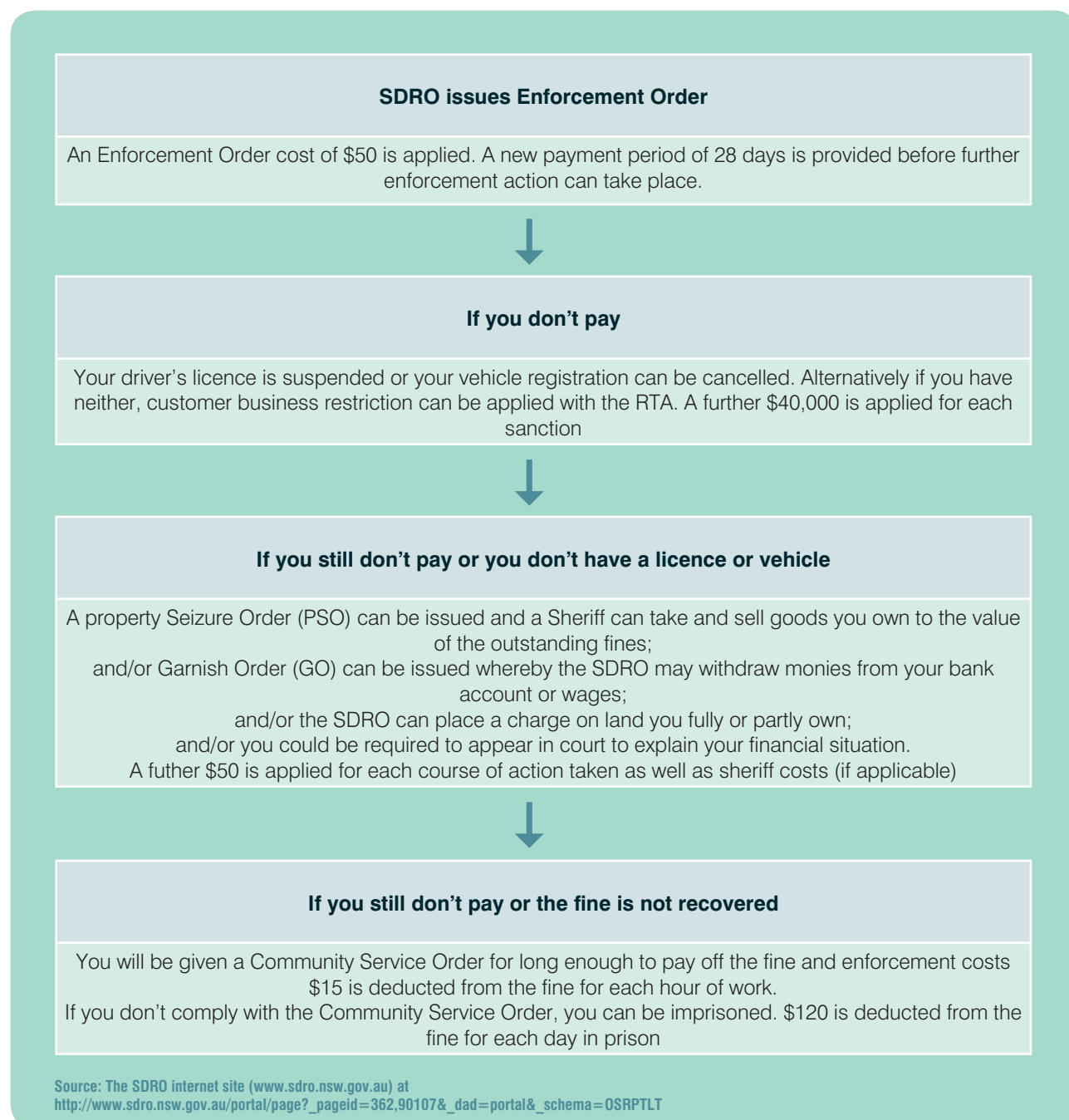
# Appendix J

## Flowchart schematic of the CINs enforcement process by IPB and SDRO



# Appendix K

## Flowchart of Standard Procedures for SDRO enforcement of outstanding fines



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