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Mr Paul McKnight
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Dear Mr McKnight

Penalty Notices

Thank you for the opportunity to contribute to the NSW Law Reform Commission's Inquiry into Penalty Notices.

As you know, my office has been closely monitoring the impact of fines through our complaints and inquiries function, community liaison work and our role in reviewing the trial of Criminal Infringement Notices (CINs) issued by police, and the impact of the state-wide roll out of the CINs on Aboriginal communities.

The attached submission draws from this work. I hope this information provides useful insights for your Inquiry.

If you would like to discuss our submission further please do not hesitate to contact Justine Simpkins, Senior Project Officer on 9265 0459.

Yours sincerely

16/12/2010
Bruce Barbour
Ombudsman

Submission by the NSW Ombudsman's Office to the NSW Law Reform Commission Inquiry into Penalty Notices

December 2010

1. Submission to the NSW Sentencing Council

As detailed in the Commission's consultation paper, the NSW Sentencing Council has previously investigated the effectiveness of fines as a sentencing option and the consequences to those who do not pay fines. The Ombudsman's Office made a submission to the Sentencing Council's investigation. Many of the issues we raised at that time remain relevant for the current Inquiry into Penalty Notices:

- we observed that marginalised groups generally had less capacity to pay fines and little understanding of how to negotiate 'the fines system'
- our complaint and auditing work showed that transport fines were often the main area of concern for marginalised groups
- we noted the importance of issuing agencies appropriately exercising their discretion to withdraw fines that have been inappropriately issued
- we noted the importance of external scrutiny of the way fine issuing agencies issue fines (and now, how they exercise their discretion to issue cautions)
- we emphasised the importance of clear and comprehensive information about options for review or mitigation of fines being provided to fine recipients, as well as advocacy groups representing vulnerable people who have received penalty notices.

2. Penalty Notices and vulnerable people

Chapter 6 of the Commission's consultation paper considers the impact of penalty notices on young people, and Chapter 7 considers the impact on vulnerable people.

We agree with the observations of the Commission with regard to the difficulties faced by young people and vulnerable individuals who may lack the capacity to negotiate the fines system, due to being in custody, being homeless, having a cognitive impairment or mental illness, or people suffering financial hardship.

While our recent report, *Review of the impact of Criminal infringement Notices on Aboriginal communities* ('the 2009 Report) focussed on the impact of CINS on Aboriginal communities, a number of the issues arising from that review may also have relevance for other parts of the community. In particular, the impact of accumulated fine debt may have significant deleterious effects on young people, people suffering financial hardship, and people in areas that have poor access to public transport.

Failure to pay accumulated fines debt can result in driver's license sanctions, or for young people it can result in an inability to obtain a driver's license. This can have the effect of perpetuating a cycle of offending or poverty, as a lack of driver's license limits access to work.

The following case studies, drawn from our complaint handling work, illustrate some of the issues which are faced by vulnerable individuals that have accumulated significant fine debt.

Case study 1

We were contacted by a man who had been fined for different offences over a 25 year period resulting in a debt of $23,000. During this time the man was a drug user and spent time in prison. The man was struggling with making a new life for himself including his aim to have his young daughter returned to his care. There were no further fines since the end of 2007 after he started on a methadone program.

The man made a payment arrangement of $30 per fortnight with the State Debt recovery office ('SDRO') in September 2009, however, he was unable to afford this on his Newstart allowance and stopped making any payments. After failed attempts to contact the man, the SDRO eventually garnisheed the man's bank account in September 2010. The man borrowed $5 from a friend to get transport to Centrelink, where he asked for financial assistance from Centrelink. He was advised to contact our office. We made inquiries with the SDRO and suggested he see a financial counsellor.

SDRO staff told the man that his best option was to apply for the fines to be written off on the grounds of financial hardship, however after he was offered a job he was no longer eligible to apply on this basis. The man was not aware of the Work and Development Order option prior to contacting our office. The SDRO confirmed that the man later applied for a Work and Development Order on the basis that he was attending treatment for his drug issues supported by an area health service.

The man had contact with a number of agencies including Centrelink, Job Network, SDRO, doctors who oversighted his methadone treatment and the Department of Community Services.

Case study 2

A man came under a Financial Management Order with the NSW Trustee and Guardian (NSWTG) after a hearing by the Mental Health Review Tribunal. He was also under a Community Treatment Order for his schizophrenia and other mental health issues. The man owes about $12,000 for 43 outstanding fines including 26 for train and bicycle offences. (One bicycle helmet fine for $244 has $200 in enforcement costs.) The fines seemed to happen in clusters. The SDRO wrote to the NSWTG in August 2010 suggesting that the man should apply for the fines to be written off on the grounds of financial hardship. There was no information about any other options for reducing or reviewing the fines.

Our office had previously made suggestions to the NSWTG and the SDRO around management of individuals that repeatedly receive penalty notices, including suggesting they develop an MOU with a view to improving communication and processes between the two agencies. One outcome was that the NSWTG was activated on the SDRO Advocacy Hotline. However, in August 2010 the NSWTG staff member handling the man's case was not aware of the Advocacy Hotline or the Caution Guidelines.

After being made aware of these options by our office the NSWTG wrote to the SDRO on behalf of the man. The letter included supporting information about the man's financial and mental health issues. The NSWTG asked for the fines to be written off or that the fine be withdrawn on the grounds that it was likely he was mentally unwell at the time the fines were issued.

These case studies raise the following issues, which we would suggest are not atypical in the context of penalty notice matters affecting vulnerable parts of the community:

- There is a need for clear information about review mechanisms and fine mitigation options
- Administration costs associated with pursuing enforcement may be high, particularly for people who repeatedly engage in conduct that constitutes a penalty notice offence, particularly if that person lacks capacity to understand or control that conduct
- Multiple agencies are often involved in assisting individuals navigate the penalty notice system or manage their finances
- Financial hardship following accumulated fine debt may be difficult to overcome, putting individuals at risk extended poverty and possibly risk of further offences
- There is a need for discretion to be carefully exercised in issuing penalty notices to avoid issuing them to people who lack capacity to understand or control their conduct
- There is a need to consider the role the SDRO should play in identifying options for reducing and reviewing fines
- For various reasons, it is not uncommon for review of the penalty notices to occur after the fine recipient has already accumulated significant enforcement costs.

2.1 Recent reforms to the fines system

The reforms to the fines system that came into force in March 2010, under the *Fines Further Amendment Act 2008,* and the Attorney General's Guidelines with regard to cautions and internal review are a welcome measure. Increased flexibility in repayment options, the creation of non-pecuniary payment options, and the diversion of vulnerable groups out of the fine system has the potential to make the fines system fairer, and to reduce the incidence of secondary offending brought about by fine default.

We note that the Attorney General indicated the reforms introduced under the *Fines Further Amendment Act* will be reviewed after two years of operation.[1] We also note that the Work and Development Order Scheme runs as a trial for a period of two years, and will presumably be the subject of evaluation after that period.

Given these reforms have only recently come into force, it is perhaps too early to comment in detail on their impact in making the fines system fairer for vulnerable people. However, it is clear to be effective the reforms will require a significant cultural change in the many agencies involved in the fines system in order to appropriately identify and prevent vulnerable people from accumulating debt or entering the criminal justice system as a result of fine defaulting.

We agree with the Commission's observation that 'it will be imperative to monitor the way in which guidelines are applied to vulnerable people; how often cautions are given; and the extent to which a penalty notice is issued, or proceedings commenced, for an offence for which the offender was originally cautioned.'[2]

As such, we suggest that in addition to the policy review following two years of the operation of the reforms, ongoing monitoring of the way fines are issued and reviewed is essential to drive the requisite cultural change. In our view, this should consist of both internal monitoring by issuing agencies as well as external oversight and support.

[1] The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008

[2] NSW Law Reform Commission, *Consultation paper 10 - Penalty Notices*, September 2010, p136

Additionally, we would suggest that in reviewing the Work Development Order Scheme and the other reforms to the fines system, it would be useful for consideration to be given to the role the SDRO can play in identifying options for reducing and reviewing fines that have been issued to youths and vulnerable people. This could include consideration of whether the SDRO should proactively support organisations that represent or are engaged with vulnerable fine recipients in identifying candidates for the Work Development Order Scheme and applying for alternatives to pecuniary repayment options.

2.2 Internal monitoring

Part 6 of the Attorney General's Caution Guidelines require issuing agencies to keep records of cautions issued, where practical. Additionally, issuing agencies are to ensure issuing officers:

- understand the offences for which they are authorised to issue penalty notices and cautions,
- are aware of the Caution Guidelines,
- receive regular and appropriate training.[3]

It is our view that to properly assess whether the reforms are delivering their intended changes, all issuing agencies should have systems in place to monitor the way cautions and penalty notices are issued. The data agencies hold about the number of cautions and penalty notices issued, internal review requests received and the outcomes of those internal review requests are an important tool to assist in the evaluation of the recent reforms, as well as an ongoing assessment of whether the fines system is working fairly and effectively.

To assist in the ongoing assessment of the fairness and effectiveness of the fines system, we recommend that all issuing agencies should be required report this data in their Annual Reports. This would increase the transparency of the fines system and would assist any policy review or ongoing audit of the effectiveness of the reforms and fairness of the fines system.

We also support the idea of agencies recording additional data to assist in evaluating the impact of the fines system on vulnerable people, such as information about where penalty notices are issued, and demographic data such as Aboriginality, homelessness, disability and age. We acknowledge there may be privacy concerns raised in relation to capturing and analysing information about fine recipients. However, it would be relatively simple for measures to be put in place to ameliorate such concerns, such as removing individual identifying information before any examination or analysis of data takes place.

2.3 Ongoing monitoring and evaluation

While the reforms to the fines system will be reviewed after two years, we consider that ongoing monitoring of such significant change is necessary to ensure the objectives of the reforms are being met. Centralised support in driving requisite cultural change is particularly important given the large number of agencies that are involved in penalty notice processes, including:

- issuing agencies such as local councils, RailCorp and police,
- enforcement through the SDRO,
- organisations engaged with or representing youth and vulnerable people that are fine recipients, including government agencies like the NSW Trustee and Guardian, non government organisations, financial counsellors and specialist legal advocates.

[3] Part 8, *Caution Guidelines Issued by the Attorney General under the Fines Act 1996*.

In Chapter 2 of the Commission's consultation paper, some options for reform of the fines system are suggested, particularly with a view to eliminating inconsistencies in the development of penalty notice offences and penalty notice amounts.

We support the idea of creating guidelines to ensure more consistent development of penalty notice offences and penalty notice amounts. However, in our view, there is a need for ongoing review of the fines system that goes beyond consideration of parity of fines.

In our 2009 Report, we recommended the Attorney General consider establishing a body with ongoing responsibility for monitoring the fair and effective use of fines and penalty notices in NSW and providing advice on opportunities for continual improvement (Recommendation 23 of our 2009 Report). The Attorney General has not signalled whether this recommendation is supported or whether it is to be considered by the interagency working party which is to be established by the Government to consider changes to the CINs scheme recommended in our 2009 report.

In order to enable appropriate ongoing and evaluation of the fines system, as well as supporting and driving change to the fines system, it is our view that the role of such an ongoing oversight body would include:

- regular auditing of the way fines are being issued, including evaluation of the effectiveness of the reform measures (cautions, internal reviews, fine mitigation strategies)
- assessment of data reported by issuing agencies and setting requirements for data collection
- reviewing the extent of secondary offending due to fine default
- evaluating the impact of the fines system on people who may have difficulty in negotiating the fines system, including the recent reforms to the fines system
- provide advice and support to penalty notice issuing agencies with regard to the implementation of the Attorney General's Guidelines about cautions and internal reviews
- advising the Attorney General and the Government on the potential to improve the fines system.

The Commission's consultation paper poses three possible models for reforming inconsistencies in the way fine offences and fine amounts are reviewed.[4] Given our views about the types of activities an oversight body should undertake, we suggest that a model like that set out at Option 2 (allocating responsibility to a stand-alone body) would be preferable to Option 1 (allocating responsibility to a Minister and agency such as the Attorney General) or Option 3 (requiring the Parliamentary Legislation Committee to report to Parliament on the creation of new penalty notice offences or the amendment of existing offences).

Such a body may be well placed to examine what type of information it is most appropriate and useful to record about fine recipients and the fines enforcement system, and how this information could be used to contribute to increasing the fairness and effectiveness of the penalty notice system.

Using the data collected from issuing agencies and the SDRO, a separate oversight agency may also assist in the coordination of targeted programs aimed at reducing debt accumulation. This could include fostering cooperation between issuing agencies, the SDRO and advocate agencies, to better identify individuals who continue to accumulate fines or parts of the community where penalty notices are issued disproportionately. This may assist in identifying the causes of offence types or reasons why particular individuals might repeatedly receive penalty notices.

[4] NSW Law Reform Commission, *Consultation paper 10 - Penalty Notices*, September 2010, pp28-29

2.4 Formalising arrangements between the SDRO and advocates or agencies representing vulnerable clients

There are significant administrative costs involved in pursuing enforcement, particularly in circumstances where the fine is ultimately withdrawn due to factors such as the fine recipient's capacity to understand the offence or control the conduct that constituted the offence. The examples contained in the Attorney General's internal review guidelines include homelessness, mental illness and cognitive impairment.

Increased coordination between advocate organisations, issuing agencies and the SDRO may assist in eliminating some of the costs associated with pursuing enforcement in these circumstances.

The example given in the consultation paper of the ad hoc arrangement between the Intellectual Disability Rights Service and the SDRO is a good example of an agreement that may minimise the administrative costs of those fines that are ultimately unable to be pursued.[5] The consultation paper notes that the arrangement allows for particular clients to have their fines written off automatically.

The case studies outlined above on page 2 also suggest that advocates and agencies representing vulnerable clients may not be clear about when and how to seek a review of penalty notices.

We have suggested to the SDRO and NSW Trustee and Guardian that a Memorandum of Understanding ('MOU') between these agencies may assist to identify when review action should be sought, and how to efficiently manage interactions in relation to clients who may be 'repeat offenders'. We understand that this arrangement has not yet been finalised.

Formalised arrangements between the SDRO and other organisations which work with or represent vulnerable persons may help clarify roles and encourage use of the new review mechanisms and alternatives to fine payment in appropriate cases.

In addition to the NSW Trustee and Guardian, relevant agencies could include Juvenile Justice, Corrective Services NSW, Ageing Disability and Home Care, large NGOs, and the peak body for financial counsellors.

A centralised body with responsibility for reviewing the fines system could also provide support to agencies entering arrangements such as MOUs with the SDRO, helping to minimise administrative costs in reviewing penalty notices issued in circumstances that would warrant the penalty being withdrawn.

3. Criminal Infringement Notices

As outlined in Chapter 8 of the Commission's consultation paper, the Ombudsman's Office has completed two legislative reviews in relation to the CINs Scheme in NSW: *On the Spot Justice? The trial of Criminal Infringement Notices by NSW Police* (finalised in April 2005) and *Review of the impact of Criminal infringement Notices on Aboriginal communities* (finalised in August 2009).

The consultation paper sets out in detail much of the findings of our research, particularly in relation to the impact of CINs on Aboriginal communities. In light of this, and the availability of both the 2005 and 2009 reports on the Ombudsman's website (www.ombo.nsw.gov.au), this submission will not summarise that research again. However, we can provide some further information about the response to the recommendations of those reports to date.

[5] NSW Law Reform Commission, *Consultation paper 10 - Penalty Notices*, September 2010, p128

3.1 Review of the CINs trial

The Commission's consultation paper refers to Recommendation 14 from the 2005 Report, which recommended principles to guide the assessment of which offences to include in the CIN scheme.

It does not appear that there has been any further assessment of extending the CIN scheme to other offences.

3.2 Review of the impact of CINs on Aboriginal communities

Following the tabling of our report into the impact of CINs on Aboriginal communities ('the 2009 Report'), the Attorney General announced his 'in principle' support for the majority of the recommendations.

The Attorney General has announced that the NSW Government would convene a working party to consider how changes to the CINs Scheme proposed in our 2009 Report could be implemented. In particular, the Attorney General indicated he would refer recommendations 5, 6, 8, 9, 17, 24 and 25 to the working party, which would consist of representatives from the Department of Justice and Attorney General, the Office of State Revenue and Aboriginal Affairs NSW. Recommendations 21, 7 and 11 were not supported.

We have not been provided with any further detail about the progress of the working party to date. My office will continue to monitor the implementation of the recommendations made in the 2009 report.

3.3 Reviewing CINs

At the time of writing the 2009 report, the provisions of the *Fines Further Amendment Act* and the Attorney General's guidelines for internal review processes had not yet commenced. Recommendation 21 of our 2009 Report recommended extending the review processes outlined in the *Fines Further Amendment Act* to police use of CINs.

In responding to the recommendations set out in the Ombudsman's 2009 Report, the Attorney General has advised that CINs are covered by the review processes outlined in the *Fines Further Amendment Act*. As such, the Attorney General has indicated that recommendation 21 of our 2009 report is not applicable.

3.4 Records of cautions issued by police

Recommendation 7 from our 2009 Report was that the NSW Police Force implement enhancements to the Computerised Operational Policing System (COPS) to allow official cautions to be recorded and reported as a legal action taken in relation to CIN offences. The Attorney General has indicated that this recommendation is not supported.

At present, it appears unclear whether police can issue official cautions in accordance with section 19A of the *Fines Act*.

Police have a common law power to issue cautions or warnings in relation to any penalty notices (including CINs). Police also have a statutory power to issue warnings to persons under the age of 18 under the *Young Offenders Act 1997.* While section 19A does not appear to exclude police from having the capacity to issue a caution, during the review of the impact of CINs on Aboriginal communities, the NSW Police Force indicated that the caution system under the Fines Act did not apply to police. Certainly, the Attorney General's caution guidelines are not applicable to police officers.

We understand that our recommendation that the Attorney General consider amending Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the Fines Act to give police officers the option of issuing an official caution in accordance with the section 19A of the *Fines Act*, (Recommendation 5) will be considered by the interagency working party announced by the Attorney General.

Drawing from our review of the impact of CINs on Aboriginal communities, we consider that there would be a benefit to police and the community if police officers were given the option of recording official cautions. This measure would enable better data capture about the instances where police have exercised their discretion to avoid issuing a CIN.

As we outlined in Part 6.8 of our 2009 report, changes were made to the way warnings issued to adults were recorded in the COPS system in August 2008. From that time warnings issued under the *Young Offenders Act* can be recorded as 'Warning YOA' in the Legal Processes section of COPS. Warnings issued to adults under the CINs system can still be recorded as 'No Formal Action' and further detail recorded against the option 'Informal Caution Given'.

At the time of our review, information relating to 'No Formal Action' was not included in standard reporting on methods of legal proceedings against alleged offenders. In our focus groups with police officers, we found that some officers only recorded CINs warnings or official cautions in their notebooks, without a corresponding COPS entry, while others strongly held the view that the warning should be recorded on COPS. We were also told by some officers that they recorded warnings or cautions for CIN offences in narrative sections of COPS.

The reduction in the recorded warnings for offensive conduct and offensive language (combined) incidents may be illustrative of the impact of the changes to COPS that were introduced in 2008. For several years, warnings for adult offensive conduct and adult offensive language in NSW had been recorded at between 350-550 warnings per quarter, falling to 130 recorded warnings in July – September 2008 and just two recorded warnings in October – December 2008.[6] As we found no evidence to suggest a fall in offending behaviour or police activity, we suggest this fall in warnings indicates a change in recording practices.

The variations in the way CIN warnings or cautions are recorded makes it difficult to assess the way police are utilising the option to issue warnings or informal cautions to alleged offenders. A clear system for recording and reporting this information may assist in evaluating the way police exercise their discretion, including how cautions are utilised in relation to vulnerable persons and in Aboriginal communities.

Additionally, variations in the way CIN warnings are recorded may make it difficult for police to get a complete picture of an individual's 'continuity of behaviour', in order to determine whether warnings have previously been issued, and whether a warning, CIN or Court Attendance Notice would be a more appropriate response to an alleged offence.

The absence of reliable data about the use of cautions or informal warnings in relation to 'CIN offences' also makes it difficult to properly assess whether the CINs scheme has had a 'net-widening' effect.

In light of this, we consider it important that the capacity for police to issue caution in relation to CIN offences and other penalty notice offences is formalised, and that cautions are clearly and consistently recorded. This would both assist officers in exercising their discretion in responding to alleged offences, and would assist the NSW Police Force to evaluate options taken by police officers for diverting people from the criminal justice system in appropriate circumstances.

[6] NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p66

3.5 Suspended and cancelled driver offences

New separate suspended and cancelled driver offences arising from non-payment of a fine or penalty were enacted in March 2009 under the *Roads Transport (Driver Licensing) Act 1998.*

We recommended that the NSW Police Force develop a strategy that assists Local Area Commands to monitor the incidence of these new suspended and cancelled driver offences with a view to devising ways to prevent further offending (Recommendation 11).

The Attorney General did not support recommendation 11, but has indicated that the new suspended and cancelled driver offences will be monitored by other agencies such as the Department of Justice and Attorney General and the Roads and Traffic Authority. The Attorney General indicated that the NSW Police force does not have a role in providing legal or financial advice to offenders. However the Attorney General indicated that NSW Police Force could have regard to the findings of other agencies when devising its enforcement strategies, which may include referring offenders to assistance.

As we outlined in Part 6.12 of our 2009 Report, the intention of recommendation 11 is that local police, with the assistance of the NSW Police Force, take steps to monitor the new suspended and cancelled driver offences, and look for ways to use the data about these offences to informs strategies to prevent further offending. An example of how that data could inform such strategies is for Youth Liaison Officers, Aboriginal Community Liaison Officers or other police to make appropriate referrals to advocates who can assist the fine recipient to negotiate a time-to-pay arrangement or a fine mitigation arrangement.

We also noted in our 2009 Report that the data relating to suspended and cancelled driver offences could also inform strategies to assist non-Aboriginal fine recipients to negotiate the fines system.

Bruce Barbour
Ombudsman