NSW GOVERNMENT | Planning

Submission to the NSW Law Reform Commission
Consultation Paper 10 – Penalty Notices

Scope of this submission

The Department's submission focuses on Chapters 2-5 of the consultation paper as they are most relevant to the nature of the penalty notices issued by the Department, namely:

- Guiding and overseeing the penalty notice system
- Determining penalty notice offences
- Determining penalty notice amounts
- Issuing and enforcing penalty notices – practice and procedure

While the Department recognises the importance of minimising the adverse consequences of penalty notices on vulnerable individuals, this submission does not respond to the issues raised in Chapters 6-8 of the paper. All but one of the penalty notices issued by the Department to date have been to corporations which carry out large scale development. The issues relating to children, young people and vulnerable groups are unlikely to arise in the Department's enforcement role.

Summary of response

The advantage of penalty notices is that they are a simple and cost effective means of enforcing offences which do not warrant civil or criminal court proceedings. In any reform, a balance needs to be struck between introducing overarching principles for consistency throughout the scheme, and over-regulating the scheme to such an extent that its effectiveness is diminished. It is important to bear in mind the large and varied range of offences which may be dealt with by a penalty notice. For that reason, it is for the statute creating the particular offence to provide the necessary detail on the use of penalty notices in response to that offence.

In summary, the Department supports:

- broad overarching guidelines for the creation and use of penalty notice offences which introduce consistency but do not over-prescribe the process;

- the Attorney General or Better Regulation Office being charged with overseeing and monitoring the penalty notice regime as a whole, rather than the establishment of a new body or committee;

- broad overarching guidelines for the creation of penalty notice offences which do not over-prescribe the nature of the offences and which:

- recognise that low volume offences are no less suitable for penalty notices than "high volume offences";

- recognise that while minor offences are usually appropriate for a penalty notice, it would be impractical to proffer a 'one-size-fits-all' definition of "minor offences";

- recognise that while offences suitable for penalty notices are often characterised by their ease of assessment, it is unnecessary to introduce this as a principle as it may not always be the case;

- Broad overarching principles in setting penalty notice amounts which include the following:

  - amounts should reflect the seriousness of the offence;
  - a consideration of other amounts for comparable offences;
  - higher penalty amounts for corporations.

- the formulation by individual agencies of their own guidelines for the use of penalty notices, including a time period in which a penalty notice should be served;

- the power to withdraw a penalty notice only being available in limited circumstances on specific policy grounds;

- more information about the offence being provided in the penalty notice form;

- information about penalty notice history should be provided to courts for the purpose of determining sentence of any offence.

Background - Penalty Notices as they relate to the Department of Planning

The Department may issue penalty notices for offences under the *Environmental Planning and Assessment Act* 1979 and *Environmental Planning and Assessment Regulation 2000*. The offences for which a penalty notice may be issued are identified in the Regulation and the penalty amount is fixed for each offence[1].

There are 21 offences listed in the EP&A Regulation with fines ranging from $100 to $1500 for an individual, and between $500 to $3,000 for a corporation. In broad terms those offences relate to the following:

- carrying out development without consent or an approval
- carrying out development in breach of a consent or approval
- contravention of orders issued by the Department (e.g for work to be done or for work to cease)
- fire safety offences

Since 2007, the Department has issued a total of 32 penalty notices as follows:

- 18 penalty notices issued to corporations for non-compliance with a development consent - (15 for a $600 penalty, 3 for a $3000 penalty)

[1] Clause 284 of the EP&A Regulation prescribes each offence listed in Schedule 5 of the regulations as a penalty notice offence for the purposes of section 127A of the EP&A Act.

- 8 penalty notices issued to corporations for non-compliance with a project approval ($3000 penalty)
- 5 penalty notices issued to corporations for carrying out development without approval (4 for a $3000 penalty, 1for a $600 penalty)
- 1 penalty notice issued to an individual for development carried out without development consent ($600)

The small number of penalty notices relative to other Government agencies reflects the 'low volume' nature of offences under the EP&A Act and Regulation. However, regardless of volume, penalty notices are an effective enforcement tool for deterring future offences under the EP&A Act and upholding the integrity of the planning system.

The Department has recently prepared its own guidelines for the use of penalty notices, including determining whether it is appropriate to issue a penalty notice for a breach of the EP&A Act, or whether stronger enforcement action is required. A copy of the guidelines is **enclosed**.

Guiding and overseeing the penalty notice system (Paper, Chapter 2)

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

Given the broad range of offences which may be dealt with by a penalty notice, there are likely to be practical difficulties in formally adopting principles which would apply 'across the board'. However, the Department is not opposed to the adoption of broad, overarching principles to guide the creation of the penalty notice offences and to provide consistency for the penalty notice system, provided they do not prescribe or over-regulate the process.

Should there be a central body in NSW to oversee and monitor the penalty notice regime as a whole? If so, who? (2.2)

The Department sees merit in identifying an agency that would have a consultation role in the preparation of the legislation and regulations that give rise to penalty notice offences. In particular, a central body would be better placed to advise on the consistency of proposed new penalty amounts with other comparable offences.

The Department submits that the appropriate central body would be the Attorney General, advised by the Department of Justice and Attorney General, or the Better Regulation Office of the Department of Premier and Cabinet. It is not considered necessary to establish a stand-alone body or Parliamentary legislation committee for the role.

Chapter 3 – Determining Penalty Notice Offences

The Department acknowledges that penalty notice offences often fall within the categories listed at 3.5 of the paper, namely, offences which are:

- relatively easy to assess (including strict or absolute liability offences)
- minor in nature
- low penalty offence
- "high volume" offences
- regulatory offences

Given the variation in the nature, seriousness and harm caused by penalty notice offences, the Department sees practical difficulties in prescribing or defining the nature of offences

suitable for a penalty notice. For example, while the Department's experience is relatively "low volume" offences, this is no way lessens the effectiveness of the penalty notice as an enforcement tool.

However, the Department is not opposed to the idea of broad principles being adopted to guide those decisions (as opposed to prescribing them). Clearly, the overarching statute is of fundamental importance in determining which offences are suitable for a penalty notice.

Our responses to questions posed in chapter 3 that are relevant to the Department are as follows:

Ease of assessment (question 3.1)

Penalty notices are an effective enforcement tool because they typically involve straightforward offences, without a fault element and/or defences or an element of 'offensiveness'. However, the Department does not think it necessary to prescribe these as features for the creation of penalty notice offences. Another feature of penalty notice offences is that they are flexible so as to be able to cover a range of offences. Ease of assessment may not always be the case. Accordingly, the Department does not consider that there is a need to prescribe that:

1. penalty notices should only be used for offences where it is easy and practical for issuing officers to apply the law and assess whether the offence has been committed *(question 3.1(1))*;
2. penalty notice offences should be either a strict and absolute liability offence, or contain a fault element and/or defences *(question 3.1(2))*.

The Department does, however, support the introduction of a requirement for each agency to adopt operational guidelines (*question 3.2)*.

Community Standards (question 3.3)

This is not relevant to the Department as penalty notices issued by the Department do not require an authorised officer to exercise judgment about a matter of community standards. The Department therefore does not offer a view about whether penalty notices are appropriate for other offences that require judgment about community standards (eg offensive language or conduct).

Minor offences and Low Penalty Offences (questions 3.4 and 3.5)

The seriousness of the offence is an important consideration when the Department is deciding whether to issue a penalty notice for a breach of the EP&A Act. The "seriousness of the offence" is included as a consideration in the Department's guidelines for determining whether a breach is appropriately dealt with by way of a penalty notice or whether its seriousness requires a stronger enforcement response. For example, penalty notices are not appropriate for a breach that is:

- Causing or likely to cause environmental harm
- Ongoing and not within the alleged offender's capacity to remedy quickly
- A continuing non-compliance of repeated orders and notices
- Warrants a higher penalty than the fine prescribed for a penalty notice

Similarly, whether the offence is a minor or serious offence is an important consideration in the creation of new penalty notice offences. The Department is not opposed to the concept

of "minor offence" being among a broad set of principles for determining whether an offence may be treated as a penalty notice offence. However, we consider it would be difficult to attempt to define "minor offence" across the board.

Offences for which imprisonment is an option (question 3.7)

In the case of the EP&A Act and Regulation, offences with imprisonment as a possible court imposed penalty should not be considered for treatment as a penalty notice offence. This is because the nature of offences which attract imprisonment under the EP&A Act and Regulation are at the most serious end of the scale.

The Department recognises, however, that other legislation provides for offences which may be dealt with by way of penalty notice or imprisonment. Given the variation, it is not considered necessary or appropriate to attempt to formulate a principle to apply to all penalty notice offences. In the Department's view, this is a matter which should be detail with in the particular statute.

"High volume offences"

The concept of "high volume offences" is not relevant to the Department. In comparison to the table of most frequently recorded penalty notices listed on page 43 of the paper, the Department is not a frequent issuer of penalty notices.

The Department understands the rationale that high volume offences ease the workload of local courts and are appropriate for penalty notice offences. However, any principles that are adopted should also recognise that penalty notices are an effective enforcement response for comparatively low volume offences, not just high volume offences.

Continuing offences – question 3.10

As noted at paragraph 3.59 of the paper, for court-imposed fines, the EP&A Act provides for penalties for each day an offence continues. In the Department's experience, penalty notices primarily deal with one-off breaches that can be remedied easily. Where multiple or continuing breaches have occurred, consideration needs to be given to whether the breaches warrant a stronger response (court proceedings) to achieve a more effective outcome and a higher level of deterrence.

Whether it is appropriate to issue multiple penalty notices for continuing offences will vary according to the nature of the offence. It would also be difficult to set a penalty notice amount for continuing offences. In the Department's view, this is a matter which should be detail with in the particular statute.

Chapter 4 – Determining Penalty Notice Amounts

Should there by principles for determining penalty notice amounts? Question 4.1

The penalty notice amounts for notices issued by the Department are prescribed by the statute. However the Department does not oppose broad principles being established which guide the setting of new penalty amounts and their adjustment over time. This would ensure consistency for other comparable notices dealt with by other government agencies. It could be the responsibility of the Attorney General to oversee to ensure consistency for other comparable notices dealt with by other government agencies. For example, if the Department proposed to introduce a new penalty notice offence, it would assist if there was a central overseeing body who could review the proposed amount in light of other agencies such as DECCW.

What principles?

The Department submits that it would be too difficult and unnecessarily prescriptive to:

- designate one maximum amount that would be appropriate for the thousands of penalty notice offences(4.2);
- set amounts at a level that would deter offending, but be considerably lower than the penalty a court would impose (4.3);
- provide that amounts must not exceed a fixed percentage of the maximum fine (4.4);
- provide that amounts should be lower than the average of any fines previously imposed by the courts (4.5).

The Department supports general principles which recognise:

- Proportionality of amount to the nature and seriousness of the offence (4.6);
- Consistency with amounts for comparable offences (4.7);
- Higher amounts for corporations (4.8).

Chapter 5 – Issuing and Enforcing Penalty Notices – Practice and Procedure

Is there sufficient guidance on when and how to issue a penalty notices? (question 5.1)

As a result of its own initiatives, the Department has sufficient guidance on when to issue penalty notices and the enforcement alternatives available. The compliance guidelines implemented by the Department assist authorised officers to determine whether an offence should be dealt with by way of a penalty notice or whether other enforcement action is appropriate.

The Department considers that tailored and detailed guidelines such as these are appropriate for agencies as they are most familiar with the nature of offences they are charged with enforcing. It is appropriate for the relevant enforcement agency to assess the suitability of offences for a penalty notice on an individual basis, having regard to the particularly statutory context in which the offence arises.

If it is accepted that there should be overarching principles relating to the issuing and enforcing of penalty notices, the Department supports the following:

- the power to withdraw a penalty notice only being available in limited circumstances on specific policy grounds, those grounds being a matter for the overarching statute which creates the offence (5.4);
- agencies should formulate their own guidelines covering the time period in which a penalty notice should be served (5.8);
- Part C of the standard form of "General Penalty Notice" should include a section for setting out the circumstances of the offence, not simply a section for the "Short title of Offence";
- Information about penalty notice history should be provided to courts for the purpose of determining sentence of any offence (5.13).

The Department does not support:

- Fixing a limit on the number or value of penalty notices that can be issued in respect of one incident or on the one occasion of offending behaviour (5.3) as this is unnecessarily restrictive.

- A period longer than 21 days from the time a penalty notice is first issued be allowed to pay the penalty amount (5.11) as 21 days is considered adequate and any longer would unnecessarily protract the resolution of matters.