Submission to

The New South Wales Law Reform Commission

Penalty Notices

November 2010

UnitingCare Burnside

because children matter

We would like to thank the UnitingCare Burnside staff who participated in consultations and made other contributions as part of the preparation of this submission.

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Introduction

UnitingCare Burnside welcomes the opportunity to comment on the Consultation paper provided by the New South Wales Law Reform Commission. UnitingCare Burnside (Burnside) is a leading child and family welfare agency in NSW and part of UnitingCare Children, Young People and Families. Our concerns for social justice and the needs of children, young people and families who are disadvantaged inform the way we serve and represent people and communities.

Burnside has assisted 13,000 disadvantaged children, young people and families across NSW in 2009/10. Our service group, UnitingCare Children, Young People and Families, also includes UnitingCare Unifam, UnitingCare Disability, the Institute of Family Practice and UnitingCare Children's Services. Together with UnitingCare Burnside, these organisations form one of the largest providers of services to support children and families in NSW.

UnitingCare Burnside is also a member of the Youth Justice Coalition, which is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales. The YJC aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

Burnside has a number of services that work with vulnerable children and young people who have received penalty notices. These services range from support services for children and young people experiencing or at risk of homelessness in rural areas to services for children and young people experiencing family breakdown. These services have reported a high proportion of their clients who have received penalty notices and are unable to pay. This proportion of service users who have outstanding penalty notices is up to 90% for some of our services.

The vulnerabilities that our service users experience include mental health issues, intellectual disabilities, drug and alcohol addictions, homelessness, family breakdown, abuse, neglect and disengagement with work and school. Combined with these issues, the financial burden of a penalty notice is restricting their ability to engage with employment, education and the community, which will result in a significant cost to our society. As a result of these vulnerabilities, many of these individuals struggle to cope financially with the cost of these notices.

We would like to comment on a number of questions raised in the consultation paper, with reference to the impacts of penalty notices on vulnerable children and young people.

Question 2.2: Should there be a central body in NSW to oversee and monitor the penalty notice regime as a whole?

UnitingCare Burnside commends the Law Reform Council for examining systemic ways of improving the penalty notice system.

The consultation paper identifies a number of issues with having several bodies governing the penalty notice regime. Bringing the monitoring and setting of penalty notices into a single body is a simple method of reducing the disparity between varying jurisdiction's fines. The punitive nature of penalty notices is a justice issue and should sit within the Attorney General's department. Both Option 1 and 2 raised in the consultation paper would achieve this.

Given the success of the Victorian model of an independent body monitoring penalty notices, we support Option 2: the formation of an independent body within the State Debt Recovery Office, in conjunction with transferring the SDRO to the jurisdiction of the Attorney General.

As noted in the consultation paper, many penalty notices for behaviours without a risk to the community or the individual have unequal fine amounts attached to them when compared to those with a risk factor. Vulnerable children and young people are disproportionately receiving these notices. Creating a single entity responsible for penalty notices will help correct this imbalance.

Question 4.6: Should there be a principle that in setting penalty notice amounts, consideration should be given to the proportionality of the amount to the nature and seriousness of the offence, including the harms sought to be prevented?

With the consolidation of penalty notice monitoring and setting under a single entity, there must be a series of principles adhered to when determining penalty notice amounts, in order to ensure that a new penalty notice structure is internally consistent. Burnside supports the principle that a penalty notice should be reflective of the harm or danger of the act being penalised and the principle that the age of the offender must be taken into account.

The consultation paper notes penalty notices for offences that do not involve a significant harm to others or themselves that are often similar in amount to harmful behaviours. Examples include the fine for Speeding (an offence with significant potential for harm) which is similar in cost to the fine for travelling on a train without a ticket. Burnside believes that a consistent approach based on principles of risk of harm or danger and the age of the offender will reduce the number of inconsistencies in the system.

Question 5.12: Could the operation of fines mitigation mechanisms, including the recent Work Development Order reforms, be improved?

The Work and Development Order (WDO) pilot is a commendable program that supports children and young people to both reduce fines and engage with beneficial programs of support and training. The lack of evidence that a monetary fine alone can change the offending behaviour of a child or young person is notable. The WDO program has the potential to produce positive outcomes for children and young people, however it is noted that there is only a limited number of NGOs providing this program. This is due in part to a lack of funding of the program, which requires organisations to run the WDO program on existing funding arrangements.

Burnside services have reported that they have been unable to refer any children or young people into an external WDO program, as these programs are at full capacity from internal referrals. Campbelltown Youth Services is a Burnside service which offers support and case-management for vulnerable young people. After identifying penalty notices as an issue for a large proportion (85-90%) of its clients, it applied to become a WDO service provider. It has gained accreditation, but has been unable to run a WDO program as it lacks the staffing capacity to operate it using existing funds.

In order to expand the number of approved organisations capable of running a WDO service, which would improve the number of children and young people accessing the program as a result of suffering financial hardship. This could be achieved through reducing the administration and reporting requirements for an approved organisation, which would encourage more organisations to apply to run the program as a result of reduced financial and time requirements. Another method of achieving this goal would be to provide small funding grants to organisations to assist in the administration of the program.

Question 6.1 (1): Should penalty notices be issued to children and young people? If so, at what age should penalty notices apply and why?

Currently penalty notices apply to all children and young people aged 10 and over. With all other forms of criminal behaviour, the *doli incapax* presumption for children aged 14 and under requires the enforcement officer to make a judgement to the child's comprehension of the offence as a crime rather than an act of mischief. Evidence shows that enforcement officers experience difficulty making this judgement, so we support raising the age at which penalty notices apply to 14 at a minimum.

There are also a number of strong arguments for raising this to 16:

- Many young people do not start casual or part-time employment until they are around the age of 14 or 15 years effectively blocking their ability to pay a fine.

- The consultation paper notes a range of evidence that a monetary fine does little to change offending behaviour in children and young people.
- With young people required to stay at school until year 10, the capacity of those ages 16 and under to be employed is limited, particularly children and young people with vulnerabilities or who live in a rural or remote area.
- When a child or young person lacks the money to pay a fine personally, the responsibility of paying this fine falls to the parents. This creates added pressure on family relationships and budgets. This has a disproportionate effect on vulnerable children and young people without stable family settings.

Question 6.1 (2): Are there offences where penalty notices should be issued notwithstanding the recipient is a child below the cut-off age?

All crimes requiring an intervention of a punitive nature for children and young people under the age of 14 are already covered by state and federal criminal law. If the cut-off age were raised to higher than 17, it would be necessary to exempt driving offences due to the risk to the individual and the community.

Question 6.4: Should enforcement officers be required to consider whether a caution should be given instead of a penalty notice when the offender is below the age of 18 years?

We support the implementation of a requirement for all officers to consider a caution as an alternative to issuing a penalty notice for offenders under the age of 18. We support the initial submission by the Illawarra Legal Centre that cautions should be the first response when an offender is under 18.

All officers require the use of discretion in their day-to-day work. In any number of situations, it is impossible to accurately predict the specific circumstances of an individual appearing to be committing an offence. The system of cautions and warnings in relation to crime used by the NSW Police Force is an acknowledgement of how discretion is needed to reflect the unique nature of any given situation.

Question 6.7 Should a child or young person be given the right to apply for an internal review of a penalty amount on the grounds of his or her inability to pay?

Even with an increase in the age limit for penalty notices, many young people receiving penalty notices will not be engaged in significant employment. This limits their ability to pay a fine. Concessions to allow young people to have their penalty amount reviewed on the grounds of financial capacity can still achieve the primary aim of a penalty notice, that of behavioural change. The need for a method to enforce financial responsibility is outweighed by the potential for disadvantage for children and young people who are not capable

of paying the penalty notice. However, any appeals process should ensure that it is streamlined and easy for young people to access.

Question 6.10: Should driver licence and registration sanctions be applied to people under the age of 18 years for non-traffic offences?

It is not appropriate for a young person under the age of 18 to have their licence cancelled or suspended when a penalty notice is unpaid. Many young people require access to a driver's license and a vehicle in order to maintain or commence employment. We support the position that restricting a young person's ability to gain their license with outstanding penalty notices is unjust. The restrictions on when a penalty notice can be issued that are already in place in section 65(3) of the *Fines Act 1996* are positive, but these restrictions needs to be clarified to stop the RTA practice of sanctioning young people from getting their licence. While in some urban areas it is possible for young people to use public transport to maintain employment without the use of their licence and vehicle, in many regional, rural and remote areas this is not possible and the negative effects of a driving suspension or licence cancellation are onerous.

The Doorways program, run by UnitingCare Burnside, works with children and young people at risk or experiencing homelessness in the Orana/Far West region. They have reported a number of instances where licence suspensions have resulted in young people unable to maintain their employment, resulting in undue pressure and hardship. This runs counter to public policy aimed at increasing young people's engagement with work and study, such as Commonwealth Government policies such as 'Earn and Learn'. In these instances, the benefits of changing offending behaviour have been outweighed by the detrimental effects of the penalty notice.

As we do not believe it is appropriate for children and young people under the age of 18 to be restricted unjustly in maintaining their mobility in order to maintain employment, sanctions on driving and licensing for offences unrelated to driving should be stopped.

Question 6.5 (1): Should police officers dealing with children who have committed, or are alleged to have committed, penalty notice offences be given the option of issuing a caution or warning, or referring the matter to a specialist youth officer under Young Offenders Act 1997 (NSW) to determine whether a youth justice conference should be held?

Burnside supports the use of cautions or warnings by police officers in dealing with children and young people. Additionally, utilising the training and discretion of the NSW police youth liaison officers will balance the need for punitive action against the specific circumstances of children and young people.

Question 7.5: Should pro-rata reduction of the penalty notice debt (and/or outstanding fines) of offenders in custody be introduced?

At times the imposition of fines on offenders in custody reduces their ability to reintegrate into society. Offenders who have demonstrated good behaviour and a willingness to engage with rehabilitation and training programs should have a monetary reduction in their fines.