Justice & Attorney General

NSW TRUSTEE AND GUARDIAN

RESPONSE TO LAW REFORM COMMISSION CONSULTATION PAPER 10 (2010) PENALTY NOTICES

Background on NSWTG

NSW Trustee & Guardian ("NSWTG") was established on 1 July 2009 by the NSW Trustee and Guardian Act 2009 merging the former offices of the Protective Commissioner and the Public Trustee NSW. NSWTG is a NSW Government agency within the Department of Justice and Attorney General.

Under section 11 of its governing legislation the NSWTG may act in any of the following capacities:

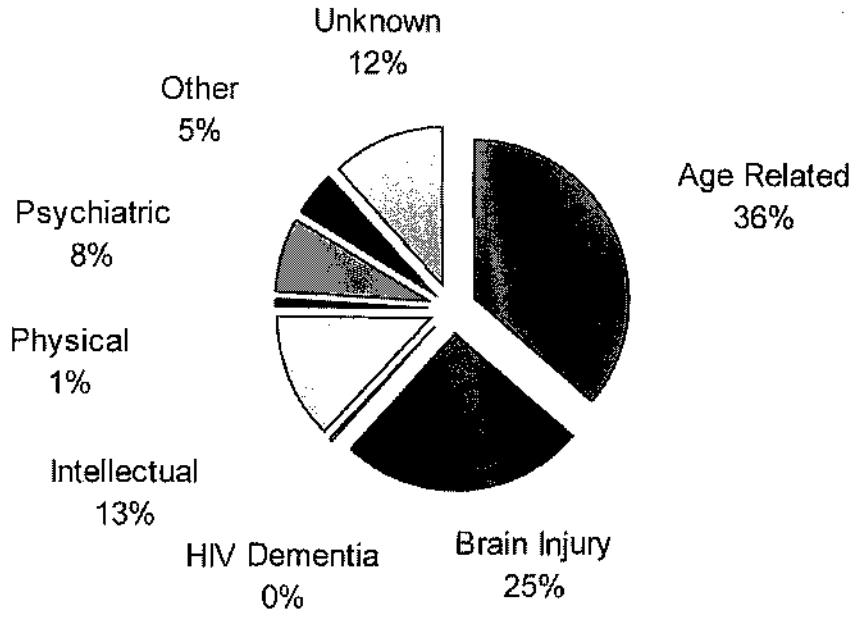
1. financial manager of the estate of a managed person
2. agent or attorney
3. executor or administrator
4. trustee
5. collector of estates
6. guardian or receiver of the estate of a minor
7. receiver of any other property

Currently, NSWTG has in excess of 9,500 clients under direct financial management. A further 2,950 clients have a private financial managers appointed, who is overseen by NSWTG. In addition, we hold about 17,000 powers of attorney most of which are dormant, but which may become active if the principal loses capacity or seeks assistance in managing their financial affairs. Consequently, NSWTG is very actively involved in, or has the potential to become involved in, the day to day management of the affairs of a large proportion of the community, who may be at risk due to mental illness, intellectual disability or other cognitive impairment.

All NSWTG clients under financial management have a disability that affects their capacity to make financial decisions. Usually this is due to mental illness, brain injury, intellectual disability, psychiatric disability or dementia. The person cannot manage their financial affairs on their own, has no suitable informal arrangement in place to help them meet all their financial needs and has no other suitable person willing to be legally appointed as their private financial manager.

NSWTG provides a wide range of legal, technical, financial, disability and other services such as: protecting assets and legal rights, facilitating the buying and selling of a home, organising an adequate cash flow to pay bills, liaising with financial and legal institutions, managing a business and making investments.

NSWTG financially managed client base by Disability:



NSWTG's experience of clients and penalty notices

NSWTG has experience of clients with disabilities accruing large amounts of penalty notice debts. We have provided some case studies below.

Case Study 1:

Mrs G is a 32 year old woman who has a diagnosis of schizophrenia. She was homeless, unwell and had multiple hospital admissions in 2009 when she accrued $1500 in fare evasion fines. Many of these fines were due to Ms G sleeping on trains because she felt safer on public transport than on the streets. Her unkempt appearance and self-talk made her conspicuous to others. Ms G had no address and no way to respond to the notices or contest them. Later, when she was medicated and well Ms G could not recall having incurred the fines. Submissions by the Mental Health worker and the Trustee to have the debts waived have not been successful. The debts are being paid at $20 per fortnight from her pension income. Ms G told the Trustee that the fines made her deeply depressed and that she had no way of getting ahead in life. Mrs G said she despaired of being free of the debt.

Case Study 2:

Mr S is a 71 year old single man with early onset dementia who owes $1750 in penalty notice fines. He lives on a pension and his budget is extremely tight. The debt repayment from each pension payment disallows other necessary expenditure. Recently his bed was assessed as unusable and a replacement bed was not affordable. Mr S has consistently asked for a funeral plan so that his family will not have the responsibility of his funeral costs but his budget does not allow for the regular payment until the SDRO debts are repaid.

Case Study 3:

Mr N is a 41 year old man who is chronically unwell and has a diagnosis of an intellectual disability. He has accrued $20,500 in penalty notice fines. At the current rate of repayment the fines will be repaid in 42 years. Mr N displays frustration at not being able to access his total pension entitlements which causes him further behavioural disturbance in the community, sometimes involving receiving further penalties

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Case Study 4:

Mr P's medical support workers have advised that he suffers from a paranoid fear of 'uniformed' authority. When unwell this paranoia prevents him from purchasing travel tickets. He has accrued $1000 in travel fines and is opposed to repayment causing challenges for financial management.

Case Study 5:

Mr S owes over $12 000 to SDRO. He will repay these debts in 48 years. He is physically frail, walks with aids and is currently homeless. Mr S has a brain injury from falling onto the railway tracks during an assault. Mr S often sleeps on trains due to safety concerns as he is robbed regularly due to his physical frailty. He wants to live in a house, get a job and buy some furniture but feels he will never be able to better his life due to his debts. Mr S has made several suicide attempts due to his financial circumstances.

Client debtors are usually pensioners on very low incomes with inadequate resources to repay the debt. An on-the-spot fine is a set amount without regard for a person's individual circumstances or capacity to pay. The system currently disadvantages people with a disability who are unable to understand the nature and effect of the notice and/or unable to utilise the appeal processes. Due to their cognitive impairment, the offender may have had difficult in understanding the need to comply with legal obligations, such as purchasing a ticket or smoking on a train. Consequently they may not understand the reason for the fine. This lack of understanding affords them little opportunity to modify their behaviour in the future, as a result of which offences are recurrent.

NSWTG's records indicate that currently in excess of 300 directly managed clients have debts outstanding to State Debt Recovery Office (SDRO) as a result of penalty notice violations. These debts total in excess of $1,050,000. The largest of these debts is $36,000. Overall, the average debt is $3,500.

In most cases, the debtor clients are in receipt of a Centrelink pension, with very limited means of financial support. In 11 instances the debtor clients are homeless or itinerant and all have been diagnosed with a psychiatric or cognitive disability which has been found to affect their ability to manage their financial affairs.

The majority of the notices are in respect to public transport infringements such as travelling without a ticket. Other notices are in respect to a range of offences, such as: drinking intoxicating liquor on public transport; offensive behaviour; shoplifting; smoking on a train; non registration of companion animal; motor vehicle offences; riding bicycle without helmet; failure to vote; sleeping/camping in public parks areas; and purchasing alcohol for a minor.

Problems with the current penalty notice system:

It is the experience of NSWTG that the current system of penalty notices disadvantages vulnerable people with a cognitive disability and other mental health impairments. The imposition of a financial penalty in situations where the offender is already at a socio-economic disadvantage, may have a disproportionate effect on the offender in view of the relatively minor nature of the offence.

Inconsistencies in the amounts of penalties also need to be addressed, to make the punishment commensurate with the seriousness of the offence. For example, smoking on a train or the covered area of a railway platform attracts a fine of $400 whereas failure to comply with a police direction carries a $200 fine. Both fines are significant amounts for people on Centrelink benefits but the first seems to bear little resemblance to the objective seriousness of the offence.

Problems with the current penalty notice system we have identified include:

- Notices are issued to persons who are unable to explain circumstances, or negotiate a caution with an authorised officer, or to understand that they have contravened the law;
- Vulnerable people may come to the attention of authorised officers more readily because of their appearance or conduct;
- Some level of understanding and support is necessary to access options of payment or court appearance to contest conviction;
- Appeal options are inaccessible for many vulnerable people with disabilities;
- People with a disability may not respond to written notification of debt (or be unable to be in receipt if homeless) resulting in court fines;
- The Waiver or reduction of fines is discretionary and depends on the claimants level of support in writing letters and negotiating the system;

- Repayment of debt can afford financial hardship (even in 'time to pay' situations) for persons on basic disability support pension;
- The existence of debts can preclude the accessing of services or licences necessary for a person's recovery.

Discretion to caution or fine:

Under the *Fines Act 1996*, officers who issue penalty notices have a discretion to give a caution rather than issue a fine. The Department of Justice and Attorney General has issued guidelines to assist officers (other than Police or officers employed by other Agencies with their own guidelines for the use of cautions) in the exercise of this discretion. The matters to be taken in to account in deciding to give a caution instead of a penalty notice include:

- The offending behaviour did not involve risk to public safety, damage to property or financial loss, or have a significant impact on other members of the public;
- The person is homeless;
- The person has a mental illness or intellectual disability.

One of the major difficulties in the practical implementation of these (or any other) guidelines is that intellectual disability and other forms of cognitive impairment can be difficult to recognise by a third party with little or no training, in circumstances where the contact is very brief.

It is the experience of NSWTG that a vast majority of the fines issued to our clients, would never have been issued, had the discretion to issue a caution been correctly applied. Addressing the issue of fines in the first place, will avoid the need for the client offender to attempt to navigate the cumbersome and difficult SDRO fine processing system (despite recent system reforms). NSWTG does not have the capacity to undertake a comparative analysis of the cost of processing and pursuing fines. However, our intuitive view would be that the administrative costs of prosecution and recovery would outweigh the value of the fines.

We agree that, as noted in the Commission's report, 'net widening' is more likely to occur where this discretion exists. Net widening is when law enforcement agents use penalty notices in situations where they would not have taken any formal action except by way of caution or warning. The issuance of penalty notices where the person committing the offending behaviour is homeless or has a mental illness or intellectual disability, unnecessarily brings the person within the criminal justice system.

We are hopeful that the Caution Guidelines will assist in minimising any net-widening effects of penalty notices. We agree with the Commission's observation that it is unlikely that a vulnerable person who receives a penalty notice would challenge it on the basis that a formal caution was appropriate in the circumstances. Again, this is due to their limited means and capacity to implement and progress review options.

Discretion of SDRO to write-off:

This leads into a further issue, which is the discretion exercised by the SDRO in deciding whether to waive fines issued to these vulnerable groups of people. The SDRO has a discretion to postpone or write off a fine if the person applying has "severe financial, medical or domestic problems".

To request a review of a penalty notice on these grounds, the application must be made in writing and accompanied by documentation detailing the nature of the problem and lodged prior to the due date on the penalty reminder notice. Due to the nature of the clients under financial management, offenders require the assistance of an advocate in seeking to have the fines written off or exploring payment options. Quite often, they will ignore the problem so that the issue escalates and becomes more difficult to deal with.

Even if an advocate is successful in having the fines written off, it is often subject to the condition that there will be no re-offence for five years. Given the vulnerable nature of such offenders, this is a very difficult condition to adhere to.

NSWTG does advocate for write-off or reduction of fines. Applications are rarely successful. We believe that the submission of a financial manager or guardian should be regarded by SDRO as determinative when considering a write-off. We acknowledge that appropriate standards and processes would need to be introduced and we would welcome the opportunity to develop the same.

Recent reforms

NSWTG welcomes the reforms commenced through the *Fines Further Amendment Act 2008*, which include:

- The Caution Guidelines, which attempt to clarify and formalise the procedure for issuing cautions in appropriate circumstances; and
- The commencement of the Work and Development Orders (WDO) trial on 1 July 2009, which allows for outstanding fines to be paid off in non-monetary ways, such as through volunteer work or participation in treatment programs or vocational courses.

NSWTG encourages any reform which may assist to improve the inequalities in the system and we will view with interest the practical effect these changes may have.

COMMENTS ON SPECIFIC ISSUES

Question 7.1

Should penalty notices be issued at all to people with mental illness or cognitive impairment? If not, how should such people be identified?

Chapter 7 of the Consultation Paper examines the area which most impacts on the clients of NSWTG. It is firstly important to make a distinction between 'disability' and 'incapacity' as it is possible to have a mental illness and/or cognitive impairment and

still have capacity for understanding society's rules and appreciating the consequences of one's actions. Therefore the seriousness of the offending behaviour, its impact on public safety and the level of the individuals' incapacity will intersect when considering the principles to apply.

Finding the balance between allowing people with a disability to fully participate in society, whilst protecting them from experiences they are precluded from understanding and responding to in the same way as other citizens due to their incapacity, is a challenge. It is important that at appropriate times people do have the opportunity to experience the consequences of their actions from an educative perspective and to ensure their continued independence in the community, as opposed to re-enforcing behaviour that works contrary to this goal.

It is consequently not appropriate to engage in exclusive law making which seeks to exclude as a given all people with a disability by not applying the principle of issuing penalty notices across the board of society.

The essence of the principle must be the level of incapacity of the person at the time of issuing the infringement and whether they are able to appreciate the nature of offence, the implications and consequences and to respond to these implications. This will require more discretion at the time of issuing a penalty or anywhere within the process through the penalty notice system, to ensure the earliest exit of those incapable to continue equitably with the process.

Many of NSWTG clients fall into the lower socio- economic group and may qualify on hardship alone as they often cannot hold or sustain income earning employment. The cumulative effect for many of our clients can seem insurmountable. Whilst we note the lessening likelihood of incarceration for unpaid fines, the escalating amount of a fine to a person on a low or irregular income can seem insurmountable. This can leave people with little or no incentive to take steps to manage the complex process of payment and review.

We welcome the Caution Guidelines as a means of addressing these inequities, but not that their effective implementation will be dependent upon adequate training of issuing officers. The difficulty is in identifying those people who are homeless of have an intellectual or mental disability. Even with training, it can be difficult to recognise cognitive impairment or differentiate it from the effects excessive alcohol consumption in a short encounter.

We are aware of suggestions for a "do not fine" register as an alternative to carrying identification of other means of verifying the intellectual disability. We agree with others who raised concerns about privacy and consent. Our comments under 7.3 below are also relevant.

It is important that any guiding set of principles should give consideration to the person's ability to appreciate the seriousness of the offence, particularly those of a more serious nature. Clearly, capacity to understand the nature of the offence, financial hardship and emotional impact are all questions that we consider. However, the identification of guiding principles is best achieved via multi sectoral approach. NSWTG would be happy to participate in a forum with other agencies, NGO's and advocacy groups to develop principles.

Question 7.2

(1) Should alternative action be taken in response to a penalty notice offence committed by a person with mental illness or cognitive impairment? If so, what is an appropriate alternative?

(2) Do the official caution provisions of the Fines Act 1996 (NSW) provide a suitable and sufficient alternative?

As previously stated, NSWTG welcomes the Caution Guidelines as a method of assisting issuing officers in the consistent exercise of their discretion to either caution or issue a penalty notice. We note that the opportunity for choosing to issue a caution is affected by both net widening and the amount of discretion the infringement officer believes they have. The discretion of the issuing officer needs to address both the initial identification of the person as incapable of understanding the offence and subsequent behaviour of the person which may be exacerbated by the interaction with the enforcement officer. For example, the behaviour and frustrations experienced by a brain injured client may encourage the issuing officer to opt for issuing a penalty notice, due to their inability to negotiate in such situations.

We recognise that even with improved and recurrent periodic training of issuing officers, there will still be occasions when a person with a mental illness or cognitive issues is issued with a penalty notice. The extent to which such notices negatively impact on our clients may be alleviated by increased flexibility in the penalty notice review or annulment process, using processes which take account of the cognitive impairment.

Question 7.3

Should a list be maintained of people who are eligible for automatic annulment of penalty notices on the basis of mental health or cognitive impairment? If so:

(1) What should the criteria for inclusion on the list be?

(2) How should privacy issues be managed?

(3) Are there any other risks, and how should these be managed?

NSWTG recognises the complexity that surrounds this issue. On the one hand a list negates the whole philosophy of treatment. Such a 'list' would promote stigmatisation, marginalisation and further alienation from the mainstream community. Because capacity is a fluctuating state for many of our clients, it would be very difficult to establish an assessment process to take these fluctuations and compliance with treatment regimes into account.

On the other hand, if the submission for write-off by NSWTG in relation to a client was accepted SDRO have automatically created a record that could be used to assess further fine activity. In short, a list develops by default. This would be helpful for those clients where neither capacity nor behaviour will change. However, it does not address the needs of clients with fluctuating capacity. We do not offer any immediate solution to this problem but we would be willing to participate in a forum

that could workshop this and other complex issues (please see comments later in this submission).

Question 7.4

Should fines and penalty notice debts of correction centre inmates with a cognitive impairment or mental illness be written off? If so, what procedure should apply, and should a conditional good behaviour period apply following the person's release from a correctional centre?

NSWTG notes the argument for write off of the debts of mentally ill and cognitively impaired prisoners on the basis that these fines are unlikely to ever be recovered. It is a consideration that the incarceration will inhibit the person's ability to respond to penalty infringement notices, as a result of which the debt escalates.

If the client is vulnerable in the custodial system then write off may allow for earlier release. Also the purpose of incarceration may well not be able to be understood or appreciated by the individual in the first instance.

This needs to be balanced against the interests of justice requiring prisoners to repay penalties imposed on them by their actions. NSWTG is in agreement with the suggestion that fines and penalty notice debts be treated differently to court imposed fines intended as victim compensation. Even then, there would need to be an individual assessment of each prisoner due to the subtlety of the levels of incapacity and disability.

To some extent, this is covered by the diversionary options similar to the Work and Development Orders already introduced. It is hoped that, with time, incarceration as a result of non-payment of fines and notices will diminish as an option for vulnerable and disadvantaged people. This change will be assisted by a guiding set of principles, better understanding of when to use cautions and warnings, better disability awareness and induction training of those vested with issuing orders/infringements.

Question 7.12

Should participation in discrimination awareness and disability awareness training be required for all law enforcement officers?

In our view, there should be compulsory induction training for all enforcement officers in regard to the impact of a disability and incapacity on a person's behaviour and ability to understand and follow rules and expectations. Issuing officers should be allowed greater leeway to be discretionary in their responses to people's behaviour.

We acknowledge that even with appropriate training, it can be exceptionally difficult to assess some clients who may present with higher levels of functioning, such as brain injury. Such an individual may present well at the commencement of an interaction but their short term memory is so impaired that they may not remember incurring the fine, ten minutes later. An infringement officer may view this behaviour as mischievousness and either issue a fine after a caution or issue a further fine.

Question 7.13
How effective are the review provisions for people with a mental health or cognitive impairment?

As stated previously, NSWTG is of the view that the present system for review of penalty notices is cumbersome, costly and complex, presenting as too difficult for people with mental illness or cognitive issues to engage in, without assistance. Such processes are too complicated for even those with minor deficits in cognition.

Often the client offender does not seek assistance until after the matter has escalated to crisis point, when options are limited.

Question 7.14
Given that it may be difficult for some vulnerable people to make a request in writing for review of a decision to issue a penalty notice, what practical alternatives could be introduced either to divert vulnerable people from the system or to support review in appropriate cases?

The fine processing system is heavily reliant on written applications, even for relatively simply matters such as working out a system of repayment. Applications for alternative payment arrangements and for postponement or write-off need to be simplified. Not all offenders have a financial manager or advocate who can assist in this process. Perhaps the process could be commenced by the offender being able to telephone an SDRO advice line, as a result of which a simplified application form may be sent to the offender.

SDRO should develop one application form which also allows for professionals to provide information on the condition of the applicant to justify the write off, without the need for separate documentation.

Please see our comments elsewhere in this submission regarding SDRO recognition of a submission by NSWTG as determinative of the mental impairment or cognitive disability of our client offenders. We reiterate that we would welcome the opportunity to work with SDRO to develop procedures and protocols for such a process.

Question 7.15
Should the requirement to withdraw a penalty notice following an internal review where a person has been found to have an intellectual disability, a mental illness, a cognitive impairment, or is homeless, be extended to apply specifically to:
(1) Persons with a serious substance addiction?
(2) In "exceptional circumstances" more generally?

NSWTG is of the view that the extending the process for internal review to specifically include clients with substance addiction or exceptional circumstances, should once again be based on an assessment of individual merit. Inclusion of

substance addiction may be appropriate only instances of long term use of such substances as are likely to have contributed to cognitive and intellectual deficits to the level that it has affected the person's appreciation and understanding of the offence committed.

Question 8.1

Should there be formal principles for determining whether a particular criminal offence is suitable to be dealt with by way of Criminal Infringement Notice? If so, what should those principles be? Should they be different from the principles that apply to penalty notice offences generally?

Criminal Infringement Notices (CIN) are penalty notices in respect to certain offences that have usually been dealt with through a prosecution process in the courts; in particular, offences relating to public order and anti-social behaviour. The aim is to provide police with a speedy alternative to arrest when dealing with relatively minor criminal matters. The person served with the notice may choose to simply pay the fine, in which case there is no further criminal proceeding for the alleged offence.

We note the findings of the Ombudsman in their review of the CIN trial in NSW and their recommendation for a guiding set of principles to assist with determining whether a criminal offence should be dealt with by CIN. It is apparent that offences dealt with by way of CIN provide for cost savings in law enforcement and alleviate the workload on the court system. As with penalty notices however, there is a danger that a vulnerable person served with such a notice may not seek assistance before it is too late. This may lead to injustice if there were grounds for appealing the fine in Court, however the time has passed for electing to go to court.

While there are obvious monetary advantages in extending CIN offences, NSWTG agrees with the approach suggested by the Ombudsman. A test or set of principles for determining an appropriate CIN offence would provide consistency and ensure that the scheme is only applied to relatively minor offences.

Whilst the prospect of a fine may at first instance seem appealing, there is a danger that vulnerable persons with real grounds to have the offence dismissed, may choose not to because of their mistrust and lack of faith in the court system, due to previous negative experiences. It is important that a CIN not be used as a method to deter those who may consider themselves innocent or who have a justifiable defence, from seeking exoneration through the court system.

We agree with the principles suggested by the Ombudsman, particularly that:

- CIN offences be relatively minor;
- a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence;
- the police issued CIN will be regarded as a deterrence by the offender;
- the physical elements of the offence are relatively clear cut.

Net-widening is again an issue. NSWTG recommends that Police develop CIN cautioning protocols to ensure that cautions are still considered in appropriate circumstances.

As suggested in our response to Issue 7.1, NSWTG is of the view that the identification of guiding principles is best achieved via multi sectoral approach. We would be pleased to participate in any ongoing consultative process in this regard.

Question 8.5
Should CINs be issued at all to persons with a cognitive impairment or mental illness? If so, should police have the discretion to issue a CIN, even after an arrest has been made, if satisfied that the offender has a support person who has understood the offence and consequences of the CIN as recommended by the Ombudsman?

Preventive measures are of benefit both at the time of arrest or when issuing a notice, and in the latter stages of the penalty notice process upon becoming aware of the person's lack of ability to appreciate the situation. Early identification, even if after arrest, will allow the vulnerable offender to be diverted from the court system and assist in avoiding a spiralling cycle of escalation of fines and/or custody.

Question 8.6
Should police have the power to withdraw a Criminal Infringement Notice if subsequently satisfied of the vulnerability of the person to whom the Criminal Infringement Notice was issued?

As per our response to Issue 8.5, NSWTG is of the view that early identification and intervention on behalf of vulnerable people, will always be the preferable option. NSWTG is in agreement with the Ombudsman's recommendation that Police should have the discretion to both issue a CIN following an arrest, or withdraw the CIN if they subsequently become aware of the vulnerability of the offender.

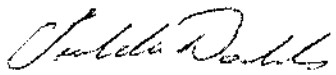
Summary

In summary, NSWTG welcomes reforms to the penalty notice system which allow a far greater discretion to infringement officers when issuing fines and cautions. This discretion should be underpinned by guidelines and protocols which are transparent and publicly available. The application of the discretion to caution or fine should be subject to ongoing scrutiny and external review in order to recognize and address any tendency to net-widening.

NSWTG strongly supports an automatic process for the waiving of fines. This should apply where an offender's support agency (including NSWTG) is able to demonstrate that the client was affected by mental illness or cognitive impairment, to the extent that they neither understood the import of the offence, nor the effect of the consequence of the offence. In such circumstances, no review process should be required. Similarly, no review should be required if an agency is able to establish significant hardship.

Finally, fines should be waived in circumstances where it can be demonstrated that they will be unable to be repaid during a person's lifetime and the offender was unable to understand the reason for the fine, at the time that the offence occurred.

NSWTG supports and will continue to advocate for, any reforms to the present system which will minimise the impact of escalating penalties in circumstances where the client offender is both incapable of paying and unable to understand the full nature and consequences of their actions.



Imelda Dodds

Chief Executive Officer

NSW Trustee and Guardian