Homeless Persons' Legal Service
Legal help for the homeless and those at risk of homelessness
A joint initiative of the Public Interest Advocacy Centre Ltd
and the Public Interest Law Clearing House Inc

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Penalty notices: Still not such a fine thing for vulnerable people

Supplementary Submission to the NSW Law Reform Commission Inquiry into Penalty Notices

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Introduction

Homeless Persons' Legal Service

In 2004, following an extensive consultation process, the Homeless Persons' Legal Service (**HPLS**) was established by the Public Interest Advocacy Centre (**PIAC**) and the Public Interest Law Clearing House (**PILCH**) NSW.[1] HPLS is largely funded by the NSW Public Purpose Fund with the support of the NSW Attorney General.

HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area.[2] These agencies provide direct services, such as food and accommodation, to people in housing crisis. The clinics are co-ordinated by HPLS and staffed by lawyers acting pro bono from PILCH members.[3] Since its launch in May 2004, HPLS has provided advice to over 4900 clients.

PIAC is solely responsible for the content of this submission.

Supplementary submission

HPLS was pleased to meet with the NSW Law Reform Commission on 14 January 2011 to discuss in detail aspects of HPLS's submission to its inquiry into the penalty notice system. At this meeting the Commission also met with members of Street Care, a homeless consumer advocacy group, and heard of their experiences of the penalty notice system. In order to build on and clarify the issues raised at this meeting, the Commission has invited HPLS to make a supplementary submission. HPLS welcomes this opportunity and trusts that the following submission clarifies and provides further detail regarding certain aspects of the original submission.

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1 Further information about PIAC and PILCH NSW is provided as Appendix A to this document.

2 The clinics are hosted by the following welfare agencies: Edward Eagar Lodge (Wesley Mission), Matthew Talbot Hostel (St Vincent de Paul Society), Newtown Mission in Partnership with Newtown Neighbourhood Centre, Norman Andrews House (Uniting Care), Parramatta Mission (Uniting Church), Streetlevel Mission (Salvation Army), The Station, Vincentian House (St Vincent de Paul Society), Wayside Chapel (Uniting Church) and Women's and Girls' Emergency Centre

3 The following PILCH NSW members provide lawyers on a *pro bono* basis to HPLS to provide legal services through the clinics: Allens Arthur Robinson, Baker & McKenzie, Corrs Chambers Westgarth, Dibbs Barker, HWL Ebsworth, Gilbert + Tobin, Henry Davis York, Legal Aid NSW, Minter Ellison, Norton Rose and Thomsons Lawyers.

A central body to oversee the penalty notices system

HPLS's submission supported the establishment of a central body to oversee the penalty notices system, similar to the Infringements System Oversight Unit established in Victoria. This unit, which could be titled the Penalty Notices Oversight Unit (PNOU), should be located within the NSW Department of Justice and Attorney General and should be headed by a senior public servant of the same grade as an Assistant Director-General of the Department.

As with the Victorian model, the PNOU would draw on the views, expertise and experience of an Advisory Committee consisting of a wide range of stakeholders, including:

- The State Debt Recovery Office (SDRO);
- issuing agencies, such as Rail Corp;
- non-government organisations, such as the Salvation Army, St Vincent de Paul Society and Youth Off The Street;
- Legal Aid NSW;
- community legal centres; and
- consumers.

The PNOU could have a number of functions aimed at ensuring a fairer and more effective penalty notice system. Some possible functions are canvassed below.

1. Develop a new stand-alone statute dealing with penalty notices

The present *Fines Act 1996* (NSW) is incredibly convoluted, confusing and fails to provide adequate distinctions between penalty notices and court fines in certain circumstances. A stand-alone body could guide development of a new piece of legislation to govern the penalty notice regime. The Advisory Committee should be consulted as to its format and content.

2. Reviewing the content of penalty notices

There is considerable need for a review into the kinds of information contained on penalty notices. As members of Street Care told representatives of the Commission, vulnerable groups such as those experiencing homelessness are not provided sufficient information on the options available to them once they have received a penalty notice. The kinds of essential information currently not provided on a penalty notice include:

- where to obtain independent legal advice;
- the circumstances in which a caution may be issued;
- how to apply for an internal review;
- how to apply for a Work and Development Order (WDO); and
- how to make a complaint against the enforcement officer.

HPLS believes the Advisory Committee could lead this review process and provide on-going monitoring of the suitability of information contained on penalty notices. The PNOU, itself, would monitor and have the power to enforce the use by issuing agencies of any revised penalty notices.

3. Setting penalty notice amounts

The need for consistent and fair penalty notice amounts was raised as a priority by the Commission's inquiry. HPLS believes the PNOU would play a primary role in developing coherent policies behind the development of penalty notice amounts and applying these to the current penalty notice regime. It would also provide on-going monitoring to ensure penalty notice amounts continue to reflect these principles. As part of this role, the PNOU would also develop and monitor a system of concession rates and discounts applied to people in receipt of Centrelink benefits and low-income earners (see below).

4. Promoting the Work and Development Order scheme

HPLS's submission pointed to the need for an on-going 'champion' to promote the WDO scheme and encourage organisations to join the scheme. HPLS discussions with those experiencing homelessness continue to show support for the WDO system; however, many are unable to enter into a WDO because of a lack of approved organisations. The PNOU would become the WDO champion, promoting the scheme throughout NSW and assisting interested organisations with the process of becoming an approved organisation under the scheme. Given the likely overlap in membership, it would make sense for the existing WDO Monitoring Committee to be subsumed within the new Advisory Committee.

5. Overseeing the creation of offences enforced by penalty notices

As with setting penalty notice amounts, the PNOU would take the lead in reviewing and monitoring on an on-going basis the kinds of offences enforced by penalty notices or Criminal Infringement Notices (CINs).[4] Issuing agencies should be required to submit to the PNOU any proposed changes or additions to the list of offences enforced by way of penalty notice. While it is clearly within the purview of the legislature to create and enforce offences in any manner it thinks fit, debate within the Parliament should be informed by a report prepared by the PNEU regarding the desirability of any proposed law affecting the penalty notice system.

6. Conducting community education

There is currently a lack of awareness of an individual's rights/options once they have received a penalty notice. The PNOU could have responsibility for conducting community education on these options.

7. Development of training for issuing agencies

It is envisaged that the PNOU would play a central role in developing training for issuing agencies and enforcement officers on dealing with vulnerable and marginalised groups, such as those experiencing homelessness, mental illness, intellectual disability and young people.

Pegging penalty notice amounts

People receiving Centrelink benefits and those on low incomes have very limited financial resources and frequently experience extreme difficulty meeting essential living expenses. As a consequence, paying off even a single penalty notice is usually beyond their means. In view of this, HPLS has recommended that these groups of people have their penalty notice amounts proportionately reduced. The submission cited by way of example the "day fine" system in Finland, where penalty notice amounts are linked to a recipient's income. Other countries where similar systems operate include Sweden, Denmark, Croatia, Germany and Mexico.

As discussed with the Commission, HPLS is not advocating for penalty notice amounts to be increased for people on higher incomes (although this does occur in some jurisdictions). Rather, the proposal is for people on Centrelink benefits or on low incomes to have the amount shown on the penalty notice proportionately reduced.

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[4] HPLS has already made a submission on the problems associated with Criminal Infringement Notices. See Julie Hourigan Ruse, Considering the impact of CIN More broadly: response to the NSW Ombudsman's review of the impact of Criminal Infringement Notices in Aboriginal and Torres Strait Islander Communities (2009) Homeless Person's Legal Service and Public Interest Advocacy Centre.

Reflecting the relatively fixed income of people on Centrelink benefits, a flat concession rate should be applied where a penalty notice recipient provides their Centrelink Reference Number to the enforcement officer, issuing agency or SDRO. HPLS does not have any firm views on the quantum of the concession rate, except that it should be low enough to make it a realistic option for people to satisfy their debt in a single payment or reasonably quickly via modest instalments. HPLS strongly opposes time to pay arrangements that require recipients to enter into a repayment plan for 20 or more years. The PNOU could determine and monitor the concession rate as part of its function of setting penalty notice amounts.

In view of the fact that a minority of people experiencing homelessness are also employed and that many low-income earners struggle to pay off their debt to the SDRO, HPLS submits that the option of obtaining a discount not be limited to people on Centrelink benefits. As a matter of principle, and to avoid potential claims that Centrelink recipients receive favourable treatment at the expense of low-income earners (particularly working young people), it is desirable that a reduction in the amount owed be extended to this latter group. This is particularly important given the prevalence of negative attitudes towards people in receipt of Centrelink benefits.

The penalty notice recipient would prove their income to the SDRO by producing, for example, three recent pay slips, most recent payment summary, or most recent tax assessment. The scheme would involve the setting of a threshold income level, above which no discount would apply. Below this threshold income level, the amount would be reduced by reference to the person's income, with the rate of discount increasing as the person's income decreased, thereby reflecting the individual's capacity to pay. The maximum discounted amount payable should be the same or higher than the concession rate applied to people on Centrelink benefits. Again, HPLS has no firm view on where the discount would cut in or on the rate of the discount. This level of detail would be best left to the PNOU discussed above.

Special circumstances list

Since January 2008, the HPLS Solicitor Advocate has represented over 330 homeless clients charged with minor criminal offences. Many of these clients have multiple matters listed before various local courts throughout the Sydney metropolitan area. The charges often stem from, and exacerbate, an individual's problems associated with homelessness, mental health issues, drug and alcohol addiction, intellectual disability or cognitive impairment. As noted in the Consultation Paper, these same circumstances often also lead to an individual being drawn into the penalty notice system and accumulating large and unsustainable debts to the SDRO.

Finalising all of a client's criminal matters in a timely and appropriate manner is often a cumbersome process. The client may not be aware of all the matters they have or in which court they are listed, and this may result in a failure to attend and a warrant being issued for the client's arrest. Arriving at court also presents a challenge, especially if the client has no money to buy a train ticket (risking another penalty notice).

If the client has matters listed in various different courts, it will be up to the Solicitor Advocate to correspond with each local court registry to ask that the matters be re-listed on the same day at a single court. If the Solicitor Advocate does not have the time to do this or the registry does not

transfer the matters, multiple court appearances and duplication of submissions to the court will be necessary, further spreading and thereby thinning the Solicitor Advocate's resources.

Even where the client's criminal matters are satisfactorily resolved, the client may still have outstanding SDRO debts. Resolving these debts will require further intensive legal support from a different lawyer who will have to familiarise themselves with the client's circumstances and make representations to the issuing agency or the SDRO in order to have penalty notice reviewed, waived, annulled or reduced. This can take many months to be finalised.

When it comes to marginalised and vulnerable people, the processes involved in resolving both their criminal charges and penalty notice debts are inefficient and costly. The courts' time is tied up hearing multiple and largely similar submissions relating to the same individual. The police have to find defendants who fail appear at court, and of course may have on-going interactions with defendants in part stemming from their legal matters not being adequately and quickly resolved. The SDRO's resources must be directed to receiving and assessing multiple applications in relation to the same individual. The defendant will usually need two legal representatives to deal with criminal matters and penalty notice debts, respectively. Yet the submissions made regarding a person's special circumstances, such as homelessness and mental health issues, will be essentially the same.

Despite these significant resources, a successful outcome for the individual concerned is not assured, risking their further involvement in the criminal justice system and the accumulation of further penalty notices.

HPLS submits that the establishment of a 'special circumstances list' would cut through these inefficiencies and would produce a better and longer-lasting resolution for vulnerable individuals with criminal and SDRO debt matters. The detail of how such a list would operate is beyond the scope of this submission. However, some basic features are explored below.

While the special circumstances list would primarily deal with criminal matters, where the defendant elects, it could also deal with outstanding debts to the SDRO, including any unpaid court fines that have been referred to the SDRO for enforcement.

The list would *only* hear matters where there is a plea of guilty or where an application will be made under sections 32 or 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).[5] Contested hearings would remain in the criminal list. Similarly, SDRO debt matters would only be heard where the client is pleading guilty to the original penalty notice or CIN offence. The internal review process, annulment and court election should be used where the penalty notice or CIN offence is contested.

The first step in having a matter listed in a special circumstances list would involve the lawyer making a single application to the Department of Justice and Attorney General. The application would contain a declaration that the client is homeless, has a mental illness, intellectual disability or

[5] PIAC has already made a submission to the NSWLRC in relation to the operation of applications under ss 32 and 33 of the *Mental (Forensic Provisions) Act 1990* (NSW). See PIAC "Treatment and care rather than crime and punishment: Submission to the NSW Law Reform Commission Inquiry – People with cognitive and mental health impairments in the criminal justice system" (2010).

cognitive impairment and would contain a request to have all of the defendant's matters listed in the special circumstances list of a local court of the defendant's choice. It will be the lawyer's responsibility to provide the Department with the defendant's date of birth and any aliases, but the onus would be on the Department to find and consolidate all of the defendant's outstanding criminal matters in NSW. As is currently the case, the lawyer can easily discover the defendant's outstanding SDRO debts. The defendant would then have the option of electing to have these included with the criminal charges.

In relation to the defendant's debt to the SDRO, the kinds of orders the court could make include:

- withdrawing the original penalty notice and replacing it with a caution;
- letting the penalty notice stand with the original debt;
- letting the penalty notice stand with a reduced debt; or
- lifting driver's licence suspensions.

The main advantage of the special circumstances list is the opportunity to make a single set of submissions to the Magistrate regarding the defendant's circumstances in relation to all of their criminal matters and their SDRO debts. For the client this means most, if not all, of their outstanding criminal and SDRO debt matters would be resolved relatively quickly and with finality. It should be emphasised that this will also result in significant cost savings to the NSW Government because fewer police, court and SDRO resources are expended in resolving these matters.

Case study

The power to make an order re-instating a defendant's driver's licence is particularly important. Under section 66 of the *Fine Act 1996* (NSW), the Roads and Traffic Authority (RTA) must suspend the driver's licence of a fine defaulter even where the SDRO has granted an extension of time or allowed the fine to be paid by instalments. The HPLS Solicitor Advocate recently represented a client whose licence had been suspended due to unpaid penalty notice debts. The original suspension led to the client being unable to obtain a licence for five years.

While suspended, the client drove, was apprehended by police and charged under section 25 of the *Road Transport (Driver Licensing) Act 1998* (NSW). Because of the length of time the client had not held a driver's license, she faced a $3000 court fine or up to 18 months imprisonment. At the time, the client was on a suspended sentence for unrelated convictions.

Fortunately, the Magistrate took a practical approach by taking no action on the bond, which had been breached due to the new charges under section 25. He stood the case over until the client had come to an agreement with the SDRO to pay off the fines and as a consequence apply for her licence. Once she had obtained the licence, the Magistrate dismissed the charges under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

This kind of case would be a potential candidate for inclusion in the special circumstances list. Rather that the client or her lawyer having to negotiate separately with the SDRO and the RTA to repay the fine and obtain a driver's licence, the new charges plus the outstanding debt to the SDRO could be brought before the Magistrate for a single set of orders which dealt with the charge, the debt and the driver's licence.

Resourcing

The resourcing for the special circumstances list would include the creation of a criminal equivalent of the Legal Aid Commission's Homeless Outreach Solicitors. Alternatively, or in addition, community legal centres should be appropriately funded to employ full-time criminal solicitor advocates with the experience and expertise to represent vulnerable and marginalised clients. As referred to above, it is envisaged that the establishment of a special circumstances list will result in significant savings to the NSW Government due to a reduction in expenditure by police, the courts and the SDRO. HPLS submits that the costs associated with creating new solicitor positions would be small compared to these savings.

Mandatory issuance of official cautions

HPLS is concerned that enforcement officers are failing to utilise the new caution provisions in the *Fines Act 1996* (NSW), particularly in circumstances where the recipient is homeless, has a mental illness, intellectual disability or cognitive impairment.

Although high quality training in how to recognise and interact with these groups of people will assist enforcement officers in identifying when a caution instead of a penalty notice should be issued, there will continue to be borderline situations where it is not readily apparent that a person is homeless or has a mental illness, intellectual disability or cognitive impairment. As a consequence, the enforcement officer may take a cautious approach and decide to issue a penalty notice rather than an official caution. Unfortunately, there will also be situations where enforcement officers will be intent on issuing multiple penalty notices to vulnerable people despite clear evidence that an official caution is appropriate.

Ironically, the existence of the process of internal review, which is in part designed to prevent these groups of people from becoming entangled in the penalty notice system, may act as a disincentive for enforcement officers to issue official cautions, because they know that any penalty notice they have issued incorrectly can, in theory, be withdrawn at a later date.

Yet a person who is homeless or has a mental illness, intellectual disability or cognitive impairment is less likely than other people to be aware of, or have the resources to pursue, their right to internal review within the time allowed before the penalty notices are referred to the SDRO for enforcement. It is usually only with intensive legal support, which may not be available due to scarce resources in the community legal sector, that a recipient in these circumstances will be able to make an application for internal review.

It is for these reasons that HPLS recommends that official cautions be mandatory where the enforcement officer has reasonable grounds to believe that a person:

- is homeless;
- has an intellectual disability;
- has a mental illness; or
- has a cognitive impairment.

In order to comply as closely as possible with the requirement to issue a caution in the above circumstances, enforcement officers should adopt a liberal approach to issuing official cautions. If subsequent investigation by the enforcement officer or the issuing agency reveals that the recipient

of the official caution was not in fact homeless or did not have an intellectual disability, mental illness or cognitive impairment, the official caution may be withdrawn and a penalty notice issued in its place. This seems a fair approach as the issuing agency has far greater resources than a penalty notice recipient to investigate mistakes and later have them corrected.

Flagging system for vulnerable people

HPLS's submission expressed concerns about the SDRO developing a list of people with mental illness or cognitive impairment on the basis of potential privacy breaches. HPLS recommends the Commission examine the operation of Centrelink's 'homeless indicator' as an example of a system that effectively enables identification of vulnerable clients whilst ensuring individual privacy.

The indicator is used by Centrelink to identify customers who are homeless or at risk of homelessness across all payment types so they can be better assisted. The 'flag' appears whenever a customer service representative (CSR) accesses a file of the client who has previously been identified as vulnerable to homelessness (or someone who is currently homeless). It instructs the CSR about the need to actively follow that customer up, generally by a Centrelink social worker, to ensure that they are receiving the support they need and are able to meet any obligations arising from their income support payment. It will also enable flexibility in Centrelink's business practices to ensure the needs of vulnerable clients are better met.

Unlike the proposed SDRO 'list', the Centrelink flag is not generally accessible and can only be used when a CSR accesses a particular customer's file.

HPLS was pleased to share with the Commission its contacts within Centrelink that will assist in providing further detail on the administration and functions of the homeless indicator.

Appendix A

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC receives funding from Industry & Investment NSW for its work on energy and water, and from Allens Arthur Robinson for the Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The Public Interest Law Clearing House

The Public Interest Law Clearing House (PILCH) NSW was established in 1992 by the Law Society of New South Wales, the Public Interest Advocacy Centre and the private legal profession to respond to the growing incidence of unmet legal needs within the community. Underlying the establishment of PILCH is the commitment from lawyers that the provision of legal services on a *pro bono publico* ('for the public good') basis is intrinsic to legal professional responsibility.

The aims of PILCH are:

- to identify matters of public interest that warrant legal assistance *pro bono publico*;
- to identify the legal needs of non-profit organisations;
- to match disadvantaged and under-represented individuals, groups and non-profit organisations with a need for otherwise unavailable legal assistance with PILCH member firms and barristers;
- to utilise the diverse skills and resources of lawyers in a broad range of public interest matters;
- to expand the participation of private practitioners in the law reform process;

- to seek the integration of *pro bono* work with legal practice;
- to encourage co-operation between private practitioners and public interest lawyers; and
- to establish/coordinate public interest projects which seek systemic reform.

PILCH provides services to community organisations and individuals for free. It is a membership-based organisation with members including small, medium and large private law firms, corporate law departments, individual barristers, barristers' chambers, law schools, accounting firms, Legal Aid NSW, the Law Society of NSW, the NSW Bar Association, and PIAC.