

POLICE PORTFOLIO SUBMISSION

to the

NSW LAW REFORM COMMISSION'S CONSULTATION PAPER ON PENALTY NOTICES

The comments in this submission do not address each of the questions posed in the Consultation Paper, but are grouped by Chapter.

Chapter 1

There is no particular view on the creation of a "Penalty Notices Act" or similar, or on the use of the terminology "penalty notice" versus "infringement notice".

Chapter 2

The need for an oversight body to regulate penalty notices is not clearly demonstrated. All legislation is already subject to scrutiny by Parliament.

Creation of such a body would involve significant cost and resources, with little evidence of its potential effectiveness, or that the benefits would outweigh the costs.

Depending on the level of oversight, there may be a significant resource impost on the NSW Police Force and additional record keeping requirements that will divert police from core functions.

Chapter 3

The broad criteria suggested for identification of appropriate offences appears reasonable.

The NSW Police Force considers that there is still value in retaining penalty notice offences for matters other than "strict liability" offences.

The concerns that are raised in the Consultation Paper against issuance of penalty notices in cases requiring "judgment" are really issues relating to the level of skill and training of the issuing officer. It is noted that while the Paper does not discuss such issues, police officers are substantially better trained than other officers who are authorised to issue penalty notices.

The capacity to issue a penalty notice for offences where imprisonment is a possible court imposed penalty should not be removed (for example, for larceny

less than \$300). To remove the ability to issue penalty notices for such offences would again place many of these lower level offences back before the courts

Chapter 4

There may be merit in supporting the introduction of a standard maximum penalty amount, such as that which applies in Victoria. Equally, there appears to be good reason to allow a penalty amount above this level in appropriate cases.

The Victorian principle of setting the penalty notice amount as a "lesser proportion" (eg 25%) of the maximum penalty a court could impose is preferred to a principle that the penalty notice amount be "considerably lower" than the penalty a court would impose. The latter approach is not preferred as it is likely to remove the deterrence effect of the penalty.

Penalties should be set based on the objective seriousness of the offence.

Chapter 5

The Paper raises no specific concerns regarding the issuing of cautions by the NSW Police Force. It is considered that current NSW Police Force guidelines and practices are sufficient at present.

There is merit in limiting the number of penalty notices capable of being issued on one occasion (eg four, given the context of traffic matters).

The Police Portfolio opposes the suggestion that more information should be contained on penalty notice forms. This has previously been considered, and would create significant administrative, practical and operational difficulties for police.

The Police Portfolio also opposes the suggestion that information on Criminal Infringement Notices (CINs) should not be appended to court records for sentencing purposes.

This issue has specifically been considered by the Ombudsman, and by Cabinet and Government in the past. The Government's policy is that courts may receive information on CINs for sentencing purposes and this is strongly endorsed by the Police Portfolio.

Chapter 6

There appears to be some confusion in the Paper regarding the powers of police to issue cautions.

Every police officer has the option at common law to issue a caution, and there is no limitation on this power in terms of young people. Police officers are exempt from the Attorney's recently introduced cautioning guidelines, in part for this reason.

The NSW Police Force is of the view that it is appropriate to continue to deal with young traffic offenders through the 'adult' system at Local Courts.

Chapter 7

People with a cognitive impairment or who are mentally ill may have difficulty in understanding the nature of the offence or be highly visible in the community. However, there are some situations where the issuing of a penalty notice to such persons would be warranted.

Police use their discretion in these circumstances to determine what is appropriate on a case by case basis. Police may use their discretion to issue a caution rather than a penalty notice. NSW Police Force procedures include guidance on indicators that a person may have impaired intellectual functioning. The NSW Police Force also provides regular training to officers on cognitive disability and mental health.

Police also have discretionary powers under the Mental Health Act that enable the diversion of criminal charges for mentally ill and mentally disturbed persons.

The NSW Police Force does not support establishment of a 'do not fine' register for such vulnerable people. A register could breach the privacy of the person; many would not wish to be included on such a register, or not understand it; and a register would compromise police discretion in issuing penalty notices.

Chapter 8

There is no opposition to the introduction of formal principles for determining the suitability of an offence for issue of a Criminal Infringement Notice (CIN). However, the difficulty would be agreeing a suitable set of principles in view of the number of competing interests.

With regard to the Ombudsman's 2009 Report on CINs and Aboriginal communities, the NSW Police Force has contributed its views to a Government response to the Report's recommendations.

The Paper discusses fears about "net widening" with regard to CINs. However, the Ombudsman's 2009 Report observed that there is no reliable evidence of "net widening" and declined to make a recommendation in respect of "net widening".

The Police Portfolio continues to strongly oppose the inclusion of police in the introduction of "official cautioning". Police already have powers to issue and record cautions by common law and statute, and are extensively trained. Introduction of "official cautions" for CINs matters would fetter police discretion and would have significant potential administrative impost and costs.

The Police Portfolio strongly supports retention of the offences of 'offensive language' and 'offensive behaviour' as part of the CINs scheme. The advantages of including these offences in the scheme, which were recognised by the Ombudsman's Report, outweigh any perceived disadvantage.

There are grounds to support issuance of CINs to persons with a cognitive impairment or mental illness. As a matter of equity, such persons should not be

deprived of the penalty notice option due to their disability, when the alternative is that they would be formally issued with a Court Attendance Notice.

The Police Portfolio considers CINs to be criminal matters, and therefore representations regarding withdrawal are addressed in the same administrative manner as representations in any other criminal case. Representations for withdrawal are reviewed by the issuing officer as well as a senior officer, who can take into consideration discretionary factors including mental illness, cognitive impairment or vulnerability generally.