HOLROYD CITY COUNCIL SUBMISSION TO
NSW LAW REFORM COMMISSION
CONSULTATION PAPER 10:- PENALTY NOTICES

Chapter 1 - Introduction

1.1 Should there be a stand alone statute dealing with penalty notices?

Yes. While the current system in NSW seems relatively simple and straightforward, discussion contained in the supplied consultation paper and in other forums indicates difficulties arise when enforcing exceptionally minor offences or rarely used provisions as well as the appropriateness of using alternatives to a penalty notice. The disadvantaged, young or over represented sections of our communities require special considerations. A more detailed examination also reveals the anomaly of significantly different penalty amounts for strikingly similar offences, as well as the net widening effect for "new" penalty notice offences.

It is possible and indeed reasonable for various law enforcement agencies responsible for the detection and prosecution of offences prescribed in legislation, to have underpinning input into a raft of associated issues. These issues include determining which offences are to be included in the penalty notice system, the penalty amount and the development of guidelines impacting on the use of alternatives to a penalty notice, discretionary powers, zero tolerance regimes and "continuing offences" issues.

This approach is a foundation cause of the procedural inconsistencies and penalty anomalies outlined in the discussion paper.

The establishment of a stand alone statute would have distinct advantages for both the general public by way of transparency and common purpose and the government through procedural consistency, the implementation of common penalties for similar offences as well as a policy guide for the aforementioned law enforcement agencies to assist in keeping legislation current and relevant.

1.2 Should the term "penalty notice" be changed to "infringement notice"?

Yes. In general use the word penalty refers to "a punishment imposed or incurred for a violation of law or rule" and infringement "a breach or infraction, as of a law, right, or obligation; violation; transgression."

A penalty is a consequence resulting from certain acts or omissions. The current name of our instrument is "General Penalty Notice." This very name highlights the punitive measures and does not adequately address behaviours resulting in such outcomes. If we

truly wish to reduce the incidence of illegal behaviour then a wider public understanding of the impacts of illegal behaviour is paramount.

Naming the instrument an "Infringement Notice" (as has previously been the case) will draw focus upon the behavioural aspects of the offence rather than just the punitive measures resulting from that behaviour.

With approximately 7,000 penalty notice offence categories in existence it can be difficult for the public to understand why a behaviour restriction has been introduced through legislation. The implementation of a name change can focus the attention of those individuals who find themselves within the "infringement system" on the "why" of the legislation (behaviour restriction) and not just the penalty and methods of having the matter dealt with in a manner satisfactory to both parties.

Chapter 2 - Guiding and overseeing the penalty notice system

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

Yes. A perusal of the Appendix A (p161 – 163) of the consultation paper indicates in excess of 100 Acts with statutory provisions under which penalty notices may be issued. Appendix B (p164) lists, among other organisations, ten (10) NSW Government Departments who have already prepared preliminary submissions. The enforcement of approximately 7,000 penalty notice offences within N.S.W is not limited to those departments who have had an opportunity to submit preliminary submissions. A cursory inspection of those Acts indicates at least another 30 Government Agencies who are responsible for the administration of those acts.

Not withstanding provisions contained within the Subordinate Legislation Act 1989 as well as the Better Regulation Principles outlined in the NSW Department of Premier and Cabinet (p20, para 2.14) and the initiative shown by the joint Legislation Review Committee set up under the Legislation Review Act 1987 (p21, para 2.17), the sheer volume of penalty notice offences coupled with the significant number of agencies involved in their enforcement calls for the development and implementation of relevant principles for the assessment of offences which may by enforced by way of penalty notice.

2.2 Should there be a central body in NSW to oversee and monitor the penalty notice regime as a whole? If so, should it be:

(1) the Attorney General and the Department of Justice; or
(2) a stand-alone body; or
(3) a Parliamentary Committee?

Yes. The overarching recommendations of the New Zealand Law Commission, specifically the adoption of guidelines and the need for government oversight (p24, para 2.30) have merit.

The Victorian Infringements Act 2006, specifically the introduction of a central oversight body, the "Infringement Systems Oversight Unit" (ISOU) (p25, para 2.32-33) seems to have addressed many of the issues raised in the consultation paper.

After perusal of the options to reform discussion (p28-29), option 1 (The Attorney General and Department of Justice and Attorney General) is appealing and perhaps the most cost effective. Such an option crystallises the "behind the scenes service" this department gives to government.

Option 2 (A stand Alone Body) indicates that if the stand alone body was linked to the infringement enforcement system (as is the Victorian system) then the body would be under the administration of the Treasurer. The option of a stand alone body under the Attorney General is appealing however the collection and enforcement role can remain under the current administration of the SDRO.

Option 3 (Parliamentary Legislation Committee) is the least attractive however existing legalisation reform safeguards such as those previously mentioned (Subordinate Legislation Act 1989, Better Regulation Principles outlined in the NSW Department of Premier and Cabinet, Legislation Review Committee under the Legislation Review Act 1987) should also remain in place ensuring guidelines and principles developed through this consultative process can be applied at both the beginning and end of the legislative process. A similar assurance occurs in most successful "quality systems" in the commercial sector.

A combination of Option 1 & 2 is the most appealing.

All mechanisms associated with stakeholder consultation, the drafting, making, reviewing, enforcing and consistency of legislation appropriate to the ambit of this review, should remain with Attorney General and the Department of Justice and Attorney General.

The role of the SDRO should remain under the administration of the Treasurer in its current or similar form.

To encapsulate our position;

The Attorney General and Department of Justice and Attorney General are responsible for administrating all relevant processes with regard to the infringement system **before** an infringement notice is issued.

The SDRO remain responsible for collection and collection enforcement, including alternate measures discussed in chapter 5 of the consultation paper, **after** the Infringement Notice has been served.

2.3 What resourcing is required to effectively oversee the operation of the penalty notice regime?

No substantial comment is made.

2.4 Should there be a provision for annual reporting to Parliament on the number and type of penalty notices issued and any other relevant data? If so, who should be responsible for this?

Yes. The SDRO currently collects, collates and disseminates this data. This process is in line with our position as outlined.

Chapter 3 - Determining penalty notice offences

3.1 (1) Should penalty notices be used only for offences where it is easy and practical for issuing officers to apply the law and assess whether the offence has been committed?

Yes. Issuing penalty notices often hinges on the ease and practicality of determining what offence has been committed and the physical method of bringing the offender/s to justice.

(2) If so, should this principle mean that penalty notices should only apply to strict and absolute liability offences, or should they also apply to offences that contain a fault element and/or defences?

No. The penalty notice scheme is of enormous value to the community in terms of cost savings through reduced incidence of process serving, arrests and subsequent duty of care provisions and a significant reduction in time taken to process matters through the courts. To issue penalty notices for strict and absolute liability offences alone would be cost prohibitive when the "greater public good" is used as the benchmark for such considerations.

3.2 If penalty notices apply more broadly to offences with a fault element and/or defences, what additional conditions should apply? Should the conditions include any of those found in the Victorian Attorney-General's Guidelines to the Infringement Act 2006, for example:

(1) specially-trained enforcement officers;
(2) a requirement for operational guidelines; and
(3) a requirement to consider warnings or cautions?

Yes. The current Australian Qualifications Framework (AQF) is specifically designed to map necessary vocational competencies to operational requirements. Cert IV, Diploma or Degree qualifications with core competencies enabling essential knowledge of facts relating to the commission of offences can be developed through industry consultation co-ordinated by the NSW Vocational Education Training and Accreditation Board (VETAB).

To support this assertion we indicate examples of Council Environmental Health Officers issuing penalty notices for water pollution under the Protection of the Environment Operations Act 1997. These officers require significant and specific water testing skills/experience/qualification as compared to a parking officer identifying a no stopping offence on a public street.

Appropriate education/training and experience will allow for more accurate interpretation of legal terms and binding decision by court of superior record and enhance the enforcement officers' application of that knowledge in the field.

3.3 Should penalty notices be used when an offence includes an element that requires judgment about community standards, for example "offensiveness"?

Yes. However we also take into consideration the fact that community standards are continually changing. The best forum to test community standards is in a court of law. Acknowledgement of this fact by enforcement agencies requires on-going accreditation and training for officers issuing such penalty notices so that changes in community standards, as expressed through the courts, can be taken into consideration in the field.

An accreditation system not unlike those employed under the Occupational Health & Safety industry (current first aid) could well be utilised. Similarly an accreditation points system, such as those used in various professional fields could be introduced.

Training costs to agencies would be more than offset by income derived through payment of penalty notices.

Such a practice may well enhance community perception of consistency and transparency whilst decreasing court hearings and negative perceptions of revenue raising.

3.4 Should the concept of "minor offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "minor offence" be defined?

Yes. A minor offence could be defined as an offence where the level of harm (actual not potential) is comparatively minor. One specific example is the 3 tier penalty system within the Protection of the Environment Operations Act 1997. Should an offender under

this act pollute waters occasioning no demonstrable harm (such as a fish kill) then the offence would be classified as a tier 3 offence and dealt with by way of a penalty notice.

Should demonstrated harm occur through a negligent act, then it would be a tier two offence dealt with by way of a Court Attendance Notice. Aggravated or wilful offences or offences causing significant or large scale harm are classified as tier one offences and are also dealt with by way of a Court Attendance Notice.

3.5 Are there any circumstances under which an offence involving a victim of violence could be a penalty notice offence?

No. Offences involving violence need a larger deterrent that a monetary penalty alone. The payment of a penalty notice caries no conviction or admission of guilt. Violent offenders should be dealt with through the court system.

3.6 Should the concept of "low penalty" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "low penalty" be defined?

\Yes. Offences where a penalty notice may be issued should have a comparatively low court imposed maximum fine.

3.7 Should offences with imprisonment as a possible court imposed penalty be considered for treatment as penalty notice offences? If so, under what circumstances?

No. Whilst there currently exists over 400 offences enforceable by penalty notice where a term of imprisonment can be imposed by a court, we believe imprisonment is reserved for more serious crime and as such should fall outside of the ambit of penalty notice offences

3.8 Should "high volume offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "high volume offence" be defined?

No. Whilst the penalty notice scheme was originally introduced to clear courts of relatively minor and high volume matters, the growth of the scheme enveloped many offences that are relatively low volume in occurrence but otherwise fit wholly within the scheme. The option to issue a penalty notice for these offences should remain.

Statistics highlighting offences for which there has not been a penalty notice issued (or a low number of notices issued) do not indicate those offences have not been committed, only that those persons committing such offences have not been brought to justice or the offence not reported.

3.9 Should the concept "regulatory offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "regulatory offence" be defined?

No. Offences are already classified under the Crimes Legislation Amendment Act 1999.

The term Infringement Notice Offence could be used instead of the term regulatory offence. The uses of the term regulatory offence could cause confusion when offences prescribed under regulations to primary legislated are enforced.

3.10 Is it appropriate to issue multiple penalty notices in relation to conduct that amounts to a continuing offence? If not, how should the penalty notice amount be determined for continuing offences?

Yes. There are many examples of offenders committing continuing offences as a result of the belief that the penalty is "affordable" (no deterrent) or deemed "a cost of doing business" (cost passed on).

In these circumstances it is appropriate to issue multiple penalties notices of increasing amounts but only where it is specifically outlined in legislation (regulations). There are many offences apart from those described on page 48 of the consultation paper where amendment to regulations allowing for the issue of multiple penalty notices in increasing amounts would be appropriate.

One such example is the offence of "stop heavy/long vehicle on road in built up area longer than 1 hour" under the Road Rules 2008 (Reg 200). This offence carries a maximum fine of $2,200 and a penalty notice amount of $86. There are many examples of heavy/long vehicle owners committing a continuing offence by leaving their vehicle on the road for weeks on end, obviously passing the cost of penalty notices on to their clients.

3.11 Are there principles other than those outlined in Questions 3.1-3.10 that should be adopted for the purpose of setting penalty notice amounts?

Our experience indicates that offences of high volume often occur which cause a cumulative harm.

One specific example is where an owner/driver of a heavy vehicle commits the offence described in 3.12 above on a daily basis, eventually causing extensive road damage which is expensive to repair. This Councils schedule of charges for restoration to residential streets is $340 per square metre. Councils will initially bear the brunt of this cost and may recover those costs through increased rates and charges or a decrease in supply of other services to the community.

Amending regulations to allow for increasing penalty notice amounts up to 50% of the court imposed maximum fine for each offence committed within a certain time frame (perhaps 28 days) would be appropriate where multiple contraventions cause a cumulative harm.

Reparations can also be sought through the civil courts however one of the main objectives of the penalty notice scheme is to clear courts of matters where it is reasonable to have those matters dealt with in an alternate fashion.

Chapter 4 - Determining penalty notice amounts

4.1 Should principles be established to guide the setting of penalty notice amounts and their adjustment over time?

Yes. Overarching principles including but not limited to the questions below should indeed be established. The New Zealand model (p54-55) has merit and could be used as a framework to be expanded after appropriate consultation.

4.2 Should a maximum be set for penalty notice amounts? If so:

Yes. Primary legislation provides for a maximum penalty. Different legislation provides for different maximum penalties depending upon the offence committed and the harms sought to be reduced.

For example; a tier one offence under the Protection of the Environment Operations Act 1997 provides for maximum corporation penalties of $5million and $1 million for an individual compared to the Road Rules 2008 where a maximum penalty of $2,200 is rarely exceeded.

The difference is obviously a result of the comparative seriousness of the offence with regard to actual and potential harm. Having regard to this fact the setting an identical prescribed maximum value across all penalty notices is problematic.

(1) What should the maximum be?

A percentage of the maximum court imposed fine for each prescribed penalty notice offence should be set in order to take into consideration variations in primary legislation and the differing seriousness of offences.

(2) Should the maximum be exceeded in some cases? If so:

(a) On what grounds (eg the need to deter offending)?

(b) Should the public interest be among the grounds? If so, how should it be defined or characterised?

Yes. As mentioned in our response to questions 3.10 and 3.11 above, in order to maintain a deterrent, especially with regard to continuing offences and high volume offences causing a cumulative harm to the public, we feel amendments to some primary legislation regulations need to be made.

(3) Should the maximum be different for individuals and corporations?

Yes. Maximum penalties for corporation should indeed be higher than for individuals due to general acknowledgement those corporations are more able to develop and employ ethical and legal practices through due diligence processes. Corporations are also more likely to financially benefit from illegal practices and are perhaps therefore more likely to commit such offences to gain advantage.

4.3 Should there be a principle that the penalty amount should be set at a level that would deter offending, but be considerably lower than the penalty a court would impose?

Yes however the adoption of any such principle is problematic with regard to quantifying an amount using a subjective process. How do we measure the deterrent effect? One possible solution is to request the NSW Bureau of Crime Statistics map upward or downward trends in identified high volume offences against increases in penalty notice amounts.

4.4 (1) Should there be a principle that a penalty notice amount should not exceed a certain percentage of the maximum fine for the offence? If so, what should be the percentage?

(2) Should a principle allow the fixing of penalty notice amounts beyond the recommended percentage in special cases? If so, what should the grounds be?

(3) Should there be an upper percentage limit in those special cases? If so, what should this percentage be?

Yes. In general terms a figure between 20 – 25% would be reasonable however in circumstances described in 3.11 and 4.2 (a) & (b) above this should increase to a figure no greater than 50% of the maximum set under primary legislation.

4.5 Should there be a principle that a penalty notice amount should be lower than the average of any fines previously imposed by the courts for the same or a similar offence, if such information is available?

No. Our experience indicates that where an individual elects to have a penalty notice matter heard in court, and the offence proved, the court usually imposes a fine identical

or similar (rounded up or down) to the value of the original penalty notices. Court costs are then usually awarded against the offending party.

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?

Yes. Any discussion involving the relative seriousness of an offence often turns upon the notions of actual and potential harm.

Offence deterrence hinges on the risk versus reward equation. A principle of penalty rationalisation taking into account the potential financial gain of offenders contravening primary legislation regulations, such as false representation by a real estate agent who risks a fine of $2,200 compared to a significant sales commission (P65 para 4.44), needs to be implemented in order to maintain the deterrent factor inherent in the penalty notice scheme.

4.7 Should there be a principle that in setting a penalty notice amount, consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences?

Yes. As discussed in 4.6 above, a similar principle of rationalising penalty notice amounts with regard to consistency of penalties for similar or identical offences is required.

However the primary principle being "the proportionality of the amount to the nature and seriousness of the offence, including the harms sought to be prevented" must endure.

4.8 Should there be a principle that for offences that can be committed by both natural and corporate persons, higher penalty notice amounts should apply to corporations? If so, what should be the guidelines for setting such amounts?

As discussed in 4.2(3) above we agree corporations need to have significantly increased penalties as compared to an individual.

4.9 Are there principles other than those outlined in Questions 4.1-4.8 that should be adopted for the purpose of setting penalty notice amounts?

The principle that any department/agency seeking reparations for harm (such as damage to roadways) in the civil courts cannot use the payment of a penalty notices issued for a high volume offences (causing cumulative harm) as an admission of liability.

Chapter 5 - Issuing and enforcing penalty notices – practice and procedure

5.1 Taking into account the recent reforms, is there sufficient guidance on:

(1) when to issue penalty notices; and

(2) the alternatives available?

Yes. Recent reforms including the Fines Further Amendment Act 2008 resulting from a report prepared by the NSW sentencing Council (p77) highlight the need for statutory guidance with regard to official cautions, guidelines as to determination of when to issue a caution or penalty notice, the establishment of internal review processes proceeding withdrawal of a penalty notice and the need to account for the disadvantaged.

Our experience indicates flow on training for field officers needs to be rolled out across a wide range of adult learning principles to ensure these reforms are implemented and measured.

5.2 (1) Should government agencies (including statutory authorities) responsible for enforcing penalty notice offences be able to engage the services of private organisations to issue penalty notices? If so, what should be the requirements?

(2) Is there any evidence of problems with the use of contractors for the purpose of enforcing penalty notice offences?

There are many current examples of government agencies out sourcing enforcement services to private organisations. In general, this type of business model has been successful where it has be limited to enforcement within well defined precincts such as those controlled by the Sydney Harbour Foreshore Authority, The Sydney Cricket Ground Trust as well as various university campuses.

We foresee inherent pubic perception problems should such arrangements be included for high volume parking and speeding offences, where significant areas of the state (not just defined precincts) are patrolled by private contractors.

Self interest contracts containing performance indicators measuring success as a ratio of penalty notices issued per unit per day are not in the public interest.

5.3 (1) Should a limit be placed 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?

(2) If so, should this be prescribed in legislation, either in the Fines Act 1996 (NSW) or in the parent statute under which the offence is created, or should it be framed as a guideline and ultimately left to the discretion of the issuing officer?

Examples of multiple penalty notices issued for differing offences but occurring within a close time nexus are many. Organisations arguing that this behaviour is unfair (p84) have some merit however the discretion of the field officer allows for movement in both directions i.e. multiple notices or just one notice for the most serious offence of a number of offences committed at the same time.

Common practice for field officers exercising their discretionary powers is to take into consideration the contrition displayed by some offender as opposed to the sometimes vitriolic abuse and non contrite behaviour displayed by other offenders.

The stance of the Office of Fair Trading, through their penalty guidelines, in setting a maximum number of penalty notices issued resulting from a single inspection (p84 para 5.30) has merit.

The principle of including penalty guidelines under primary legislation regulation should be adopted. Each agency responsible for the administration of that legislation will then have ample opportunity to set guidelines having regard to their circumstance.

5.4 Should the power to withdraw a penalty notice only be available in limited circumstances on specific policy grounds? What should those grounds be?

Yes. Agencies should have the power to withdraw a notice but only on specific policy grounds. Grounds such as those outlined in the Water Management Act 2000 providing for withdrawal of a penalty notice within 28 days should the offending behaviour be more serious than discovered at first assessment (p85-86 para 5.34) could be imported into other primary statute regulation.

Experience dictates that allowing for the withdrawal of a penalty notice for reasons other than those expressly expressed in policy (or indeed contained within future overarching legislation) opens the door for inconsistent decision making. This in turn is can mask corrupt behaviours or at the very least be the catalyst for perception of corrupt behaviour.

5.5 Are current procedural provisions relating to how a penalty notice is to be served on an alleged offender, contained in each relevant parent statute, adequate?

Stipulation on the method of service of penalty notices is non existent in the Fines Act 1996. The Infringements Act 2006 (Vic) allows for statutory service methods and timeframes.

Any future overarching statute dealing with infringement notices should include similar provisions.

5.6 Is it feasible to require the State Debt Recovery Office or the issuing agency to confirm service of the penalty notice or subsequent correspondence?

No. Deeming provisions regarding service should be used in order to eliminate the use of the "I didn't receive the notice" type of excuse, as well a decreased potential for an unmanageable paper trail due to the exceptionally large number of penalty notices issued.

5.7 (1) Should the Fines Act 1996 (NSW) prescribe a period of time within which a penalty notice is to be served after the commission of the alleged offence? If so, what should the time limit be?

The current statute of limitations calls for information to be laid before the expiration of 6 or 12 months (whichever is applicable). However their seems to be no statute requiring the method or timeframe for service of the penalty notice. The Fines Act 1996 requires a reminder notice to be served by post and deems that service to have taken place 14 days after the date of the penalty reminder notice.

Common Law principles dictate that an offender is to be told the true reason for their arrest at the first reasonable opportunity to do so. It can be argued this principle be extended to all enforcement processes and as such it is reasonable for enforcement agencies to serve offenders with a penalty notice within a reasonable time frame after the commission of an offence. A 28 day period seems reasonable.

(2) If the penalty notice is served after this time has elapsed, should the Act provide that the penalty notice is invalid?

Yes. It is incumbent upon enforcement agencies to always ensure due process is commenced prior to statutory limitations being invoked.

5.8 If it is inappropriate to prescribe a time limit in legislation, should agencies be required to formulate guidelines governing the time period in which a penalty notice should be served?

Not applicable with regard to response in 5.7 above.

5.9 (1) What details should a penalty notice contain?

(2) Should these details be legislatively required? If so, should the Fines Act 1996 (NSW) be amended to outline the form that penalty notices should take, or is this more appropriately dealt with by the legislation under which the penalty notice offence is created?

The current General Penalty Notice must contain the essential proofs of the offence and enough information for the offender to reasonably understand why the notice has been issued. An area on the notice for a description of the offence, including any relevant and admissible conversations, should continue to enable ease of contemporaneous notation.

It must also contain enough information for the recipient to reasonably understand what is required to finalise the matter.

Incorpoating the generic form a penalty notice must take into overarching legislation is a commonsense approach to ensure standardisation and general understanding.

5.10 Are the recent amendments to the Fines Act 1996 (NSW) relating to internal review of penalty notices working effectively?

Council has in practice a review procedure as prescribed by the Fines Act 1996 s 24J which states;

"A reviewing agency may enter into arrangements with another person or body under which the functions of the agency under this Division are exercised by that person or body on behalf of the agency."

As such council's review procedure is in line with council's status as a premium level client of the SDRO. Recent amendments are effective.

5.11 (1) Should a period longer than 21 days from the time a penalty notice is first issued be allowed to pay the penalty amount?

(2) Can the time-to-pay system be improved?

Provisions allowing alternate methods of satisfying a penalty notice are currently in place and the Subordinate Legislation Act 1989 ensures timely reviews are conducted.

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

See comment above.

5.13 Should information about penalty notice history be provided to courts for the purpose of determining sentence for any offence?

The principle allowing for zero liability or admission of guilt being apportioned to those individuals or corporations paying a penalty notice precludes the use of penalty notice history as a sentencing tool.

5.14 Are there other issues relating to the consequences of payment of the penalty notice amount?

No substantial comment is made.

Chapter 6 - Impact on children and young people

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

Yes. Generally, a penalty notice should be issued to person who has committed an offence. However the current provisions for disposal of matters in alternate forms prescribed in the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987 should be the guiding instruments. In particular the following principles contained in the Children (Criminal Proceedings) Act 1987 relating to excersing function under that act are paramount. They are;

"(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim."

No child under the age of 10 can be issued with a penalty notice. We would suggest that owning to a child's general state of immaturity and dependency, any child between the ages of 10 and 14 should be dealt with by way of alternate process such as a Warning, Caution or by Youth Justice Conference.

Children over the age of 16 can be issued with a penalty notice or have the matter dealt with by way of a Warning, Caution, or Youth Justice Conference at the discretion of the field officer.

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

No. See response immediately above.

6.2 Are there practical alternatives to penalty notices for children and young people?

Yes. See 6.1 above.

6.3 Should parents be made liable for the penalty notice amounts incurred by children and young people?

No. Provisions for alternate measures involve parents/guardians. We argue it is preferable to work with adults whom have responsibility for children who offend, in an attempt to maintain adequate guidance and assistance rather than take punitive measures against parents/guardians.

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?

Yes. See response to 6.1 above.

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?

Yes. See response to 6.1 above.

(2) Should some of the diversionary options under Young Offenders Act 1997 (NSW) apply and, if so, which ones?

Yes. See response to 6.1 above.

(3) For which penalty notice offences should these diversionary options apply?

All field officers should have the discretionary power to use alternate or diversionary options when dealing with children who have committed **any** penalty notice offence.

6.6 (1) Should a lower penalty notice amount apply to children and young people? If so, should this be achieved by providing that:

(a) penalty notice amounts are reduced by a set percentage when the offence is committed by a child or young person; or

(b) the penalty notice amount could be set at a fixed sum, regardless of the offence; or

(c) a maximum penalty notice amount is established for children and young people?

(2) What would be an appropriate percentage reduction or an appropriate maximum amount?

No. Field officers should be encouraged to use alternate or diversionary measures. We have previously suggested only children over the age of 16 can be issued with a penalty notice and as such they also have the same rights as an adult to use existing alternate methods such as time to pay, write offs and work orders, to have the matter finalised.

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?

Yes. Principles outlined in the Children (Criminal Proceedings) Act 1987 dictate a child has "rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them."

6.8 Should a cap be put on the number of penalty notices, or the total penalty notice amount, a child or young person can be given:

(1) for a single incident; and/or

(2) in a given time period?

We argue the discretionary powers of a field officer should not be significantly diluted by statute as in our repose to 5.3 above. We have also suggested that only children above the age of 16 be issued with penalty notices and we also refer to our consistent responses above (6.1, 6.5, 6.5 & 6.7).

6.9 Should driver licence sanctions be used generally in relation to offenders below the age of 18 years?

Yes. Our stance in only issuing persons over the age of 16 with penalty notices allows that person to apply for alternate provision such as time to pay. Their unique financial position as a young person should be taken into account with extended time to pay provisions developed for this circumstance. However, should all avenues be eventually exhausted and the penalty not finalised then licence and vehicle registration sanctions are appropriate.

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

Yes. See response above.

6.11 Should a young person in receipt of penalty notices for both traffic and non-traffic offences be issued with separate enforcement notices in relation to each offence?

Yes. The SDRO position as outlined (p115, para 6.47) are reasonable.

6.12 Should a conditional "good behaviour" period shorter than five years apply to children and young people following a fine or penalty notice debt being written-off?

Yes. Reported argument by youth service bodies (p116, para 6.48, 6.49) have merit. In particular the argument expressed by the Youth Justice Coalition that provision of a 5 year good behaviour bond is excessive when applied to a child and contravenes the mandated maximum good behaviour bond of 2 years under s33(1)(b) of the Children (Criminal Proceedings) Act 1987.

We would also argue that such a bond (5 years) is counterproductive when taken in context of a 16 year old offender who's behaviour as a result of a relatively minor offence, remains under notice until the age of 21; effectively placing him under the auspices of the Criminal Justice System for approximately one quarter (¼) of his entire life.

6.13 Should any of the measures proposed in the New Zealand Ministry of Justice's 2009 research paper titled Young People and Infringement Fines: A Qualitative Study be adopted in NSW?

The finding of the New Zealand Ministry of Justice's research paper (p117-119) outlines a three tier system in dealing with young offenders between 17 & 24 years of age. We agree tier one and tier two measures are positive and could well be introduced into any overarching legislation impacting upon the NSW penalty notice scheme.

The NZ tier three recommendation relates to drivers in excess of the age of 21 and as such we would argue that the suggested measures espoused, such as a government subsidy assisting an individual to repay an accumulated penalty notice debt, is inappropriate. We also argue for the age limit for any similar measures included in any NSW legislation apply to young persons between the ages of 16 and 21 years of age to maintain parity with The Young Offenders Act s 7A(1)(b).

Chapter 7 - Impact on vulnerable groups

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?

Field officers are required to use their discretionary power in each and every instance

where a penalty notice may be issued. This discretionary power is only used after all relevant facts, circumstances and mitigations have been taken into account. In this instance it would simply not be appropriate to issue a person who displays an **obvious** mental illness or cognitive impairment with an infringement notice.

The doctrine of duty of care dictates a field officers action at these times.

Identification of those people suffering a mental illness or cognitive impairment hinges on the specific training and experience of the field officer. In some cases it is difficult for a field officer to make such a determination on the evidence available and we argue that if the field officer is unsure as to the cognitive mental state of an offender then reliance upon alternate measures is preferable in these circumstances.

It is inevitable that at times, such a person will be issued penalty notice. The use of internal review provisions inserted into the Fines Act 1996 by the Fines Further Amendment Act 2008 would be a suitable mechanism to have the matter finalised in a manner satisfactory to all parties.

The provision of having the matter heard and determined in a court of law can also be an elected option however we recognise the inherent difficulty facing a cognitively impaired or mentally ill person in taking this course of action.

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?

Yes. See response above.

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?

No. We feel such a program would be onerous upon the general public whom may feel others in the community are in possession of what is effectively a "get out of gaol free" card. Our experience indicates the current Mobility Parking Scheme is already being regularly abused with persons deceiving less diligent general medical practitioners in order to be issued a card under that scheme. Our assertion is supported by data supplied

to the RTA indicating over 48,000 Mobility Parking Scheme Permit Cards have been revoked in NSW as a result of improper use.

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?

Yes. Apart from rarely used sentencing provisions dealing with racially motivated aggravated sexual assault matters, a long held rule of law in this state if that sentencing procedures call for full time custodial sentences to be served concurrently.

It is a non-sequiter argument to have penalty notice offences endure throughout a custodial sentence when more serious criminal offences committed by the offender "cut out" during the one term of incarceration.

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

No. See response above.

7.6 Should some other strategy be adopted in relation to offenders who have incurred penalty - or fine - debt? If so:

(1) In relation to which groups should any such strategy be adopted, and

(2) What strategy or strategies would be appropriate?

No. See response to 7.4 above.

7.7 How should victims' compensation be dealt with in any proposed scheme?

Any offence finalised by way of penalty notice should not carry the right to victim's compensation due to the relatively minor nature of the offence. The commission of offences incurring an identified and significant harm to any victim should be prosecuted in a court of law where the issue of victims' compensation can be properly dealt with.

7.8 (1) Should a concession rate apply to penalty notices issued to people on low incomes? If so, how should "low income" be defined?

(2) Should a person in receipt of certain Centrelink benefits automatically qualify for a concessional penalty amount? If so, which benefits?

No. Offence deterrents imposed via penalty notices need always adhere to the principle of appropriate penalty via the "risk versus reward" equation through determining "the

proportionality of the amount to the nature and seriousness of the offence, including the harms sought to be prevented".

7.9 If a concession rate were applied to people on low incomes, should the penalty amount be reduced by a fixed percentage or determined by some other formula?

Not applicable with regard to our response above.

7.10 How could such a system be administered simply and fairly?

Not applicable with regard to our response in 7.8 above.

7.11 (1) Are the write-off provisions of the Fines Act 1996 (NSW) effective in assisting vulnerable individuals deal with penalty notice debts?

*(2) What improvement, if any, could be made to the write-off procedures under the **Fines Act 1996 (NSW)?***

No substantial comment is made.

7.11 Should participation in discrimination awareness and disability awareness training be required for all law enforcement officers authorised to issue penalty notices? How else could awareness be raised?

Yes. As outlined previously under 3.2 above, training in discrimination and disability awareness should be essential for all field officers to gain requisite competency.

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

No specific experience at this Council has occurred to draw from however comments in 7.1 above indicates our assertion such a process should be adopted in such circumstance.

7.13 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 mechanism initiating an internal review of a penalty notice could be expanded to include third party verbal requests from such persons as family member, elected official (local, state, federal), Police Officers, Medical Practitioners, Justices of the Peace and Court Officers etc.

In short persons employed in a professional capacity who would be reasonably expected to be persons of good character.

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?

Yes. Persons with a permanent cognitive imparement as a result of a long term serious substance addiction should be able to avail themselves to the same statutory provision as any other person with a permanent cognitive impairment.

Persons who have a temporary cognitive impairment during the time of the offence as a result of the inhaling, ingesting or injecting any drug or other substance should not be able to use such substance abuse as a defence.

(2) In "exceptional circumstances" more generally?

Yes. Exceptional circumstance can include actions or omissions enabling an accident to be avoided, medical emergencies or any other exceptional circumstances having regard to the unique situational environment operating at the time of the offence.

7.16 (1) Is the State Debt Recovery Office's Centrepay Program helping people receiving government benefits deal with their outstanding fines and penalty notice amounts?

(2) Are there any ways of improving this program?

No substantial comment to be made.

Chapter 8 - Criminal infringement notices

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?

No Substantial comment to be made.

8.2 Are there any views about the recommendations in the 2009 Ombudsman's Review of the impact of Criminal Infringement Notices on Aboriginal communities and their implementation?

No Substantial comment to be made.

8.3 (1) Are Criminal Infringement Notices having a net-widening effect, in particular in relation to the offences of offensive language and offensive behaviour? If so, what measures should be adopted to prevent or minimise this effect?

No Substantial comment to be made.

(2) Should official cautions (governed by police guidelines) be available as part of the Criminal Infringement Notice regime, as recommended by the Ombudsman?

No Substantial comment to be made.

(3) Should the offences of offensive language and offensive conduct continue to be among the offences for which Criminal Infringement Notices may be issued?

No Substantial comment to be made.

8.4 (1) What steps should be taken to address the issue of under-payment of criminal infringement notices issued to Aboriginal persons?

(2) Should recipients of criminal infringement notices be able to apply for an extension of the prescribed time to elect to have the matter dealt with by a court? If so, under what circumstances?

No Substantial comment to be made.

8.5 Should Criminal Infringement Notices be issued at all to persons with a cognitive impairment or mental illness? If so, should police have the discretion to issue a Criminal Infringement Notice, 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 Criminal Infringement Notice as recommended by the Ombudsman?

No Substantial comment to be made.

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?

No Substantial comment to be made.