PENALTY NOTICES

Response to Consultation Paper 10

30 November 2010

Submission on behalf of Legal Aid NSW
to the New South Wales Law Reform Commission

About Legal Aid NSW

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW specialist services include a Mental Health Advocacy Service and a network of outreach clinics for homeless people throughout the State. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres.

In the 2008-2009 financial year, Legal Aid NSW provided more than 215,000 civil law services and more than 375,000 criminal law services. In the course of providing such services, Legal Aid NSW solicitors regularly advise people on issues relating to penalty notices and fines. This practical experience provides a strong base from which to comment on the consultation paper.

Introduction

The penalty notice system has a disproportionately negative impact on economically and socially disadvantaged people. For people whose financial capacity is limited, or who are disadvantaged in other ways such as by reason of a mental illness or cognitive impairment, it is common for debts to accumulate over time to become very substantial and sometimes overwhelming.

For people already experiencing great disadvantage, the consequences of these accumulated debts can be far-reaching and can have a detrimental effect far exceeding their intended purpose. For example, such debt can impact upon the security of a person's housing situation, the person's ability to service other debt, and the person's capacity to maintain employment and stable family relationships. In some cases, accumulated debt can lead to further criminal offending and even imprisonment.

In a 2009 submission to the New South Wales Ombudsman's *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities*, the Criminal Law Committee of the Law Society of New South Wales made the following comment in relation to the impact of unpaid fines on remote Aboriginal communities:

Aboriginal people in remote areas are extremely disadvantaged by the negative impact of unpaid fines and their ability to get a licence. For reasons such as remoteness, lack of transport, hot climate etc, Aboriginal people will often drive their cars even when they do not have a licence.

Public transport is almost non-existent in remote areas and taxis are only available in the large towns. Activities such as shopping, going to the doctors, driving kids to school etc are functions that Aboriginal families participate in as we all do, but the difference is that in these areas, many will drive unlicensed and risk a fine and disqualification and invariably prison.

This example shows how accumulated debt can lead to negative consequences not just for the individual who is unable to pay the penalty notice amount, but also for his or her family and the local and wider community.

As Consultation Paper 10 ("the Consultation Paper") acknowledges, some people are more vulnerable to receiving penalty notices than others. For example, consultation undertaken by the Law and Justice Foundation in 2003 and 2004 and published in its report: *No home, no justice? The legal needs of homeless people in NSW* indicated that because of economic disadvantage and public visibility resulting from a lack of housing, homeless people were likely to accrue multiple penalty notices for street offences such as drinking in public spaces and public transport-related penalty notices. It is arguable that the issuing of penalty notices is inappropriate when the offence committed is so closely associated with the person's circumstances of disadvantage.

Despite this, in recent years Legal Aid NSW has become aware of many cases where penalty notices have been inappropriately issued to vulnerable members of the community, such as young people, people with cognitive impairment or mental illness, and economically and socially disadvantaged people including homeless people.

A more general problem that the Consultation Paper acknowledges is the potential net-widening effects of the penalty notice scheme. Again, this general problem has affected vulnerable people disproportionately. For example, the proven net-widening effect of the issuing of penalty notices for offensive conduct offences has particularly affected Aboriginal people.

Measures need to be taken to ensure that the penalty notice scheme does not operate to further disadvantage the already disadvantaged. The recent changes to the *Fines Act 1996* are a step in the right direction; however, we believe that further changes are required to ensure that the system operates fairly and effectively.

A recommended approach

To address the issues outlined above, Legal Aid NSW makes the following general recommendations in relation to the penalty notice scheme. These recommendations underpin our responses to the specific questions raised in the Consultation Paper.

1. While acknowledging the benefits of the penalty notice scheme, both to the individual in terms of avoiding the trauma and stigma of a court conviction and appearance, and to the State in terms of administrative efficiency and cost effectiveness, the evidence of the scheme's net-widening effects suggest to us that the types of offences covered by the scheme should be strictly limited.

2. The number of incorrectly issued penalty notices should be minimised as much as possible. The importance of this is clear when one considers that once a penalty notice

has been issued, the onus is on the recipient to put time aside either to apply for review or to take the matter to court, where he or she risks court costs and conviction. The difficulties inherent in defending a penalty notice are compounded for vulnerable people.

Limiting the scheme to strict and absolute liability offences is part of the solution; other important factors are appropriate guidelines and training for issuing officers.

3. Given the penalty notice scheme has a disproportionately negative impact on vulnerable people, it is crucial that:
   - alternative ways of responding to offending behaviour, such as cautions and warnings, are not only available to issuing officers, but are actively utilised;
   - internal review mechanisms as well as flexible payment options, including Work and Development Orders, and write-off provisions are readily accessible at all stages of the payment and enforcement process, and are easy to access;
   - the scheme recognises that certain individuals should not have to bear responsibility for a penalty notice offence; for example, people with a cognitive impairment who lack the capacity to make rational choices to act or refrain from acting; and
   - discounts are available for certain vulnerable people to prevent them from spiralling into debt at great cost not only to themselves but to the wider community.

   Despite the recent legislative amendments to the Fines Act, significant barriers to accessing mitigation and write-off options remain. These processes need to be improved to take into account the practical realities that vulnerable people face; for example, lack of education, lack of resources, and communication difficulties.

Conclusion

Our comments addressing each of the specific questions raised in the consultation papers are attached. Legal Aid NSW is grateful for the opportunity to provide these comments, and we would welcome the opportunity to comment further if necessary. Should you have any queries in relation to any aspect of this submission, please contact Erin Gough, Senior Solicitor, Legal Policy Branch at [redacted] or by telephone on (02) [redacted]

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CHAPTER 1: INTRODUCTION

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

Yes. A stand alone statute would clarify the distinction between court-imposed fines and penalty notices and enable the penalty notices scheme to be separately administered by the Attorney General.

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

Yes. This term articulates more plainly the nature and purpose of the system.

CHAPTER 2: GUIDING AND OVERSEEING THE PENALTY NOTICE SYSTEM

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

Yes. Formal principles would improve the consistency of penalty amounts and help to ensure that the scheme covers appropriate offences.

Question 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 and Attorney General; or
(2) a stand-alone body; or
(3) a Parliamentary Committee?

Yes, there should be central body in New South Wales to oversee and monitor the regime. A stand-alone body based on the Victorian model but within the jurisdiction of the Attorney General is the preferable option. A body whose sole focus is the penalty regime is likely to provide a more purposeful and consistent approach to the regime. We agree that a Parliamentary Legislation Committee would have limited effectiveness because its contribution would occur at the tail end of the policy development phase. If the stand-alone body model is adopted, we do not think that additional oversight by a Parliamentary Committee is necessary or desirable.

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

Additional resourcing would be required to ensure that the operation is effectively regulated.

Question 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 stand-alone body could be responsible for this.

Question 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? (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?

(1) Yes.

(2) Penalty notices should only apply to strict and absolute liability offences. In practice, once a penalty notice has been issued, the onus is on the person to whom it has been issued to put time aside to attend court and risk court costs and conviction to disprove the offence. Therefore, it is important to minimise the possibility that penalty notices will be mistakenly issued. This should be achieved by excluding from the penalty notice scheme any offences that are not strict and absolute liability offences, as well as any type of offence that is complicated and difficult to establish, or that requires an understanding of complex legal concepts.

Question 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?

As stated in response to Question 3.1, our preference is that penalty notices not apply to offences with a fault element and/or defences. However, if they were to apply to such offences, all six of the Victorian *Guidelines* should be adopted. In addition, the guidelines should also require that the agency has good reason to include such offences within the penalty notice scheme; an example of a good reason might be that a penalty must be imposed immediately to be effective.

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

No, for the reasons discussed above in response to Question 3.1.

Question 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, "minor offence" is a useful concept and should be defined to include offences contained in the *Summary Offences Act 1988*, as well as offences not contained in the Act that are not punishable by a sentence of imprisonment. Offences involving dishonesty, violence, or injury to a victim should not be included.

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

No, for the reasons stated in the Consultation Paper.

Question 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?

The concept of "low penalty" is not necessary if the concept of "minor offence" is used.

Question 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?

Yes, but only if:

- the offence is a strict and absolute liability offence; and
- a fine is already an available sentencing option; and
- the offence does not involve dishonesty, violence, or injury to a victim.

Question 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?

Whether an offence is or is anticipated to be a "high volume" offence should be one of a limited number of reasons that can justify an offence being treated as a penalty notice offence. The fact that the issuing of a penalty notice is necessary to deter the offending effectively could be another reason. This way the fact that an offence is "high volume" would not need to be a relevant factor in all cases, if there was another good reason for including the offence in the penalty notice scheme.

Question 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?

Yes. We like the definition used by the Law Reform Commission of Canada (see the Consultation Paper at paragraphs 3.54-3.57.)

Question 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?

The appropriateness of this type of action depends upon the offence in question, as does the appropriate amount. The relevant statute should prescribe when an offence is a continuing offence, rather than leaving this assessment to the discretion of the issuing officer.

Question 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?

No.

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

Yes.

Question 4.2: Should a maximum be set for penalty notice amounts? If so:
(1) What should the maximum be?
(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?
(3) Should the maximum be different for individuals and corporations?

Yes. Setting a maximum ensures that the scheme only covers relatively minor offences.
(1) Twelve penalty units for an individual and 60 penalty units for a corporation, or the average of the penalties imposed by the Courts in recent years for that offence, whichever is lower.
(2) Yes, but it should never be higher than the average of the penalties imposed by the Courts in recent years for that offence.
a) On the basis of a demonstrable deterrent level of penalty.
b) No.
(3) Yes, as set out in our response to (1) above.

Question 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. This should be a general principle that applies to the setting of penalty amounts. There could be room for exceptions to this general principle, as discussed in our response to Question 4.2 above.

Question 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?

(1) Yes, such a principle would provide a useful guide, and 25% is an appropriate percentage.
(2) Yes. The grounds should be that a higher penalty is necessary to act as a deterrent.
(3) No, this approach might prove too inflexible.

Question 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?

Yes. This is an important principle. The body that is responsible for overseeing the penalty notice scheme should re-examine the court statistics on a regular basis to ensure that this principle is adhered to.

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

Yes.

Question 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.

Question 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?

Yes. The guidelines for setting the amounts should refer to the principles set out above at Questions 4.2 to 4.7.

Question 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?

No.

CHAPTER 5: ISSUING AND ENFORCING PENALTY NOTICES – PRACTICE AND PROCEDURE

Question 5.1: Taking into account the recent reforms, is there sufficient guidance on: (1) when to issue penalty notices; and (2) the alternatives available?

While the new provisions of the Fines Act are a step in the right direction, the guidelines still leave issuing officers with a broad discretion to proceed by way of penalty notice rather than by way of caution. The lack of an explicit requirement in the Act that issuing officers employ the guidelines is likely to lead to inconsistency in application and in many cases, a bypassing of the caution option altogether.

In a similar way to the Sydney Olympic Park Authority guidelines (at paragraph 5.7 of the Consultation Paper) the Fines Act should mandate that penalty notices are not to be issued for "inconsequential" offences, especially where the penalty amount could be considered excessive. Furthermore, the guidelines should provide that issuing officers must exhaust all other options such as warnings and cautions before issuing a penalty notice. Such safeguards are particularly important in the context of less serious offences such as transport offences, and in circumstances where the intended recipient is a vulnerable member of the community.

A further difficulty with the guidelines is that they do not apply to police, or to agencies that have issued their own guidelines. While police can issue cautions under the *Young Offenders Act 1997*, this is a more limited discretion than provided for by the *Fines Act*. For the sake of consistency across all issuing bodies, police should have the same discretion as other issuing authorities when performing functions similar to other issuing officers, particularly when the intended recipient of a penalty notice is a vulnerable member of the community.

The effectiveness of such guidelines would be further enhanced by training and monitoring of issuing officers and in due course, an evaluation of the impact of the guidelines.

Case study

Katherine is a Legal Aid NSW client of Aboriginal background who suffers from extreme financial disadvantage. She was comforting a friend who had received some bad news about a family member and had accompanied that friend to the train station. Given she had no intention of boarding the train, but wanted to stay with her friend until her train arrived, she sought and was granted permission from Railcorp staff to enter through the ticket barriers.

While waiting on the platform, police officers asked Katherine for her ticket. Despite explaining her circumstances (which were also confirmed by her friend), she was issued with a $400 penalty notice for being on a platform without a valid ticket.

Legal Aid NSW assisted Katherine in seeking an internal review of the penalty notice by the SDRO, providing details of her personal circumstances, the fact that Railcorp had given her permission to accompany her friend to the platform, and enclosing a statutory declaration from her friend confirming these circumstances. Despite this, the SDRO confirmed that the penalty notice had been lawfully issued, and informed Legal Aid NSW that penalty notices issued by NSW Police were not able to be withdrawn by the SDRO regardless of the circumstances.

Question 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?

Government agencies should be able to engage the services of private organisations to issue penalty notices, but only on the proviso that those agencies provide adequate training for and regulation of the contractors. Contracted issuing officers should be bound by the same legislation and guidelines that binds other issuing officers.

Question 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?

(1) Yes. The practice of issuing more than one penalty notice in respect of one incident can unfairly punish a person numerous times for the same conduct in a way that does not reflect the seriousness of the offence or the circumstances of the offence. In our experience this practice is not uncommon, particularly in the context of railway offences, although Legal Aid NSW is aware of it occurring in other contexts as well. Its impact, especially upon homeless people, young people and people suffering from mental illness, cognitive impairment or an intellectual disability, can be dramatic, leaving the recipient with an instantaneous and in many cases insurmountable level of debt.

Case study

Mark was issued a penalty notice by a National Parks and Wildlife Service ranger for having a dog in a national park. Mark gave a false name and address. The applicable legislation provides that it is an offence to "give any information that is false or misleading in a material particular". The park ranger subsequently issued two further penalty notices, one for giving a false name and one for giving a false address.

Case study

Fifteen year-old Peter was given a motorised mountain bike as a gift. Peter didn't know what the engine capacity of the motor was, nor the maximum output in watts of his bicycle. Shortly after he received the bike, Peter and a friend rode their bikes to the local shops. They were stopped by police, who issued four penalty notices to Peter for: (1) using an unregistered cycle on the road; (2) riding on the footpath; (3) being an unlicensed rider; and (4) not wearing a helmet.

The penalty amounts totalled $1659. Legal Aid NSW wrote to the SDRO asking that the penalty notices be withdrawn and that Peter be cautioned instead. The SDRO refused the request, providing no reasons.

(2) Given the frequency of the practice of issuing multiple penalty notices and the difficulties this has created, some broad legislative guidance in this area is required. For example, the *Fines Act* could include a prohibition on issuing multiple penalty notices if to do so would unfairly punish a person numerous times for the same conduct in a way that does not reflect the seriousness of the offence or the circumstances of the offence. Issuing authorities could then be encouraged to devise guidelines that prescribed appropriate approaches in relation to specific offence types, having regard to this broad principle.

Question 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. A person who has been punished for an offence is entitled to consider that punishment final. Therefore, the power to withdraw a penalty notice with the intention of prosecuting the matter in court instead, should be strictly limited to cases where the severity of the offence can only be determined after the fact. Strict time limits should also apply; we cannot think of an offence in relation to which a withdrawal after 28 days would be justified.

Question 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?

Procedural provisions that enable a penalty notice to be served by post have led to various difficulties for Legal Aid NSW clients, particularly those who are homeless or itinerant. While we understand the practical benefits of service by post and do not advocate that this means of service is abolished, it is imperative that people who are unaware that a penalty notice has been served on them and have a reasonable excuse for being unaware, are not liable to pay an amount greater than that provided by the original penalty notice.

Case Study

Mary, an elderly woman without a driving record, was stopped by police while driving. The police informed her that her licence had been suspended for an unpaid penalty amount. They charged her with the offence of driving while suspended.

Mary had moved house some months before. Investigations revealed that a penalty notice for failing to vote at an election had been sent to her old address. Her licence had been suspended because she had not paid the penalty notice amount. The reason she had not paid the amount was because she had no actual knowledge of the penalty notice.

Question 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?

While not in a position to comment on the feasibility of this proposal, Legal Aid NSW supports a requirement that the SDRO or issuing agency confirm service.

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

(1) Yes. Given that one of the key justifications for including an offence within the penalty notice scheme is that the offence is one that can, and should, be dealt with swiftly, Legal Aid NSW supports the introduction of a set time frame in which a penalty notice has to be issued and served.

We note that the time frame in which police are required to commence court proceedings for summary offences is six months (s 179 *Criminal Procedure Act 1986*). Given the fact that penalty notice offences are minor in nature, we submit that a 28 day time period would be appropriate for most offences covered by the scheme. Where more time is required, the onus should lie with the issuing authority to provide reasons for the extension of time.

One danger, though, in imposing a time limit on the issuing of a penalty notice is that after the 28 days has expired, police will choose to issue a court attendance notice instead. Guidelines should make clear that a court attendance notice should only ever be issued because the nature of the offence justifies this course of action, and not simply because the time limit for issuing a penalty notice has expired.

(2) Yes. A penalty notice that is served outside of the 28 days (or other set time frame) should be deemed invalid.

Question 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?

Yes.

Question 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?

A penalty notice, among other things, should include:

- the name of the offence;
- the date and place of the alleged offence;
- the penalty notice issue date;
- the name of the issuing authority;
- the name of the legislation and section number under which the alleged offence arises and information about where the legislation can be accessed; eg www.legislation.nsw.gov.au (It is the experience of Legal Aid NSW solicitors that the act and section number is sometimes omitted. Without these details, it is often difficult for the recipient of the penalty notice or a legal advisor to locate the relevant law, particularly when the offence is of a type that is contained within a number of different Acts.);
- the amount payable under the penalty notice;
- information about the right to request an internal review;
- a statement making clear that the person may either pay the specified sum within the stipulated time frame or elect to go to court;

- notice that electing to go to court carries the risk of criminal conviction, and that this is a risk even when the person has a good chance of having the actual penalty reduced due to extenuating circumstances, and might outweigh the financial advantage of court election;
- notice that electing to go to court carries the risk that professional costs could be awarded against the client (In our experience this is a particular risk if the penalty notice has been issued by an agency that engages solicitors to represent it in penalty notice cases.); and
- brief information about payment options; for example, time-to-pay options (including Centrepay), work and development orders, and write-offs.

The *Fines Act* should be amended to outline the form that a penalty notice should take in order to ensure consistency across issuing authorities.

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

The introduction of expanded grounds for review is a positive amendment. The new provisions rightly recognise the particular disadvantages faced by people who are homeless, or who have an intellectual disability, mental illness or cognitive impairment. However, Legal Aid NSW is not convinced that the internal review provisions go far enough.

Firstly, as stated above in our response to Question 5.1, many matters that are currently dealt with by way of penalty notice could more appropriately be dealt with by way of caution. While the new internal review guidelines recognise this, they refer back to the caution guidelines, which still leave issuing officers with a broad discretion to proceed by way of penalty notice.

Secondly, s 24B of the *Fines Act* provides that an agency does not have to conduct a review if it notifies the applicant within 10 days of receiving the application that it has decided not to conduct a review and gives reasons for its decision. We are concerned that this discretion will be routinely exercised by issuing authorities to justify sending out a standard letter giving "reasons" for not conducting a review such as "this is a matter that is more appropriately dealt with by the Courts."

Thirdly, the internal review process does not apply to police. As previously mentioned, it does not make sense to exclude police from the internal review procedure, particularly given that in many cases the police exercise the same functions as other issuing authorities in relation to penalty notices. For the sake of consistency the process should be applicable to all issuers of penalty notices.

Finally, we are concerned by the provision that an internal review can only be conducted up to the due date for payment. This is particularly problematic when the grounds for review are that the person has an intellectual disability, cognitive impairment, mental illness or is homeless. It is not reasonable to expect a person at extreme disadvantage to be able to address complex issues that warrant a review within the time frame leading up to payment. While we acknowledge a person may be able to apply for an annulment and trigger an internal review at a later stage, this is not ideal. A person may not have grounds for an annulment and yet still be someone who would, but for the time limit, fall within the internal review guidelines. An annulment application is also a more cumbersome and costly process than the internal review process.

In our submission it should be possible to conduct an internal review at any stage, including after the due date for payment and at the enforcement stage.

Question 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?

(1) Yes. Legal Aid NSW clients typically do not have the financial resources to pay off a penalty notice amount within 21 days or even within 49 days in cases where the SDRO has provided a further 28 days to pay.

(2) The current time-to-pay system could be improved by allowing stays on enforcements for people currently on time-to-pay arrangements who are unable to pay the full amount owing by the set time frame. Many clients who attend the Legal Aid NSW homeless clinics and who enter into a time-to-pay arrangement are only able to commit to payments of about $5 to $10 a fortnight. Currently, even where such payments are consistently made, once the penalty notice reaches its due date, it is automatically referred to enforcement and $50 is added as an enforcement fee to the final amount. Clients experiencing acute economic hardship should not be further penalised as a result of limited financial capacity.

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

1. Work and Development Orders

While the Work and Development Order ("WDO") scheme has the potential to assist many vulnerable people to work off their penalty amounts by undertaking various casework based activities, the scheme is not currently operating at capacity. While empowered under the *Fines Regulation 2010* to make 2000 WDOs during the life of the pilot, to date the SDRO has approved under 20% of this number of orders. It is the view of Legal Aid NSW that the success of the scheme has been limited by a number of factors:

a) Lack of information about what organisations are approved

A person can only apply for a WDO if he or she has the support of an "approved organisation" to supervise the WDO but a complete list of approved organisations has not been published. For this reason, when advising clients about the WDO scheme, Legal Aid NSW solicitors have difficulty referring clients to approved organisations within their area.

b) Lack of approved organisations

A common occurrence among Legal Aid NSW clients is that, while they are already engaged in counselling or other life skills courses, they are unable to count those courses towards a WDO because the organisation providing the course is not approved.

Even when, in such circumstances, clients approach the organisation to apply to become an approved organisation, not all organisations feel they have the capacity to apply to become an approved organisation. Applying to become an approved organisation is a time-consuming exercise, and a number of organisations see the required paperwork as onerous and a barrier to their involvement in the WDO scheme.

Community Organisations

There have been no resources provided to the community sector to participate in the WDO scheme. Community organisations already have limited funding and have at times considered participation in the WDO scheme to be an additional burden on already scarce

resources. This is particularly the case in rural and remote areas where there are limited services available. The provision of adequate resources to the community sector to facilitate its participation in the WDO scheme would improve its operation.

Government Departments

To date, the Department of Juvenile Justice is the only Government Department that has been approved as an organisation to supervise WDOs. This means that many vulnerable people have been unable to undertake a WDO, despite already having an involvement with a key government department.

Government departments that should authomatically be considered an approved organisation under the scheme include:

a) the Department of Corrective Services (particularly Community Offender Services);
b) Community Services;
c) Ageing, Disability and Home Care; and
d) Housing NSW.

Cross-agency initiatives such as the Compulsory Drug Treatment Correctional Centre should also be considered for inclusion in the scheme. This would mean that applicants who are already being case-managed by a government agency would not have to seek additional assistance.

c) Significant delay and lack of communication by SDRO

The most significant feedback received by Legal Aid NSW solicitors and from the approved organisations that Legal Aid NSW works with in relation to the WDO scheme has been the extensive delays experienced in the processing of WDOs (both for an application to be an approved organisation and for WDO applications). It is not uncommon for four to five months to pass before a WDO has been approved, or for any communication from the SDRO to be received.

> *"The initial process of becoming a registered organisation was a little frustrating. I sent through all the paperwork and waited to hear if this was approved. After some time (a few months), I contacted the SDRO and was told that they didn't receive our application. I was informed at the time that the fax number listed on the application form was incorrect. Even after re-faxing through the application form, it took a couple of months before we were told that we were approved."*
>
> Spokesperson from organisation seeking to become an approved organisation

While the impact of such delays is potentially mitigated by the ability of the SDRO to backdate a WDO to the date the application was made, this does not appear to be occurring in practice. It is the experience of Legal Aid NSW that the SDRO does not automatically seek information to determine whether backdating is relevant. This is potentially problematic when one considers that applicants who are eligible for WDOs generally are limited in their capacity to make enquires to ensure that their time has been appropriately backdated.

The SDRO should ensure as a normal course of action that it calculates any relevant backdating.

We would like to see a more streamlined process implemented to ensure that WDO applications are dealt with in a timely manner. This time period should be made explicit in the legislation. When this time period expires, enforcement action should be stayed.

> ***Case study***
> *Wesley had $6,800 worth of fines outstanding and opted to undertake a WDO with the support of St Vincent de Paul. The activity nominated as part of the WDO was weekly participation in life skills courses. Legal Aid NSW submitted an application for a WDO to the SDRO that was not approved until five months after the application was made. In the time the application was pending, Wesley had participated in two months' worth of activities, but this was not backdated by the SDRO. It was only after Legal Aid NSW raised this issue with the SDRO that Wesley's activities were backdated and his fines debt reduced accordingly. Without the involvement of Legal Aid NSW, Wesley would not have had his overall fines debt reduced.*

d) Lack of community awareness

There is limited community awareness of the WDO scheme, possibly due to the lack of targeted community education programs. Responsibility for raising awareness of the WDO scheme has largely fallen to organisations such as Legal Aid NSW (which has conducted a number of community legal education seminars about the scheme), community organisations, and word of mouth.

e) Excluded activities

The fact that certain activities are excluded from the WDO scheme prevents many Legal Aid NSW clients who would otherwise benefit from the scheme from participating. Examples of excluded activities are court-ordered activities and activities undertaken while serving a period of time in gaol.

While we understand the policy rationale for excluding such activities on the basis of 'double counting', their exclusion is arguably contrary to the rehabilitative aims of such programs, which seek to address the welfare issues contributing to an individual's capacity to reintegrate into the community.

Their exclusion seems particularly inequitable when one considers that activities that would normally be eligible for inclusion in the WDO scheme, such as drug and alcohol counselling or participation in educational courses, are excluded by the guidelines if attached to a court order.

Another problematic area of exclusion relates to inmates serving terms of imprisonment. Solicitors from Legal Aid NSW regularly see clients in prison who owe many thousands of dollars in unpaid fines. Previously it was possible for inmates to get credit towards the payment of fines for time served in prison; however this option was discontinued with the introduction of the *Fines Act*. As a consequence, it is not uncommon for prisoners to leave prison owing thousands of dollars but with no capacity to clear their debt.

While it is possible for prisoners to have SDRO sanctions suspended until three months after release, this may in reality only give brief respite. In our experience many ex-prisoners with unpaid fines lose their driver's licences as a result. This makes finding employment more difficult for them, particularly in rural and remote locations, and it is not uncommon for people to reoffend by driving unlicensed in such circumstances.

Given the evidence that suggests a link between debt and reoffending, there is a substantial public policy benefit in providing prisoners with the opportunity to participate in the WDO

scheme. This would enable prisoners to undertake voluntary activities that contribute to their rehabilitation while also cancelling out some of their accumulated debt. In our view it is also likely to lead to a reduced risk of reoffending and return to prison.

2. Write-offs

a) Conditional deferral

The conditional deferral in the write-off process is problematic.

A person who is eligible for a write-off has already demonstrated that he or she does not have sufficient means to pay the penalty amount and is not likely to have sufficient means to pay in the near future. It remains futile and punitive to impose a five year good-behaviour period, particularly given that this is more likely to impact on vulnerable clients. Many of our clients who are homeless or suffering from mental illness would be unable to comply with the good behaviour period, by virtue of the inappropriate issuing of penalty notices associated with their circumstances. A typical example is where a homeless person receives a penalty notice for not travelling with a valid ticket on the train. The issuing of such a penalty notice relates directly to the person's homelessness. Whether or not that person is able to be of good behaviour is irrelevant, as the key problem lies with the inappropriate issuing of a penalty notice in such circumstances.

b) The discretion to recommence enforcement action

Currently, section 101(4) of the *Fines Act* provides a discretion for the SDRO to reinstate any unpaid fine that has been written off where there is a further fine enforcement order, or where the SDRO is satisfied that the fine defaulter has sufficient means to pay the fine.

Legal Aid NSW submits that where a write-off application is granted, the SDRO should not have the power to recommence enforcement action. We point again to the criteria needed to satisfy the granting of a write-off application and the requirement to show the unlikelihood of the person having sufficient means to pay off the fine due to personal, financial or medical circumstances. As discussed above, many vulnerable clients are likely to receive a further fine enforcement order by virtue of their disability, mental illness, homelessness or age and the availability of this discretion will have a disproportionate affect on vulnerable people.

Furthermore, the provision serves to discourage people from improving their circumstances, and punishes those who are able to do so.

c) No reasons provided for write-off decisions

Write-off applications are determined in accordance with guidelines issued under section 120 of the *Fines Act*. However, the write-off guidelines are not available to the public, which makes it difficult for people to know the basis upon which write-off applications are determined. No reasons are provided for the refusal of a write-off application, even where substantial evidence to support the financial, medical or personal circumstances of a client have been provided. This makes it very difficult for write-off applicants to know what information will be relevant to include in an application.

> ***Case study***
> *Kylie is 24 years old and has $25,446 outstanding in enforcement orders. The vast majority of these enforcement orders relate to railway offences (not having a valid train ticket) that were incurred during a period when Kylie was a young person and homeless. Kylie also has significant drug and alcohol issues that have led to numerous medical conditions and is also suffering from depression. She is currently*

being treated for this depression and has been assessed as suitable to receive the Disability Support Pension. She remains vulnerable to homelessness and has recently been released from gaol.

Supporting documents from Kylie's treating psychologist and a youth health service were provided in support of an application for the write-off of Kylie's fines. Despite meeting the requirements under section 101 for a write-off, the SDRO refused the application. The letter sent by the SDRO stated that it had "reviewed the information supplied and unfortunately was unable to recommend the write-off of your fines". An SDRO officer indicated during a subsequent phone conversation that the fact that Kylie had incurred fines recently suggested to the SDRO that she was more likely to re-offend.

Case study
Dante is a 36 year old Legal Aid NSW client currently serving 4 years and 2 months in prison for domestic violence related offences. He has around $17,000 in fines with the SDRO, including $1000 in enforcement costs. Dante has bipolar disorder and was in receipt of a Disability Support Pension. He was caring for his elderly mother. He also has addiction issues. He is due to be released in twelve months. An application to the SDRO for write-off was refused. On release from prison next year, he will have $17,000 in SDRO debt to deal with, along with his mental illness, addiction, and caring for his ill mother.

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

Information about penalty notice history should generally not be available to courts for the purpose of sentencing. An exception to this might be strict liability offences such as some traffic offences, in cases where a defendant is before the court for driving offences.

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

No.

CHAPTER 6 – IMPACT ON CHILDREN AND YOUNG PEOPLE

Question 6.1: (1) Should penalty notices be issued to children and young people? If so, at what age should penalty notices apply and why? (2) Are there offences where penalty notices should be issued notwithstanding the recipient is a child below the cut-off age?

(1) No. Penalty notices should generally not be issued to people under 18. By virtue of their age and the requirement to attend school, young people have a limited capacity to earn money. They have not had an opportunity to accumulate savings like older people. For these reasons they are disproportionately disadvantaged by the imposition of penalty notices. Even for those young people who are engaged in employment, the income they earn is significantly lower than that earned by an adult. This is particularly the case for young people who are undertaking an apprenticeship. For those who are still studying, the Youth Allowance payment is less than other Centrelink entitlements.

The impact of penalty notices and the ensuing enforcement process has a significant impact on young people. Licence sanctions and restrictions limit the capacity of a young person to find employment and increase the risk that a young person will be further exposed to the criminal justice system as a result of secondary offending (for driving while suspended, for example). The large number of penalty notices that young people can accumulate also results in extensive debts, which has a substantial impact on a young person's ability to maintain stable accommodation and can also lead to further offending.

As the Consultation Paper notes, the use of penalty notices has limited rehabilitative value for young people. In many instances parents assist teenagers who are unable to pay the penalty amount themselves. In other cases, and especially in the case of disadvantaged young people, fines accumulate without the recipient understanding the consequences of the resulting debt.

This issue is further exacerbated by the fact that young people are more likely to be targeted by issuing officers and police than older people. This is often because of the way young people use public space in large groups. For example, Legal Aid NSW sees many young clients who have accumulated hundreds of railway related penalty notices. These are typically issued for not having a valid ticket on a train, or for being on a restricted area of railway station (usually a platform) without a valid ticket. While these offences are minor in nature they can result in significant debt over time. This is likely to impact on disadvantaged young people most of all, particularly those who have experienced homelessness or have a mental illness, and who are therefore more likely to incur these types of penalty notices.

Such an accumulation of penalty notices can entrench young people in a cycle of debt, preventing them, for example, from qualifying for a drivers licence, and limiting their job opportunities and their financial capacity.

> ***Case Study***
> *Jason is a 24 year-old Legal Aid NSW client currently serving a 12 year sentence for GBH and aggravated robbery. His earliest possible release date is in six and a half years. He has around $7,000 in fines with the SDRO, which includes almost $1000 in enforcement costs. Half of his fines were imposed when he was a minor. Around a quarter of his fines are for travelling on a train without a valid ticket.*

(2) It is appropriate that driving offences for young people over 16 remain part of the penalty notice scheme.

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

Yes - the system of warnings or cautions under the *Young Offenders Act 1997* (YOA) is one practical alternative.

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

No – this defeats the deterrent effect of the penalty notice scheme and places unnecessary pressure on disadvantaged families.

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

Yes – the mechanisms already exist for enforcement officers to consider a caution as an option in accordance with the DJAG Caution Guidelines. To ensure that enforcement officers comply with such a requirement, we recommend that it is contained in the legislation itself.

Question 6.5: (1) Should police officers dealing with children who have committed, or are alleged to have committed, penalty notice offences be given the option of issuing a caution or warning, or referring the matter to a specialist youth officer under *Young Offenders Act 1997* (NSW) to determine whether a youth justice conference should be held? (2) Should some of the diversionary options under *Young Offenders Act 1997* (NSW) apply and, if so, which ones? (3) For which penalty notice offences should these diversionary options apply?

Yes. Broadening the ambit of the *Young Offenders Act* may provide further incentives for NSW Police to deal with minor offences committed by young people that are currently dealt with by way of penalty notice in more appropriate ways. It could also improve consistency in police interactions with young people.

While all the diversionary options of the *Young Offenders Act* could apply to all penalty notice offences, particular emphasis could be placed on the use of warnings and cautions, given that penalty notices are intended to be issued for offences that are minor or regulatory in nature. Such an approach would be consistent in providing an appropriate and proportionate response to such offences.

Question 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?

(1) If penalty notices are still to be issued to young people, then a lower penalty notice amount should apply. This is in keeping with the principles of youth justice, as highlighted in the Youth Justice Coalition's preliminary submission. Children and young people should be treated differently from adults and are entitled to special protections when taking into account their age, lack of maturity and lack of financial capacity.

In addition to lower penalty notice amounts, Legal Aid NSW is of the view that enforcement costs should not apply to children and young people. The rationale behind the imposition of an additional $50 once a penalty notice proceeds to enforcement is that it provides an incentive for a person to pay the full amount of the penalty notice before the due date. This incentive does not work with young people because of their lack of financial capacity to pay.

We support option (b): the penalty notice amount should be set at a fixed sum.

(2) An appropriate fixed sum amount is $25.

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

Yes. Given that courts are required to look at a person's capacity to pay when deciding whether to impose a fine as a punishment (or when deciding the appropriate amount of the fine), there should be grounds for a young person (and other vulnerable people) to apply for an internal review on the grounds that they do not have the capacity to pay the penalty amount.

In determining a young person's inability to pay, Legal Aid NSW is of the view that where a young person is in receipt of a Youth Allowance payment, proof of receipt of this payment should automatically satisfy the criteria for demonstrating lack of financial capacity.

Question 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?

(1) Yes, for the reasons discussed in our response to Question 5.3.
(2) Yes, for the reasons discussed in our response to Question 5.3.

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

No. The imposition of driver licence sanctions only leads to further marginalisation of such young people. In particular, it can affect a young person's capacity to participate in employment, and it especially affects those young people residing in rural, remote and regional areas.

While the *Fines Act* now provides for a shorter disqualification period when caught driving whilst suspended due to fine default, this does not go anywhere near far enough to ameliorate the impact driver licence sanctions have on young people and other vulnerable groups.

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

No.

Question 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?

We do not have an opinion on this issue.

Question 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?

As discussed in response to Question 5.12, where a write-off has been granted Legal Aid NSW is of the view that there should be no conditional "good behaviour" period at all. A write-off should be an unconditional waiver of outstanding fines and penalty notice debts and the SDRO should not have the capacity to recommence enforcement action.

Question 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?

Some of the proposed measures are worth exploring further, for example, the approaches to education and case management, and enabling greater discretion by the collection authority.

CHAPTER 7 – IMPACT ON VULNERABLE GROUPS

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?

It is our view that it is generally inappropriate to issue penalty notices to people with cognitive impairment or mental illness. We agree with the Shopfront Youth Legal Centre that such people have a limited capacity to pay penalties and that those with a cognitive impairment often find it difficult to understand and comply with their legal obligations.

Like the Intellectual Disability Rights Service ("IDRS"), however, we are wary of any alternatives that are more harsh, onerous or restrictive, and involve greater court involvement or exposure, or greater involvement by police or agency officers.

We support the establishment of a "do not enforce" register for identifying people with a cognitive impairment. We believe that a register with the following features would go some way to overcoming the privacy concerns expressed by the IDRS and Shopfront:

- The register could be held and administered by the SDRO and not by any front line enforcement officers.

- The register could be voluntary and consensual; ie individuals (or caseworkers on their behalf) could elect to be included on the list on the understanding that no data cross-matching or automatic inclusion based on data-sharing would be involved.

- Inclusion on the register could be restricted to individuals with a continuing cognitive impairment that is unlikely to improve.

- Individuals could prove eligibility by way of evidence that is simple and inexpensive to provide; for example, a watermark on the individual's concession card or a letter from a support worker or solicitor.

- Any fines referred to the SDRO for collection or enforcement for individuals on the list could be automatically removed and a notice of such removal could be sent to the individual or their nominated carer.

- The register would be subject to privacy regulations that cover health information as defined in the *Health Records and Information Privacy Act 2002* (NSW).

The information needed to qualify for the "do not enforce" register would therefore be similar to the health information already required for an internal review under the *Fines Act*.

Such a register could work in tandem with guidelines that promote the use of a warning or a caution instead of a penalty notice where an offender has a mental illness or cognitive impairment. This option would require adequate training of law enforcement officers to ensure the exercise of proper judgement of the circumstances, awareness of the difficulties that people with a mental illness or cognitive disability face, and a lack of prejudice.

We note that Paragraph 4.9 of the *Caution Guidelines under the Fines Act 1996* currently provides:

> In considering whether there are reasonable grounds to believe that a person has a mental illness, intellectual disability, special infirmity, is in very poor physical health or is homeless, officers should form their own judgment having regard to all the circumstances, including the appearance, speech and behaviour of the person. Any documentary evidence produced by the person may also be taken into account.

While this guideline is appropriate, we would not support an identification procedure which *requires* a person to provide documentary evidence at the time of the alleged offence to be eligible for a caution.

> ***Case study***
> *Sasha is a 24 year Legal Aid NSW client with an acquired brain injury. He is currently serving 5 years 1 month in prison for armed robbery. Sasha was assaulted by his co-offenders (which caused his brain injury). As a result he has limited cognitive abilities, speech problems, and can't read or write. He has been assaulted by other inmates several times. Sasha has 62 enforcement orders for a total of $14,065, most of them penalty notice debts relating to train ticket infirngements; about a quarter of those he received when he was a minor. Sasha is on a financial management order and may receive a victim's compensation payment for the assault, but is unlikely to be able to work again. It is probable that he will have to pay any compensation money he receives to the SDRO to decrease his fines and penalty notices debt.*

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?

(1) Yes. As mentioned in our response to Question 7.1, an appropriate alternative action is a warning or caution delivered by suitably trained law enforcement officers at the time of the alleged offence and a referral to the person's caseworker or other relevant agency that may assist that person deal with the issues that caused the infringing behaviour.

We support such alternative action only with appropriate safeguards, including a requirement that the individual alleged to have committed the penalty offence is provided with:

- written and verbal details of the evidence that forms the basis of the allegation;
- written and verbal information about how the individual may dispute the facts and seek a review of the recording of the caution; and
- written and verbal information about how the individual may seek legal advice.

Clause 6 of the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006* (VIC) provides a useful template and includes the following information:

> (a) that it is an official warning;
> (b) the date of the official warning;
> (c) the name and address (if known) of the person served with the official warning;
> (d) the name of the enforcement agency;
> (e) the enforcement agency identifying reference of the official warning;
> (f) either the name of the issuing officer or the enforcement agency identifying reference of the issuing officer;
> (g) the date and approximate time and place of the infringement offence alleged to have been committed;
> (h) the Act or other instrument that creates the infringement offence and a brief description of the infringement offence alleged to have been committed;
> (i) that further information may be obtained from-
> (ii) a nominated telephone number;
> (iii) a designated address;
> (iv) if available, the enforcement agency's website.

(2) The caution guidelines alone are not sufficient for those people whose infringing behaviour is caused by cognitive impairment or mental illness and is thereby out of their control. In those cases, the caution guidelines should be supplemented by some therapeutic referral protocol to ensure the person is supported to avoid both situations that lead to the infringing behaviour and inappropriate treatment by enforcement officers.

In situations where penalty notices are likely to fail to act as a deterrent and only serve to further exclude the individual, more creative solutions could be considered: for example, persons with a mental illness or cognitive impairment who regularly travel on trains without a ticket could be eligible for a train pass.

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?

See our response to Question 7.1. The use of a “do not enforce” register should be in conjunction with the caution guidelines and therapeutic referrals as referred to above, to ensure that law enforcement officers take appropriate action at the time of the offences and do not simply rely on the "do not enforce" register to cancel out any inappropriately issued penalty notices.

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?

Yes, fines and penalty notices of correction centre inmates with a cognitive impairment or mental illness should be written off. Inmates are in severe financial hardship during their custodial sentence – their income is very limited and only covers “buy-up”, ie essential toiletries and clothing items; they have limited access to funds other than prison income (usually a limit of $100 per month is imposed on deposits from outside sources); and their assets, if any, have usually been depleted to pay their solicitors' and barristers' legal fees.

The policy should not be limited to inmates with cognitive impairment or mental illness. All inmates who are serving a sentence of longer than two years should also be eligible to have their fines and penalty notice debt written off. This process could be automatically triggered on sentencing, in the same way that Centrelink is automatically notified by the Department of Corrective Services when a person is sentenced to imprisonment.

We do not support any conditional good behaviour period applying following the person’s release from custody. Such a period hinders the individual’s ability to re-establish him or herself in the community.

In a recent informal survey of 60 Legal Aid NSW fine and penalty notice related matters where the client was an inmate, the average debt of each client was $5800. This is equivalent to approximately 20 weeks of disability support pension payments. Even if $5800 in fines and penalty notice debt has been written off while a person was in custody, if a good behaviour period subsequently applies, the individual faces an absurdly disproportionate penalty, for example, if travelling on a train without a valid ticket. The individual should be given a chance to start afresh with a clean slate and not be hindered by unrealistically high levels of debt.

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

No. As mentioned above, inmates earn only a very limited income. The average income is $30 per week. If an inmate does earn more than $30 per week, it is usually only as part of special pre-release work program. Those special earnings should be available for use by inmates to establish themselves once released, and should go towards such things as rental bond, furniture and transport.

Question 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?

As noted above at 7.4, we suggest all inmates serving longer than two years (or those who have served a number of shorter sentences in a relatively brief period of time that amount to a total of two years) and those with cognitive impairment or mental illness should be eligible for write-off of their fines and penalty notices.

For those inmates serving less than two years who do not have a cognitive impairment or mental illness, the Work and Development Order Scheme could be run in prisons and in Probation and Parole, so that inmates can earn "credit" toward their fines and penalty notices by participation in courses, counselling and community service during their custodial sentence and parole. After release, payment could be enforced at a discounted rate (see our response to Question 7.8 below).

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

It is our view that the Victims Compensation Tribunal should not recover compensation from inmates other than in the form of the Victims Compensation Levy.

If restitution orders continue to be made, however, payment options available for these orders should combine the best of what is currently available from the SDRO and the Victims Compensation Tribunal (VCT); for example, the option to have the amount of the debt reduced based on financial circumstances and culpability, and the option to pay in instalments (options that are currently available under the VCT), should be available in addition to, for example, the options to pay via Centrepay (currently an option available through the SDRO). It is also our view that the use of RTA sanctions in the context of restitution orders is inappropriate.

Question 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?

Yes. A concession rate should apply to penalty notices issued to people on low incomes. "Low income" could be defined as people on full Centrelink benefits.

It is important to recognise, however, that Centrelink benefits are designed to cover housing, utilities and food costs exclusively. Requiring recipients to also pay penalty notice debts out of this limited funding is particularly onerous.

An alternative could be to postpone the enforcement process for two years in cases where the recipient is on a low income, and then, in cases where the recipient is no longer on Centrelink benefits after two years, enforce the debt at a discounted rate. This could

significantly enhance the individual's prospects of continuing financial security, rather than sabotaging those prospects by reinstating substantial, and sometimes insurmountable, debts.

Question 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?

A concession rate based on the difference between average weekly earnings and the average weekly allowance of a pensioner is appropriate. For example, the Australian Bureau of Statistics (Catalogue No 6302.0) recorded the average weekly earnings of a person in NSW on 21 May 2010 as about $987 gross per week. By contrast, the average pensioner on this date had an allowance of $300 gross per week. Therefore, a 65%-70% reduction for a pensioner would be reasonable.

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

When considering the fairness of any penalty notice system, it is important to recognise that the penalties imposed under the current scheme are not fair, since they have a disproportionate impact on the most vulnerable; for example, a $200 penalty notice amount for travelling on a train without a ticket may represent almost an entire week's income for a pensioner on disability support, while for a person on average earnings the amount would not be nearly as significant.

Fairness in relation to Centrelink recipients, people who have a mental illness or cognitive impairment, homeless people, inmates and other vulnerable people lies in ensuring that their basic needs are met before they are burdened with additional debt. The financial and non-financial costs to the community of supporting vulnerable people will only increase if financial penalties are imposed upon them and enforced in a way that maintains or increases their social exclusion.

Provision of discounts and write-off to vulnerable people in no way undermines the general deterrent effect of the penalty notice system. In terms of specific deterrence, highly disadvantaged and socially excluded people, the effect of financial penalties is limited because their lives are usually too chaotic. Due to their circumstances they are unable to avoid being the recipient of financial penalties and, once those penalties reach a high amount, they become trapped in a cycle of debt, overwhelmed by the magnitude and unable to forsee any real chance of paying down that debt. Accordingly, there is no deterrence to incurring further fines or penalty notices as the debt is already insurmountable.

The revenue that is potentially created by imposing financial penalties on vulnerable people should be balanced against the cost to the State of supporting vulnerable people who are trapped in debt, whether as inmates or as high users of support services.

There is already a system in place that enables certain costs faced by Centrelink recipients to be written-off or discounted; for example, the cost of ambulance services and utilities. This system could be expanded to include the cost of penalty notices.

Question 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)?

(1) No. The write-off provisions of the *Fines Act* are problematic for people with a mental illness or cognitive impairment for a number of reasons including the following:

- they are only made available after a fine enforcement order is made. They should be available earlier in the process;
- the application process is such that many individuals with cognitive impairment or mental illness cannot understand the requirements or make an application without legal or other support;
- the five-year "good behaviour" component of s101(4) is inappropriate for vulnerable people for the reasons set out in our response to Question 5.12; and
- it is difficult to establish vulnerability if the person suffers from severe social exclusion, for example, letters of support or records of treatment from medical practitioners are often not available as the person does not engage with such services.

(2) The write-off procedures should be a complete, unconditional waiver of the penalty notice debt and not involve a "good behaviour" period. The write-off procedures could also be more user-friendly and adopt the approach of the Telecommunications Industry Ombudsman, the Financial Ombudsman Service and the Energy and Water Ombudsman by allowing individuals to apply online or over the phone. The sorts of evidence that can establish vulnerability should be broadened to accommodate the needs of socially excluded individuals, such as a letter of support from a solicitor or caseworker. The most vulnerable and socially excluded will likely still require assistance but a more user-friendly and pro-active approach should make that assistance easier for non-legal support workers to provide.

Question 7.12: 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. Law enforcement officers would benefit from training by psychiatrists, psychologists and other disability and mental health workers to assist them with:
- identifying persons with a cognitive impairment or mental illness;
- understanding the difficulties they face;
- communicating with such people effectively; and
- being sensitive to their needs.

The SDRO could also provide education sessions and outreach services for vulnerable individuals and support workers to ensure they are able to utilise the special legislative provisions; for example, by participating in "Fines Days" held at prisons and in regional areas. The SDRO educational program could also aim to educate other agencies, such as Legal Aid NSW and the Department of Corrective Services, to avoid the unintentional dissemination of misinformation.

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

We refer to the comments provided in our response to Question 5.10, all of which are relevant here. In particular, we support an amendment to the provisions to enable applications for review to be made at any stage, including during the enforcement process.

Another option is to amend the provisions to enable the timeframe to be extended on request. See for example s 23 of the *Infringements Act 2006* (Vic) (emphasis added):

> (3) Within 14 days of service of the request for additional information by the enforcement agency, the applicant-
> (a) must provide the additional information; or

(b) if additional time is required, may request in writing an extension of time to provide the additional information.

(4) If the applicant requests additional time in accordance with subsection (3)(b), the enforcement agency may-
(a) refuse to extend the time for the provision of the additional information; or
(b) grant an extension of time for that information to be provided.

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?

In order to ensure access to the review process we suggest that, in addition to participating in regular "Fines Days" at prisons and in regional areas, the SDRO consider having a face-to-face client service centre staffed by client service officers with specialist training in cognitive and mental health issues. The NSW Trustee and Guardian operate such centres in the Sydney CBD and at Parramatta. We also suggest that the SDRO adopt a more user-friendly system that enables online and telephone applications, including applications for write-offs, WDOs, and time to pay arrangements.

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?

(1) Yes. Section 3 of the *Infringements Act 2006* (Vic) includes in its definition of "special circumstances":

> a serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the *Drugs, Poisons and Controlled Substances Act 1981* where the serious addiction results in the person being unable—
> (i) to understand that conduct constitutes an offence; or
> (ii) to control conduct which constitutes an offence.

We would support a definition in similar terms, or alternatively, an adapted version of the definition of a person with a "severe substance dependence" included in the *Drug and Alcohol Treatment Act 2007* (NSW) at s 5:

> ***severe substance dependence***, in relation to a person, means the person:
> (a) has a tolerance to a substance, and
> (b) shows withdrawal symptoms when the person stops using, or reduces the level of use of, the substance, and
> (c) [may lose] the capacity to make decisions about his or her substance use and personal welfare due primarily to his or her dependence on the substance.

The provisions of 5.13 of the Internal Review Guidelines under the *Fines Act* could then apply:

> 5.13 The obligation to withdraw the penalty notice only arises if as a result of the person's condition, the person is unable to understand that their conduct constitutes an offence, or is unable to control the conduct constituting the offence. For example [bullet point in italics added]:

- A person with an intellectual disability does not understand that they have to purchase a platform ticket, even if they have no intention of travelling on a train,
- A person with a mental illness is swearing or behaving offensively during a severe episode,
- A person with a cognitive impairment gives a police officer an incorrect name or address because their impairment affects their social and interpersonal skills,
- For a homeless person, everyday domestic activities such as sleeping, having implements to prepare food (such as a knife) or drinking alcohol can become illegal activities because they are undertaken in public.
- *A person with an opiate dependence falls asleep on a train after a methadone dose and travels beyond a purchased fare.*

(2) Yes. We support an adaptation of the "exceptional circumstances" test set out in *The Internal Review Provisions – Internal reviews under the Infringements Act 2006 (Vic): An information paper (2008)* at 5.3, and recommend that the circumstances of the individual at the time of enforcement should be taken into account in addition to the circumstances in which the offending conduct occurred (additions in italics):

> **5.3 Exceptional Circumstances**
> The 'exceptional circumstances' test, like the special circumstances test, provides the infringements system with the flexibility to determine whether, taking into account the circumstances in which the offending conduct occurred *and the current circumstances of the individual*, the imposition of a penalty was justified *or the enforcement of the penalty is justified*.
>
> **5.3.1 What are exceptional circumstances?**
> There is little legislative guidance or helpful case law in terms of defining special circumstances. However, agencies should be aware that this category can encompass other areas of disadvantage which do not fall within the narrow definition of 'special circumstances'.

Question 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?

(1) Yes.

(2) Persons who are on full Centrelink benefits should be eligible to undertake Work and Development Orders.

CHAPTER 8 – CRIMINAL INFRINGEMENT NOTICES

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?

Yes. Principles similar to those proposed by the NSW Ombudsman are appropriate. The principles that apply to Criminal Infringement Notices (CINs) do need to be specific to CINs so that the role of CINs is placed in the broader context of the criminal justice system. For example, the principles should specify when another diversionary option should be used instead of a CIN.

Question 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?

The Ombudsman's recommendations are reasonable.

Question 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? (2) Should official cautions (governed by police guidelines) be available as part of the Criminal Infringement Notice regime, as recommended by the Ombudsman? (3) Should the offences of offensive language and offensive conduct continue to be among the offences for which Criminal Infringement Notices may be issued?

The Ombudsman's review clearly indicates that CINs are having a net-widening effect, particularly in relation to offensive language and offensive behaviour offences. This is of particular concern when one considers the low rates of seeking court election and internal review, particularly when the recipient is Aboriginal or a Torres Strait Islander. The decline in the proportion of such offences being brought before the court is not significant enough to justify the increase in police action for offensive conduct. In any case, the determination of whether specific incidents are offensive according to community standards should be left to the courts. For these reasons it is our view that CINs should not be issued for these offences.

Question 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?

(1) Under-payment could be addressed by ensuring that the full gammit of flexible payment options, including Work and Development Orders, and write-off provisions, are available.

(2) Yes, on the basis of acute economic hardship.

Question 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, for the reasons set out in response to Question 7.1.

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?

Yes.