



Mr Paul McKnight  
Executive Director  
Law Reform Commission  
DX 1227 SYDNEY

Dear Mr McKnight

*Law Reform Commission Consultation Paper 10 Penalty Notices*

I refer to your letter dated 20 September 2010.

I note that the NSW Law Reform Commission (LRC) is undertaking a review of the laws relating to the use of penalty notices in New South Wales and has invited Corrective Services NSW to make a submission. As part of this review, the LRC has written a consultation paper entitled **Consultation Paper 10 – Penalty Notices** dealing with the various aspects of this review.

Corrective Services NSW (CSNSW) recognises that fine enforcement can present significant access to justice issues for disadvantaged people. These issues are not unique to NSW or even Australia. Overall, the LRC consultation paper highlights the importance of redressing this disadvantage and why reforms to the fine enforcement system are necessary.

It is well known that offenders in custody and in the community have extremely high levels of debt. Offenders received into custody invariably have a history of debt owing to unpaid court fines or penalty notices. Such offenders commonly fall into further debt whilst incarcerated.

In addition, when people have come through a period of instability in their lives, for example through mental illness, accumulated fine-related debt can remain an obstacle to rebuilding their lives and overcoming disadvantage. Similarly, debt, including fine-related debt, can hinder former inmates from moving forward with their lives after their release from custody.

Without other means to repay their debt, inmates can leave gaol with substantial fine related debt, adding to the challenges they face in successfully integrating into the community post release.

As part of standard case management practices for both community-based and incarcerated offenders, CSNSW promotes access to a range of programs and services to assist with financial management. Strategies include referral to mainstream community group-based interventions, CSNSW-run group-based programs, one-to-

one counselling and the provision of information in relation to the resolution of debt and financial difficulties.

CSNSW notes the previous work of the New South Wales Sentencing Council regarding inmates and debt in its 2006 report *Interim Report on the Effectiveness of Fines and Penalty Notices*, referred to in the LRC's Consultation Paper on Penalty Notices (Chapter 7: Impact on vulnerable groups).

The Womens Advisory Council (WAC) (an agency reporting to CSNSW) has made a separate submission to you noting that while considerable reform has been initiated in the wake of the Sentencing Council's report, many of the reforms specifically relating to inmates (whether on remand or under sentence) have not yet been enacted, or have been left to the NSW Department of Justice and Attorney General to implement as stand-alone projects.

For example, the recently developed Work and Development Order – which allows disadvantaged people to undertake community work in lieu of payment of a fine – has been directed toward an overall 'vulnerable population', and contains no specific reference to inmates. While people in custody are not exempt from participation in the scheme, CSNSW is concerned that the opportunity for debt reduction in correctional centres has been restricted by their exclusion.

There also needs to be a stronger focus on causal factors related to offending in relation to Work Development Orders. There may be community ethical concerns raised in relation to mandating mental health and medical treatment where these are not related to the offence for which the fines were imposed. The rights of the individual may be seen to be neglected when the legal powers of the state are imposed and this is particularly true for vulnerable groups.

There is also a need to avoid overlap and duplication of options to address non-payment of fines which otherwise have potential to create community and offender confusion.

CSNSW supports the recommendations made in the Sentencing Council's report with respect to people in custody, namely:

- the systematic elimination of debts of the mentally ill and intellectually disabled inmates;
- pro rata reduction of outstanding debt;
- development of a more progressive regime for the writing-off of accumulated fines and penalties;
- development of guidelines for debt reduction/licence reinstatement;
- reduction or waiver of fines and surcharges for offenders who successfully complete an accredited job training, or driver education programs or other approved program and who then begin to pay off their debt; and

- extension of three months SDRO moratorium on collection.

In relation to the Consultation Paper, CSNSW limits its comments to the discussion contained in Chapter 5 relating to Community Services Orders and to Questions 7.1 to 7.16 in Chapter 7 (vulnerable groups).

The issues raised in the Paper not only impact directly on offenders within the target groups, but also on the core work undertaken by the Statewide Disability Service (SDS) and the Community Offender Services Program Support Group (COS Program Support Group) arms of CSNSW.

### **Chapter 5: Issuing and enforcing penalty notices**

CSNSW manages offenders in correctional centres and in the community. CSNSW also manages offenders in custody who may potentially be safely managed in the community if suitable diversion options were available. Finally, CSNSW has oversight of offenders on Community Service Orders. A large proportion of all these groups of offenders have fine-related debts and have direct contact with the State Debt Recovery Office (SDRO).

While fines are designed to promote specific and general deterrence, CSNSW notes a previous study by the NSW Bureau of Crime Statistics and Research (BOCSAR) into whether fine amounts had any impact on reoffending<sup>1</sup>. The BOCSAR study suggests that substantial increases in fines and licence disqualifications have limited potential in deterring recidivist offenders.

In addition, fines have differential impacts and consequences according to capacity to pay, capacity to modify or change behaviour and geography. For instance, non-payment of fines for offences resulting in loss of a Driver's Licence has a disproportionate effect on people living in rural and remote communities with few public transport options, and this has led to disproportionate numbers of Aboriginal men and women from these communities being given a custodial term for repeat Drive Whilst Disqualified offences.

CSNSW believes that an early response to Drive Whilst Disqualified offences should be urgently considered and would like the opportunity to develop such a response. An alternative could provide offenders with an opportunity to make a positive contribution to the community as well as earning the right to regain their Driver's Licence.

Paragraph 5.71 of the Consultation Paper under the heading 'Community service orders' notes that where a fine defaulter has not paid the amount in the fine enforcement order and where civil action has, or is likely to be, unsuccessful, the SDRO may issue a community service order.

CSNSW notes that a fine defaulter who is held to be unsuitable for community service work under section 79(3) of the *Fines Act 1996* may have a fine written off under

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<sup>1</sup> Moffatt, S & Poynton S, *The deterrent effect of higher fines on recidivism: Driving offences*, NSW Bureau of Crime Statistics and Research, March 2007

section 101(2), but a fine defaulter whose community service order is revoked under section 86(3) because he or she is unsuitable for community service work [the same ground that would have excluded him or her under section 79(3)] is liable to imprisonment under section 87(1).

Since community service orders are only to be issued when civil enforcement has been unsuccessful (effectively meaning that the fine defaulter has virtually no assets to seize and no employment income to garnish), it is likely that many fine defaulters who are issued community service orders will be homeless or have transient accommodation, or be subject to psychological or mental health problems, or have significant alcohol and other drug problems. Most such problems will render a person unsuitable for community service work.

CSNSW is keen to minimise the number of community service orders issued to fine defaulters who are unsuitable for community service work, and suggests that the SDRO should maintain a register of fine defaulters who are found to be unsuitable for community service work, and only issue community service orders against fine defaulters who are not on the register. There should also be provision in the register for the names of relevant carers or treatment providers so that contact can be made with such persons if an offender commits further offences. The person could, for example, be a case worker assisting a mentally ill offender under a Community Treatment Order.

## **Chapter 7: Vulnerable People**

The CSNSW Statewide Disability Service (SDS) is the primary business unit which addresses the additional support needs of offenders with disabilities. The SDS consists of a multidisciplinary team that works with all offenders with a disability who are under the management of CSNSW— whether in custody or in the community. The SDS functions in a number of capacities including direct work with offenders, providing support and advice to staff managing offenders with a disability, providing advice to internal and external stakeholders, through to ensuring that issues impacting offenders with disability are adequately addressed via policy and procedure.

A primary function of SDS is to focus on the pre-release planning of offenders with an intellectual disability, including making referrals to Ageing Disability and Home Care (ADHC) and their Community Justice Program (CJP), as well as addressing issues of outstanding debt.

### **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?**

CSNSW acknowledges that people with mental illness or cognitive impairment face significant barriers to effectively dealing with penalty notices including, but not limited to, difficulty in understanding what a penalty notice is, financial hardship that precludes payment of the fine, minimal supports that make it difficult to deal with the fine through other means and, often, limited understanding of the principles of contract which can hinder a time to pay arrangement. However, whether penalty

notices should be issued to vulnerable groups is dependent on what might/would replace the penalty notice. CSNSW supports the submission made by the Intellectual Disability Rights Service (IDRS) that any alternative solution should not involve increased exposure to the criminal justice system.

There are a number of difficulties faced in not issuing fines to people with mental illness or cognitive impairment, or introducing an alternative method of dealing with the offences that now result in a penalty notice. One difficulty concerns the identification of the target group. Even when officers receive awareness training that includes information on the identification of intellectual disability or mental illness, the officers may not engage with each individual for a significant period of time and thus may not have sufficient time to determine if it is likely that the individual falls within the target group. Many officers are primarily concerned with safety and offending behaviour, and issues related to disability or impairment are not the focus for their role. Furthermore, many people with a cognitive impairment are able to “mask” their disability, or present as being much higher functioning than they actually are, which compounds the already difficult task of identifying individuals who fall within the target group.

Thus identification, prioritisation of disability in relation to offending behaviour, and staff attitudes and training may need to be addressed in addition to deciding whether to issue penalty notices.

**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?**

CSNSW notes that the *Mental Health (Forensic Provisions) Act 1990* provides a legislative scheme for diverting defendants with a mental health problem or cognitive impairment. The Act allows defendants to be diverted out of the criminal process and into treatment for mental health problems where treatment is urgently required. CSNSW submits that such an alternative could be explored in response to a penalty notice offence for people with mental health issues or cognitive impairment.

The alternative of official cautions is a matter for which the legal profession or other law enforcement bodies such as police are best placed to comment on.

**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?**

CSNSW considers that the creation of a register of people who are eligible for automatic annulment of penalty notices on the basis of mental health or cognitive impairment may assist in dealing with a number of the barriers that face this target group. However, the creation of such a register appears not to be a feasible option, owing to the characteristics of this target group and concerns around privacy and consent to the release of information of this target group. It should also be noted that mental illness is not present all the time, and a person who has a diagnosis of mental illness may be responsible at the time of an offence and 'eligible' to receive a penalty notice.

However, it may be possible for the SDRO to maintain an *internal* register of people for whom fines have previously been waived on the basis of mental health or cognitive impairment. This internal register could then be used to allow for automatic annulment of penalty notices that arise in the future. This method would ensure that:

- (1) offenders seeking an initial waiver were able to consent to their name being recorded on the internal register;
- (2) SDRO has detailed information supporting the need for future automatic annulment of penalty notices; and
- (3) if required, the SDRO could follow up with the agency or person who originally supported the offender to apply for a waiver to determine if a waiver is required.

The risks of maintaining a register for people who are eligible for automatic annulment include:

- (1) An assumption that people on the register are always considered eligible and the circumstances of each offence are not reviewed.
- (2) If a person with mental health or cognitive impairment knows their name is on the register, this may be considered by them as receiving a *carte blanche* to offend without consequence of a penalty notice.
- (3) The risk of the register/list not being secure and private information being made available to agencies or people who should not have access to a person's information.
- (4) Issues of informed consent are not adequately managed, and people with mental health or cognitive impairment do not fully understand the implications of consenting to be on a list.

**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?**

CSNSW supports the proposal by the NSW Sentencing Council that fines and penalty notice debts of correctional centre inmates with a cognitive impairment or mental

illness be written off<sup>2</sup>. At present, Statewide Disability Services requests the write off of such debts for offenders with an intellectual disability or acquired brain injury on a case by case basis; however, a streamlined process would be far more effective in addressing this issue.

CSNSW notes that any procedure introduced would need to address a number of issues, including:

- The recognition that there are offenders within the target group who do have the capacity to comprehend the nature of a penalty notice and the deterrent effect of a fine, and who take responsibility for their debt and are willing to pay it off;
- That automatic waiver will not address the underlying issues and behaviours leading to the imposition of a fine and therefore, it is likely that the waiver process will need to take place on multiple occasions as the individual offender incurs new penalty notices;
- That the information gained from the number and nature of penalty notices issued to individual offenders within the target group provides useful information regarding these issues and behaviours that needs to be addressed as part of pre-release planning and by service providers post release. Therefore, such information should continue to be provided even if there is an automatic waiver; and
- The need to ensure that the provision of names to the State Debt Recovery Office (SDRO) is done by those arms of CSNSW that have responsibility for the management of offenders within the target group, e.g. Statewide Disability Services for offenders with a cognitive disability, to ensure that individuals have been correctly identified and that valid consent has been given.

At present, waivers issued on a case by case basis are in effect put on hold for a five year period. During this time, if the offender has any further fines that go to enforcement, the old fines are raised. If no new fines go to enforcement, the fines are permanently written off. The difficulty with this, or any period of good behaviour, is that the behaviours which lead to the offences incurring the penalty notices cannot be rectified in a short period of time for people with a cognitive impairment or mental illness.

For example, people with an intellectual disability who are issued with penalty notices for failing to purchase valid tickets for train travel may require a range of support to remedy this issue, including:

- Support with budgeting to ensure that they have sufficient money for travel; and
- Support with planning their time and participating in appropriate social activities so that they are not spending significant portions of their time travelling throughout different areas to relieve boredom.

Therefore, the consequence of breaching a “good behaviour” period following waiver would be an important factor in determining the practicality of such an option.

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<sup>2</sup> NSW Sentencing Council, *The effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices*, paragraph 4.116

**Question 7.5 –**

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

CSNSW supports the introduction of a pro-rata reduction of penalty notice debts and outstanding fines of offenders in custody. This option would offer offenders who have the capacity to comprehend the nature of a penalty notice/fine, who understand the deterrent effect of a fine and who take responsibility for their debt and are willing to pay it off, a realistic chance of doing so.

Any system for pro-rata reduction would need to take into account:

- The differing levels of debt each offender has. For example, a pro-rata reduction for offenders who have \$2000 worth of outstanding debt would be much easier to pay off than for an offender with a \$20,000 debt. For offenders with a high level of debt, a pro-rata reduction combined with a waiver would be a more effective way of managing this issue i.e. payment under the pro-rata scheme until a set amount of the fine has been paid off and then a waiver of the outstanding amount.
- For many offenders, the money that they gain from correctional industries or correctional centre wages is the only money earned whilst in custody and this money is required for phone calls and buy ups. Using this money for payment of a debt over things such as phone calls, home or cigarettes, could lead to a range of behaviours within the target group that would be exceptionally difficult to manage.
- The short sentences that many offenders within the target group receive. For example, if the debt had not been paid off prior to exiting custody, would the pro-rata reduction continue in the community and how would it be managed?

**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?**

Before a strategy can be proposed, the objective of the strategy needs to be outlined. If the outcome of the strategy is to reduce behaviours that result in penalty notices being issued, then for this group there are many disability issues which need to be explored. The strategy would need to address placing appropriate supports and services in place so the risk of receiving penalty notices is reduced.

Detailed functional analysis and risk assessment by staff trained to work with people with disabilities who offend may assist in reducing offending behaviour in this target group. When a review of the pattern and pathways of offending that lead to the issuing of penalty notices is conducted, triggers for the behaviour may be identified and over time, the behaviour may be reduced. However, it is unlikely that offending behaviour will cease immediately, or that relapse will not occur.



Any strategy would need to include a trend in decreasing behaviours and an expectation that some relapse will occur.

If the strategy is to manage the issue of penalty notices, then strategies discussed above including conditionally writing off debt, or maintaining a list of people who may be eligible for debt write off, can be explored.

**Question 7.7 –**

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

CSNSW believes that any proposed scheme should focus on penalty notices and fines issued by the courts and not victims' compensation. Although offenders within the target group face many of the same issues in dealing with victims' compensation that they do with penalty notices and fines, it is recommended that a separate scheme be developed to deal with victims' compensation.

However, any scheme that pertains to victims' compensation should enable offenders to begin dealing with the debt, even if appealing the amount for payment, prior to leaving custody. This would be of particular benefit to offenders with a mental health or cognitive impairment who may not have the support in the community to effectively deal with this issue – including appealing the amount of victims compensation they are required to pay.

**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?**

CSNSW supports the introduction of a concession rate applicable to penalty notices issued to people on low incomes. In dealing with the issue of outstanding debt for offenders with an intellectual disability, Statewide Disability Services has noted that those offenders who predominately have court issued fines tend to have lower incomes than those offenders who are predominately issued with penalty notices, as the court has discretion to alter the amount of the fine based on the offender's capacity to pay a fine.

CSNSW does not propose a definition of "low income", but supports the proposition that individuals in receipt of certain Centrelink benefits should automatically qualify for a concessional penalty amount. In determining the type of benefits to which this concessional payment should apply, consideration must be given to the range of Centrelink benefits people within the target group are in receipt of. A high proportion of offenders with a mental illness or intellectual disability, for example, are in receipt of NewStart benefits through Centrelink as opposed to the Disability Support Pension.

**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)?**

CSNSW assists offenders with respect to write-off applications. CSNSW considers that mental health advocacy or legal groups which deal with this issue regularly are best placed to address this issue.

**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?**

CSNSW supports mandatory discrimination awareness and disability awareness training for all law enforcement officers authorised to issue penalty notices. In order to raise awareness so that training has maximum impact, there should be a strong practical component to the training as it can often be difficult to translate the theory of identifying people with a mental illness or cognitive impairment into practice.

As training alone will not resolve the issue of identification, it would be worthwhile for law enforcement groups to develop strong working relationships with key agencies in the local areas that work with people with mental illness and cognitive impairment to ensure ongoing dialogue and co-operation that will heighten awareness of the issues. Law enforcement agencies would also require strong policies in which disability issues are aligned with key performance indicators for officers who are authorised to issue penalty notices.

**Question 7.13 –**

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

Where an individual with a mental health or cognitive impairment has support to seek review of a penalty notice, the review provisions are highly effective. CSNSW notes that when Statewide Disability Services began assisting offenders with an intellectual disability in seeking a review of penalty notices through the SDRO approximately five years ago, there were significant barriers owing to the lack of understanding of how an intellectual disability differs from a medical condition. However, through ongoing dialogue between these two agencies, these issues are no longer of major concern.

One of the primary issues which presents in seeking review is that many offenders do not understand what is happening when they are issued with a penalty notice, or cannot read the information and instructions on the notice, and therefore simply throw the "piece of paper" away. Statewide Disability Services notes that the majority of offenders with an intellectual disability in custody state that they do not have any outstanding fines. However, when information is sought from the SDRO, it is discovered that this is not the case.

Recently, one offender who was insistent that he had no fines, but agreed to an SDRO check, was determined to have over \$60,000 of outstanding fines which were predominately penalty notices. When this was discussed with the offender, he was very shocked and quite anxious about the situation. He had no recollection of ever receiving a fine from the court, or from any law enforcement officer, although was able to state that he was "handed a piece of paper" on one occasion when he didn't have a ticket for train travel. Although the offender was frequently returning to custody, he was unable to raise this issue with staff at intake, because he did not know that the issue existed. Statewide Disability Services is currently preparing an application for review in this matter.

**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?**

This is a question which is better addressed by community advocacy groups than CSNSW. One practical solution is the establishment of a free call number which can be accessed and linked into a service to assist a vulnerable person obtain a review. A further solution for offenders in custody is supported access to legal information from the legal information portal available on networked offender computers. This network is currently being rolled out in all correctional centres.

**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?**

CSNSW submits there may be some merit in withdrawing a penalty notice on the general grounds of "exceptional circumstances" and/or serious drug addiction, on the basis that the penalty notice will most likely have very little, if any, deterrent effect, nor will it necessarily result in the payment of any of the penalties. A right to a waiver of the fine following review, however, should not be automatic and should apply on a case-by-case basis.

**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?**

Statewide Disability Services has had limited contact with the SDRO Centrepay Program through Centrelink. However, there are concerns about the effectiveness of this program for offenders with a cognitive impairment.

The primary issue is the method through which the Centrepay Program becomes activated. The offender not only has to have identified the issue of outstanding enforcement orders or penalty notices, but must have made an application to enter into a time to pay agreement. Once the time to pay application has been approved, the offender must then complete further paperwork for the payments to be made directly from their Centrelink benefits, assuming they are aware of the program. Without sufficient support in the community, it is likely that many offenders with a cognitive impairment will not be able to complete these steps.

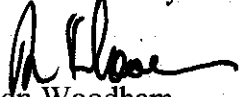
Furthermore, if new penalty notices are received, they are not automatically added to the Centrepay arrangement and the offender must contact SDRO in order to have the new orders added to the time to pay agreement. Again, without sufficient support in the community, it is likely that this will become an unmanageable situation for the offender, particularly if they do not have the capacity to address or understand their offending behaviour and continue to accumulate fines. In essence, the time to pay can end up being an ongoing payment with no action being taken to address the causes of the offending behaviour or to provide the offender with the required support in the community.

The final difficulty with the Centrepay Program is that many people with a cognitive impairment have difficulty in understanding the concept of a contract. On numerous occasions, offenders with a cognitive impairment have reported to Statewide Disability Services that they have closed down their bank accounts because money was being "stolen" from them, however, investigations revealed that the missing money was related to payments required under various contracts they had entered into e.g. time to pay agreements, personal loans etc. The time to pay agreement is not dependent on the Centrepay Program, and is still applicable after the person stops receiving benefits or cancels the payments through Centrelink. This may raise issues if offenders do not have sufficient support to understand that they are still required to make the payments under the agreement to ensure that it is not cancelled or that further enforcement action is taken.

One way that could significantly improve this program is by ensuring that such applications are made, as much as possible, while offenders are in custody as part of their pre release planning. This would ensure that a time to pay agreement (with Centrepay Program) is the most appropriate option, that there is sufficient support to explain the process, and sufficient time to link the offender into supports in the community to assist with any underlying issues.

Thank you for the opportunity of making a submission.

Yours sincerely



Ron Woodham

COMMISSIONER

65/12/10