Redfern Legal Centre

16 December 2010

The Commissioners
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Commissioners

Submission by Redfern Legal Centre – New South Wales Law Reform Commission Consultation Paper 10 – Penalty Notices

Redfern Legal Centre

RLC is an independent, non-profit community legal centre dedicated to promoting social justice and human rights. We offer free legal advice, referral and casework to disadvantaged people and the groups that advocate for them. We also provide community legal education and advocate for the reform of inequalities in laws, the legal system, administrative practices and society as a whole.

RLC provides a general legal service. It also has specialist services such as a credit & debt legal service, a tenancy service and a Women's Domestic Violence Court Advocacy Service. As a generalist community legal centre providing services to a population experiencing overlapping causes of social and economic disadvantage, RLC has frequent contact with vulnerable groups and other people with serious penalty notice issues.

RLC advises people or groups who live or are based in the Botany Bay, City of Sydney and Leichhardt Local Government areas.

Responses to the Consultation Paper

Redfern Legal Centre strongly supports the reform of the procedure and functions of the State Debt Recovery Office to engage with vulnerable people in a way more helpful to the public interest.

Our responses to selected questions from the Consultation paper are set out below:

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

RLC agrees with the argument outlined in paragraph 1.47 of the Consultation Paper for a stand-alone statute on penalty notices operating in parallel to legislation applicable to

fines. Accessibility, clarity, ease of use and the minimisation of confusion of the penalty notice system with the court-imposed fines system should be paramount objectives in any reform of the penalty notices system. The similarity between penalty notices and fines, and the fact that interactions between penalty notices and fines do arise, does not provide a sufficiently strong counter-argument.

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

All organisations and agencies empowered to issue penalty notices should have policies directing issuing officers not to impose penalty notices for "minor" or "inconsequential" offences, especially where the penalty amount could be considered excessive.

As highlighted in the preliminary submission to the NSWLRC by the Intellectual Disability Rights Service, there is also a strong need for transparency and accountability in the issuing of penalty notices. Issuing officers must be able to justify to a court why a penalty notice was issued, and provide a detailed outline of the facts of the case.

RLC submits that agencies should develop policies about issuing penalty notices to minors or vulnerable people. Specific review procedures must ensure a continuing commitment to the availability of internal review throughout the enforcement process, irrespective of whether the penalty notice is now subject to an enforcement order.

(2) the alternatives available?

The recent enactment of provisions in the Fines Act to enable statutory cautions and the development of the Caution Guidelines under the Fines Act are welcomed and supported by RLC. However, we believe that there are a number of shortcomings in terms of using, understanding and applying the recent initiatives.

Effective use of the Caution Guidelines could be better achieved by creating a legal obligation on all authorised organisations and agencies to comply with the statutory provisions and Caution Guidelines. Compliance should be externally monitored. Relevant training should be provided about the Guidelines and implementing the Caution Guidelines should be specifically noted as a key duty of any issuing or enforcement officer.

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?

The only private organisations who should be eligible to issue penalty notices are charitable organisations. The procedure to be followed should be modelled on that by which the RSPCA is empowered under the Prevention of Cruelty to Animals Act 1979 (NSW). Private companies should in no way be considered appropriate to make an impartial decision on the punishment of individuals. It is unlikely that a responsible organisational culture would develop in a private contractor that does not have the authority to write off enforcement debts.

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

The debt collection industry provides important examples of the problems of using private contractors to collect money owed. RLC operates a specialist credit & debt service and has seen examples of:

- Pursuit of unrecoverable debts via Local Court claims against debtors with minimal assets and subsisting solely on Centrelink benefits;
- Actively seeking payment by instalments where the instalments are less than the accruing interest;
- After referral to the Financial Ombudsman Service, continued phone calls and letters – despite both actions being in breach of the FOS Terms of Reference;

RLC submits that penalty notice enforcement is too serious a governmental function to be outsourced to private contractors. The repercussions for individuals mistreated by the enforcement system are so potentially dire that the government must retain the maximum level of control and accountability over its agents. This means not using private contractors.

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?

On the basis advocated by The Shopfront Youth Legal Centre, a limit should be placed on the total value of penalty notices that can be issued in respect of one occasion of offending behaviour. This would recognise and mitigate the shortcomings of the penalty notice system compared to the more holistic approach taken by the judiciary in sentencing offenders found guilty of multiple charges arising from the same incident.

RLC has no objection to the relevant number of penalty notices being issued according to the number of offences committed on any one occasion, as long as the total value of the penalties does not exceed the prescribed limit for one occasion. This would allow for a record to be kept regarding a person's history of offences, but avoid an aggregate penalty amount that is disproportionate to the seriousness of the 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 guidance and ultimately left to the discretion of the issuing officer?

RLC's suggested approach is that the Fines Act mandate a maximum of 10 penalty units arising from one incident, but that there be provision in other legislation for the Fines Act mandate not to apply. One example is the Petroleum (Onshore) Act 1991, where although the offence can be dealt with by way of penalty notice, there is significant public loss caused by the offence.

Case Study

The following case study illustrates how some fines operate on a series of assumptions that can bring about serious injustices for vulnerable people. These include assumptions about the capacity to receive notice, provide reasons and the deterrent effect of high penalty amounts.

Clara was an Aboriginal woman in her fifties. She suffered from many health issues, including depression, anxiety and post-traumatic stress disorder. She also suffered from poor eyesight which made her functionally illiterate. She visited RLC on an unrelated matter and brought her mail for us to read. Included in her mail was an SDRO enforcement order for $1,700 for failing to present for jury duty in 2008.

RLC assisted Clara in sending an annulment application to the Sheriff's Office. The outcome of the application is not known, as the client died shortly after.

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?

In the same fashion as it remains open to the Crown to withdraw proceedings in more serious matters at any time, so there should be a similarly unfettered power to withdraw penalty notices. The system is not structured to solicit relevant information from alleged infringers, so the interests of justice demand that a withdrawal remain possible.

In the event that a withdrawal power is limited in scope, it is important that all issuing and enforcement authorities have the power to withdraw where a vulnerable person is the subject of a penalty notice.

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

Penalty notices should contain information about:

1. A person's right to request a review of the penalty notice by the issuing agency;
2. The entitlement to seek to have a penalty or fine withdrawn or written off by the SDRO. The key factors in making a withdrawal or write off determination should be listed on the penalty notice;
3. The telephone number and URL for LawAccess;
4. A list of outlets for the "Fined Out" publication and the URL for the electronic version stored on the Legal Aid website.

There is also a need to amend the Fines Act to ensure penalty notices specify the date and place that the alleged breach occurred. This information is particularly helpful for some vulnerable people who seek advice about penalty notices, but may be unable to recall precise details of the circumstances of the offence committed.

Case Study

This case study illustrates the steps that many debtors take in attempting to pay off penalty notices. Due to a lack of understanding of review options and protected sources of income, debtors will place themselves in even greater financial hardship in an attempt to pay. Debtors often do not understand the difference between what the SDRO is entitled to and the greater demands that it commonly makes.

Belinda sought advice from RLC regarding a $405 fine debt with the SDRO. Belinda is in severe financial hardship and debt. One of her bank accounts overdrawn by $88 and the other is in credit by $18. Belinda has a $10,000 Centrelink debt, has been bankrupt since 2003 and relies on the disability support pension as her income. Belinda lives in a housing commission unit, is in poor health and is the primary carer for her mother who has heart

disease and cancer. Belinda is also in very poor health and suffers from diabetes, Osteoporosis, Asthma, fatigue, sleep apnoea, chest pain and has difficulty walking. Belinda and her mother's medical conditions require Belinda to use a car to attend medical appointments.

On 17 March 2009, Belinda drove her mother to hospital for cancer treatment. However, Belinda's licence had expired 12 days before (on 5 March 2009). As a result of driving on an expired licence, Belinda had her licence suspended for 6 months and was issued with a penalty notice.

Belinda alleges the RTA failed to send her a licence renewal notification and as a result, she was unaware her licence had expired.

Belinda wrote to the SDRO asking for the fine to be waived on the basis that she had not received a licence renewal notification and her disability support pension.

The SDRO replied to Belinda's letter on 7 May 2009 outlining the following:

- *The SDRO cannot cancel or offer leniency for the offence in the current circumstances.*
- *The penalty notice was issued legally.*
- *Failure to receive renewal notification does not negate a driver's obligation to renew their licence.*
- *The SDRO does not have authority to waive a penalty or fine due to an individual's financial hardship.*
- *The SDRO can accept a series of $20 payments, provided the full penalty is repaid by the due date.*
- *If there is an outstanding balance by the due date, enforcement action will commence as well as the enforcement of a $50 late payment fee.*

Belinda was extremely distressed about her circumstances and requested RLC assist her to draw upon her superannuation to fund her Centrelink and SDRO debts.

RLC advised Belinda that superannuation money is protected from creditors while the money is in a superannuation fund but it is not protected once it is withdrawn from the fund. RLC also advised that as Belinda was currently paying off her debt so there was no need for her to accelerate her payments.

(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?

These details should be legislatively required, however it is not necessary for the Fines Act to declare a specific form.

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

The effectiveness of the recent amendments to the Fines Act relating to the internal review of penalty notices is dealt with below at paragraph 7.13.

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

RLC submits one key improvement would be offering immediate write off rather than a five year probationary period. This point is made with specific reference to vulnerable people, the group most likely to receive a write off, at paragraph 7.4 below.

Fine mitigation mechanisms such as CSOs, WDOs and write offs must be applied in a rational manner. The magnitude of many fine debts is such that CSOs and WDOs would take years to mitigate any significant amount of the debt. It is not appropriate for the SDRO to deny a write off and take the position that a decade is a suitable amount of time for a person to work off a fine debt. To do so exacerbates, not mitigates, the effect of the fine debt on the life and future prospects of the person.

The operation of s.101(1A)(a) is a problem because eligibility for a CSO prevents individuals obtaining a write off. RLC has also seen write offs rejected on the basis of eligibility for a WDO, which is not a relevant factor under the Fines Act. RLC submits that mitigation mechanisms should not be mutually exclusive with withdrawals and write offs. A hybrid strategy of CSOs/WDOs and write offs could do much to create the appearance of fairness, from the perspective of the penalised person.

Another current problem is the linking of eligibility for a WDO with the availability of an authorised supervisor. For many of RLC's clients, their current treatment providers are not authorised under the WDO program. Disruption to a treatment plan can have serious consequences and is often more costly to the public sector than simply writing off the debt. Unless WDO regulations are amended to reduce paperwork and deem Medicare-registered treatment providers to be authorised supervisors, WDOs are unlikely to help adults with chronic problems, one of the stated target groups.

Case Study

The following case study illustrates the ways in which procedure and an institutional preference for fine mitigation can unduly prolong the life of a penalty notice file. In this example, payment of the fines is not possible.

James is homeless and lives on the streets or in temporary refuge accommodation. James has been approved for priority housing with Housing NSW. James suffers from serious mental illness, including schizophrenia, which has not been well managed since his diagnosis in 2004, and his sole income derives from the disability support pension which he has been receiving since 2006.

James has accumulated a debt of $16,051 over the period from 1996 to date. The fines are predominantly for public transport offences as well as some court imposed fines including contravention of an ADVO, possession of a prohibited weapon and drug possession.

RLC made an application on James's behalf to have his fines written off or waived. RLC enclosed a letter of support from an NGO, a letter of support from a Mental Health case manager and an earlier letter from James to the SDRO requesting for his fines be written off. James's earlier letter had set out his medical, personal and financial hardship and

enclosed a statement of his financial status and copies of the fines issued to him. James's financial circumstances are unlikely to improve and it is unlikely he will ever be able to pay off his fines.

The SDRO responded to RLC's application with a requisition for further details, including a request for copies of Centrelink statements and the balance of a personal loan. In a subsequent letter, the SDRO declined to write off James's fines on the grounds James would be a suitable candidate for a Work and Development Order. SDRO also offered the following options to James to pay off his debt:

- *Extended time to pay off his fines.*
- *Making an application for a Community Service Order.*
- *Appealing to the Fine Enforcement Hardship Review Board in respect of the rejection by the SDRO to write-off the fines.*

James continues to engage in his treatment program despite it not decreasing his debt under a WDO. Despite being a suitable candidate, his treatment providers are not authorised supervisors under the Scheme. James chooses to maintain the stability and efficacy of his treatment program rather than risk undoing the progress he has made if he changes treatment providers.

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?

No, penalty notices should not be issued to anyone who has a mental illness, cognitive impairment, intellectual disability or is homeless. These people are referred to as 'vulnerable people' for the purposes of this submission.

RLC believes that, particularly in circumstances involving frequent infringements, many vulnerable people are likely to:

- lack the perception of having committed an offence; or
- fail to understand how to comply with their legal obligations; or
- fail to grasp the gravity of the ramifications possible from failure to pay,

As a subset within vulnerable people, there are those who can comprehend the 'rule-breaking' nature of their behaviour. However, adhering to those rules would jeopardise their already limited chances to obtain food, clothing and shelter. Further, vulnerable people are usually on a low income or no income at all and are therefore unlikely to ever be able to pay fines.

There are obvious and recognised difficulties associated with identifying a person's individual vulnerabilities at the time of issuing the penalty notice. Accordingly, a number of alternatives should be pursued to increase the fairness and effectiveness of the penalty notice system. Most importantly, this includes increased and ongoing training and awareness-raising directed at all enforcement officers. Increased ability to recognise a vulnerable person at the time of infringement provides a chance to avoid the wasted effort of attempting to enforce the fine against someone who cannot satisfy it. Ideally, vulnerable people would be involved in the training sessions.

One alternative to issuing a penalty notice would be to issue a caution as soon as it is established that the individual is a vulnerable person. We recognise that cautions may not be an effective deterrent to some vulnerable people, but this only underscores the greater ineffectiveness and unfairness of issuing a penalty notice.

The stage of the penalty notice process should not be relevant to the exercise of discretion. This discretion to caution is available at the point of issue of the penalty notice or fine. It should also be able to be exercised when:

- a person has been issued with a penalty notice but is later identified as a vulnerable person;
- the SDRO has withdrawn a penalty notice or fine, or for write off without a good behaviour period.

Establishing someone is a vulnerable person can be done in two ways: identifying existing notations on individual case files (discussed further under question 7.3 below) or when the individual or their representative provides the SDRO with the relevant evidence. We consider that many existing health care and concession cards would provide enforcement officers with reason to consider whether a person belongs to a vulnerable group and should not be issued a penalty notice.

Overall, it is important to remedy any existing stigmatisation of vulnerable people that may influence a higher rate of penalty notices. Officers need to be equipped with a greater knowledge and understanding of the tools available to most appropriately deal with vulnerable people who have committed an offence, and how to adequately identify vulnerable people.

7.2 Do the official caution provisions of the Fines Act 1996 (NSW) provide a suitable and sufficient alternative?

No, the official caution provisions of the Fines Act 1996 (NSW) do not provide a suitable and sufficient alternative to the issuing of penalty notices and fines. Under the Fines Act, whilst an 'appropriate officer' may give an official caution,1 under the Caution Guidelines a police officer is not bound by the Guidelines.

RLC believes the official caution provisions of the Fines Act and the accompanying Guidelines should be amended as follows:

1. The Guidelines should apply to all enforcement officers including police officers. Police officers regularly exercise functions, particularly relating to public transport, which are also performed by enforcement officers.

2. The Guidelines should include an additional matter to be taken into account: "The officer has reasonable grounds to believe that the person has no prospects of satisfying payment of the fine. The relevance of this factor does not give rise to any investigative power or authority to question the person suspected of the infringing conduct." Such a Guideline would clearly indicate to enforcement officers that they can take into account contemporaneous statements and documents offered in support by the person. This provision does not bind the enforcement officer, but gives

[1] *Fines Act 1996* (NSW) s 19A.

additional support for making a sensible decision that enforcement action would be futile.

3. Paragraph 4.7(a) of the Guidelines should be amended to ensure vulnerable people are not examined in respect of their behaviour when determining whether it is appropriate in the circumstances to issue a person with a caution. Swearing and the use of inappropriate language in general, for example, may indeed impact on the public but may be a common reaction of a vulnerable person when approached by an enforcement officer or when issued with a penalty notice or fine. Such behaviour is often indicative of the need to adopt alternative approaches to dealing with vulnerable people when they have committed an offence. RLC submits that the examination of any offending behaviour of vulnerable people when determining whether to issue a caution is unfairly prejudicial to such people, except in circumstances where the behaviour is so offensive that an enforcement officer reasonably believes a caution is inappropriate in the circumstances.

4. Paragraph 4.6 of the Guidelines specifies the requirement for the exercise of good judgment when determining whether to issue a caution. RLC believes the effective use of this power requires enforcement officers to have the ability to easily identify vulnerable people so as to ensure the appropriate exercise of discretion. Further, there should be additional training provided around the interpretation and application of the Guidelines. For example, examinations could be used to demonstrate that enforcement officers (including police officers) have a sound understanding of the actual offences for which they are authorised to issue a caution.

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?

Ideally, vulnerable individuals or their representative should be able to nominate to have a notation placed on their file which merely indicates they are a person entitled to a withdrawal of the penalty notice or fine, or a write off without a good behaviour bond, in circumstances where the penalty or fine was validly issued.

RLC considers that the creation of one consolidated list of vulnerable people would stigmatise them and breach their privacy. A better strategy is to place the relevant information on the individual's file only.

RLC is also wary of the possible desire to keep an 'automatic annulment list' below a particular size. Not creating that list is one way of giving genuinely vulnerable people the best chance to receive effective and efficient withdrawals.

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?

Fine and penalty notice withdrawals and write offs should apply evenly to all vulnerable people regardless of whether they have ever been gaoled or not. Prisoners who have a mental illness or cognitive impairment and are therefore eligible for a withdrawal or write

off of accumulated penalty or fine debts should be identified through the same process as other vulnerable people. A write off period should not involve a good behaviour bond.

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

A system of pro-rata reduction of outstanding debts should be offered to offenders whilst they are in custody. As suggested by Shopfront Youth Legal Centre in its preliminary submission, pro-rata reduction is feasible in the rehabilitative context on the same basis as concurrent sentencing. To exclude pro-rata reductions ignores the marginalising, and in some cases criminalising, effect of debt on people.

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

If an offender is also a member of a vulnerable group, they should be entitled to a write off of the penalty or fine debt, excepting criminal compensation or victim's compensation levies.

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

The group of people to whom a withdrawal or write off policy should be adopted includes all vulnerable people as defined in this submission. Alternative strategies should also be investigated for all vulnerable people on the basis their vulnerability may be inextricably linked to their limited capacity to understand the offence committed, understand their legal obligations in complying with fine and penalty laws or satisfy a penalty, fine or accumulated debt.

(2) What strategy or strategies would be appropriate?

Activities that make up CSOs or WDOs in the broader population should also be applied to offenders in gaol. Tasks that perform community service or personal development should be recognised as qualifying for fine mitigation. The fact that the offender is in gaol should not be a reason to ignore the value of the work performed.

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

Victims compensation should not be included in any proposed scheme for the administration of penalty notices and fines. The Victims Compensation restitution scheme involves case-by-case analysis of the offender's conduct and present circumstances. As such, restitution debts should generally be regarded as having been heard and determined in a way that penalty notices are not. Widespread use of fine mitigation mechanisms in relation to restitution debts may also have a detrimental effect on the longevity of the Victims Compensation Fund.

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?

Yes, concession rates should apply to people on low incomes. This would make the penalty notice system fairer. Current penalty notice amounts are much less of a burden for people on higher incomes.

Concession rates could be available for people whose sole source of income is social security payments. However, RLC would not support such a system if it resulted in a bias against withdrawal and write off approvals for people on social security payments.

Case Study

The following case study illustrates that even small fines of $100 can be beyond the capacity to pay of people dependent on social security. The fees attached to the review process also make it difficult for these people to engage in a formal review.

Samantha is a 62-year old woman who receives income from Centrelink, including a rent subsidy. On 28 April 2009, Samantha received a letter from the SDRO advising she had been issued with a $100 fine for being in possession of a concession ticket on the bus without having a concession card. Samantha failed to pay the fine within the 28 day due date because of a lack of financial capacity and consequently Samantha was issued with a $50 late fee. Samantha received a second letter from the SDRO advising she had another 28 days to pay $150.

Shortly after the second due date passed, Samantha contacted the SDRO to explain her personal circumstances. Samantha was instructed to download and complete an 'annulment form' to send to the SDRO with $50 to cover her late payment fee.

RLC advised Samantha her options included either paying the $150 fine, or sending in an annulment form to the SDRO along with $50 for payment of the overdue fee. RLC advised if her application for annulment was accepted, she would have to go to court for her matter to be decided before a Magistrate. RLC advised Samantha it was unlikely she would be successful in court, in which case she would have to pay court costs. RLC also advised Samantha that she had missed her opportunity to write a letter to the SDRO as the fine was now enforced.

In circumstances where a person has no current or foreseeable means of paying their penalty notice or fine debt, this may lead to the disqualification of their drivers licence. This undermines the ability of that person to access education, employment or health care, and places them at risk of committing further offences such as driving whilst suspended or disqualified. Further, offences such as travelling without a valid concession card are more likely to affect people who are entitled to concessions, causing disproportionate penalties to be applied to those on low incomes.

As submitted by Shopfront in its preliminary submission, a concession rate should apply particularly in respect of penalties and fines that are disproportionate to the severity of the offence. For many classes of offence where the fines are disproportionate to the severity of the offence, offences are primarily committed by economically disadvantaged people. Further, it is not uncommon for economically disadvantaged people to receive more than one penalty notice at a time.

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

Yes. The benefits eligible for the concessional penalty should include the age pension, disability pension, sickness allowance, newstart allowance, parenting payment, carers payment, special benefit, Austudy and Abstudy. The concession should be granted where the person is in receipt of the maximum benefit.

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?

People who are unemployed or on Centrelink benefits should receive a discount of 50% of the normal rate.

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

RLC proposes that a concession rate could be applied:

- At the time of issue, if the enforcement officer sees evidence that the person is entitled to a concession (including observing that the person is a minor);
- At the time of payment, by provision of a certified copy of a pension card, concession card or Centrelink Income Statement.

RLC believes that administering the concession rate system through the courts, allowing capacity to pay to be considered on a case-by-case basis is not feasible.

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

No. The write off provisions are too narrow in scope. Details indicating that an individual is a vulnerable person could be held (with permission) by the SDRO as the initial mechanism invoked to withdraw a penalty notice before it reaches the write off stage. A specific problem with the statutory provisions is the failure to provide adequate scope for the SDRO to accept informal submissions that nonetheless provide verified, relevant information, thereby forcing people through the formal review process.

The current write off provisions unduly extend the enforcement process of many debts, increasing enforcement costs for debts that are unlikely to ever be recovered. Although the penalty notices regime is not intended to fulfil a commercial definition of success, pursuing unrecoverable debts is simply not an effective use of public resources.

In its preliminary submission, Shopfront submitted there are long-term resource implications associated with attempting to enforce fines that are unlikely to be paid, particularly at the expense of legal and advocacy organisations in applying to have penalty notice enforcement orders written off. RLC supports this submission, noting that the people who most often seek pro bono legal advice about penalty notices are vulnerable people without the capacity to pay.

A shift in SDRO culture could promote an increased understanding that enforcement of penalties and fines does not always achieve deterrence or recovery of money. Vulnerable people are often unable to avoid committing a penalty notice offence because they do not understand their legal obligations or they fail to understand the reason for the penalty notice or fine. People on low income may understand their conduct, but simply be unable to pay. It should be recognised that the withdrawal or writing off of unrecoverable debts is nevertheless the best of several undesirable options available to the SDRO.

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

As described above, there is a need for greater information to be supplied regarding the entitlement to seek to have a penalty or fine withdrawn or written off at the point at which the penalty or fine is issued.

In specific reference to the Fines Act, under s 101(1A), the word 'may' should be changed to 'must'. RLC regularly deals with people who have no apparent way of making payments without increasing the already substantial hardship in their lives. In such circumstances, there should be a positive obligation on the SDRO to write off the debt.

In the event that amendment is not made, the Minister should make publicly available the write off Guidelines. This would drastically increase the ability of Community Legal Centres and other advisors to provide accurate advice to clients regarding their prospects of a successful write off application. At present, the lack of available guidelines leads to uncertainty. Consequently, applications are recommended that would not be made if the guidelines were known.

It is also important that a change in personal circumstances, such as someone who was previously unemployed but is now employed, should not be a valid ground for reinstating a penalty or fine during the 5 year 'good behaviour' period following a write off. This is because it would potentially undermine the incentive for someone to attempt to 'get their life back on track' after receiving a fine write off. Section 101(4)(b) should be repealed and replaced with a provision for reactivation of written off fines only where the SDRO has reasonable grounds to believe that the information given at the time of the write off application was intentionally misleading.

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. Routine and ongoing participation in such training should be mandatory for all enforcement officers, including police officers, in exercising their powers in issuing penalty notices and fines.

Awareness raising should be interactive, comprehensive and involve contact with and training delivered by vulnerable people themselves. Whilst it may be that awareness already exists amongst a proportion of enforcement officers, RLC believes the exercise of discretion against issuing penalty notices or fines should be fully understood, accepted and encouraged as a key part of an enforcement officer’s responsibilities.

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

The review provisions are not very effective.

The Guidelines state that the fact a person has a serious intellectual disability, mental illness, cognitive impairment or is homeless is not in itself sufficient grounds to require withdrawal of a penalty notice. But these grounds are often enough to establish that enforcement of the fine is not feasible or not in the public interest.

RLC submits that paragraph 5.12 should be amended to state that such grounds are sufficient for withdrawal of a penalty notice on the basis that in a high number of cases, such people have difficulty comprehending that their conduct constitutes an offence, are unable to cope with being questioned, or control the conduct constituting the offence.

Paragraph 1.2 of the Internal Review Guidelines states that additional enforcement costs will be added to penalties not paid on the due date and where no time-to-pay arrangements have been made. Should penalties continue be enforced against vulnerable people (whether it is a result of a lack of identification of a person's disability or homelessness by the issuing officer or another reason), additional enforcement costs should not be imposed when considering the economically disadvantaged state of vulnerable people and their likely inability to ever satisfy their debt.

Paragraph 3.3 specifies that applications for review must be in writing and include a number of specified facts. Relying on written submissions places an unfair burden on vulnerable people who may have difficulties recalling being issued with a penalty notice or fine, have no ability to lodge an application for review or have no awareness of the way in which a review may sought. Provision should be made for reviewing a person's history of write offs in response to a verbal request to review the fine. This would allow people with mental health issues and cognitive impairment an easier level of access. It would also encourage the SDRO to withdraw fines where it is obvious from their own records that a person has a history of receiving withdrawals or write offs.

Paragraph 4.4 states that an internal review cannot result in any variation of the amount to be paid under the penalty notice, nor any variation in options for payment. However, this provision ought to be amended if penalty notices and fines continue to apply to vulnerable people to ensure that amounts and options for payment can be varied taking into account the particular circumstances of each case. If the proposal for a concessional penalty amount were adopted, this would also demand an amendment of the Review Guidelines.

Paragraph 4.11 states that the review must take into account the grounds upon which the application for review has been made and whether, given the person's application, prosecution of the offence would be likely to be successful and/or whether it is appropriate to continue the enforcement process. RLC submits that this assessment should be undertaken well before the review process is invoked. The likelihood of a successful prosecution or enforcement action should be a key consideration in issuing the initial penalty notice.

Should penalty notices or fines continue to be issued to vulnerable people, paragraph 4.12 should be amended to ensure the review can be conducted with additional information required up to 42 days after the request for information being made as opposed to the current 14 day limit. It is unreasonable to expect people with mental health issues or cognitive impairments to be so organised as to be likely to meet the 14-day limit.

Paragraph 5.23 should also be amended to ensure the Caution Guidelines apply to police officers.

Overall, there is need for more proactive measures to be taken at the penalty notice or fine issuing stage so as to prevent the issuing of penalties and fines to vulnerable people.

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?

RLC submits that cautions are the most effective diversionary measure. However, should a penalty notice or fine be issued to a vulnerable person, a practical alternative should involve the SDRO cross checking the penalty or fine against their existing records. Where

the SDRO has knowledge of a history of withdrawals or write offs, it should not be the responsibility of a vulnerable person to ensure the SDRO does not pursue an unrecoverable debt.

Alternatively, at the time of enforcing a penalty or fine, the SDRO should provide adequate guidance about the review procedure, and where to get assistance. RLC believes that an internal review earlier in the penalty and fines process would help ease the burden on the court system and reduce wasteful enforcement efforts on debts that are unlikely to ever be recovered.

RLC recognises efforts undertaken with Work and Development Order pilot scheme and encourages the continuation of the scheme after the expiry of the pilot. However, RLC considers there are a number of problems associated with the scheme that need addressing to ensure its maximum effectiveness and impact.

RLC faces the problem of assisting clients to apply for a Work and Development Order when applying for such an Order prevents an individual from obtaining a penalty or fine write off. RLC believes it is desirable for options to operate concurrently as opposed to one option cancelling out the availability of another.

Further, there remains the problem of the suitability of Orders for certain individuals. It needs to be recognised that a penalty notice debt is not the primary problem faced by vulnerable people. For people living with disabilities, physical and mental wellbeing must take precedence over whether or not a particular treatment provider is registered under the WDO scheme.

7.15 Should the requirement to withdraw a penalty notice following an internal review where a person has been found to have an intellectual disability, a mental illness, a cognitive impairment, or is homeless, be extended to apply specifically to:
(1) Persons with a serious substance addiction?

Yes. Serious substance addictions often present in conjunction with mental illness. RLC submits that serious substance addiction should be included to ensure that the vulnerable person has the best opportunity of achieving an appropriate withdrawal of the penalty notice.

(2) In "exceptional cases" more generally?

A ‘catch-all’ provision is recommended, to avoid situations where the SDRO would withdraw for practical reasons, except for the perceived constraints of the statute.

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?

Centrepay provides an easy way for people on government benefits to enter into payment arrangements regarding fines. This includes fines that should perhaps be challenged. RLC considers that many of the forms and notices provided to penalty notice debtors exert pressure on debtors to consent to payments the SDRO cannot obtain through the courts.

For many people who utilise the Centrepay Program, the primary purpose is not to “deal with their outstanding fines and penalty notice amounts”. Their primary purpose is simply to make sufficient instalments payments to have driver’s licence restrictions lifted by the

RTA. The instalments have a negligible impact on the total fine debt, and serve to highlight the disproportionate effect that penalty notices have on low-income groups.

Case Study

The following case study demonstrates the priorities of debtors when interacting with the penalty notices regime. It also demonstrates the ways in which the Centrepay scheme can be abused to recover money that is ordinarily protected by legislation.

Greg is a recovering alcoholic who has served a gaol sentence relating to drug use. He has ongoing treatment in connection to mental health issues. He lives in a boarding house, is on Newstart Allowance.

He has approximately $32,000 of accumulated enforcement orders, dating back to the late 1990s.

Greg contacted RLC because he had found out his driver's licence was suspended. He was aware of the total value of his fines, but knew that he had no capacity to repay them. He decided to take action in order to have his licence reinstated.

Accordingly, we advised Greg that although he may be eligible for a write off of his debt, the fastest way to have his licence reinstated was to enter into an instalment arrangement with the SDRO.

Greg contacted the SDRO, who accepted a payment arrangement of $25 per fortnight for the next 49 years. Greg was 30 years old at the time he began to make repayments. His licence was reinstated two months later and RLC has not had contact with him since that time.

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

Where a person's sole source of income is government benefits, instalments paid via the Centrepay Program should trigger a review of the fines debt, with specific consideration of suitability for a write off. Centrepay arrangements are often made for the reason of having a driver's licence reinstated, even though the debtor is unable to repay the debt in less than a decade.

People who, although still in control of their financial affairs, have reduced capacity and simply believe the government when it says that they need to pay money also enter into Centrepay arrangements. Penalty Reminders and Enforcement Notices should display review and write off information explicitly and prominently, in order to assist in the more judicious administration of the penalty notice regime.

Thank you for the opportunity to make submissions on the Consultation Paper.

David Porter
Solicitor
Redfern Legal Centre