THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001
AUSTRALIA

17 December 2010

CONSULTATION PAPER 10: PENALTY NOTICE OFFENCES

We refer to the consultation paper produced by the New South Wales Law Reform Commission in response to the terms of reference referred by the Attorney-General regarding the use of penalty notices in New South Wales.

NSW Young Lawyers is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. The Young Lawyers Criminal Law Committee ("the Committee") provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

The primary authors of this submission were **Alexander Edwards** and **Francois Brun**, members of the Criminal Law Committee.

In making this submission, the Committee will direct itself mainly to the questions in Chapter 8, which relate to Criminal Infringement Notices ("CINs"), and more general questions in the body of the consultation paper which are relevant to all penalty notices and CINs. The Committee notes the high level of research already done by the Commission, and by the NSW Ombudsman in its reports referred to in the consultation paper, and will avoid reproducing any commentary or analysis where possible.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

GENERALLY

It is the experience of the Committee that the penalty notice scheme as a whole has been successful in diverting a category of minor offenders from criminal proceedings. This is a positive outcome.

However, there is some evidence that the current scheme does not respond with sufficient flexibility to individual circumstances, and that this is to the detriment of vulnerable persons. To the extent that this is of concern, it can be corrected by relatively minor changes which introduce additional review and oversight procedures.

QUESTION 4.1

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

Yes. Principles for setting penalty notice amounts should exist to give both structure and clarity to the overall implementation and management of penalty notices.

The Committee agrees with the comments of the NSW Sentencing Council at [4.5] of the consultation paper: there is an unjustified lack of consistency between penalty notice amounts set for different offences. Principles ought to be established that allow the setting of penalties with some predictability.

The Committee is of the view that overarching principles do not have the flexibility to respond to particular offenders who suffer from an incapacity to pay a penalty notice amount. Issuing bodies should, rather, have regard to the sum of the penalty notice when issuing a notice. A more thorough examination of the circumstances in which it is inappropriate to issue a penalty notice is contained in the analysis of Chapter 8 of the consultation paper below.

The consultation paper suggests the following principles:

a) Maximum amount

Developing a principle that establishes an upper limit for the amount of a penalty notice would ensure a control mechanism for the exercise of discretion by issuing bodies.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

The Committee favours the South Australian and Victorian schemes, which set maximum penalties at 20-25% and 25% of the maximum court-imposed fine respectively. However, considering the arguments for allowing flexibility in these limits, if an issuing body wishes to enforce a higher sum to establish deterrence or for a more serious offence, it has the option of commencing formal proceedings.

Setting a maximum sum preserves the position of penalty notices as an intermediate response in the scale of enforcement options. It is not desirable to allow a penalty notice to exceed a maximum amount if that amount has been set.

b) Deterrence and court diversion

The Committee agrees with the argument made by the NSW Department of Environment and Climate Change, referenced by the consultation paper at [4.23]. Penalty notice discounting should reflect a sum high enough to deter from offending yet low enough to discourage unnecessary court election.

c) Proportionality

It is desirable that formal principles endorse a relationship between the objective seriousness of the offence and the penalty notice amount.

d) Consistency

Formal principles should improve consistency by establishing factors that should be considered in determining penalty sums. An independent body administering such principles would further improve consistency by administering all offences on the same scale (noting distinctions in some species of offence, particularly criminal). This proposal will be dealt with in more detail below.

e) Corporations

Statutory bodies have responsibilities to the wider community, and private corporations must be accountable for the impacts of their actions outside the confines of their responsibilities to shareholders. Neither, in general, suffers from financial incapacity to pay penalty notices.

Both should be subject to higher penalty notice amounts.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

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?

Ordinarily not, but the Committee supports the approach of the Victorian guidelines, referenced by the consultation paper at [3.43], in this regard.

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. It is desirable to adopt formal principles, ***administered by an independent body***, applicable to the determination of what criminal offences are appropriate to being dealt with by way of CINs.

a) Formal principles

The consultation paper notes that there are several thousand civil offences are now dealt with by way of penalty notice. However, the number of criminal offences for which CINs may be issued is still extremely restricted. The introduction of new criminal offences to the scheme is not a trivial matter. Transparent principles should be applied in making any such decision.

b) Content of principles

Of the three guidelines considered by the Commission, Victoria's *Attorney-General's Guidelines to the Infringements Act* represents the most appropriate set of principles for penalty notices in NSW. Those guidelines require an independent designated body (in Victoria, the Infringements System Oversight Unit) to consider proposals prepared by government agencies under two main criteria:

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

- whether there is a need for an infringement offence; and
- whether the offence is suitable to be dealt with by way of infringement notice.

Where sub-elements are not equivalent to, or more prescriptive than, those proposed by the NSW Ombudsman (referred to in the consultation paper at [8.16]), they may be modified to form principles more appropriate for NSW.

The Victorian guidelines suggest that government bodies have codes of conduct to address the circumstances in which it is inappropriate to issue penalty notices. It would be preferable to require the submitting of a formal code of conduct be established as a third criteria in the application process.

The code of conduct should recognize situations in which it is inappropriate to issue a penalty notice to a vulnerable person or where the circumstances do not otherwise merit it. Specifically, such a code of conduct should respond to circumstances where a CIN is issued, or could be issued instead of arrest, to an Aboriginal person or a person suffering a cognitive impairment or mental illness, and what steps or alternate actions can be taken by the issuing Police officer. The Committee discusses these circumstances at length below.

c) CIN-specific principles

Considerations additional to those proposed for civil penalty notices are desirable. These have been articulated by the consultation paper and are further contained in the Victorian guidelines. In particular, these considerations relate to:

- offences where there is a victim of violence;
- indictable offences;
- offences where imprisonment is a mandatory sentencing option; and
- the desirability of not recording a criminal conviction.

These considerations are supplementary to those suggested for civil penalty notices. Thus there is no need for a separate set of principles, as CIN considerations can be incorporated into any set of formal principles for penalty notices.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

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 Committee supports the Ombudsman's recommendations referred to Annexure 8A of the consultation paper, with the exception of recommendation one.

Recommendation one suggests:

> *[t]hat the NSW Police Force revise the guidance provided to police to reflect the requirements in section 4(3) and section 4A(2) [offensive language and conduct] of the Summary Offences Act that police should consider whether 'the defendant had a reasonable excuse for conducting himself or herself in the manner alleged'*

It appears an accepted principle that CINs and penalty notices generally are appropriate for offences where either strict liability applies, or the elements of the offence at least possess clarity. As discussed in the consultation paper at [8.31]-[8.42], these offences already require the issuing Police officer to evaluate community standards and intent to offend.

Police *always* retain a discretion whether to deal with alleged criminal behaviour. While clearly it is desirable to allow discretion on the Police officer's part not issue a CIN where the alleged behaviour is reasonably excusable, adding this level of analysis tends to make the scheme unwieldy.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

QUESTION 8.3

- *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?*

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

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

Formal cautions should be available as part of the CIN regime, giving Police officers a scale of actions with which to respond to potential offence.

a) Net-widening

The consultation paper makes a case for sustained, albeit slight, net-widening since the implementation of the CIN regime and those arguments will not be repeated, except to say that it is consistent with the Committee's general experience.

This question foreshadows the next, which deals with the option of providing an official caution.

A code of conduct submitted according to the proposed CIN principles described above would also be of assistance here.

b) Official cautions

The capacity to issue an official caution, if made available as a real option where appropriate, would increase the flexibility of Police officers in responding to different circumstances. An official caution could be used where the Police officer perceived the alleged offence as borderline, minor or perpetrated by a vulnerable person, including a person with a manifest incapacity to pay a CIN penalty.

b) Offensive language and offensive conduct

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

The arguments at [8.31]-[8.42] need not be repeated in detail. These issues stem in part from the issuing Police officer inevitably exercising his or her subjective judgment as to what behaviour is offensive while being at the receiving end of such behaviour. Certainly, anecdotal evidence suggests that offensive language CINs are often issued for merely intemperate language and accumulate upon other, more serious, charges.

The Committee supports stricter guidelines for issue of CINs for offensive language and offensive conduct, including internal review by a senior Police officer to ensure all CINs meet the legal requirements for the offence.

QUESTION 8.4

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

- *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?*

On point 2: Yes.

The Committee respectfully defers to the recommendations already made by the Ombudsman, Shopfront Youth Legal Centre and Law Society in this regard.

The Committee defers to the preliminary submissions made by Shopfront Youth Legal Centre regarding debt escalation for Aboriginal (and other underprivileged) recipients of penalty notices. While a penalty notice can avoid a criminal conviction, it is only of utility where the recipient has the means to pay. If the recipient does not have such means, a penalty notice can be a worse hardship than formal charges.

The Committee agrees with an earlier submission of the Law Society as to the inadequacy of the 21-day court election period. Vulnerability, including consideration of factors such as Aboriginal status, should be a grounds under which to receive an extension of the court election period.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

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?

It is going too far to suggest that CINs should *never* be issued to persons with a mental illness; the pervasiveness of mental illness amongst offenders would make that position unworkable.

Rather, CINs should not be issued to persons with a cognitive impairment or mental illness where it is apparent that their disability affects their ability to understand what they are being issued with and what they must do to discharge the penalty.

However, Police officers are not always in a position to evaluate the presence or degree of cognitive impairment or mental illness when arresting a person. The influences of drugs and alcohol can present similarly to mental illness.

With that in mind, Police officers should be given the flexibility, as appropriate, to substitute CINs *after* arrest.

As a general principle, CINs should not be issued to persons with a cognitive impairment or mental illness where that disability affects their ability to understand what they are being issued with and what they must do to discharge the penalty. Cognitively or mentally impaired persons are at high risk of debt escalation and also may find it more difficult to challenge the grounds under which a CIN is issued. Further, allegations of minor public order offences against such persons are better evaluated in a setting where the time and expertise to evaluate capacity are available, rather than 'on the spot' by Police officers.

However, occasionally, if an arresting Police officer becomes aware of the presence of cognitive impairment or mental illness in an arrested person and an appropriate support person is available, there may be circumstances in which the officer should be able to instead substitute a CIN. That is, the incapacity may only become apparent at a later stage, after arrest, such that it would be appropriate to issue a CIN. The exercise of such a discretion would depend on the balancing of the level of incapacity, and the particular conduct alleged. The Committee supports the suggestion that this be done in the presence of a support worker in accordance with the *Crimes (Detention After Arrest) Regulation 1998* (NSW) and the NSW Police CRIME Code of Practice.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

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. The Committee supports this discretion.

There may be circumstances where an officer, in the course of appropriately discharging his or her duty, is not in a position to assess the capacity or vulnerability of a person whom the officer believes is committing a CIN offence. If a CIN is given, and the officer subsequently becomes aware of the presence of:

- cognitive impairment;
- mental illness;
- extenuating circumstances; or
- other vulnerability

in the infringer, such that the officer would not have issued the CIN, the officer should have the discretion to withdraw the CIN.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au

OTHER MATTERS

The Committee is of the view that Police officers should always have the discretion to issue CINs to offenders *after* arrest, instead of issuing a Court Attendance Notice.

The consultation paper's proposal in Question 8.5, regarding the issuing of CINs after arrest to persons suffering cognitive disabilities or mental illnesses, should be extended to all offenders. This suggestion is especially relevant to public order related CINs, where, subsequent to arrest, the arresting officer has the opportunity to objectively reflect on the seriousness of an alleged offence. Where the behaviour leading to arrest was aggravating, but not of a level deserving formal charges, the officer can take advantage of hindsight and issue a CIN instead.

If you have any questions in relation to the matters raised in this submission, please contact: Thomas Spohr, Chair of the NSW Young Lawyers Criminal Law Committee (crimlaw.chair@younglawyers.com.au) or Daniel Petrushnko, President of NSW Young Lawyers (president@younglawyers.com.au).

The Committee thanks you for the opportunity to comment.

Yours faithfully,

Thomas Spohr | Treasurer | Chair, Criminal Law Committee
NSW Young Lawyers | The Law Society of New South Wales

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0270 F +61 2 9926 0282
ACN 000 000 699 ABN 98 696 304 966 www.younglawyers.com.au