Introduction

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

The Committees do not have a strong view on this issue. The benefit of a stand-alone statute is that it could provide greater clarity and easier access to the law on penalty notices.

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

Most practitioners use the terms "penalty notice" and "infringement notice" interchangeably. The Committees are of the view that infringement notice is a preferable term to penalty notice. The Committees agree with the Commission that the term infringement notice focuses on the nature of the offences the system regulates rather than the means by which the alleged offender is made aware of an offence that he or she is alleged to have committed.

Guiding and overseeing the penalty notice system

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

Yes, principles should be formally adopted for the purpose of assessing which offences may be enforced by penalty notice.

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

(1) the Attorney General and the Department of Justice and Attorney General; or

(2) a stand-alone body; or

(3) a Parliamentary Committee?

Yes, there should be a central body in NSW to oversee and monitor the penalty regime as a whole. The Committees are of the view that it should be the Attorney General advised by the Department of Justice and Attorney General.

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

Yes. The Attorney General.

Determining penalty notice offences

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

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

The Committees understand that offences with a fault or mental element may be difficult for an enforcement officer to assess. However, persons should not be exposed to the risk of a conviction for a relatively minor offence merely because an offence has a fault element and/or defences.

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

(1) **specially-trained enforcement officers;**

(2) **a requirement for operational guidelines; and**

(3) **a requirement to consider warnings or cautions?**

Increased training and operational guidelines would be desirable. The Committees are of the view that it should be a requirement that enforcement officers consider warnings or cautions for all penalty notice offences, not just offences with a fault element and/or defences.

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

Offensive language

The Committees are concerned about the number of penalty notices issued for offensive language to vulnerable people in the community (homeless, young, Aboriginal and/or affected by a mental illness or cognitive impairment) who find it difficult to access legal advice and challenge the matters in court.

In the experience of the Committees the offence of offensive language is rarely proved if challenged in court because the language allegedly used does not meet the legal test for "offensiveness".

The Committees' primary position is that the offence of offensive language should be repealed, and that only language that is so grossly offensive as to amount to vilification or intimidation ought to be criminalised. Until the offence is repealed the Committees support the retention of the availability of penalty notices conditional on improved training, operational guidelines and a reduction in the amount of the penalty imposed.

Community standards

The issue of 'community standards' is particularly relevant to people with an intellectual disability whose appearance, behaviour, emotional responses or lifestyles might fall outside of accepted society norms of behaviour, as discussed in relation to question 8.3 below. People with an intellectual disability might attract penalty notices when engaging in 'offensive' behaviour not only because of the particular offence itself but the compounding nature of

discriminatory views and prejudices against disability, poverty and other markers of social exclusion such as homelessness and substance use.

This question raises broader issues about how the penalty notice system might apply to people with an intellectual disability as a socially marginalised and stigmatised group. This has implications not only for offences requiring judgment about community standards, but also:

- Offences that relate to public space, e.g. public transport offences, move on offences, consumption of alcohol in alcohol free zones.
- Offences that relate to emotional responses, or behaviour that arises during the interaction between the individual and the enforcement officer, such as refusing to comply with the directions of a law enforcement officer ('trifecta' offences).

This issue requires more systemic consideration of the policing of penalty notice offences, the responses of law enforcement officers to escalating situations and their skills/knowledge, the discriminatory effect of penalty notice offences and how penalty notice offences might be a way to police abnormality, poverty and social disadvantage.

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

There is some merit in the concept of "minor offences". Minor offences could include all offences capable of being dealt with summarily, for which the maximum penalty is a fine only or imprisonment for six months or less.

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

Minor offences of resisting or obstructing an officer, (which might involve some physical force or verbal threats) may be suitable for penalty notices.

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

The demographics of people who are likely to be issued with penalty notices for particular types of offences should be considered when setting penalty notice amounts.

<u>Determining penalty notice amounts</u>

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

Yes, principles should be established to guide the setting of penalty notice amounts and their adjustment over time.

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

(1) What should the maximum be?

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

No.

(a) **On what grounds (e.g. the need to deter offending)?**
Not applicable.

(b) **Should the public interest be among the grounds? If so, how should it be defined or characterised?**
Not applicable.

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

Yes.

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

The concept of deterring offenders is flawed in relation to vulnerable and disadvantaged people facing problems of homelessness, poverty, mental illness or intellectual disability. Offences such as fare evasion are not commonly committed by people who might be deterred by a financial penalty.

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

Yes.

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

No.

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

Yes. Consideration should be given to the proportionality of the amount of the penalty to the nature and seriousness of the offence. The harm sought to be prevented through the penalty should be considered against the broader harm that the policing and penalising of disadvantaged and marginalised groups can have in increasing their social exclusion, financial disadvantage and stress.

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

Yes. The consultation paper provides numerous examples of anomalies that need to be addressed e.g. offensive language or behaviour on any train or railway area carries a penalty of $400, whereas the penalty on a bus or a ferry is $300.

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

Yes.

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

Yes. Consideration should be given to the demographics of the people most likely to commit the offences. Penalty notice offences in criminal law are often committed by vulnerable people. Courts take into account the person's capacity to pay when imposing a fine and penalty notice amounts should also factor in the person's capacity to pay.

People on benefits should pay a lower rate. An administrative method to reduce penalty reduced due to hardship should be introduced. This could be achieved by either by giving proof of Centrelink benefits with an automatic reduction in fine or a hardship panel with discretion.

Issuing and enforcing penalty notices – practice and procedure

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

(1) when to issue penalty notices; and

The present guidelines are fine. Enforcement officers need to be made aware of the guidelines and receive proper training.

(2) the alternatives available?

There is also sufficient guidance on alternative such as cautions but again this comes down to training and the culture of the enforcement officers.

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?

No. Contractors do not fall within the jurisdiction of the NSW Ombudsman.

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?

There should be a limit placed on the number or value of penalty notices that can be issued in respect of the one incident or on the one occasion of offending behaviour. Otherwise the aggregate penalty amount can be out of proportion wit the seriousness of the offending behaviour.

There should be particular limits in relation to 'trifecta' style offences, that is offences that relate to emotional responses or behaviour that arise during the interaction between the individual and the law enforcement officer, such as refusing to comply with the directions of a law enforcement officer

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?

There should be a broad discretion with guidelines if the penalty notice is going to be withdrawn and no further action taken. If the penalty notice is going to be withdrawn and more serious action taken then very tight and strict guidelines are necessary.

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

Yes, and there should be no further enforcement sum attached to this notice.

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

The Australian Law Reform Commission's suggestion of one year is far too long. Penalty notices should be issued as soon as practicable so that the circumstances of the offence are fresh in the mind of the alleged offender. Three to six months should me the maximum period of time within which a penalty notice must be served.

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

The penalty notice should contain easy to read information about a person's right to request a review of the penalty notice. The penalty notice should also specify what the further consequences are if payment is not made.

It is particularly important for people with poor memory recall or who may be distressed at the time of the offence that the penalty notice contains some details of the offence. If these cannot be contained in the penalty notice itself, there should be easy and accessible procedures for obtaining the details of the offence which do not require having to take the matter to court.

(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?

Yes, these details should be contained in the *Fines Act 1996*.

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

No. The options outlined on a penalty notice list (1) going to court or (2) paying a fine. There needs to be a specific reference to the right to review so that people are aware of this option.

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

Yes.

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

Yes.

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

Yes, definitely. The Committees note that the Hardship Review Board process is extremely onerous.

A write-off of unpaid fines is conditional. The SDRO can recommence enforcement action at any time within five years of a write-off. A five year deferral is very onerous for vulnerable people e.g. people with an intellectual disability.

The Work Development Order scheme is a positive initiative but it is very difficult to access. The eligibility requirements are quite narrow and the scheme needs to be properly funded. Currently the person must find a community organisation or a health practitioner who can support the order. This further marginalises people with no support in the community.

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

No.

The Committees are concerned about the use of Criminal Infringement Notice (CIN) histories in the form of antecedents presented to the Local Court in criminal proceedings.

The Committees submit that an individual's CIN history should not be included as part of an offender's antecedents. Payment of the fine does not constitute an admission of guilt or liability: s 338 *Criminal Procedure Act 1986*.

When the legislation was introduced it was a stated intention that payment of a CIN would not result in a conviction or criminal record. In the Second Reading Speech to the *Crimes Legislation Amendment (Penalty Notice Offences) Bill 2002* the (then) Minister of Police, the Hon. Michael Costa MLC, stated that:

> *"... payment of the fixed penalty results in the offender acquiring neither a conviction nor a record. The offender can avoid the social stigma and legal disabilities that attach to prosecution and conviction in a criminal court."*

The current police practice of providing CIN histories to the court is contrary to the legislative intent. Permitting CIN histories to be presented to court defeats the intention of the scheme which was to avoid *"...[t]he social stigma and legal disabilities that attach to prosecution and conviction in a criminal court."*

The NSW Ombudsman's *'Review of the Crimes Legislation Amendment (Penalty Notice Offences) Act 2002'*, April 2005, recommended that safeguards be put in place to prevent CIN matters from being presented as part of a person's criminal history.

Recommendation 19 provides:

> *That Parliament establish safeguards, by means of legislation, against the presentation to the courts of Criminal Infringement Notice histories where those matters have been satisfied by the payment of the prescribed penalty.*

The Committees strongly support this recommendation.

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

Currently if a person receives a penalty notice and pays the fine they can change their mind and go to court so long as they are within the relevant time period. However, if a person pays the fine and the time period has elapsed it is too late to then decide to go to court.

Compare this with the situation where a person does not pay the fine at all and it is then made into an enforcement order. That person can apply to have the enforcement order annulled and then take it to court. In terms of options a person is in a better position if they do not pay the fine. This is an anomaly that needs to be addressed.

The Committees understand the need for finality, but if there are legitimate grounds for review then in these circumstances there should be an opportunity to elect to go to court.

Another issue the Commission may like to consider relates to court elections. There are always some people who court-elect based on a mistaken belief that they have a defence. Once they receive legal advice they realise they are mistaken. For these people it would be helpful if they could withdraw the court election and pay the penalty notice. This would also assist in saving court time. For such a proposal to be successful it would require legislative protections to prevent the issuing agency from attempting to recoup filing fees and associated costs.

<u>Impact on children and young people</u>

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

The Committees are of the view that children under the age of 18 should never be issued with penalty notices. If an age is to be imposed it should be 16 years of age with the presumption that a penalty notice is a last resort after cautions and warnings.

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

Traffic infringement notices issued to children aged 16 and over who have a driving licence.

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

Yes. Warnings and cautions are practical alternatives to penalty notices for children.

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

No, parents should not be made liable for the penalty notice amounts incurred by children and young people. The suggestion that somebody should suffer the penalty for the offence of another offends the basic principles of criminal law.

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

Yes, enforcement officers should be required to consider whether a caution should be given instead of a penalty notice when the offender is below the age of 18 years.

6.5 (1) Should police officers dealing with children who have committed, or are alleged to have committed, penalty notice offences be given the option of issuing a caution or warning, or referring the matter to a specialist youth officer under *Young Offenders Act 1997* (NSW) to determine whether a youth justice conference should be held?

Yes, police officers dealing with children who have committed, or are alleged to have committed, penalty notice offences should be given the option of issuing a caution or warning. Issuing a penalty notice should be a last resort and intervention under the *Young Offenders Act 1997* should be the default position. The Committees do not consider the YOA interventions as more onerous than a penalty notice.

The Commission raises concerns that if a caution is given instead of a penalty notice this is added to the tally of a maximum of three cautions. The Committees suggest that a way to avoid this issue is to remove the limit of three cautions, or alternatively the three caution limit could only apply to offences that are not penalty notice offences. The Police also have the option of using warnings.

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

Yes the diversionary options under *Young Offenders Act 1997* should apply; particularly warnings.

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

To all penalty notice offences that relate to children and young people.

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

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

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

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

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

As stated above, it is the Committees' view that children under the age of 18 should never be issued with penalty notices.

However, in the current scheme, the penalty notice amount for a child should be a fixed sum. The amount of the fine should be nominal given that children and young people usually have no financial means whatsoever.

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

Yes, a child or young person should be given the right to apply for an internal review of a penalty amount on the grounds of his or her inability to pay.

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

(1) **for a single incident;**

Yes. There should be a cap on the number of penalty notices for a single incident so that the penalty is not disproportionate to the level of offending of the young person.

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

No, never.

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

No, never.

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

If driver licence and registration sanctions apply, then yes.

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

Yes, a conditional "good behaviour" period shorter than five years should apply to children and young people following a fine or penalty notice debt being written-off. Five years is unrealistic period for children and young people and is incredibly onerous. Six months is more appropriate than five years.

Impact on vulnerable groups

7.1 Should penalty notices be issued at all to people with mental illness or cognitive impairment? If not, how should such people be identified?

Penalty notices should not be issued to people with a mental illness or cognitive impairment. These are often the most disadvantaged, financially struggling and vulnerable people in the community.

In relation to the question of identification, the Committees oppose a 'do not fine register' which is understood to be a centralised list or database of people with mental illness or cognitive impairment that is accessible to enforcement officers. A 'do not fine register' raises privacy issues, it serves to label and segregate people with a disability and might result in the penalising of people with a disability who are not on the list even where these people assert to the enforcement officer that they have a disability.

Instead, the Committees suggest a four limbed approach.

The first approach is effective awareness training of all law enforcement officers. This training should address issues around disability such as 'identification' (i.e. the characteristics of disability) of disability; communication techniques; de-escalation techniques; how to treat persons with cognitive impairment and intellectual disability with dignity and respect, and human rights (including the principles of inherent dignity, acceptance of difference, non-discrimination, equality, and social inclusion). There should also be broader training around racial discrimination (particularly against Indigenous persons); poverty and social disadvantage, and area specific training tailored to the particular groups overrepresented in the penalty notice system.

Secondly, enforcement officers should be encouraged to refrain from taking any action where it appears to that enforcement officer that a person has a mental illness or cognitive impairment. This should be specified in *Fines Act 1996* and the Caution Guidelines under the Act.

Thirdly, although there should not be a database that is accessible to law enforcement officers, there should be a centralised system for the automatic immediate write-off of penalties incurred by people with mental illness or cognitive impairment. Once an individual has had one penalty notice written off on the basis of mental illness or cognitive impairment, they should be noted on the penalty notice computer systems so that any future penalty notice will automatically be written off when entered into the system. The penalty notice documentation itself and any further enforcement documentation should come with a simplified reply paid form that enables write off of the penalty notice on grounds of mental illness or cognitive impairment. This would address those persons with a mental illness or cognitive impairment who have not yet had a penalty notice written off, and who are therefore not yet on the system.

Fourthly, there needs to be consideration at a systemic level of where policing is occurring and who is targeted within the public space, through quantitative and qualitative research. This could prompt greater awareness training in these areas, or reduced resources in unduly over-policed areas.

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?

No alternative action should be taken. On principle, people with mental illness of cognitive impairment should not be punished. This includes by alternative means, even if this is purportedly therapeutic or beneficial to the individual.

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?

Please refer to comments in question 7.1 above.

7.4 Should fines and penalty notice debts of correction centre inmates with a cognitive impairment or mental illness be written off? If so, what procedure should apply, and should a conditional good behaviour period apply following the person's release from a correctional centre?

Yes, fines and penalty notice debts of correctional centre inmates with a cognitive impairment or mental illness should be written off. This is because (a) people with a cognitive impairment or mental illness should not be issued with penalty notice offences regardless of whether they are in prison or within the community, and (b) people with a cognitive impairment or mental illness face many barriers to successful reintegration in the community following release from custody. Penalty notice debt can exacerbate the difficulty of reintegration and provide a precursor to re-entry into the criminal justice system.

The procedure could involve some type of data linking on the computer systems of Corrective Services NSW and the SDRO, as well as easy procedures for Corrections staff (such as welfare workers), solicitors, advocates, social workers, family members, and prisoners themselves to seek the write off of fines (even post-release).

A conditional good behaviour bond period should not apply to these write offs. People leaving custody face numerous barriers to successful reintegration into the community. People with mental illness and cognitive impairment leaving custody can face even more significant barriers to successful reintegration due to the pre-existing social exclusion and the lack of effective post-release services specifically for this group.

Good behaviour bonds could cause great stress to individuals who are trying to reintegrate, avoid becoming involved in the criminal justice system, re-establish social networks, avoid stigmatisation associated with having been in prison and overcome the trauma of the rule-based and institutional nature of prison. This stress, when coupled with the other stresses associated with reintegration, can exacerbate existing mental health or substance use issues and place these individuals at risk of self harm or re-entry into the criminal justice system. People leaving custody are often in a vulnerable situation of having little money, being isolated from social and service support networks and unfamiliar with law or rule changes. This could make such individuals more likely to commit penalty notice offences and breach the bond.

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

These debts should be written off for the reasons outlined in 7.4 above. This will not affect victims' rights to compensation.

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

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

Yes. Centrelink, or Disability Pension or supported income.

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, this training should be provided to all law enforcement officers as outlined under 7.1 above.

Training should not only look at how to best to interact with people with mental illness and cognitive impairment, but also (a) to make law enforcement officers more aware and reflective of their policing of public space, disadvantaged areas and of people with disability and other disadvantaged and marginalised groups, and (b) the effect that issuing penalty notices can have on the life course and social exclusion of people with mental illness and cognitive impairment.

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?

The procedure should be simplified. All documentation that accompanies the penalty notice documentation itself and any further enforcement documentation should be in easy to read English with reply paid options for mailing. The SDRO call centre and any internal review phone numbers need to be adequately staffed to ensure people can speak to a customer service officer promptly. All customer service officers should have training in assisting people with mental illness and cognitive impairment.

SDRO should provide funding for specific projects that will provide legal representation, advocacy and support to people in particularly highly policed areas or people belonging to particularly vulnerable groups.

As discussed in question 7.1 above, there should be systems for automatically writing off the fines of people with intellectual disability.

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?

The requirement to withdraw a penalty notice should be extended to include people with a serious substance addiction or "in exceptional circumstances generally".

Criminal infringement notices

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

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

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

Offences grounded in community standards, such as offensive language and offensive behaviour are likely to have a disproportionate impact on vulnerable people. For instance, people with an intellectual disability are more likely to visible in the public space, because of such factors as homelessness, social isolation, no employment or organised day activities, or because they look and act differently. The behaviour, lifestyle, emotional responses or appearance of people with an intellectual disability might be considered 'offensive' to some law enforcement officers.

Certainly disability, poverty and social disadvantage training and official cautions can go some way to addressing the net-widening effect of CINs. The Committees support the Ombudsman's recommendations 1-6 as proposals that may minimise net-widening in relation to the offences of offensive conduct and offensive language.

It is argued, however, that these strategies will only go so far because this net-widening is partly attributable to (a) cultural approaches to intellectual disability, poverty and other markers of social exclusion, (b) the role of police in managing poverty and social disadvantage, and (c) broader issues relating to social exclusion and poverty.

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

The statistics in the Ombudsman's 'Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities' show only 7% of Aboriginal recipients paid the CIN before it went to the SDRO which is a major concern.

It appears from the above analysis that when Aboriginal people received a CIN they ignored the notice. The Committee has received information from a

number of ALS solicitors throughout northern NSW that in most offices no one has come to them for advice after having received a CIN.

In the Committees' view there are two ways that non-payment could be dealt with:

1. By referring it to the SDRO for enforcement (as is currently the case); or

2. By issuing a CAN (similar to what happens when a juvenile fails to turn up for a police caution). This would be result in a court-election by default, and would recognise that many recipients of CINs (Aboriginal or otherwise) do not court-elect for various reasons including homelessness, disability, disorganisation, lack of literacy, lack of legal advice, lack of understanding that they even have this option.

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

Yes. There should be provision to apply for an extension of the 21 day period to elect, or to seek a review at a later time.

Someone suffering from poor literacy or an intellectual disability may not be able to comprehend the process and simply do nothing. Alternatively, the person may appreciate that he/she should seek legal advice but is not able to access it.

In some remote parts of NSW Aboriginal people do not have ready access to a solicitor. In some remote locations there are no solicitors in the local or nearest township and the Local Court may only sit once a month (or less). Typically a person in this situation with a CAN will seek legal advice from the solicitor (ALS or Legal Aid), on the day that they are due to appear in court. Occasionally, a person with a CAN will go to the court even if their matter is yet to come up so that they can talk to a solicitor and get advice. When the Magistrate is not sitting at the remote location the court is shut and not staffed. An example of this is Boggabilla in north west NSW which is one and a half hours drive from Moree. A large number of Aboriginal people live on the Mission at Toomelah (15 minutes drive further away). There is no public transport into Moree. The people generally do not have a driver's licence (or a car) and many do not have a phone. If such a person receives a CIN, for instance a few days after the court has sat, the 21 days notice provision given under the CIN will have expired before the court next comes back to town and the person has had the opportunity to see a solicitor at court. By this time it is too late for the person to elect.

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?

Yes. Criminal Infringement Notices should be issued to people with cognitive impairment or mental illness in appropriate circumstances. It can be argued on human rights grounds, specifically those relating to access to justice, equality and non-discrimination, that people with intellectual disability should not be denied the benefits of CINs and risk imprisonment merely because police have not made the CIN system accessible to people with intellectual

disability (e.g. through accessing support persons, providing easy to read information).

The Committees support the recommendation of the Ombudsman that police should 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. There should also be greater disability awareness training available for police and the production of easy read information about CINs.

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. There should be guidelines similar to those pertaining to penalty notices which specifically highlight vulnerability arising from intellectual disability.