

Submission

Penalty Notices

23 December 2010

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About the Youth Justice Coalition

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

How the Youth Justice Coalition was formed

The YJC was formed in early 1987 under the auspices of NCOSS to work around the children's criminal, care and protection legislation introduced in that year. The YJC has been active since 1987 advocating for young people, particularly those involved in the criminal justice or welfare systems.

Membership of the YJC

- Barnardos Belmore (incorporating the Reconnect program, Streetwork program and Post Release Options Program)
- Bondi Outreach Project
- Catholic Care Sydney
- Central Illawarra Youth Services
- Council of Social Service of New South Wales (NCOSS)
- Crime and Justice Research Network
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research
- Elaine Fishwick
- Illawarra Legal Centre
- Inner West Community Development Organisation
- Justice Action
- Liverpool Youth Accommodation Assistance Company
- Jenny Barga, CHD partners
- Joanne Morrison, Youth Development Officer – Canterbury City Council
- Jodie Grundy, Community Project Officer (Youth) – Camden Council
- Macarthur Legal Centre

- Marrickville Legal Centre
- Marrickville Youth Interagency
- Marrickville Youth Resource Centre
- National Children's and Youth Law Centre
- Professor Chris Cunneen, NewSouth Global Chair in Criminology, Faculty of Law, University of New South Wales
- Public Interest Advocacy Centre
- Redfern Legal Centre
- Rosemount Youth and Family Services
- Shire Wide Youth Services
- Shopfront Youth Legal Centre
- South Sydney Youth Services
- The Crossing, Mission Australia
- Uniting Care Burnside
- Western NSW Community Legal Centre
- Youth Accommodation Association (YAA)
- Youth Action and Policy Association (YAPA)

Acknowledgements

The YJC wishes to acknowledge the contribution of Nadya Riitano, Gemma Lardner and Katrina Wong in the drafting of this submission.

Recommendations

- 1. That issuing officers be trained in their discretionary power to issue cautions**
- 2. The SDRO collect and publish statistics on the number of cautions issued to young people**
- 3. A limit should be placed on the number of penalty notices that can be issued for a single incident or occasion. The Principle of Totality should guide the limit.**
- 4. Amend the *Fines Act* to include a mandatory ground of review that the person is under 18 years of age, homeless, suffers from a mental illness or does not have the financial capacity to pay the fine.**
- 5. The DJAG and/or the SDRO undertake targeted community education to inform the community about WDOs.**
- 6. Funding be provided to organisations who wish to become approved so that they have capacity to supervise young people on WDOs.**
- 7. The WDO pilot scheme be extended to compensate for the slow uptake of WDOs due to lack of community education and significant procedural delays at the commencement of the scheme.**
- 8. Penalty notices should not be issued to persons under 18 years of age.**
- 9. Cautions, warnings and diversionary programs should be used as alternatives to the issuing of penalty notices to persons under 18 years of age.**
- 10. The *Fines Act* should be amended to empower police to issue cautions under the Attorney General's Cautions Guidelines**
- 11. Amend the *Fines Act* to include an express provision stating that there is an onus on the enforcement officer to show why a warning or caution wasn't issued before proceeding to issue a penalty notice**
- 12. Police officers should be given the discretion to issue a caution or warning**
- 13. This discretion should be limited to serious offences. Minor offences, such as transport offences should be specifically excluded**
- 14. Police should be subject to the current caution and internal review guidelines.**
- 15. Abolish penalty notices for people under 18 years of age.**

16. In the alternative, the maximum amount payable under a penalty notice issued to persons under 18 years of age should be \$25.
17. Young people should be able to apply for a review of the penalty amount on the basis of their ability to pay.
18. Young people should be provided with information on their appeal entitlements at the time they are issued with a penalty notice.
19. Amend the *Children (Criminal Proceedings) Act 1987* (NSW) to permit the Children's Court to hear and determine proceedings in relation to traffic offences.
20. The "good behaviour" period in relation to write off application should be abolished.
21. In the alternative, if "good behaviour" periods are to remain, they should be set at 6 months for a person under the age of 18 years.
22. Section 101(4) of the *Fines Act* should be deleted

SUBMISSION OF THE YOUTH JUSTICE COALITION

Question 5.1

- (1) Taking into account the recent reforms, is there sufficient guidance on:**
- a. when to issue penalty notices; and**
 - b. the alternatives available?**

The YJC supports the amendments to the *Fines Act*, which empowers 'issuing officers' to issue 'official cautions' instead of a penalty notice.

As discussed at question 6.4, the YJC does not believe that sufficient guidance is provided to issuing officers when issuing penalty notices. Evidence from our members and young people strongly suggests that issuing officers are not issuing cautions as per the Attorney General's 'Caution Guidelines under the *Fines Act 1996*'¹ (the "caution guidelines"), and do not appear to be aware of their power to issue a caution under the caution guidelines. Young people are also not made aware of their rights under the new legislation, in terms of seeking a caution or the availability of an internal review on the basis of a caution not being issued.

The YJC recommends that mandatory training must be given to all enforcement officers on their discretionary power to issue cautions under the caution guidelines'. The training should specifically include how to deal with young people and other vulnerable groups in the community (including people at risk of homelessness, people from non-English speaking backgrounds, people with intellectual disabilities, people suffering from mental illness etc). The Youth Action and Policy Association NSW in their 2005 report on "Young people and transit security"², highlighted how young people felt disproportionately targeted due to their age, and in some cases, due to their cultural and ethnic background. Proper training on working with young people, including raising awareness of the specific issues of young people from diverse cultural backgrounds and those from socially disadvantaged backgrounds, will ensure that issuing officers are able to adopt appropriate measures when dealing with young people

We also recommend that the SDRO monitor the use of 'official cautions' by collecting and publishing statistics on the numbers of 'official cautions' issued to young people.

To ensure further compliance with the amendments to the *Fines Act*, the YJC believes that there should be a clear provision in the legislation that requires issuing officers to consider a caution before issuing a penalty notice.

¹ *Caution Guidelines under the Fines Act 1996* at 1, available at www.lawlink.nsw.gov.au/.../Caution_Guidelines_under...Fines_Act.../Caution_Guidelines_under_the_Fines_Act_pdf.pdf, (accessed 30 October 2010)

² Youth Action and Policy Association NSW "Fair go RailCorp", *YAPRap* Volume 15(5) May 2005, page 1-6.

Recommendations

1. That issuing officers be trained in their discretionary power to issue cautions
2. The SDRO collect and publish statistics on the number of cautions issued to young people

Question 5.3

- (1) Should a limit be placed on the number or value of penalty notices that can be issued in respect of one incident or on the one occasion of offending behaviour?

YJC members are frequently confronted with young people who receive multiple fines on one occasion or for one incident. A common incident occurs on railway stations, where police officers issue a penalty notice to a young person for being in a restricted area (the platform) without a ticket. The young person typically does not know it's an offence to be on the platform without a ticket, as there are no gates or barriers to prevent entry, nor are any signs visible explaining that it is an offence to be on the platform without a ticket. The young person provides an excuse to the police officer that they are waiting on the platform for their friends to arrive on the next train or it's late at night and they are just seeing their friends get safely on the train. The police officers don't believe the excuse and they are fined for being in a restricted area without a ticket. The young person will often use offensive language in frustration at being fined for doing nothing wrong and subsequently fined \$400 for saying something like, "Fucking hell, all I'm doing is standing on the station, I'm not doing anything wrong, this is a fucking joke".

As a result of this one occasion, the young person is given a total fine of \$450.00 for being on a platform without a ticket. What started as a minor offence has escalated to a total fine that is not proportional to the objective seriousness of the offence and is manifestly excessive for a young person, who may be homeless or suffering some other form of disadvantage.

In this case (and this is a common occurrence) no regard has been had to the sentencing Principle of Totality. This principle states that a court must determine that an appropriate sentence is based on the totality of the criminal conduct. The principle has two components. The first being that any total sentence must be proportional to the seriousness of the offences and secondly, the total overall sentence should not be so harsh as to be 'crushing'. The totality principle is often referred to as a 'limitation upon excess'.³

In *Postiglione v The Queen*⁴, Justice McHugh characterised the totality principle as:

³ *R v Patison* [2003] NSWCCA 171, per Giles JA at 58

⁴ (1997) 189 CLR 295

The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved...⁵

The YJC believes that the principle of totality should limit the total amount of fines issued to a young person for the one incident or on the one occasion. In the case study, an overall fine of \$450 is not, as Justice McHugh points out, 'a just and appropriate measure of the total criminality involved ...'.

Recommendation

1. A limit should be placed on the number of penalty notices that can be issued for a single incident or occasion. The Principle of Totality should guide the limit.

(2) If so, should this be prescribed in legislation, either in the *Fines Act 1996 (NSW)* or in the parent statute under which the offence is created or should it be framed as a guideline and ultimately left to the discretion of the issuing officer?

The YJC believes that limiting the number of penalty notices that can be issued for one incident or on any one occasion, should be contained in the *Fines Act*. Allowing the issuing officer to exercise discretion is problematic as it is our member's experience that very little discretion is currently given to young people by issuing officers.

Question 5.10

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

The internal review guidelines do provide some recourse for young people to have their penalty notices reviewed according to their circumstances. However the YJC believes that the *Fines Act* should be amended to provide an additional ground for mandatory review where a penalty notice was issued to a person under 18 years of age and that person is homeless, suffers from a mental illness or does not have the capacity to pay the fine. Each of these criteria would need to be supported by a letter from the young persons caseworker, solicitor or specialist service provider. Continuing to issue penalty notices to young people in these circumstances disadvantages and marginalises young people and unnecessarily penalises those in society who can least afford the monetary penalty and the sanctions that inevitably apply after failure to pay the fine.

The internal review guidelines provide several grounds that a penalty notice can be reviewed, such as if a caution should have been issued instead of a penalty notice, the person is homeless or has mental health problems.

⁵ Id at 307

However, the caution and internal review guidelines do not apply to police and this exposes a significant gap in the manner in which young people can seek a review of penalty notices issued for public transport offences. Excluding the police from these guidelines severely limits the effectiveness of the internal review and caution guidelines to young people. We believe that the issuing of a caution to young people is a significant step in acknowledging that young people are financially disadvantaged due to their age and learning commitments. We elaborate further on this point in question 6.4.

We recommend that young people should be subject to the same internal review and caution guidelines irrespective of who issues the penalty notice. It seems unfair that one young person may be given a caution by a transit officer for being on a railway platform without a ticket, while another receives a \$50 fine from a police officer for the same offence. The law needs to be certain for all young people and not discriminate according to the issuing agency.

We therefore recommend that the *Fines Act* be amended to include police within the ambit of the caution guidelines, and therefore provide another measured and responsible ground for review for young people.

Recommendation

1. Amend the *Fines Act* to include a mandatory ground of review that the person is under 18 years of age, homeless, suffers from a mental illness or does not have the financial capacity to pay the fine.

Question 5.12

(1) Could the operation of fines mitigation mechanisms, including the recent Work and Development Order reforms, be improved?

a) Work and Development Orders

The YJC welcomed the introduction of the *Fines Amendment Act 2008* which introduced, among other things, the Work and Development Order ('WDO') pilot scheme. The WDO scheme allows eligible young people who are homeless, suffer from a mental illness or cognitive impairment, or are experiencing acute economic hardship to either 'work-off' their fines or undertake certain treatment plans, educational or vocational courses. While the scheme is a positive step forward in mitigating fines debt, there have been some significant issues with its operation.

Insufficient funding to implement WDO scheme

Since the WDO scheme commenced in mid-2009, there has been no additional allocation of funding from Department of Justice and Attorney Generals Department (DJAG) to implement, promote and educate community

organisations about the changes to the fines legislation and the WDO scheme in particular. Given that the WDO scheme is reliant on the community sector to implement these new measures, the lack of any funding by the government has been an issue affecting the numbers of organisations applying to be an approved organization. Feedback from youth services are that the lack of funding attached to the program has been a barrier to those organisations who do find out about WDOs actually proceeding to become 'approved organisations'. Most of these organisations have set programs with very limited budgets so accommodating new or even existing clients who wish to undertake a WDO is problematic without the provision of additional resources or support.

Lack of awareness

There also has been no targeted community legal education by DJAG to the community in highlighting the WDO scheme, relying on community organisations to conduct their own community education sessions to promote the scheme. The Convenor of the YJC has personally spent significant amounts of time travelling around the Sydney Metropolitan area delivering Community Legal Education ('CLE') seminars, talks and informal roundtable discussions on WDOs. Notwithstanding these efforts, at one interagency meeting recently attended by the Convenor of the YJC, all members of the interagency meeting had not heard of the WDO scheme.

This is the most significant failing of the WDO pilot scheme and one of reasons for the low numbers of young people undertaking WDOs. Although it is a beneficial scheme, very few organisations have been informed about it other than by their fellow community organisations. This has placed a significant burden on community and not-for-profit organisations that are already underfunded and under-resourced to undertake education that should be the responsibility of the Attorney General's Department or the SDRO.

From an operational perspective, there have also been a number of stumbling blocks to the successful implementation of the WDO scheme since it was first introduced. Recommendations that approved organisations be listed on the SDRO website (with their consent) has made it easier for young people who are not already linked with service providers to find an approved organisation in their area. There have also been significant concerns over delays in the processing of approval papers and WDO applications. However, the provision for backdating a WDO has alleviated this problem and there are reports from some YJC member organisations that the approval process now suffers fewer delays, however a four week period still applies in the application process.

Recommendations

- 1. The DJAG and/or the SDRO undertake targeted community education to inform the community about WDOs.**
- 2. Funding be provided to organisations who wish to become approved so that they have capacity to supervise young people on WDOs.**

3. The WDO pilot scheme be extended to compensate for the slow uptake of WDOs due to lack of community education and significant procedural delays at the commencement of the scheme.

Question 6.1

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

The appropriateness of issuing penalty notices to young people has long been a major concern for the YJC. This concern has been highlighted in the Australian Law Reform Commission 1997 report "Seen and Heard: Priority for Children in the Legal Process" where the function of penalty notices as a sentencing option for young people was considered to be limited.⁶ The reason for this is largely because penalty notices have little deterrent effect, do little to rehabilitate offenders, and given their inability to pay are susceptible to secondary offending. Imposing a significant monetary penalty unfairly disadvantages young people as the fine is often disproportionate to the seriousness of the offence. Without the benefit of any deterrent or effective behaviour modification, the operation of the penalty notice system appears to be largely focused on revenue and does little to assist the most vulnerable people in society.

This narrow approach means that penalty notices often disproportionately and adversely impact on young people in a number of ways:

- young people are less likely to have the financial capacity to pay fines;
- young people have less capacity to understand and appreciate the consequences of not paying their fines;
- young people are more likely to be adversely affected by secondary offending and civil enforcements; and
- young people are less likely to advocate on behalf of themselves and have less knowledge of the options available to them in reviewing a fine.

Financial capacity of young people

Young people are amongst the most financially vulnerable groups of citizens in Australia. In 2008 the Youth Action and Policy Association ('YAPA') conducted a study which found that approximately 1 in 10 young people experienced multiple forms of disadvantage across different categories including, homelessness, lack of access to services, lack of financial means and social exclusion.⁷ In particular, the study found that 18.1% of young

⁶ Australian Law Reform Commission, *Seen and heard: Priority for Children in the Legal Process*, Report No 8 (1997) at 19.34.

⁷ Youth Action and Policy Association, *Poverty and Disadvantage amongst Young Australians – How are young people going?* (2008) at www.yapa.org.au/yapa/policy/poverty.pdf (accessed 25 October 2010).

people do not have enough money to cover their basic needs, and 44.7% have less than \$500 in savings.⁸ These findings indicate that young people could face serious financial difficulty in the event of unforeseen expenses, such as a fine.

The financial disadvantage of young people in receipt of Centrelink Youth Allowance payments, is also significant. The current Youth Allowance payment is set at \$206.30 per fortnight for a single person under 18 years and living at home.⁹ This amount is well below the OECD poverty line.

Young people also have very limited earning capacity. Given that the school leaving age was raised to 17 earlier in 2010, most young people 17 years or younger are unlikely to have any income at all. Young people who are employed earn significantly less compared to adults. Engagement in full time study also significantly limits a young person's capacity to comply with any enforcement procedures. This financial disadvantage experienced by young people means that they are in a particularly vulnerable situation when issued with a penalty notice.

Systemic disadvantage

The majority of young people that come in to contact with members of the YJC are from socio-economic disadvantaged backgrounds and some are in the care of Community Services (formerly the Department of Community Services). Their vulnerability is exacerbated by the systemic disadvantage they may experience through low levels of literacy, homelessness, coming from culturally and linguistically disadvantaged backgrounds and abusive and violent family environments.

Young people from disadvantaged backgrounds do not have the capacity to pay fines, nor do they have appropriate support mechanisms to seek reviews of penalty notices or assistance with the various alternative methods in paying a fine. As a result, they are more likely to do nothing about the penalty notice, which results in the penalty notice becoming an enforcement order, with the probability of further sanction being imposed such as licence restrictions and property seizure orders. At each stage of the enforcement process additional costs are added, that often add up to double the original penalty amount.

The most common types of penalty notices issued to young people are public transport offences, such as travelling on a train without a ticket, being in a restricted area without a ticket, not having their concession cards with them, or public order offences such as offensive conduct or use of offensive language. Penalty notices issued to disadvantaged young people often have serious consequences for a young person's employment, education, financial stability and self-esteem. Young people often report to our members that they feel defeated by a system they believe is stacked against them; there is also a widespread perception among young people and youth workers/caseworkers

⁸ Ibid at 16.

⁹ Centrelink, *Payment Rates* (2010) at

http://www.centrelink.gov.au/internet/internet.nsf/payments/ya_rates.htm (accessed 25 October 2010).

that transit and police officers target them because of the way they look. We frequently hear these comments from young people and youth workers from Western and South Western Sydney. In other cases, solicitors and social workers have witnessed transit/police officers only ask only certain young people on a train for their ticket, while other adults and young people are not asked for a ticket. Young people were apparently targeted because of their ethnic origin or their physical appearance.

The additional sanction of restricting a young person from obtaining a driver's licence is often the harshest penalty young people face at a time when they start to look towards employment as a means to lift them out of poverty and homelessness. We deal with this particular issue later in the submission, but wish to point out at this stage that the YJC firmly believes that licence sanctions disproportionately affect the motivation and self-esteem of young people. Young people become dispirited with the amount of outstanding fines, and with the added licence restrictions, it can be a final blow to their employment prospects. Youth workers in the YJC report that young people 'drop-out' of contact with their workers if they feel the system is weighted against them. Further, with the imposition of licence sanctions, young people are likely to take the risk of driving without a licence. If they are caught driving without a licence, the penalties often include a mandatory period of licence suspension, which further entrenches young people in a cycle of disadvantage and vulnerability and disengagement with society.

Case Study

John is a refugee from Western Africa with limited English language skills. He arrived in Australia with his uncle and his family. John was receiving Youth Allowance and found it hard to make ends meet, as he had to pay a portion of his Youth Allowance to his uncle for accommodation. As a young person struggling to fit into Australia and with little money, John accumulated around \$1000 in fines, mainly for travelling on a train without ticket. Public transport was John's only means of transport to and from TAFE and to visit his friends.

John was unaware of the requirement to pay the fines and as a result his fines became enforcement orders, adding \$25 to the original fine. John failed to pay the enforcement orders, and the SDRO issued a property seizure order, at a \$50 cost, and then applied RTA sanctions, adding another \$40 to the total. What was originally a \$50 fine, became a 'fine' of \$165.00, including \$115 of additional cost. This represents an increase of over 100% of the original fine.

Case Study

Ali is 17 years old homeless young person from South Western Sydney. Ali was made homeless because he had a drug problem and did not get along with his stepfather. His mother told him to leave the family home because he was disruptive. Ali was sleeping rough and occasionally 'couch surfed' at a friend's house. Ali was receiving Youth Allowance, but could not always afford the train fare to meet with his drug and alcohol counsellor. As a result, Ali often travelled on the Bankstown train line without a ticket and quickly accumulated 12 fines for travelling on a train without ticket or entering/leaving a restricted area without a ticket. Despite telling the police officer he was homeless and couldn't afford a train ticket and was going to see his drug and alcohol counsellor, he was issued penalty notices that he could not afford to pay.

Principles of Youth Justice

As discussed above, young people have a significantly reduced financial capacity to pay a fine. This often means that young people are likely not to pay a fine and therefore more likely to receive an enforcement order and come into contact with the criminal justice system. International law recognises that young people are entitled to special protections when dealing with the criminal justice system. These protections are designed to ensure that young people are treated according to their level of maturity, their financial circumstances. Young people are entitled to be dealt with differently than adults when dealing with the criminal justice system to ensure that appropriate diversionary programs minimises young peoples contact with the criminal justice system. This is a concern for the YJC, as studies have shown that young people who have contact with the criminal justice system are 15-20% more likely to reoffend than those who are dealt with through diversionary programs.¹⁰

For these reasons the YJC does not believe that young people under 18 years of age should be issued penalty notices.

Recommendations

- 1. Penalty notices should not be issued to persons under 18 years of age.**
- 2. Cautions, warnings and diversionary programs should be used as alternatives to the issuing of penalty notices to persons under 18 years of age.**

¹⁰ NSW Bureau of Crime Statistics and Research, Crime and Justice, *Reducing Juvenile Crime: Conferencing versus Court*, Bulletin No 86 (2002), [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB69.pdf/\\$file/CJB69.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB69.pdf/$file/CJB69.pdf) (accessed at 25 October 2010).

Question 6.2

(1) Are there practical alternatives to penalty notices for children and young people?

The approach to young people in the juvenile justice system since the late 1990s has largely been to move away from punitive measures of punishment towards diversionary options. However the current practice of the penalty notice system maintains a largely punitive fixed monetary penalty, which is often disproportionate to the seriousness of the offence committed by a young person. It is fundamentally inequitable to impose a monetary penalty on a young person that is often greater than one that would be imposed at sentence in the Local or Children's Court.

As discussed above, the most common type of offences for which young people receive penalty notices are transit offences, such as not carrying a valid train ticket, being in a restricted area of a railway station or the use of offensive language. In the Children's Court, where available sentencing options under the *Children (Criminal Proceedings) Act 1987 (NSW)* allow the principles of rehabilitation, reintegration and diversion to be taken into consideration when sentencing a young offender, the courts have commonly chosen not to impose fines. In fact, in 2008-2009 the NSW Children's Court ordered a monetary penalty in only 10.8% of cases where the juvenile offender was found guilty of the offence.¹¹ This statistic is evidence that monetary penalties are not the court's preferred method of dealing with young offenders.

The YJC believes that the current penalty notice system should be brought into line with the approach of dealing with young people as per the *Young Offenders Act 1997* ("YOA"). Under the guiding principles of diversion and finding alternative and appropriate means of dealing with young people, police officers are able to warn, caution or refer a young person to a youth justice conference under the YOA for certain offences.

The YJC continues to support the Attorney General's 'Caution Guidelines' for dealing with minor penalty notice offences and as stated in question 6.4, we recommend that the caution guidelines be extended to police officers.

Question 6.4

(1) 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?

The YJC believes that all enforcement officers must first consider a caution before proceeding to issue a penalty notice. Despite the recent amendments to the *Fines Act* to give authorised officers the discretion to issue a caution to an offender, the guidelines do not extend to police officers. The YJC finds this problematic as police officers regularly issue penalty notices for public

¹¹ Australian Bureau of Statistics, *Criminal Courts: Australia 2008-09* Report No.4513.0 (2010), <http://www.abs.gov.au> (accessed at 25 October 2010).

transport offences and excluding them from the caution guidelines is a significant flaw in the penalty notice system and acts counter to the principle that young people should be diverted away from the criminal justice system. A young person who receives a penalty notice from a police officer has no alternative to challenge a fine, other than by electing to have the matter heard in court, thus bringing the young person into contact with the justice system. This defeats the diversionary principles of juvenile justice. The YJC believes this is a significant gap in the penalty notice system that must be closed.

Case Study

Two young people, aged 15 years old were issued with penalty notices by police officers for entering a restricted area (the train platform) without a valid ticket. The young people were waiting on the train platform for some friends who were arriving on the next train. There was no sign stating that the boys needed to purchase a ticket to wait on the train platform.

The amount of the fine was \$400 for each young person. Upon further investigation by the Children's Legal Service, it was found that this was the wrong amount for that offence. Had the young people not had access to legal advice they would have had to pay the full \$400.

Additionally one young person was issued with a penalty notice for the use of offensive language, which resulted in a fine of \$400. The issuing officer gave no consideration to the fact that the boy was only 15 years old and had no capacity to pay such a large fine.

The only mechanism available to these young people to challenge the fines, is to elect to have the matter heard by a court.

The YJC consulted with community organisations and young people to gauge whether enforcement officers have been issuing cautions to young people in lieu of issuing penalty notices. These interviews were conducted during inter-agency meetings and during the numerous community legal education sessions the YJC Convenor conducts throughout the greater Sydney Metropolitan area. Our consultation showed that enforcement officers were not issuing cautions, despite the amendments to the *Fines Act* and the issuing by the Attorney General of the 'Caution Guidelines'. YJC member's report that the level of fines that are being dealt with by community organisations, including community legal centres have not decreased since the new guidelines were implemented. This indicates that the power to issue a caution instead of a fine is not being utilised.

The YJC believes that cautions are a more appropriate, fair and just way in dealing with young people. We recommend that training should be given to enforcement officers by issuing agencies on the Attorney General's 'Caution Guidelines'.

We also recommend that the *Fines Act* be amended to expressly state that the onus is on the enforcement officer (including a police officer) to show

why a warning or caution wasn't issued before proceeding to issue a penalty notice.

Recommendations

- 1. The *Fines Act* should be amended to empower police to issue cautions under the Attorney General's Cautions Guidelines**
- 2. Amend the *Fines Act* to include an express provision stating that there is an onus on the enforcement officer to show why a warning or caution wasn't issued before proceeding to issue a penalty notice**

Question 6.5

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

The penalty notice system should adopt more flexible diversionary approaches to youth offenders that accurately reflect the objective seriousness of the offence and emphasise the principles of rehabilitation, reintegration and diversion. NSW police have utilised the options available under the *Young Offenders Act 1997 (NSW)* as a successful alternative to charging young offenders. These same diversionary principles could be incorporated into the penalty notice system. As discussed earlier, the YJC believes that minor offences such as public transport offences could be more effectively dealt with by bringing the police within the ambit of the caution guidelines. Examples of these programs include: distance or outreach educational programs designed to support young people at risk of dropping out of school, such as the Links to Learning program; and legal street art programs aimed at educating young people about graffiti, such as the Aerosol Art Program provided by the Marrickville Youth Resource Centre and Dulwich Hill High School.

Recommendations

- 1. Police officers should be given the discretion to issue a caution or warning**
- 2. This discretion should be limited to serious offences. Minor offences, such as transport offences should be specifically excluded**
- 3. Police should be subject to the current caution and internal review guidelines.**
- 4. Caution and warnings should apply to reflect the regulatory nature of the penalty notices**

Question 6.6

- (1) Should 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?

Throughout this submission we have demonstrated that penalty notices disproportionately affect young people who often lack the financial capacity or means to pay the fine. This means that young people are at a greater risk of encountering further enforcement sanctions.

The YJC recommends that the issuing of penalty notices for young people under the age of 18 years should be abolished.

In the alternative the YJC believes that a significantly lower penalty amount, being \$25 should apply for young people. This approach would be consistent with the objectives and approach for dealing with young people in the juvenile justice system. When sentencing a young person, a Magistrate must consider section 33(1AA) of the *Children (Criminal Proceedings) Act 1987* (NSW) and consider the age of the young person, their ability to pay the fine¹² and the potential impact of the fine on the rehabilitation of the child.¹³ This recognises the disadvantage suffered by young people due to their age and limited capacity to pay. The penalty notice system should also recognise the disadvantaged circumstances of young people and set a maximum penalty amount that realistically reflects their capacity to pay.

Rail Corporation (NSW) currently recognises the discrepancy in the way monetary fines affect young people as opposed to adults. For example, in the above case study, Rail Corporation reduced the penalty amount for entering a restricted area of a train station to \$50. However the fine for offensive language still remains at the unreasonable amount of \$400 for both young people and adults.

Recommendations

- 1. Abolish penalty notices for people under 18 years of age.**
- 2. In the alternative, the maximum amount payable under a penalty notice issued to persons under 18 years of age should be \$25.**

¹² Section 33 (1AA)(a) of *Children (Criminal Proceedings) Act 1987* (NSW)

¹³ Section 33 (1AA)(b) of *Children (Criminal Proceedings) Act 1987* (NSW)

Question 6.7

- (1) 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 ability to pay?**

Young people are less likely to be aware of the options for seeking internal review of a penalty notice given their age and maturity. In addition, young people are less likely to advocate for themselves and thus are more inclined to allow a penalty notice to reach enforcement stage.

As discussed in question 6.1, young people are financially disadvantaged and face systemic factors that may prevent them paying fines. The majority of young people are in full-time education, which means that they may not have any source of income and are reliant upon the support of their parents or guardians to provide their essential needs.

The YJC believes that a young person should be given the right to apply for an internal review on the basis of their inability to pay at the penalty notice stage and enforcement order stage. An appeal on this basis will have the added benefit of relieving the Courts of dealing with minor matters, thus saving the Court's time and the expense of unnecessary proceedings. It will also be consistent with the principles of juvenile justice to divert young people away from the criminal justice system and recognise that young people should not be financially burdened at a time when they have little or no financial independence.

In addition, at the time of being issued with a penalty notice, young people should be provided with hard copy information as to their appeal rights and the contact details of organisations such as Law Access who may be able to assist them with an internal review.

Recommendations

- 1. Young people should be able to apply for a review of the penalty amount on the basis of their ability to pay.**
- 2. Young people should be provided with information on their appeal entitlements at the time they are issued with a penalty notice.**

Question 6.9

- (1) Should driver licence sanctions be used generally in relation to offenders below the age of 18 years?**

The YJC believes that driver licence and vehicle registration sanctions should not be used against young people under 18 years of age. The use of such sanctions as an enforcement procedure for a person under 18 years of age has a number of detrimental effects. These include:

- reducing a young persons ability to maintain and/or find employment, which further reduces their capacity to pay an outstanding fine;
- disproportionately impacting on young people from regional and remote areas, who do not have access to public transport and must drive long distances to access essential services and obtain employment; and
- increasing the likelihood of the young person committing secondary offences, such as driving without a license.

Children's Court: Lack of jurisdiction to hear traffic offences

A related concern for the YJC is the omission of traffic offences from the jurisdiction of the Children's Court under section 28 (2) of the *Children (Criminal Proceedings) Act 1987* (NSW). A young person charged with a traffic offence must appear before the Local Court and does not have the benefit of being dealt with by a specialist court with expertise in dealing with young people.

This issue was also raised in the *Strategic Review of the New South Wales Juvenile Justice System* by Noetic Solutions.¹⁴ The Noetic Review, released earlier this year, said that as "...NSW recognises that children and young people are important and different, it would seem reasonable that traffic offences be heard in the Children's Court".¹⁵ The Noetic Report recommended¹⁶ that a study be conducted to understand the impacts of amending the legislation to allow young people's traffic offences to be heard in the Children's Court. We note that the Department of Justice and Attorney General's ('DJAG') response to the recommendation was to consider the feasibility of the recommendation in consultation with Bureau of Crime Statistics and Research ('BOCSAR'), the Courts, the Police and the RTA. The YJC continues to support his recommendation and encourages the DJAG to undertake the feasibility study.

The YJC recommends that the *Children (Criminal Proceedings) Act 1987* (NSW) be amended to allow the Children's Court to hear and determine proceedings in relation to traffic offences.

In addition, the availability of Legal Aid representation is limited given that the Children's Legal Service of Legal Aid NSW does not provide representation where the matter is not being heard in the Children's Court. This reduces the capacity of the court to deal appropriately with the young person and undermines the key principles of the juvenile justice system: rehabilitation, reintegration and diversion.

Recommendation

1. Amend the *Children (Criminal Proceedings) Act 1987* (NSW) to permit the Children's Court to hear and determine proceedings in relation to traffic offences.

¹⁴ Peter Murphy & Anthony McGinness, *A Strategic Review of the New South Wales Juvenile Justice System* (Canberra: Noetic Solutions, 2009) (hereafter "Noetic Review").

¹⁵ Id at 75

¹⁶ see Recommendation 25 at 75

Question 6.10

(1) Should driver licence and registration sanctions be applied to young people under the age of 18 years for non-traffic offences?

The YJC submits that the use of driving license sanctions for non-traffic offences is an inappropriate sanction for young people who have not committed a traffic offence.

As discussed in the consultation paper, the SDRO has interpreted section 65(3) of the *Fines Act* 1996 (NSW) narrowly. The section states that:

enforcement action with respect to a fine defaulter's driver license is not to be taken under [Division 3] if (a) the offence...occurred while the fine defaulter was under the age of 18 years and (b) the offence is not a traffic offence.

According to the SDRO, this means that the exemption does not apply when the young person does not have an existing license. This unfairly disadvantages young people who have not yet obtained a driver license and unjustly links an unrelated offence to a young persons ability to obtain a drivers license. In particular, it serves to compound the disadvantage suffered by young people whose social or financial circumstances may have prevented them from applying for a drivers license, by exposing them to harsher penalties than those imposed on current license holders.

Case Study: Barriers to Gaining Employment – Western Sydney

A Road Safety Officer from a Western Sydney Council has for many years been involved in young driver programs provided the following case study.

One of the barriers that keep coming up for young people is the sanctions the RTA applies against a young person for unpaid fines. This leads to difficulties for marginalized young people to obtain employment and apprenticeships, particularly in the building industry.

Many young people are not able to apply for a learners permit because the SDRO has prevented them getting a license for fines related to travelling on a train without a ticket, fishing without a license and other non-driving offences. It seems illogical that the unpaid fines results in an automatic refusal for a drivers licence when no driving offences have contribute to the refusal.

As an example, a Western Sydney economic and employment development organisation that links school students with employers found that after discussions with a building trades association, young people living in the Mount Druitt area only had a 2% success rate in obtaining a building trades apprenticeship. The primary reason for the lack of success in obtaining an apprenticeship was that young people were unable to obtain a learners permit due to SDRO sanctions.

The use of driver's licence sanctions also does little to deter young people who have received a penalty notice for a non-driving related offence. A NSW Sentencing Council survey released in 2007 found that 67% of NSW Magistrates believed that suspending driver licenses for the non-payment of fines was never or almost never appropriate.¹⁷ The survey found that:

Respondents noted that licence sanctions fail to deter, fail to alleviate any of the causes of failure to pay and may actually exacerbate the cause of failing to pay ... The "blunt instrument" of sanctions was seen as causing considerable hardship to disadvantaged people, such as the young, the unemployed, and people from rural or regional areas where there is no public transport.¹⁸

These findings illustrate that the use of licensing sanctions on young people, is largely incongruent with the reason they were issued with a penalty notice in the first place, and thus does little to deter young people from re-offending. In addition, the disproportionate financial impact of fines on young people means that licensing and registration sanctions are unfairly and excessively imposed where a young person is unable to pay a fine.

The YJC does not believe that driver's licence or registration restrictions should be applied against young people for non-traffic related penalty notices. The linking of two unrelated matters does not fit with the principles of juvenile justice nor is the punishment proportional to the offence.

Question 6.11

(1) 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?

The SDRO has also implemented a policy of combining penalty notices issued for both traffic and non-traffic offences under one enforcement order. This allows the SDRO to impose license restrictions in relation to non-traffic offences where the young person is unable to pay the full amount under the enforcement order. This practice while technically permissible undermines the intention of section 65 that license restrictions should only be imposed specifically in relation to traffic offences.

We recommend that the *Fines Act* be amended to prevent enforcement action being taken under Part 4 Division 3 for unpaid enforcement orders that relate to both traffic and non-traffic offences.

Question 6.12

(1) 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?

¹⁷ NSW Sentencing Council, *Judicial Perceptions of Fines as a Sentencing Option: A Survey of NSW Magistrates* (2007) at 4.10

¹⁸Ibid

The YJC views the "conditional good behaviour" period of 5 years, as stated under section 101(4) of the *Fines Act* as problematic. Under section 101(4) of the *Fines Act*, the SDRO can reinstate within 5 years, any fine that is written off if a subsequent fine enforcement order is made against the fine defaulter or the SDRO believes the fine defaulter has the capacity to pay the fine.

As discussed throughout this submission, young people are at a greater risk of receiving penalty notices as they face greater systemic marginalisation and disadvantage in society due to their age and lack of financial capacity to pay fines. Young people in these situations are more likely to require or be required by courts to seek the assistance of community service organisations to assist them in finding accommodation, overcome drug and alcohol problems or mental health issues.

In order to meet with caseworkers young people have no option but to use public transport and given their lack of financial resources are likely to travel without a ticket and incur a fine. The issuing of penalty notices in these cases does not act as deterrent and does little to prevent re-offending.

The YJC views section 101(4) of the *Fines Act* as a conditional deferral that sets up young people for failure and should be deleted from the *Fines Act*. As discussed above, young people are more likely to re-offend given they are more likely to use public transport. In this submission we have clearly laid out the reasons that young people re-offend and the minimal deterrent value penalty notices have on young people facing inherent social and financial disadvantage. Penalty notices are a blunt instrument that does not serve young peoples interest, nor do they satisfy to the principles of juvenile justice of rehabilitation, reintegration and diversion. The YJC views the five-year condition write-off period would as a disincentive for young people to rehabilitate and turn their lives around. Imposing such a long and harsh 'sentence' is contrary to the principles of youth justice and is likely to exacerbate and entrench the disillusion they perceive of the justice system.

Against this backdrop, it is inherently unfair and unjust to young people are subject to a 5 year conditional period of "good behaviour".

The YJC strongly advocates that a 'write-off' should be a true write-off, that is, a complete unconditional waiver of a fine.

If a conditional write-off period is to remain, then it should be brought into line with other conditional periods in the criminal law. The maximum duration of a good behaviour bond that can be imposed by the Children's Court pursuant to section 33 (1)(b) of the *Children (Criminal Proceedings) Act 1987 (NSW)* is 2 years. Penalty notices are issued for minor infractions of the law and the "good behaviour" period imposed following a write-off is clearly intended to be a less serious consequence and less punitive than a bond imposed under criminal law.

Given that a vast majority of penalty notices imposed on young people relate to transit and public order offences, it would be detrimental and unfair to impose a "good behaviour" period that is more than 6 months.

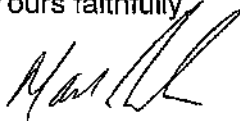
The YJC would also like to express its concern over the manner in which the SDRO's Priority Debt section operates. We understand that this department's mandate is to collect debts that exceed \$10,000. Several members report that the department vigorously pursues fine defaulters for outstanding debts and has adopted punitive measures to collect debts. For instance, the Priority Debt office is not accessible from the SDRO Advocacy Hotline and does not allow young people to make time-to-pay applications over the phone, instead they insist that a formal written application be made. This acts as a disincentive to young people to seek a write off of their debts. We submit that when dealing with young people, and regardless of the total amount of the outstanding fines, the special disadvantage young people face should be acknowledged and procedures should be put in place by the Priority Debt section to specially assist young people to pay off their fines. As we have continually emphasized throughout this submission, young people who incur fines suffer greater levels of disadvantage and marginalization from society. Young people with fines greater than \$10,000 should be encouraged to enter programs that help them pay off the fines.

Recommendations

- 1. The "good behaviour" period in relation to write off application should be abolished.**
- 2. In the alternative, if "good behaviour" periods are to remain, they should be set at 6 months for a person under the age of 18 years.**
- 3. Section 101(4) of the *Fines Act* should be deleted**

Thank you for considering the YJC's submission. If you require any further details or clarifications on any issues or recommendations in this submission, please contact me on 9559 2899 or yjc@clc.net.au

Yours faithfully



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