Legal Services, Community Services, Department of Human Services
Submission to the NSW Law Reform Commission on *Penalty Notices*

Introduction

Community Services welcomes the NSW Law Reform Commission's review of penalty notices, and is grateful for the opportunity to comment on the Commission's consultation paper, *Penalty Notices*.

Community Services agrees that the penalty notice system could be improved to make it fairer, more equitable and more effective in achieving compliance. The lack of a co-ordinated and principled approach has caused unwieldiness and inconsistencies, and this affects public confidence in the system. Of most concern to Community Services is the disproportionate impact that penalty notices have on vulnerable people who have limited capacity to pay, including children and young people. Penalty notices are a one-size fits all system that takes no account of the circumstances of the offence, or of the offender. Also, because of the ease with which they can be issued, and the unlikelihood of people challenging them, penalty notices are drawing more people into the fine enforcement cycle. This is particularly true for disadvantaged groups, including the poor and less educated, who are even less likely to challenge penalty notices.

The Commission's review is an opportunity to build further on recent reforms to the *Fines Act 1996* (NSW) designed to address some of these issues, including:

a) authorising enforcement officers to issue cautions
b) providing for internal reviews of decisions to issue a penalty notice
c) allowing time to pay arrangements, including making arrangements to make periodic deductions from Centrelink payments
d) introducing work and development orders which allow eligible people to satisfy all or part of their unpaid penalty notice/fine debts by undertaking approved unpaid work or participating in an approved course or treatment program

Areas of interest for Community Services

From a client perspective, the issues raised in the Consultation Paper which are of most interest to Community Services are those issues relating to the impact of penalty notices – their issue and enforcement - on children and young people at risk and more generally.

Children and young people in out of home care are particularly vulnerable not only to the imposition of penalty notices, such as transport-related fines, but to the impact of these penalties more broadly on their circumstances and potentially the stability of their placement. In most cases, children and young people in out of home care do not have family supports to fall back on when penalty notices are received. In many cases, the child or young person may

not have an allocated caseworker, requiring the child or young person to deal with the penalty notice with his or her carer.

Rather than issue penalty notices, we believe there should be an increased focus on crime prevention initiatives for children and young people through education and awareness programs. Schools could play a broader educative role to engage children and young people on the law and their legal rights and responsibilities in the community, and what consequences will follow if they break the law.

From a regulatory perspective, Community Services also has an interest in issues relating to:

- the framework for guiding and overseeing the penalty notice system;
- the development of guidelines and principles to determine which offences are suitable to be dealt with by way of penalty notice, and how penalty notice amounts are fixed and adjusted over time; and
- the issue and enforcement of penalty notices.

Currently, none of the offences in legislation administered by Community Services is prescribed as a penalty notice offence. However, recent amendments to the *Children and Young Person (Care and Protection) Act 1998* to operate from 1 January 2011 will introduce a new penalty notice provision (s 259A) so that certain offences may be prescribed by the *Children's Services Regulation 2004* as penalty notice offences. The recent amendments also create a new offence of failing to comply with a compliance notice, without reasonable excuse (s 219V), which is an offence prescribed by the regulation as a penalty notice offence. The penalty notice amount is prescribed at $1100 (or 10% of the maximum penalty for the offence).

Experience in drafting the penalty notice provisions identified the lack of principles and guidelines available to an agency in NSW to determine effective and consistent penalty amounts to reflect the comparative seriousness of a range of proposed offences.

General comments

Community Services supports the proposal for a dedicated statute setting out a comprehensive legislative framework for an infringements system in NSW.

This legislation should outline a clear set of principles and guidelines which agencies should take into account when determining if an offence is suitable to be dealt with by way of penalty notice, and to set penalty notice amounts that are effective, reflect the seriousness of the offence, and are consistent with penalty notice amounts for comparable offences. This will ensure consistency, equity and fairness, and thereby increase public confidence in the infringements system.

However, we believe there should remain a degree of flexibility to accommodate current and future regulatory reform frameworks that seek to align and streamline regulatory arrangements on a national basis. This

process typically involves the development of consistent regulation practice across a number of different jurisdictions guided by broad, COAG-agreed frameworks. A recent example in our experience has been working with other states and territories in the development of the Education and Care Services National Law. Problems arise in negotiations to develop a regulatory framework when there is no flexibility within a jurisdiction to move away from set percentages for penalty notice amounts or grading of seriousness of offences. The need for flexibility - in each jurisdiction - will grow as alignment of regulatory practice across the nation progresses.

Community Services supports an approach that allows different penalty amounts and gradings to be considered in cases where an agency can demonstrate a strong and justifiable public interest as provided in the Victorian guidelines, or where the approach is consistent with nationally agreed reform.

Community Services also supports the Victorian model of a central co-ordinating unit that oversees the infringements system, which would:

- provide advice and assistance to government agencies on the application of principles and guidelines for the creation of new infringement notices;
- vet legislative proposals to make new, or amend existing, penalty notice offences to ensure compliance with the guidelines, and consistency with comparable offences;
- monitor and review penalty notice offences, including monitoring their impact on vulnerable groups, and make suggestions for reform; and
- provide community education to increase community awareness of the penalty notice system, including the right to seek an internal review and to make payment arrangements, with special programs (possibly school-based) for young people.

Legislative proposals to make new or amend existing penalty notice offences should be required to be certified as meeting the guidelines by the central unit before they are submitted to Cabinet (in the case of draft legislation) or the Executive Council (in respect of proposed regulations).

Community Services makes the following specific comments in relation to children and young people.

Children and Young People
Chapter 6

Community Services supports measures to ameliorate the impact of penalty notices on vulnerable groups, including children and young people, those with a mental illness, those with an intellectual or cognitive impairment, and the homeless.

In relation to children and young people, Community Services notes that Juvenile Justice has also made a submission to the Commission, which Community Services generally supports.

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?

Currently, penalty notices cannot be issued to children aged under 10 years (*Fines Act* s 53). Community Services submits that this provision should be extended to cover children and young people aged under 16 years because the imposition of financial penalties on people of limited financial means is an inappropriate punishment and ineffective as a deterrent. Children aged between 10 and 16 years are of compulsory school age, are likely to be in full-time schooling and have limited earning capacity.

Their limited financial capacity often means either that:

(a) the burden to pay the penalty notice is transferred to the parent or carer, which has little deterrent or rehabilitative effect on the offending behaviour of the child or young person; or

(b) the child or young person inevitably defaults on payment, consequently incurring escalated fines and other sanctions.

Road safety is a particular concern in relation to young drivers and it is appropriate that young drivers not be immune from punishment for speeding and other driving offences.

Alternatively, Community Services submits that at the very least, children and young people aged under 14 years should not be able to be issued a penalty notice. Apart from their likely inability to pay the penalty notice themselves, prohibiting the use of penalty notices in relation to children and young people aged under 14 years is consistent with the common law presumption of doli incapax, which may be rebutted in respect of children aged between 10 and 14 if it can be proved beyond reasonable doubt that the child or young person knew that the act was wrong.

Community Services also notes, and supports the provision, that a Criminal Infringement Notice (CIN) cannot be issued to a person under the age of 18 years (*Criminal Procedure Act 1986* s 335).

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

Along with an increased focus on crime prevention education initiatives, as discussed in our earlier comments, other practical alternatives to issuing penalty notices could be Youth Justice Conferencing or community service orders with pre-counselling.

For 'offences' committed during school hours (including the time taken to travel to and from school), rather than a penalty notice there could be a role for the school in educating the child or young person in relation to the offence.

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

Making parents liable to pay the penalty notice is unlikely to be effective in promoting compliance with the law. Penalty notices paid by a parent, without any arrangement for the young person to pay back or work off the debt to the parent, are unlikely to deter the young person from reoffending or change the young person's behaviour.

It could also have some unintended detrimental consequences, including increasing the use of penalty notices for minor infringements when warnings might otherwise have been more appropriate, and potentially exacerbating conflict in families that may already be strained dealing with adolescent (mis)behaviour.

As stated earlier, children and young people in out of home care often do not have family supports to fall back on when they receive penalty notices. Where they have an allocated caseworker, the caseworker can either negotiate on their behalf to pay the fine in instalments, or agree to pay the fine up front, and seek reimbursement from the young person over an agreed timeframe. However, where there is no allocated caseworker, the child or young person may have to broach the issue with their foster carer. The Foster Carer resource guide which is currently being finalised for publication has some limited information in this area.

Engaging parents in youth counselling would be a more child focused outcome than holding parents responsible for penalty notice amounts.

Question 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?

Community Services understands that this is presently the case. See above.

Consideration should also be given to children or people with culturally and linguistically diverse backgrounds, particularly unaccompanied refugee minors. With limited English language skills/experience of local culture and laws, some children and young people may genuinely be unaware that they have committed an offence. Enforcement officers should also take this into account when considering whether to issue a caution in place of 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?

Community Services understands that police may issue a warning or caution as an alternative to a penalty notice. In our view, guidelines developed to assist police officers when exercising this discretion ought to provide that the child's or young person's circumstances should be a factor that they take into account when deciding whether to exercise their discretion not to issue a penalty notice, and whether to issue an informal warning or a caution (which is recorded). This should form part of regular training for police officers. There ought also be ongoing monitoring to ensure that the discretion is exercised consistently across all local area commands.

Diversionary options under the Young Offenders Act 1997 apply generally to offences which are not prescribed as penalty notice offences, and which are therefore of a more serious nature. Warnings under this Act are recorded on the police database. If such warnings were used in place of informal warnings, more young people would be brought within the criminal justice system. For this reason, Community Services does not support the use of cautions or warnings under the Young Offenders Act 1997 for penalty notice offences.

Question 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?

If penalty notices are to be issued to children and young people, which is not our preferred approach, then Community Services submits that a lower penalty notice amount should apply to children and young people because of their limited capacity to pay. The amount should be age-appropriate and indexed according to the circumstances of the child or young person (eg if they are in full-time school or training).

Given the wide variation of penalty notice amounts, reducing the penalty notice amount by a set percentage, say 50%, may still mean that the penalty notice is prohibitive for a child or young person who has limited means. Community Services believes that the Fines Act, or the proposed Infringements Act, should prescribe a maximum amount applicable to children and young people. A penalty notice could then prescribe that children and

young people are required to pay 50% of the penalty notice amount or the prescribed maximum amount in the Fines Act, whichever is the lower.

Question 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?

Presently, young people are entitled to seek a review of the penalty notice (before the due date for the penalty reminder notice) on the ground, inter alia, that a caution should have been issued rather than a penalty notice. If the issuing agency finds that a caution should indeed have been given according to the guidelines, the penalty notice must be withdrawn. One of the factors that an enforcement officer should consider when determining whether to issue a caution is whether the alleged offender is under 18 years old. A young person's inability to pay the penalty notice amount is implicit in this consideration. In our view, it is not strictly necessary to provide a specific ground for review based on inability to pay.

As noted by Juvenile Justice in its submission, children and young people are unlikely to seek a review, whatever the grounds, unless they are supported to do so. Information should be provided to young people about youth advocacy services they can go to for advice and assistance.

It would also be useful to allow young people to enter into time to pay arrangements, or to apply for penalty notices to be written off, or reduced. However, these options should be available at the moment the penalty notice is issued, and not only after a fine enforcement order is made.

Information about how to apply for an internal review, time to pay arrangements and for writing off fine debts should be provided clearly and in simple terms on the penalty notice itself and on the SDRO website. There should also be links to community legal centres or youth services where young people can get advice and access support services.

Question 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; and/or
(2) in a given time period?

Yes. Community Services believes it is appropriate to limit the number of penalty notices issued to a child or young person in respect of a single incident, and that this should be prescribed in legislation. Presently, an enforcement officer could, for example, issue multiple penalty notices in respect of one incident eg travelling on a train without a valid ticket/concession pass, committing a graffiti offence and offensive language, which could amount to hundreds of dollars. The greater the sum of money that a young person is obliged to pay, the less likely that any of it can be recovered. It is therefore counter-productive to issue multiple penalty notices to a young person at any one time.

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

Community Services acknowledges the impact that driver licence sanctions have on all people who live in regional areas where there are limited public transport facilities. Residents of these areas, including young people, generally rely on motor vehicle transport to get to work or attend an educational/training facility. The imposition of driver licence sanctions in these areas, in particular, may affect a young person's ability to engage in training or employment, and may lead to secondary offending as they resort to driving unlicensed.

On the other hand, Community Services notes the significant public interest in reducing the high incidence of fatal road accidents involving young people. For this reason, Community Services considers it justifiable to enforce traffic-related fines imposed on young drivers by licence and registration sanctions.

In order to promote safe and responsible driving by young drivers, driver licence and registration sanctions should be coupled with driver education programs.

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

Community Services does not believe that it is appropriate to apply driver licence and registration sanctions to young people for non-traffic offences. While the imposition of licence and registration sanctions for driving-related offences can be justified on the basis of promoting safe and responsible driving, and reducing fatalities among young drivers, the same cannot be said for non-driving related offences.

In particular, Community Services believes that a young person who does not have an existing driver's licence or vehicle registration should not be prevented from obtaining a driver's licence, or registering a vehicle, for non-traffic related offences. Section 65(3) should be amended so that this is the clear effect of the provision. Other sanctions, such as community service orders, should apply for the non-payment of penalty notices for non-traffic related offences.

Question 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?

Yes, for the reasons given above.

Question 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. Community Services considers that a 5 year conditional good behaviour bond is an onerous period of time for children and young people, but especially for our most at risk client group – children and young people who are in out of home care, and for children and young people who are homeless or who suffer from mental illness. A five year conditional good behaviour bond is also inconsistent with the usual 6 months' good behaviour orders issued by the Children's Court for minor offences.

Question 6.13
Should any of the measures proposed in the New Zealand Ministry of Justice's 2009 research paper titled Young People and Infringement Fines: A Qualitative Study be adopted in NSW?

Some of the initiatives proposed in New Zealand should be further explored.

Community Services strongly supports educating children and young people as a first step so that they understand what the law is, and explaining what consequences will follow if they fail to comply. In our view, school-based education programs should be developed and delivered to all students in upper primary and secondary schools.

We also support debt minimisation measures. As noted earlier, time to pay arrangements should be available from the time the penalty notice is issued, and penalty amounts should be lower for young people, where they apply. Young people should also be able to access community service orders/programs earlier in the fine enforcement process.

Impact on vulnerable groups
Chapter 7

The nature of Community Services' work means that the great majority of our clients are vulnerable people. Many are from poor socio-economic backgrounds or have dysfunctional family relationships, sometimes marked by violence, are affected by mental health issues, disability, drug and/or alcohol dependence, homelessness, poor educational attainment, and financial hardship. These vulnerable groups of people are often more 'visible' to police and other enforcement officers and therefore more likely to be issued penalty notices for minor offences such as railway offences, spitting, offensive language/behaviour.

As the Consultation Paper and previous reviews note, penalty notices have a disproportionate impact on vulnerable groups in society. Community Services welcomes measures designed to ameliorate the impact of penalty notices on vulnerable groups.

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

In our view, penalty notices should not be issued to people with an intellectual or cognitive impairment, and for people with serious mental illnesses, as they are unlikely to fully understand their legal obligations, much less comply. They are also unlikely to have the financial capacity to pay the penalty notice amounts.

Community Services acknowledges that it may not always be apparent to an enforcement officer that the person has an intellectual or cognitive impairment, or a serious mental illness. Despite the difficulty, Community Services does not support the establishment of a "do not fine" register of vulnerable people because of privacy and consent issues.

More appropriate is ensuring the provision of relevant and ongoing training of enforcement officers in disability and mental health awareness and in discrimination training so that they are in a position to identify persons with suspected mental health, or cognitive impairments, and exercise their discretion accordingly.

There should also be clear information on the penalty notice about the right to seek an internal review to have the penalty notice withdrawn where the person "is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless: (i) to understand that the person's conduct constituted an offence, or (ii) to control such conduct".

Question 7.8
(1) Should a concession rate apply to penalty notices issued to people on low incomes? If so, how should "low income" be defined?
(2) Should a person in receipt of certain Centrelink benefits automatically qualify for a concessional penalty amount? If so, which benefits?

A fixed penalty amount applies regardless of income and therefore has a disproportionate impact on our families, many of whom struggle on low incomes. Furthermore, people who are vulnerable and on low incomes are extremely unlikely to elect to take the matter to court, where a court would take their circumstances into account when determining an appropriate fine.

Community Services supports debt minimisation measures for people on low incomes. If vulnerable people cannot be diverted from the penalty notice system, a concessional rate should be considered. One way of determining eligibility for a concessional rate is to automatically include people who receive unemployment, disability and carer payments from Centrelink.

Also, consideration should be given to alternatives to monetary sanctions such as community service orders or education programs.

Question 7.11
(1) Are the write-off provisions of the Fines Act 1996 (NSW) effective in assisting vulnerable individuals deal with penalty notice debts?
(2) What improvement, if any, could be made to the write-off procedures under the Fines Act 1996 (NSW)?

The write-off provisions, like the review provisions and applications to the Hardship Review Board, are unlikely to be used by vulnerable persons without legal or other advocacy support. There should be information about these measures in clear and simple terms on the penalty notice itself, and on the SDRO website. There should also be links to community legal centres for advice and assistance.

Conditional good behaviour bonds imposed when decisions are made to write off unpaid fines should be substantially reduced in length for people with cognitive and intellectual impairments, and for those with mental illnesses. The current 5 year period is overly burdensome on vulnerable people. See earlier statement above.

Question 7.12
Should participation in discrimination awareness and disability awareness training be required for all law enforcement officers authorised to issue penalty notices? How else could awareness be raised?

Yes. See answer to Question 7.1 above.

Other Issues

Question 5.13 to 15.14
Penalty notices are a cost-effective and administratively efficient way of promoting compliance with minor offences, rather than proceeding by summons in local courts. For the system to work effectively, incentives are offered to encourage people to be diverted from courts. These incentives include setting penalty notice amounts at a discounted rate, and providing that payment of the penalty notice expiates the offence.

The reality is that in the vast majority of cases, regardless of their culpability, people will opt to pay the penalty notice to avoid the time, cost and inconvenience of challenging the matter in a court, where the court may consider the circumstances of the offence, and of the offender. People who are poor, less educated or otherwise disadvantaged, are even less likely to contest a penalty notice.

Payment of the penalty notice amount is not an admission of liability, and therefore no conviction should be recorded. Nor is it appropriate for evidence of the penalty notice to be used in the sentencing process for any other offence. The only exception to this may be on a driving or traffic-related charge. In these cases, there may be some justification to use evidence of

past driving offences, for which penalty notices were issued, in sentencing submissions when a person has been convicted for a related offence.

For children and young people who have been issued multiple warnings, cautions and penalty notices, one approach could be the implementation of a flagging system to trigger referrals to early intervention and/or juvenile justice diversion program.