Response to NSW Law Reform Commission
Consultation Paper 10 - Penalty Notices

In summary, the position of I&I NSW is as follows:

- A stand alone statute should be created for dealing with penalty notices;
- Formal policy principles should be established for the purpose of assessing which offences may be enforced by penalty notice as well as the setting of penalty notice amounts and their adjustment over time;
- The Attorney-General and the Department of Justice and Attorney General should be responsible for overseeing and monitoring the penalty notice scheme as a whole;
- Applying penalty notices to only strict liability and absolute liability offences is not supported. Once a matter has been investigated thoroughly, an officer should have the option of issuing a penalty notice (e.g. where prosecution in court would not be an efficient sanction);
- Clear information should be issued with each penalty notice to explain the penalty notice, the options available, and details of what will happen if the matter is court elected. This will assist in reducing the incidence of unnecessary court elections;
- Practical and appropriate alternatives to penalty notices for children, young people and persons with mental illness or cognitive impairment should be encouraged eg. a caution;
- Persons suffering from financial hardship should be eligible to be considered for alternative payment arrangements or alternative sanctions including in some cases a caution;
- Principles for determining whether a particular criminal offence is suitable to be dealt with by way of a criminal infringement notice should be the same as the principles that apply to penalty notices generally.

The following comments are provided in addition to the submission provided by the New South Wales Food Authority titled *"New South Wales Food Authority Submission in response to NSW Law Reform Commission Consultation Paper 10 – Penalty Notices."*

In relation to chapters 7 and 8, responses are only provided for matters the Department has experience with.

Chapter 2 - Guiding and overseeing the penalty notice system

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?

The Attorney General, supported by the Department of Justice and Attorney General (DJAG) should provide policy guidance with respect to the penalty notice regime in NSW. DJAG will need to consult closely with agencies in this role.

2.3 What resourcing is required to effectively oversee the operation of the penalty notice regime?

This will be an issue for the DJAG. It is assumed that the current role of the State Debt Recovery Office will be retained and will continue to require appropriate resourcing.

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?

An amendment could be made to Schedule 1 of the Annual Reports (Departments) Regulation 2010 to make this reporting mandatory for government agencies.

Chapter 3 - 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?

Penalty notices should not only be used for offences where it is easy and practical for issuing officers to apply the law and assess whether the offence has been committed. I&I NSW consider that penalty notices should be able to be issued for any offence for which a monetary penalty provides an appropriate sanction. Penalty notices are primarily designed to provide a fixed monetary penalty for offences to save the costs and delays associated with requiring the court system to determine those offences.

Penalty notices are issued by I&I NSW in complicated and complex factual and legal circumstances. However, in these circumstances they are not issued on the spot as there is a need to ensure that there are sufficient proofs of each element of the specific offence and that the person is given an opportunity to provide a defence or demonstrate mitigating facts.

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?

With respect to fisheries offences, it is a complex issue to seek to define a particular offence as 'minor'. For example, possession of a specified number of prohibited size fish of one species such as sea mullet may be considered minor but possession of the same number of prohibited size fish of species such as abalone, lobster or groper may be considered more significant. Therefore, the concept of 'minor offence' should only be one consideration in determining whether an offence should be a prescribed as a penalty notice offence or not.

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

Offences involving a victim of violence are not appropriate matters to be dealt with by way of penalty notice. The offence of threatening, abusing or assaulting a fisheries officer was recently excluded from the penalty notice scheme when the *Fisheries Management (General) Regulation 2010* was remade on 1 September 2010.

3.7 Should offences with imprisonment as a possible court imposed penalty be considered for treatment as penalty notice offences? If so, under what circumstances?

Offences with imprisonment as a possible court imposed penalty should also be able to be dealt with by way of penalty notice. This approach is adopted in the *Mining Act 1992* (see for example ss5 and 6). This provides considerable scope for an agency/ review authority to determine an appropriate penalty, which is important for offences where the implications of the offending action/ activity can vary from the insignificant to the very significant. For example, compare the implications of the illegal removal of several opals by an individual to the illegal extraction of hundreds of tonnes of coal by a company already engaged in coal production. These activities would both constitute offences under s.5 of the *Mining Act*.

3.8 Should "high volume offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "high volume offence" be defined?

If such a criterion is included in any principles which are developed to identify possible penalty notice offences, the availability of penalty notices to deal with comparatively low volume offences should not be precluded.

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

The paper provides a broad brush outline of the definitional and conceptual issues associated with the term "regulatory offence". Given the proliferation of statutory-based regulatory regimes operating in NSW, this is an area which requires considerable additional policy research which should be undertaken by DJAG.

3.10 Is it appropriate to issue multiple penalty notices in relation to conduct that amounts to a continuing offence? If not, how should the penalty notice amount be determined for continuing offences?

I&I NSW considers that this is appropriate: see for example s.378K(7)(d) of the *Mining Act* which provides for penalty notices in relation to continuing offences.

Chapter 4 - Determining penalty notice amounts

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

Yes. These principles should be flexible to accommodate the vast array of legislation in NSW which utilises penalty notices.

4.2 Should a maximum be set for penalty notice amounts? If so:
(1) What should the maximum be?

Consideration should be given to making penalty notice amounts a proportion of the maximum offence amount.

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?

The nature and seriousness of the offence should, in the first instance, be taken into account when fixing the maximum penalty.

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?

The penalty amount should be an effective deterrent and be set at a level where most will be paid and only a small number are likely to be court elected. The 'benefit/penalty' ratio can often provide an appropriate measure of the relevant deterrent level.

In most cases, a penalty notice will often be a cheaper option for the offender because prosecution which results in a low fine or even no fine (e.g. orders under s. 10 of the *Crimes (Sentencing Procedure) Act 1990* or similar) typically requires the defendant to incur some expense whether it be for legal costs, loss of pay or travel or court costs (typically $79). This needs to be considered in setting the penalty amount.

Penalty notice amounts should be set factoring in the costs associated with issuing and administering a penalty notice on the basis that the community or the issuing agency should not be expected to issue penalty notices at a net loss. On this basis the minimum for a penalty notice would be $75 to $100.

Chapter 5 - 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
(2) the alternatives available?

Agencies should also regularly review compliance policies, procedures and guidelines.

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

It can be appropriate to authorise private contractors for specialised operations where the Department does not have the resources available or the costs of engaging additional staff (including training for short term operations) is prohibitive. At present, contractors are engaged to detect and report on fruit fly exclusion zone offences but penalty notices are issued by Departmental authorised officers relying on the reports of the contractors. To date, this system has operated effectively with no problems.

Requirements would include the appropriate level of training for the tasks involved including the normal training provided to officers who issue penalty

notices as well as specialist skills regarding the proof-making requirements for the offences involved.

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?
(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 Fisheries and Compliance Branch of the Department has a policy that not more than two penalty notices are usually issued to the same person involved in one incident or event. This policy was developed in consultation with the Marine Parks Authority and is consistent with that Authority's guidelines. When more than two offences are detected, the matters are reviewed and may result in either cautions being issued for less significant offences or all offences may be prosecuted if the circumstances are considered to warrant such action.

It is noted that when a person is apprehended with more than one prohibited size fish, separate sanction action (whether it be penalty notices, prosecution or cautions) is not taken in relation to each fish.

5.4 Should the power to withdraw a penalty notice only be available in limited circumstances on specific policy grounds? What should those grounds be?

In addition to the situation identified by the Food Authority, penalty notices should be able to be cancelled or withdrawn if information comes to light that there is insufficient evidence to prove the offence or the person has a valid defence.

5.8 If it is inappropriate to prescribe a time limit in legislation, should agencies be required to formulate guidelines governing the time period in which a penalty notice should be served?

The time limit should be prescribed in the legislation that creates the offences, rather than in the *Fines Act 1996* or other generic legislation.

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

Clear information explaining the penalty notice, the options available and details of what will happen if the matter is 'court elected' should be issued with each penalty notice. This would assist in reducing the incidence of unnecessary court elections,

For a number of years, a significant number of people who have 'court elected' penalty notices issued by the Department's Fisheries Branch have expressed surprise that they have subsequently received a court attendance notice. Many of those people have then sought to pay the penalty notice amount rather than attend court but the system operates to prevent that. It would be better to ensure that people served with a penalty notice receive

clear information about what court election means. Many of the customers of I&I NSW do not use computers so simply having that information on a website is not sufficient.

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

The time-to-pay system could however be improved by providing payment options with the notice when it is issued - similar to council rates notices. Further, an administrative fee could be considered for payment by instalments or a discount for early payment.

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

The time-to-pay options should be more transparent, and applications to write off penalties or fines, in whole or part, processed in an ethical and cost efficient way.

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

At present, there are no other consequences under the fisheries or agriculture legislation for payment of a penalty notice.

The fisheries legislation does provide for administrative sanctions such as cancellation of a commercial fishing licence following a record of convictions, and in some cases, of offences being proven by the court without a conviction being recorded.

The fact that such administrative sanctions are not available if a penalty notice is paid has led to concerns that prosecutions are encouraged in circumstances when a penalty notice would otherwise be appropriate. In most situations however, the potential offenders are aware of the risks of administrative or civil sanctions before they offend. Coupled with the need to follow administrative law, this means that it is not unreasonable to provide for administrative or civil sanctions to be applied if relevant types of penalty notices are paid.

It is appropriate to enable consequences to follow payment of a penalty notice, provided the offenders have had reasonable warning of that before the offence is committed or when the penalty notice is issued. The requirement that the alleged offender be given an opportunity to show cause why the administrative sanction should not be applied gives that person the ability to show how such a sanction would not be the 'correct and preferable decision given the circumstances' if they then claim not to have been guilty of the offence. This means that the administrative decision maker should be able to review the evidence that was available about the offence but should not be required to actually decide the guilt or innocence of the person beyond reasonable doubt.

Chapter 6 - Impact on children and young people

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?

I&I NSW fisheries officers normally issue a caution to persons between the ages of 16 and 18 years old. Penalty notices issued to such persons should be subject to general guidelines.

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

I&I NSW fisheries officers normally issue a caution to young offenders. The most serious juvenile matters are referred to the Children's Court and in those limited number of cases, the courts have usually made orders other than fines.

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

No. There are practical alternatives to issuing penalty notices to young people which are aimed at ensuring the young person does not reoffend.

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?

Under current fisheries policy and guidelines, enforcement officers are required to consider whether a caution should be given for any offence when the offender is below the age of 18 years. These guidelines operate so that a caution is the 'default' sanction for young offenders and officers need to consult their supervisor before taking any other action.

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?

Any cap on the number of penalty notices should be generally consistent with the approach taken for other classes of offenders but again, the decision to issue a penalty notice must take into consideration the age of the offender and the circumstances of the offence/s.

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?

I&I NSW supports the first two principles from the research paper shown in s 6.53 (at p 117) of the Consultation Paper but varied as indicated below:

a. *Education: making young infringers aware that their behaviour is unacceptable, the reality of the consequences, explaining options etc.*
b. *Case management: having one staff member responsible for the management* of the case (rather than collection of their fines as shown in the NZ paper).

Otherwise I&I NSW is not in a position to provide a response to this question.

Chapter 7 - 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?

If there is evidence that a person suffers from a cognitive impairment or mental health impairment (including whether the person suffers from any financial disadvantage associated with their condition) then alternative action rather than a penalty notice should be considered, except where it is unlikely to act as a deterrent.

Occasionally however, problems arise when an officer encounters a person who does not understand the implications of their actions, despite the ability of that person to engage in an otherwise normal conversation. As a person routinely will not mention or discuss aspects of their impairment, it is often difficult to identify persons with impairment. Often, identification of impairment will not occur until after a penalty notice has been issued and a carer or family member assists in submissions on behalf of the person.

Providing specific training for relevant officers may be one means of dealing with this issue.

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

For fisheries or agriculture offences, alternative action rather than a penalty notice (or prosecution) is generally considered appropriate if the offender suffers from a mental illness or cognitive impairment.

While the caution provisions prescribed in the *Fines Act 1996* are often appropriate, in some situations the investigating officers or their supervisors can achieve a better result by discussing the issues with a responsible carer or family member. However, such action can only be taken when privacy concerns have been addressed.

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?

The number of relevant cases handled by I&I NSW is so low that there would be little net benefit for this agency or for the offenders in having such a register.

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?

The number of relevant cases incurred by I&I NSW is too low for this agency to be impacted by penalty notice offenders being in custody.

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

The number of relevant cases incurred by I&I NSW is too low for this agency to be impacted by penalty notice offenders being in custody.

7.6 Should some other strategy be adopted in relation to offenders who have incurred penalty - or fine - debt? If so:
(1) In relation to which groups should any such strategy be adopted, and
(2) What strategy or strategies would be appropriate?

If this question is only meant to apply to inmates see the response to 7.4 above. Otherwise, alternative approaches including the options available under the review of representations are considered appropriate for fisheries and aquaculture offences.

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 scheme impacts more on those who are less able to pay the penalty than those who have the ability to pay the penalty without hardship.

The information issued with a penalty notice should include details of options available if the person has genuine difficulty in paying the penalty by the due date or in full over time. Persons who can prove they are in receipt of Centrelink payments should be eligible for consideration as to alternative payment arrangements or an alternative sanction including in some cases a caution if is it likely to act as a deterrent.

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?

On induction, I&I NSW provides training to officers in the following areas: ethics, discrimination and disability awareness. Such awareness is encompassed in the Department's policies procedures and guidelines.

Awareness of these issues is very much a community issue and it is submitted that a broad Commonwealth or Commonwealth/State awareness program is appropriate.

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

People with impairments do have difficulty in accessing the review process. This highlights the need to improve the extent and format of information provided to people who receive penalty notices. I&I NSW is guided by the SDRO in relation to the information provided with penalty notices.

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?

Generally speaking, and as indicated above, where a relevant impairment is identified in the investigation of an offence alternative approaches such as cautions are taken. If the impairment is not identified at that stage it is common for carers to provide relevant submissions and the matter is then determined on its merits.

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 addition?
(2) In "exceptional circumstances" more generally?

The Agriculture and Fisheries Branches of the Department make provision for the withdrawal of penalty notice under exceptional circumstances and supports the principle that the decision should be made on a merits basis regardless of the issue.

Chapter 8 - Criminal infringement notices

8.1 Should there be formal principles for determining whether a particular criminal offence is suitable to be dealt with by way of Criminal Infringement Notice? If so, what should those principles be? Should they be different from the principles that apply to penalty notice offences generally?

I&I NSW generally supports the principles for determining whether a particular criminal offence is suitable to be dealt with by way of a Criminal Infringement Notice as expressed by the NSW Ombudsman in the report '*On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* 2005' 118 Recommendation 14 (at s 8.16 of the Consultation Paper p. 146).

The following principles are also relevant:

- The issuing officer has sufficient evidence of each element of the offence and proofs that the person does not have an admissible defence.
- The penalty amount is a reasonable sanction given the circumstances known to the officer at the time (i.e. not just that the offence is relatively minor as indicated in he Ombudsman's recommendation). This includes the officer's understanding of the person's record of prior offences, or at least offences under the same or similar statutes.

- If payment of the penalty could lead to discretionary administrative sanctions being taken such as cancellation of a relevant licence, the issuing officer should not take that into account as that is a matter for the administrative decision maker to determine.
- the principles that apply to penalty notice offences generally should also apply to CINs.

8.2 Are there any views about the recommendations in the 2009 Ombudsman's Review of the impact of Criminal Infringement Notices on Aboriginal communities and their implementation?

The Fisheries Branch of the Department now records Aboriginality in the data held for offenders. However, not all offenders are asked if they are Aboriginal so that data may be unreliable.

Only some of the recommendations in the Review are relevant to the operations of I&I NSW. In particular:

- Recommendation 6: Guidelines for the issue of cautions for CIN type offences should be consistent with those applied to penalty notices offences.
- Recommendation 7: 'official cautions' should be recorded in a database so that other authorised officers can access such data to determine if any prior cautions have been issued to a person. A record of a prior caution is one important consideration in deciding whether or not to issue a caution. This principle has been practised for fisheries offences for a number of years.
- Recommendation 8: service by post is reasonable and appropriate as the primary means of service. For example if a person is served at home or work by a police officer, not only does that involve considerable costs and time that the officer could spend on more effective police work, but it can impact on the offender and/or their family by neighbours or work colleagues witnessing the service. The report does not make it clear as to why service by post should be the last resort.
- Recommendation 9: The proposal that explanatory information should be provided if a CIN is served by post fails to consider reasons why such information should not be issued when other means of service are used. It is submitted that such information should be issued with any CIN, or other penalty notice that is issued.
- Recommendation 12: The recommendation that information related to payment options should be provided on penalty notice forms is supported.
- Recommendation 13: I&I NSW have consulted SDRO and a specific I&I NSW fact sheet has been drafted and is being considered for issue with penalty notices.
- Recommendation 17: The proposal that SDRO considers keeping records about the Aboriginality of CIN recipients suggests that the relevant information will need to be sought in the relevant investigation. Most fisheries or agriculture matters do not involve the arrest of suspects and unless a suspect is arrested, offenders are not normally asked if they are Aboriginal. The recommendation suggests that all offenders would need to be asked that question and the data recorded which would require a change to our current practices.
- Recommendation 18: Strategic planning of a range of aspects related to the CIN scheme or penalty notices generally, including analysis of community

attitudes to the level of penalties and the deterrence effects of penalties appears to be valuable.

8.3(2) Should official cautions (governed by police guidelines) be available as part of the Criminal Infringement Notice regime, as recommended by the Ombudsman?

Official cautions should be an option available in relation to almost all offences.

8.4(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? If so, under what circumstances?

It is reasonable that anyone receiving any kind of penalty notice, including a CIN, be able to apply for time to pay that penalty. The circumstances for approval to have time to pay CINs should be consistent with those applying to penalty notices.

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?

The guidelines for issue of CINs in relation to vulnerable people should be generally consistent with those applied to the issue of penalty notices as indicated in our responses to questions in Chapter 7.

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?

The powers to withdraw a CIN should be generally consistent with those applied to penalty notices.