NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

1/36 Alice St
Queanbeyan NSW 2620

18 February 2011

Re: Consultation Paper 10 – Penalty Notices

Ref: Fines Act (NSW) 1996

Companion Animals Act (NSW) 1998

Dear Sir or Madam,

Thank-you for the opportunity to make a submission at this late hour. Time forbids elaboration so I will attempt to be brief, but I have recently found a number of aspects of the Penalty Notice system somewhat oppressive and inherently lacking in procedural fairness. A number of these are alluded to in your consultation paper.

Whilst none of the issues I raise below falls within the ambit of any of the Attorney-General's nominated specific areas of enquiry, I submit they fall with the all-encompassing "other related matters" provision of the Attorney-General's notice to conduct a review.

Inadequacies of Notices

Most critically, because authorities follow the strict letter of the Acts which requires no more than advice to pay or make a court election, one is not advised of the recently formalised review option unless one ignores the original notice, contrary to the statutory advice within, which is to the effect one may [lawfully] only pay [without objection] within a nominated timeframe, or make a court election. That one must ignore the advice in the penalty notice in order to be duly apprised of one's statutory right to review is manifestly Kafka-esque. The statutory advice in the notice therefore is strictly incorrect. And implicitly lacks procedural fairness. Why should only person's who ignore original notices be so advised of their right?

As you allude, the general lack of information on notices is extremely problematic. There even seems no strict requirement to nominate an issue or due date, rendering the statutory demand for payment within 21 days quite oppressive, as there is no reference given for this period. I have recently learnt a barcode on the notice may embody the due date, but not being human-readable this is plainly inadequate for the purpose.

The brief description of the alleged offence on penalty notices is all-too-brief. Though there is no requirement, I understand an offence number is usually displayed. However it is not evident to the public where this number may be translated into a provision of an Act. After much enquiry, I learnt there is such a facility within the NSW Law Access Network. This is not, and cannot be expected to be, widely known to the public. In lieu, the notice should plainly state the Act and provision alleged to have been contravened, rather than a highly abbreviated and encoded version thereof.

Unwitting Jeopardy

There is no explicit advice on notices that court election exposes one to the jeopardy of conviction. This should not be merely inferred, but rather explicitly stated.

You allude to persons making court election only because they have not been appropriately apprised of alleged events. That is, people make elections merely to clarify what is alleged to have occurred, typically because the alleged event was some considerable time earlier. This was my experience some years ago when I received a parking notice from the Parks & Wildlife Service some months after the alleged offence, allowing me no practical recall of events. There ought to be a requirement notices are served expediently, in the public interest, say within 42 days. This would not preclude or prejudice later action by way of Court Attendance Notice or Summons if deemed appropriate.

The lack of any requirement under s.21 of the Criminal Procedure Regulation to serve a formal brief in relation to penalty notice proceedings serves to subvert people's intentions in this regard. Thus the purpose for election, illumination, is defeated. This was my experience.

Onus of Section 37 Fines Act

Section 37 of the Fines Act gives judicial discretion to conduct proceedings as though penalty notices had not been issued, notwithstanding that proceedings are necessarily the result of the issuance of penalty notices, and that the recipient may have grave reservations with respect to the manner in which the notices were originally issued. Thus people electing to go to Court because they perceive the process was faulty are left high and dry. This clause is procedurally unfair. It is not clear to me why it is required.

Inability to present mitigating factors

There is provision for mitigating factors to be assessed by the issuing officer; that is, a caution may be issued. But in the absence of interaction with the issuing officer it is generally not possible to present such circumstances. Especially in the absence of advice of a review option. Thus people make a court election seeking only to present mitigation, and properly seek leniency in accordance with statutory provisions mandating such where persons are recipients of welfare, for example. In so doing, people [often unwittingly] expose themselves to the jeopardy of conviction in the course of pursuing their statutory right to leniency. That a person must expose themselves to conviction to seek leniency is oppressive.

Logical deficiencies in the Fines Act

The Fines Act makes reference in numerous provisions to dates with respect to the [nominal] due date in a penalty reminder notice, notwithstanding that in many relevant instances a reminder notice has not, and perhaps will not ever, be issued. This is absurdist and should be rectified. The SDRO have expressed the view they take the Act to mean the date that would have been nominated had a reminder notice been issued, but this is rather meaningless in the context that a reminder would not have been issued, and in any event is only the SDRO's arbitrary interpretation of the Act's intent. Also by the SDRO's own admission, the date the reminder notice is issued (and hence the reminder notice due date within) is quite arbitrary, especially with respect to the dates of the alleged offences or original notices. Thus the due date in a penalty reminder notice bears no direct relationship to the original offence or notice dates. This arbitrariness is not very satisfactory.

Inconsistency of Review Guidelines

I have outlined previously that I do not believe the State Debt Recovery's Office's Review Guidelines are consistent with the Attorney-General's, as required. Because a number of circumstances and grounds in the Attorney-General's guidelines are circumscribed or omitted by those of the SDRO. That this inconsistency can seemingly only be challenged by way of a test case in the Supreme Court in the context of proceedings stemming from a penalty notice offence, and that no-one has apparently yet done so, is most unfortunate. It would be desirable if a public interest body, perhaps the Attorney-General or other Government Officer, would test the consistency of published guidelines in an appropriate Tribunal in the public interest, rather than leave the onus to test their consistency on any particular member of the public.

Without Fear or Favour

There is public disquiet that issuing authorities may be less than diligent when it comes to issuing notices in relation to their own officers, equipment, etc. In recent years the Police have been seen to markedly improve their performance in this regard. It is not clear that similar progress has been made within other issuing agencies. Might agencies state-wide be consulted to ascertain the extent to which they are [or more pertinently, are not] issuing notices upon their own? Without fear or favour?

Inherent Duress

Perhaps it is in the very nature of the penalty notice system, and inherently unavoidable, but there is a sense in which the system as it presently stands embodies importunate elements; in essence, pay up, or else. This is distasteful but perhaps unavoidable.

In Closing

Somewhat ironically, and without doubt rather perversely, many of the issues I raise serve to promote Court elections, contrary to the stated aim of the Penalty Notice system, to minimise elections.

I trust this submission will be of use to you in your deliberations. Thank-you again for the opportunity to make it.

Yours faithfully,

Matthew Bennett