

PENALTY NOTICES

Response to Consultation Paper 10

SUPPLEMENTARY SUBMISSION

**on behalf of Legal Aid NSW to the
New South Wales Law Reform Commission**

April 2011

Introduction

On 30 November 2010 Legal Aid NSW made a submission in response to the New South Wales Law Reform Commission's Consultation Paper 10 on the subject of penalty notices. We would like to add a couple of additional remarks to our original submission, as set out below.

1. Internal Review and Court Election (Question 5.10 of the Consultation Paper)

As acknowledged in Consultation Paper 10, recent amendments to the *Fines Act 1996* ("the Act") introduced expanded grounds for review, some of which are intended to benefit people who are homeless, or who have a mental illness, cognitive impairment or intellectual disability.

Prior to these recent amendments, if a person applied for an internal review and was unsuccessful, it was the practice of the State Debt Recovery Office ("SDRO") to allow that person a further 21 days to either pay or alternatively, to elect to have the matter heard in court, even if the due date of the penalty reminder notice had passed. One of the consequences of the recent amendments, however, is that additional time to make a court election is no longer granted following an unsuccessful internal review.

The amount of time a person has to elect to have a penalty notice matter heard in court varies. If a person makes a part payment or full payment then they have 90 days from the date the original penalty notice was served on them to elect to have the matter heard in court: s 36(2)(b). (The legislation is unclear as to what point in the process this payment must be made in order for the 90-day period to apply). If, on the other hand, the person has paid no portion of the amount payable, they will only have until the due date proscribed by the first penalty reminder notice to elect to have the matter heard in court: s 36(2)(a). So, for example, if the initial penalty notice gives a person 21 days from the date of service to pay and the subsequent penalty reminder notice gives an additional 28 days, the person will only have 49 days to elect to have the matter heard in court.

While a new penalty reminder notice will be issued after an unsuccessful review, the time to court elect will continue to be the time specified in the original penalty reminder notice: s 24F.

If a person lodges an application for a review prior to the SDRO issuing the first penalty reminder notice, it may be that the SDRO will have to give them additional time to elect to have the matter heard in court after an internal review, as they have not yet received the first penalty reminder notice. (see s 24F(3)). In any event they would need to have applied for review in within 21 days (or whatever the initial period given in the penalty notices is) and would have to make a court election within 90 days.

Agencies conducting reviews have 42 days to notify the applicant of the outcome of a review or 56 days if they have requested additional information: s 24E(4). People seeking a review of a penalty are unlikely to have paid anything, given they are challenging the fine. This means that in many cases they will only have 49 days to elect to have the matter heard in court.

Where the person has delayed applying for an internal review (to seek advice, for example) and particularly where they have applied for internal review after the first penalty reminder has been issued, a person will in all likelihood lose the opportunity to make a court election once that review has been conducted, as they will be outside the time limit to do so.

The time limits are complicated and require careful study of four separate sections of the Act. Some of the people who will be most disadvantaged by this tightening of the time limits to elect to have the matter heard in court are the people that the amendments to the review process were designed to benefit - people who are homeless, and people with a mental illness, cognitive impairment or intellectual disability. Other people affected will include the elderly, people with no internet access, people living in remote locations, people who are illiterate and people from non-English speaking backgrounds.

Given the confusing time limits, the vagaries of the review process, the limited options for review and a lack of an appeal process, and considering the broader scope a court has to deal with the fine, in many cases it would be advisable to elect to have the matter heard in court at first instance rather than seek an internal review. This arguably defeats the purpose of having an internal review process at all.

In our submission the legislation should be amended to extend and clarify the time limit to make a court election, particularly in circumstances where the person who has been issued the penalty notice is a disadvantaged member of the community. The option to elect to have the matter heard in court should be automatically available in cases where someone has in good faith applied for a review, even if this is outside the 90 days set out in s 36 of the Act.

While we acknowledge that the annulment process exists to provide some recourse in situations when a person has been unable to make a court election earlier, it is not reasonable to expect people who are disadvantaged to engage in a process which has a filing fee, requires a submission and lacks certainty of outcome. We would also argue that there is no real disadvantage to issuing authorities in allowing more time for a person to elect to have the matter heard in court.

2. Court election form (Question 5.9 of the Consultation Paper)

A court election form is no longer printed on the back of penalty notices. Previously (at least for many penalty notices) in order to elect to have the matter heard in court, a person simply had to complete the court election form on the back of the penalty notice and send it to the SDRO. Now the form refers the penalty notice recipient to a web site to download the form or to complete an online form. The online forms are excellent for some people, but they are not accessible for other more disadvantaged people who do not have internet access. This includes the most disadvantaged members of the community who are also likely to struggle with the time limits for court election, which in our view compounds the problem.

For example, Legal Aid NSW was recently approached by an 88 year old client with mobility difficulties, who does not use the internet. He received a penalty notice and was unable to elect to have the matter heard in court without assistance. With much difficulty and inconvenience he accessed his local Legal Aid NSW office for such assistance. He was one of the more fortunate - in many cases people are not able to access the internet or services that can help them elect to have the matter heard in court.

In our submission a court election form should be provided with each penalty notice issued. This notice should clearly set out the time limit for making a court election.