



New South Wales
Law Reform Commission

Consultation
paper

10

Penalty notices

September 2010
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Make a submission

We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

To tell us your views you can send your submission by:

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Terms of reference

The Law Reform Commission received the following terms of reference on 5 December 2008:

I, JOHN HATZISTERGOS, Attorney General of New South Wales, having regard to the importance of a fair, just and effective penalty notice system,

REFER to the New South Wales Law Reform Commission, for inquiry and report pursuant to section 10 of the Law Reform Commission Act 1967, the laws relating to the use of penalty notices in New South Wales.

In carrying out this inquiry, the Commission will have particular regard to:

1. whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate;
2. the consistency of current penalty amounts for the same or similar offences;
3. the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices;
4. the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time;
5. whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so: (a) whether penalty amounts for children and young people should be set at a rate different to adults; (b) whether children and young people should be subject to a shorter conditional "good behaviour" period following a write-off of their fines; and (c) whether the licence sanction scheme under the Fines Act 1996 should apply to children and young people;
6. whether penalty notices should be issued to people with an intellectual disability or cognitive impairment; and
7. any related matter.

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Terms of reference

- 1.1 In a letter to the Commission received on 5 December 2008, the Attorney General, the Hon John Hatzistergos MP, asked the Commission to inquire into, and report on, the laws relating to the use of penalty notices in New South Wales. The Terms of Reference require us to have particular regard to:
1. whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate;
 2. the consistency of current penalty amounts for the same or similar offences;
 3. the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices;
 4. the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time;
 5. whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so: (a) whether penalty amounts for children and young people should be set at a rate different to adults; (b) whether children and young people should be subject to a shorter conditional “good behaviour” period following a write-off of their fines; and (c) whether the licence sanction scheme under the *Fines Act 1996* (NSW) should apply to children and young people;

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6. whether penalty notices should be issued to people with an intellectual disability or cognitive impairment; and
 7. any related matter.
- 1.2 The Terms of Reference exclude from this inquiry a review of amendments of offences under road transport legislation administered by the Minister of Roads:
- While the Commission may consider penalty notice offences under road transport legislation administered by the Minister for Roads, the Commission need not consider any potential amendments to these offences as these offences have already been subject to an extensive review¹.
- 1.3 In undertaking this reference, we are required to consult with agencies that issue and enforce penalty notices.

History of penalty notices

- 1.4 Prior to the introduction of penalty notices in NSW, all offences including minor parking and traffic offences that attracted fines, were dealt with by the courts. In 1954, the first penalty notice provisions relating to some parking offences were enacted pursuant to s 265 of the *Transport Act 1930* (NSW) which provided that regulations may provide for the infliction and collection by prescribed officers of penalties for minor offences against the *Metropolitan Traffic Act 1900* (NSW), the *Motor Traffic Act 1919* (NSW) and the *Motor Tax Management Act 1914* (NSW).¹
- 1.5 Subsequently, the *Minor Traffic Offences Regulations 1954* (NSW) introduced the first provisions that allowed for the imposition, by notice, of modified penalties for various parking offences. They were introduced to address the difficulties encountered by the courts in dealing with a large number of parking offences.
- 1.6 In 1961, the penalty notice scheme was extended to some of the offences created under *Motor Traffic Act 1909* (NSW) such as driving in excess of certain speed limits and driving without a licence. This was done at a time when the road toll in NSW had dramatically increased and the government decided that the time of traffic police could be better spent patrolling rather than preparing breach reports and attending court. It was noted that a penalty notice system would save the time spent by motorists in attending court, reduce the costs of issuing and serving summons, and help relieve court congestion.²
- 1.7 The offences for which penalty notices may be issued gradually grew beyond parking and driving offences so that by 1983, there were eight statutory provisions authorising the use of penalty notices to deal with offences relating to traffic, maritime services, forestry and fisheries.³
- 1.8 In 1996, Parliament adopted the *Fines Act 1996* (NSW) ("Fines Act"), the statute that now underpins the penalty notice system. At its inception, the Fines Act

1. *Motor Traffic (Amendment) Act 1961* (NSW) s 2(h), *Motor Traffic Regulations 1961* (NSW) sch K.

2. NSW, *Parliamentary Debates*, Legislative Assembly, 23 November 1960, 2316.

3. *Justices Act 1902* (NSW) s 100I.

contained 38 statutory provisions authorising the use of penalty notices.⁴ Since then, the list has grown to 114 statutory provisions,⁵ creating more than 7,000 offences that may be enforced by way of penalty notice.⁶ Penalty notice offences now arise in such diverse areas as occupational health and safety,⁷ the building industry,⁸ protection of the environment,⁹ national parks and wildlife,¹⁰ native vegetation,¹¹ residential parks,¹² prevention of cruelty to animals,¹³ water management,¹⁴ animal diseases,¹⁵ electricity supply,¹⁶ passenger transport,¹⁷ rail safety,¹⁸ ports and maritime administration,¹⁹ fair trading,²⁰ registration of interests in goods,²¹ gaming machines,²² pawnbrokers and second-hand dealers,²³ veterinary practice,²⁴ fitness services²⁵ and assisted reproductive technology,²⁶ among others.

The focus of this paper

1.9 As the Terms of Reference foreshadow, there are a number of shortcomings with the penalty notice system that have developed over time as the use of penalty notices has grown from its initial confines to being ubiquitous and wide-ranging. The key concerns of this paper are:

- the lack of consistency of penalty amounts for similar offences arising under different statutes and regulations administered by different agencies;
- the skewing of some penalty amounts away from the seriousness of the offence, and the maximum that a court could order as a fine;
- the lack of overarching principles and guidance for agencies developing penalty notice offences and setting or changing penalty notice amounts;

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4. *Fines Act 1996* (NSW) sch 1.
 5. See Appendix A.
 6. Information provided by the NSW Judicial Commission.
 7. *Occupational Health and Safety Act 2000* (NSW) s 108.
 8. *Building Professionals Act 2005* (NSW) s 92.
 9. *Protection of the Environment Operations Act 1997* (NSW) s 224.
 10. *National Parks and Wildlife Act 1974* (NSW) s 160.
 11. *Native Vegetation Act 2003* (NSW) s 43.
 12. *Residential Parks Act 1998* (NSW) s 149.
 13. *Prevention of Cruelty to Animals Act 1979* (NSW) s 33E.
 14. *Water Management Act 2000* (NSW) s 60A(2).
 15. *Animal Diseases (Emergency Outbreaks) Act 1991* (NSW) s 71A.
 16. *Electricity Supply Act 1995* (NSW) s 103A.
 17. *Passenger Transport Act 1990* (NSW) s 59.
 18. *Rail Safety Act 2008* (NSW) s 139.
 19. *Ports and Maritime Administration Act 1995* (NSW) s 100.
 20. *Fair Trading Act 1987* (NSW) s 6.
 21. *Registration of Interests in Goods Act 1986* (NSW) s 19A.
 22. *Gaming Machines Act 2001* (NSW) s 203.
 23. *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 26.
 24. *Veterinary Practice Act 2003* (NSW) s 101.
 25. *Fitness Services (Pre-paid Fees) Act 2000* (NSW) s 16.
 26. *Assisted Reproductive Technology Act 2007* (NSW) s 64.

- the fairness of the system in its application to children and vulnerable people; and
- the alternatives for people who are struggling to pay penalty notice amounts.

Background to this review

- 1.10 This inquiry builds on recent reviews of fines and penalty notices by the Parliament and the NSW Sentencing Council, as well as recent amendments to the Fines Act.
- 1.11 In the course of its review of community-based sentencing options for remote rural areas, and for disadvantaged populations,²⁷ the Committee on Law and Justice of the NSW Legislative Council (“the Committee”) received a considerable number of submissions concerning issues relating to driver licence or vehicle registration suspension or cancellation arising from failure to pay fines and penalty notices. While the Committee noted that this matter was beyond the scope of its inquiry, it considered it useful to document the problems encountered by people in rural areas when driver licences are suspended or cancelled due to non-payment of fines and penalty notices. It recommended that the Government undertake a multi-agency project to examine issues relating to fine default and drivers’ licences.²⁸
- 1.12 Subsequently, the Attorney General asked the NSW Sentencing Council to investigate the effectiveness of fines as a sentencing option, and the consequences for those who do not pay fines. In an interim report published in 2006, the Sentencing Council identified a number of potential reform options in relation to penalty notices.²⁹
- 1.13 In 2008, Parliament passed the *Fines Amendments Act 2008* (NSW) and the *Fines Further Amendments Act 2008* (NSW), which implement some of the recommendations made by the Sentencing Council and a cross-agency working group on fines and penalty notices.³⁰ These Acts provide for:
- the power to issue an official caution as an alternative to issuing a penalty notice;³¹

27. Standing Committee on Law and Justice, NSW Legislative Council, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006).

28. Standing Committee on Law and Justice, NSW Legislative Council, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006) [9.52]-[9.79], Recommendation 49.

29. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices*, Interim Report (2006) Part 3.

30. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11968 (John Hatzistergos, Attorney General, Minister for Justice, and Minister for Industrial Relations).

31. *Fines Act 1996* (NSW) s 19A and 19B. These provisions and the Attorney General’s *Caution Guidelines Under the Fines Act 1996* commenced on 31 March 2010. Prior to the adoption of these provisions, the Road and Traffic Authority already had the power to issue formal warnings for traffic offences: *Road Transport (General) Act 2005* (NSW) s 105. Most agencies authorised to issue penalty notices did not have such statutory power but some of them were nevertheless giving warnings or cautions informally instead of issuing penalty notices in certain cases: State Debt Recovery Office, *Preliminary Submission*, 1.

- work and development orders, allowing certain classes of people to satisfy all or part of the penalty amount by undertaking unpaid work for an approved organisation, or by participating in certain courses or treatment;³²
 - improvements in methods of payment, including periodic deductions from Centrelink payments,³³ and
 - internal review by agencies of their decision to issue a penalty notice.³⁴
- 1.14 In the Second Reading Speech on the *Fines Further Amendment Bill 2008*, the Attorney General announced the government's intention to ask the Law Reform Commission to examine the need for further reforms of the penalty notice system.³⁵

Previous reviews

- 1.15 There have been a number of reviews of penalty notice schemes or infringement schemes, as they are known in other jurisdictions. Throughout this report, we refer to these reviews, and the schemes of other jurisdictions, where they can inform the debate on how to improve the penalty notice scheme in NSW.
- 1.16 A 1995 study of infringements in Victoria identified the essential features of a model infringement statute, with a recommendation for national uniformity.³⁶ This study is often referred to in reviews of penalty notice schemes — including those conducted by this Commission, the Australian Law Reform Commission (“ALRC”) and the Law Commission of New Zealand — since it is the first comprehensive study of its kind in Australia and its recommendations and observations continue to be relevant.
- 1.17 In our 1996 report on sentencing, we supported the Victorian call for uniform legislation.³⁷ We suggested that this could be achieved either by the introduction of a single *Infringement Act*,³⁸ or by amending the Fines Act to prohibit the issue of infringement notices other than in accordance with its provisions. The majority of the Commissioners also supported the expansion of infringement notices to offences which are traditionally regarded as more substantively criminal, rather than regulatory, in nature.³⁹

32. *Fines Act 1996* (NSW) s 99A-99J. A two-year trial of Work and Development Orders commenced in September 2009.

33. *Fines Act 1996* (NSW) s 100-101.

34. *Fines Act 1996* (NSW) s 24A-24J, inserted by *Fines Further Amendment Act 2008* (NSW) sch 1 [10]. These provisions and the Attorney General's *Internal Review Guidelines Under the Fines Act 1996* commenced on 31 March 2010.

35. NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11968 (John Hatzistergos, Attorney General, Minister for Justice, and Minister for Industrial Relations).

36. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995).

37. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) (“NSWLRC Report 79”) [3.48], Recommendation 15.

38. This is discussed in more detail in para 1.44-1.49.

39. NSWLRC Report 79 [3.48]-[3.51]. Two of the six Commissioners on the Division considered that the infringement notice system should not be expanded, on the ground that it carries too great a risk of abuse by authorities and may simply become a vehicle of oppression for particular groups in society, such as young people and Aboriginal people.

- 1.18 The ALRC, in its 2003 report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, supported uniformity across federal infringement notice schemes.⁴⁰ It recommended the development of a model federal scheme for use when offences, and certain non-criminal contraventions of law (such as requirements to provide information to a regulator), are being considered for enforcement by way of infringement notice. It identified the key elements of its model federal infringement scheme and recommended that its provisions be contained in a Regulatory Contraventions Statute.⁴¹
- 1.19 The Law Commission of New Zealand published Study Paper 16 as part of the review of the infringement offence system undertaken by the Ministry of Justice.⁴² Study Paper 16 covers similar issues to those we are examining in this Consultation Paper, including those relating to the criteria for identifying infringement offences and setting of penalty amounts.

The legislative framework

What is a penalty notice?

- 1.20 Section 20 of the Fines Act defines a penalty notice as follows:
- (1) A penalty notice is a notice referred to in subsection (2) to the effect that the person to whom it is directed has committed a specified offence and that, if the person does not wish to have the matter dealt with by a court, the person may pay the specified amount for the offence to a specified person within a specified time.
 - (2) A penalty notice for the purposes of this Act is:
 - (a) a notice issued under any of the statutory provisions set out in Schedule 1, or
 - (b) any similar notice issued under any statutory provision specified by the regulations for the purposes of this section, or
 - (c) a notice issued under a statutory provision that declares the notice to be a penalty notice for the purposes of this Act, or
 - (d) a notice that, at the time it was issued, was issued under a statutory provision referred to in paragraph (a), (b) or (c).
 - (3) A notice is not a penalty notice for the purposes of this Act unless it is of a kind referred to in subsection (2).
- 1.21 As the definition indicates, a penalty notice gives the recipient a choice between paying a fixed amount to the agency that issued the notice, or going to court, to deal with the alleged commission of the specified offence.

40. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2003) ("ALRC Report 95") [12.48].

41. ALRC Report 95 [12.47]-[12.113].

42. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005).

- 1.22 There is often confusion between the word “fine” and the amount payable under a penalty notice. The Fines Act defines “fine” to mean, for the purposes of that Act, “any monetary penalty imposed by a court for an offence; or any amount payable under a penalty notice enforcement order”.⁴³ However, for the sake of clarity, in this paper we will use “fine” to refer to a court-imposed monetary penalty exclusively and “penalty notice amount” or “penalty amount” to refer to the monetary penalty payable pursuant to a penalty notice.

Procedures

- 1.23 As indicated by the definition of a penalty notice, the offences for which penalty notices may be issued are found in various legislative instruments.⁴⁴ However the procedures for the enforcement of all penalty notices are provided for, and regulated by, the Fines Act.⁴⁵ These procedures relate to such matters as:
- the content of, and the manner of serving, a penalty reminder notice;⁴⁶
 - the timeframe within which the alleged offender is required to pay the penalty amount, which must be at least 21 days from the time the notice is served, or at least 28 days after the penalty reminder notice is posted;⁴⁷ and
 - the alleged offender’s right to elect to have the matter dealt with by a court, and the procedure for doing so.⁴⁸

These procedures are discussed in detail in Chapter 5.

The State Debt Recovery Office

- 1.24 The Fines Act established the State Debt Recovery Office (“SDRO”)⁴⁹ in 1996 for the purpose of managing the overall process of penalty notice and fine enforcement, and co-ordinating the other agencies involved in the process.⁵⁰ Its main functions relate to:
- collecting penalty amounts;
 - making enforcement orders;
 - taking enforcement action against those who fail to pay the penalty amount; and
 - writing-off outstanding penalty notice amounts.

43. *Fines Act 1996* (NSW) s 4.

44. See Appendix A.

45. These procedures may, by regulation, be made inapplicable with respect to certain classes of penalty notice offences: *Fines Act 1996* (NSW) s 55.

46. *Fines Act 1996* (NSW) s 27.

47. *Fines Act 1996* (NSW) s 30.

48. *Fines Act 1996* (NSW) s 23A, 35-37A.

49. The SDRO is the fines division of the Office of State Revenue, which is one of the main offices of the NSW Treasury.

50. NSW, *Parliamentary Debates*, Legislative Assembly, 14 November 1996, 5977 (Jeff Shaw, Attorney-General).

- 1.25 Chapter 5 discusses the role of the SDRO in more detail.

Advantages and disadvantages of a penalty notice system

- 1.26 The penalty notice system is an important part of NSW's justice system. Its significance lies in the benefits it gives to law enforcement agencies, the courts, offenders and the general community. However, it also has some drawbacks. To give some context to this paper, it is helpful to canvass some of the advantages and disadvantages of enforcing offences by means of penalty notices.

Advantages of penalty notices

Cost-effective enforcement

- 1.27 One advantage relates to the cost-effectiveness of using penalty notices in the detection, prosecution and trial of minor offences. The use of non-police personnel, such as local council employees and rail transit officers, to issue penalty notices for certain minor offences allows police to focus their resources on more serious crimes. Further, since no court action is required where the offender chooses to pay the penalty, the courts and prosecution agencies are saved the costs of dealing with a substantial volume of cases,⁵¹ and resources that would otherwise be absorbed can be applied elsewhere.

A simple process that results in better enforcement

- 1.28 A penalty notice system is arguably relatively easy to administer. Even where the alleged offender does not immediately comply with the penalty notice, the paperwork is simpler and clearer for both the enforcement agency and the alleged offender, compared with the more involved processes associated with court proceedings. Because it is easier to issue a penalty notice than to prepare for, and conduct a trial, enforcement of the prohibition (or other regulation) of the particular conduct by means of penalty notice may potentially be more likely to occur than if enforcement were solely by means of court action,⁵² thereby encouraging a greater degree of compliance with laws designed to protect the public and the environment.

A fixed and discounted penalty

- 1.29 Offenders benefit from the penalty notice system in being informed from the outset of the exact penalty for the offence. Furthermore, the offender receives a discounted penalty and avoids spending the time and costs associated with court proceedings.

51. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 11, 287-288; New Zealand Ministry of Justice, *Policy Framework for New Infringement Schemes* (2009) [7.a].

52. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 12, 288-289.

The consequences of paying a penalty notice in full

- 1.30 The Fines Act provides that full payment of a penalty notice results in no further proceedings being taken against the offender with respect to that notice. Further, the payment of the penalty is not an admission of guilt in relation to the offence for the purposes of civil claims arising out of the same occurrence.⁵³ Therefore, payment of a penalty notice results in no conviction being recorded, which allows the offender to avoid the social stigma and other consequences associated with a court conviction.⁵⁴
- 1.31 However, the Fines Act is silent on whether the record of the penalty notice is capable of being used for the purpose of determining sentence for other offences. Chapter 5 examines this issue in more detail.⁵⁵

Potential disadvantages of penalty notices

Net-widening

- 1.32 The ease with which penalty notices can be issued has the potential to result in net-widening, which occurs when law enforcement agents use penalty notices in situations where they would not have taken any formal action, except perhaps to informally caution or warn the person to stop the offending behaviour.⁵⁶ Examples of such situations include: where the offending behaviour is at the lower scale of seriousness for that offence; where the person concerned did not deliberately commit the offence and complies with a request to stop the offending behaviour; or where the person committing the offending behaviour has a mental illness or intellectual disability, is homeless, or in poor physical health. The issuance of penalty notices in such circumstances unnecessarily brings the person within the criminal justice system. Should the person be unable to pay the penalty notice amount because of some form of disadvantage (for example, financial hardship) he or she may incur further costs and possibly more severe penalties associated with the enforcement of the penalty notice and, as a result, the person may become more enmeshed in the criminal justice system.
- 1.33 The recent amendment of the Fines Act allowing relevant government agencies to give official cautions, and the adoption of guidelines on their proper use by agencies (except police),⁵⁷ may assist in minimising any net-widening effects of penalty notices, since they allow law enforcement agencies to formally give cautions instead of penalty notices in appropriate circumstances. However, these measures are not a panacea against net-widening because it is unlikely that a person who receives a penalty notice would challenge it on the basis that a formal caution was appropriate

53. *Fines Act 1996* (NSW) s 23(2), 45.

54. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 12, 288.

55. See para 5.108-5.113.

56. NSWLRC Report 79 [3.49]; Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 12-13, 288-289.

57. *Fines Act 1996* (NSW) s 19A, 19B, inserted by *Fines Further Amendment Act 2008* (NSW) sch 1[8]. These provisions and the Attorney General's *Caution Guidelines Under the Fines Act 1996* commenced on 31 March 2010.

in the circumstances.⁵⁸ This is so because the person may not have the resources to mount a challenge, or may act out of fear that electing to have the matter heard by a court may result in a criminal record, a harsher penalty, and additional financial costs and anxieties associated with court proceedings.

Raising revenue

- 1.34 The substantial revenue raised from penalty notices⁵⁹ has led to fears that the system may be used for the wrong reasons, that is, mainly as a revenue-raising exercise.⁶⁰
- 1.35 This issue can be illustrated by the revenue generated by local councils from penalty notices for parking violations. A report by the Department of Local Government⁶¹ has found that the revenue generated by local councils increased substantially in 2002 when they were given the responsibility for enforcing parking legislation in their local areas. By 2008, all councils had an increase in parking fine revenue of between 44% and 747%.⁶² For example, the City of Sydney Council's revenue from parking fines increased 220% — from \$7.7 million in 2002 to about \$25 million in 2008.⁶³ The report addressed public concerns that local councils are using parking enforcement primarily as a revenue-raising tool. It found no evidence to support such concerns and concluded that “the increased revenue [from parking fines] is a natural flow-on effect of councils undertaking parking enforcement”.⁶⁴
- 1.36 The large and increasing number of penalty notice offences, the escalation of penalty amounts, and the use of technologies that assist in the detection of penalty notice offences — such as speed cameras, parking meters, in-ground sensors which monitor the exact times vehicles enter and leave parking bays, police radar, lasers and digital cameras — may strengthen the public perception that penalty notices are mainly a money-raising device for the government.

Deterrence

- 1.37 It has been argued that responding to wrongdoing “administratively with minimal formality and with reduced penalties” may reduce “the moral and deterrent force of the law”. According to this argument, the sanction is seen as an inconvenience, or a cost of doing business, rather than a meaningful deterrent.⁶⁵

58. During the financial year 2008/09, only 1.05% of penalty notice recipients elected to go to court: see para 1.43.

59. See para 1.41 and Tables 1.1 and 1.2.

60. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 288-289.

61. NSW Department of Local Government, *Review of Parking Enforcement: Report on Findings* (2008).

62. NSW Department of Local Government, *Review of Parking Enforcement: Report on Findings* (2008) 6.

63. NSW Department of Local Government, *Review of Parking Enforcement: Report on Findings* (2008) 62.

64. NSW Department of Local Government, *Review of Parking Enforcement: Report on Findings* (2008) 26-27.

65. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 288-289.

- 1.38 This is a significant factor that needs to be considered when assessing whether the use of penalty notices is appropriate for enforcing certain offences, especially those that, by their nature, involve violence and victims.

Diminution of procedural protections

- 1.39 Electing to pay the penalty waives the entitlement to have a case presented before an independent judicial officer, and the entitlement to have the subjective circumstances relating to the offence and the offender taken into account in the imposition of the penalty.
- 1.40 On this latter point, however, the penalty notice system has some capacity to take into account individual circumstances. For example, a person who has been served with a penalty notice enforcement order may apply to the SDRO to have the penalty written off based his or her financial, medical or personal circumstances. If the SDRO denies such an application, the alleged offender can ask the Hardship Review Board to review the SDRO decision.⁶⁶ The recently introduced concept of a work development order is another example. If an offender has an intellectual disability, a mental illness or a cognitive impairment, is homeless or is experiencing acute economic hardship, he or she may apply for a work development order, allowing him or her to expunge the penalty debt by: undertaking unpaid work; an educational, vocational or life skills course; financial or other counselling; drug or alcohol treatment; or a mentoring program.⁶⁷

Incidence of penalty notice use

- 1.41 The significant role of the penalty notice system in law enforcement is evidenced by the massive number of penalty notices issued every year. In the six-year period 2003/04 - 2008/09, 16,097,633 penalty notices were issued, with a face value of approximately \$2.4 billion.⁶⁸ During the 2008/09 financial year, the SDRO:⁶⁹
- processed 2.8 million penalty notices⁷⁰ to the value of \$455 million;
 - issued over 800,000 enforcement orders with a total value of \$246.7 million; and
 - collected \$298 million in penalty notice payments (\$168.9 million for the Crown and \$129.4 million on behalf of other organisations) and \$155 million through enforcement orders, including court-imposed fines (\$104.8 million for the Crown and \$51.6 million on behalf of other organisations).
- 1.42 Penalty amounts collected for the Crown are paid into consolidated revenue; the SDRO receives an amount in its annual budget to process these. The amounts

66. *Fines Act 1996* (NSW) s 101-101C.

67. *Fines Act 1996* (NSW) s 99A-99J.

68. See Table 1.2.

69. Office of State Revenue, NSW Treasury, *Annual Report 2008-2009* (2009) 27; see Table 1.1.

70. Of which 1.2 million carried demerit points.

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collected by the SDRO on behalf of its “commercial clients” go directly to those clients, less a processing fee retained by the SDRO.⁷¹

- 1.43 Of the 2.8 million penalty notices issued during the financial year 2008/09, 1.05% (29,469) of recipients elected to go to court.⁷² Tables 1.1 and 1.2 below give more detail of the number and value of penalty notices.

Table 1.1 Penalty notices: number and value for 2003/04 to 2008/09

Financial Year	Commercial		Crown		Total No	Total value \$m
	No of PNs	Face value \$m	No of PNs	Face value \$m		
2003/04	1,431,280	151.4	1,348,005	240.1	2,779,285	391.5
2004/05	1,364,858	155.6	1,145,085	208.5	2,509,943	364.1
2005/06	1,441,545	177.0	1,043,584	192.0	2,485,129	369.0
2006/07	1,492,308	182.2	1,121,736	215.7	2,614,044	397.9
2007/08	1,501,837	187.9	1,387,433	265.8	2,889,270	453.7
2008/09	1,539,410	196.7	1,280,552	258.7	2,819,962	455.4
Total	8,771,238	1050.8	7,326,395	1,380.8	16,097,633	2,431.5

Source: Office of State Revenue, NSW Treasury, Annual Report 2008-09 (2009) 27 (for 2008-09); Office of State Revenue, NSW Treasury, Annual Report 2007-08 28 (for 2003/04 to 2007/08).

71. Information supplied by Mr Gregory Frearson, Assistant Director (Operations), SDRO.

72. The SDRO informed the Commission that there are cases where offenders initially elect to go to court but later change their mind by paying the penalty amount before a court attendance notice is issued.

Table 1.2 Number and value of penalty notices issued in 2008/09

Client Category	Infringement Type	Closed/Finalised - Other		Court Attendance Notice Issued		Total PNs	Total Face Value (\$)
		No of PNs	Face Value (\$)	No of PNs	Face Value (\$)		
Commercial	Client Parking	1,222,115	135,319,294	5,324	856,522	1,227,439	136,175,816
	Council Free Car Parks	101,663	9,719,569	295	56,829	101,958	9,776,398
	Client Traffic	75	18,104			75	18,104
	RTA Traffic	17,284	7,427,328	527	299,282	17,811	7,726,610
	Fair Trading	1,121	941,790	102	146,870	1,223	1,088,660
	Fisheries	2,267	623,250	67	28,000	2,334	651,250
	General Client ⁷³	160,534	35,903,536	2,454	1,217,727	162,988	37,121,263
	Sydney Harbour Bridge	21,137	3,022,860	120	17,142	21,257	3,040,002
	Waterways	3,590	518,450	32	13,210	3,622	531,660
	Workcover	691	601,450	12	9,700	703	611,150
Commercial Total		1,530,477	194,095,631	8,933	2,645,282	1,539,410	196,740,913
Crown	RTA Bus/TWay Camera	27,350	6,641,820	826	200,453	28,176	6,842,273
	Red Light Camera	27,887	9,050,972	318	103,077	28,205	9,154,049
	RTA Static Speed Camera	556,401	64,949,990	3,388	522,199	559,789	65,472,189
	Police Speed Camera	1,545	171,014	14	1,605	1,559	172,619
	Police Radar/Lidar	191,396	44,876,903	2,777	1,158,747	194,173	46,035,650
	Police General	54,903	11,972,171	1,085	623,047	55,988	12,595,218
	Police Parking	24,360	4,058,279	285	52,874	24,645	4,111,153
	Police Traffic	363,805	97,802,441	11,823	3,818,825	375,628	101,621,266
	Failure to Nominate	12,369	12,686,205	20	20,520	12,389	12,706,725
Crown Total		1,260,016	252,209,795	20,536	6,501,347	1,280,552	258,711,142
Total No and Face Value (\$)		2,790,493	446,305,426	29,469	9,146,629	2,819,962	455,452,055

Source: Office of State Revenue, NSW Treasury, Annual Report 2008-2009 (2009) 27.

73. This pertains to penalty notices issued for a wide range of offences including those pertaining to trust lands, train offences, the environment, etc.

A NSW Penalty Notices Act?

- 1.44 One reform option that may assist in the better administration of penalty notices, and in making the rules on penalty notices easier to understand and more accessible, is the adoption of a stand-alone statute on penalty notices.
- 1.45 The Fines Act, which provides the statutory framework for penalty notices, is mainly under the administration of the Treasurer, as Minister responsible for the State Debt Recovery Office, which is located in the State Revenue Office of the Treasury.⁷⁴ While the collection of amounts under penalty notices is properly the responsibility of the Treasurer, the issuance of penalty notices and ancillary matters (such as the power of issuing officers to give formal cautions and the review and annulment of penalty notices) should arguably be subject to scrutiny by the Attorney General, as Minister responsible for the justice system. A new statute on penalty notices could clarify the delineation of these Ministerial responsibilities.
- 1.46 A further argument for a new statute on penalty notices is that the Fines Act is confusing, since it governs not just court-imposed fines but also penalty notices; and it uses the terms “fines” and “penalties” in a way that is not always clear-cut. Both terms refer to monetary penalties for offences, but while a fine is imposed by a court, a penalty under a penalty notice is incurred through an administrative process. Because the Fines Act contains provisions applying to both fines and penalty notices, it sometimes uses the term “fine” to include the amounts arising under penalty notices. For example, the term “fine defaulter” is defined, for the purposes of Part 5 of the Act (which is titled “Fine enforcement action”), to include someone who has defaulted on a penalty notice.⁷⁵ Without a careful examination of the definitions contained in the Fines Act, it is easy to fall into the trap of assuming that certain provisions apply only to fines and not to penalty notices.
- 1.47 This raises the issue of whether it is desirable to adopt a statute that would be the dedicated repository of the principles, rules and procedures governing penalty notices, operating in parallel to legislation applicable to fines. The argument in favour of this is that it would give law enforcement agencies, as well as the general community, greater clarity on, and easier access to, the law on penalty notices. Further, it would have the symbolic function of recognising the importance of the penalty notice system to the criminal justice system, as well as its significant impact on the community.⁷⁶
- 1.48 The main counter-argument is that because of the similarity in the nature of fines and penalty notices, both being monetary penalties for a criminal offence, as well as their interrelationship, it makes sense to locate the rules that apply to both in one statute. The enforcement mechanisms, for example, apply to both.⁷⁷ Aside from the

74. The Attorney General is responsible for Part 2, Divisions 1 and 2 (fines imposed by courts); section 120 (guidelines on exercise of functions under this Act in so far as it relates to registrars of the courts and the Sheriff); and section 123 (remission of fines or other penalties). The remainder of the Act, including the provisions on penalty notices are under the responsibility of the Treasurer.

75. *Fines Act 1996* (NSW) s 57.

76. See para 1.41-1.43.

77. *Fines Act 1996* (NSW) pt 4.

fact that a penalty amount is set by reference to the maximum fine, the interaction particularly arises when the recipient of a penalty notice elects to have the matter dealt with in court.

- 1.49 A possible alternative label for a stand-alone Act could be an *Infringements Act*, with the system being known as the infringements system, rather than penalty notice system. This approach has been taken in Victoria through the *Infringement Act 2006*, which is the first consolidated law on infringement notices in that jurisdiction.⁷⁸ The term “penalty notice” focuses on the means by which the alleged offender is made aware of an offence that he or she is alleged to have committed. The term “infringement” focuses on the nature of the offences the system regulates. Such a label would arguably better articulate the nature and purpose of the system, which is to deal with offences that are generally minor in nature; ideally, administratively rather than judicially.

Question 1.1

Should there be a stand alone statute dealing with penalty notices?

Question 1.2

Should the term “penalty notice” be changed to “infringement notice”?

Structure of this paper

- 1.50 Chapter 2 discusses the absence of, and the need for, guidelines to assist agencies to develop legislative proposals for new infringement offences and to set penalty amounts. Chapter 2 also raises the issue of whether there is a need for a central body in NSW to oversee and monitor the penalty notice regime as a whole.
- 1.51 Chapters 3 and 4 consider, respectively, the principles that should guide the determination of appropriate offences for enforcement by penalty notice, and those that should guide the setting of penalty notice amounts.
- 1.52 Chapter 5 examines the procedures and practice relating to issuing, enforcing and reviewing penalty notices, mechanisms to alleviate financial hardship, and the effects of paying a penalty notice in full.
- 1.53 Chapter 6 discusses the ways in which the penalty notice system impacts on children and young people and asks whether penalty notices should be issued to this group at all. If the penalty notice system should continue to apply to children

78. In 2008, the Auditor-General of Victoria conducted a limited performance audit on the new infringements system. The audit was confined to withdrawal of infringement notices. While the report of the Auditor-General acknowledged that progress has been made to implement the new infringements framework, it said that more work remains to be done and made a number of recommendations for this purpose: see Auditor General, Victoria, *Withdrawal of infringement notices* (2009). Subsequently, the Victorian government implemented a number of initiatives to address the Auditor-General’s concerns: see Victoria, Attorney General, *Annual Report on the Infringements System 2008–09* (2009) 6.

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and young people, the chapter considers whether the provisions of the Fines Act should be modified in their application to this age group.

- 1.54 Chapter 7 considers measures to mitigate the effects of penalty notices on vulnerable sections of the community, including people with a mental illness or cognitive impairment, the homeless and the financially disadvantaged.
- 1.55 Chapter 8 deals with Criminal Infringement Notices, which are a special type of penalty notice used for offences relating to public order and anti-social behaviour.

2. Guiding and overseeing the penalty notice system

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Introduction

- 2.1 This chapter discusses the absence of, and the need for, guidelines to assist agencies when developing legislative proposals for new infringement offences, and for setting or increasing penalty amounts. As noted in Chapter 1, prescribed penalty notice offences are contained in numerous statutes, administered by a number of government and regulatory agencies, each concerned with their own particular sphere of responsibility. The absence of an integrated and co-ordinated policy framework for determining which offences are suitable for inclusion in the system, and for setting penalty amounts, means that the penalty notice system has expanded in a fragmented and ad hoc way, and is consequently marked by inconsistencies. The following two chapters, Chapters 3 and 4, explore in detail the problems that have arisen. Guidelines may ameliorate the problems of inconsistency and the desirability of such guidelines is also foreshadowed in our Terms of Reference. This chapter canvasses possible systems for ensuring compliance with such guidelines.
- 2.2 The balance of this chapter then examines how any such broad policy framework could be implemented and governed. Chapters 3 and 4 consider the form guidelines should take in relation to the nature and scope of penalty offences, and appropriate penalty amounts, respectively.

How are penalty notice offences currently created?

- 2.3 The statute governing the subject area under which offences arise can provide for the issuance of penalty notices instead of a court-imposed fine in respect of any of those offences. This can be achieved in one of two ways: the Act can specify the offences for which penalty notices may be issued;¹ or it may authorise the making of regulations to identify the offences under the Act, or under the Act's regulations, that may be dealt with by means of a penalty notice.²
- 2.4 To give an example, cl 16 of the *Apiaries Regulation 2005* prescribes each offence listed in sch 1 of the regulations as a penalty notice offence for the purposes of s 42A of the *Apiaries Act 1985* (NSW),³ and also fixes the penalty amount for each offence prescribed as a penalty notice offence. The *Apiaries Regulation 2005* prescribes 28 offences created by the enabling Act as penalty notice offences and creates another three new penalty notice offences itself.⁴

General legislative process applies

- 2.5 There is no specific legislative process for creating, amending or repealing penalty notice offences, or for setting or increasing infringement amounts. In the absence of a discrete process, the usual process for the development of legislation applies.
- 2.6 Though formally set in legislation or regulation, in practice, whether an offence is suitable to be dealt with by way of penalty notice, and how much the penalty notice amount should be, is largely determined by the Minister and agency responsible for administering the Act under which the offence is created.⁵
- 2.7 While some agencies have developed policy manuals to guide them when proposing to add new, or amend existing, offences to be dealt with by way of a penalty notice,⁶ and in setting penalty amounts, a large number operate without any formal guidelines.⁷ Some agencies have submitted that they usually consult with officers of the Department of Justice and Attorney General and the Office of

1. See, for example, s 16 of the *Graffiti Control Act 2008*: "an authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence under s 7 (sale of spray paint cans to persons under 18) or 8 (unsecured display by retailers of spray paint cans)".

2. See for example, *Apiaries Act 1985* (NSW) s 50; *Protection of the Environment Operations Act 1987* (NSW) s 323(3).

3. This section allows a prescribed officer to issue a penalty notice on an offender for an offence prescribed by the regulations as a penalty notice offence.

4. See para 2.27-2.28 below on the issue of whether it is appropriate to allow offences (suitable to be dealt with by way of penalty notice) to be created by regulation.

5. See Chapter 3 which discusses the need to establish principles regarding the assessment of which offences can be dealt with by way of penalty notice, and Chapter 4 which deals with principles for setting and adjusting penalty notice amounts.

6. NSW Department of Planning, *Preliminary Submission*, 1.

7. NSW Police, *Preliminary Submission*, 1; NSW Department of Local Government, *Preliminary Submission*, 1; NSW Department of Sport and Recreation, *Preliminary Submission*, 1. Railcorp has submitted that, although it is consulted when penalty notice offences are being determined for railway offences, the final decision is a matter for the NSW Ministry of Transport in consultation with the Independent Transport Safety and Reliability Regulator: Railcorp, *Preliminary Submission*, 1-2.

Parliamentary Counsel for preliminary advice on their legislative proposal prior to seeking Cabinet's approval.⁸

- 2.8 A manual developed by the Office of Parliamentary Counsel⁹ that articulates accepted practice and convention provides some guidance to officers in government departments and other agencies when preparing legislation and statutory instruments in general.¹⁰ It provides that any legally contentious issues and any departures from the accepted range of penalties should be discussed with the Department of Justice and Attorney General (which supports the Attorney General as the principal legal adviser to the Government) before briefing Parliamentary Counsel.¹¹ It also provides that amendments increasing penalties by very large amounts or creating offences punishable by very high fines are not generally appropriate for the Statute Law Revision Program.¹² The manual advises further that, if the legislative proposal will impinge on the activities of another Minister or agency, that Minister or agency should be consulted before drafting instructions are given.¹³
- 2.9 This, however, is the limit of formal guidance on intra-government consultation in relation to penalty notice offences or the fixing of penalty notice amounts.
- 2.10 As a member of Cabinet, the Attorney General is consulted as a matter of course on all legislative proposals relating to the creation or amendment of penalty notice offences in primary legislation (as are all Cabinet ministers). However, the Attorney General may not be consulted on legislative proposals relating to penalty notices if these are contained in regulations, which are submitted to the Executive Council for approval.

Requirements for making regulations

Subordinate Legislation Act 1989

- 2.11 Before a new statutory regulation is made, the responsible Minister is required to ensure that, as far as is reasonably practicable, the guidelines set out in sch 1 of the *Subordinate Legislation Act 1989* (NSW) are complied with. In addition, a Regulatory Impact Statement must be prepared setting out the substantive matters contained in the regulation. The Act also requires agencies to publish the regulation and sets out a minimum period in which the agency is to consult with the public and relevant parties.

8. See for example, NSW Office of Fair Trading, *Preliminary Submission*, 2.

9. The Office of Parliamentary Counsel is the agency responsible for drafting all government legislation to be introduced into Parliament.

10. NSW, Office of Parliamentary Counsel, *Manual for the Preparation of Legislation* (8th ed, 2000).

11. NSW, Office of Parliamentary Counsel, *Manual for the Preparation of Legislation* (8th ed, 2000) [2.22]-[2.23].

12. NSW, Office of Parliamentary Counsel, *Manual for the Preparation of Legislation* (8th ed, 2000) [3.14].

13. NSW, Office of Parliamentary Counsel, *Manual for the Preparation of Legislation* (8th ed, 2000) [2.21].

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- 2.12 Every proposed regulation submitted to the Governor or Executive Council for approval must be accompanied by:
- a certificate by the responsible Minister stating whether or not the requirements of the *Subordinate Legislation Act 1989* (NSW) have been complied with;
 - an opinion of the Attorney General or Parliamentary Counsel as to whether the regulation is legally made; and
 - where the regulatory impact statement provisions have been dispensed with or postponed, in the case of a “principal statutory rule”,¹⁴ a certificate under s 6 of the Act.
- 2.13 The *Subordinate Legislation Act 1989* (NSW) also makes provision for staged repeal. This provides for the automatic sunseting of statutory rules after they have been in force for five years.¹⁵ Under this program, regulations are periodically reviewed to ensure that they remain appropriate and consistent with other relevant legislation. The program thus provides an opportunity to remove redundant or ineffective regulations.

Better Regulation Principles

- 2.14 With some exceptions,¹⁶ all new and amending regulatory proposals must also meet the Better Regulation Principles, as set out in the government’s *Guide to Better Regulation*.¹⁷ These principles provide a comprehensive framework for quantifying the costs and benefits of parliamentary regulation. A Better Regulation Statement, demonstrating compliance with the Better Regulation Principles, is required for “significant” regulatory proposals and must be approved by the Minister for Regulatory Reform before it is considered by Cabinet or the Executive Council.¹⁸ The Better Regulation Principles do not, however, apply to regulatory proposals related to police powers, general criminal laws and the administration of justice (such as rules of court and sentencing legislation).¹⁹ They are silent as to their application to penalty notice offences.

Parliamentary scrutiny

- 2.15 Regulations are subject to some parliamentary scrutiny. Written notice of a regulation must be given to both Houses of Parliament within 14 sitting days of it coming into effect, being the date on which the regulation is published on the government legislation website.²⁰ Parliament may disallow a regulation at any time

14. A principal statutory rule is a rule that is not an amending statutory rule: *Subordinate Legislation Act 1989* (NSW) s 3.

15. *Subordinate Legislation Act 1989* (NSW) s 10.

16. See NSW Department of Premier and Cabinet, *Guide to Better Regulation* (2009) 10.

17. NSW Department of Premier and Cabinet, *Guide to Better Regulation* (2009).

18. However, there is no need for a separate statement where a regulatory impact statement has been submitted: NSW Department of Premier and Cabinet, *Guide to Better Regulation* (2009) 10.

19. NSW Department of Premier and Cabinet, *Guide to Better Regulation* (2009) 10.

20. *Interpretation Act 1987* (NSW) s 40.

before receiving such written notice, or within 15 sitting days after written notice has been given.²¹

- 2.16 All bills introduced in Parliament and all regulations subject to disallowance are subject to scrutiny by the Legislation Review Committee,²² a joint committee set up under the *Legislation Review Act 1987* (NSW).²³ In relation to Bills, the Committee is to report to Parliament on whether the Bill:
- unduly trespasses on personal rights and liberties;
 - adequately defines administrative powers affecting rights and obligations;
 - makes rights, liberties or obligations dependent on decisions that are non-reviewable;
 - inappropriately delegates legislative powers; or
 - insufficiently subjects the exercise of legislative power to parliamentary scrutiny.²⁴
- 2.17 The Committee reports to Parliament on similar matters also in respect to regulations.²⁵ It has, in fact, specifically commented on penalty notice provisions in regulations on a number of occasions.²⁶ It does so, usually, by letter to the Minister sponsoring the regulation. For example, the Committee wrote to the Minister for Tourism, Sport and Recreation expressing its concerns that the maximum penalties and penalty notice amounts proposed under the *Sydney Olympic Park Amendment Regulation 2004* (NSW) did not appear to be consistent with the severity of the offence to which those penalties related.²⁷

How are penalty notice amounts currently determined?

- 2.18 An Act, or regulation made under an Act, prescribes the amount of penalty payable for the offence if dealt with by issue of a penalty notice. The setting of this amount is initiated by the individual government department concerned with the administration of the relevant legislation, with final approval given by parliament in the process described above. The penalty notice amount is, in almost all cases, less than the maximum fine that could be imposed for the offence by a court.

21. *Interpretation Act 1987* (NSW) s 41(1).

22. *Legislation Review Act 1987* (NSW) s 8A, 9.

23. *Legislation Review Act 1987* (NSW) s 4.

24. *Legislation Review Act 1987* (NSW) s 8A.

25. *Legislation Review Act 1987* (NSW) s 9.

26. In relation to *Companion Animals Amendment (Penalty Notices) Regulation 2005* (NSW): NSW Parliament, Legislation Review Committee (2006) 1 *Legislation Review Digest* 52; *Swimming Pools Regulation 2008* (NSW): NSW Parliament, Legislation Review Committee (2008) 10 *Legislation Review Digest* 117; *Centennial Park and Moore Park Trust Regulation 2004* (NSW): NSW Parliament, Legislation Review Committee (2005) 1 *Legislation Review Digest* 40; *Sydney Olympic Park Amendment Regulation 2004* (NSW): NSW Parliament, Legislation Review Committee (2005) 1 *Legislation Review Digest* 68.

27. NSW Parliament, Legislation Review Committee (2005) 1 *Legislation Review Digest* 69.

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- 2.19 The maximum fine that a court can impose for an offence is set by the legislation creating that offence. In 1987, the “penalty unit scheme” was introduced with the enactment of the *Interpretation Act 1987* (NSW). Prior to this, the maximum fine for an offence was expressed as a monetary amount. The *Statute Law (Penalties) Act 1992* (NSW) amended more than 200 Acts, generally enacted before the commencement of the *Interpretation Act 1987* (NSW), in which maximum fines were expressed in dollar amounts, to substitute units for those dollar amounts. Section 56 of the *Interpretation Act 1987* (NSW) gave one penalty unit a value of \$100 so that, for example, the maximum fine for an offence expressed to be \$1,000 became 10 penalty units.²⁸ Subsequent legislation systematically dealt with penalty unit conversion as part of the regular statute law revision program.
- 2.20 The use of penalty units was seen as “of assistance in assuring that the relative values of [maximum fines] as between various offences remains constant.”²⁹ The other advantage was that a single amendment in the revising statute to the value of a penalty unit could increase fines across the statute book. By the same token, an individual fine could be varied by amending the number of penalty units for the offence.
- 2.21 Since the commencement of the *Interpretation Act 1987* (NSW), Acts and regulations creating an offence have generally expressed the maximum fine in penalty units. The original value of \$100 for one penalty unit was increased in 1997 to \$110.³⁰ It has not been increased since.³¹
- 2.22 While the maximum fine that a court can impose is almost always expressed in multiples of penalty units, the amount payable upon issue of a penalty notice is almost always expressed in dollars.³² This means that the amounts do not automatically increase when the penalty unit sum (for the maximum fine) is increased. Increases to penalty notice amounts will only be made when the individual provisions are reviewed.

Issues arising from current processes

- 2.23 There is no clear set of criteria guiding the formulation of penalty notice offences and the fixing of penalty amounts, to which all agencies should have regard when developing legislative proposals.
- 2.24 Nor is there a vetting procedure or a specific agency charged with principal responsibility for advising on whether legislative proposals to create new penalty notice offences comply with basic principles, or whether penalty notice amounts are consistent with those for other comparable offences. To some extent, the

28. Specifically, s 56 provided that a reference in an Act or a statutory rule to a number of penalty units was to be read as a reference to an amount of money equal to the amount obtained by multiplying the number of penalty units by \$100.

29. NSW, *Parliamentary Debates*, Legislative Council, 20 May 1993, 2410 (John Hannaford).

30. *Statute Law (Miscellaneous Provisions) Act 1997* (NSW) sch 1.11[1].

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

32. The rare exceptions include: *Food Regulation 2004* (NSW) sch 1; *Retirement Villages Regulation 2000* (NSW) sch 8.

Department of Justice and the Attorney General and the Office of Parliamentary Counsel perform some of these functions, but only on an informal and ad hoc basis. There is no assurance that every legislative proposal for the creation of a penalty notice offence is examined, and advice provided to Cabinet or the Executive Council on its suitability and appropriateness.

- 2.25 A further and related issue arises with respect to the review of penalty notice offences that have become obsolete or inappropriate for contemporary conditions, or are of a trivial nature. An example of a penalty notice offence that, on its face, seems trivial is moving in the opposite direction on an escalator in railway premises.³³ There are also offences that are rarely enforced by penalty notice. Chapter 3 canvasses a substantial number of penalty notice offences that have never been enforced, or have only been enforced once, in the last 5 years.³⁴ Examples of these offences include: conveying goods in an escalator or lift while in railway premises;³⁵ leaving an animal carcass on a reserve;³⁶ and a hotelier or club not paying a prize of more than \$2000 by cheque.³⁷ There is a need to assess the relevance of these offences in light of the fact that they are rarely enforced. However, as with the creation of penalty notice offences and setting penalty notice amounts, there is currently no formal system in NSW for a comprehensive and periodic review of existing penalty notice offences that may need to be amended or repealed.
- 2.26 Chapter 1 described the substantial monies collected from penalty notices³⁸ and noted that this has led to fears that the system may be used for the wrong reasons.³⁹ As recounted in Chapter 1, in 2008-2009, the SDRO collected \$129.4 million in penalty notice payments on behalf of local government and State government agencies, which helps fund those agencies' activities.⁴⁰ Some of these agencies are influential in setting penalty levels. In the absence of scrutiny of penalty amounts by an independent body, there may be a perception that these agencies are pursuing conflicting goals: genuinely maintaining public health, safety, order and fairness; and raising revenue.

Appropriateness of creating penalty notice amounts by regulation

- 2.27 Regulations do not necessarily receive the same degree of parliamentary scrutiny as legislation does, since they do not have to be passed by both Houses of Parliament. This raises the issue of whether it is appropriate for new offences to be created by regulation at all, rather than by primary legislation.

33. *Rail Safety Act 2008* (NSW) s 139, *Rail Safety (Offences) Regulation 2008* sch 1 cl 33(1)(b).

34. See para 3.47-3.48.

35. *Rail Safety Act 2008* (NSW) s 139, *Rail Safety (Offences) Regulation 2008* (NSW) sch 1 cl 33(c).

36. *Rural Lands Protection Act 1998* (NSW) s 206, *Rural Lands Protection (General) Regulation 2001* (NSW) sch 6.

37. *Gaming Machines Act 2001* (NSW) s 203, *Gaming Machines Regulation 2002* (NSW) sch 3.

38. See para 1.41-1.43 and Tables 1.1 and 1.2.

39. Richard G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995) 288-289.

40. The SDRO provides a centralised processing service for all penalty notices issued by the NSW Police, the RTA (camera detected offences) and over 230 other agencies including local councils, semi-government bodies and other government bodies; \$168.9 million was collected for the Crown: Office of State Revenue, NSW Treasury, *Annual Report 2008-2009* (2009), 27.

- 2.28 However, an argument in favour of this approach is the flexibility associated with regulations; that is, it is easier to amend regulations than to revise Acts of Parliament. For example, adjustments of penalty amounts according to CPI increases could be more expeditiously implemented if they were contained in a regulation rather than set out in a statute.

Approaches in other jurisdictions

New Zealand

- 2.29 In a 2005 report, the New Zealand Law Commission recommended the adoption of guidelines as part of a principled legal framework for, and to guide the future growth of, the New Zealand infringement system.⁴¹
- 2.30 To ensure compliance with its proposed guidelines, the Law Commission argued that any new infringements framework must contain “governance oversight of the creation of new infringement regimes”.⁴² It emphasised that its recommended guidelines should be taken into account by any Minister proposing new infringements, the agency developing the legislation, and the parliamentary select committee or regulations review committee considering the legislation.⁴³ It also proposed mandatory vetting of prospective infringement regimes by the Ministry of Justice, by listing the Ministry in the *Cabinet Office Guidelines* as one of the agencies that must be consulted when offences and penalties are being created.⁴⁴ These proposals have not, so far, been implemented.

Victoria

- 2.31 The *Infringements Act 2006* (Vic) introduced a revised infringements system in Victoria designed to address longstanding issues about the inconsistency of the law and practices across different issuing agencies. Specifically, the Act sought to improve the administration and management of the infringements process by:
- creating guidelines outlining practices and processes for managing infringements;
 - establishing consistent procedures for issuing and enforcing infringements notices;
 - enhancing data collection; and
 - providing for better monitoring of the system through a central oversight body.⁴⁵

41. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005) (“NZLC Study Paper 16”) [275].

42. NZLC Study Paper 16 [278].

43. NZLC Study Paper 16 [277].

44. NZLC Study Paper 16 [281].

45. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2190 (Rob Hulls).

Infringements System Oversight Unit

2.32 An integral part of the revised scheme was the establishment of the Infringements Systems Oversight Unit (ISOU). Its creation was an administrative undertaking by the then Attorney General⁴⁶ that was widely supported in Parliament, with one member commenting that:

The consolidation and coordination of the system through central legislation and oversight through a central unit, as proposed in this Infringements Bill, will mean there is proper oversight of the whole system. It will make the infringement system more transparent and fairer by setting standards and procedures for issuing agencies and the [Penalty Enforcement by Registration of Infringement Notice] Court. There is no doubt that navigation of the current system is complex and confusing even to legal representatives and other representatives of people from agencies such as those with an acquired brain injury or with mental illness. The system is disjointed. There is a clear need for a central point of contact and oversight to monitor the system, to ensure fairness, efficiency and consistency.⁴⁷

2.33 Administratively, the ISOU is a business area of the Department of Justice, and is a part of the Infringement Management and Enforcement Services (IMES) business unit, which has overall responsibility for the management and accountability of the infringement system, including enforcement operations. The Infringements Court, which is responsible for processing and enforcing infringement notices and penalties in Victoria in the same way that the SDRO performs those functions in NSW, as well as the Sheriff's Operations,⁴⁸ is also located in the IMES business unit.⁴⁹

Functions of the ISOU

2.34 One of the initial roles of the ISOU was to assist in the development and implementation of umbrella legislation for consistent infringement law and procedures. It has an ongoing role in ensuring that agencies proposing new infringement offences apply Cabinet-approved policy regarding which offences are best dealt with as infringements.

2.35 In particular, the ISOU is responsible for:

- providing advice to the Attorney General and the whole of government on the policy and operation of the infringements system;
- monitoring the operation of the infringements system and new infringements policy initiatives;

46. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2190 (Rob Hulls).

47. Victoria, *Parliamentary Debates*, Legislative Assembly, 2 March 2006, 499 (Robert Hudson).

48. Sheriff's Operations execute warrants (including for civil matters and warrants arising from unpaid infringements) issued by Victorian and Federal Courts to provide effective and visible sanctions against those who do not comply with court orders.

49. Although it is housed within the Magistrates Court of Victoria, the Infringements Court provides an administrative service rather than a judicial function. Registered issuing agencies authorised to issue infringement notices may lodge those infringement notices with the Infringements Court for further enforcement action where they remain unpaid after 28 days from the service of the penalty reminder notice. Prior to 2006, the Infringements Court was known as the Penalty Enforcement by Registration of Infringement Notice (PERIN) Court.

- effecting necessary legislative instruments;
- undertaking key system-wide improvement projects;
- promoting the objectives of the *Infringements Act 2006* (Vic) through community information and education; and
- providing advice to stakeholders on their rights and responsibilities.⁵⁰

2.36 The ISOU monitors the system across more than 130 State and local government agencies (including hospitals and universities) that can issue infringements. It provides assistance and support to agencies through offering telephone support, conducting State-wide workshops, and developing and disseminating information papers. It has, for example, developed information papers on the legislative provisions regarding internal reviews, special circumstances and financial hardship; in order to assist agencies to clarify and improve their performance, provide guidance about government requirements and give practical examples. The ISOU also contributes to newsletters from the Infringements Court and has recently established its own newsletter with enforcement news, advice and information about system changes, which is emailed directly to enforcement agencies. The ISOU also works with enforcement agencies following any legislative or operational changes.

2.37 Two of its major functions, the canvassing of proposed new infringement notices to ensure proper consideration of the Attorney General's Guidelines, and its support for the Infringements Standing Advisory Committee are dealt with in more detail below.

Vetting proposed new infringement notice offences

2.38 A Procedures Manual produced by the ISOU details the process for making new or amended infringement offences, obtaining offence codes and making the offences lodgeable with the Infringements Court. This document is distributed by the ISOU to relevant agencies to assist them to:

- analyse their legislative proposals against the Attorney General's Guidelines; and
- follow the consultation processes required with the ISOU.

2.39 Under the Guidelines, enforcement agencies must consult with the ISOU when proposing a new infringeable offence to assess its compliance with the requirements contained in the Guidelines.⁵¹ Where the proposed infringeable offence is to go to Cabinet for approval, the Cabinet Submission accompanying it must indicate whether the agency has consulted with the Department of Justice and whether the proposed infringeable offence complies with the Attorney General's Guidelines.

2.40 Where the proposed infringeable offence is to be made by regulation, the responsible Minister must obtain an Infringements Offence Consultation Certificate

50. Victoria, *Attorney General's annual report on the infringements system 2007-08* (209) 3.

51. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 3.

under s 6A of the *Subordinate Legislation Act 1984* (Vic),⁵² certifying that the Minister has:

- consulted the Department of Justice about the proposed infringeable offence; and
- considered the Attorney General's Guidelines in the preparation of the proposed infringeable offence.

2.41 The Minister must also certify that the proposed statutory rule either satisfies the requirements contained in the Guidelines, or, if it does not, must give reasons to justify the statutory rule despite not meeting those requirements. This certification must be annexed to the statutory rule, and submitted to the Governor in Council. It must also be submitted to the Scrutiny of Act and Regulations Committee as soon as practicable after the regulation has been made, and must be tabled in both Houses of Parliament at the same time as the regulation.⁵³ The purpose of these requirements is to “ensure that a proposed infringement offence satisfies the annexed Policy on infringement offences and if it does not, to make clear the reasons and justification why it does not”.⁵⁴

2.42 Once an agency has established that an offence is suitable to be dealt with as part of the infringements system, it may then apply to the Attorney General to request that the offence be prescribed under the *Infringements (General) Regulations 2006* as a “lodgable infringement offence”. This means that the offence may be registered in the Infringements Court for enforcement action. A lodgable infringement offence must satisfy guidelines issued by the Attorney General pursuant to the *Infringements Act 2006* (Vic) for the creation of infringement notices.⁵⁵

2.43 Although the Guidelines are not in themselves binding, and the ISOU has no power to investigate or discipline agencies, these new requirements give the Attorney General some policy influence and control over the creation of new infringeable offences.

Infringements Standing Advisory Committee

2.44 One of the chief ways that the ISOU consults with key stakeholders is by providing secretariat services and research support to the Infringements Standing Advisory Committee (ISAC). The Committee is chaired by an Executive Director of the Department of Justice and has high level representatives from Victoria Police, VicRoads, the Departments of Transport and Community Development, local government, the Homeless Person's Legal Clinic, the Financial Counsellors Organisation, the Federation of Community Legal Centres and the Magistrates Court. The Committee meets four times a year to resolve stakeholder issues and discuss system improvements.

52. Section 6A of the *Subordinate Legislation Act 1984* (Vic) was inserted by *Infringements Act 2006* (Vic) s 177.

53. *Subordinate Legislation Act 1984* (Vic) s 6A(2) and (3).

54. Victoria, *Attorney General's Guidelines to the Infringements Act 2006* (2006) 3.

55. *Infringements Act 2006* (Vic) s 5(1)(a); Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 3.

- 2.45 There is no similar forum in NSW with an ongoing role to discuss issues and suggest system-wide improvements. There are presently two ad hoc working committees chaired by a senior officer of the Department of Justice and Attorney General to implement recent reforms to the fines and penalties system. One committee is charged with drafting uniform guidelines for the conduct of internal reviews by enforcement agencies and the use of cautions, while the other committee was set up to implement the Work and Development Orders provisions of the *Fines Further Amendment Act 2008* (NSW). It is anticipated that these committees will be disbanded once their work is completed.

Options for reform

- 2.46 As highlighted in the introduction to this chapter, the development of penalty notice offences and penalty notice amounts in NSW has been ad hoc and decentralised. The following two chapters contain some examples of inconsistency that this has created. If it is accepted that more structure is required – and based on the evidence in the following chapters, we tend to the view that this is the case – then what options for reform are there?
- 2.47 This chapter has highlighted the need for guidelines to assist agencies in determining whether an offence is appropriate for a penalty notice, and if so, how much the penalty notice amount should be.⁵⁶ This would appear to be the very least that could be done in aid of consistency. The potential content of such guidelines is addressed in the following two chapters.
- 2.48 It is possible for these guidelines to be “self-enforcing”, simply applied by agencies as the agency considers the policy and substance of legislation it is developing. However, at first sight this would appear to be of limited effect, and there is no guarantee that agencies would apply the guidelines in a consistent way.
- 2.49 We therefore consider the following options for applying any guidelines.

Option 1: The Attorney General and Department of Justice and Attorney General

- 2.50 This first option involves identifying clearly an existing Minister or agency with responsibility for advising government and agencies on the application of guidelines (and for keeping guidelines current), as well as requiring consultation with that Minister or agency when preparing legislation and regulations that might give rise to penalty notice offences. This would have the effect of ensuring that consistent advice was provided to government, and that any guidelines were interpreted in a consistent way. The obvious candidate for this role is the Attorney General, advised by the Department of Justice and Attorney General. The Department currently fulfils this role on a more or less ad hoc basis. This approach would strengthen the role of the Department within government.

56. Our Terms of Reference require us to inquire into this issue.

- 2.51 An alternative might be to expand the role of the Better Regulation Office, bearing in mind that, currently, its role is focused on the quality of regulation principally as an economic matter, and it excludes criminal legislation from its ambit.

Option 2: A stand-alone body

- 2.52 A second option is to establish a stand-alone body based on the Victorian model. A body solely focused on the penalty notice system could possibly provide a more purposeful and consistent approach to interpretation.
- 2.53 The role of this body could be limited to advice and guidance, or could be extended, quite significantly, to include responsibility for the regulations that set penalty notice amounts, and reviewing existing penalty notice offences for purposes of recommending the repeal or amendment of offences that have become obsolete or irrelevant.
- 2.54 If NSW followed the approach of Victoria, where the ISOU is linked to the infringement enforcement system, this would mean locating the body with the SDRO under the administration of the Treasurer. As noted in chapter 1, it is however, whether the policy role of advising on the use of penalty notices is appropriate for the Treasurer, or whether this role should be carried out by the Attorney General. If the stand-alone body is given responsibility for the regulations establishing penalty notice amounts, and reviewing penalty notice offences that have become stale or irrelevant, there is a greater argument for bringing it within the jurisdiction of the Attorney General. On the other hand, setting up a stand-alone body in the Attorney General's administration, simply to look after this policy issue, may not be regarded as efficient.

Option 3: Parliamentary Legislation Committee

- 2.55 A third option is to amend s 8A and 9 of the *Legislative Review Act 1987* (NSW) to require the Parliamentary Legislative Review Committee to also report to Parliament on whether a Bill or regulation in which a new penalty notice offence is created, or an existing one is amended, satisfies the guidelines. This provides an opportunity for draft legislation to be vetted by a body independent of the agency sponsoring the provision. However, its effectiveness may be limited, as the assessment occurs at the tail end of the policy development phase, after the legislative proposal has been drafted by Parliamentary Counsel, endorsed by Cabinet, or the Executive Council in the case of a regulation, and submitted to both Houses of Parliament. A similar model in New Zealand has not been shown to be effective in achieving consistency across various infringement schemes.
- 2.56 Parliamentary oversight could, of course, be combined with either of the options above.

Question 2.1

Should principles be formally adopted for the purpose of assessing which offences may be enforced by penalty notice?

Question 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?

Question 2.3

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

Question 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?

3. Determining penalty notice offences

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General principles to guide the creation of penalty notice offences

- 3.1 Chapter 1 described how the scope of offences that can be dealt with by penalty notice has expanded from a few parking offences at the scheme's inception, to over 7,000 offences covering diverse subject-matters, conduct, contexts and locations.¹ Chapter 2 described the process of creating penalty notice offences and highlighted that this process occurs in the absence of any over-arching principles or guidelines.
- 3.2 This chapter considers what principles should guide decisions about which offences are suitable for enforcement by penalty notices.
- 3.3 The chapter draws on examples of Commonwealth, Victorian and New Zealand guidelines, which contain principles about the types of offences that may be considered for treatment as penalty notice offences. In particular, the Victorian guidelines provides a comprehensive model acknowledging the changing nature of penalty notice systems, including the fact they now cover offences that are not absolute or strict liability in nature.²
- 3.4 The chapter also refers to reviews undertaken by other law reform agencies, particularly the Australian Law Reform Commission ("ALRC") and the New Zealand Law Commission.³

1. See para 1.1-1.8.

2. See para 3.17-3.18.

3. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2003) ("ALRC Report 95"); New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16, (2005) ("NZLC Study Paper 16") 14-15.

- 3.5 In general, offences that may be enforced by penalty notices are those that fall under one or more of the following categories:
- offences that are easy to establish — including strict or absolute liability offences;
 - offences that are minor in nature;
 - offences that attract low penalties;
 - high-volume offences; and
 - regulatory offences.
- 3.6 Each of these characteristics is examined below to determine the extent to which they can be used to assess whether an offence can appropriately be enforced by penalty notice.
- 3.7 In the course of the discussion, we will also consider whether certain offences are unsuitable for enforcement by penalty notice due to their seriousness, including offences where imprisonment is a sentencing option, offences involving victims of violence, and indictable offences. We will also consider the issue of how penalty notice might apply to continuing offences.

Ease of assessment

Absolute and strict liability offences and defences

- 3.8 The suitability of an offence for enforcement by penalty notice depends on how easy it is for an enforcement officer to assess whether or not an offence has been committed.
- 3.9 On this basis, offences with a fault, or mental, element (that is, those that require proof of intent or fault, including wilful, reckless or negligent conduct) and offences with a defence (such as “reasonable excuse”) or that contain exceptions, provisos, excuses or qualifications, can be quite complicated and difficult to establish, and are, arguably, not appropriate for enforcement by penalty notice, or appropriate but only with safeguards.
- 3.10 This is argued because these offences require an understanding of complex legal concepts, which may have different meanings depending on the wording of the offence and the purpose of the statute in which it is found.
- 3.11 For example, the term “wilfully”, which features in many penalty notices offences, has been given different meanings by the courts,⁴ depending upon its context and the subject matter of the provision in which it is found.⁵ In the context of the offence

4. *Environment Protection Authority v N* (1992) 59 A Crim R 408, 410 (Hunt CJ at CL). See *R v T* (1996) 91 A Crim R 152, 191-193 for a catalogue of various case law interpretations of the term “wilfully”.

5. *Iannella v French* (1968) 119 CLR 84, 95 (Barwick CJ).

of wilfully insulting a judge, for example, the High Court has held that “wilfully” means “intentionally” or “deliberately” in the sense that what is said or done is intended as an insult; that is, it does more than negative the notion of “inadvertently” or “unconsciously”, and imports the notion of purpose.⁶ In other cases, courts have interpreted the term “wilfully” to be more extensive than “intentionally” or “deliberately” so as to include “a result not positively desired but foreseen as a likely consequence of the relevant act”.⁷ Hence, in cases involving the offence of wilfully disposing of waste in a manner that harms or is likely to harm the environment, NSW courts have held that the prosecution must prove that the defendant deliberately disposed of waste in such a manner either intending, or with an awareness of, such consequences, or likely consequences, of the conduct.⁸

3.12 The phrase “reasonable excuse” is another concept incorporated in some penalty notice offences that can be difficult to assess, both for officers authorised to issue penalty notices and for those who seek to rely on the defence. The general guidance provided by courts in relation to “reasonable excuse” requires an intricate process of objectively assessing the particular facts, including the defendant’s belief and community standards.⁹

3.13 The High Court has observed that “decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of ‘reasonable excuse’ is an exception”.¹⁰ Further, the Court said that:

the reality is that when legislatures enact defences such as “reasonable excuse” they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.¹¹

3.14 Where penalty notice offences contain a “reasonable excuse” defence, or similar defences of the nature discussed by the High Court, the content of which have not yet been prescribed by courts, officers authorised to issue penalty notices for such offences, as well as the general community, would have no specific guidance as to conduct that would be permitted.

3.15 Because of these considerations, some argue that penalty notices should be confined to strict or absolute liability offences:

6. *Lewis v Ogden* (1984) 153 CLR 682.
 7. *R v T* (1996) 91 A Crim R 152, 156-157 (Fitzgerald P) citing *Lockwood; Ex parte Attorney-General* [1981] Qd R 209.
 8. *Environment Protection Authority v N* (1992) 59 A Crim R 408; *State Pollution Control Commission v Hunt* (1990) 72 LGRA 316.
 9. *Connors v Craigie* (1994) 76 A Crim R 502, 507 (Dunford J). See also *Mark v Henshaw* (1998) 101 A Crim R 122.
 10. *Taikato v The Queen* (1996) 186 CLR 454, 464 (Brennan CJ, Toohey, McHugh and Gummow JJ).
 11. *Taikato v The Queen* (1996) 186 CLR 454, 466 (Brennan CJ, Toohey, McHugh and Gummow JJ).

The efficacy of an infringement notice scheme depends on the reliability of the assessments made by enforcement officers as to whether an offence has occurred. These assessments will be consistently accurate if the assessment turns on straightforward and objective criteria rather than on complex legal distinctions. The offences should not require proof of fault and the physical elements giving rise to a notice should be readily capable of assessment by an enforcement officer.¹²

- 3.16 On the other hand, it may be argued that the presence of an element of fault or the availability of a defence are, in many cases, relatively straightforward to assess. As long as an enforcement officer can assess the fault element on a common sense basis, it may be appropriate to expand the range of penalty notice offences beyond those of strict or absolute liability.

Approaches under guidelines in other jurisdictions

- 3.17 The Victorian Guidelines provide the following:

Strict liability infringement offences, where an offence occurs automatically on the basis of proved facts or behaviour (eg speeding by 10kms or less), are currently subject to the infringement process. The philosophy behind this policy is that because there is no requirement to prove a guilty mind or subjective culpability for these offences, their enforcement is relatively straightforward.¹³

- 3.18 However, the Victorian Guidelines do allow “offences which are more complex than strict liability offences”,¹⁴ including those that contain an exception, proviso, excuse or qualification, to be made infringeable if certain conditions are met, namely:

- a) Clarity around what constitutes offending behaviour. The agency's issuing documentation, and other publicly provided information, must clearly and accurately set out the offending behaviour, and the rights of the person, including the right to have the matter determined in court;
- b) Only certain categories of trained officers should be able to issue infringement notices for the more serious offences;
- c) The agency should provide operational guidelines and training for issuing officers prior to any offences coming into effect, and proof of this would be the basis for an offence meeting (b) above;
- d) The operating guidelines would need to be publicly disclosable to the extent that they inform the community of what constitutes wrongdoing;
- e) The guidelines must include an option to give formal and informal warnings (unless a case can be made that this is inappropriate for a particular offence, eg drink driving offences where prosecutorial discretion is rarely exercised); and
- f) The agency must also report annually on such offences.¹⁵

12. Australia, Minister for Home Affairs, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (2007) 51.

13. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 11.

14. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 11-12.

15. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 12.

3.19 The Commonwealth guidelines provide as follows:

An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. *An infringement notice scheme should only apply to strict or absolute liability offences.*¹⁶

3.20 Similar to the Commonwealth approach, the New Zealand Guidelines provide that an infringement offence scheme should “involve actions or omissions that involve straightforward issues of fact” and “only apply to strict or absolute liability offences”.¹⁷

Examples of offences in NSW with fault elements or defences

3.21 The assessment of which approach to follow ought to consider the fact that in NSW there are numerous penalty notice offences that have an intent or fault requirement, or contain defences, exceptions, provisos, excuses or qualifications. The following are examples of such offences:

Offences containing an intent requirement

- a person must not do or say anything intending to hinder or interfere with the proper progress or conduct of any cricket or other match, game, sport or event within the Sydney Cricket Ground and Sydney Football Stadium;¹⁸ and
- a person who applies a thermal stimulus (such as hot wires) to the leg of an animal with the intention of causing tissue damage and the development of scar tissue around tendons and ligaments of the leg is guilty of an offence.¹⁹

Offences containing a number of possible fault elements

- a person who wilfully or negligently wastes or misuses water from a public water supply, or causes any such water to be wasted, is guilty of an offence;²⁰
- the driver of a public passenger vehicle must not negligently or wilfully move or drive or cause the vehicle to be moved or driven so that any person is subjected to the risk of injury;²¹
- a person must not negligently handle any explosives in such a manner or in such circumstances as to endanger or be likely to endanger the life of any person;²²

16. Australia, Minister for Home Affairs, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (2007) 50 (emphasis added).

17. New Zealand Ministry of Justice, *Guidelines for New Infringement Schemes* (2008) [21].

18. *Sydney Cricket and Sports Ground Act 1978* (NSW) s 30A, *Sydney Cricket Ground and Sydney Football Stadium By-law 2009* (NSW) cl 12, sch 2.

19. *Prevention of Cruelty to Animals Act 1979* (NSW) s 33E, *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) cl 23, sch 3.

20. *Local Government Act 1993* (NSW) s 679, *Local Government (General) Regulation 2005* (NSW) cl 12, sch 12.

21. *Passenger Transport Act 1990* (NSW) s 59, *Passenger Transport Regulation 2007* (NSW) cl 217, sch 3.

22. *Explosives Act 2003* (NSW) s 34, *Explosives Regulation 2005* (NSW) cl 101 sch 2.

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- a person must not, by act or omission, use a measuring instrument to give incorrect measurement or information with reckless indifference as to result;²³
- a person must not intentionally or recklessly communicate a declared disease to marine vegetation;²⁴ and
- a person must not intentionally or recklessly pollute or, without lawful authority, interfere with any water that flows into, or that is used as, the source of supply for any stock watering place.²⁵

Offences with exceptions, provisos, defences, excuses or qualifications

- a passenger must not, without reasonable excuse, throw any thing in or from a public passenger vehicle;²⁶
- a person must not without lawful excuse, obstruct any doorway that serves as, or forms part of, a building's fire exit;²⁷
- a person served with a summons to appear before the Share Management Fisheries Appeal Panel to give evidence must not, without reasonable excuse, fail to attend from day to day unless excused, or released from further attendance, by the Chairperson of that Panel;²⁸
- a person must not, except in an emergency or with lawful excuse, open any ground so as to expose a water supply authority's pipe or other work unless, the person has given the water supply authority at least 2 days' written notice of his/her intention;²⁹ and
- a person must not on Centennial and Moore Park Trust lands, except with the written permission of, and as approved by, the Trust or the Director, bring any non-prohibited animal unless it is under the effective control of a competent person.³⁰

Question 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?

-
23. *Trade Measurement Administration Act 1989* (NSW) s 23, *Trade Measurement Administration Regulation 2007* (NSW) cl 8, sch 3.
 24. *Fisheries Management Act 1994* (NSW) s 276, *Fisheries Management (General) Regulation 2002* (NSW) cl 413, sch 5.
 25. *Rural Lands Protection Act 1998* (NSW) s 206, *Rural Lands Protection (General) Regulation 2001* (NSW) cl 56, sch 6.
 26. *Passenger Transport Act 1990* (NSW) s 59, *Passenger Transport Regulation 2007* (NSW) cl 58.
 27. *Environmental Planning and Assessment Act 1979* (NSW) s 127A, *Environmental Planning and Assessment Regulation 2000* (NSW) sch 5.
 28. *Fisheries Management Act 1994* (NSW) s 276, *Fisheries Management (General) Regulation 2002* (NSW) cl 413, sch 5.
 29. *Water Management Act 2000* (NSW) s 365, *Water Management (General) Regulation 2004* (NSW) cl 107, sch 6.
 30. *Centennial Park and Moore Park Trust Act 1983* (NSW) s 24, *Centennial Park and Moore Park Trust Regulation 2009* (NSW) cl 19 sch 1.

- (2) If so, should this principle mean that penalty notices should only apply to strict and absolute liability offences, or should they also apply to offences that contain a fault element and/or defences?

Question 3.2

If penalty notices apply more broadly to offences with a fault element and/or defences, what additional conditions should apply? Should the conditions include any of those found in the Victorian *Attorney-General's Guidelines to the Infringement Act 2006*, for example:

- (1) specially-trained enforcement officers;
- (2) a requirement for operational guidelines; and
- (3) a requirement to consider warnings or cautions?

Community standards

- 3.22 Some offences may require an enforcement officer to exercise judgment about a matter of community standards where there may be room for considerable judgment. One example of this is the use of Criminal Infringement Notices (“CINs”) in NSW for the offences of offensive language and offensive conduct.
- 3.23 These provisions need be read in light of case law, which has established that for language or conduct to be considered offensive, the prosecution must prove that it was calculated to wound the feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person.³¹ The “reasonable person” test embedded in this rule requires the offensiveness of the language or conduct to be assessed according to community standards. Courts have also said that the reasonable person must not be thin-skinned.³² He or she is reasonably tolerant and understanding and reasonably contemporary in his reactions, has some sensitivity to social behaviour, and social expectations in public places.³³
- 3.24 The issues involved in the use of CINs for these offences are canvassed in detail in Chapter 8. However the general question remains: are penalty notices suitable to these cases?

Question 3.3

Should penalty notices be used when an offence includes an element that requires judgment about community standards, for example “offensiveness”?

31. *Worcester v Smith* [1951] VLR 316; See also *Inglis v Fish* [1961] VR 607; *Re Marland* [1963] 1 DCR (NSW) 224.

32. *Re Marland* [1963] 1 DCR 224.

33. *Spence v Loguch* (unreported, Supreme Court of NSW, Sully J, 12 November 1991).

Minor offences

- 3.25 The Commonwealth and Victorian Guidelines provide that an infringement notice scheme may be employed for minor offences.³⁴ This is consistent with the recommendations of some law reform agencies,³⁵ as well as the origins of the penalty notice system in NSW, which referred to “minor offences” committed against certain traffic laws.³⁶ The issue that arises is how the term “minor offence” should be defined for purposes of assessing whether an offence could be enforced by way of penalty notice.
- 3.26 In the United Kingdom, the Stewart Committee, which considered the effect on the criminal courts and the prosecution system of the volume of minor offences dealt with by summary prosecution, considered minor offences as those that do not involve dishonesty, injury to a victim, or obstruction of police.³⁷
- 3.27 In New Zealand, the Law Commission acknowledged the difficulties of defining minor offending. However, it emphasised that the broad concept of “minor offending” is useful as it conveys the general level of offences that should be included in a penalty notice system. It asserted that it is possible to place a ceiling on what is minor offending and recommended that penalty offences should be restricted to offending that is not so serious as to justify imprisonment. The reasoning behind its recommendation is as follows:
- The possibility of imprisonment marks the boundary between summary offences and infringement offences. If conduct is serious enough to warrant the sanction of imprisonment, it is too serious to be dealt with by way of an infringement notice. Moreover, it is certain to have such a wide range of culpability that it cannot receive an adequate response through a standard infringement fee.³⁸
- 3.28 There are a number of statutory definitions of, or references to, “minor offence” in some Australian jurisdictions. These definitions are specific to the legislation in which they are found. Section 8 of the *Bail Act 1978* (NSW) provides the accused with a right to be released on bail for “minor offences” and lists the following offences to which it applies:
- all offences not punishable by a sentence of imprisonment (except in default of payment of a fine);
 - all offences under the *Summary Offences Act 1988* (NSW) that are punishable by a sentence of imprisonment;

34. Australia, Minister for Home Affairs, *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (2007) 50-51; Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 10.

35. Scottish Home and Health Department and Crown Office, *The Motorist and Fixed Penalties: First Report by the Committee on Alternatives to Prosecution* (HMSO, Cmnd 8027, 1980) [1.08]; NZLC Study Paper 16, 14-15; ALRC Report 95, Recommendation 12-2.

36. See para 1.4-1.6.

37. Scottish Home and Health Department and Crown Office, *The Motorist and Fixed Penalties: First Report by the Committee on Alternatives to Prosecution* (HMSO, Cmnd 8027, 1980) [1.08].

38. NZLC Study Paper 16, 55.

- all offences punishable summarily and prescribed by the *Bail Regulation 2008* (NSW); and
 - all offences where the accused is appearing on breach of a good behaviour bond or because his or her community service order is to be altered.
- 3.29 Section 17B of the *Crimes Act 1914* (Cth) imposes sentencing restrictions on “minor offences”, more particularly, offences relating to property or amounts of less than \$2,000. The offences covered include: damaging Commonwealth property; theft; knowingly receiving stolen property; avoiding paying money due to the Commonwealth; possessing article to commit theft; obtaining property or a financial advantage from the Commonwealth by deception; dishonestly obtaining a gain or financial advantage from the Commonwealth; conspiring to obtain a gain from the Commonwealth; falsifying a Commonwealth document to obtain a gain or cause a loss; and dishonestly giving information from a false Commonwealth document to obtain a gain or cause a loss.
- 3.30 Section 120 of the *Justices Act* (NT), which is titled “Minor offences”, empowers a Magistrate to hear and determine in a summary manner the offences of stealing, removing a publicly displayed article, unlawfully diverting electrical power, severing an article with the intent of stealing it, obtaining another’s property or a benefit by deception, and knowingly receiving stolen property.

Question 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?

Offences where there is a victim of violence

- 3.31 The Victorian Guidelines provide that for offences where there is a victim of violence, the presumption is that they should not be treated as infringement offences. The Guidelines assert that such offences require a court hearing because the concept of restorative justice applies:
- the rights of, and impact on, the victim should be considered, and the alleged offender should be required to acknowledge and atone for the harm caused by the criminal act, or be provided with the opportunity to respond to all allegations.³⁹
- 3.32 It should be noted that the CINs scheme originally applied to common assault, but this was removed following state-wide roll-out of the scheme on the recommendation of the ombudsman, because the offence involved violence.⁴⁰ The Commission is inclined to the view that violent offences should not be dealt with by way of penalty notice.

39. Victoria, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 13.

40. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 116-117, Recommendation 13.

Question 3.5

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

Indictable offences

- 3.33 The Victorian Guidelines provide that indictable offences are generally not suitable for treatment as infringement offences since “it has already been decided that an offence requires a full court process to determine guilt and sentencing”.⁴¹
- 3.34 Indictable offences are those which can be tried before a judge and jury. They are distinguished from summary offences, which are tried before a magistrate sitting without a jury.⁴² A large number of indictable offences may be dealt with summarily unless the prosecution or accused elect to have the matter heard before a jury.⁴³
- 3.35 At this stage, the Commission is of the view that indictable offences, including those which may be tried summarily, are not suitable for enforcement by penalty notice due to the serious nature of such offences.

Low penalty offences

- 3.36 There is a view that only offences that attract low penalties should be covered by the penalty notice system. This idea is intertwined with the concepts of minor and regulatory offences; that is, a feature of these offences is that they attract low penalties. It is also linked with absolute and strict liability offences. The ALRC used the concept “low penalty” to be among the characteristics of strict and absolute liability offences that should be the subject of penalty notices. It was of the opinion that “infringement notices schemes are only suitable to deal with high-volume, low penalty criminal offences of strict or absolute liability.”⁴⁴

Appropriate fine levels

- 3.37 The ALRC did not define the concept of low penalty. Instead, it noted with approval the recommendation made by the Senate Standing Committee for the Scrutiny of Bills that the general Commonwealth criteria of 60 penalty units (\$6600 for an individual and \$33,000 for a body corporate) is a reasonable maximum.⁴⁵

41. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 13.

42. *Azzopardi v R* (2001) 179 ALR 349, 351; *BHP v Dagi* [1996] 2 VR 117, 152; *Adams v R* (1995) 66 SASR 284, 299.

43. *Criminal Procedure Act 1986* (NSW) s 258-273, sch 1. See also *Crimes Act 1900* (NSW) s 475B, which provides that certain complex dishonesty offences, at the election of the accused, can be heard by a Supreme Court judge sitting without a jury.

44. ALRC Report 95 [12.42].

45. ALRC Report 95 [12.42] citing Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (6th Report, 2002) 285.

- 3.38 The NSW Legislation Review Committee, in its project on absolute and liability offences, cited the above recommendations by the Senate Standing Committee but took the view that “it may be more appropriate to assess the appropriateness or otherwise of a monetary penalty for a strict liability offence on a case by case basis rather than adopt an arbitrary cap”.⁴⁶
- 3.39 Many of the penalty notice offences in NSW attract relatively low maximum fines if imposed by a court (under \$1000). The following are examples:

Table 3.1 Offences with low penalties

Offence	Maximum Fine	Penalty Notice Amount
Possession of liquor in a public place by a person under the age of 18 years ⁴⁷	\$20	\$20
Failure to record a vote at an election by an elector ⁴⁸	\$55	\$25
Standing or parking a vehicle on RailCorp, Sydney Ferries or STA land, where there is no sign permitting the standing or parking of vehicles ⁴⁹	\$220	\$70
The driver of a public passenger vehicle allowing a person to carry onto the vehicle an animal that is not confined in box, basket or other container ⁵⁰	\$220	\$150
An unregistered companion animal (that is not a dangerous or restricted dog) being outside of the place that it is ordinarily kept ⁵¹	\$330	\$165
Various train fare evasion offences ⁵²	\$550	\$200

- 3.40 However, there are some penalty notice offences for which substantial maximum fines are available if imposed by a court. For these offences the penalty notice amounts can also be substantial. The following are examples, all of which apply to individual and corporate offenders:

46. NSW Parliament, Legislation Review Committee, *Strict and Absolute Liability* (Discussion Paper No 2, 2006) [35].

47. *Summary Offences Act 1988* (NSW) s 11, 29.

48. *Parliamentary Electorates and Elections Act 1912* (NSW) s 120C, 120F.

49. *Transport Administration (General) Regulation 2005* (NSW) s 6, sch 1 pt 2.

50. *Passenger Transport Regulation 2007* (NSW) s 41(2), sch 3.

51. *Companion Animals Act 1998* (NSW) s 10A(a), 92, *Companion Animals Regulation 2008* (NSW) sch 1.

52. *Rail Safety (Offences) Regulation 2008* (NSW) cl 4-7, cl 57, sch 1 pt 3.

Table 3.2 Offences with high penalties

Offence	Maximum Fine	Penalty Notice Amount
Harming any endangered fish or marine vegetation ⁵³	\$220,000	\$2,500
Advertising oneself as carrying on the business of a car market operator without being the holder of a car market operator's licence ⁵⁴	\$110,000	\$5,500
Carrying on a security activity without a licence ⁵⁵	\$55,000	\$5,500
Disturbing or interfering with the site of a serious electrical accident before it has been inspected by an authorised officer ⁵⁶	\$27,500	\$10,000
A seller of residential property or rural land making a bid at their own auction ⁵⁷	\$27,500	\$2,200
Threatening, intimidating or coercing another person to obtain towing work ⁵⁸	\$22,000	\$2,200
Accepting a hiring by a taxicab driver outside a taxi zone in the Sydney Airport precinct ⁵⁹	\$5,500	\$50

- 3.41 If the concept of low penalty is one of the criteria for determining whether an offence may be treated as a penalty notice offence, the issue that arises is how to define "low penalty".

Question 3.6

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

Offences for which imprisonment is an option

- 3.42 There are currently more than 400 offences in NSW that are enforceable by penalty notice and for which imprisonment is an option where the relevant law enforcement

53. *Fisheries Management Act 1994* (NSW) s 220ZA, *Fisheries Management (General) Regulation 2002* (NSW) sch 5.

54. *Motor Dealers Act 1974* (NSW) s 9(5), 53E, *Motor Dealers Regulation 2004* (NSW) cl 68, sch 2.

55. *Security Industry Act 1997* (NSW) s 7(2), *Security Industry Regulation 2007* (NSW) sch 2.

56. *Electricity (Consumer Safety) Act 2004* (NSW) s 36, *Electricity (Consumer Safety) Regulation 2006* (NSW) cl 40, sch 3.

57. *Property, Stock and Business Agents Act 2002* (NSW) s 66(1)(a), *Property Stock and Business Agents Regulation 2003* (NSW) sch 15.

58. *Tow Truck Industry Act 1998* (NSW) s 64, *Tow Truck Industry Regulation 2008* (NSW) sch 1.

59. *Passenger Transport Regulation 2007* (NSW) cl 143, sch 3.

agency decides to deal with the matter through the court, or where the offender elects to have the matter dealt with that way. Some examples include:

- larceny of less than \$300;⁶⁰
- negligently handling explosives in circumstances likely to endanger lives;⁶¹
- assaulting a fisheries officer;⁶²
- sale of liquor to a minor;⁶³ and
- entering private land to hunt without consent.⁶⁴

3.43 In Victoria, the Guidelines provide that offences where imprisonment is a sentencing option may only be considered as infringement offences where:

- the magistrate can convert a sentence of imprisonment to a fine; and
- the relevant agency can demonstrate a strong public interest case for such offence to become infringeable.

3.44 Further, safeguards similar to those applying to non-strict liability also apply to imprisonable offences.⁶⁵

Question 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?

High volume offences

3.45 There is a view that one feature of the offences for which a penalty notice may be issued is that they are usually “high volume” in the sense that they occur quite frequently.⁶⁶

3.46 Many penalty notice offences in NSW would satisfy this criterion: the following table shows the ten most frequently recorded penalty notice offences in the last 5 years.⁶⁷

60. *Criminal Procedure Act 1986* (NSW) s 333, *Criminal Procedure Regulation 2005* (NSW) sch 2.

61. *Explosives Act 2003* (NSW) s 3, *Explosives Regulation 2005* (NSW) sch 2.

62. *Fisheries Management Act 1994* (NSW) s 276, *Fisheries Management (General) Regulation 2002* (NSW) sch 5.

63. *Liquor Act 2007* (NSW) s 150, *Liquor Regulation 2008* (NSW) sch 2.

64. *Summary Offences Act 1988* (NSW) s 29B, *Summary Offences Regulation 2005* (NSW) cl 12.

65. See para 3.18.

66. ALRC Report 95 [12.41]. See also NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 118.

67. This list is based on a database provided by the SDRO to the Commission consisting of around 4,800 penalty notice offences that have been enforced by way of a penalty notice at least once from 2004 until October 2009.

Table 3.3 High-volume offences

Offence	Number of Penalty Notices Issued
Exceeding speed limit 15km/h and under — camera detected ⁶⁸	1,461,775
Parking continuously for longer than permitted ⁶⁹	1,354,403
Parking without current ticket displayed ⁷⁰	1,011,414
Disobeying no stopping sign ⁷¹	861,630
Exceeding speed limit 15km/h and under — camera recorded ⁷²	735,645
Exceeding speed limit over 15km/h ⁷³	627,11
Disobeying no parking sign ⁷⁴	571,351
Parking after meter has expired ⁷⁵	501,979
Standing vehicle in area longer than allowed ⁷⁶	389,075
Travelling on train without a valid ticket ⁷⁷	371,270

3.47 On the other hand, there are numerous penalty notice offences that cannot be considered high volume in nature. The State Debt Recovery Office (“SDRO”) records approximately 4,500 offences for which not a single penalty notice has been issued in a five year period between 2004 - late 2009, including:⁷⁸

- falsely stating or representing the year of manufacture of motor vehicle;⁷⁹
- possessing, placing or using any explosive in a State forest, timber reserve or flora reserve;⁸⁰

68. *Road Rules Regulation 2008* (NSW) cl 20, 21, *Road Transport (General) Regulation 2005* (NSW) sch 3.

69. *Road Rules 2008* (NSW) cl 205.

70. *Road Rules 2008* (NSW) cl 207-3(1).

71. *Road Rules 2008* (NSW) cl 167.

72. *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 45, 46, 47; *Road Rules Regulation 2008* (NSW) cl 20, 21; *Road Transport (General) Regulation 2005* (NSW) sch 3.

73. *Road Rules Regulation 2008* (NSW) cl 20, 21; *Road Transport (General) Regulation 2005* (NSW) sch 3.

74. *Road Rules 2008* (NSW) cl 168.

75. *Road Rules 2008* (NSW) cl 207-1(6).

76. *Road Rules 2008* (NSW) cl 167-1.

77. *Passenger Transport Act 1990* (NSW) s 59, *Passenger Transport Regulation 2007* (NSW) cl 74.

78. It must be noted that some of the offences in the SDRO database may have ceased to be offences enforceable by penalty notice in the relevant period. Further, some of the offences in the database may have been newly created in the time period. The total number of penalty notices issued for the top ten offences in the last five years is 7,885,653 penalty notices, being 52% of the total number of penalty notices for all categories (15,297,072) issued in the period.

79. *Motor Dealers Act 1974* (NSW) s 47(1)(b), *Motor Dealers Regulation 2004* (NSW) cl 68, sch 2.

- possessing fishing gear for taking fish from prohibited waters;⁸¹
 - securing a vessel to a navigation buoy;⁸²
 - driving a licensed tow truck on a road without a drivers certificate;⁸³
 - neglecting to perform a duty or obligation imposed by the *Plant Diseases Act 1924 (NSW)*;⁸⁴ and
 - knowingly possessing in NSW any contraband fruit or plants;⁸⁵
- 3.48 The SDRO records that a further 4,800 penalty notice offences have been enforced at least once in the five year period covered by the SDRO data, but more than 800 of those were enforced only once. Examples of these offences include:
- failure by taxi-cab driver to return lost property;⁸⁶
 - operator of a taxi-cab not providing network uniforms;⁸⁷
 - conveying goods, without reasonable excuse, in an escalator or lift while in a public area in railway premises;⁸⁸
 - using pesticide so as to harm non-target animal or plant;⁸⁹
 - leaving an animal carcass on a reserve;⁹⁰
 - exhibiting a stock sign without authority;⁹¹ and
 - hotelier or club not paying prize of more than \$2000 by cheque or EFT.⁹²
- 3.49 The view that penalty notice offences should be high volume in nature is consistent with the rationale for the introduction of the penalty notices in NSW, which was to alleviate the work-load of local courts in dealing with a large number of parking offences.⁹³ On the other hand, use of penalty notice in comparatively low volume

80. *Forestry Act 1916 (NSW)* s 32C(2)(b), *Forestry Regulation 2004 (NSW)* cl 73, sch 3.

81. *Fisheries Management Act 1994 (NSW)* s 25(1)(b), *Fisheries Management (General) Regulation 2002 (NSW)* cl 413, sch 5.

82. *Maritime Services Act 1935 (NSW)* s 30D, *Management of Waters and Waterside Lands Regulations—NSW 1972 (NSW)* cl 21(2)(b), sch 5.

83. *Tow Truck Industry Act 1998 (NSW)* s 23(1)(a), *Tow Truck Industry Regulation 2008* cl 56, sch 1.

84. *Plant Diseases Act 1924 (NSW)* s 26(1)(d), *Plant Diseases Regulation 2008 (NSW)* cl 4, sch 1.

85. *Plant Diseases Act 1924 (NSW)* s 26(1)(f), *Plant Diseases Regulation 2008 (NSW)* cl 4, sch 1.

86. *Passenger Transport Act 1990 (NSW)* s 59, *Passenger Transport Regulation 2007 (NSW)* sch 3 cl 42.

87. *Passenger Transport Act 1990 (NSW)* s 59, *Passenger Transport Regulation 2007 (NSW)* sch 3 cl 128.

88. *Rail Safety Act 2008 (NSW)* s 139, *Rail Safety (Offences) Regulation 2008 (NSW)* sch 1 cl 33(c).

89. *Pesticides Act 1999 (NSW)* s 76, *Pesticides Regulation 1995 (NSW)* sch 1.

90. *Rural Lands Protection Act 1998 (NSW)* s 206, *Rural Lands Protection (General) Regulation 2001 (NSW)* sch 6.

91. *Rural Lands Protection Act 1998 (NSW)* s 206, *Rural Lands Protection (General) Regulation 2001 (NSW)* sch 6.

92. *Gaming Machines Act 2001 (NSW)* s 203, *Gaming Machines Regulation 2002 (NSW)* sch 3.

93. NSW, *Parliamentary Debates*, Legislative Assembly, 7 November 1957, 1643. See para 1.4-1.6.

offences may be necessary to deter the offending effectively, and may give offenders an option to deal with the matter without going to court.

- 3.50 In addition, the paradox with using this criterion is that a newly created offence would not be enforced by penalty notice until sufficient time had elapsed for it to have become “high volume”. The Commonwealth Guidelines deal with this by using the phrase “where a high volume of contraventions is expected”.

Question 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?

Regulatory offences

- 3.51 Many offences covered by penalty notices schemes can be described as regulatory in nature.⁹⁴ Like minor offending, there is currently no settled definition of the concept of “regulatory offence”.
- 3.52 Two Australian jurisdictions, Queensland and the Northern Territory, have passed legislation recognising the concept of regulatory offence as a class of crime.⁹⁵ While neither statute defines the meaning of regulatory offence, they each list the offences that are considered regulatory.⁹⁶ Both jurisdictions require regulatory offences to be tried summarily⁹⁷ and exclude certain legal defences or excuses from regulatory offences.⁹⁸
- 3.53 In some overseas jurisdictions, law reform agencies have attempted to characterise or identify the indicia of regulatory offences. In the United Kingdom, the Stewart Committee, which examined the use of fixed penalties as alternatives to prosecution for motoring offences in Scotland, considered regulatory offences as either: (a) those offences that affect a large number of people; or (b) prohibitions “intended to promote and maintain public safety and an orderly use of roadways throughout the country”.⁹⁹
- 3.54 The Law Reform Commission of Canada, in *Studies on Strict Liability*,¹⁰⁰ observed that there is no comprehensive definition of regulatory offence in decided cases. It said that the concept of regulatory offence, which is concerned with a wide array of subject matters such as pollution, natural resources, consumer protection, health, and marketing, may be too broad to be encapsulated effectively into a rigid

94. See NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [3.43].

95. *Criminal Code Act 1899* (Qld) s 3(1); *Criminal Code Act 1983* (NT) s 3(1).

96. *Criminal Law (Regulatory Offences) Act 1983* (NT); *Regulatory Offences Act 1985* (Qld).

97. *Criminal Code Act 1899* (Qld) s 3(4); *Criminal Code Act 1983* (NT) s 3(3).

98. *Criminal Code Act 1899* (Qld) s 36(2); *Criminal Code Act 1983* (NT) s 20.

99. Scottish Home and Health Department and Crown Office, *The Motorist and Fixed Penalties: First Report by the Committee on Alternatives to Prosecution* (HMSO, Cmnd 8027, 1980) [3.01].

100. Law Reform Commission of Canada, *Studies in Strict Liability* (1974).

definition. Nevertheless, it identified the “badges of the regulatory offence”, which relate to law, conduct, harm and penalty.¹⁰¹

- 3.55 First, a regulatory offence usually does not require proof of mens rea (“guilty mind”, that is, the subjective mental state that accompanies the offending conduct).¹⁰²
- 3.56 Secondly, the conduct prohibited by regulatory law is usually not considered “reprehensible”. Further, it argued that regulatory law deals with specialists; it is concerned with, for example, the citizen as motorist or trader, and not as a citizen as such. This explains why the law relating to regulatory offences is usually located in specialist statutes, rather than in general criminal legislation.¹⁰³
- 3.57 Thirdly, the lighter the penalty, the more likely it is to be regulatory offence.¹⁰⁴
- 3.58 In NSW, a large number of environmental, occupational health and safety, and fair trading offences are subject to penalty notices and are readily described as “regulatory offences”. Often these offences are enforced by specialist regulators charged with ensuring compliance with particular legislative regimes that have significant policy imperatives (such as environmental protection and workplace safety). The use of penalty notices in this context forms part of a cost-effective enforcement approach. They can be subject to high penalties. Examples of these offences include:
- owning a motor vehicle that emits excessive air impurities when it is used;¹⁰⁵
 - polluting any waters;¹⁰⁶
 - an occupier of premises, where dangerous goods are stored or handled, failing to develop, implement, maintain and communicate an emergency plan;¹⁰⁷
 - an employer failing to eliminate any reasonably foreseeable risk to the health or safety of an employee;¹⁰⁸
 - selling goods at a higher price than the lowest affixed price, where more than one price has been affixed;¹⁰⁹ and
 - supplying goods to be used by a consumer, which do not comply with the goods’ product safety standard.¹¹⁰

101. Law Reform Commission of Canada, *Studies in Strict Liability* (1974) 205.

102. Law Reform Commission of Canada, *Studies in Strict Liability* (1974) 206.

103. Law Reform Commission of Canada, *Studies in Strict Liability* (1974) 206.

104. Law Reform Commission of Canada, *Studies in Strict Liability* (1974) 208.

105. *Protection of the Environment Operations (Clean Air) Regulation 2002* (NSW) cl 9.

106. *Protection of the Environment Operations Act 1997* (NSW) s 120, *Protection of the Environment Operations (General) Regulation 2009* (NSW) sch 6.

107. *Occupational Health and Safety Regulation 2001* (NSW) cl 174ZC(2), sch 2.

108. *Occupational Health and Safety Regulation 2001* (NSW) cl 11, sch 2.

109. *Fair Trading Act 1987* (NSW) s 40; *Fair Trading Regulation 2007* (NSW) sch 1.

110. *Fair Trading Act 1987* (NSW) s 27(1); *Fair Trading Regulation 2007* (NSW) sch 1.

Question 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?

Continuing offences

- 3.59 Another issue arises in relation to offences that are continuing. Provision to impose penalties for each day that an offence continued were first introduced into the *Environmental Planning and Assessment Act 1979* (NSW) for court-imposed fines. In this model, a maximum fine is prescribed for the first day of the offence and each day the conduct continued amounted to a fresh offence (a continuing offence) for which a separate fine was imposed in addition to the initial fine. For example, having more than one cigarette vending machine in contravention of s 12 of the *Public Health (Tobacco) Act 2008* (NSW) gives rise to a maximum penalty under s 52 of the Act, in respect of a corporation, of up to \$22,000 for each day the offence continues, in addition to the original penalty of up to \$55,000.
- 3.60 Similar substantial penalty amounts are contained in environmental protection laws, such as the *Water Management Act 2000* (NSW) where Tier 1 offences attract a maximum fine of 20,000 penalty units and, if the offence is continuing, a further 2,400 penalty units per day; Tier 2 offences attracting a maximum fine of 10,000 penalty units and, if the offence is continuing, a further 1,200 penalty units per day; and Tier 3 offences attract a maximum fine of 100 penalty units.¹¹¹
- 3.61 Typically court proceedings are brought once and determined. However an enforcement officer might visit the site of a continuing offence on multiple occasions. Should multiple penalty notices be able to be issued? How should the concept of a continuing offence be applied to penalty notice enforcement?
- 3.62 For example, it is an offence not to comply with an order to demolish a building erected without development consent for which the maximum penalty is a fine of \$110,000 and \$11,000 every day the offence continues. This offence can be dealt with by a penalty notice of \$750 for an individual or \$1,500 for a corporation.¹¹² However, if the inspector re-visits the site with the illegal structure each day thereafter, can he or she issue a new penalty notice for a continuing offence, attracting additional penalty amounts?
- 3.63 Recognising the difficulties involved, some statutes have begun to prescribe when an offence is a continuing offence, rather than leaving this assessment to the discretion of the enforcement officer. In some cases, the law prescribes penalty amounts that increase for each period (for example, for each week) during which the offence continues. For example, different penalty notice amounts are prescribed

111. *Water Management Act 2000* (NSW) s 363B.

112. *Environmental Planning and Assessment Act 1979* (NSW) s 1, 121B, 125(2), 126; *Environmental Planning and Assessment Regulation 2000* (NSW) sch 5.

for the offence of failing to give the Fire Commissioner an annual fire statement, ranging from \$500 (if it is a week overdue), to \$2,000 (after four weeks).¹¹³

Question 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?

Other principles

- 3.64 The Commission seeks submissions on whether there are principles other than those discussed in this chapter that should be adopted for the purpose of assessing whether an offence may be appropriately enforced by penalty notice.

Question 3.11

Are there principles other than those outlined in Questions 3.1-3.10 that should be adopted for the purpose of setting penalty notice amounts?

113. *Environmental Planning and Assessment Regulation 2000* (NSW) sch 5.

4. Determining penalty notice amounts

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Introduction

- 4.1 As set out in Chapter 1, our terms of reference require us to consider “the formulation of principles and guidelines for a uniform and transparent method of fixing penalty notice amounts and their adjustment over time”. We are also required to have particular regard to:
- “whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate”; and
 - “the consistency of current penalty amounts for the same or similar offences”.
- 4.2 Chapter 2 describes the current process for setting penalty notice amounts and, as with creating penalty notice offences, notes the absence of overarching principles to guide this process. This chapter raises for discussion what principles should guide the setting of penalty notice amounts. In considering what principles would be appropriate to apply, we have drawn on the approaches taken in other jurisdictions. We also survey road transport offences and penalty notice amounts for comparative purposes, although it is not within our terms of reference to recommend reform of this category of penalty notice offence.

A need for principles to guide the setting of penalty notice amounts

- 4.3 As noted in Chapter 2, individual government departments develop policies regarding the setting of penalty notice amounts for offences arising under legislation within their administration. There are currently no overarching principles or guidelines regulating and balancing penalty notice amounts. The approach to setting penalty notice amounts is *ad hoc* and sometimes inconsistent. Some agencies have a policy of setting the amount as a percentage of the maximum fine.¹ A number of departments have developed guidelines for the appropriate issue of penalty notices but there is no mention in those guidelines of penalty notice amounts.² Some departments conduct consultation and analyse comparable offences, including those in other Australian jurisdictions, before making recommendations to the government on the setting of penalty notice amounts for legislation under their administration.³
- 4.4 In some limited cases, penalty notice amounts have been prescribed as part of the development of a national scheme. For example, offences under the *Energy and Utilities Administration Regulation 2006* (NSW) were fixed by reference to Queensland and Victorian legislation then in force.⁴
- 4.5 No concerted attempt has been made to coordinate all penalty notice amounts or systematise the way amounts are set. The NSW Sentencing Council has observed that this has led “to considerable differences between offences which do not seem to be justified by the differences in their objective seriousness”.⁵ Examples of penalty notice amounts that do not seem to be proportional to the nature and seriousness of the offence are set out below in paragraphs 4.41-4.47.
- 4.6 Even within the same offence, different penalty notice amounts can apply depending on which authority issues the penalty notice. Take the example of a person guilty of “offensive language”: a penalty notice issued by a Transit Officer under the *Rail Safety (Offences) Regulation 2008* (NSW) can impose a penalty of \$400; if, however, the penalty notice is issued by the police under the criminal infringement notices scheme, the maximum penalty is \$150.⁶ Similarly, a person guilty of a graffiti offence in a reserve can be penalised \$220 under s 22(1)(f) of the *Crown Lands (General Reserves) By-law 2006* (NSW) whereas a person guilty of a graffiti offence on a train can be penalised \$400 under the *Rail Safety (Offences) Regulation 2008* (NSW). Many more examples of inconsistencies in the penalty notice amounts for similar offences are given below in paragraphs 4.50-4.62.

1. NSW Office of Fair Trading, *Preliminary Submission*, 2; NSW Department of Local Government, *Preliminary Submission*; NSW Department of the Arts, Sport and Recreation, *Preliminary Submission*.

2. For example, NSW Environment Protection Authority, *EPA Prosecution Guidelines* (NSW Department of Environment and Conservation, 2004). See also para 2.7.

3. Such as the Department of Planning: NSW Department of Planning, *Preliminary Submission*, 1.

4. See NSW Department of Water and Energy, *Preliminary Submission*, 2.

5. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.20].

6. Example in NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.21].

- 4.7 The issue that arises is whether the development of principles would be an effective way of ensuring fairness and consistency across penalty notice offences. The “strict liability nature of penalty notices and the absence of any discretion in the issuing officer to fix a penalty other than in the prescribed amount”⁷ add weight to arguments for an oversight regime that ensures appropriate penalty levels and parity.

Question 4.1

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

Principles in some jurisdictions

- 4.8 There are a number of jurisdictions, namely Victoria, New Zealand and South Australia, which have developed principles for setting the equivalent of the penalty notice amounts. The principles found in these jurisdictions are canvassed in the following paragraphs since they are instructive as to what principles might be useful in NSW.

Victoria

- 4.9 Victoria’s equivalent of NSW’s *Fines Act 1996* (“Fines Act”) is the *Infringements Act 2006*. Section 5 of that Act gives the Attorney-General the power, after consultation with any other Minister whose area of responsibility may be affected, to make guidelines for assessing which offences are suitable for infringement notices and the level of penalty. Chapter 2 discusses in detail the Victorian guidelines as they pertain to determining which offences are suitable as infringement notice offences. In the following paragraphs, the Victorian guidelines relating to the setting of infringement penalties are outlined.

- 4.10 The Victorian guidelines provide the following fundamental principle:

An infringement penalty should generally be approximately no more than 20-25% of the maximum penalty for the offence and be demonstrated to be lower than the average of any related fines previously imposed by the Courts.⁸

- 4.11 This principle is elaborated in the policy annexed to the guidelines, the relevant provisions of which are as follows:⁹

Percentage of maximum penalty

Part of the incentive underpinning the system is that the level of penalty is set at an amount lower than a person might expect to receive were the matter to go to court.

7. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.22].

8. Victoria, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 4.

9. Victoria, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) 14.

The level of the infringement penalty must be set as a significantly lesser proportion of the maximum penalty to maintain the “bargain” in the infringements system and the incentive inherent in that bargain. As a general rule, the infringement penalty should be no more than approximately 25% of the maximum penalty for the offence. However, a proportion of up to 50% can be considered where there are strong and justifiable public interest grounds.

Level of infringement penalty

The maximum infringement penalty for an individual should generally not exceed 12 penalty units, and for a corporation should not exceed 60 penalty units. The infringement penalty should only be higher than this recommended maximum where a demonstrable case can be made on public interest grounds and/or on the basis of a demonstrable deterrent level of penalty. A deterrent level of penalty can be determined taking into account factors such as consequences of offence, risk or opportunity cost.

The amount of variation must be such that the penalty is still suitable for a summary offence.

New Zealand

- 4.12 New Zealand’s equivalent infringement legislation is the *Summary Proceedings Act 1957*. The New Zealand government has established guidelines that “provide a framework for the development of infringement schemes to ensure cross-government consistency and to manage the future growth of the infringement system”.¹⁰ The guidelines seek to “ensure that infringement schemes are fair, equitable, consistent and a proportionate means of encouraging compliance with the law.”¹¹ They apply to infringement schemes under all legislation, although exceptions can be made to meet specific circumstances of a particular infringement scheme.¹² They are built around eight elements, including appropriate use, payment options, and enforcement. The guidelines on infringement amounts are as follows:

Penalties should involve the following features:

- The maximum penalty for any infringement offence, whether the offender is served with an infringement notice or subject to prosecution by summary proceedings, should be established in primary legislation.
- The actual penalty for any offence subject to an infringement notice may be established as a fixed fee, in regulations or by-laws.
- As a general rule, every offence which is subject to an infringement notice should not normally exceed a fee of \$1,000, unless in the particular circumstances of the case a high level of deterrence is required. The fee should generally be considerably less than the statutory maximum available to the court following a successful summary prosecution.
- Where the proposed penalty is intended to exceed \$1,000, it is preferable that this amount be fixed in primary legislation, although in certain circumstances it

10. New Zealand, Ministry of Justice, *Infringement Guidelines: Introduction* (2008) [2].

11. New Zealand, Ministry of Justice, *Infringement Guidelines: Introduction* (2008) [3].

12. Examples include a shortened timeframe for payment for certain infringements under the *Biosecurity Act 1993* (NZ) or the *Civil Aviation Act 1990* (NZ); or limiting the Court’s ability to reduce the penalty for overloading offences under the *Land Transport Act 1998* (NZ).

may be appropriate to specify the fee in regulations, with a maximum fixed in primary legislation.

- In setting infringement fees consideration must be given to the level of harm involved in the offending, the affordability and appropriateness of the penalty for the target group, and the proportionality of the proposed fee with the infringement fees for other comparable infringement offences.
- The penalty must not include a criminal conviction, even when liability is contested in court or the person is found guilty in a summary prosecution, although other appropriate orders such as deemed convictions and driver licence demerit points may be made.
- No term of imprisonment should result from an infringement offence.

Explanation

28. Infringement offence schemes are generally designed to address comparatively minor breaches of the law. For this reason, the penalty should be proportionate and generally less than \$1,000, although higher maximum penalties may be appropriate where high levels of deterrence are necessary.
29. As the imposition of a penalty for a breach involves a transfer of the judicial function to the executive, it is very important that the penalty should not result in:
 - a criminal conviction, even when liability is contested in a Court; or
 - a term of imprisonment.
30. Where an offence may warrant a more serious penalty, or different treatment e.g. Court proceedings, then a separate offence provision should be established in the primary legislation.
31. Infringement offence notices impose a monetary fee as a penalty (although the penalty for some transport offences may also include the imposition of a deemed conviction and driver licence demerit points). The monetary penalty should be set at a level considerably lower than the maximum fine which can be imposed for the same offence by the Court following a successful summary prosecution.
32. Higher maximum infringement fees are often necessary to deter offending where a significant economic benefit can result for the offender. Examples of offending with significant economic benefit include the avoidance or evasion of Road User Charges, the overloading of heavy vehicles and the breaching of marine protection zones.

South Australia

- 4.13 In South Australia, the *Expiation of Offences Act 1996*, which is the equivalent to the Fines Act, prescribes that if the maximum fine is expressed in a dollar amount, the expiation fee should not exceed \$315 or 25% of the maximum fine, whichever is the lesser amount.¹³

13. *Expiation of Offences Act 1996* (SA) s 5(3)(b). This provision also states that if the maximum fine prescribed for the offence is expressed as a divisional fine, the expiation fee should be a divisional expiation fee of the same division.

Possible principles for NSW

- 4.14 Based mainly on the principles in the Victoria, New Zealand and South Australia, we have formulated principles that might be adopted in NSW. The options below are derived in part from the most important principles that operate in those three jurisdictions. We seek submissions on whether some or all of these principles should be adopted and on the details of the content of the principles.
- (1) **Maximum amount:** The penalty notice amount should not exceed a specified maximum amount that applies to all penalty notice offences, except where it can be demonstrated that the particular offence requires a higher penalty for deterrence purposes.
 - (2) **Deterrence and court diversion:** The level of penalty should be set at an amount that would deter offending but considerably lower than a person would receive if such person elected to go to court to deal with the matter. This general principle could be implemented by prescribing that:
 - (a) as a general rule, a penalty notice amount should not exceed a certain percentage of the maximum fine; and
 - (b) a penalty notice amount should be lower than the average of any related fines previously imposed by the courts for the same or a similar offence, if such information is available.
 - (3) **Proportionality:** In setting the penalty notice amount, 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.
 - (4) **Consistency:** In setting the penalty notice amount consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences.
 - (5) **Corporations:** For offences that can be committed by both natural and corporate persons, the penalty notice amounts for corporations should be set higher than those for natural persons.

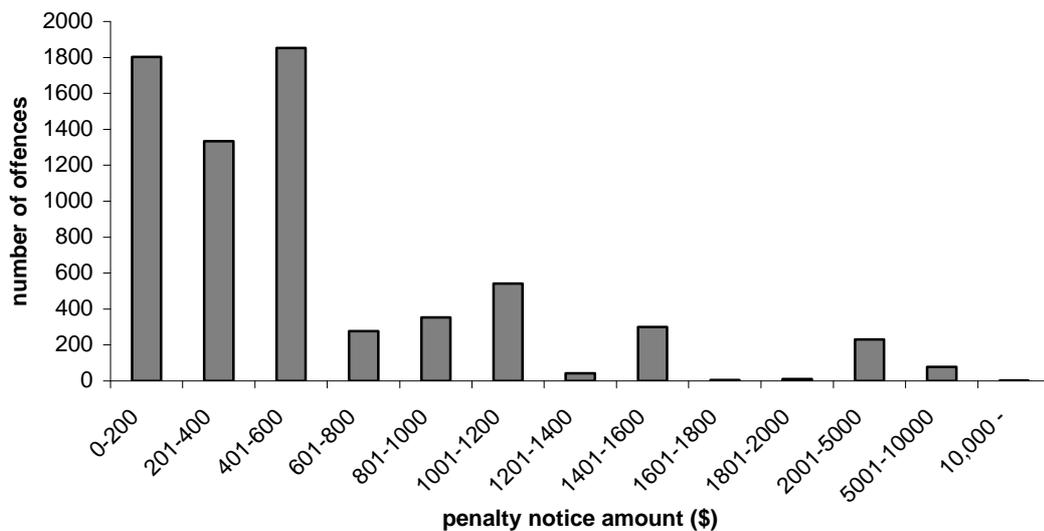
A maximum amount

- 4.15 The principles for setting infringement amounts in the jurisdictions canvassed above contain a maximum amount, which is:
- 12 penalty units for individuals and 60 penalty units for corporations in Victoria (1 penalty unit is \$119.45 in the 2010-11 financial year);
 - \$1,000 in New Zealand; and
 - \$350 in South Australia.
- 4.16 A maximum amount underscores the nature of penalty notice offences, which is that they are generally minor offences that can be dealt with administratively instead of through the courts, and as a consequence, their penalties should generally be set at

a level that reflects this nature. The setting of a maximum amount would discourage the use of penalty notices for serious offences that should be dealt with through the courts because of the need to secure a high penalty as deterrence, and/or to provide greater procedural protections for the alleged offender. If such approach were to be adopted in NSW, one major issue is the maximum amount.¹⁴

- 4.17 It may be useful to note that most penalty notice offences in NSW have amounts that range from \$20 to \$1,200. The Commission surveyed around 6,800 penalty notice offences from a list of offences provided by the Judicial Commission of NSW¹⁵ and found that 90% of penalty notice amounts do not exceed \$1,600, as illustrated by Figure 4.1 and Table 4.1. The biggest group is comprised of penalty notice amounts that range from \$400 to \$600 (1,852 offences), followed very closely by the \$20 to \$200 range (1,803 offences), and then the \$200 to \$400 group (1,334 offences). Beyond \$1,600, the biggest group consists of the \$2,000 to \$3,000 for which there are 213 offences. These include some serious offences for example: a corporation harming threatened species;¹⁶ a person making an illegal seller’s bid at auction,¹⁷ and contravention or failure to comply with a condition of an exploration licence or assessment lease under the *Mining Act 1991* (NSW).¹⁸

Figure 4.1 Offences by penalty amount



14. This issue is linked with the issues we raised in Chapter 3 of whether the concepts of “minor offence” and “low penalty” should be among the criteria for assessing whether an offence may be enforced by penalty notice, and if so, how should these terms be defined: para 3.24-3.29, 3.35-3.40.

15. The NSW Law Reform Commission took the Judicial Commission list of offences and researched the maximum penalty and penalty notice amount for each. That data was then analysed to provide Figures 4.1 and 4.2 and Tables 4.1 and 4.2.

16. *National Parks and Wildlife Act 1974* (NSW), s 118A, 192, *National Parks and Wildlife Regulation 2002* (NSW) cl 85, sch 2 (penalty notice amount of \$3,000).

17. *Property, Stock and Business Agents Act 2002* (NSW) s 66, 216, *Property, Stock and Business Agents Regulation 2003* (NSW) cl 45, sch 15 (penalty notice amount of \$2,200).

18. *Mining Act 1992* (NSW) s 374A, 375A, *Mining Regulation 2003* (NSW) cl 60, sch 10.

Table 4.1 Number of offences by penalty notice amount

Penalty notice amount	Number of offences	Percentage of offences	Cumulative percentage of offences where penalty is less than top amount
\$200 or less	1803	26%	26%
\$201-400	1334	20%	46%
\$401-600	1852	27%	73%
\$601-800	277	4%	77%
\$801-1000	354	5%	82%
\$1001-1200	541	8%	90%
\$1201-1400	42	1%	91%
\$1401-1600	301	4%	95%
\$1601-1800	6	<1%	95%
\$1801-2000	10	<1%	95%
\$2001-5000	231	3%	99%
\$5001-10,000	79	1%	100%
\$10,000 or greater	1	<1%	100%
Total	6831	100%	

Source: NSW Law Reform Commission

- 4.18 A counter-argument against establishing a maximum amount is that it may be too difficult to designate one amount that would be appropriate for the thousands of penalty notice offences, which vary in their nature, seriousness, and the harms they seek to prevent. The approach taken in Victoria and New Zealand to address this issue is to allow the setting of amounts above the maximum amount but only on specified grounds. The ground common to both jurisdictions is the need to set a higher level in order to deter the offending.
- 4.19 In Victoria, public interest is another ground for allowing an infringement penalty to be set higher than the recommended maximum amount. We seek submissions on whether this ground should be adopted in NSW, and if so, how public interest should be defined or characterised, and whether there are examples to illustrate its application.
- 4.20 A further issue relating to the setting of a maximum amount is whether there should be different amounts for individuals and corporations, as in Victoria. Below we discuss whether corporations should generally face higher penalty levels than

individuals. If that is the case, it would follow that the maximum amount ought to be higher as well.¹⁹

Question 4.2

Should a maximum be set for penalty notice amounts? If so:

- (1) What should the maximum be?
- (2) Should the maximum be exceeded in some cases? If so:
 - (a) On what grounds (eg the need to deter offending)?
 - (b) Should the public interest be among the grounds? If so, how should it be defined or characterised?
- (3) Should the maximum be different for individuals and corporations?

Deterrence and court diversion

4.21 The Victorian guidelines state the following policy:

Part of the incentive underpinning the system is that the level of penalty is set at an amount lower than a person might expect to receive were the matter to go to court.²⁰

4.22 This reflects the main purpose of infringement or penalty notice systems, which is to reduce the burden on court resources by diverting less serious offences away from courts. To achieve this, the level of the infringement penalty must be set as a significantly lesser proportion of the maximum penalty to maintain the “bargain” in the infringements system and the incentive inherent in that bargain.²¹ A “discounted” penalty is also one of the incentives to offenders to surrender some of the procedural protections associated with the criminal justice system, such as the presumption of innocence.²² From the point of view of enforcement agencies, the lesser penalty is the trade-off for being relieved of the burden of prosecuting the matter in court.

4.23 The Victorian principle quoted above is useful in underscoring the importance of fixing a penalty notice amount as a discounted penalty to encourage the diversion of minor criminal matters from the court system. However, it is equally important that penalty notice amounts be set at levels that will deter offending. As the NSW Department of Environment and Climate Change pointed out in its preliminary

19. There is a separate issue of whether penalty notice amounts should be set at higher amounts for corporations than individuals. This is discussed in para 4.70-4.73

20. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 14.

21. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 14.

22. The other incentives are avoidance of the financial and other costs associated with going to court and the possibility of a conviction.

submission, penalty notice amounts need to be high enough to deter offending but not so high as to induce the offender to elect to have the court assess the penalty.²³

- 4.24 The tension between deterring the offending behaviour and creating disincentive for the matter to proceed to court calls for a careful assessment of the level of discount from the maximum penalty, taking into account the factors that may discourage court-election, such as the inconvenience and stress of going to court, the imposition of court costs regardless of the outcome, the risk of incurring a conviction, and sentencing patterns in the courts. Despite these factors, a high penalty notice amount may encourage an offender to elect to have the matter dealt with by a court.²⁴
- 4.25 The Commission seeks submissions on whether the Victorian principle quoted above should be adopted in NSW but modified to the effect that the level of penalty should be set at an amount that would deter offending but considerably lower than a person would receive if such person elected to go to court to deal with the matter.

Question 4.3

Should there be a principle that the penalty amount should be set at a level that would deter offending, but be considerably lower than the penalty a court would impose?

Must not exceed a certain percentage of the maximum fine

- 4.26 There are two ways of making the deterrence/diversion principle more specific. The first is to specify that the penalty notice amount must not exceed a fixed percentage of the maximum fine. The second is to provide that the penalty notice amount should be lower than the average fine imposed by courts for the offence in question or similar offences. These factors could apply cumulatively: the Victorian guidelines, provide that “an infringement penalty should generally be approximately no more than 20-25% of the maximum penalty for the offence *and* be demonstrated to be lower than the average of any related fines previously imposed by the Courts.”²⁵ These two factors are discussed in this and the next section.
- 4.27 At the outset, it should be noted that, the principles in the Victoria, South Australia and New Zealand all provide that the infringement amount or expiation fee should be lower than the maximum fine. There is no question this should be the case.

23. See, for example, NSW Department of Environment and Climate Change, *Preliminary Submission*, 2.

24. NSW Parliament, Legislation Review Committee (2006) 1 *Legislation Review Digest* 52.

25. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 4 (emphasis added).

- 4.28 Both the Victorian and South Australian law provide that the infringement amount or expiation fee should not exceed a certain percentage (20-25% in Victoria, 25% in South Australia) of the maximum fine.²⁶
- 4.29 By contrast, the New Zealand guidelines simply provide that the “fee should generally be *considerably* less than the statutory maximum available to the court following a successful summary prosecution”.²⁷
- 4.30 A principle that provides that penalty notice amounts should not exceed a certain percentage of the maximum fine may provide government agencies with clarity and consistency with respect to the range within which they can fix the amounts.
- 4.31 Currently in NSW, penalty notice amounts range from less than 1% to 100% of the maximum fine.²⁸ A number of government departments have adopted a policy of fixing penalty notice amounts as a percentage of the maximum fine that a court could impose. For example, taking the advice of Parliamentary Counsel’s Office, the NSW Office of Fair Trading, the NSW Department of Local Government and the NSW Department of the Arts, Sport and Recreation have adopted a policy of setting penalty notice amounts at 10% of the maximum fine.²⁹
- 4.32 However, the informal policy of fixing amounts at 10% of the maximum fine is not always followed. Annexure 4A to this chapter contains a range of offences that illustrate variances in the relationship between the penalty notice amount and the maximum fine a court could impose for that offence. Annexure 4A demonstrates a wide range in the ratio between the penalty notice amount and the maximum fine.
- 4.33 Although penalty notice amounts range from less than 1% to 100% of the maximum fine, more than 90% of the approximately 6,800 penalty notice offences we surveyed are 25% of the maximum fine or less, illustrated by Table 4.2 and Figure 4.2.³⁰ Consequently, a principle that provides that penalty notice amounts should not exceed 25% of the maximum fine would cover 90% of current penalty notice amounts. Table 4.2 shows the distribution of penalty notice amounts in terms of their ratio to the maximum fine, while Figure 4.3 shows this as a graph.

26. Victoria, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) Annexure 4, 14; *Expiation of Offences Act 1996* (SA) s 5(3)(b).

27. New Zealand, Ministry of Justice, *Infringement Guidelines: Introduction* (2008) [27]. Emphasis supplied.

28. See Annexure 4A at the end of this chapter for examples of ratios of penalty notice amounts to the maximum fines. See also Table 4.1 and Figure 4.1.

29. NSW Office of Fair Trading, *Preliminary Submission, 2*; NSW Department of Local Government, *Preliminary Submission*; NSW Department of the Arts, Sport and Recreation, *Preliminary Submission*.

30. The survey is based on the database provided by to the Commission by the SDRO. The database is current as at December 2009.

Figure 4.2 Number of offences in range

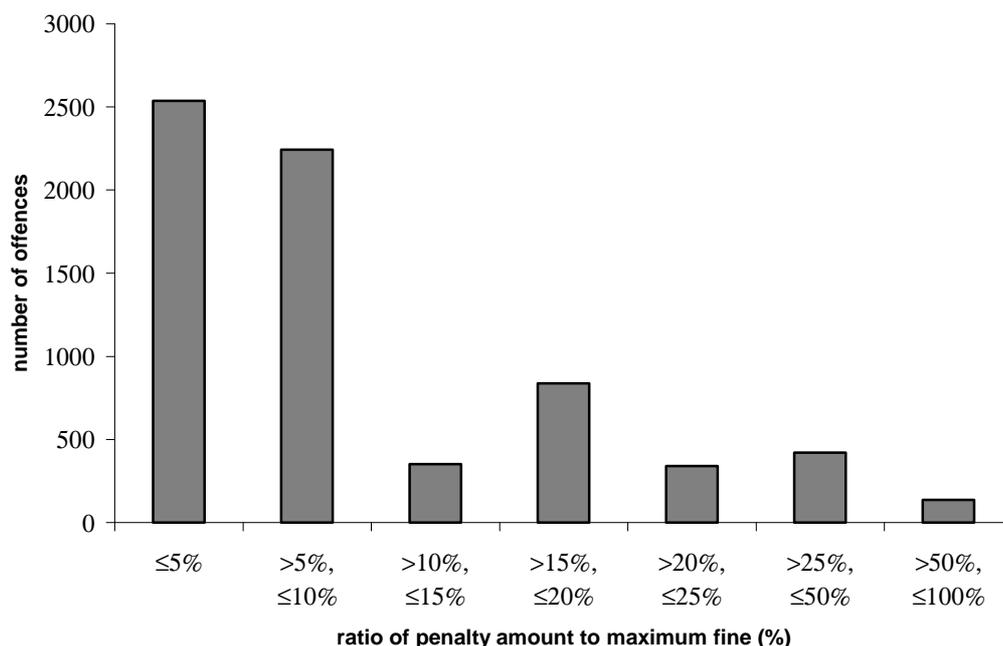


Table 4.2 Offences by ratio of penalty notice amount to maximum fine

Ratio of penalty notice amount to maximum fine (percentage)	Number of offences in range	Percentage of offences in range	Cumulative percentage ≤ range top
≤5%	2536	37%	37%
>5%, ≤10%	2242	33%	70%
>10%, ≤15%	352	5%	75%
>15%, ≤20%	837	12%	87%
>20%, ≤25%	340	5%	93%
>25%, ≤50%	421	6%	98%
>50%, ≤100%	137	2%	100%
Total	6865	100%	

Source: NSW Law Reform Commission

4.34 There are arguments against setting a maximum ratio between penalty notice amounts and maximum fines. In its 2005 review of the infringement system, the New Zealand Law Commission argued that there are problems with applying a set percentage across infringement regimes as this “fails to take account of the varying purposes of the different regimes” as well as the proportion of offending and the level of seriousness of the different infringement notice offences, and the percentage of offences within an offence category that are dealt with by

infringement notice.³¹ On the latter point, the review argued that if, say, 90 per cent of offences within an offence category are dealt with by infringement notice, the infringement fee should be closer to the maximum fine than if only a low percentage of offences within an offence category were dealt with by infringement notice. The review concluded that the approach of setting infringements fees as a percentage of the maximum fine “would produce only a spurious appearance of consistency”.³²

- 4.35 A possible solution to the concerns identified by the New Zealand Law Commission is to allow the fixing of penalty notice amounts beyond the recommended percentage in special cases. The Victorian guidelines, for example, provide that “a proportion of up to 50% can be considered where there are strong and justifiable public interest grounds”.³³ If this approach were to be followed in NSW, the Commission seeks submissions on what should be the grounds for allowing amounts to be set beyond the recommended percentage. Further, we seek submissions on whether, as in Victoria, an upper limit of 50% of the maximum fine should be set?

Question 4.4

- (1) Should there be a principle that a penalty notice amount should not exceed a certain percentage of the maximum fine for the offence? If so, what should be the percentage?
- (2) Should a principle allow the fixing of penalty notice amounts beyond the recommended percentage in special cases? If so, what should the grounds be?
- (3) Should there be an upper percentage limit in those special cases? If so, what should this percentage be?

Lower than the average of fines previously imposed by the courts

- 4.36 In ensuring that a penalty notice amount is set at a discounted rate for those who choose not to go to court, the maximum fine set by the statute is just one of the two factors that may be relevant. The second factor to consider is the fines actually imposed by courts for the same or a similar offence. This is arguably a more accurate means for ensuring that the penalty notice amount is discounted since courts rarely impose the maximum penalty.
- 4.37 Statistics relating to the offence of travelling on a train without a valid ticket³⁴ illustrate that in some cases, the penalty notice amount would not have been a discount since the fine offenders were ordered to pay, in addition to the courts costs, was very close to the penalty notice amount. The maximum fine for this

31. New Zealand Law Commission, *The Infringement System: A Framework for Reform*, Study Paper 16 (2005) (“NZLC Study Paper 16”) [134].

32. NZLC Study Paper 16 [135].

33. Victoria, *Attorney-General’s Guidelines to the Infringements Act 2006* (2006) Annexure A.

34. *Rail Safety (General) Regulation 2003* (NSW) cl 5(1)(b).

offence is \$550 and the penalty notice amount is \$200. Between August 2003 and March 2006, 2,763 people issued with a penalty notice elected to have the matter heard by the court. Forty three per cent received a court order directing that the relevant charge be dismissed under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), and 57% were fined an average amount of \$100, with 80% of fines being between \$50 and \$200.³⁵ In each case, the defendant would also have been ordered to pay court costs of \$78. Thus, those fined would have paid an average fine of \$178, or \$22 less than the penalty notice amount. If courts regularly impose lower penalties than the penalty notice amount, the diversionary goal of penalty notices is undermined and it is arguably unfair.

- 4.38 Information about the fines previously imposed by courts can be obtained from the NSW Judicial Commission's Sentencing Information System ("SIS"), which contains sentencing statistics for offences dealt with in the Supreme, District, Local and Children's Courts.
- 4.39 However, information about previous fines imposed by courts may not always be available. For example, it will not exist for newly-created offences for which there are no comparable offences. Alternatively, the available sample may be too small to have any statistical significance. In such situations, the government agency proposing to fix a penalty notice amount clearly could not demonstrate that the amount is lower than the average fines imposed by courts for the same or similar offences.

Question 4.5

Should there be a principle that a penalty notice amount should be lower than the average of any fines previously imposed by the courts for the same or a similar offence, if such information is available?

Proportionality of amount to the nature and seriousness of the offence

- 4.40 The terms of our reference require us to examine "whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate".
- 4.41 On any reasonable view, penalty notice amounts ought to be determined by reference to the nature of the act constituting the offence, its prevalence, its seriousness in terms of the potential harm it might cause, and the moral culpability of an offender. In some cases, penalty notice amounts do not seem to reflect the seriousness of an offence viewed by reference to these factors. For example, the Legislation Review Committee of Parliament suggested that the penalty notice amounts for certain offences under the *Sydney Olympic Park Regulation 2001*

35. These statistics were provided by the Judicial Commission of NSW and published in Law and Justice Foundation of NSW, *Fine but not Fair: Fines and Disadvantage* (2008) 6.

(NSW) were excessive in the circumstances,³⁶ such as the penalty notice amount of \$200 for operating a motorised model aircraft, boat or car within the park.³⁷

- 4.42 A number of government agencies and non-government organisations have provided some examples of penalty notice amounts that are seemingly disproportionate to the seriousness of the offence.
- 4.43 The NSW Department of Environment and Climate Change stated that seriousness and nature of the offence have been identified as the “primary policy consideration” in fixing the penalty notice amount.³⁸ An application of this principle can be seen in two offences administered by the Department: driving into a park without a valid entry pass attracts a penalty of \$68³⁹ whereas using land as a waste facility without lawful authority attracts a penalty of \$5,000 for corporations.⁴⁰
- 4.44 The NSW Office of Fair Trading has expressed concern that some of the penalty notice amounts in legislation that it administers are not commensurate with the objective seriousness of the offence, not as being excessive, but as being too low to deter the offending behaviour.⁴¹ It argues that there are penalty notice amounts that may not be substantial enough to deter the offending conduct because the profits to be made from the contravention of the legislation outweigh the penalty. It cites the following examples:
- false representation to a seller or buyer of real estate, which attracts a penalty of \$2,200 even though a substantial sales commission may result from the false representation; and
 - unlicensed motor dealing, for which the penalty notice amount is \$5,500 but substantial profits can be made from such a business.⁴²
- 4.45 The Illawarra Legal Centre expressed concern that the penalty notice amounts for railway ticketing offences are not commensurate with the seriousness of the offence,⁴³ with the penalty of \$200 for travelling on a train or being on a platform without a ticket being singled out as especially inappropriate.⁴⁴
- 4.46 The Illawarra Legal Centre’s submission reflects the view expressed in a 2006 report published by the Homeless Persons’ Legal Service, Public Interest Advocacy Centre (“PIAC”) that the penalty notice amount of \$200 for travelling on a train without ticket is disproportionate to the nature of the offence. PIAC also drew

36. NSW Parliament, Legislation Review Committee (2005) 1 *Legislation Review Digest* 68.

37. Now in *Sydney Olympic Park Authority Regulation 2007* (NSW) cl 4(w).

38. NSW Department of Environment and Climate Change, *Preliminary Submission*, 2 (now the Department of Environment, Climate Change and Water).

39. *National Parks and Wildlife Regulation 2002* (NSW) cl 7(1)(c), sch 2.

40. *Protection of the Environment Operations Act 1997* (NSW) s 144(1), *Protection of the Environment Operations (Penalty Notices) Regulation 2004* (NSW) sch 1.

41. NSW Office of Fair Trading, *Preliminary Submission*, 3.

42. NSW Office of Fair Trading, *Preliminary Submission*, 3.

43. Illawarra Legal Centre Inc, *Preliminary Submission*, 5.

44. The amount is reduced to \$50 when the offender is under the age of 18, but the Illawarra legal Centre pointed out that this is still out of proportion given that most young people will have little or no income: Illawarra Legal Centre Inc, *Preliminary Submission*, 5. The increased impact of this offence on young people is dealt with in detail in Chapter 6.

attention to an apparent inequality between the size of the penalties imposed for rail offences with the penalties for road safety. To illustrate this point, PIAC compared the offences set out in Table 4.3 below. It argued that the table “shows some relatively minor public transport offences attract higher [penalty amounts] than offences affecting public safety”.⁴⁵ It recommended a review of the comparative fairness of penalty notice amounts.⁴⁶

Table 4.3 Rail and road safety offences: Penalty notice amounts (Maximum fines)

Rail offences ⁴⁷	Road safety ⁴⁸
Travelling without a valid ticket \$200 (\$550)	Speeding more than 15 km/h but less than 30 km/h \$225 & 3 demerit points (\$2,200)
Smoking under any covered station area or on a train \$300 (\$1,100)	Drive using hand held mobile phone \$225 & 3 demerit points (\$2,200)
Offensive language, offensive behaviour or spitting \$400 (\$1,100)	Not stopping at a red light and driving behind another vehicle too closely to stop safely (tailgating). \$300 & 3 demerit points (\$2,200)

- 4.47 Penalty notice amounts may need to be high in circumstances where the “disincentive effect” of a penalty notice amount may be minimal due to “a potentially significant financial benefit from the illegal behaviour”.⁴⁹ This reflects the general principle that a penalty must exceed the benefits the offender derives from the illegal activity.⁵⁰ Some of the penalty notice amounts relating to water use under the *Water Management Act 2000* (NSW) are arguably at odds with this principle, for example where water obtained illegally is used to irrigate a commercial crop. Typically, the offences under the *Water Management Act 2000* (NSW), such as constructing water bores without a licence,⁵¹ or taking water without an access licence,⁵² attract a penalty notice amount of \$750 for individuals and \$1,500 for corporations.⁵³ However, the maximum fines available if the matter is pursued through the courts are in the order of \$247,500 for individuals and \$1,100,000 for corporations. According to sentencing statistics, there have been no convictions arising from prosecutions under this Act in the courts recorded in recent years.⁵⁴
- 4.48 The issue to be resolved is whether there should be a principle that in setting the penalty notice amount, consideration should be given to the proportionality of the

45. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (Report, 2006) 16.

46. Homeless Persons' Legal Service, Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (Report, 2006) Recommendations 7, 16.

47. *Rail Safety (Offences) Regulation 2008* (NSW) cl 4, 14, 12, sch 1.

48. *Road Rules 2008* (NSW) r 20, 56, 59, 126, 300, 300-1, *Road Transport General Regulation 2005* (NSW) s 170, sch 3.

49. NSW Department of Water and Energy, *Preliminary Submission*, 1.

50. See G Rusche and O Kirchheimer, *Punishment and Social Structure* (Columbia University Press, 1968) 169.

51. *Water Management Act 2000* (NSW) s 346.

52. *Water Management Act 2000* (NSW) s 60A(2).

53. *Water Management (General) Regulation 2004* (NSW) cl 107, sch 6.

54. Judicial Commission of NSW, Judicial Information Research System.

amount to the nature and seriousness of the offence, including the harms sought to be prevented.

Question 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?

Consistency with amounts for comparable offences

- 4.49 The terms of our reference require us to have particular regard to “the consistency of current penalty notice amounts for the same or similar offences”. We have examined the current amounts and discovered numerous instances of inconsistencies, which are set out in the following paragraphs.

Offensive language or behaviour

- 4.50 Currently, penalty notice amounts for offensive language or behaviour range from \$100 to \$400 depending on the location in which the offence is committed. For example, the penalty is \$100 in Parramatta Park Trust land,⁵⁵ whereas, on a public passenger vehicle, such as a bus, or a ferry, the penalty is \$300⁵⁶ and, on any train or railway area, the penalty is \$400.⁵⁷
- 4.51 With respect in particular to parklands, penalty notice amounts vary from \$100 to \$300 depending on the park in which the offence is committed.⁵⁸ In some parks, however, offensive language or behaviour does not constitute a park-specific offence at all.⁵⁹

Offences on trains, buses and ferries

- 4.52 Penalty notice amounts for many offences committed on public transport are not consistent across the different transport services administered by RailCorp, State Transit Authority, Sydney Ferries and other relevant agencies. Table 4.4 compares the penalty notice amounts for the same or similar offences committed on trains and in railway areas on the one hand, and buses and ferries on the other.

55. *Parramatta Park Trust Regulation 2007* (NSW) cl 23(b), 23(c), sch 1.

56. *Passenger Transport Regulation 2007* (NSW) cl 49(a), 49(b), sch 3 pt 2.

57. *Rail Safety (Offences) Regulation 2008* (NSW) s 12(1)(a), 12(1)(b), sch 1 pt 3.

58. See Table 4.4.

59. For example, there is no similar offence for offensive language or behaviour under the *Western Sydney Parklands Regulation 2007* (NSW).

Table 4.4 Offences on public transport: Penalty notice amounts (and maximum fines)

Penalty offence	Trains and railway areas ⁶⁰	Buses and ferries ⁶¹
Failing to hold a ticket	\$200 – adults (\$550) \$50 – under 18 years (\$50)	\$100 (\$550)
Spitting	\$400 (\$1,100)	\$300 (\$1,100)
Littering	\$200 (\$1,100)	\$150 (\$550)
Smoking (in prohibited area)	\$300 (\$550)	\$300 – by passenger (\$550) \$200 – by driver (\$550)
Eating or drinking (in prohibited area)	\$100 (\$550)	\$150 (\$550)
Placing feet up on the seat	\$100 (\$550)	\$300 (\$1,100)

- 4.53 Even if the disparities in penalty notice amounts can be justified by reference to some unidentified special circumstances applicable to each form of transport, they do not seem to give rise to consistent disparities. For example, spitting, littering and fare evasion on trains will result in *higher* penalty notice amounts than such offences committed on buses and ferries, yet eating, drinking and placing feet up on a seat on a train will result in *lower* penalty notice amounts than on buses and ferries. Further, penalty notice amounts for fare evasion on trains differentiate between adults (\$200) and juveniles (\$50), though no distinction is made for the same offence on public passenger vehicles and ferries. Conversely, the offence of smoking on public passenger vehicles and ferries differs for drivers (\$200) and passengers (\$300); yet, the same offence on trains makes no such distinction.

Offences in parks

- 4.54 Penalty notice amounts for a whole range of offences committed in parks differ depending on the park in which the offence is committed. This is illustrated by Table 4.5.

60. *Rail Safety (Offences) Regulation 2008* (NSW) cl 4(1), 57, 12(1)(c), 37(1)(a), 14(1), 15(1), 12(2), sch 1 pt 3.

61. *Passenger Transport Regulation 2007* (NSW) cl 74(1), 49(e), 57(a), 50, 36(1)(a), 215, 36(10)(b), 51(1), 51(2)(b), 49(d), sch 3 pt 2.

Table 4.5 Offences in Parks: Penalty notice amounts (and maximum fines)

Penalty Offence	National Parks ⁶²	Parramatta Park ⁶³	Centennial Park/Moore Park ⁶⁴	Western Sydney Parkland ⁶⁵	Sydney Olympic Park ⁶⁶	Royal Botanic Gardens ⁶⁷
Offensive language or behaviour	\$300 (\$3,300)	\$100 (\$1,100)	\$130 (\$1,100)	N/A	\$150 (\$2,200)	\$175 (\$1,100)
Littering	\$300 (\$3,300)	\$200 (\$1,100)	\$195 (\$1,100)	\$150 (\$1,100)	\$200 (\$2,200)	\$220 (\$1,100)
Damage vegetation	\$300 (\$3,300)	\$150 (\$1,100)	\$500 (\$1,100)	N/A	\$200 (\$2,200)	\$500 (\$1,100)
Light fire	\$300 (\$3,300)	\$75 (\$1,100)	\$330 (\$1,100)	\$150 (\$1,100)	\$200 (\$2,200)	\$330 (\$1,100)
Bathe in lake or pond	N/A	\$75 (\$1,100)	\$95 (\$1,100)	N/A	\$200 (\$2,200)	\$85 (\$1,100)
Unauthorised selling	\$500 (\$3,300)	\$300 (\$1,100)	\$395 (\$1,100)	\$150 (\$1,100)	\$200 (\$2,200)	\$350 (\$1,100)
Camp/reside	\$300 (\$3,300)	\$150 (\$1,100)	\$195 (\$1,100)	\$150 (\$1,100)	\$200 (\$2,200)	\$175 (\$1,100)

- 4.55 Sometimes disparities have been justified by special considerations relating to a particular location or activity. For example, the relatively harsh penalty for removing plants from Centennial Park⁶⁸ compared with similar conduct in other parklands⁶⁹ has been justified by reference to the special heritage aspects of Centennial Park.⁷⁰
- 4.56 It should be noted, however, that, whereas in other parks the penalty notice amount tends to vary depending on the offence committed, penalty notice amounts for all offences in Sydney Olympic Park appear to be fixed at either \$200 or \$150. As such, a minor offence, such as bathing in a lake or pond, which has relatively lower

62. *National Parks and Wildlife Regulation 2009* (NSW) cl 13(1), 11(1)(a)-(c), 18(1), 15(1)(a), 21, 10, sch 2.

63. *Parramatta Park Trust Regulation 2007* (NSW) cl 23(b), 16(1), 15(b), 15(k), 17(d), 10(1)(a)-(e), 12(1), sch 1.

64. *Centennial Park and Moore Park Trust Regulation 2009* (NSW) cl 26, 17, 16(b), 16, 18(b), 13(1)(a)-(c), 4(1)(g), 15(1), sch 1.

65. *Western Sydney Parklands Regulation 2007* (NSW) cl 4(1)(f), 4(1)(b), 4(1)(a), sch 1.

66. *Sydney Olympic Park Authority Regulation 2007* (NSW) cl 13(1), 4(h), 4(f), 4(t), 4(s), 4(a)-(c), 4(o), 10(k), sch 1.

67. *Royal Botanic Gardens and Domain Trust Regulation 2008* (NSW) cl 15, 8(1), 9(1)(b), 10(i), 11(a)-(e), 7(1), sch 1.

68. Under the *Centennial Park and Moore Park Trust Regulation 2004* (NSW).

69. \$500 under the *Centennial Park and Moore Park Trust Regulation 2004* (NSW) s 16(b), compared with \$150 under *Parramatta Park Trust Regulation 2007* (NSW) cl 15(b), \$110 under *Sydney Cricket Ground and Sydney Football Stadium By-law 2004* (NSW) cl 12(1)(g) and \$200 under *Sydney Olympic Park Authority Regulation 2007* (NSW) cl 4(f).

70. NSW Parliament, Legislation Review Committee (2006) 1 *Legislation Review Digest* 50.

penalty notice amounts (\$75-\$95) in the other parklands, is simply assigned the fixed \$200 penalty in Sydney Olympic Park, which then can appear unreasonably excessive. A consistent approach to determining penalty notice amounts for offences within and between parklands may need to be developed.

Inconsistencies between industries

- 4.57 Inconsistencies between penalty notice amounts in various industry statutes for similar offences may be justified by differing circumstances, imperatives and objectives. However, the following examples and tables compare industry statutes for similar offences that share similar objectives yet give rise to different penalty notice amounts.

Industry statutes dealing with threatening, intimidating or assaulting enforcement officers or inspectors

- 4.58 Penalty notice amounts for offences of threatening, intimidating or assaulting authorised industry officers or inspectors vary depending on which industry statute administers the offence regime. Penalty notice amounts range from \$200 to \$2,200 as shown in Table 4.6.

Table 4.6 Offences against authorised officers: Penalty notice amounts (and maximum fines)

Fisheries Management Act ⁷¹	Forestry Act ⁷²	Explosives Act ⁷³	Rural Lands Protection Act ⁷⁴	Food Act ⁷⁵	Tow Truck Industry Act ⁷⁶
\$200 (\$22,000)	\$500 (\$5,500)	\$800 (\$82,500 corp; \$24,750 indiv)	\$1,000 (\$5,500)	\$1,320 (\$55,000)	\$2,200 (\$11,000)

Industry statutes to curtail corruption

- 4.59 Table 4.7 compares similar offences under the *Tow Truck Industry Act 1998* (NSW) and the *Security Industry Act 1997* (NSW) that aim to stamp out corruption, fraud and unscrupulous operators from these particular industries.

71. *Fisheries Management Act 1994* (NSW) s 247(2), *Fisheries Management (General) Regulation 2002* (NSW) sch 5.

72. *Forestry Act 1916* (NSW) s 44(1)(a), *Forestry Regulation 2009* (NSW) sch 3.

73. *Explosives Act 2003* (NSW) s 28(b), *Explosives Regulation 2005* (NSW) sch 2.

74. *Rural Lands Protection Act 1998* (NSW) s 198(1)(b), *Rural Lands Protection (General) Regulation 2001* (NSW) sch 6 pt 6.

75. *Food Act 2003* (NSW) s 43(3), *Food Regulation 2004* (NSW) sch 1.

76. *Tow Truck Industry Act 1998* (NSW) s 64(1), *Tow Truck Industry Regulation 2008* (NSW) sch 1.

Table 4.7 Tow truck and security industry offences: Penalty notice amounts (and maximum fines)

Penalty Offence	Tow Truck Industry Act ⁷⁷	Security Industry Act ⁷⁸
Advertise unlicensed business	\$1,100 (\$5,500)	\$2,200 (corp) (\$22,000) \$1,100 (indiv) (\$11,000)
Carry on business without licence	\$2,200 (\$11,000)	\$5,500 (\$55,000)
Suggest licence permits unauthorised functions	\$1,100 (\$5,500)	\$550 (\$5,500)

Industry statutes to prevent improper commercial practice

4.60 Table 4.8 compares similar offences under the *Conveyancing Licensing Act 2003* (NSW), the *Property, Stock and Business Agents Act 2002* (NSW), the *Valuers Act 2003* (NSW) and the *Gaming Machines Act 2001* (NSW) that aim to prevent improper commercial or financial practices in the course of carrying on an occupation within the relevant industry.

Table 4.8 Commercial offences: Penalty notice amounts (and maximum fines)

Penalty Offence	Conveyancing Licensing Act ⁷⁹	Property, Stock and Business Agents Act ⁸⁰	Valuers Act ⁸¹	Gaming Machines Act ⁸²
Failure to disclose interest	\$2,200 (corp) (\$22,000) \$1,100 (indiv) (\$11,000)	\$1,100 (\$11,000)	N/A	N/A
Unlawfully disclose information	\$220 (\$2,200)	\$550 (\$2,200)	\$550 (\$2,200)	\$500-\$1,100 (\$5,500-\$11,000)
Carry on business without licence or registration	\$1,100 (\$11,000)	\$1,100 (\$11,000)	\$1,100 (\$11,000)	\$1,100 (\$11,000)

77. *Tow Truck Industry Act 1998* (NSW) s 71(1), 15, 74(a), *Tow Truck Industry Regulation 2008* (NSW) sch 1.

78. *Security Industry Act 1997* (NSW) s 32(1), 7(2), 34, *Security Industry Regulation 2007* (NSW) sch 2.

79. *Conveyancers Licensing Act 2003* (NSW) s 36(1), 161(1), 6(1), *Conveyancers Licensing Regulation 2006* (NSW) sch 4.

80. *Property, Stock and Business Agents Act 2002* (NSW) s 50(2), 219(1), 8(1), *Property, Stock and Business Agents Regulation 2003* (NSW) sch 15.

81. *Valuers Act 2003* (NSW) s 38(1), 6(1), *Valuers Regulation 2005* (NSW) sch 3.

82. *Gaming Machines Act 2001* (NSW) s 139(1)(a)-(b), 139(2), 84(1), 85(1), *Gaming Machines Regulation 2002* (NSW) sch 3.

Industry statutes to increase public safety

- 4.61 Table 4.9 compares similar offences under the *Explosives Act 2003* (NSW), the *Food Act 2003* (NSW) and the *Pesticides Act 1999* (NSW) that aim to regulate and increase public safety.

Table 4.9 Industry regulation offences: Penalty notice amounts (and maximum fines)

Offence Type	Explosives Act ⁸³	Food Act ⁸⁴	Pesticides Act ⁸⁵
Contravene licence conditions	\$1,000 (\$55,000)	\$660 (corp) (\$275,000) \$330 (indiv) (\$55,000)	\$800 (corp) (\$120,000) \$400 (indiv) (\$60,000)
Handle thing in such way as to cause danger	\$2,000 (corp) (\$55,000) \$1,000 (indiv) (\$27,500)	\$1,320 (corp) (\$275,000) \$660 (indiv) (\$55,000)	\$800 (corp) (\$120,000) \$400 (indiv) (\$60,000)
Offences relating to false and misleading conduct	\$1,000 (\$5,500)	\$1,320 (corp) (\$275,000) \$660 (indiv) (\$55,000)	\$800 (corp) (\$60,000) \$400 (indiv) (\$60,000)

Industry statutes involving licensing schemes

- 4.62 Table 4.10 compares similar offences under the *Passenger Transport Regulation 2007* (NSW), the *Veterinary Practice Act 2003* (NSW), the *Motor Dealers Act 1974* (NSW), the *Motor Vehicle Repairs Act 1980* (NSW) and the *Home Building Act 1989* (NSW) that aim to implement and regulate licensing schemes and standards in each industry.

Table 4.10 Licensing offences: Penalty notice amounts (and maximum fines)

Penalty Offence	Passenger Transport Act ⁸⁶	Veterinary Practice Act ⁸⁷	Motor Dealers Act ⁸⁸	Motor Vehicle Repairs Act ⁸⁹	Home Building Act ⁹⁰
Operate without licence or registration	\$1,000 (\$110,000)	\$500 (\$5,500)	\$5,500 (\$110,000)	\$5,500 (\$110,000)	\$500 (corp) (\$110,000) \$500 (other) (\$22,000)
Misrepresent self as having licence	N/A	\$500 (\$5,500)	\$5,500 (\$110,000)	\$5,500 (\$110,000)	N/A
Fail to return licence or authority	\$500 (\$2,750)	N/A	N/A	\$330 (\$2,200)	\$500 (corp) (\$1,100) \$250 (indiv) (\$1,100)

83. *Explosives Act 2003* (NSW) s 15, 8(1), 18(2), *Explosives Regulation 2005* (NSW) sch 2.

84. *Food Act 2003* (NSW) s 104(3), 16(1), 18, 42, *Food Regulation 2004* (NSW) sch 1.

85. *Pesticides Act 1999* (NSW) s 59, 10(1), 11(1), 61(2), *Pesticides Regulation 2009* (NSW) sch 2.

86. *Passenger Transport Act 1990* (NSW) s 30(1), 37(1), s 53B(1)-(2), *Passenger Transport Regulation 2007* (NSW) sch 3 pt 1.

87. *Veterinary Practice Act 2003* (NSW) s 9(1), s 12, s13(1), s 14(1), *Veterinary Practice Regulation 2006* (NSW) sch 3.

88. *Motor Dealers Act 1974* (NSW) s 9(1)(a), (2)(a), (3)(a), (4)(a), (5)(a), (6)(a), (7)(a), *Motor Dealers Regulation 2004* (NSW) sch 2.

89. *Motor Vehicle Repairs Act 1980* (NSW) s 15(1)(a), s 15(1)(a), s 44(7), *Motor Vehicle Repairs Regulation 1999* (NSW) sch 1.

90. *Home Building Act 1989* (NSW) s 12(a), *Home Building Regulation 2004* (NSW) cl 41, sch 6.

- 4.63 The numerous examples of apparent inconsistencies in penalty notice amounts for comparable offences give rise to the question of whether in setting a penalty notice amount, consideration should be given to whether the proposed amount is consistent with the amounts for other comparable penalty notice offences.

Question 4.7

Should there be a principle that in setting a penalty notice amount, consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences?

Higher amounts for corporations

- 4.64 Many penalty notice provisions now set separate, higher penalty notice amounts for corporations than for individuals. In some cases, these follow the lead set in relation to the maximum fine that is available for an offence where a separate amount is specified for corporate offenders. For example, a number of offences under the *Security Industry Act 1997* (NSW) attract maximum fines of \$11,000 for individuals and \$22,000 for corporations,⁹¹ and penalty notice amounts of \$1,100 for individuals and \$2,200 for corporations.⁹²
- 4.65 However, in other cases, the penalty notice provisions set higher rates for corporate offenders even though no such distinction is made in relation to the maximum fine available. For example, a range of offences under the *Stock (Chemical Residues) Act 1975* (NSW) attract a maximum fine of \$11,000⁹³ while the penalty notice provisions stipulate amounts of \$550 for individuals and \$1,100 for corporations.⁹⁴
- 4.66 In further cases, higher maximum fines are set for corporations than for individuals, yet the penalty notice provisions do not distinguish between corporations and individuals. For example, provisions of the *Fisheries Management Act 1994* (NSW) establish maximum fines of \$22,000 for individuals and \$55,000 for corporations,⁹⁵ yet these offences attract penalty notice amounts of \$300 for both individuals and corporations.⁹⁶
- 4.67 It has been suggested that higher penalty notice amounts for corporations can be justified on the grounds that a corporation is more likely to have committed the offence “in the course of commercial operations, which makes the conduct objectively more serious”.⁹⁷ It has also been suggested that a corporation is “also likely to have greater financial capacity than an individual”.⁹⁸

91. *Security Industry Act 1997* (NSW) s 29A(2), 39(1).

92. *Security Industry Regulation 2007* (NSW) sch 2.

93. *Stock (Chemical Residues) Act 1975* (NSW) s 12C, 12D.

94. *Stock (Chemical Residues) Regulation 2005* (NSW) sch 1.

95. *Fisheries Management Act 1994* (NSW) s 122(4), 122A(3).

96. *Fisheries Management (General) Regulation 2002* (NSW) sch 5.

97. NSW Department of Environment and Climate Change, *Preliminary Submission*, 2.

98. NSW Department of Environment and Climate Change, *Preliminary Submission*, 2.

Question 4.8

Should there be a principle that for offences that can be committed by both natural and corporate persons, higher penalty notice amounts should apply to corporations? If so, what should be the guidelines for setting such amounts?

Other principles

- 4.68 The Commission seeks submissions on whether there are principles other than those discussed in this chapter that should be adopted in for the purpose of setting penalty notice amounts.

Question 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?

Annexure 4A: Examples of ratio of the penalty notice amount in relation to the maximum fine

Offence	Penalty amount	Maximum fine	Penalty amount as percentage of fine	Law
Piloting an aircraft to apply pesticides without a licence	\$400	\$60,000	0.6%	<i>Pesticides Act 1999</i> (NSW) s 59, <i>Pesticides Regulation 2009</i> (NSW) sch 2
Carrying on a taxi-cab service without license or accreditation	\$1,000	\$110,000	0.9%	<i>Passenger Transport Act 1990</i> (NSW) s 30(1)(a)-(b), 37(1)(a)-(b), <i>Passenger Transport Regulation 2007</i> sch 3 pt 1
Providing false or misleading information in carrying out a food business	\$660	\$55,000	1.2%	<i>Food Act 2003</i> (NSW) s 18, 42, <i>Food Regulation 2004</i> (NSW) sch 1
Performing residential or specialist work without contractor license	\$500	\$22,000	2%	<i>Home Building Act 1989</i> (NSW) s 12(a), <i>Home Building Regulation 2004</i> (NSW) sch 6
Assaulting, threatening or intimidating forestry officer discharge of duties	\$500	\$5,500	2.2%	<i>Forestry Act 1916</i> (NSW) s 44(1)(a), <i>Forestry Regulation 2009</i> (NSW) sch 3
Threatening, intimidating or assaulting an officer acting pursuant to the <i>Food Act</i>	\$1,320	\$55,000	2.4%	<i>Food Act 2003</i> (NSW) s 43(3), <i>Food Regulation 2004</i> (NSW) sch 1
Intimidating, attempting to intimidate or threatening an inspector of explosives	\$800	\$24,750	3%	<i>Explosives Act 2003</i> (NSW) s 28(b), <i>Explosives Regulation 2005</i> (NSW) sch 2

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Offence	Penalty amount	Maximum fine	Penalty amount as percentage of fine	Law
Negligently handling explosives	\$1,000	\$27,500	3.6%	<i>Explosives Act 2003 (NSW) s 8, Explosives Regulation 2005 (NSW) sch 2</i>
Eating or drinking on public transport vehicles	150	\$550	3.7%	<i>Passenger Transport Regulation 2007 (NSW) cl 36(1)(b), sch 3 pt 2</i>
Hotelier or registered club allowing a person under 18 to operate gaming machine	\$220	\$5,500	4%	<i>Gaming Machines Act 2001 (NSW) s 51, Gaming Machines Regulation 2002 (NSW) sch 3</i>
Assaulting, abusing or threatening fisheries officer or encouraging another to do so	\$200	\$22,000	4.4%	<i>Fisheries Management Act 1994 (NSW) s 247(2), Fisheries Management (General) Regulation 2002 (NSW) sch 5</i>
Selling of spray paint to a person under 18	\$550	\$1,100	5%	<i>Graffiti Control Act 2008 (NSW) s 7, Graffiti Control Regulation 2009 (NSW) cl 11</i>
Selling or supplying of explosives to a person under 18	\$1,000	\$5,500	5.5%	<i>Explosives Act 2003 (NSW) s 9, Explosives Regulation 2005 (NSW) sch 2</i>
Lighting fire on Parramatta Trust land	\$75	\$1,000	7.5%	<i>Parramatta Park Trust Regulation 2007 (NSW) cl 15(k), sch 1</i>
Falsely representing oneself as a holder of veterinary qualification	\$500	\$5,500	9%	<i>Veterinary Practice Act 2003 (NSW) s 12, Veterinary Practice Regulation 2006 (NSW) sch 3</i>
Selling or supplying of liquor to a minor	\$1,100	\$11,000	10%	<i>Liquor Act 2007 (NSW) s 117, Liquor Regulation 2008 (NSW) sch 2</i>
Camping or using facilities for sleeping overnight at Sydney Olympic park trust land	\$200	\$2,200	11%	<i>Sydney Olympic Park Authority Regulation 2007 (NSW) cl 4(o), sch 1</i>
Carry on business of a tow truck operator without licence	\$2,200	\$11,000	20%	<i>Tow Truck Industry Act 1998 (NSW) s 15, Tow Truck Industry Regulation 2008 (NSW) sch 1</i>
Placing feet up on seat on a passenger vehicle	\$300	\$1,100	33%	<i>Passenger Transport Regulation 2007 (NSW) cl 49(d), sch 3 pt 2</i>
Travelling on a public passenger vehicle without a valid ticket	\$200	\$550	36%	<i>Passenger Transport Regulation 2007 (NSW) cl 74(1), sch 3 pt 2</i>
Removing, uprooting or damaging vegetation on Centennial Parklands or Royal Botanic Parklands	\$500	\$1,100	45%	<i>Centennial Park and Moore Park Trust Regulation 2004 (NSW) s 16(b), sch 1; Royal Botanic Gardens and Domain Trust Regulation 2008 (NSW) cl 9(1)(b), sch 1</i>
Possessing or consuming alcohol by a minor in a public place	\$20	\$20	100%	<i>Summary Offences Act 1988 (NSW) s 11, 29</i>

5. Issuing and enforcing penalty notices – practice and procedure

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Introduction

- 5.1 This chapter sets out the procedures governing issue and enforcement of penalty notices. It canvasses recent reforms to these procedures introduced by the *Fines Further Amendment Act 2008* (NSW), arising from a recent Sentencing Council report,¹ and highlights some remaining potential gaps.
- 5.2 These recent reforms include the *Fines Further Amendment Act 2008* (NSW) which introduced new provisions to:

1. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices*, Interim Report (2006).

- provide a statutory basis for issuing cautions in place of penalty notices where appropriate;
 - create guidelines, issued by the Attorney General, to judge when a caution, as opposed to a penalty notice, should be given;
 - require enforcement agencies to establish internal review processes, to allow for the withdrawal of penalty notices where it is considered appropriate; and
 - initiate measures designed to allow disadvantaged persons to mitigate their fines by undertaking approved work, development courses or training.
- 5.3 Although we are not specifically required by the Terms of Reference to consider procedures for the issue and enforcement of penalty notices in general, we do so for completeness and as background to our consideration of the impact of the penalty notice regime on young people and on the vulnerable, which the terms of reference do specifically require us to consider. This chapter raises a range of issues to do with procedures and process in general. Chapters 6 and 7 look at some of these issues again from the perspective of children and vulnerable groups.

Issuing penalty notices

- 5.4 Part 3 of the *Fines Act 1996* (NSW) (“Fines Act”) sets out the process for issuing and dealing with penalty notices. The Act provides that a penalty notice is to be issued in accordance with the statute under which the offence is created,² by a person who is authorised to issue the notice.³
- 5.5 An authorised person, or “appropriate officer”, includes: a person authorised by the parent statute to issue that kind of penalty notice; an authorised employee of the Office of State Revenue; and a person authorised under the regulations to issue that kind of penalty notice or all penalty notices.⁴ They may include State government employees, such as police officers and transit officers, local government employees, such as council parking rangers, and other non-government officers, such as employees of universities.

When to issue a penalty notice

Allegation of breach

- 5.6 A penalty notice cannot be issued unless there is an allegation that a person has committed an offence under a law for which a penalty notice can be given. The circumstances in which a penalty notice may be issued in respect of a specific offence are dictated by the terms of the statutory provision under which the offence is created. The *Occupational Health and Safety Act 2000* (NSW), for example, provides that an authorised officer may issue a penalty notice to a person where the officer *believes* that person has committed an offence under the Act or the

2. *Fines Act 1996* (NSW) s 21.

3. *Fines Act 1996* (NSW) s 22.

4. *Fines Act 1996* (NSW) s 22(2).

regulations.⁵ Some policies developed by enforcement agencies require that the issuing officer be certain that there is sufficient evidence to prove the commission of the offence by the alleged offender such that the matter can be successfully prosecuted if the person chooses to contest the penalty notice in a court.⁶

Concerns about the issue of penalty notices

Inconsequential offences

- 5.7 Some agencies have a policy not to impose penalty notices for “minor” or “inconsequential” offences especially where the penalty amount could be considered excessive.⁷ For example, the Sydney Olympic Park Authority advises its rangers to be:

mindful that they are not to issue penalty notices for minor offences and to always request nuisance offenders to cease their activities in the first instance for the benefit of other Sydney Olympic Park users.⁸

- 5.8 However, the Shopfront Youth Legal Centre has observed, with respect to the offence of offensive language on the railways:

It is of particular concern that fines are often issued in cases of very low-level offensiveness, or where the language would not even meet the legal definition of “offensive” (for example, we have had clients issued with penalty notices for telling a transit officer “look, I have got a fucking ticket” or for jokingly saying to a friend “fuck off”).⁹

- 5.9 The Illawarra Legal Centre has also highlighted the failure of some rail transit officers to give appropriate consideration to the context of the alleged offence. For example, friends accompanying travellers onto a railway platform late at night to ensure they board safely have been fined for being on a platform without a ticket; and students awaiting the issue of a concession pass have been fined for travelling without concession cards despite having documentation from the college to support their claim.¹⁰

Transparency

- 5.10 The Intellectual Disability Rights Service has submitted that:

There is a lack of transparency and accountability in the issuing of penalty notices as the issuing official generally does not have to justify to a court why the penalty notice was issued, they do not have to provide a detailed outline of the facts (as is contained in a police Facts Sheet) and there are limited options for review of this decision. IDRS strongly recommends that the NSWLRC give

5. *Occupational Health and Safety Act 2000* (NSW) s 108(1).

6. See, for example, NSW Food Authority, *Compliance and Enforcement Policy* (October 2006), 10; NSW Office of Fair Trading, *Penalty Notice Manual* (2007) 8.

7. NSW Parliament, Legislation Review Committee (2005) 1 *Legislation Review Digest* 69 in relation to offences under the *Sydney Olympic Park Amendment Regulation 2004* (NSW).

8. NSW Parliament, Legislation Review Committee (2005) 1 *Legislation Review Digest* 69.

9. Shopfront Youth Legal Centre, *Preliminary Submission*, 3.

10. Illawarra Legal Centre, *Preliminary Submission*, 7.

consideration to officials issuing penalty notices being required to provide to those receiving a notice a detailed account of the facts surrounding the penalty.¹¹

Previous Commission views

- 5.11 These issues, among others, were noted by the Commission when we considered an expansion of the infringements scheme in our 1996 report on sentencing.¹² Recognising the benefits of an expanded infringement notice scheme, both to the individual in terms of avoiding the trauma and stigma of a court conviction and appearance, and to the State in terms of administrative efficiency and cost effectiveness, the Commission recommended that, before the scheme was expanded any further, a comprehensive legislative framework should be adopted to govern both the issue and enforcement of infringement notices. We recommended that safeguards be put in place to minimise the risk of abuse of the system, including:
- a discretion not to issue an infringement notice, and the development of guidelines which set out the criteria against which this discretion is to be exercised; and
 - proper monitoring of agencies responsible for the issue of infringement notices to guard against abuse and to ensure that infringement notices are not imposed on people who would not ordinarily be punished.¹³
- 5.12 The Commission recommended that the power to issue infringement notices (and the procedures for enforcing them) should be regulated by uniform legislation. It suggested that this could be accomplished either by the adoption of a single Infringements Act; or by amending the Fines Act to prohibit the issue of penalty notices other than in accordance with its provisions. Chapter 1 canvasses the proposal for a dedicated Infringements Act.¹⁴
- 5.13 Similarly, the Sentencing Council found that the failure of the Fines Act to provide adequate guidance on when it is appropriate to issue a penalty notice contributed to concerns about the infringements scheme.¹⁵
- 5.14 The ALRC has also supported having a range of options for regulators, including:
- commencing a prosecution;
 - issuing an infringement notice;
 - issuing a formal caution;
 - giving an informal warning; and
 - taking no action.¹⁶

11. Intellectual Disability Rights Service, *Preliminary Submission*, 11.

12. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) ("NSWLRC Report 79") [3.51].

13. NSWLRC Report 79 [3.51].

14. See 1.44-1.49.

15. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.123]-[3.124].

Official cautions

- 5.15 One of the major problems with the increasing use of penalty notices, particularly as a result of the use of modern technology to detect alleged contraventions of the law, is the possibility of “net-widening”, that is, the issue of an infringement notice in circumstances that would otherwise have been dealt with by a caution.¹⁷
- 5.16 While there is a statutory basis for some powers to issue cautions, such as the powers of inspectors under the *Food Act 2003* (NSW), there was no statutory basis for the issue of cautions in other cases, until recently.
- 5.17 Some agencies have been issuing cautions as part of their internal policies and had guidelines governing their use. For example, the National Parks and Wildlife Service (“NPWS”) issues cautions advising recipients of the offence they are alleged to have committed, and warning them that “should they offend again against any provision of the Act or its regulations, any court before which they are prosecuted will be advised of the caution, which may affect any level of penalty the court imposes”. The NPWS guidelines advise that “cautions should be issued where the public interest factors against prosecution outweigh those in its favour and where the circumstances of the matter indicate that an infringement notice is not appropriate”.¹⁸
- 5.18 However, the *Fines Further Amendment Act 2008* (NSW) added new provisions to the Fines Act,¹⁹ which empower those who are authorised to issue penalty notices to serve an “official caution” instead of a penalty notice “if it is appropriate to give an official caution in the circumstances”.²⁰ These provisions give all issuing officers discretion to proceed either by way of caution or by penalty notice, depending on the circumstances. The exercise of this discretion is directed by guidelines formulated by the Attorney General.
- 5.19 In summary, the guidelines provide that:
- the matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:
- (a) The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have significant impact on other members of the public;
 - (b) The person is homeless;
 - (c) The person has a mental illness or intellectual disability;
 - (d) The person is a child (under 18);

16. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2003) (“ALRC Report 95”) [12.69].

17. See Chapter 1 at para 1.32-1.33 for a fuller explanation of “net-widening”.

18. NSW National Parks and Wildlife Service, *Prosecution Policy*, 7. See also NSW Office of Fair Trading, *Penalty Notice Manual* (2007) [7.1].

19. *Fines Act 1996* (NSW) s 19A, 19B, inserted by *Fines Further Amendment Act 2008* (NSW) sch 1[8]. These provisions and the Attorney General’s *Caution Guidelines Under the Fines Act 1996* commenced on 31 March 2010.

20. *Fines Act 1996* (NSW) s 19A(1).

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- (e) The person has a special infirmity or is in very poor physical health;
- (f) The offending behaviour is at the lower end of the seriousness scale for that offence;
- (g) The person did not knowingly or deliberately commit the offence;
- (h) The person is cooperative and complies with a request to stop the offending conduct;
- (i) It is otherwise reasonable, in all the circumstances of the case, to give the person a caution.²¹

5.20 In issuing an official caution, the appropriate officer (other than a police officer) must have regard to guidelines issued by the Attorney General, or by the relevant agency provided these are consistent with the Attorney General's guidelines.²² The Attorney General has approved the guidelines above, which were developed by a working party spearheaded by the Department of Justice and Attorney General. These guidelines commenced on 31 March 2010.

5.21 The Fines Act preserves the right of the appropriate officer or the issuing agency to issue a penalty notice in relation to the offence or commence proceedings against the person to whom the caution was given.²³

5.22 The provisions are widely supported by community advocacy groups, particularly those representing the interests of young people and the vulnerable for whom a zero tolerance approach has a particularly disproportionate impact.²⁴

5.23 The provisions appear to have been modelled on those contained in the Victorian legislation.²⁵ Although it is not statutorily required, an issuing officer in Victoria may be instructed under relevant agency policies or guidelines to consider whether a person falls within the definition of "special circumstances" when deciding whether to issue a caution or an infringement notice. The *Infringements Act 2006* (Vic) defines "special circumstances" as follows:

special circumstances, in relation to a person means—

- (a) a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable—
 - (i) to understand that conduct constitutes an offence; or
 - (ii) to control conduct that constitutes an offence; or
- (b) a serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the *Drugs, Poisons and Controlled Substances Act 1981* where the serious addiction results in the person being unable—

21. Attorney General's *Caution Guidelines Under the Fines Act 1996* Essential Summary.

22. *Fines Act 1996* (NSW) s 19A(2).

23. *Fines Act 1996* (NSW) s 19B.

24. Illawarra Legal Centre, *Preliminary Submission*, 7; Shopfront Youth Legal Centre, *Preliminary Submission*, 2; Intellectual Disability Rights Service, *Preliminary Submission*, 10.

25. *Infringements Act 2006* (Vic) pt 3.

- (i) to understand that conduct constitutes an offence; or
- (ii) to control conduct which constitutes an offence; or
- (c) homelessness determined in accordance with the prescribed criteria (if any) where the homelessness results in the person being unable to control conduct which constitutes an offence.²⁶

5.24 Whether “special circumstances” is a factor to be considered in the exercise of discretion at the issuing stage is up to each individual enforcement agency, and will depend on agency circumstances, the type of offence and the level of training possessed by the issuing officers of the particular agency.²⁷

Question 5.1

Taking into account the recent reforms, is there sufficient guidance on:

- (1) when to issue penalty notices; and
- (2) the alternatives available?

Penalty notices issued by government contractors

- 5.25 There are some government agencies that are authorised to engage the services of private organisations for purposes of enforcing the laws for which they are responsible, and such services may include the issuance of penalty notices.
- 5.26 The engagement of private organisations for purposes of policing public security is not unusual. A government agency that requires more personnel to enforce the laws it administers may find it cost-effective to outsource this service rather than create new positions within its structure.²⁸
- 5.27 One example is the provision in the *Sydney Harbour Foreshore Authority Act 1998* (NSW) allowing private contractors to act as rangers, which includes the power to issue penalty notices for offences under the Act and its regulations. These offences include, for example, conducting commercial activities (such as weddings or busking) within properties administered by the Authority without its permission. The law provides that these private contractors are subject to the control and direction of the Chief Executive Officer of the Authority while they are exercising the functions of a ranger.²⁹

26. *Infringements Act 2006* (Vic) s 3. Homelessness is defined in the *Infringement (General) Regulations 2006* (Vic) r 7.

27. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 7-8.

28. R Verspaandonk, *Outsourcing For and Against* (Australia, Department of Parliamentary Library, Current Issues Brief 18, 2001) 5-6.

29. See, for example, *Sydney Harbour Foreshore Authority Act 1998* (NSW) s 32(1A).

Question 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?

Multiple penalty notices

- 5.28 The Shopfront Youth Legal Centre has expressed concern about officers issuing more than one penalty notice in relation to one incident.³⁰ For example, a person who is fined for driving an unregistered vehicle (\$486) will usually also be fined a commensurate amount for driving an uninsured vehicle. It has also been suggested that it is common for young people using trains to be issued with up to three infringement notices at a time,³¹ for example, failure to produce evidence of concession entitlement,³² failure to comply with requirement of authorised officer,³³ and offensive language on railway land.³⁴ This can potentially expose the alleged offender to a total penalty for the one incident of \$800. Another example is where the owner of more than one (not dangerous) dog is penalised by a council ranger for having a dog unrestrained by a leash in a public place.³⁵ Rather than the owner receiving one penalty notice with a value of \$220,³⁶ a penalty notice is issued in respect of each dog, penalising the owner with an amount of perhaps \$440 or \$660 (possibly more) in respect of the one incident, or on the one occasion of the owner's offending behaviour.
- 5.29 Penalty notice amounts are determined on the basis that the offender commits a single offence, with the amount reflecting, among other things, the seriousness of that offence.³⁷ However, an offender may receive multiple penalty notices (for different offences) on the one occasion. Where this occurs, the aggregate penalty amount can be out of proportion with the seriousness of offending behaviour.³⁸
- 5.30 Again, some agencies have developed policies dealing with the appropriateness of issuing multiple penalty notices in relation to the same incident. The Office of Fair Trading has stipulated in its Penalty Guidelines that no more than 15 penalty

30. Shopfront Youth Legal Centre, *Preliminary Submission*, 4.

31. Shopfront Youth Legal Centre, *Preliminary Submission*, 4.

32. *Rail Safety (Offences) Regulation 2008* (NSW) cl 8(3): penalty notice amount - \$200 or \$50 for juveniles.

33. For example, requirement to show ticket for inspection on request of an issuing officer: *Rail Safety (Offences) Regulation 2008* (NSW) cl 9(1): penalty notice amount - \$200.

34. *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a) - \$400.

35. *Companion Animals Act 1998* (NSW) s 13.

36. *Companion Animals Regulation 2008* (NSW) sch 1.

37. This point was made in New Zealand Ministry of Justice, *Increasing the Effectiveness of the Infringement System* (Cabinet Policy Committee Paper, 2006) [16].

38. New Zealand Ministry of Justice, *Increasing the Effectiveness of the Infringement System* (Cabinet Policy Committee Paper, 2006) [16].

notices may be issued as a result of one inspection, and that the total amount payable in respect of those notices must not exceed 50 penalty units (\$5,500) for “on-the spot” notices, or 100 units for “delayed issue” notices. In addition, if the issue of three or more notices would result in the accrual of sufficient demerit points to justify disciplinary proceedings, the matter must be referred to the Supervising Inspector or Team Leader for assessment of alternative compliance strategies.³⁹ The Environmental Protection Agency advises authorised officers that it is not appropriate to issue multiple penalty notices for contemporaneous or successive breaches, even when each breach in itself may be comparatively minor. Its guidelines stipulate that it is more appropriate for courts to deal with such matters.⁴⁰

- 5.31 A direction to local government parking rangers not to issue multiple parking infringements (in respect of an illegally parked vehicle parked in the same spot, regardless of how long it has been parked there) has been criticised by the NSW Auditor General as providing an ineffective deterrent. It has argued that a "one offence per day" policy provided no incentive for the driver to return to the vehicle and remove it.⁴¹
- 5.32 A review of New Zealand’s infringement system by the New Zealand Ministry of Justice considered whether this issue could be addressed by placing a limit on the number or value of infringement notices that are issued at once or within a certain period, above which the matter must go before a court.⁴²
- 5.33 The ALRC has recommended that, in cases where conduct might amount to several different offences, regulators should choose one offence to be dealt with by an infringement notice, noting that alleged offenders could otherwise “in effect, be penalised more than once for the same conduct”.⁴³

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?
- (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?

Withdrawing penalty notices

- 5.34 In the case of some offences, such as environmental offences, it is not always easy for an enforcement officer issuing a penalty notice to assess accurately, on the spot, the seriousness of the offence. For example, what may seem a relatively harmless

39. NSW Office of Fair trading, *Penalty Notice Manual* (2007) [3.1].

40. NSW Environmental Protection Agency, *Prosecution Guidelines* (2nd edition, 2004) [12.6].

41. NSW Audit Office, *NSW Police Service: Enforcement of Street Parking* (1999) [5.5] and [5.9].

42. New Zealand Ministry of Justice, *Increasing the Effectiveness of the Infringement System* (Cabinet Policy Committee Paper, 2006) [17].

43. ALRC Report 95 [12.68].

case of dumping some rubbish into a waterway, and therefore appropriately dealt with by penalty notice, may turn out to be serious arsenic pollution, with far-reaching effects. To deal with this predicament, a power to withdraw a penalty notice if its issue was subsequently found to be inappropriate, was introduced into legislation governing environmental offences. The *Water Management Act 2000* (NSW), for example, provides that penalty notices may be withdrawn within 28 days after they have been issued, and that prosecutions for the offence may take place as if the penalty notice had never been served. Any penalty amount that has already been paid by the offender is to be refunded.⁴⁴ This provision allows prosecuting agencies to pursue more serious offences through the court system. Given that the penalty amount for all penalty notice offences under the *Water Management (General) Regulation 2004* is \$1,500 for corporations⁴⁵ and the maximum fine for the majority of offences is \$1.1million,⁴⁶ there is an imperative for this withdrawal power to be available where actual or serious harm to the environment is found, or where the breach is found to be deliberate and the damage cannot be easily or quickly remedied.⁴⁷

- 5.35 However, there is potential for this approach to be misused and be adopted more as a matter of the agency's convenience and flexibility, rather than to cater to cases where the nature of the breach may not be immediately evident. The question that arises here is what principles should apply to the use of withdrawal powers.

Question 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?

Service of a penalty notice

- 5.36 Each relevant parent Act generally allows authorised officials to serve a penalty notice on a person, either in person (on the spot) or by post some time after the event, if it appears that the person has committed an offence prescribed under the Act as one for which a penalty notice may be issued. The course of action taken by an enforcement office may depend on the extent to which agency processes allow an officer to exercise discretion in relation to their use, and on the agencies' own guidelines or internal procedures. It also depends on the manner in which the offence is detected. Penalty notices in respect of camera-detected traffic offences, for example, are posted to the registered owner of the vehicle involved in the commission of the offence within a short time after the offence.

44. *Water Management Act 2000* (NSW) s 365(7).

45. *Water Management (General) Regulation* (NSW) 2004 sch 6.

46. Most offences are classified as Tier 2 offences attracting a maximum fine of 10,000 penalty units and, if the offence is continuing, a further 1,200 penalty units per day; Tier 1 offences attract a maximum fine of 20,000 penalty units and, if the offence is continuing, a further 2,400 penalty units per day; and Tier 3 offences attract a maximum fine of 100 penalty units: *Water Management Act 2000* (NSW) s 363B.

47. M Baird, "A brief overview of the use of administrative penalties for environmental offences in Australia and New Zealand" (2007) 13 *Local Government Law Journal* 14.

- 5.37 The Fines Act does not itself contain any requirements as to how an original penalty notice is to be served.⁴⁸ By contrast, legislation governing infringement notices in other jurisdictions detail how notices are to be served, without limiting the ability of an enforcement agency to make different arrangements. For example, the *Infringements Act 2006* (Vic) provides that an infringement notice may be served either personally, by post, or, where a vehicle is involved in the alleged offence, by affixing the notice on that vehicle; or in any other manner specified in the statute under which the infringement notice is issued.⁴⁹ Unless evidence to the contrary is adduced, service by post is deemed to have occurred 14 days after the date of the notice, even if the notice is returned to the agency as undelivered.⁵⁰ The Victorian Act also provides that a notice served on a person less than 28 days before the due date of payment of the penalty notice is invalid.⁵¹
- 5.38 The *State Penalties Enforcement Act 1999* (Qld) also provides for the manner in which infringement notices may be served in that State, and makes specific provisions when dealing with offences involving vehicles.⁵² In addition, it makes it an offence for a person, other than the person who owns or is in charge of the vehicle, to tamper with a penalty notice that has been affixed to a vehicle.⁵³
- 5.39 One issue raised by the Sentencing Council was the absence of any requirement for the State Debt Recovery Office (“SDRO”) or the issuing agency to confirm service of the original penalty notice, or any subsequent correspondence, including a penalty reminder notice.⁵⁴

Question 5.5

Are current procedural provisions relating to how a penalty notice is to be served on an alleged offender, contained in each relevant parent statute, adequate?

Question 5.6

Is it feasible to require the State Debt Recovery Office or the issuing agency to confirm service of the penalty notice or subsequent correspondence?

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48. It does, however, require a penalty reminder notice to be served by post and goes on to provide that service is assumed to have taken place 14 days after the date of the penalty reminder notice: *Fines Act 1996* (NSW) s 28.
49. *Infringements Act 2006* (Vic) s 12.
50. *Infringements Act 2006* (Vic) s 163A.
51. *Infringements Act 2006* (Vic) s 12(3).
52. *State Penalties Enforcement Act 1999* (Qld) s 13-14.
53. *State Penalties Enforcement Act 1999* (Qld) s 14(5).
54. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.82].

Timeframe for issuing a penalty notice

- 5.40 In cases where the penalty notice is not issued on the spot, but some time after the commission of an offence, an issue arises as to the time limit within which an enforcement agency should be permitted to issue a penalty notice.
- 5.41 One of the reasons justifying the inclusion of an offence within the penalty notice scheme is that the offence is one that can, and should, be dealt with swiftly. It follows that a penalty notice should be issued within a relatively short period of time. In Report 95, the ALRC suggested that an appropriate time limit is one year from the date of the breach of the statutory provision.⁵⁵ Any longer undermines the policy underpinning the use of infringement notice schemes, namely that they provide a timely and cost-effective alternative to court proceedings.
- 5.42 The reality is that for some offences a period of one year may be too long. A penalty notice should preferably be issued as soon after the date of the offence as possible so that the circumstances of the alleged offence are fresh in the mind of the alleged offender. Particularly where a notice is received in the mail, such as after an offence has been detected by camera, the alleged offender needs to be able to recall the incident to which the notice applies. A related issue is whether a penalty notice served outside a prescribed time limit would then be invalid.

Question 5.7

- (1) Should the *Fines Act 1996* (NSW) prescribe a period of time within which a penalty notice is to be served after the commission of the alleged offence? If so, what should the time limit be?
- (2) If the penalty notice is served after this time has elapsed, should the Act provide that the penalty notice is invalid?

Question 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?

Form of a penalty notice

- 5.43 The form of a penalty notice is prescribed in the legislation under which the penalty notice is issued. Although these forms vary from one issuing agency to the next, every penalty notice must specify:
- the offence in respect of which the notice relates;
 - the amount payable under the penalty notice; and
 - that the person may either:

55. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2003) 464, Recommendation 12.5(h).

- pay the specified sum within a certain period of time (usually 28 days); or
- elect to have the matter dealt with by a court.⁵⁶

5.44 Although it is not specifically required under the Fines Act, a penalty notice usually also specifies the date and place that the alleged breach occurred.

5.45 There is no legislative requirement for the penalty notice to contain information about a person's right to request a review of the penalty notice by the issuing agency, or a withdrawal of the penalty notice.

Question 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?

Review of decisions to issue a penalty notice

5.46 The *Fines Further Amendment Act 2008* (NSW) inserts a new Division 2A into Part 3 of the Fines Act which requires the SDRO, or the issuing agency, to conduct an internal review of a decision to issue a penalty notice at the request of the individual to whom the penalty notice was served, or by someone on the individual's behalf.⁵⁷

5.47 An application for a review can be made at any time before the due date in the penalty reminder notice, and may be made even if the penalty notice amount has been partially or fully paid.⁵⁸

5.48 On completion of its review, a reviewing agency can confirm the decision to issue a penalty notice or withdraw the penalty notice. It must withdraw a penalty notice if it finds that:

- the penalty notice was issued contrary to law;
- the issue of the penalty notice involved a mistake of identity;
- the penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence;

56. *Fines Act 1996* (NSW) s 20(1).

57. *Fines Act 1996* (NSW) s 19(1)(b1), inserted by the *Fines Further Amendment Act 2008* (NSW) sch 1 [7]. This provision, the new s 24A-24J (which were inserted by *Fines Further Amendment Act 2008* (NSW) sch 1 [10]) and the Attorney General's *Internal Review Guidelines Under the Fines Act 1996* commenced on 31 March 2010. As an illustration of the implementation of these provisions, the Parramatta City Council is establishing a parking infringement review panel, which will have power to cancel parking penalty notices in special circumstances. The panel will consist of two volunteer residents and one council member.

58. *Fines Act 1996* (NSW) s 24A(3).

- the person to whom the penalty notice was issued is unable to, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless to:
 - (i) understand that the person's conduct constituted an offence, or
 - (ii) control such conduct; or
- an official caution should have been given instead of a penalty notice.⁵⁹

Other grounds on which a penalty notice must be withdrawn can be prescribed by regulations.⁶⁰

- 5.49 Internal reviews must be conducted in accordance with the Fines Act. As with the cautions guidelines, the Attorney General has approved the guidelines on internal reviews developed by the working party spearheaded by the Department of Justice and Attorney General. In Chapter 7, we return to this issue as it affects vulnerable people.

Question 5.10

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

Enforcing a penalty notice

State Debt Recovery Office

- 5.50 The SDRO was created by the Fines Act in 1996 to manage the overall process of fine enforcement, co-ordinate the other agencies involved in the scheme, establish performance management standards and create an audit trail for the system.⁶¹ In April 2002, it was transferred from the Attorney General's Department (as it then was) to the Office of State Revenue in NSW Treasury.
- 5.51 The SDRO issues and processes penalty notices on behalf of NSW Police, the Roads and Traffic Authority ("RTA") in relation to camera-detected offences, and over 230 other agencies, including local councils, and government departments. It relies on the use of computerised systems to increase the efficiency of processing notices. Chapter 1 gives statistics on the number, and value, of penalty notices, criminal infringement notices and enforcement orders processed by the SDRO.⁶²
- 5.52 The Fines Act gives the SDRO the power to enter into arrangements with agencies that are authorised to issue penalty notices with respect to, among other things:
- the receipt, recovery and collection of penalty notice amounts;

59. *Fines Act 1996* (NSW) s 24E(2)(a)-(e).

60. *Fines Act 1996* (NSW) s 24E(2)(f).

61. NSW, *Parliament Debates*, Legislative Council, 14 November 1996, 5977 (Jeff Shaw, Attorney General).

62. See para 1.41-1.43 in Chapter 1.

- amending penalty notices to correct minor errors;
 - reviewing or withdrawing penalty notices; and
 - refunds of penalty notice amounts.⁶³
- 5.53 In 2008-2009, the SDRO collected over \$27 million from its clients for processing services, annulment fees and miscellaneous revenue.⁶⁴
- 5.54 According to its annual report, one of the SDRO's key functions is to notify the RTA of demerit point offences so they can update driving records.⁶⁵

Enforcement process

- 5.55 The Fines Act outlines the procedures relating to all penalty notices, unless excluded from the ambit of the Act by regulation.⁶⁶ The SDRO website summarises the process, and outlines the steps available to penalty notice recipients at each stage of the enforcement process. It also usefully sets out the additional costs incurred at each stage of the enforcement process when penalty notice recipients fail to take any action.⁶⁷

When a penalty notice is first received

- 5.56 A person's options when he or she first receives a penalty notice are to pay the penalty amount, nominate another driver if they were not in charge of the vehicle at the time of the offence (where relevant), elect to go to court, or seek a review. While these options are set out clearly on the SDRO website, they are not as clearly articulated on a penalty notice. A penalty notice for a camera detected speeding offence, for example, gives the person named on the notice the option to pay the penalty amount, nominate another driver or elect to go to court. There is no information on the availability to seek a review of the decision to issue a penalty notice.
- 5.57 Since the Sentencing Council's inquiry into the SDRO's enforcement procedures, it has become easier for people to pay the penalty notice amount if they do not wish to elect to go to court. Payments can now be made through Bpay, credit card, online, telephone, posted cheque, in person (by cash, cheque or credit/debit card) at any Australia Post outlet. Time-to-pay arrangements are not available at this stage of the process.⁶⁸
- 5.58 The SDRO warns, on its website, not to pay a penalty notice if the person named on the notice was not in charge of the vehicle at the time of the offence as demerit points will apply to the wrong person. In these cases, the person named on the

63. *Fines Act 1996* (NSW) s 114(1A).

64. See Table 1.1 and para 1.41.

65. Office of State Revenue, NSW Treasury, *Annual Report 2008-2009* (2009) 27.

66. *Fines Act 1996* (NSW) s 55.

67. <http://www.sdronsw.gov.au/fine_process.html> at 30 July 2010.

68. <<http://www.sdronsw.gov.au/payments.html>> at 30 July 2010.

penalty notice should submit a statutory declaration naming the person driving the vehicle at the relevant time, before the due date.

Penalty reminder notice

- 5.59 If the penalty is not paid by the due date, the SDRO sends out a penalty reminder notice allowing a further 28 days in which to pay the full amount. Although it may be served personally, it is almost always served by post. Service is assumed unless the recipient can establish that he or she did not receive the original penalty notice or enforcement notice. However, it is only effective if it is served on the person named on the original penalty notice. So, where a person named on a penalty notice nominates another person as being the offender, the SDRO must send a new penalty notice to the nominated person.
- 5.60 If a person's financial circumstances prevent the person from making a single full payment, they may pay the amount due in part payments, without incurring additional costs, provided that the full amount is paid by the due date.⁶⁹

Penalty enforcement order

- 5.61 If the fine remains unpaid following the reminder notice, and no court election has been made, the SDRO may issue a penalty enforcement order.⁷⁰ A penalty enforcement order requires the fine defaulter to pay the penalty notice amount, plus enforcement costs of \$50, by a specified date.⁷¹
- 5.62 An application for time-to-pay, or for a work and development order, may only be made after a penalty enforcement order is issued. However, in order to expedite these applications, amendments to the Fines Act now allow the SDRO to issue a penalty notice enforcement order earlier than usual so that it may grant an application for time-to-pay arrangements or a work and development order, in which case enforcement costs are not added on.⁷²

Suspension or cancellation of driver licence or vehicle registration

- 5.63 If the fine defaulter does not comply with the penalty enforcement order by the due date, the SDRO may direct the RTA to take various enforcement actions, namely:
- suspension or cancellation of a driver licence;
 - cancellation of vehicle registration; or
 - suspension of dealings with the RTA including, for example, renewal of driver licence or registration of vehicle, issue of number plates to the fine defaulter and booking driver licence tests.⁷³

69. *Fines Act 1996* (NSW) s 33(2).

70. *Fines Act 1996* (NSW) s 42(1).

71. *Fines Act 1996* (NSW) s 43.

72. *Fines Act 1996* (NSW) s 42(1AA), (1BB). But note, the person is no longer entitled to make an election to go to court: s 42(1CC).

73. *Fines Act 1996* (NSW) s 65-70.

- 5.64 In separate reports, the NSW Sentencing Council⁷⁴ and the NSW Legislative Council's Standing Committee on Law and Justice⁷⁵ have identified some problems arising from these enforcement measures.
- 5.65 There are concerns about the use of these measures to enforce unpaid fines that have been incurred for offences that are not related to driver licence or vehicle registration. Some people who have no record of serious traffic offences have lost their driving privileges for failure to pay fines incurred for non-traffic offences. It has been argued that this creates a perception of unfairness because these "sanctions" do not fit the crime or the risk, if any, posed by the offender.⁷⁶
- 5.66 Of greater concern are the practical and economic effects of these enforcement measures. The suspension or cancellation of a driver licence may hinder an offenders' ability to keep his or her job, where possession of a valid licence is essential. For the unemployed, the inability to drive due to licence suspension or cancellation affects their capacity to seek employment. Hence, these measures may aggravate the financial hardship which some offenders are experiencing and which is, in many cases, the main cause of their failure to pay the fine.⁷⁷
- 5.67 The detrimental impact of driver licence suspension or cancellation are arguably heightened in rural and remote areas where the absence of reliable public transport means people quite often need to drive to go to work or school, to do grocery shopping, to visit health professionals, or to attend compulsory Job Network or Centrelink interviews. Consequently, some people who cannot find alternative transport feel that they have to choose between breaking the law by driving without a valid licence, or losing their job or Centrelink payments.⁷⁸
- 5.68 There have been suggestions of over-representation of young people and Aboriginal people in relation to driver licence suspensions or cancellations arising from fine defaults.⁷⁹ Chapters 6 and 7 of this paper canvass some issues on driver licence and vehicle registration sanctions as they relate to young people and Aboriginal people.⁸⁰

74. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006).

75. NSW Legislative Council, Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006).

76. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [5.17], [5.24].

77. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [5.19]-[5.24].

78. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [5.36]-[5.38]; NSW Legislative Council, Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006) [9.61]-[9.63].

79. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [5.30], [5.32]-[5.35]; NSW Legislative Council, Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006) [9.64]-[9.66].

80. Para 6.37-6.47; 8.44.

Civil sanctions

5.69 If the enforcement order is still unpaid after the RTA restrictions, the SDRO may issue an order:

- for the seizure of property by the Sheriff;
- to garnishee the wages or salary of the fine defaulter;
- requiring the fine defaulter to attend court for an examination of his or her financial circumstances; or
- placing a charge on the fine defaulter's property.⁸¹

5.70 An additional \$50 enforcement cost is added to the unpaid debt for each order made.

Community service orders

5.71 Where a fine defaulter has not paid the amount in the fine enforcement order and where civil action has been, or is likely to be, unsuccessful, the SDRO may issue a community service order.⁸² Decisions of the SDRO to make a community service order, or to revoke a community service order, are not reviewable.⁸³

5.72 The SDRO has the power to commit a fine defaulter to a correctional centre, if he or she fails to comply with a community service order.⁸⁴

5.73 The fact that community service orders are only available at the tail end of the enforcement process has been identified as a weakness of the fine enforcement process. A number of advocacy groups have argued that, for impecunious offenders, community services orders (and other measures to waive a penalty or fine, such as work and development orders) should be available before the offender defaults on payment, and certainly before the initial penalty amount increases with the addition of further enforcement costs and sheriff's fees. In a submission to the Sentencing Council, the NSW Legal Aid Commission pointed out that it can take up to three years before an offender becomes eligible for a community service order, by which time their outstanding fines have increased substantially.⁸⁵ The Legal Aid Commission argued that this policy entrenches certain people in a cycle of fine default, traffic offences and further crime.⁸⁶

5.74 From this perspective, the Work and Development Order scheme, which is discussed below, provides a significant relief to certain disadvantaged groups of people who are unable to pay outstanding fines.⁸⁷

81. *Fines Act 1996* (NSW) s 71-77.

82. *Fines Act 1996* (NSW) s 78.

83. *Fines Act 1996* (NSW) s 85(1), 86(9).

84. *Fines Act 1996* (NSW) s 87-97.

85. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.84].

86. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.85].

87. See para 5.84-5.98.

Fine mitigation

5.75 The *Fines Further Amendment Act 2008* (NSW) has made significant changes to the way penalty notices are dealt with and enforced, designed to make the system fairer. Recognising that the penalty notice regime (as well as the impact of court-imposed fines) was having a disproportionate impact on the vulnerable and disadvantaged, new provisions have been inserted into the Fines Act to allow people in specified circumstances to:

- apply for an extension of the time within which a penalty or fine must be paid; or
- apply for a work and development order.

Time to pay

5.76 Section 100 of the Fines Act allows a person to apply to the SDRO for an extension of time to pay, or to pay by instalments. Applications for time to pay can only be made after an enforcement order has been issued, unless the person is in receipt of a government benefit, and providing a community service order has not been made.⁸⁸

5.77 However, the SDRO can issue an enforcement order before the expiry of the penalty notice time period for the purposes of allowing the offender to lodge an application for time-to-pay, or to pay by instalments, before he or she is actually in default. If the application is received prior to the due date of the enforcement order, no further enforcement action will be taken and no enforcement costs imposed. However, any RTA restrictions that are already in place will continue, or that are about to be applied will be applied, and will only be lifted when the full amount is paid.

5.78 Applications for time to pay can be made over the telephone in some cases, or by filling out a dedicated form.⁸⁹ The form asks questions about:

- the applicant's employment details;
- what type of Centrelink benefit he or she receives, if any;
- the value and registration details of any vehicle owned;
- whether the applicant has any outstanding fines in other jurisdictions; and
- the amount the applicant can afford to pay per fortnight.

5.79 The SDRO reports that it has internal guidelines for determining time-to-pay applications. These guidelines are currently not publicly available. Payments can be deducted directly from the fine defaulter's eligible Centrelink benefit via Centrepay.⁹⁰

88. *Fines Act 1996* (NSW) s 100 (1A).

89. <http://www.sdro.nsw.gov.au/payments/pay_by_instalment.html> at 30 July 2010.

90. *Fines Act 1996* (NSW) s 100 (3A).

- 5.80 In Victoria, a person who holds a Centrelink Health Care Card, a Pensioner Concession Card or a Department of Veterans' Affairs Pensioner Concession Card is not automatically entitled to an extension of time to pay the fine, or to pay by instalments.⁹¹ However, agencies may at their discretion offer these cardholders access to a payment plan, taking into account a range of factors including financial hardship.
- 5.81 A corresponding measure to relieve fine default and penalty escalation may be to allow a longer initial period to pay a penalty than the current 21 days.

Question 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?

Applications for write-off

- 5.82 Section 101 of the Fines Act gives a fine defaulter the right to apply to the SDRO, after an enforcement order has been made and before a community service order is issued, to have the fine written off. The SDRO has the power to write-off part or all of the fine, either on application by the fine defaulter or at its own discretion, if satisfied that, due to financial, medical and/or personal circumstances, the fine cannot be paid and a community service order is not appropriate.⁹²
- 5.83 However, the write-off of an unpaid fine is conditional. The SDRO can recommence enforcement action at any time within five years of a write-off, if the fine defaulter receives a further fine enforcement order or the SDRO is satisfied that the fine defaulter now has the means to pay and enforcement action is likely to be successful.⁹³

Work and development orders

- 5.84 The Fines Act now allows eligible persons to apply to the SDRO for a work and development order (WDO), under which they may pay off their fines⁹⁴ in return for performing unpaid work with an approved organisation or by undertaking a particular course or treatment.⁹⁵
- 5.85 A WDO is defined as an order requiring a person to do one or more of the following things:

91. Victoria, *Attorney-General's Guidelines to the Infringements Act 2006* (2006) 5.

92. *Fines Act 1996* (NSW) s 101(1A).

93. *Fines Act 1996* (NSW) s 101(4).

94. Here defined broadly to include both court-imposed fines and penalty notices.

95. The Work and Development Order scheme was launched by the Attorney General, the Hon John Hatzistergos, on 15 September 2009 on a two-year trial. Under the *Fines Regulation 2005* (NSW) cl 10A, the SDRO may issue a maximum number of 2,000 WDOs in the course of the trial.

- undertake unpaid work for, or on behalf of, an approved organisation (but only with the agreement of that organisation),
 - undergo medical or mental health treatment in accordance with a health practitioner’s treatment plan,
 - undertake an educational, vocational or life skills course,
 - undergo financial or other counselling,
 - undergo drug or alcohol treatment, and
 - if the person is under 25 years of age, undertake a mentoring program.⁹⁶
- 5.86 WDOs are available to people who have a mental illness, intellectual disability or cognitive impairment; people who are homeless; or people who are experiencing severe economic hardship.⁹⁷ They are available for both adults and children.⁹⁸ Guidance on who is eligible to apply for a WDO is provided in guidelines issued by the Attorney General under s 99I of the Fines Act (“WDO Guidelines”), to which the SDRO must have regard when exercising its functions in respect of WDOs.
- 5.87 The SDRO may only issue a WDO if a fine enforcement order has been issued, the person is not subject to a community service order and the application satisfies all the statutory requirements.⁹⁹ However, it is possible for a WDO to be made in anticipation of a fine enforcement order.¹⁰⁰ Under the WDO Guidelines, a person may apply for an enforcement order at any time in the process, for the purpose of applying for a WDO. In these circumstances, enforcement costs are not added.¹⁰¹
- 5.88 Each application for a WDO must be made to the SDRO by or on behalf of the offender, and supported by each “approved person” who is to supervise the offender in complying with the order. An approved person is an organisation that has been approved by the Director General of the Department of Justice and Attorney General to supervise the work to be carried out under a WDO, or, where the WDO involves a medical or mental health treatment, a health practitioner qualified to provide that treatment.¹⁰²
- 5.89 The application for a WDO must set out the grounds for requesting the order (including evidence to support claims of acute economic hardship, mental illness etc), the activities that are proposed to be carried out under the order and the time that is proposed to complete those activities.¹⁰³ The application must also specify the value of the activities that are to be undertaken for the purpose of expiating the fines accrued, and the nature of any unpaid work to be performed. According to the WDO Guidelines:

96. *Fines Act 1996* (NSW) s 99A.

97. *Fines Act 1996* (NSW) s 99B.

98. NSW Attorney General, *Guidelines for Work and Development Orders* (2009) 4.

99. *Fines Act 1996* (NSW) s 99B(1).

100. *Fines Act 1996* (NSW) s 99B(3).

101. NSW Attorney General, *Guidelines for Work and Development Orders* (2009) [4].

102. *Fines Act 1996* (NSW) s 99A. See NSW Attorney General, *Guidelines for Work and Development Orders* (2009) [5.1]-[5.3].

103. *Fines Act 1996* (NSW) s 99B.

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- unpaid work is to be valued at \$30 per hour;
 - completion of a medical or mental health treatment, or a drug and alcohol program, is to be valued at \$1000 per month; and
 - an educational, vocational or life skills course is to be valued at \$50 per hour or \$350 per day, with a maximum of 3 full days per month.¹⁰⁴
- 5.90 The guidelines also provide caps on the number of hours of work or activities that may be performed under a WDO, which is consistent with community service orders.
- 5.91 WDOs can be varied or revoked by the SDRO either at the request of the offender, or by its own motion where, after taking reasonable steps to consult with both the offender and the approved person, the SDRO is satisfied that the person has failed to comply with the order without reasonable excuse.¹⁰⁵
- 5.92 The scheme has been widely supported by a variety of organisations, including charitable organisations, youth services, drug and alcohol services, neighbourhood centres and mental health service providers. Apart from lifting the financial burden from many of its disadvantaged clients, it is generally agreed that WDOs will also address the problem of secondary offending and, by participating in volunteer work or treatment programs, can potentially have long lasting benefits beyond the payment of the debt.¹⁰⁶
- 5.93 However, some concerns have been raised about the scheme. PIAC has argued that the eligibility criteria for applying for a WDO may be too restrictive. For example, it states that the fact that a person is in receipt of a welfare benefit may not be sufficient to meet the hardship provisions, which potentially means that some people, particularly those from an Indigenous background, may be excluded from qualifying for a WDO.¹⁰⁷
- 5.94 There is also a concern that there may be few opportunities for disadvantaged people in rural and remote areas to avail themselves of the new WDO provisions. There may be no organisation for whom to do work in such areas, or few (or no) drug and alcohol counsellors, or other approved program that they can access under the WDO scheme.¹⁰⁸
- 5.95 The Intellectual Disability Rights Service has argued that the concentration of penalty-waiving options at the end of the process raises concerns about net-

104. NSW Attorney General, *Guidelines for Work and Development Orders* (2009) [6]-[6.5].

105. *Fines Act 1996* (NSW) s 99C.

106. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Considering the impact of CIN more broadly: Response to the NSW Ombudsman's review of the impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009): <<http://www.piac.asn.au/publications/pubs/09.01.30-CIN%20Submission%20copy.pdf>> at 30 July 2010.

107. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Considering the impact of CIN more broadly: Response to the NSW Ombudsman's review of the impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009) [4].

108. See Law Society of NSW, *Submission to the Ombudsman Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (12 February 2009) [13.2].

widening. It submits that issuing officers may issue penalty notices for want of any alternative on the assumption that the penalty notice can be withdrawn or waived at a later stage.¹⁰⁹

- 5.96 For example, a penalty notice issuing official might not exercise discretion and issue a penalty notice despite a person's disability because this can be 'dealt' with by a waiver down the track at enforcement stage through a work and development order or a write-off application, when in reality an individual might not be able to access the services to be eligible for a WDO or have the advocacy support to help him or her make a write-off application.¹¹⁰
- 5.97 The Commission notes that, unlike community service orders, WDOs are not only available at the tail end of the process. Although the power to make a WDO order is triggered after a penalty enforcement order is made, the SDRO may make an early penalty enforcement order for the purposes of accepting a WDO application.
- 5.98 The Commission recognises that these are new provisions and that a trial is currently underway. We do not want to pre-empt the trial and its evaluation. No doubt issues will arise and it is important that these be noted in the evaluation report, and addressed at the appropriate time. There is a keen interest in the program and a strong desire to see it work effectively to reduce the cycle of debt for the disadvantaged.

Hardship Review Board

- 5.99 The Hardship Review Board was established in 2004 to review certain decisions of the SDRO. The Board comprises delegates from the Department of Justice and the Attorney General, NSW Treasury and the Chief Commissioner of State Revenue.
- 5.100 Specifically, the Hardship Review Board may review an SDRO decision in relation to:
- work and development orders;
 - time to pay arrangements; and
 - applications to write-off, in whole or in part, a fine or penalty notice.¹¹¹
- 5.101 The SDRO may suspend, or be required to suspend, enforcement action while the Hardship Review Board is reviewing a matter.¹¹²
- 5.102 In 2008-2009, the Board reviewed 44 decisions by the SDRO, with a total value of \$1.8 million.¹¹³ It upheld 13 SDRO decisions, approved time-to-pay arrangements in 3 matters, and wrote off 28 matters (3 of which were only partially written off).¹¹⁴

109. Intellectual Disability Rights Service, *Preliminary Submission*, 10.

110. Intellectual Disability Rights Service, *Preliminary Submission*, 10.

111. *Fines Act 1996* (NSW) s 101B. Applications to write-off a fine or penalty notice in part were permitted by amendments introduced by the *Fines Further Amendment Act 2008* (NSW).

112. *Fines Act 1996* (NSW) 101B(4), (5).

- 5.103 One of the issues that emerged from the Sentencing Council's review was that there was a general lack of awareness in the community of the availability to seek a review of SDRO decisions and a lack of understanding of when the option was available. We note, for example, that there is no information on the SDRO website on the Hardship Review Board. Many community advocates understood that recourse to the Hardship Review Board was only available after all other civil enforcement processes had been exhausted.¹¹⁵

Question 5.12

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

Consequences of the penalty notice

- 5.104 The development of a penalty notice system in NSW was underpinned by the philosophy that payment of a penalty notice would not be an admission of guilt. Hence, the Fines Act provides that payment of the full amount under a penalty notice results in there being no further liability for further proceedings for the offence to which the notice relates.¹¹⁶
- 5.105 Even if the offender delays paying the full amount of the penalty until after the SDRO has issued a penalty notice enforcement order, nonetheless:
- the offender is not liable for any further proceedings for the alleged offence concerned; and
 - “the payment of any amount payable under a penalty notice enforcement order is not an admission of liability for the purpose of and does not in any way affect or prejudice any civil claim, action or proceeding arising out of the same occurrence”.¹¹⁷
- 5.106 However, as the penalty notice system has expanded, there has been an expansion of the consequences of paying a penalty notice. This has been especially apparent in the category of traffic offences where penalties such as automatic licence suspension and licence demerit points apply to penalty notices, not just court convictions. Where the penalty notice offence is a driving offence that carries licence demerit points, payment of the penalty notice triggers a deduction of points. Even if a person elects to go to court on the penalty notice, and presents mitigating circumstances, the court has no power to review licence demerit points. This can have a particular impact on young people in that “a young person on a P1 driver licence may automatically lose that licence as a result of committing a single traffic

113. Office of State Revenue, NSW Treasury, *Annual Report 2008-2009* (2009) 27. One of the matters alone was worth \$1.4 million.

114. Office of State Revenue, NSW Treasury, *Annual Report 2008-2009* (2009) 27.

115. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.55].

116. *Fines Act 1996* (NSW) s 23(2).

117. *Fines Act 1996* (NSW) s 45.

offence, even if their matter is dismissed” by the Court under s 10 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*]. The Youth Justice Coalition has suggested that the Local Court should have power to review demerit points.¹¹⁸

- 5.107 Another example can be found in the *Food Act 2003 (NSW)*. Section 133A of that Act allows the Food Authority to keep a register of information about penalty notices issued for alleged offences under the Act or regulations, including the names and business addresses of the alleged offenders. The information appears on the register if the penalty notice amount has been paid in part or full, or an enforcement notice has issued, or the penalty notice is still unresolved 70 days or more after it was served.
- 5.108 One issue relating to the payment of a penalty notice is whether the record of the payment can be used for the purpose of determining sentence for any offence. The Fines Act does not have express provision on this matter. It would appear that records of Current Infringement Notices (CIN) matters are being appended to criminal records as part of the information presented for sentencing purposes in criminal proceedings. The Facts Sheets, which are prepared by the NSW Police Force for the courts, sometimes contain information about the defendant’s CIN records appended to the “Criminal History – Bail Report”.¹¹⁹
- 5.109 On the one hand, it could be argued that there may be circumstances where a history of penalty notices may be relevant to sentencing. For example, evidence of a series of speeding penalties may be relevant to sentencing for dangerous driving.
- 5.110 On the other hand, the use of information about payment of penalty notices implies admission of guilt for the offence subject of the penalty notice. However, it is not always the case that paying a penalty notice is an admission of liability. There would no doubt be many examples of a person paying a penalty notice because, on balance, it is easier and cheaper than challenging the issue. This becomes a decision of convenience, not an admission and acceptance of liability. More significantly, a penalty notice is paid on the understanding that this precludes a conviction.
- 5.111 The provisions of the Fines Act outlined above in paragraphs 5.104-5.105 may be compared with the counterpart provisions in the Victorian legislation. The *Infringement Act 2006 (Vic)* provides that if an infringement notice is not withdrawn and the penalty and costs are paid, the person on whom notice was served has expiated the offence by that payment.¹²⁰ If the person has expiated the offence,
- no further proceedings may be taken against the person with respect to the offence; and
 - no conviction is to be taken to have been recorded against that person for the offence.
- 5.112 Further, payment of the infringement penalty:

118. The Youth Justice Coalition, *Preliminary Submission*, 10.

119. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 102-121.

120. *Infringement Act 2006 (Vic)* s 32(1).

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- is not an admission of guilt in relation to the offence, including for the purpose of civil claims arising out of the same occurrence; and
- must not be referred to in any report provided to a court for the purpose of determining sentence for any offence.¹²¹

5.113 The last-mentioned provision, that payment of the infringement penalty must not be referred to in any report provided to a court for the purpose of determining sentence for any offence, is not in the Fines Act.

Question 5.13

Should information about penalty notice history be provided to courts for the purpose of determining sentence for any offence?

Question 5.14

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

121. *Infringement Act 2006* (Vic) s 32-33.

6. Impact on children and young people

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Introduction

- 6.1 The Commission’s terms of reference require us to consider whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 17.¹ If it is appropriate for children and young people to be given penalty notices, we are required to consider:
- whether the penalty amount should be set at a rate different from the adult rate;
 - whether a shorter conditional “good behaviour” period should apply following a write-off of a fine; and
 - whether the licence sanction scheme under the *Fines Act 1996* (NSW) (“Fines Act”) should apply.
- 6.2 Children can receive a monetary penalty in one of two ways: under a penalty notice or by order of the Children’s Court. The Children’s Court, which has jurisdiction over most children’s offences apart from traffic offences, has power to fine a young offender found guilty of an offence, provided the fine does not exceed either the maximum fine prescribed or 10 penalty units (currently \$1,100), whichever is the lesser.² Under s 53 of the Fines Act, penalty notices cannot be issued to children under 10.³
- 6.3 In addition to the issues that the terms of reference require us to examine, this chapter raises a number of related issues for consideration, including:
- whether the cut-off age of 10 for the exclusion of children from penalty notice offences is appropriate, or whether it should be higher;

1. The terms of our reference specify 15 years as the compulsory school age. This was accurate at the time of the Attorney General gave us the terms of reference. However, the compulsory school age has been raised to 17 years from 1 January 2010: *Education Act 1990* (NSW) s 21B, inserted by *Education Amendment (School Attendance) Act 2009* (NSW)

2. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c).

3. This is consistent with the conclusive presumption that no child who is under the age of 10 years can be guilty of an offence: *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

- what alternatives to issuing a penalty notice would be appropriate, including cautions or action under the *Young Offenders Act 1997* (NSW); and
- the impact on young people who cannot pay their fines including the effect of any escalation of penalties by reason of accumulation or enforcement action.

Should penalty notices be issued to children and young people?

- 6.4 As set out above, s 53 of the Fines Act provides that the penalty notice procedure does not apply to children who were younger than 10 when the offence is alleged to have been committed, which effectively means that penalty notices cannot be issued to children under 10. Hence, the penalty notice provisions of the Fines Act apply to children and young people over 10 but under 18. In fact, some penalty notice offences are specifically targeted at young people, particularly in relation to under-age drinking and gambling.⁴ However, a police officer cannot issue a penalty notice under s 335 of the *Criminal Procedure Act 1986* (NSW) – known as a Criminal Infringement Notice (“CIN”) and covering certain summary offences – to a person under the age of 18 years.
- 6.5 The law in NSW is consistent with that in Victoria, where infringement notices cannot be issued to children younger than 10 years.⁵ In contrast, infringement notices cannot be issued to children younger than 14 years in the Northern Territory.⁶ In South Australia, expiation notices cannot be given to a child under the age of 16 years, except where some other Act provides otherwise.⁷
- 6.6 In considering when children should be liable for penalty notices, it must be emphasised that in NSW, s 5 of the *Children (Criminal Proceedings) Act 1987* (NSW) provides a conclusive presumption that no child under the age of 10 years can be guilty of an offence. This is consistent with s 53 of the Fines Act.
- 6.7 As regards a child between 10 and 14 years, there remains a presumption at common law that such a child is incapable of committing a crime, because of lack of understanding of the difference between right and wrong and therefore cannot have the *mens rea* for offending. The presumption can be rebutted by the prosecution if it establishes, beyond a reasonable doubt, that the defendant knew, at the time of the offence, that the act was “seriously wrong, as distinct from an act of mere naughtiness or mischief”.⁸ This suggests that an enforcement officer ought to make a judgment about criminal responsibility before issuing a penalty notice to a child under 14 years – which may be difficult to make.

4. *Gaming Machines Act 2001* (NSW) s 50(1), 52(1), *Gaming Machines Regulation 2002* (NSW) sch 3; *Registered Clubs Act 1976* (NSW) s 45A, *Registered Clubs Regulation 1996* (NSW) sch 3; *Liquor Act 2007* (NSW) s 114(7), 118(1), 123(1), 129, *Liquor Regulation 2008* (NSW) cl 74, sch 2; *Summary Offences Act 1988* (NSW) s 11(1), 29.

5. *Infringements Act 2006* (Vic) s 3(1): definition of a “child”.

6. *Fines and Penalties (Recovery) Act* (NT) s 7.

7. *Expiation of Offences Act 1996* (SA) s 4, 6(1)(g).

8. *BP v R* [2006] NSWCCA 172; *R v SW* [2006] NSWCCA 172, [27]; *R v CRH* (unreported, New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996); *C v Director of Public Prosecutions* (1996) 1 AC 1, 38.

- 6.8 We received a number of preliminary submissions suggesting that it is generally inappropriate to issue penalty notices to people under 18 years, and particularly young people under 16 years. The Youth Justice Coalition argues that penalty notices should never be issued to young people,⁹ while the Shopfront Youth Legal Centre accepts that it may be appropriate to issue penalty notices to people aged 16 years or over in relation to driving offences.¹⁰ The Illawarra Legal Centre suggested that cautions should be the standard first response for dealing with people under 18 years of age.¹¹
- 6.9 While there are young people who earn income, there are many who earn little or no money.¹² An overwhelming majority of teenagers are studying full-time. As at May 2009, 70% of 15-19 year olds were in full-time study (at school or elsewhere), 16.6% were in full-time work, and 13.3% were neither fully engaged in study nor in work (and were either unemployed or working part-time).¹³ While the proportion of 19-24 year olds not earning or learning has been declining — it peaked at above 16% during the recession of the early 1990s but gradually declined to 13.3% in 2008 — this may be attributed to an increase in full-time education rather than with growth in full-time work.¹⁴
- 6.10 It is likely that in many instances, parents assist teenagers who have incurred a penalty notice and are unable to pay it due lack of money. Where the penalty is paid by a parent or carer, unless that adult puts in place a private arrangement with the child for repayment (in work or dollars), there is unlikely to be a deterrent effect. Some have further suggested that where parents are contributing financially, or even just supporting the young person emotionally, this can place a strain on family relationships “at a stage when parents often have already strained relationships with their children”.¹⁵
- 6.11 A similar concern was expressed in relation to a pilot scheme introduced in the United Kingdom whereby penalty notices for disorder offences (“PNDs”, similar to the NSW CINs scheme) for 10-15 year-olds made parents liable for payment of the child’s penalty.¹⁶ Police officers surveyed reported that it was the parents that generally paid the fine, which meant that the child was not being punished and

9. Youth Justice Coalition, *Preliminary Submission*, 7.

10. Shopfront Youth Legal Centre, *Preliminary Submission*, 5.

11. Illawarra Legal Centre, *Preliminary Submission*, 7.

12. The minimum school leaving age in NSW is 17.

13. The Foundation for Young Australians, *How Young People are Faring 2009: The National Report on the Learning and Work Situation of Young Australians* (2009) 4.

14. The Foundation for Young Australians, *How Young People are Faring 2009: The National Report on the Learning and Work Situation of Young Australians* (2009) vii.

15. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10.

16. The Penalty Notices for Disorder (PNDs) scheme was introduced in 2002 as a court-alternative for offences relating to low-level disorderly behaviour: *Criminal Justice and Police Act 2001* (UK) c 16. It allowed police to issue a penalty notice for 24, mainly summary, offences where the most likely outcome would be a fine if the matter went to court. The scheme originally applied to offenders 18 years and older but was extended to juveniles aged 16-17 in 2003: *Criminal Justice and Police Act 2001* (UK) c 16 was amended by the *Anti-Social Behaviour Act 2003* (UK) s 87; and, for a pilot period of one year, to children aged 10-15 in 2004.

made to take responsibility for his or her actions.¹⁷ Those surveyed believed that making the parent liable for the penalty “could have a detrimental effect on family life, particularly in poorer or single parent families”, and contribute to a deterioration in relationships between the youth and the parent. It was suggested that the Penalty Notices for Disorder scheme “might be more effective if the penalty was not financial but was something that impacted more on the child, for example visible unpaid work”.¹⁸

- 6.12 A study of the outcome of the pilot, conducted by the United Kingdom Ministry of Justice, found “evidence of a significant switch from reprimands, Final Warnings and prosecutions to the use of PNDs”.¹⁹ During the pilot period, the use of Final Warnings as a response to disorderly conduct fell by 59%. The study concluded that the scheme had caused net-widening in the pilot areas.²⁰
- 6.13 The New Zealand Ministry of Justice, in its study of the New Zealand infringement system, also found that penalty notices were not considered a strong deterrent to future infringing. It found that many young infringers continued their infringing behaviour, regardless of the fees and fines, until they had reached a level of maturity.²¹ The study also found that fines imposed on young adults who had limited financial resources then impacted on their ability to save, and their borrowing power.²²
- 6.14 The Australian Law Reform Commission (“ALRC”) has also questioned the appropriateness of fines as a sentencing option for young offenders, pointing out that many come from financially disadvantaged backgrounds. The ALRC pointed out that the difficulty in paying a fine could lead to default and further involvement in the criminal justice system.²³ Further, the ALRC argued that “financial penalties have limited rehabilitative value for young offenders”.²⁴
- 6.15 These are all legitimate considerations. Balanced against them is the equally legitimate concern to punish and deter irresponsible, even dangerous, behaviour, and to effectively enforce a range of minor offences that are often committed by children. Further, road safety is a particular concern in relation to young drivers and it can fairly be argued that they should not go unpunished for speeding and other driving offences. Practical issues arise for those driving offences involving indirect detection, for eg by camera. The Shopfront Youth Legal Centre agreed that it may

17. J Amadi, *Piloting Penalty Notices for Disorder on 10- to 15-year-olds: results from a one year pilot* (United Kingdom Ministry of Justice, Research Series 19/08, 2008) 22.

18. J Amadi, *Piloting Penalty Notices for Disorder on 10- to 15-year-olds: results from a one year pilot* (United Kingdom Ministry of Justice, Research Series 19/08, 2008) 22.

19. J Amadi, *Piloting Penalty Notices for Disorder on 10- to 15-year-olds: results from a one year pilot* (United Kingdom Ministry of Justice, Research Series 19/08, 2008) 15.

20. J Amadi, *Piloting Penalty Notices for Disorder on 10- to 15-year-olds: results from a one year pilot* (United Kingdom Ministry of Justice, Research Series 19/08, 2008) 15.

21. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 33.

22. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 9.

23. Australian Law Reform Commission, *Seen and Heard: Priority for Children in The Legal Process*, Report 84 (1997) (“ALRC Report 84”) [19.34] citing J Seymour, *Dealing with Young Offenders* The Law Book Company Sydney (1988), 337–344.

24. ALRC Report 84, [19.34].

be appropriate to issue penalty notices to people aged 16 years or over in relation to driving offences.²⁵

6.16 The possible options for cut off ages for the application of the penalty notice provisions of the Fines Act would appear to be:

- 10 years: which retains the current law and aligns with the age of criminal responsibility.
- 14 years – this option would align with the *doli incapax* presumption on the basis that enforcement officers are unlikely to be in a position to judge whether the young person should be held criminally responsible.
- 16 years – this option recognises that below this age children are unlikely to be able to pay a penalty notice but allows inclusion of driving offences for young people.
- 18 years, but with exemptions: this option recognises that children generally would find penalty notices difficult to pay. An exemption may be necessary for traffic offences, and perhaps for certain other offences, eg underage drinking and gambling.

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?

Question 6.2

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

Question 6.3

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

Cautions

6.17 One alternative to the use of penalty notices on children is to require the enforcement officer to consider a caution in respect of a person below the age of 18 years. Recent amendments to the Fines Act have given enforcement officers the discretion to issue a caution to an offender instead of a penalty notice, and guidelines issued under the provision require enforcement officer to take into

25. Shopfront Youth Legal Centre, *Preliminary Submission*, 5.

account whether the person is under 18 years.²⁶ However, while the power to caution extends to Police officers, the guidelines do not. Consideration could be given to requiring enforcement officers to consider issuing a caution when the offender is under 18 years.

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?

Application of the Young Offenders Act to penalty notice offences

- 6.18 A related and more complex issue concerns the application of the *Young Offenders Act 1997* (NSW) (“YOA”) to penalty notice offences. Several submissions supported the use of alternative interventions under the YOA (warnings, cautions, and youth conferencing).²⁷ The Shopfront Youth Legal Centre emphasised that issuing a penalty notice should be a measure of last resort and has proposed that intervention under the YOA should be the default position, leaving young people with the capacity to pay to opt for a penalty notice instead.²⁸ This option, it suggested, may be more costly to administer, but could reduce “secondary” offending.
- 6.19 At present, a police officer must consider the appropriateness of a YOA intervention before commencing criminal proceedings in respect of an offence covered by the Act,²⁹ which includes all summary offences and indictable offences that may be dealt with summarily, except several specified serious offences, and traffic offences.³⁰ The police officer must also consider a YOA intervention before issuing a penalty notice, but *only* in respect of an offence prescribed by the regulations,³¹ which are:³² custody of a knife in a public place or school;³³ and failure to comply with a direction.³⁴ For all other penalty notice offences, a police officer can issue a penalty notice without considering whether a YOA intervention may be more appropriate. The YOA procedures do not currently apply to non-police matters (though there is scope to do so by regulation).

26. *Fines Act 1996* (NSW) s 19A; Attorney General’s *Caution Guidelines Under the Fines Act 1996* (2010).

http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_lp_cautionguidelines

27. Shopfront Youth Legal Centre, *Preliminary Submission*, 5; Youth Justice Coalition, *Preliminary Submission*, 6.

28. Shopfront Youth Legal Centre, *Preliminary Submission*, 5.

29. *Young Offenders Act 1997* (NSW) s 9(2).

30. *Young Offenders Act 1997* (NSW) s 8.

31. *Young Offenders Act 1997* (NSW) s 9(2A).

32. *Young Offenders Regulation 2004* (NSW) cl 22.

33. *Summary Offences Act 1988* (NSW) s 11C.

34. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 199 (the so-called “move-on” power to control behaviour in public places).

6.20 Our Report 104, *Sentencing Young Offenders*, considered whether the offences for which there is a requirement to consider a YOA intervention before issuing a penalty notice should be broadened.³⁵ The key benefit identified was to make the diversionary options available under the YOA, including warnings and cautions, available to the young offender.

6.21 The NSW Police had submitted to the statutory review of the YOA that, as children do not generally have the capacity to pay monetary penalties, it is inappropriate for children to be issued with penalty notices. The review committee recommended that the YOA be extended to cover offences for which penalty notices may be issued to children.³⁶

6.22 We did not agree with this recommendation. Our reasons for opposing the inclusion of penalty notice offences within the ambit of the YOA were as follows:

On the face of it, it is a fair and sensible suggestion to enable young offenders to escape the burden of fines that stretch, or are beyond, their resources. Our concern is that the practical effect of extending the diversionary options of the YOA to penalty notice offences would be to net-widen and bring a young person further into the criminal justice system than they otherwise would be.

At present, an officer with the authority to issue a penalty notice can, in his or her discretion, simply warn the young person about the offending behaviour and thereby bring the incident to a close. A warning given under the YOA is recorded³⁷ and kept on the COPS (Computerised Operational Policing) computer system maintained by NSW Police.³⁸

In order to caution a young person under the YOA (he or she must admit the offence and consent to the caution³⁹), the young person must attend at a police station,⁴⁰ a record of the caution is kept and the tally of a maximum of three cautions begins to run. Once a child has been dealt with by caution on three or more occasions, he or she is no longer entitled to be dealt with by caution in relation to an offence.⁴¹ Furthermore, if penalty notices were covered by the YOA, the gatekeepers under the Act would need to be expanded to include such people as railway ticket inspectors. It is difficult to see how this would work in practice.⁴²

6.23 This passage highlights the fact that some YOA interventions may be more onerous than a penalty notice.

35. NSWLRC Report 104 [4.11], [4.16]-[4.18].

36. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002) Recommendation 3. The NSW Government supported this recommendation: New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997* (tabled in New South Wales Legislative Assembly, 24 June 2004).

37. *Young Offenders Act 1997* (NSW) s 17(1).

38. *Young Offenders Regulation 2004* (NSW) cl 14(2).

39. *Young Offenders Act 1997* (NSW) s 19(b), (c).

40. *Young Offenders Act 1997* (NSW) s 26(2). A caution can be given at a place other than a police station if appropriate: *Young Offenders Act 1997* (NSW) s 26(3).

41. *Young Offenders Act 1997* (NSW) s 20(7).

42. NSWLRC Report 104, [4.16]-[4.18].

- 6.24 Nonetheless, in light of contemporary calls for the alternative interventions under the YOA to apply to penalty notice offences, we raise the question whether our earlier position should be reconsidered.

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?

Amount of the fine

- 6.25 If it is considered appropriate to make the penalty notice system applicable to children and young people, it may yet be concluded that it is appropriate to set different penalty amounts when the offence is committed by a child or young person than when the offence is committed by an adult.
- 6.26 Some penalty offences differentiate between adults and children already, although the incidence of this across penalty notice offences is limited. Examples include some train travel offences under cl 57(2) of the *Rail Safety (Offences) Regulation 2008* (NSW) relating to fare evasion, where a penalty of \$50 is imposed on offenders under the age of 18 compared with the amount of \$200 imposed on adults.⁴³ Other train travel offences that young people may commit are not included in the scheme. For example, the penalty notice amount of \$400 for offensive language is not reduced where the person is aged under 18 years.
- 6.27 There are some non-transport offences that relate specifically to minors and that attract low penalty amounts. For example, some offences relating to the use of gaming machines apply specifically to people aged under 18 years and attract a penalty amount of only \$55.⁴⁴ A person who is aged under 18 years who enters his or her name in the register of a registered club is also liable to a penalty notice amount of only \$55.⁴⁵
- 6.28 For the vast majority of penalty notice offences, no differentiation is made between young offenders and adult offenders. This is arguably contrary to the principles of youth justice, which recognise that different considerations apply to young

43. *Rail Safety (Offences) Regulation 2008* (NSW) cl 4(1), sch 1. The Shopfront Youth Legal Centre has pointed to this as a good example of how a differential scheme could work: Shopfront Youth Legal Centre, *Preliminary Submission*, 6.

44. *Gaming Machines Act 2001* (NSW) s 50(1), 52(1), *Gaming Machines Regulation 2002* (NSW) sch 3.

45. *Registered Clubs Act 1976* (NSW) s 45A, *Registered Clubs Regulation 1996* (NSW) sch 3.

offenders.⁴⁶ Furthermore, in accordance with general sentencing principles, a court imposing a fine tailors the penalty to fit the individual offender's circumstances. The court is required by statute to have regard to the means of the accused in fixing the amount of any fine.⁴⁷ In contrast, a fine imposed by penalty notice is not generally tailored to the offender's means. Penalty notices, applying as they do irrespective of age, thus ignore the fact that young people generally do not have the financial resources available to adults. The Shopfront Youth Legal Centre reports that, in the majority of cases, it advises "court-election or annulment because the penalty notice amount appears disproportionate to the gravity of the offence, and the client has little or no capacity to pay".⁴⁸

- 6.29 In its submission to our review of sentencing young offenders, the Children's Court suggested that on-the-spot fines should be brought into line with court-based fines so that neither can exceed 10 penalty units (\$1,100) when being imposed on a young offender.⁴⁹ The Children's Court suggested that one way in which this could be achieved is by granting greater access to the courts, perhaps by written pleas, so that the court can exercise the task of taking the young person's means into consideration.⁵⁰ In Report 104, *Young Offenders*, the Commission agreed with the substance of this submission.⁵¹ We observed, however, that it would be administratively impossible to require on-the-spot-fines to differentiate on the basis of a person's age: the offender may not be present; his or her age may not be apparent; and identification may not be available or offered. We recommended that s 53 of the Fines Act be amended to provide that the Children's Court has power to review the amount specified in any penalty notice in light of the young offender's means.⁵²
- 6.30 On further reflection, given the Children's Court's lack of jurisdiction over traffic matters (an area in which young people will commonly receive penalty notices), the SDRO's role in reviewing penalty notices, and the new internal review provisions inserted into the Fines Act, giving the Children's Court the power to review penalty amounts may not be necessary or appropriate.
- 6.31 If a child applies for internal review, the guidelines recently approved by the Attorney General require consideration of whether a caution should have been issued.⁵³ In turn, the caution guidelines require an issuing officer to have regard to the fact the person was aged under 18.⁵⁴ These guidelines will apply to all issuing agencies, apart from police, unless those agencies adopt guidelines of their own consistent with the Attorney General's guidelines.

46. The Youth Justice Coalition drew attention to this in its submission: Youth Justice Coalition, *Preliminary Submission*, 5.

47. *Fines Act 1996* (NSW) s 6; *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c).

48. Shopfront Youth Legal Centre, *Preliminary Submission*, 2.

49. Children's Court of New South Wales, *Submission*, 19, cited in NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) ("NSWLRC Report 104") [8.60].

50. Children's Court of New South Wales, *Submission*, 19, cited in NSWLRC Report 104 [8.60].

51. NSWLRC Report 104 [8.60].

52. NSWLRC Report 104 Recommendation 8.4.

53. Attorney General's *Internal Review Guidelines Under the Fines Act 1996* (2010) [5.3]

54. Attorney General's *Caution Guidelines Under the Fines Act 1996* (2010) [4.7]

6.32 An option to consider is, in addition to allowing review of a penalty amount on the grounds of ability to pay, reducing penalty amounts across the board when the offence is committed by a young person.⁵⁵ Three approaches could achieve this:

- (1) the penalty notice amount could be reduced by a set percentage when the offence is committed by a young person;
- (2) the penalty notice amount could be set at a fixed sum, regardless of the offence;⁵⁶ or
- (3) a maximum penalty notice amount that can be imposed could be set, so that the young person pays the standard penalty amount or the maximum set for children, whichever is the lesser.

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?

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?

Penalty escalation

6.33 It is no surprise that the imposition of a further penalty for fine default becomes more likely for an offender without the financial means to pay, and that many young offenders would fall into this category. This is supported by the experience of the Children's Court, which from time to time is asked to annul old fines and re-sentence a young person.⁵⁷

55. This was an option suggested by the Illawarra Legal Centre Inc: *Preliminary Submission*, 8.

56. The Youth Justice Coalition has suggested that the sum that young people should be required to pay in response to a penalty notice should be fixed at \$25: Youth Justice Coalition, *Preliminary Submission*, 7-8.

57. NSWLRC Report 104 [8.61]; Children's Court of New South Wales, *Submission*, 18-19.

- 6.34 In a study of the impact of infringement notices on young people, the New Zealand Ministry of Justice found that young people are less likely to take steps to pay or reduce accumulated fines when the total amount exceeds \$2,000 “as they consider they have little or no ability to pay this amount back”.⁵⁸ In other words, if penalty escalation has become too great, young people can feel defeated, drawing them into more serious consequences of fine default.

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?

Enforcement

- 6.35 When penalty notice amounts are unpaid, payment may be enforced under the Fines Act through the following means:
- driver licence and vehicle registration sanctions;
 - civil enforcement, such seizure of property, or garnishment of wages;
 - community service orders; and
 - imprisonment.⁵⁹
- 6.36 In relation to a child (that is, a person who is younger than 18 years) the Fines Act provides that:
- imprisonment is not available;⁶⁰
 - the number of hours in any one community service order for a child must not exceed 100 hours (compared with 300 hours for adults);⁶¹ and
 - a child may perform community service work concurrently for the purposes of more than one community service order (adults may not).⁶²

Driver licence and vehicle registration sanctions

- 6.37 The enforcement procedures that have attracted concerns are driver licence and vehicle registration suspension and cancellation.

58. New Zealand Ministry of Justice, *Young People and Infringement Fines: A New Zealand Ministry of Justice, Young People and Infringement Fines: A Qualitative Study* (2005) 9.

59. *Fines Act 1996* (NSW) s 66-97.

60. *Fines Act 1996* (NSW) s 58(e), 92.

61. *Fines Act 1996* (NSW) s 81(2).

62. *Fines Act 1996* (NSW) s 81(3A).

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- 6.38 Pursuant to s 65(3) of the Fines Act, where an offender is under the age of 18 years, and the offence is not a traffic offence, payment of a fine cannot be enforced by suspending or cancelling the young offender's driver licence. If, however, the offence committed by the young person is a traffic offence, payment of the fine can be enforced by suspending or cancelling his or her licence or cancelling his or her vehicle registration.⁶³
- 6.39 A number of issues arise in relation to driver licence sanctions, including whether it is an appropriate enforcement measure where the fine defaulter is under 18 years; whether the cut-off age for exemption from licence sanctions for offences other than traffic offences should be increased, in view of the limited financial resources of young adults; and the way in which the SDRO applies s 65(3).
- 6.40 The actual wording of s 65(3) is as follows:
- enforcement action *with respect to a fine defaulter's driver licence* 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.⁶⁴
- 6.41 The SDRO has reported that it strictly interprets this provision to mean that the exemption does not apply when the young person does not have an existing licence. This means that the further provisions that suspend dealings with the RTA⁶⁵ are taken to apply to young people under 18 years whether or not the offence is a traffic offence. A young person who does not have a licence and who has committed an offence other than a traffic offence will, therefore, be prevented from, for example, obtaining a driver licence, registering a vehicle or even booking, or undergoing, a driving test.⁶⁶
- 6.42 Arguably, this goes against the intention of s 65(3) limiting licence and vehicle registration sanctions to under-18-year-olds who have committed traffic offences. The Youth Justice Coalition suggests that this exposes young people to "harsher penalties than those imposed on current licence holders".⁶⁷ The Illawarra Legal Centre has also submitted that "under no circumstances should RTA sanctions apply to young people under 18 for non traffic related offences".⁶⁸
- 6.43 The NSW Sentencing Council has noted the potential for young adults over the age of 18 "to be negatively affected by the loss of their mobility".⁶⁹ Furthermore, the Council argued that "measures applying to fine default necessarily impact young

63. If the young offender does not hold a driver's licence, but is the holder of a car registration, a fine for a traffic offence can be enforced by cancelling the offender's vehicle registration: *Fines Act 1996* (NSW) s 67(1).

64. Division 3 of the *Fines Act 1996* (NSW) deals with driver licence or vehicle registration suspension or cancellation. Underscoring supplied.

65. *Fines Act 1996* (NSW) s 68.

66. *Fines Act 1996* (NSW) s 68(2).

67. Youth Justice Coalition, *Preliminary Submission*, 9.

68. Illawarra Legal Centre, *Preliminary Submission*, 9.

69. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [5.30].

people disproportionately because they are less likely to have an income, assets or savings to pay for fines that are accumulated".⁷⁰

- 6.44 Shopfront Youth Legal Centre has argued that licence sanctions do not act as an incentive to pay fines for people who already lack the capacity to pay.⁷¹ The Youth Justice Coalition has argued that suspension or cancellation of a driver licence or vehicle registration may cause particular problems for the employment and earning capacity of a young person, especially in rural and remote communities, further reducing their capacity to pay outstanding fines.⁷² There is also the risk that a young person, feeling defeated by the situation he or she finds him or herself in, will be tempted to drive without a licence, or drive an unregistered vehicle, the consequences of which may be further enmeshment in the penalty system.
- 6.45 The Youth Justice Coalition has pointed out two further aspects of the current system that disadvantage young people.⁷³ The first is the SDRO's policy of combining penalty notices for both traffic and non-traffic offences. The effect of this is that where a young person is unable to pay the amount under the enforcement order, the SDRO can impose licence sanctions, in spite of the fact that these sanctions would not have been available for the non-traffic offence alone.
- 6.46 Secondly, because the Children's Court lacks jurisdiction to hear traffic offences,⁷⁴ a young person challenging a traffic offence penalty notice must come before the Local Court. As a result, the young offender loses the expertise of a court that specialises in dealing with children, and cannot access legal representation from the Children's Legal Service branch of the Legal Aid Commission.
- 6.47 The SDRO has argued that driver licence and vehicle registration sanctions are the most effective means of securing compliance with penalty notices and other Australian jurisdictions are moving towards adopting these measures.⁷⁵

Question 6.9

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

Question 6.10

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

70. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [5.30].

71. Shopfront Youth Legal Centre, *Preliminary Submission*, 6.

72. Youth Justice Coalition, *Preliminary Submission*, 8-9.

73. Youth Justice Coalition, *Preliminary Submission*, 9-10.

74. Section 28(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) provides that the Children's Court does not have jurisdiction to hear or determine proceedings in respect of a traffic offence unless it arose out of the same circumstances as another offence in respect of which the person is charged before the Children's Court, or unless the child was not old enough to hold a driver's licence.

75. State Debt Recovery Office, *Preliminary Submission*, 3.

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?

Time to pay

- 6.48 Provisions that allow time to pay a penalty, or that allow payment by instalments, are an important safety-net for many offenders but particularly benefit young people, whose financial resources are limited. These provisions are discussed in detail in Chapter 5 at paragraphs 5.76-5.81.

Writing-off unpaid fines

- 6.49 Section 101 of the Fines Act, which allows a fine defaulter to apply to the SDRO to have a fine or penalty notice debt written off, is an important provision for young people to have available to them because of the likelihood that many may not have sufficient means to pay the fine or penalty notice debt. The issue that arises in this context is whether the “good behaviour” period of five years following write-off of the debt is an appropriate length of time for children and young people.
- 6.50 While some submissions supported application of a shorter “good behaviour” period to children and young people,⁷⁶ one submission argued that any “good behaviour” period disadvantages young people who are homeless or have an intellectual disability or mental illness and who are, therefore, likely to incur further fines and penalties.⁷⁷ The Youth Justice Coalition advocated an unconditional waiver of the fine or penalty, not merely a reduction of the “good behaviour” period.⁷⁸ The Youth Justice Coalition, submitted alternatively that a “good behaviour” period of six months would better reflect the policy in s 33(1)(b) of the *Children (Criminal Proceedings) Act 1987* (NSW) and the minor nature of the offences that attract penalty notices. The Illawarra Legal Centre also supported a reduction in the “good behaviour” period for young people.⁷⁹

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?

76. See, for example, Shopfront Youth Legal Centre, *Preliminary Submission*, 6.

77. Youth Justice Coalition, *Preliminary Submission*, 8.

78. Youth Justice Coalition, *Preliminary Submission*, 8.

79. Illawarra Legal Centre, *Preliminary Submission*, 8.

New Zealand review

- 6.51 The New Zealand Ministry of Justice observed a number of themes that emerged from its study of young people’s experience of the infringement system. Both young people and their parents commonly and consistently reported that:
- they had received infringement notices for mainly minor offences, such as licence-related as opposed to safety-related offences;
 - compared with older drivers, they felt unfairly targeted by police when driving, being subjected to “routine checks” and having their cars thoroughly inspected;
 - the attitude of police to the young person is perceived to have a significant impact on the likelihood of being issued with an infringement notice, and the number issued;
 - the period of 28 days within which to pay is unrealistic, given the number and size of the infringement notices being issued, and the young person’s relatively low earning capacity;
 - there are few options available to reduce or clear fines; and
 - fines have a significant financial, emotional, vocational, social and societal impact on young people.⁸⁰
- 6.52 The Ministry of Justice has recommended a three-tiered response to young offenders aged 17-24 years, on the basis that this age group spans a number of different life stages.⁸¹ Each tier would have a different focus: first, early intervention; next, debt minimisation; and lastly, debt reduction.⁸² The actions under each phase were proposed by participants to the study, who were young people aged between 17 to 24 years who have multiple infringement fines and members of their families.
- 6.53 During the early intervention phase, management of those “new to infringing” would involve measures that recognise their lack of: financial resources; knowledge of the “system”; confidence dealing with government agencies; and general life skills.⁸³ The goal would be to prevent young people “transitioning to the next phase of infringing”. The measures suggested for this phase are as follows:
- Education – making young infringers aware that their behaviour is unacceptable, the reality of the consequences, explaining options, etc.
 - Case management – having one staff member responsible for the management and collection of their fines.
 - ‘Time to pay’ arrangements from the time the infringement notice is issued.

80. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 47.

81. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10, 49. These phases have been labelled the “rabbits in the headlight” phase, the “sweet as” phase and the “rear vision reality” phase.

82. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10, 49-50.

83. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10, 49.

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- Family friendly processes and procedures – acknowledging that the parent has a significant part to play in the management and payment of fines.⁸⁴

6.54 The debt reduction phase is when the young person has “moved into a heavy phase of infringing”. The focus is on minimising the level of penalty debt, while still deterring the unacceptable behaviour, through the following means:

- Lowering fine levels to an acceptable level, reflecting young infringers’ financial position.
- Setting maximums for the amount of fines the Police or another authority can give in a single incident (e.g. \$200), or over a given period (e.g. a maximum of \$6,000 to \$10,000 total fines in a specified time) before other enforcement measures come into play (e.g. Community Work, losing their licence for a fixed period).
- Reviewing the weighting of fines so that fines relating to safety have a higher value than licence-related fines.
- Enabling greater discretion (bargaining power) by the Collections Unit, e.g. reducing penalties if fines are paid, wiping fines related to their learner licence if they get their restricted licence.
- Ensuring easier access to Community Work, i.e. allocated by the Collections Unit without having to appear before a Judge.⁸⁵

6.55 In the last phase, people who were demonstrating a growing maturity and had received few fines in recent years would be rewarded for their changed behaviour and helped to reduce previously accumulated debt. Measures during this phase include:

- Financial incentives, e.g. the Government matching the young person’s contribution towards their fines dollar-for-dollar, or making a percentage contribution towards what they have paid.
- Clean slate policies, e.g. wiping fines if the person has not had a fine in the last two or five years. (The fines would be added again, if the young person infringed within a set period of time).⁸⁶

6.56 The study participants also suggested the following measures:

- Reducing the time period between learner and restricted and restricted and full licences.
- Making the licence fees more affordable for low income earners.
 - The Government through Work and Income funding driving lessons and licence fees.
 - Implementing a second chance system for restricted and full licences (i.e. paying once and getting two chances to pass).

84. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10, 49.

85. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10, 49-50.

86. New Zealand Ministry of Justice, *Young People and Infringement Fines: A Qualitative Study* (2005) 10, 50.

- Making it more difficult for young people to access cars that are un-roadworthy, or making it illegal for those on a learner licence to buy cars with high specification motors (these comments came from parents).
- Educating the Police about the impact multiple infringement fines have on young people and their families, and the role the Police play in the process.

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?

7. Impact on vulnerable groups

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Identifying vulnerable groups and their problems

- 7.1 This chapter examines the impact of penalty notices on vulnerable groups of people, and raises issues in relation to some of the means by which the negative effects of penalty notices on these groups could be avoided or minimised. Our focus in this chapter is on certain groups of vulnerable individuals; namely, those with a mental illness or cognitive impairment, those who are in custody, homeless, or suffering financial hardship.¹ The various problems they encounter with fines and penalty notices are discussed in the following paragraphs.

People with a mental illness or cognitive impairment

- 7.2 In reviewing the laws relating to the use of penalty notices, the terms of reference require us to have particular regard to “whether penalty notices should be issued to people with an intellectual disability or cognitive impairment”. Generally, a “cognitive impairment” means a loss of brain function affecting judgment, resulting in a decreased ability to process, learn and remember information. “Intellectual disability” is not a separate state but is encompassed within the category of cognitive impairment. It is a permanent condition of significantly lower than average intellectual ability, or a slowness to learn or process information.²

1. The next chapter contains a discussion on the impact of criminal infringement notices, a special type of penalty notices, on Aboriginal and Torres Strait Islander people.

2. NSW Law Reform Commission, *People With Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultation Paper 5 (2010) (“NSWLRC Consultation Paper 5”) [1.30]. This paper relates to a separate inquiry on people with cognitive and mental health impairments in the criminal justice system, explains these definitions and concepts in detail.

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- 7.3 We have taken a wide view of our Terms of Reference to include people with a mental illness. This is because people with a mental illness will be affected in the way in which they feel, think, behave and interact with others. They may, if an illness is acute, perceive reality in ways completely different from others,³ or lack impulse control or judgment in relation to their conduct. These are considerations that have the potential to be highly relevant to circumstances in which a penalty notice is issued, and the impact of incurring penalties. It is important to note that some people with cognitive impairment may also have a mental illness.⁴
- 7.4 Our concern with the impact of penalty notices on vulnerable people should not centre on drawing distinctions between intellectual disability, other types of cognitive impairment and mental health impairment. What are relevant and will, therefore, determine the appropriate response of the penalty notice system are: whether a person has capacity for mental functioning so as to justify the imposition of a penalty rather than an alternative approach of a therapeutic or diversionary kind; and whether a person suffers financial disadvantage by reason of his or her impairment or mental illness, which arguably makes the imposition of a penalty inappropriate.
- 7.5 Problems with the penalty notice system for people with a mental illness or cognitive impairment include the following:
- Socio-economic disadvantage: limited employment opportunities and reduced ability to access support services can lead to “survival crimes”, such as evading transport fares.⁵
 - Higher visibility to law enforcement officers: This can be caused by their perceived socially “inappropriate behaviour”, which is the result of their isolation from the general community, and narrow societal stereotypes about acceptable behaviour; or by greater physical presence in public spaces because of unemployment and homelessness. Higher visibility can result in a greater chance of being randomly stopped by law enforcement officers and issued with on-the-spot fines such as fare evasion.⁶
 - Difficulty understanding conflict and coping with stressful situations: This can lead to an argument or misunderstanding escalating into the issue of a penalty notice.⁷
 - Inability to identify the conditions: Law enforcement officers may lack knowledge of the issues surrounding mental illness or cognitive impairment and may not be able to identify people with these vulnerabilities.
 - Lack of deterrence: Penalty notices may not have a deterrent effect because of the nature of a particular person’s illness or impairment (for example, inability to

3. This is also explored in detail in NSWLRC Consultation Paper 5 (2010) [1.29].

4. K Vanny, M Levy and S Hayes, “People with an Intellectual Disability in the Australian Criminal Justice System” (2008) 15 *Psychiatry, Psychology and Law* 261, 262; NSWLRC Consultation Paper 5 [1.31].

5. Intellectual Disability Rights Service, *Preliminary Submission*, 4.

6. Intellectual Disability Rights Service, *Preliminary Submission*, 4.

7. Intellectual Disability Rights Service, *Preliminary Submission*, 4.

comprehend the nature of the offence or the consequence of receiving a penalty notice).⁸

- 7.6 The Intellectual Disability Rights Service (“IDRS”) has argued that the high levels of socio-economic disadvantage and marginalisation within the community experienced by people with an intellectual disability, as well as literacy and/or communication difficulties, make it difficult for them either to pay fines or access assistance to deal with the penalty notice by means other than payment.⁹ It provided case studies to support this argument.
- 7.7 **Case study one.** A client of IDRS with an intellectual disability, severe mental illness and other health concerns, had accumulated tens of thousands of dollars in rail and other fines. As a result of his disability, he does not grasp the extent of the fines and does not have the capacity to understand the reasons for his fines. Fining him has not worked to reduce the incidence of travelling without a ticket and other such offences. His disabilities and ongoing health problems effectively render him incapable of ever engaging in employment and thereby prevent him from being in a position to pay any of the outstanding fine amounts.¹⁰
- 7.8 **Case study two.** Another client has a moderate intellectual disability and attention deficit disorder, manifesting as an impaired capacity to comprehend and process complex concepts or instructions, an inability to engage in reasonable problem solving, difficulty understanding social cues and responding appropriately, and memory impairment. She does not have a driver licence and uses public transport daily to travel to work and support services, and visit friends. She has no understanding of the need to purchase tickets for bus and train travel, nor does she understand the rules about travelling on public transport (such as not smoking on trains or putting feet on seats). Over the past five years, she has accumulated thousands of dollars in fines for various travel-related offences, mainly due to travelling on trains and ferries without valid tickets and going onto/into restricted areas. She has no comprehension of the meaning of the penalty notices and usually just passes them on to her mother.¹¹
- 7.9 The IDRS reasoned that, as she lacks the “capacity to appreciate the wrongfulness of her actions giving rise to the penalties, the enforcement of the penalty notices will not prevent her from engaging in such conduct in the future and incurring further penalties”. Applications to write-off accumulated penalties had to be repeated each time more penalties were incurred, until the State Debt Recovery Office (“SDRO”) agreed to review the client’s file every three months and write-off any penalties that had been issued.¹²
- 7.10 **Case study three.** Another client, in his mid-20s, has a mild intellectual disability and has been in and out of prison since adolescence for minor property, drug

8. Intellectual Disability Rights Service, *Preliminary Submission*, 9. These were problems identified for people with an intellectual disability but apply also to the broader group of people with a cognitive impairment and people with a mental illness.

9. Intellectual Disability Rights Service, *Preliminary Submission*, 7.

10. Intellectual Disability Rights Service, *Preliminary Submission*, 16.

11. Intellectual Disability Rights Service, *Preliminary Submission*, 16-17.

12. Intellectual Disability Rights Service, *Preliminary Submission*, 17.

possession and public order offences, arising out of drug addiction. Because of these circumstances, he has been unemployed and homeless for most of his adult life. His disability has left him with an awkward gait, which regularly brings him to the attention of police and other law enforcement officers. He has accumulated thousands of dollars of fines for offences such as riding a bike without a helmet and travelling on trains without a ticket. The prospects of his being employed or having a driver licence in the foreseeable future are slim. Issuing more penalty notices will most likely have very little, if any, deterrent effect, nor will it result in the payment of any of the penalties.¹³

- 7.11 In addition to these case studies provided by the IDRS, there was a case covered in the media about an intellectually disabled man, with a mental age of eight, who had accumulated \$1,150 in penalties for fare evasion or for having the incorrect ticket for his journey. He travelled by train each day to his employment at a sheltered workshop, where he earned \$73 per week. He had no understanding of what a fare was, and hence no concept of fare evasion. When an appeal to the SDRO to waive the fines was not successful, the man's father sought the intervention of the Transport Minister. The Minister asked RailCorp to put in place arrangements for the man to travel without penalty in the future.¹⁴

People in custody

- 7.12 People in custody comprise another group of people who are adversely affected by fines and penalty notices. In *Taking Justice into Custody*, a Law and Justice Foundation report on the legal needs of prisoners, the "vast majority" of the 67 prisoners and ex-prisoners interviewed reported having outstanding fines and penalties.¹⁵ One inmate estimated his fine and penalty debt to be in the order of \$49,000. More commonly, amounts ranged from \$175 to \$15,000. Sources of these fines and penalties included traffic and transport penalties, and court-imposed fines from current and past offences.
- 7.13 The Sentencing Council, in its 2006 interim report on fines and penalties, observed that there was at that time "a significant body of offenders, many of whom are in custody, who have accumulated a very significant debt as the result of unpaid fines, penalties, levies and administrative charges, which they have no hope of paying".¹⁶ It noted that the NSW Department of Corrective Services had advised that Australian prisoners owed an average of \$8000 each in outstanding debt.¹⁷ This will include non-fine and non-penalty debt, and some of these amounts will include reparations to victims and victim compensation levies (which are not relevant to penalty notice amounts).

13. Intellectual Disability Rights Service, *Preliminary Submission*, 17-18.

14. H Aston and A Chesterton, "Mentally disabled 'boy' bullied over train fines" (Daily Telegraph, 14 May 2007).

15. A Grunseit, S Forell and E McCarron, *Taking justice into custody: the legal needs of prisoners* (The Law and Justice Foundation of NSW, Sydney, 2008) 79-80.

16. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.109].

17. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.109].

- 7.14 Most prisoners were financially disadvantaged and earned very little in prison. The Sentencing Council recorded that in 2006, prisoners in NSW earned between \$12 to \$65 dollars a week, with 70% earning approximately \$15 dollars a week. Money from external sources, deposited in inmate's gaol accounts by family and friends, was limited to \$450 per calendar month.¹⁸ The Council also noted that from this income prisoners paid for essential items, telephone calls, sports and art activities and discretionary consumer items (such as radio, television or shoes) at prices comparable to those in the general community.¹⁹ Where prisoners are convicted of an offence against a victim who is awarded victim's compensation, 10% of his or her income will be levied for contribution to the compensation fund.²⁰
- 7.15 The Law and Justice Foundation has observed that:
- Without other ways to 'repay' their debt, inmates can leave prison with substantial fine related debt, adding to the challenges they face in successfully reintegrating into the community post release.²¹
- 7.16 Another Law and Justice foundation study found that the burden of accumulated fines can be exacerbated by driver licence sanctions imposed while the person was in prison. This can add to "the challenges in gaining employment and generally re-establishing life after custody". The Law and Justice foundation also noted that some inmates are reported as not being aware their licence had been suspended.²²
- 7.17 In addition, debt generally can be a problem and fines and penalties can add to prisoners' debt burden. A 1999 Queensland study on debt found high levels of debt among prisoners and that many prisoners with debt (though not necessarily fines and penalties debt) said they committed a crime to pay it.²³ In addition, in a 2003 NSW study, 51% of ex-prisoners interviewed had debts (not necessarily as a result of fines and penalties) and those with debt were more likely to return to prison.²⁴ Penalty notices are intended to *reduce* offending by deterrence. The idea that penalty notice might add to a debt burden and have the effect of contributing to re-offending is of major concern.

Homeless people

- 7.18 Homeless people who live or sleep in public places have been found to be particularly vulnerable to being fined for offences such as drinking in public places,

18. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.110].

19. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.111].

20. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.112].

21. A Grunseit, S Forell and E McCarron, *Taking justice into custody: the legal needs of prisoners* (The Law and Justice Foundation of NSW, Sydney, 2008) 119-122.

22. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 8.

23. In a 1999 study in Queensland, 49% of 100 prisoners surveyed said that they had committed an offence to repay a fines debt: A Stringer, *Prison and debt: the findings of the Prison and Debt Project by Anne Stringer for the Prisoners' Legal Service* (Brisbane, 1999) 13, 56.

24. E Baldry, D McDonnell, P Maplestone and M Peeters, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration for ex-prisoners?* (Australian Housing and Urban Research Institute, Melbourne, 2003) 14.

and for public transport offences.²⁵ The following account by a social worker vividly illustrates homeless people's experiences with the penalty notice system:

[T]hey will quite frequently [forget], particularly if they were perhaps intoxicated at the time and it was something so minor, such as having feet on the seat or telling a Transit Officer to rack off and picking up a \$400 a piece for that, they quite easily forget it. Until they get picked up on \$1200 worth of fines that are outstanding. All of a sudden they are in courtSo, they don't deal with them, they don't remember having them and then they lose the paperwork which is another thing. As often as IDs get lost, other related paperwork gets lost so we have people call us saying 'I have to be in court and I have no idea when, what date, who...' and sometimes even 'what for'.²⁶

People in financial hardship

- 7.19 The Law and Justice Foundation has summed up the adverse consequences of fines on certain disadvantaged groups, including those who are experiencing financial hardship:

We particularly noted the impact on those who are homeless, young, on low incomes, who experience mental illness and/or have unstable or chaotic lives, including periods of imprisonment. Some disadvantaged people are more vulnerable to receiving fines, are more likely to accrue multiple fines, have less capacity to pay fines and can accumulate significant debt for unpaid fines. As fines remain unpaid, disadvantage is further compounded as driver licenses and car registration are affected.²⁷

Issues and potential solutions

- 7.20 Having identified some of the problems encountered by certain vulnerable groups of individuals, we now turn to some of the ways by which the negative effects of penalty notices on these groups could be avoided or minimised. The issues we raise relate to: (a) specific groups; (b) some features of the penalty notice system that affect vulnerable groups in general; and (c) recent reforms to the *Fines Act 1996* (NSW) ("Fines Act") that were specifically designed, or can be used, to mitigate the impact of penalty notices on vulnerable people.

Issues relating to specific groups

People with mental illness or cognitive impairment

- 7.21 The main issues with respect to people with mental illness or cognitive impairment are (a) whether penalty notices should be issued to them, and (b) whether there are alternative measures that could be taken in response to a penalty notice offence

25. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006).

26. A Grunseit, S Forell and E McCarron, *Taking justice into custody: the legal needs of prisoners* (The Law and Justice Foundation of NSW, Sydney, 2008) 16.

27. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 1; see also Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006).

committed by them. We have received some preliminary submissions on these issues.

- 7.22 The IDRS submitted that the answer to the question “should penalty notices be issued to people with intellectual disability or cognitive impairment?” depends on what alternative is made available.²⁸ The IDRS does not support any alternative that involves greater court involvement or exposure, or greater involvement by police or agency officers, including increasing the scope of court attendance notices to cover penalty notice offences, as this “creates substantial anxiety and stress for people with intellectual disability, which in turn can lead to behavioural problems and the risk of more serious charges”.²⁹
- 7.23 The IDRS supported “the development of guidelines and a model code of conduct for issuing officers, which would permit greater discretion in, and guidance for, the use of a warning or a caution in those cases where that would be more appropriate than the issue of a penalty notice.”³⁰ The IDRS noted the introduction of official cautions in the *Fines Further Amendment Act* and urged that the guidelines that were, at that time, to be developed, address the circumstances of intellectual disability, and be accompanied by information resources and education of law enforcement officers.³¹
- 7.24 The guidelines that have since been adopted meet these suggestions. The guidelines provide that whether a person has a mental illness or intellectual disability is a matter that “should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice”.³² They also provide that agencies should ensure that all issuing officers:
- have a good understanding of the actual offences for which they are authorised to issue penalty notices and cautions;
 - are aware of the guidelines; and
 - receive regular and appropriate training to assist in the interpretation and use of the guidelines, tailored to meet their particular needs and areas of responsibility.³³
- 7.25 The IDRS also submitted that “[t]here are inadequate alternatives (both legal and operational) to the issuing of penalty notices compared to the options available at the tail-end of the penalty notice system”.³⁴ If penalty notices are issued on the assumption that “they can be dealt with at a later stage”, this only postpones the

28. Intellectual Disability Rights Service, *Preliminary Submission*, 8.

29. Intellectual Disability Rights Service, *Preliminary Submission*, 8.

30. As recommended in NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.123].

31. Intellectual Disability Rights Service, *Preliminary Submission*, 10.

32. Attorney General’s *Caution Guidelines Under the Fines Act 1996* Essential Summary.

33. Attorney General’s *Caution Guidelines Under the Fines Act 1996*, [8.1].

34. Intellectual Disability Rights Service, *Preliminary Submission*, 10.

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exercise of discretion to a point in the process that might not be available to, or appropriate for, a person with an intellectual disability.³⁵

- 7.26 The IDRS was opposed to the establishment of a “do not fine” register because of privacy and consent issues.³⁶
- 7.27 In relation to penalty mitigation measures available after issue of an enforcement notice, the IDRS submitted that these were of little benefit to people with an intellectual disability. First, in order to obtain a permanent write-off of a penalty, a person must not re-offend for five years, which for people with an intellectual disability is too long for comprehension or compliance. It assumes that they can change their circumstances or the behaviour that led to the offence, which is not always the case. Secondly, where a person with an intellectual disability has received multiple penalty notices, the necessity to “re-prove” the disability in respect of each application for review or write-off disadvantages those who cannot get repeated legal or advocacy assistance. IDRS reported that it has established an informal, ad hoc procedure in relation to particular clients whereby it notifies the SDRO of new penalties and these are written off automatically. The IDRS submitted that the SDRO should make this approach more widely known and available.³⁷
- 7.28 The Shopfront Youth Legal Centre (“Shopfront”) submitted that it is inappropriate to issue penalty notices to people with cognitive impairment or serious mental illness for two main reasons. First, many will be on very low incomes and therefore have limited capacity to pay penalties. Secondly, those with a cognitive impairment “may find it very difficult to understand and comply with their legal obligations”.³⁸
- 7.29 Shopfront suggested that, because it is often hard for the untrained person to recognise cognitive impairment, and because it may not be easy for people with a cognitive impairment to carry and produce identification that they are a “vulnerable person”, a “do not fine” register kept by police and RailCorp may be preferable. However, at the same time, Shopfront acknowledged that this raised privacy concerns.³⁹
- 7.30 Referring specifically to young people, the Youth Justice Coalition (“YJC”) was opposed to any conditional period at all for writing-off penalties incurred by young people suffering from a mental illness, and other vulnerable groups, including the homeless. Failing that, the YJC submitted that a “good behaviour” period “should be consistent with other conditional periods prescribed under the criminal law”, namely, be less than the two year bond that can be imposed by the Children’s Court for a criminal offence, and ideally not more than six months.⁴⁰
- 7.31 It is to be hoped that the new caution provisions of the Fines Act, which are discussed below,⁴¹ will allay some of the concerns expressed in the preliminary

35. Intellectual Disability Rights Service, *Preliminary Submission*, 10.

36. Intellectual Disability Rights Service, *Preliminary Submission*, 11.

37. Intellectual Disability Rights Service, *Preliminary Submission*, 12-13.

38. Shopfront Youth Legal Centre, *Preliminary Submission*, 7.

39. Shopfront Youth Legal Centre, *Preliminary Submission*, 8.

40. Youth Justice Coalition, *Preliminary Submission*, 8.

41. See para 7.57-59.

submissions. Being a discretionary measure, the use of a caution relies on proper judgment of the circumstances, lack of prejudice, and awareness training. The problems of identifying mental illness or cognitive impairment in the offending behaviour remain.

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?

Question 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?

Question 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?

People in custody

7.32 The main issue with people in custody is finding strategies to enable them to pay fines and penalty notices debt. The Sentencing Council examined this issue and canvassed the following strategies:⁴²

- systematic elimination of debts of the mentally ill and intellectually disabled prisoners;
- pro rata reduction of outstanding debt;
- development of a more progressive regime for the writing-off of accumulated fines and penalties;
- development of guidelines for debt reduction/licence reinstatement;
- reduction or waiver of fines and surcharges for offenders who successfully complete an accredited job training, or driver education programs or other approved program and who then begin to pay off their debt; and

42. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.114].

- extension of three months SDRO moratorium on collection.
- 7.33 The Sentencing Council raised the prospect of systematically expunging the debts of the mentally ill and cognitively impaired prisoners, on the basis that these fines are unlikely ever to be recovered.⁴³ It noted that penalty debts can be written off or waived at the discretion of the SDRO or by the Hardship Review Board, but only on a case-by-case basis, and upon application.⁴⁴ A better approach, it was suggested, would be to “provide the SDRO with the names of those prisoners assessed as having a mental illness or an intellectual disability at intake, for whom the expunging or writing off of accumulated debts for penalties or fines would be appropriate”.⁴⁵
- 7.34 Pro-rata reduction of outstanding debt could be offered to offenders in custody in exchange for partial payment of the outstanding sum, for example by “a \$100 debt reduction for every \$10 repaid by a prisoner; or on the basis of a sliding scale for a set-off based on the differing wage levels across the Correctional Centres and prison industries”.⁴⁶ This is an option that may be appropriate in a context where, realistically and historically, these are debts that the SDRO has little hope of recovering. It may also assist in a person’s rehabilitation and avert further offending to repay the outstanding penalty amounts.
- 7.35 The counter argument is that the amounts owed by the prisoner relate to penalties imposed on them and the interests of justice require their payment. This argument is stronger for court-imposed fines, and amounts owing in relation to victims compensation (which involve court processes), and raises the possibility of treating fines debts and penalty notice debts differently.

Question 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?

Question 7.5

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

Question 7.6

Should some other strategy be adopted in relation to offenders who have incurred penalty - or fine - debt? If so:

43. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.116].

44. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.118].

45. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.119].

46. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [4.122].

- (1) In relation to which groups should any such strategy be adopted, and
 (2) What strategy or strategies would be appropriate?

Question 7.7

How should victims compensation be dealt with in any proposed scheme?

Features of current system that affect vulnerable groups

- 7.36 The section examines the following features of the penalty notice system that particularly affect vulnerable groups:
- penalty amounts are fixed and do not permit any allowance for the circumstances of the offender or offending behaviour;
 - the processes and procedures of the penalty notice system are complex and rely heavily on written responses and applications; and
 - the discretion not to issue a penalty notice is exercised by a wide range of authorised officers, many of whom will not be trained in identifying and dealing with mental illness, cognitive impairment and other vulnerabilities, or may not have clear and comprehensive guidelines to assist in the exercise of their discretion.

Penalty amounts

- 7.37 The Law and Justice Foundation has highlighted the impact of high penalty amounts on vulnerable people suffering financial disadvantage.⁴⁷ We have drawn attention in Chapter 4 to examples of penalty amounts that are seemingly out of proportion to the objective seriousness of the offence.⁴⁸ A number of these relate to activities on trains or railway platforms, including travelling without a ticket, spitting or smoking on a train or platform, and putting feet up on train seats, and are of particular relevance to socially and economically disadvantaged people.⁴⁹
- 7.38 The HPLS has recommended the introduction of a concession penalty rate for people on low incomes, and that a person receiving income from Centrelink be considered, by definition, on a low income.⁵⁰ Similarly, the Illawarra Legal Centre has submitted that penalty amounts should be linked to a person's capacity to pay, such as being equated to their daily rate of income. If a person is not employed, and not on a Centrelink benefit, then the Illawarra Legal Centre submits that the "amount should be greatly discounted".⁵¹

47. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 3.

48. Para 4.40-4.48.

49. Para 4.5-4.46, Table 4.3.

50. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) Recommendations 8 and 9.

51. Illawarra Legal Centre Inc, *Preliminary Submission*, 7.

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7.39 PIAC also recommends, if feasible, a concession rate for penalty notice fines for people on low incomes.⁵² It states that, in addition to the issue of comparative fairness of penalties for different offences, there is the issue of income inequality between offenders. PIAC is supported in this by the Australian Institute, which proposed a proportional fines system based on income.⁵³ PIAC quotes from the Australian Institute as follows:

Few would argue against the principle that the penalty for an offence should affect all offenders equally. No-one would argue that rich people should receive shorter jail sentences or have fewer demerit points deducted than poor people. Yet the system of flat rate fines for traffic and other offences in Australia is grossly unfair in just this way. A flat fine applied to all imposes much more pain on low income people than it does on high-income earners.⁵⁴

7.40 In cases that go to court, fines will be set according to a range of factors including the particular hardship that an individual may suffer from the punishment, and the fine will be set taking into account the offenders means to pay the fine.

7.41 Access to the new Work and Development Order and provision for hardship review can ameliorate some of the impact on financially disadvantaged groups.⁵⁵

7.42 Any system of concessions would need to be practical to administer and not undermine the need for the penalty notice system to be simple. This raises a number of questions such as:

- How would the system be administered?
- Would a person receive a discount upon proof of financial disadvantage?
- Would these extra administrative steps add to the costs of the penalty notice system, ultimately being borne, unfairly some may argue, by all taxpayers?

7.43 One option is to fix a discount for pensioners and those in receipt of centrelink benefits as some have suggested. This raises the question whether such a system would be regarded as fair.

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?

52. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) Recommendation 8, 17: "That the NSW Government investigate the feasibility of introducing a concession rate for people on low incomes."

53. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 17.

54. C Hamilton, *Making Fines Fairer* (The Australian Institute, 2004) 1, quoted in Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 17.

55. Para 7.68-7.73.

Question 7.9

If a concession rate were applied to people on low incomes, should the penalty amount be reduced by a fixed percentage or determined by some other formula?

Question 7.10

How could such a system be administered simply and fairly?

Processes and procedures

- 7.44 The Law and Justice Foundation has also highlighted the difficulties for vulnerable people of managing the penalty notice system, accessing court, seeking legal advice and assistance, and seeking special consideration.⁵⁶ It observed that the penalty notice system, including the processes to challenge decisions, seek special consideration, or make alternative arrangements for payment, “relies heavily on written information and correspondence”.⁵⁷ This can present particular difficulties for disadvantaged people, including people with limited literacy, or who do not read English well or at all.⁵⁸
- 7.45 The HPLS has also found that many disadvantaged people do not understand how penalty notices can be contested and yet do not seek legal assistance, or seek it too late when the matter has escalated to crisis point.⁵⁹
- 7.46 The obstacles vulnerable people can face in obtaining legal assistance include:⁶⁰
- not recognising that legal help is available for their problem;⁶¹
 - not knowing where or how to seek help;⁶²
 - living in rural or regional areas which do not have appropriate services;⁶³ and
 - having other problems which take priority over addressing their fines and other legal problems.⁶⁴

56. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 4.

57. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 5.

58. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 5.

59. Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006) 13.

60. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 6.

61. S Forell, E McCarron and L Schetzer, “No home, no justice? The legal needs of homeless people in NSW”, *Unpublished section of interview* (The Law and Justice Foundation of NSW, 2005) 131, 127; *Public Consultations*, 61.

62. S Forell, E McCarron and L Schetzer, “No home, no justice? The legal needs of homeless people in NSW”, *Unpublished section of interview* (The Law and Justice Foundation of NSW, 2005) 113.

63. S Forell, E McCarron and L Schetzer, “No home, no justice? The legal needs of homeless people in NSW”, *Public Consultations* (The Law and Justice Foundation of NSW, 2005) 73.

64. S Forell, E McCarron and L Schetzer, “No home, no justice? The legal needs of homeless people in NSW”, *Unpublished section of interview* (The Law and Justice Foundation of NSW,

- 7.47 There are some disincentives to electing to have a penalty notice matter dealt with by a court, such as the inconvenience and stress associated with court processes, the imposition of court costs regardless of the outcome, and the risk of incurring a conviction. For a disadvantaged person, “especially those unable to access legal advice or representation”,⁶⁵ the disincentives are magnified. Going to court can be “a difficult and frightening experience” to be avoided, particularly if the person has had a previous negative experience with the justice system.⁶⁶
- 7.48 If the new caution provisions⁶⁷ are used appropriately to divert vulnerable people, wherever possible, from the penalty notice system at the outset, the obstacles the system’s processes and procedures present will obviously not arise. Be that as it may, the harsh reality is that, no matter the mechanisms put in place to assist people navigate the penalty notice system, there will always be those who will be disadvantaged by administrative processes, finding them intimidating and difficult to understand.

Writing-off unpaid fines

- 7.49 The Fines Act gives a fine defaulter the opportunity to apply to the SDRO to write-off unpaid fines (including penalty notices amounts). An application may be made after a fine enforcement order is made and before a community service order is issued.⁶⁸ The SDRO may write-off the unpaid fine if it is satisfied that, due to any or all of the financial, medical or personal circumstances of the fine defaulter:
- the fine defaulter does not have sufficient means to pay the fine and is not likely to have sufficient means to pay the fine, and
 - civil enforcement (garnishment of wages or debts, or seizure of property) has not been or is unlikely to be successful in satisfying the fine, and
 - the fine defaulter is not suitable to be subject to a community service order.⁶⁹
- 7.50 If an application for write-off is denied by the SDRO, the fine defaulter may apply to the Hardship Review Board (which is composed of the Chief Commissioner of State Revenue, the Secretary of the Treasury, Director-General of the Department of Justice and Attorney General) for a review of the SDRO decision.⁷⁰
- 7.51 On a review, the Hardship Review Board may direct the SDRO to write-off, in whole or in part, an unpaid fine.⁷¹
- 7.52 We seek submissions on whether the write-off provisions of the Fines Act are effective in assisting individuals who are experiencing financial, medical or other

2005) 114–115. This can include finding somewhere to live, dealing with medical issues and finding employment.

65. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 6.

66. Law and Justice Foundation, *Fine but not Fair: Fines and disadvantage* (2008) 6.

67. See para 7.57-7.59.

68. *Fines Act 1996* (NSW) s 101(1).

69. *Fines Act 1996* (NSW) s 101(1A).

70. *Fines Act 1996* (NSW) s 101B.

71. *Fines Act 1996* (NSW) s 101B(6)(c).

forms of disadvantage. Further, we seek submissions on whether any improvements could be made to the procedures relating to applications for write-off.

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)?

Training and education

- 7.53 The Sentencing Council has pointed out that a vulnerable person is reliant upon the authorising officer exercising discretion, yet “[s]uch discretion is limited where the authorising officer has not been trained effectively in identifying when it is appropriate to issue a penalty notice, or is unsympathetic to the marginalised sections of the community”.⁷² As noted above, mental illness and cognitive impairment, including intellectual disability, can be difficult to recognise by those who are untrained.
- 7.54 The Sentencing Council identified the need for training for staff of relevant issuing agencies in accommodating the special problems of vulnerable people, particularly in remote and regional areas and in regions with a significant Aboriginal population.⁷³
- 7.55 One submission has also raised the issue of disability and discrimination training for law enforcement officers issuing penalty notices.⁷⁴ The IDRS drew attention⁷⁵ to Article 13(2) of the *United Nations Disability Convention*, which provides that:

In order to help to ensure effective access to justice for persons with disabilities, States parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

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?

72. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.34].

73. NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, 2006) [3.124].

74. Intellectual Disability Rights Service, *Preliminary Submission*, 7-8.

75. Intellectual Disability Rights Service, *Preliminary Submission*, 6.

Recent reforms

7.56 Recent amendments to the Fines Act have introduced provisions that either specifically focus on vulnerable people, or can be used to alleviate the impact of penalty notices on vulnerable people.⁷⁶ While these amendments are discussed in detail in Chapter 5, the paragraphs below outline their essence, and their potential for addressing the particular needs of vulnerable people caught up in the penalty notice system.

Official cautions

7.57 The *Fines Further Amendment Act 2008* (NSW) added s 19A into the Fines Act, which gives a law enforcement officer the discretion to give an official caution instead of issuing a penalty notice.⁷⁷ In deciding whether or not to issue a caution, the officer needs to take into account the applicable guidelines.⁷⁸

7.58 The guidelines which were recently approved by the Attorney General, require an officer to consider the following factors when deciding whether it is appropriate to give a person a caution instead of a penalty notice:

- whether the person is homeless;
- whether the person has a mental illness or intellectual disability;
- whether the person is a child (under 18);
- whether the person has a special infirmity or is in very poor physical health;
- whether the offending behaviour involved risks to public safety, damage to property or financial loss, or had significant impact on other members of the public
- whether the offending behaviour is at the lower end of the seriousness scale for that offence;
- whether the person did not knowingly or deliberately commit the offence; and
- whether the person is cooperative and complies with a request to stop the offending conduct.⁷⁹

7.59 As these provisions become operative, it will be imperative to monitor the way in which guidelines are applied to vulnerable people; how often cautions are given; and the extent to which a penalty notice is issued, or proceedings commenced, for an offence for which the offender was originally cautioned.

76. For example, *Fines Act 1996* (NSW) s 99A-99J (work development orders); 100 (time to pay applications, including payment by instalments); and 101 (writing off unpaid fines).

77. *Fines Further Amendment Act 2008* (NSW) sch 1 [8] inserts s 19A and 19B into the *Fines Act*.

78. *Fines Act 1996* (NSW) s 19A(2).

79. Attorney General's *Caution Guidelines Under the Fines Act 1996*, [4.7].

Internal review

- 7.60 The *Fines Further Amendment Act 2008* (NSW) introduced provisions into the Fines Act allowing a person to apply to either the issuing agency, or to the SDRO, for a review of the decision to issue the penalty notice.⁸⁰ The request can be made at any time up until the due date specified in the penalty reminder notice.⁸¹
- 7.61 The current SDRO's guidelines limit the grounds for review to specific circumstances and reasons, for example where the person issued with a penalty notice in respect of a driving offence was not the driver of the vehicle at the time.⁸² The guidelines limit special consideration for vulnerable persons to proof of "mental incapacity".⁸³ In relation to parking offences, the guidelines provide that a vulnerable person must demonstrate that he or she has a "diagnosed mental health condition" and that "this condition was a contributing factor or lessens the responsibility of the person for the penalty notice".⁸⁴
- 7.62 The "internal review" amendment to the Fines Act will have the effect that a reviewing agency must withdraw a penalty notice if "the person to whom the penalty notice was issued 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".⁸⁵
- 7.63 This is a significant reform affecting vulnerable people. However, it still has the drawback that it requires an application for review to be in writing setting out the grounds on which a review is sought. Hence, access to the benefits of the provision relies on the vulnerable person being able, him or herself, or by seeking assistance, to understand the provision and prepare a written application. It seems likely that many people who qualify under the internal review provisions will necessarily have difficulty in seeking assistance or applying for review.
- 7.64 We also note that the Victorian provisions for internal hardship review extend to persons with serious substance abuse problems, and also give a more general, undefined ground where the conduct should be excused because of "exceptional circumstances".⁸⁶

Question 7.13

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

80. *Fines Act 1996* (NSW) s 24A.

81. *Fines Act 1996* (NSW) s 24A(3)

82. NSW State Debt Recovery Office, *SDRO Review Guidelines* (2008) 2.

83. NSW State Debt Recovery Office, *SDRO Review Guidelines* (2008) 2.

84. NSW State Debt Recovery Office, *SDRO Review Guidelines* (2008) 4.

85. *Fines Act 1996* (NSW) s 24E(d).

86. *Infringements Act 2006* (Vic) s 3.

Question 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?

Question 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 addiction?
- (2) In “exceptional circumstances” more generally?

Payments through Centrelink debits

7.65 The *Fines Further Amendment Act 2008* (NSW) added provisions to the Fines Act that allow persons in receipt of government benefits to elect to pay outstanding fines and penalty notice amounts from those benefits. Under those provisions, the SDRO may allow a person in receipt of a government benefit to pay the fine in instalments, as a regular direct debit from that benefit, if:

- it is satisfied that adequate arrangements are in place for such a regular payment to be made, and
- it agrees to the fine being paid in this manner.⁸⁷

7.66 The SDRO has established a program known as Centrepay, whereby persons who are receiving Centrelink payments may elect to have a fine enforcement order paid through direct debits from their Centrelink payments.

7.67 We are seeking information on whether this new payment program is helping people receiving Government benefits deal with outstanding fines and penalty notice amounts. We also seek submissions on any ways of improving this system.

Question 7.16

(1) Is the State Debt Recovery Office’s Centrepay Program helping people receiving government benefits deal with their outstanding fines and penalty notice amounts?

(2) Are there any ways of improving this program?

87. *Fines Act 1996* (NSW) s 100(1A), 100(3A).

Work development orders

7.68 The *Fines Further Amendment Act 2008* (NSW) added provisions to the Fines Act allowing certain people to deal with outstanding fines and penalty notice amounts through “work development orders” (“WDOs”). The SDRO may make a WDO only with respect to a person who has an intellectual disability, a mental illness or a cognitive impairment, is homeless or is experiencing acute economic hardship.⁸⁸

7.69 If a WDO is made, the offender can satisfy the debt by:

- undertaking unpaid work for, or on behalf of, an approved organisation (but only with the agreement of that organisation);
- undergoing medical or mental health treatment in accordance with a health practitioner’s treatment plan;
- undertaking an educational, vocational or life skills course;
- undergoing financial or other counselling;
- undergoing drug or alcohol treatment; or
- if the person is under 25 years of age, undertaking a mentoring program.⁸⁹

7.70 Preliminary submissions have raised some concerns about the scheme.

7.71 The IDRS supports the initiative but warns against the risk of net-widening “if WDOs become seen as a gateway to services for people with intellectual disability and cognitive impairment”.⁹⁰ The IDRS hopes that:

education and information material, as well as the relevant guidelines will stress that law enforcement officers should not lose sight of the option of not issuing the penalty notice in the first place and that review officers should not choose to not write-off or withdraw a fine because of the benefit that an individual could purportedly receive from being put on a WDO. Individuals can still access the services linked to the WDO without becoming enmeshed in the enforcement system of the WDO scheme. Although the WDO is less punitive than other enforcement mechanisms, we must not lose sight of its punitive character and the need to try to keep as many disadvantaged people as possible out of the criminal legal system, regardless of how purportedly benevolent it may be.⁹¹

7.72 The IDRS also submitted that the WDO program will only be as effective as the services that are provided. It observed that there are waiting lists for most services; services can be inflexible and not suited to people who have intellectual disability; that placing a person with a cognitive impairment or mental illness in a setting where the supervisors are not trained to respond to symptomatic behaviour could disastrously result in assault charges or apprehended violence orders.⁹² The IDRS

88. *Fines Act 1996* (NSW) s 99B(1)(b).

89. *Fines Act 1996* (NSW) s 99A.

90. Intellectual Disability Rights Service, *Preliminary Submission*, 14.

91. Intellectual Disability Rights Service, *Preliminary Submission*, 14-15.

92. Intellectual Disability Rights Service, *Preliminary Submission*, 15.

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suggested that if there are no suitable services available for an individual who would qualify for a WDO, this could be grounds for withdrawing or writing off the penalty.⁹³

- 7.73 WDOs are a key initiative in alleviating the impact of penalty notices on vulnerable people. However, we are not presently raising issues about the desirability and efficacy of the work orders scheme since the Department of Justice and Attorney General is currently conducting a trial, and will make an evaluation of the scheme at the end of the trial.

93. Intellectual Disability Rights Service, *Preliminary Submission*, 16.

8. Criminal infringement notices

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Background

- 8.1 NSW and a number of other Australian and overseas jurisdictions have extended their penalty notice systems to certain offences that have usually been dealt with through a prosecution process in the courts; in particular, offences relating to public order and anti-social behaviour. This represents an extension of the penalty notice system into policing of “core” criminal activities.
- 8.2 In NSW, this species of penalty notices are called Criminal Infringement Notices (“CINs”), even though the relevant legislation uses the term “penalty notice”.¹ This paper deals with CINs separately from other penalty notices because of the special provisions that apply to them, as well as the fact they have been subject to specific reviews.

CINs in other jurisdictions

- 8.3 As mentioned above, a number of interstate and overseas jurisdictions have implemented, or are piloting, CINs or similar schemes.
- 8.4 In South Australia, Western Australia and the Australian Capital Territory, police may issue a penalty notice (or the equivalent) for possession of small amounts of cannabis.² In Victoria, the infringements system was expanded in July 2008, on a trial basis, to include shoplifting, wilfully destroying or damaging property, alcohol-related offences (such as refusal by person who is drunk, violent or quarrelsome to leave licensed premises when requested to do so, and consuming or having liquor

1. See *Criminal Procedure Act 1996* (NSW) s 332-344A. The legislation that authorised the CIN trial – *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (NSW) – also used the term “penalty notice”.

2. *Controlled Substances Act 1984* (SA) s 45A; *Cannabis Control Act 2003* (WA) pt 2; *Drugs of Dependence Act 1989* (ACT) s 71A. These are known as an expiation notice, a cannabis infringement notice or an offence notice under the respective statutes.

on unlicensed premises), and using offensive language.³ The trial is currently under evaluation.

8.5 In Queensland, police officers were given the power, on a 12-month trial basis commencing 1 January 2009 in the South Brisbane and Townsville policing districts, to issue infringement notices for public nuisance offences such as resisting, obstructing and disobeying direction from police, and public urination.⁴ The trial was in response to the recommendation by the Queensland Crime and Misconduct Commission that a ticketing system be introduced as a further option for police to deal with public nuisance behaviour.⁵ At the end of the trial period, the Queensland Government extended the trial. In June 2010, the Premier announced that the evaluation of the trial, which was conducted by Griffith University, found that infringement tickets are a cost-effective means of dealing with public nuisance offences because they “improved workload efficiencies for both the courts and police service”. The Premier said that legislation to allow the statewide roll-out of public nuisance ticketing will be introduced into the Parliament later this year.⁶

8.6 In England and Wales, police officers can issue Penalty Notices for Disorder (“PNDs”), the equivalent of CINs, for the following offences:

- being drunk in a highway, other public place or licensed premises;
- throwing fireworks in a thoroughfare;
- knowingly giving a false alarm to a fire brigade;
- trespassing on a railway;
- throwing stones and other objects at trains;
- buying or attempting to buy alcohol for consumption on licensed premises by a person under 18;
- disorderly behaviour while drunk in a public place;
- wasting police time or giving a false report;
- using a public telecommunications system for sending a message known to be false in order to cause annoyance; and
- consumption of alcohol in designated public places.⁷

3. *Infringements and Other Acts Amendment Act 2008* (Vic) pt 2.

4. *Summary Offences and Other Acts Amendment Act 2008* (Qld).

5. Queensland, *Parliamentary Debates*, Legislative Assembly, 11 November 2008, (Judy Spence, Minister for Police).

6. <<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=70201>> at 30 July 2010.

7. *Criminal Justice and Police Act 2001* (UK) s 1. Trials of (PNDs) were conducted in 4 pilot sites during 2002/03. The trials were considered successful and the national implementation of the scheme commenced throughout 2003/04 with all police forces having now introduced PND schemes into their local operational policing practices: see K Spicer and P Kilsby, *Penalty Notices for Disorder: Early Results from the Pilot* (UK Home Office, 2004); Office for Criminal Justice Reform, *Penalty Notices for Disorder: Review of Practice Across Selected Police Forces* (2006).

- 8.7 The PND scheme originally applied to those aged 18 years or over. In 2003, it was extended to juveniles aged 16 and 17 years,⁸ and in 2004 the scheme was extended to 10 to 15-year-olds for a pilot period. It allowed the police to issue PNDs to 10 to 15-year-olds in custody or on the street, for 24 specific offences, with two separate tariffs of £30 and £40. The juvenile PND scheme differs from the adult scheme in that the parent or guardian of the recipient is liable to pay the penalty under the notice.⁹
- 8.8 In Scotland, the *Antisocial Behaviour etc (Scotland) Act 2004* allows the police to issue Fixed Penalty Notices (“FPNs”) for offences of an antisocial nature committed by offenders aged 16 and over. The FPN amount is set at £40 for each of the following ten offences:
- riotous behaviour while drunk in licensed premises;
 - refusing to leave licensed premises on being requested to do so;
 - urinating or defecating in circumstances causing annoyance to others;
 - being drunk and incapable in a public place;
 - being drunk in a public place in charge of a child;
 - persisting, to the annoyance of others, in playing musical instruments, singing, playing radios etc. on being required to stop;
 - vandalism;
 - consuming alcoholic liquor in a public place;
 - breach of the peace; and
 - malicious mischief.¹⁰

CINs in NSW

- 8.9 In NSW, legislation was initially passed in 2002 amending the *Criminal Procedure Act 1986* to authorise police officers in 12 local area commands, for a 12-month trial period, to issue CINs for certain prescribed offences.¹¹

8. Section 87(2) of the *Anti-social Behaviour Act 2003* amended section 2(1) of *Criminal Justice and Police Act 2001* (UK) so that penalty notices could be issued to 16 and 17 year olds. That extension came into effect on 20 January 2004 and has been implemented on a national basis.

9. *Anti-Social Behaviour Act 2003* (UK) s 87. See J Amadi, *Piloting Penalty Notices for Disorder on 10- to 15-year-olds: Results from a One Year Pilot* (UK Ministry of Justice, 2008).

10. See *Antisocial Behaviour etc. (Scotland) Act 2004* pt 11. Following the passage of this legislation, a pilot of the FPN scheme was conducted in 2005 in Tayside for a one-year period. The evaluation report of the pilot recommended the national implementation of the scheme: see University of Abertay Dundee and Tayside Police, *Evaluation of the 12-Month Fixed Penalty Notice Pilot in the Tayside Police Force Area* (2006). The latest evaluation of the FPN scheme is found in B Cavanagh, *A Review of Fixed Penalty Notices (FPNs) for Antisocial Behaviour* (Scottish Government Social Research, 2009).

11. *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (NSW).

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- 8.10 The Ombudsman, who conducted an evaluation of the trial, described the purpose of CINs as follows:

The Penalty Notice Offences Act permits police to serve a CIN on a person if it appears to the officer that the person has committed a CIN offence. The notice is to the effect that if the person served does not wish to have the matter determined by a court, the person can pay a fine. When this is paid, no person is liable to any further criminal proceeding for the alleged offence.

The primary rationale of the Penalty Notice Offences Act was to provide police officers with a speedy alternative to arrest when dealing with relatively minor criminal matters. This would in turn reduce the administrative time taken, as alleged offenders would not be returned to police stations and charged, and police officers would usually not need to prepare for and appear at court. In addition to cutting red tape for police, it was thought the scheme would save the court system the costs of having to deal with these minor offences.¹²

- 8.11 The offences and the amounts prescribed for the CIN trial were as follows:

- common assault – \$400;
- larceny or shoplifting, where the property or amount does not exceed \$300 – \$300;
- obtaining money etc by wilful false representation – \$300;
- goods in custody – \$350;
- offensive conduct – \$200;
- offensive language – \$150;
- obstructing traffic – \$200; and
- unauthorised entry of vehicle or boat – \$250.¹³

The NSW experience

The Ombudsman's review of the trial

- 8.12 In April 2005, the Ombudsman completed a review of the CIN trial.¹⁴ The Ombudsman considered the trial generally successful in providing the police with a further option in dealing with minor offences, and alleviating the workload of the Local Courts.

12. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) i.

13. *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002* (NSW) sch 2.

14. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005). The review was required pursuant to s 344 of the *Criminal Procedure Act 1986* (NSW).

- 8.13 After the first six months of the CIN trial, NSW Police estimated savings of up to 267 minutes in processing each “minor non violent offence”.¹⁵ The first nine months of the CIN trial resulted in 1,079 cases being diverted from the Local Courts with savings of an estimated 180 hours hearing time.¹⁶
- 8.14 The Ombudsman estimated that the NSW Police and the Local Courts saved \$647,015 for the 12 months of the CIN trial. This figure comprised:
- \$31,810 as a direct result of the reduced amount of time on the part of NSW Police to issue a CIN compared with the time involved in charging an alleged offender;
 - \$183,138 for time-savings by police officers in preparing for, and attending, court; and
 - more than \$430,000 for the Local Courts, representing the costs associated with the criminal matters not otherwise heard.¹⁷

The Ombudsman's recommendations on CIN offences

- 8.15 Following the Ombudsman's positive assessment of the trial, the CIN scheme was extended to apply state-wide from 1 January 2008.¹⁸ The *Police Powers Legislation Amendment Act 2006* (NSW) and the *Criminal Procedure Further Amendment (Penalty Notices) Regulation 2007* (NSW) implemented some of the recommendations made by the Ombudsman, including removing common assault from the list of prescribed offences for which police officers may issue a CIN.¹⁹ All the other offences prescribed for the purposes of the trial,²⁰ and the application of the scheme to those aged 18 years and older,²¹ have been maintained.
- 8.16 The Ombudsman also proposed the establishment of tests for determining whether or not a particular offence could appropriately be dealt with by issuing a CIN. The Ombudsman argued that introducing a test for determining an appropriate CIN offence “would allow the reasoning for including or excluding a particular offence from the CIN scheme to be articulated, and form the basis of an explanation that informs the community and the police”.²² The Ombudsman recommended principles

15. The amount of time saved was calculated on the basis that each CIN took police 50 minutes to process compared to 317 minutes for every charge: NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 93.

16. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 95.

17. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 96.

18. *Police Powers Legislation Amendment Act 2006* (NSW) sch 4.4; *Criminal Procedure Further Amendment (Penalty Notices) Regulation 2007* (NSW).

19. *Police Powers Legislation Amendment Act 2006* (NSW) sch 4.4[2].

20. See *Criminal Procedure Regulation 2005* (NSW) sch 2.

21. See *Criminal Procedure Act 1986* (NSW) s 335.

22. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 117-118.

to guide the assessment of which offences to include in the CIN scheme.²³ The recommended principles are as follows:

- the offence is relatively minor
- there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of a CIN
- other diversionary options are not available to police to effectively and appropriately deal with the conduct in question
- a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence
- specific and general deterrence can be adequately conveyed by police rather than by a court
- the physical elements of the offence are relatively clear cut
- the issuing of a CIN for the offence would generally be considered by the community to be a reasonable sanction, having due regard to the seriousness of the offence.²⁴

This recommendation has not been implemented.

Question 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?

The 2009 Ombudsman's report on CINs

- 8.17 The legislation extending the power of the police to use CINs across the entire state includes a requirement that the Ombudsman conduct a review of the operation of the CINs "in so far the as those provisions impact on Aboriginal and Torres Strait Islander communities".²⁵
- 8.18 In August 2009, the Ombudsman completed his report.²⁶ The report provides a useful collection of data about the use of CINs following their state-wide implementation, particularly in relation to the effects of the CINs on Aboriginal communities. The report highlights a number of concerns, such as the potential net-

23. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 118, Recommendation 14.

24. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 118.

25. *Criminal Procedure Act 1986* (NSW) s 344A.

26. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009).

widening effects²⁷ of CINs, and the disproportionate issue of CINs to Aboriginal people. These issues are discussed in more detail below.

- 8.19 The report contains 25 recommendations, such as to:
- require annual reporting of CIN use by local area commands (“LACs”) especially those with a high rate of CIN use;
 - strengthen the option of giving a caution rather than a CIN, and to improve police recording of cautions;
 - improve service provision and reduce use of service by post;
 - improve information provision about CINs by Police and the State Debt Recovery Office (“SDRO”), including information about processes, enforcement and review options; and
 - monitor flexible payment options and the requirement for the SDRO to report on further options for reform.²⁸
- 8.20 It is unnecessary to replicate the work of the Ombudsman in this paper. However, we are interested in any views regarding the Ombudsman’s recommendations and their implementation. At the end of this Chapter, Annexure 8.A contains a list of the Ombudsman’s recommendations.

Question 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?

Net-widening concerns

- 8.21 In the first year of the state-wide roll-out (1 November 2007 to 31 October 2008), 8,861 CINs were issued.
- 8.22 Table 8.1 sets out the offences and recipients of CINs. Table 8.2 shows the changing patterns of CIN issuance during the pilot and in the first year of state-wide operation.

27. For a description of the meaning of the concept of net-widening, see para 1.32-1.33.

28. A summary of the recommendations is found in NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) ix-x.

Table 8.1 CINs issued 1 November 2007 to 31 October 2008, by offence and Aboriginality of recipient

Offence	Total number of CINs	Non-Aboriginal	Aboriginal
Offensive conduct	4095	3850	245
Offensive language	2034	1746	288
Larceny/shoplifting	2269	2182	87
Goods in custody	138	123	15
Obstruct person/vehicle	68	59	9
Unauthorised entry vehicle	32	32	0
Obtain money etc	45	44	1
Total	8681	8036	645
Percentage	100%	92.6%	7.4%
Aboriginal population = 2.1 % of NSW population			

Source: NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities (2009)* 37 (Table 37) drawing data from NSW Police Force COPS data.

Table 8.2 CINs issued by offence as a percentage of total CINs issued

Offence	All recipients			
	Pilot		State-wide	
	Scope: 12 Trial LACs Sept 2002-Oct 2007 Volume: 9,452 CINs issued over the 5 year period (population of the 12 LACs: 1.2 million)		Scope: All LACs: 1 Nov 2007–31 July 2008 Volume: 8,681 CINs issued in the first full year of operation (population of NSW: 6.5 million)	
<i>Larceny</i>	43%		26%	
<i>Offensive conduct</i>	25%	43%	47%	70%
<i>Offensive language</i>	18%		23%	
<i>Common assault</i>	12%		0%	
<i>Other</i>	2%		4%	

Table 8.2 (continued)

Offence	Aboriginal recipients			
	Pilot		State-wide	
	Volume: 267 CINs issued, or 2.8% of all CINs. In the relevant LACs Aboriginal people make up 1.7% of the population		Volume: 645 CINs issued, or 7.4% of CINs Aboriginal people make up 2.1% of the NSW population	
Larceny	36%		14%	
Offensive conduct	20%	47%	38%	83%
Offensive language	27%		45%	
Goods in custody	7%		2%	
Common assault	10%		0%	
Other	0%		1%	

Source: NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 52, (Figure 8) drawing data from NSW Police Force COPS database 2002-2008.

- 8.23 The data reported in Table 8.2 shows an increased use of CINs for offensive language and offensive conduct. While these two offences were the subject of 43% of all CINs during the trial period, they accounted for 70% of all CINs issued during the first year that the CINs scheme became available state-wide. More dramatically, during the trial period, 47% of CINs issued to Aboriginal people were for offensive conduct and offensive language. In the first year of the state-wide use of CINs, the figure jumped to 83%.
- 8.24 The Ombudsman also noted that the use of CINs varies significantly among police Local Area Commands (LACs). In particular, he made the following findings:
- Some LACs used CINs extensively, some almost not at all. High use LACs include those in Central Sydney, Manly, Newcastle and Wollongong with shopping centres and entertainment precincts. Low use commands include those, especially in Western Sydney, with serious crime issues, but less public order related crime.
 - In relation to Aboriginal people, the highest use is in regional areas eg Coffs/Clarence, Richmond, New England, Far South Coast, Oxley, Mid-North Coast and Wagga Wagga. Country Areas with otherwise very low use of CINs (eg the LACs based around Walgett and Bourke) mostly issued those CINs to Aboriginal people. The 15 LACs issuing the highest number of CINs to Aboriginal people were all country LACs and none had been in the pilot. These 15 LACs issued 460 (71%) of the CINs issued to Aboriginal people, 75% of which were for offensive conduct or offensive language – in 3 LACs over 90% were for these 2 offences.²⁹

29. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 54-55.

CP 10 Penalty notices

- 8.25 On the face of it, this is a concerning picture showing a growth particularly in the use of CINs for offensive language and offensive conduct, and particularly in relation to Aboriginal people.
- 8.26 The Ombudsman considered whether this data showed evidence of net-widening. CINs are meant to replace court proceedings, yet in some cases they may be issued where no court proceeding would have been brought, and where police would have exercised the option of taking no legal action (which may include giving an informal caution). Though the Ombudsman did not find clear and definitive evidence of net-widening, there is evidence that raises concerns.
- 8.27 First, the report observed an increased trend in police action for offensive conduct. The total number of incidents where the police took action (court proceedings, CINs or informal caution) increased from 3,759 in 2002 to 7,174 in 2008. In relation to Aboriginal people however, the number of incidents has remained fairly steady, though disproportionately high (803 matters in 2002; 769 in 2008).³⁰
- 8.28 Secondly, there is a more recent increase in offensive language incidents. The total number of incidents remained fairly steady until 2007 when it jumped from 4499 in 2007 to 5258 in 2008 (an increase of 17%). The Ombudsman noted that it is unclear whether this is going to lead to an increasing trend.³¹
- 8.29 On the other hand, the Ombudsman found a clear decline in the proportion of offensive language and offensive conduct incidents being brought before the courts. In 2007, 68% of offensive conduct and offensive language incidents led to some form of court attendance notice ("CAN"). This fell to 40% in 2008.³² This may not be enough however, to outweigh the increase in action being taken.³³
- 8.30 Overall the Ombudsman concluded that:

With half of all adult offensive conduct and offensive language incidents detected in NSW now resulting in CINs there can be no doubt that the scheme is having a major impact on how police deal with these offences, overall legal actions in relation to these offences is increasing and Aboriginal people remain significantly over represented in relation to both.

The initial state-wide data indicates that CINs are contributing to a significant net increase in legal action taken on offensive language and offensive conduct incidents. That is, some offenders are being diverted from court, but the early

30. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 59.

31. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 59.

32. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 66.

33. The Ombudsman also noted a decrease in the number of recorded warnings for these offences, which appears to be due to changes in police recording policy. While police were recording 350 to 550 warnings per quarter for adult offensive conduct and offensive language incidents for a few years, the numbers fell dramatically to 130 warnings in July-September 2008, and only 2 warnings in October-December 2008. This appears largely to be due to a change in recording practice where the police stopped recording informal warnings in August 2008. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 66.

data indicates that the decreases in court appearances are being eclipsed by the very high numbers of minor offenders being fined for those offences.

What is not yet clear is whether the changes noted in 2008 . . . will continue . . . and whether [CINs] . . . will deliver the diversionary benefits that were anticipated when the scheme was extended. Further monitoring is needed to assess the trends over time.³⁴

How should the potential for net-widening be addressed?

- 8.31 To address the issue of net-widening, the Ombudsman recommended that the police monitor local commands that are making frequent use of CINs.³⁵ Further, he recommended the development of “formal cautioning” powers for police with guidelines for their use, and a record of when they are given.³⁶ This option is intended as an alternative to CINs, in appropriate cases.
- 8.32 The Ombudsman noted the submission from the Department of Justice and Attorney General suggesting other options, including:
- mandating by law the requirement that all CINs issued for offensive language/conduct offences be the subject of internal review by a senior Police officer, who would need to be satisfied that the offence met the legal test for these offences;
 - requiring the police to provide detailed data on CINs issued for offensive language and offensive conduct to the Office of the Ombudsman, so that it can monitor trends and report to the Parliament on the need for any further action; and
 - prohibiting the use of CINs for offensive language/conduct offences.³⁷
- 8.33 The last suggested option focuses on the issue of whether it is appropriate to use CINs for the offences of offensive language and offensive conduct.
- 8.34 On the one hand, it may be argued that CINs provide a proportionate and useful means of addressing anti-social behaviour. This argument may be more persuasive in relation to offensive conduct than offensive language. The Ombudsman notes evidence that CINs for offensive conduct in particular are widely used to address alcohol-related and anti-social behaviour, and are supported by Police Commanders in this context.³⁸
- 8.35 On the other hand, it may be argued that the evidence of net-widening effects of CINs (albeit limited at this stage), and the disproportionate use of CINs in relation to

34. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 71.

35. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 72.

36. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009), 78

37. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 72, Recommendation 4.

38. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 54.

Aboriginal people are of serious concern, particularly in light of evidence that Aboriginal recipients do not usually challenge the issuance of CINs.³⁹

8.36 Moreover, the differences in how the police and the courts construe whether offensive conduct or offensive language has been committed provide further arguments against the use of CINs for these two offences. In this context, it is useful to outline the elements of these offences, which are mainly found in s 4 and 4A of the *Summary Offences Act 1988* (NSW):

4 Offensive conduct

- (1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school.
- (2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.

4A Offensive language

- (1) A person must not use offensive language in or near, or within hearing from, a public place or a school.
- (2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

8.37 These provisions need to be read in light of case law, which has established that for language or conduct to be considered offensive, the prosecution must prove that it was calculated to wound the feelings, or arouse anger resentment or disgust or outrage in the mind of a reasonable person.⁴⁰ The “reasonable person” test embedded in this rule requires the offensiveness of the language or conduct to be assessed according to community standards. Courts have also said that the reasonable person must not be thin-skinned.⁴¹ He or she is reasonably tolerant and understanding and reasonably contemporary in his reactions, but has some sensitivity to social behaviour, and social expectations in public places.⁴² An example of the application of this principle can be found in a recent case where the Magistrate held that a reasonable person would not be offended by the use of the word “prick” due to its common use in the community in everyday conversations.⁴³

8.38 The broadly defined nature of these offences, in practice gives police the discretion to decide if certain behaviours constitute one (or both) of these offences. This in turn gives rise to arguments against the use by CINs to enforce such offences.

8.39 First, there is an argument that the determination of whether specific incidents are offensive according to community standards should be left to the courts, as impartial arbiters of such matters. The ACT Attorney General’s Department, in

39. During the CIN trial, only 2.6% of the total number of CINs issued were challenged before the courts: NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) ii.

40. *Worcester v Smith* [1951] VLR 316. See also *Inglis v Fish* [1961] VR 607; *Re Marland* [1963] 1 DCR (NSW) 224.

41. *Re Marland* [1963] 1 DCR 224.

42. *Spence v Loguch* (Unreported, Supreme Court of NSW, Sully J, 12 November 1991).

43. *R v Grech* (Unreported, NSW Local Court (Waverly), Magistrate Williams, 3 May 2010).

recommending against the use of on the spot fines for offensive language incidents in that jurisdiction, made the following argument:

in the past the Courts have rejected police interpretations as to what is offensive behaviour. At present a Magistrate, sitting in open Court and subject to media reporting, supplies the community understanding of what behaviour is offensive to the public. It is not in the public interest for the function of determining the boundaries of community tolerance to be transferred to police.⁴⁴

8.40 Second, the discretion that police need to exercise could result in CINs being issued for behaviours that would not be considered offensive by the courts. In his 2005 review of the CINs trial, the Ombudsman assessed a sample of the CINs issued for offensive language and found that if those matters were brought before a Magistrate, the defendants would have been acquitted in about 60% of cases.⁴⁵

8.41 The Ombudsman found that the vast majority of those matters involved the offender swearing at police or security guards in situations where police officers were dealing with another offence or incident. A significant number of these incidents occurred late at night or in the early morning, with many of the offenders affected by alcohol. The Ombudsman observed that:

there is no doubt that the language used in these incidents was intemperate and ill mannered. What is in doubt is the present capacity of those words to offend, in the sense that they might wound, anger or outrage the reasonable person. With a popular culture where the same words frequently punctuate movies and late night television, where three songs, heavily featuring the word “fuck”, have each been in the top 50, with two of them number one, in the Australian music charts during this year, and the music videos for these songs...are played on television on Saturday and Sunday mornings, the capacity of the words to be regarded as offensive as they once were must come into question.⁴⁶

8.42 There may be some in the community concerned with these trends in society, and no doubt some would argue that CINs for offensive language and offensive conduct give police a useful tool to combat anti-social behaviour. The NSW Police Force, in its submission to the Ombudsman, argued that CINs give police an alternative to charging offenders and the objective of diverting those who commit offences from the criminal justice system is being met since more offenders are being dealt with by CINs instead of prosecuting them in court. Further, the Police Force argued that it is too soon to assess whether CINs are having a net-widening effect. It said that the available data does not conclusively show a definite net-widening trend; the apparent increase in the number of CINs for offensive language and offensive conduct may be due to community concerns about public order. The NSW Police Force said it supports local monitoring in commands that are making frequent use of CINs but rejects broader measures to prevent LACs net-widening.

44. ACT Law Reform Commission, *Street Offences*, Report No 15, Canberra (1997) Appendix A.

45. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 73-76.

46. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 75.

Question 8.3

- (1) Are Criminal Infringement Notices having a net-widening effect, in particular in relation to the offences of offensive language and offensive behaviour? If so, what measures should be adopted to prevent or minimise this effect?
- (2) Should official cautions (governed by police guidelines) be available as part of the Criminal Infringement Notice regime, as recommended by the Ombudsman?
- (3) Should the offences of offensive language and offensive conduct continue to be among the offences for which Criminal Infringement Notices may be issued?

Other impacts of CINs on Indigenous people

- 8.43 CINs may also have a problematic impact on Aboriginal people at the enforcement stage.
- 8.44 In the course of the Ombudsman's 2005 review, the Aboriginal and Torres Strait Islander Studies Unit ("ATSIS") expressed concern that CINs could result in an accumulation of debt, which Indigenous people often have little or no capacity to pay. ATSIS emphasised the need to avoid the "cascading effect" of accumulated debt: cancellation of driver licence, further unlicensed driving offences and loss of employment or employment opportunities.⁴⁷
- 8.45 Similar disquiet was expressed by the Shopfront Youth Legal Centre, which emphasised the detrimental effect that sanctions imposed for unpaid penalties can have on disadvantaged people, often out of proportion to the seriousness of the infringement. As also pointed out by ATSIS, these can include:
- licence suspension and eventual cancellation, which often results in a charge of driving whilst suspended or cancelled, a further fine and a court imposed disqualification. This in turn may lead to further driving charges and may culminate in a "habitual traffic offender" declaration. We understand that this phenomenon is particularly common in Aboriginal communities, where private vehicles are often the only mode of transport available and where driving (with or without a licence) is a practical necessity.⁴⁸
- 8.46 The Ombudsman also drew attention to the potential for significant hardship for Indigenous people arising from the financial obligations of a CIN, and any subsequent failure to pay the original amount, as well as the consequences of enforcement action. The Ombudsman acknowledged that "these risks exist for any individual receiving a CIN, but the potential consequences and knock-on effects in

47. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 84.

48. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 84.

the case of Aboriginal offenders are of particular concern". The Ombudsman also warned against issuing a CIN where a warning or caution would have sufficed.⁴⁹

- 8.47 Consistent with this concern, the 2009 review found low rates of seeking court election and internal review:
- Only 7 of 895 CIN recipients in the SDRO database (since inception) chose to have the CIN heard by a court.
 - Only 4 of the 895 recipient had made representation for internal review (and none in the review period since CINs went State-wide).⁵⁰
- 8.48 There is also a low rate of compliance with CINs at early stages. Only 8.5% of Aboriginal recipients of CINs paid the penalty before it was referred to the SDRO for enforcement, compared to 48% for non-Aboriginal people. Failure to pay at the penalty notice stage raises the cost of the CIN through enforcement changes, and may lead to additional sanctions such as loss of a person's driver's licence.⁵¹
- 8.49 These low rates of compliance suggest that there may be a problem with CINs as a sanction for behaviour. If the CIN simply cannot be paid, the sanction is both ineffective and, as it escalates, disproportionate.
- 8.50 This heightens the concern about net-widening and suggests a further reason for examining the scope of the use of CINs, and alternatives to their issue. But it also suggests that procedural protections need further examination.
- 8.51 The Ombudsman recommended better information provision to Aboriginal (and other) persons receiving CINs, better recording of Aboriginal status by the SDRO to track the issue, and better access to advocacy services to try to improve access to review processes (including court-election).⁵² The Ombudsman also recommended that the SDRO undertake a review of the flexible payment options available under the *Fines Further Amendment Act 2008* (NSW) within 18 months of his report, to examine whether improvement of access to these measure might be needed.⁵³
- 8.52 Another issue raised by the Law Society was the inadequacy of the 21-day period in which to elect to have a CIN heard in court. The Law Society pointed out that in some remote Aboriginal communities, there may be real difficulty in obtaining advice as to whether to pay the penalty or have it heard by the court within the time-frame, but there is no provision to apply for an extension.⁵⁴

49. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 86.

50. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 98, 101-102.

51. Law Society of NSW, *Submission to the Ombudsman's Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009) [1.6].

52. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) Chapter 8, Recommendations 12, 13, 14, 15, 16, 17, and 18.

53. NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) 122, Recommendation 19.

54. NSW Law Society, *Submission to the Ombudsman Review of the Impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities*, [8.1].

Question 8.4

- (1) What steps should be taken to address the issue of under-payment of criminal infringement notices issued to Aboriginal persons?
- (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?

Impact of CINs on people with a mental illness or cognitive impairment

- 8.53 While the Police Standing Operating Procedures stipulate that a CIN cannot be issued to seriously intoxicated or drug affected persons where the person cannot comprehend the procedure, there is no such direction in relation to people with a mental illness or cognitive impairment.⁵⁵
- 8.54 The 2005 Ombudsman’s review of CINs revealed that there were only a few circumstances where this may have been relevant. In addition, the issue was not substantially raised in submissions or focus groups. Nonetheless, the Ombudsman observed that it could become a more significant issue when the scheme is implemented state-wide.⁵⁶
- 8.55 The Ombudsman noted that both the *Crimes (Detention After Arrest) Regulation 1998* (NSW) and the NSW Police CRIME Code of Practice give guidance for dealing with an alleged offender considered to be a vulnerable person by reason of impaired intellectual functioning or physical functioning, or being from a non-English speaking background.⁵⁷ However, the Ombudsman expressed a reservation that, while these guidelines are somewhat reassuring, it may not be possible to give them full effect “where a support person is not present or immediately available and it is proposed to issue a CIN on the spot as an alternative to arrest”.⁵⁸ Police may have to arrest the vulnerable person to allow the safeguards in the various guidelines to be observed, in particular, to arrange for the attendance of a support person at the police station. This is more likely to occur if the vulnerable person has difficulty communicating an explanation for his or her conduct that might have averted further action being taken.
- 8.56 The Ombudsman suggested that, in those circumstances, the police should have a discretion to issue a CIN, even after arrest, once the nature of the offence, and the effect of the CIN, has been explained to the support person.
- 8.57 The same issues that arise in relation to penalty notices generally, including an inability to comprehend fully the effect of a CIN being issued, and hence the risk of

55. See also the discussion in Chapter 7 on the impact of penalty notices on people with mental illness or cognitive impairment: para 7.2-7.11, 7.21-7.31.

56. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) (2005) 87.

57. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 88.

58. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police* (2005) 88.

failing to pay the penalty or electing to go to court, arise in relation to the CIN scheme.

Question 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?

Question 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?

Annexure 8A: List of recommendations in the 2009 Ombudsman's review of CINs

1. That the NSW Police Force revise the guidance provided to police to reflect the requirements in section 4(3) and section 4A(2) of the *Summary Offences Act* that police should consider whether 'the defendant had a reasonable excuse for conducting himself or herself in the manner alleged'.
2. That the NSW Police Force training and advice for officers responding to offensive conduct and offensive language incidents include guidance about the options available to frontline police when dealing with people whose particular vulnerabilities such as homelessness, substance addiction, intellectual disability or mental health may be contributing to their offending behaviour.
3. That the NSW Police Force develop local strategies to reduce the over-representation of Aboriginal people being charged and fined for offensive conduct and offensive language incidents.
4. That the NSW Police Force monitor and report annually on trends relating to actions (including warnings and cautions) taken in response to common CIN offences in all commands that make frequent use of CINs.
5. That the Attorney General consider amending Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the *Fines Act 1996* to give police officers the option of issuing an official caution in accordance with section 19A of the *Fines Act*.
6. That the NSW Police Force develop guidelines in relation to the issuing of 'official cautions' for CINs in accordance with section 19A(1)(3)(b) of the *Fines Act 1996*.
7. That the NSW Police Force implement enhancements to COPS to allow 'official cautions' to be recorded and reported as a legal action taken in relation to CIN offences.
8. That the option for police to serve penalty notices by post be retained, but the *Criminal Procedure Act 1986* be amended to provide that postal service should only occur after all reasonable attempts to serve the notice in person have been exhausted.
9. In circumstances where penalty notices must be served by post, that the NSW Police Force ensure that the notice is accompanied by information explaining key features of the scheme, including that provisions relating to criminal records and the destruction of fingerprints upon payment at the penalty notice stage, the options for seeking an internal administrative review, the likely consequences of failing to deal with the notice and how recipients might go about obtaining further advice.
10. That Local Area Command Aboriginal Consultative Committees consider the local availability and adequacy of information and assistance about management of fines to Aboriginal people who are detected driving after having their licence suspended because of fine default.

11. That the NSW Police Force develop a strategy that assists Local Area Commands to monitor the incidence of the new suspended and cancelled driver offences under the *Roads Transport (Driver Licensing) Act 1998*, with a view to devising ways to prevent further offending.
12. The NSW Police Force, in consultation with the SDRO, consider the feasibility of providing additional information relating to payment and review options on penalty notice forms.
13. The NSW Police Force and SDRO develop a fact sheet about the Criminal Infringement Notice scheme to be sent with all Criminal Infringement Notices served by post, with penalty reminder notices, and published on the SDRO website.
14. That the SDRO take steps to evaluate and improve the effectiveness of its group advocacy network, in particular by:
 - a. Consultation with advocates about improving the provision of information and support provided by SDRO via the Advocacy Hotline.
 - b. Setting strategic goals and action plans to increase the number of groups or persons registered to the Advocacy Hotline that might assist Aboriginal people living in regional and remote communities.
 - c. Evaluating the outcomes of the Advocacy Hotline including initiatives supported by SDRO such as debt clinics and information seminars.
15. The SDRO consider ways to improve the provision of information to CIN recipients about the option to have the matter for which the CIN was issued heard in court, including avenues for seeking legal advice and representation.
16. The SDRO review how it presents and disseminates information about the fines enforcement system to legal centres, with the aim of developing strategies to improve information provision.
17. The SDRO consider keeping records about the Aboriginality of CIN recipients.
18. The SDRO strategically and systematically analyse records kept about CIN recipients with a view to:
 - learning more about the characteristics of people who default on their fines and those who have significant fine debts
 - learning more about the utilisation of different payment options, including whether different options benefit people likely to have difficulty paying their fines
 - improving the provision of information and assistance to people who default on their fines and those who have significant debts.
19. That the SDRO review the initial uses of flexible payment options under the *Fines Further Amendment Act 2008* and advise the Attorney General of the outcome for the purpose of considering, within 18 months of the date of this report, the need to amend the *Fines Act 1996* (NSW) to extend the availability of flexible upfront

payment options to other applicants who can demonstrate financial hardship or other reasons why they will have difficulty meeting their payment obligations at the penalty notice stage.

20. That the SDRO consider developing ways to extract and report on data relating to applications for it to use discretion to lift RTA sanctions in exceptional circumstances, including the number of applications received, the grounds for seeking an immediate sanction lift, the characteristics of applicants, and the outcome of these requests.
21. That, as part of the current reforms to the fines system, the Attorney General consider amendments to Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the Fines Act to make the police uses of CINs subject to the review processes outlined in the *Fines Further Amendment Act 2008* (NSW).
22. That the State Debt Recovery Office develop a strategy to improve provision of information for fine recipients and organisations who advocate on their behalf, about the role of the Hardship Review Board and reasons for determinations made by the board.
23. That, following appropriate consultation, the Attorney General consider establishing a body with ongoing responsibility for monitoring the fair and effective use of fines and penalty notices in NSW and providing advice on opportunities for continual improvement.
24. That the Minister for Police take steps to have the *Law Enforcement (Powers and Responsibilities) Act 2002* amended to clarify whether fingerprint and palm print identification evidence gathered under section 138A may also be used to investigate offences unrelated to the alleged CIN offence, and consider the adequacy of associated safeguards.
25. That the NSW Police Force review the adequacy of the advice that it provides to officers exercising powers under section 138A of the *Law Enforcement (Powers and Responsibilities) Act 2002* to ensure compliance with appropriate safeguards.

Appendix A.

Statutory provisions under which penalty notices may be issued

Animal Diseases (Emergency Outbreaks) Act 1991 (NSW) s 71A
Apiaries Act 1985 (NSW) s 42A
Assisted Reproductive Technology Act 2007 (NSW) s 64
Associations Incorporations Act 2009 (NSW) s 93
Barangaroo Delivery Authority Act 2009 (NSW) s 45
Biofuels Act 2007 (NSW) s 29
Building Professionals Act 2005 (NSW) s 92
Business Names Act 2002 (NSW) s 32
Casino Control Act 1992 (NSW) s 168A
Casino, Liquor and Gaming Control Authority Act 2007 (NSW) s 46
Centennial Park and Moore Park Trust Act 1983 (NSW) s 24
Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW) s 61A
Commercial Agents and Private Inquiry Agents Act 2004 (NSW) s 28
Companion Animals Act 1998 (NSW) s 92
Contaminated Land Management Act 1997 (NSW) s 92A
Conveyancers Licensing Act 2003 (NSW) s 158
Court Security Act 2005 (NSW) s 29
Crimes (Administration of Sentences) Act 1999 (NSW) s 97
Criminal Procedure Act 1986 (NSW) s 333
Crown Lands Act 1989 (NSW) s 162
Dangerous Goods (Road and Rail Transport) Act 2008 (NSW) s 48
Deer Act 2006 (NSW) s 33
Electricity (Consumer Safety) Act 2004 (NSW) s 47
Electricity Supply Act 1995 (NSW) s 103A
Energy and Utilities Administration Act 1987 (NSW) s 46A
Environmental Planning and Assessment Act 1979 (NSW) s 127A
Exhibited Animals Protection Act 1986 (NSW) s 46A
Explosives Act 2003 (NSW) s 34
Fair Trading Act 1987 (NSW) s 64
Firearms Act 1996 (NSW) s 85A
Fisheries Management Act 1994 (NSW) s 276
Fitness Services (Pre-paid Fees) Act 2000 (NSW) s 16
Food Act 2003 (NSW) s 120
Forestry Act 1916 (NSW) s 46A
Game and Feral Animal Control Act 2002 (NSW) s 57
Gaming Machines Act 2001 (NSW) s 203
Gene Technology (GM Crop Moratorium) Act 2003 (NSW) s 35
Graffiti Control Act 2008 (NSW) s 16
Hemp Industry Act 2008 (NSW) s 45

Home Building Act 1989 (NSW) s 138A
Hunter Water Act 1991 (NSW) s 31A
Impounding Act 1993 (NSW) s 36
Inclosed Lands Protection Act 1901 (NSW) s 10
Industrial Relations Act 1996 (NSW) s 396 (including as applied to and for the purposes of Part 2 of the *Industrial Relations (Child Employment) Act 2006* (NSW) by s 16 of that Act)
Jury Act 1977 (NSW) s 64, 66
Landlord and Tenant (Rental Bonds) Act 1977 (NSW) s 15A
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 235
Liquor Act 2007 (NSW) s 150
Local Government Act 1993 (NSW) s 314, 679
Lord Howe Island Act 1953 (NSW) s 37B
Marine Safety Act 1998 (NSW) s 126
Maritime Services Act 1935 (NSW) s 30D
Meat Industry Act 1978 (NSW) s 76A
Mining Act 1992 (NSW) s 375A
Motor Dealers Act 1974 (NSW) s 53E
Motor Vehicle Repairs Act 1980 (NSW) s 87A
National Parks and Wildlife Act 1974 (NSW) s 160
Native Vegetation Act 2003 (NSW) s 43
Non-Indigenous Animals Act 1987 (NSW) s 27A
Noxious Weeds Act 1993 (NSW) s 63
Occupational Health and Safety Act 2000 (NSW) s 108
Parliamentary Electorates and Elections Act 1912 (NSW) s 120C
Parramatta Park Trust Act 2001 (NSW) s 30
Passenger Transport Act 1990 (NSW) s 59
Pawnbrokers and Second-hand Dealers Act 1996 (NSW) s 26
Pesticides Act 1999 (NSW) s 76
Petroleum (Onshore) Act 1991 (NSW) s 137A
Photo Card Act 2005 (NSW) s 34
Plant Diseases Act 1924 (NSW) s 19
Plantations and Reafforestation Act 1999 (NSW) s 62
Ports and Maritime Administration Act 1995 (NSW) s 100
Prevention of Cruelty to Animals Act 1979 (NSW) s 33E
Property, Stock and Business Agents Act 2002 (NSW) s 216
Protection of the Environment Operations Act 1997 (NSW) s 224
Public Health (Tobacco) Act 2008 (NSW) s 50
Radiation Control Act 1990 (NSW) s 25A
Rail Safety Act 2008 (NSW) s 139
Redfern – Waterloo Authority Act 2004 (NSW) s 47
Registered Clubs Act 1976 (NSW) s 66
Registration of Interests in Goods Act 1986 (NSW) s 19A
Residential Parks Act 1998 (NSW) s 149
Retail Leases Act 1994 (NSW) s 16P
Retirement Villages Act 1999 (NSW) s 184

Road Transport (General) Act 2005 (NSW) Pt 5.3
Roads Act 1993 (NSW) s 243
Royal Botanic Gardens and Domain Trust Act 1980 (NSW) s 22B
Rural Fires Act 1997 (NSW) s 131
Rural Lands Protection Act 1998 (NSW) s 206
Security Industry Act 1997 (NSW) s 45A
Smoke-free Environment Act 2000 (NSW) s 20A
Sporting Venues Authorities Act 2008 (NSW) s 38
Sporting Venues (Invasions) Act 2003 (NSW) s 12
Stock (Chemical Residues) Act 1975 (NSW) s 15A
Stock Diseases Act 1923 (NSW) s 200
Stock Foods Act 1940 (NSW) s 32A
Stock Medicines Act 1989 (NSW) s 60A
Summary Offences Act 1988 (NSW) s 29, 29A or 29B
Swimming Pools Act 1992 (NSW) s 35
Sydney Cricket and Sports Ground Act 1978 (NSW) s 30A
Sydney Harbour Foreshore Authority Act 1998 (NSW) s 43A
Sydney Olympic Park Authority Act 2001 (NSW) s 79
Sydney Water Act 1994 (NSW) s 50
Tow Truck Industry Act 1998 (NSW) s 89
Trade Measurement Administration Act 1989 (NSW) s 23
Transport Administration Act 1988 (NSW) s 117
Unlawful Gambling Act 1998 (NSW) s 52
Valuers Act 2003 (NSW) s 42
Veterinary Practice Act 2003 (NSW) s 101
Vocational Education and Training Act 2005 (NSW) s 45
Water Industry Competition Act 2006 (NSW) s 82
Water Management Act 2000 (NSW) s 365
Weapons Prohibition Act 1998 (NSW) s 42
Western Sydney Parklands Act 2006 (NSW) s 48
Workplace Injury Management and Workers Compensation Act 1998 (NSW) s 246

Appendix B. Preliminary Submissions

Illawarra Legal Centre Inc, 23 March 2009
Intellectual Disability Rights Service, 24 March 2009
Mr Patrick McCabe, 10 March 2009
NSW Attorney General's Department, 6 March 2009
NSW Department of Arts, Sports and Recreation, 11 May 2009
NSW Department of Energy, 6 April 2009
NSW Department of Environment and Climate Change, 23 February 2009
NSW Department of Juvenile Justice, 2 April 2009
NSW Department of Local Government, 15 May 2009
NSW Department of Planning, 6 April 2009
NSW Office of Fair Trading, 24 April 2009
NSW Police Force, 2009.
NSW Rail Corporation, 2 April 2009
Shopfront Youth Legal Centre, 9 March 2009
Youth Justice Coalition, 17 March 2009