

**Submission
No 22**

DRIVER LICENCE DISQUALIFICATION REFORM

Organisation: NSW Ombudsman
Name: Mr Bruce Barbour
Position: Ombudsman
Date Received: 25/07/2013



ABN 76 325 886 267

Level 24, 580 George Street, Sydney NSW 2000

T 02 9286 1000 | F 02 9283 2911

Tollfree 1800 451 524 | TTY 02 9264 8050

www.ombo.nsw.gov.au

Our reference: ADM/5338
Contact: Julianna Demetrius
Telephone: [REDACTED]

25 July 2013

Mr John Barilaro MP
Chair, Committee on Law and Safety
Parliament House
Macquarie St
Sydney NSW 2000

Dear Mr Barilaro,

Thank you for the opportunity to provide a submission to the Legislative Assembly Committee on Law and Safety inquiry into driver licence disqualification reform. I note that the purpose of the inquiry is to examine and report on whether it is appropriate to reform the law related to the following unauthorised driving offences:

Drive while licence disqualified, cancelled or suspended;
Drive while licence cancelled, suspended – due to fine default; and
Drive while never having been licensed.

In particular, to:

- a) Establish a right to the court to have any outstanding disqualification periods removed for people who complete a minimum offence free period;
- b) Abolish the Habitual Traffic Offenders Scheme;
- c) Provide courts with discretion when imposing disqualification periods for unauthorised driving offences by:
 - i) Providing for automatic (and minimum) periods rather than mandatory periods; and
 - ii) Requiring that disqualification periods run from the date of conviction unless otherwise ordered.
- d) Revise the maximum penalties prescribed for unauthorised driving offences; and
- e) Introduce vehicle sanctions for offenders who repeatedly drive while disqualified.

I note that the terms of reference for the inquiry require the committee to have regard to *“previous reports that have drawn attention to problems associated with driver licence disqualification including...reports by...the NSW Ombudsman”*.

As committee members would be aware, my office is often required by Parliament to review the operation of new laws, particularly those conferring additional powers on police. In 2005 I tabled a report about one such review of the NSW Police Force’s implementation of the Criminal Infringement Notice (CINs) scheme trial.¹ In 2010, I tabled a further report about

¹ NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, July 2010 (provided to the Attorney General and Minister for Police in August 2009); *On the Spot Justice?: the trial of Criminal Infringement Notices by NSW Police*, November 2005. Available at www.ombo.nsw.gov.au.

our subsequent review of the impact of the CINs scheme on Aboriginal communities. Both reports are available from our website at www.ombo.nsw.gov.au.

While these reports did not directly canvas the subject of driver licence disqualification, they contained a number of observations about the detrimental and disproportionate impact of the fines system, particularly State Debt Recover Office (SDRO) fine default sanctions imposed by the Roads and Traffic Authority (RTA) on vulnerable groups, especially Aboriginal people. In particular, I refer the committee to Chapter 12 of my 2005 report, and Chapter 8 of my 2010 report. My office also drew attention to this issue in our 2010 submission to the NSW Law Reform Commission's inquiry into penalty notices and our 2007 submission to the NSW Sentencing Council's review of the effectiveness of fines as a sentencing option. As we reported in those submissions, the common theme to emerge from our work, as well as from the available literature, is that vulnerable groups generally have less capacity to pay fines, and limited understanding of how to negotiate 'the fines system'. (I have attached copies of both submissions.)

SDRO sanctions imposed by the RTA usually involve the fine recipient's driver's licence being suspended or car registration cancelled. If the fine recipient does not have a car registered in his or her name, and does not possess a driver's licence, he or she will be restricted from dealing with the RTA so that it is not possible to obtain a licence or transfer registration of a car. While the SDRO does have the discretion to lift restrictions in exceptional circumstances if the fines remain outstanding, vulnerable people with limited ability to understand and negotiate the administrative processes associated with the fines system are more likely to experience difficulties applying for this dispensation.²

The committee is no doubt aware that unlicensed driving is prevalent, and indeed often considered a normal practice, in Aboriginal communities across the country. A state-wide qualitative and quantitative research study commissioned by the RTA in 2008 confirmed that one of the major reasons for unlicensed driving is the impact of SRDO fine sanctions imposed by the RTA, and in fact recommended that the use of licence suspension as an SDRO fine default sanction be reconsidered.³ Our 2010 CINs review found that Aboriginal people who received an 'on the spot' fine were much more likely to be referred for enforcement action by the SDRO as a result of difficulties in paying the fine.

Other well-documented reasons for the prevalence of unlicensed driving among Aboriginal people include poor literacy and computer literacy; inadequate access to appropriate driving instruction/supervision; and a combination of vast distances, a lack of alternative transport options and kinship obligations in rural and remote communities that make driving imperative.⁴ Moreover, in several reports in recent years we have highlighted the inadequacy of service delivery in a number of Aboriginal communities in NSW, which compounds the chronic disadvantage that already affects the lives of many of their members.⁵ While we know

² NSW Ombudsman, op.cit. NSW Sentencing Council, op.cit.

³ Elliot and Shanahan Research (for the Roads and Traffic Authority), *Investigation of Aboriginal Driver Licensing Issues*, December 2008.

http://www.rta.nsw.gov.au/publicationsstatisticsforms/downloads/aboriginal_licensing_report171208.pdf

⁴ Many of the barriers listed above similarly affect other vulnerable groups, including socio-economically disadvantaged young people (whether Aboriginal or non-Aboriginal), people with a disability and recently arrived migrants.

⁵ NSW Ombudsman, *Audit of the implementation of the NSW Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities* (2013); *Addressing Aboriginal disadvantage: the need to do things differently* (2011); *Service provision to the Bourke and Brewarrina communities* (2010). All available at www.ombo.nsw.gov.au.

from our work with Aboriginal communities that holding and maintaining a valid driver's licence is highly valued, it is very difficult for the majority of individuals to achieve in the context of the chaotic circumstances surrounding them on a daily basis.⁶

As our 2010 CINs review noted, loss of a driver's licence or the inability to obtain one can have a range of detrimental impacts, including reduced employment options or termination of employment; limited access to essential services; and social isolation. It is unsurprising that, faced with these consequences, many people – particularly if they are already affected by disadvantage – will choose to drive regardless of whether they hold a valid licence, thereby risking further involvement in the fines system and the criminal justice system more broadly.

Our 2010 CINs review found that the imposition of RTA sanctions in response to unpaid CIN penalties appeared to have increased the risk of secondary offending by Aboriginal people, particularly young people who make up the majority of CIN recipients. In most cases, the secondary offences associated with the sanctions, such as driving while a driver's licence suspension is in place, were more serious than the original CIN offence. It has been reported that regulatory driving offences, including licensing offences, are significant contributors to custodial sentences for Aboriginal people, and that driving offences – the most common being driving while disqualified – accounted for 15% of the increase in the rate of Aboriginal imprisonment in NSW between 2001 and 2008.⁷ As the NSW Sentencing Council has commented, "*the disproportionate number of Aboriginal people imprisoned for drive while suspended, cancelled or disqualified offences (whether initially incurred through by fine default or for poor or unlicensed driving) is of concern.*"⁸

Because unlicensed driving is so prevalent in Aboriginal communities, any reform to the law relating to unauthorised driving offences will potentially impact upon Aboriginal people in a significant way. In general, our work with Aboriginal communities would lead us to be supportive of any reforms that would provide for greater flexibility and discretion in the provision and application of penalties for the offences in question.

Our 2010 CINs review acknowledged the important reforms effected by the *Fines Further Amendment Act 2008*, which created separate suspended and cancelled driver offences arising from non-payment of a fine or penalty notice, and:

- provides for a shorter disqualification period for a person convicted for the first time of driving without a licence if the licence was suspended or cancelled because of fine default (rather than unsafe driving practices);
- allows the court to consider certain factors, such as the impact a lengthy disqualification would have on employment and the offender's ability to pay the outstanding debt; and
- provides that the offence of driving without a licence if the licence was suspended or cancelled because of fine default is not a relevant offence for the purpose of declaring

⁶ This work includes handling inquiries and complaints by Aboriginal people as well as identifying and addressing systemic issues that affect Aboriginal communities. Through this work we have directly liaised with thousands of Aboriginal people across the state as well as hundreds of agencies servicing the communities in which they live.

⁷ Professor Rebecca Ivers, St George Institute for International Health, *Development of a community based Aboriginal driver licensing service: the AstraZeneca Young Health Programme*. Paper delivered at the 2012 Australasian College of Road Safety National Conference. <http://www.acrs.org.au/wp-content/uploads/Ivers-R-PPT.pdf>

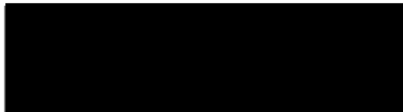
⁸ NSW Sentencing Council, op.cit. p155.

a person to be a habitual traffic offender, which entails a five year driver's licence disqualification period.

In relation to the current inquiry, we would also emphasise the potential value of linking penalties for unauthorised driving offences, where appropriate, with access to diversionary initiatives that are designed to overcome those factors behind the high rate of unlicensed driving among Aboriginal people and other disadvantaged groups. Our 2010 CINs review outlined a number of initiatives, many of them operating at a local community level, and we are aware of others that have since commenced. For example, the Driving Change program, which is partially funded by the NSW Government, was launched in May 2013 by The George Institute for Global Health. The program will fund positions for local Driver Licensing Champions, create mentoring opportunities and provide links to existing services and information in six communities (initially Redfern, Shellharbour and Griffith) across the state, with the aim of supporting young Aboriginal people to obtain a driver's licence.

I hope that the committee will find our submission to be of assistance. Please do not hesitate to contact Ms Julianna Demetrius, Director, Strategic Projects Division, on [REDACTED] should you require any further information.

Yours sincerely,

A large black rectangular redaction box covering the signature area.

Bruce Barbour
NSW Ombudsman

The effectiveness of fines as a sentencing option interim report - submission from the NSW Ombudsman

1. Introduction

The disproportionate impact of the fines system on marginalised groups became evident to us about four years ago when we commenced our audits of the NSW Police Force's (NSWPF) implementation of their *Aboriginal Strategic Direction* (ASD) plan in 22 local area commands across NSW¹. We have also received feedback about this issue through our youth liaison officer's contact with youth and community groups and from complaints and enquiries received by our office. Our review of the CINS legislation² also provided us with the opportunity to examine this issue. The information we received through this work is consistent with the observations and findings contained in several key reports released in recent years.³

The majority of complaints, inquiries and feedback we have received has been about fines issued by police, transit officers and revenue protection officers, and the impact of the accumulation of fines on vulnerable or marginalised groups of people. The common theme to emerge from both our work and the available literature is that marginalised groups generally have less capacity to pay fines and little understanding of how to negotiate 'the fines system'. As the Council's report highlights, this can result in detrimental outcomes for individuals across a range of areas.

We agree that fines, for the most part, are a cost effective, prompt and appropriate means of providing a disincentive for a wide range of minor offences. Having said that, many marginalised groups are unable to pay fines and often, the fine is ignored and not seen as a disincentive to cease the behaviour which led to the fine being issued—multiple fines and an accrued debt can lead to license cancellations, in turn this can impact on the employment opportunities and also result in secondary offending.

Our research has also revealed that transport fines are the main area of concern for these groups and we believe there is value in the Council exploring the impact of these fines in more detail, including the exercise of discretion, staff training and the need for legislative reform.

¹ Four years ago we commenced an audit program aimed at holding the NSWPF to account against its own policy by auditing the implementation and effectiveness of its *Aboriginal Strategic Direction* plan in 22 locations. During this time, we have conducted consultations with more than 3,500 Aboriginal people from over 90 communities, representatives from over 400 agencies and services and senior and specialist liaison police. Our audit process also involved reviewing existing projects or initiatives aimed at assisting police to work more effectively with local Aboriginal Communities.

² Review of the *Crimes Legislation Amendment (Penalty Notice Offences) Act 2002: On the Spot Justice? The trial of criminal infringement notices by NSW Police*, NSW Ombudsman.

³ For example 1) Public Interest Advocacy Centre / Public Interest Law Clearing House *Not Such a Fine Thing*, Sydney 2006. 2) Walsh *From Park Bench to Court Bench* Brisbane: Queensland University of Technology 2004. 3) Walsh 'Won't Pay or Can't Pay? Exploring the use of fines as a sentencing alternative for public nuisance type offences in Queensland', *Current Issues in Criminal Justice* Volume 17(2) page 218-238, 2005.

2. Complaints and inquiries – an overview

From 1 April 2006 to 30 March 2007 we received 188 complaints and 754 inquiries that were about the fines system and/or issuing agencies. Figure 1 lists the agencies that we received these complaints and inquiries about and figure 2 lists the issues raised by these complaints and inquiries.

A number of the complaints about police also involved allegations relating to misconduct and excessive use of force which occurred at the same time as the fine was issued. The majority of complaints were about debt recovery action, failure to conduct a proper review and poor or inadequate service.

Figure 1: Fine related complaints received between 1 April 2006 and 30 March 2007

<u>Agency</u>	<u>Formal</u>	<u>Informal</u>
NSW Police Force	65	185
Office of State Revenue	61	265
Councils	26	105
SDRO	17	24
Roads & Traffic Authority	8	67
Rail Corporation	5	28
State Transit Authority	2	4
State Electoral Office	1	3
NSW Treasury	1	3
Ministry of Transport	1	0
IPB	1	8
Department of Commerce	0	10
Other	0	52
TOTAL no. of complaints	188	754

Figure 2: Fine related issues between 1 April 2006 and 30 March 2007

<u>Issue</u>	<u>Formal</u>	<u>Informal</u>
Enforcement	88	178
Customer Service	55	169
Misconduct	43	80
General Enquiries	40	0
Information	27	36
Complaint Handling	23	47
Other	24	34
Charges/Fees	11	202
Excessive use of force	11	4
Object to decision	11	33
Investigation	10	0
Prosecution	8	40
Environment services	3	12
Policy/law	3	11
Approvals	1	19
TOTAL	358	865

3. Possible further consultations

Throughout our consultations and research we identified the following marginalised groups in relation to the impact of the fines system: Aboriginal people, young people, people with an intellectual disability, people with mental health issues, homeless people, prisoners, people living in rural and remote areas, refugees and certain groups from a cultural and linguistically diverse background.

The Council's report identifies all of these groups apart from refugees and people from a cultural and linguistically diverse background. Our consultations and research revealed that these groups face similar issues, including low literacy levels and a lack of understanding about the operation of the fines system. Additionally, some people from these groups have had previous traumatic experiences with authority figures in their homeland and this can impact on the nature of their dealings with issuing officers.

We note that the Council's initial consultations have been conducted in a number of regional and metropolitan areas with a range of agencies and community members. We

have outlined below a number of other agencies and community groups that we believe could provide valuable information to the Council, these include:

- The Department of Education and Training may have useful information particularly about the impact of fines on students travelling on school buses and other forms of public transport. In local areas, Aboriginal Education Assistants should be able to provide information about the experiences of Aboriginal students.
- The Department of Juvenile Justice may be able to provide useful comments about the experiences of young people in detention and those subject to community sentences.
- Frontline and specialist officers from the NSW Police Force including, youth liaison officers, Crime Prevention Officers, Aboriginal Community Liaison Officers and senior staff from the Commissioner's Inspectorate could all provide useful insights into the impact of fines on young people and Aboriginal people.
- The commander of the PCYC and local PCYC officers could outline the range of driver education and other diversionary programs being run in conjunction with the RTA and Department of Education. These types of programs have been running for some time in Richmond and Tweed/Byron local area commands.
- Relevant officers from Rail Corporation and the State Transit Authority could provide information about their role in issuing fines.
- Mental Health advocates employed by Area Health Services may be able to discuss the impact of fines on clients with a mental illness and the support systems in place to assist them.
- The Intellectual Disability Rights Service and the Multicultural Disability Advocacy Association and other disability advocacy groups may be able to outline the impact for their clients.
- Refugee and CALD advocacy groups, such as migrant resource centres as well as community development officers employed by local councils in areas where significant refugee populations have settled, such as Blacktown, Holroyd and Newcastle LGAs. The Community Justice Commission may also be able to provide information about the impact of fines on African communities as a result of their 2006 research.
- Community representatives, service providers and advocates for marginalised groups.

4. Examples of feedback received from vulnerable groups

Young People

Young people tend to be 'easy targets' for police and transit officers due to the amount of time they spend in public spaces and on public transport. The accumulation of debt from transport fines and the resulting impact on young people is one of the main concerns of youth advocacy groups and youth services.

In regional areas, particularly in Western NSW, we received information about young people being issued with multiple fines for not wearing a bike helmet. During a visit to Naranderra we were told that a young person, now 18, had accumulated a \$2000 debt from fines that he received when he was 15 years old. According to the young person, three of these fines were issued on the same day for failing to wear a helmet when riding a bike. Some commands are addressing this issue through bike helmet safety reward programs (see the section on diversionary programs for further details).

Another issue identified through our audits and complaints is children under 14 years of age being fined contrary to the NSW Police and RailCorp policy. The mother of a 13 year old boy complained to us that her son had been fined \$200 for carrying an aerosol spray-can on public transport. He was fined and arrested even though he was under 14. The police investigator found the issue of the infringement notice to the young person clearly inappropriate as guidelines for the issue of penalty notices provide that they should not be issued to persons under the age of 14 years. A submission was made to the SDRO to withdraw the penalty notice – which occurred. The police officer was provided advice and guidance in relation to the need to ensure the details of young persons are correct before taking action.

Aboriginal People

We have also been told about Aboriginal people struggling to pay off fine-related debts received as a result of unauthorised Abalone fishing. For example, a man had \$25,000 worth of fines that he was willing to pay off but it would have taken him 30 years to do so based on his time-to-pay plan. This issue was more prevalent in the Shoalhaven and Far South Coast regions of the state.

Information received from the Aboriginal communities we have visited supports the Council's comments that Aboriginal people often incur substantial fines as a result of driving without a licence, it is common that these same people have lost their drivers license due to fine default sanctions. For example, in the Riverina area a community worker informed us that 'every second person' has outstanding fines and that the lack of licences in the community remains the biggest barrier to getting regular work. She said there was a high prevalence of 17-18 year olds who drive unlicensed, uninsured – get caught – receive fines and then cannot get a licence.

When people from these communities live large distances from the main business centre it is very hard for them to travel into town to buy food and go about their general business if they do not have a licence.

Intellectual disability or mental illness

People with an intellectual disability or mental illness often do not recognise the seriousness of 'on the spot' fines or understand what they have done wrong to receive the fine in the first place. For example, we have received information from an Official Community Visitor⁴ that she 'regularly comes across' residents in boarding houses who have received fines issued by RailCorp officers for smoking at railway stations. We understand that the boarding house proprietor in each case has tried to discuss this with the issuing officer but usually to no avail. Smoking is a common habit for these residents, who often are unable to understand or forget the implications of smoking at railway stations. To remedy this, the proprietors sometimes confiscate travel passes from the residents to prevent them from travelling. The residents understandably complain when the proprietor refuses to return the travel pass.

⁴ The Official Community Visitors are appointed by the Minister for Community Services under the Community Services (Complaints, Reviews and Monitoring) Act 1993 (CS - CRAMA) and are managed by our office. The OCVs visit places providing accommodation for children, young people and people with a disability. They inform the Minister and the Ombudsman about how to improve residents' quality of care.

5. Penalty Notices

The Council is familiar with the findings and recommendations contained in our report about the CIN trial and that many of these recommendations are relevant to a range of other 'on-the-spot' fines examined by the Council in its review. A particular purpose in trialling the use of CINs in limited locations was to determine if the scheme operated as anticipated, and whether there were any operational issues to be remedied before extending the scheme on a state-wide basis.

Our review indicated that effective police training was central to the generally successful implementation of the CIN scheme in trial commands, and that local community consultation and education was also necessary prior to the implementation of CINs state-wide—this is especially the case in smaller communities, and those with sizeable Aboriginal populations. For these communities, we recommended that the implementation should have an emphasis on developing local solutions as to how the CIN scheme might be used effectively without creating unintended or undesirable consequences, such as 'net widening'.

Our research revealed that in some circumstances, CIN records were being appended to criminal records and presented to courts in criminal proceedings. It was an express intention of the CIN scheme that payment of a CIN would not result in a criminal record. We recommended that safeguards be put in place to prevent CIN matters from being presented as part of a person's criminal history. In this regard, we note that the Council has also stated in its report that the consideration that a penalty notice should have the status of a conviction is wholly undesirable.

We note the Council's view that there should be no extension of the CIN scheme until attention has been given to the issues identified in their report. The Council is aware that the Ombudsman has been given the role to review the operation of the provisions giving police officers the power to issue penalty notices for certain prescribed offences insofar as they impact on Aboriginal and Torres Strait Islander communities. Our review of the CIN scheme will commence on 1st November 2007 coinciding with the state-wide rollout of CINs by the NSW Police Force. This review requires our office to review the operation of the CINS for a period of one year.

The offences CINS can be issued for and the penalties incurred are:

Offences – Crime Act	CIN Fine
Larceny (under \$300)	\$300
Shoplifting (under \$300)	\$300
Obtaining money etc by false representation	\$300
Goods in personal custody suspected of being stolen (not motor vehicle)	\$350
Goods in personal custody suspected of being stolen (motor vehicle)	\$350
Goods suspected stolen in/on custody of other (not motor vehicle)	\$350
Goods suspected stolen in/on custody of other (motor vehicle)	\$350
Goods suspected stolen in/on premises (not motor vehicle)	
Goods suspected stolen in/on premises (motor vehicle)	
Goods suspected stolen given other not entitled (not motor vehicle)	\$350
Goods suspected stolen given other not entitled (motor vehicle)	
Offences – Summary Offences Act	
Offensive behaviour	\$200

Offensive language	\$150
Obstruct person/vehicle/vessel	\$200
Unlawfully enter vehicle/boat	\$250

Our office is more than happy to meet again with representatives of the Council once our review has commenced, to ensure that our respective agencies do not duplicate any proposed research on this or related issues.

6. Alternatives to fines

Driver education and traffic offender programs

Through our ASD audits we have become aware of a range of programs run by police, the RTA and local schools aimed at helping adults and young gain the driving experience needed to obtain a license—participation in some of these programs is often an alternative sentencing option for driving offences.

Several PCYC clubs across the state run a traffic offender program which is an alternative to criminal sanctions after a young person has been found guilty of a drink driving traffic offence. The program aims to educate offenders and to reduce the incidence of re-offending. The program is run in many PCYC clubs across the state. The program lasts for eight weeks, and includes personal and video presentations from police highway patrol officers, local solicitors, brain and spinal injury sufferers, drug and alcohol counsellors, the RTA and ambulance officers. The most recent data we have received from the NSW Police Force is from a 2002-2003 sample, and it indicates that 78% of all participants had not re-offended in the year after completing the program.⁵ We suggest that it would be worthwhile obtaining the most recent data from the PCYC.

A recent visit to the Northern region confirmed that Tweed/Byron and Lismore local area commands continue to operate successful driver education programs. The Aboriginal community liaison officers employed by police in these commands would be useful contacts.

Bike helmet safety programs

At times police have problems with young people riding their pushbikes without a helmet, which is an offence that can attract a \$50 on-the-spot fine. A few local area commands have conducted bike programs with young people. New England LAC conducted a bike maintenance program which involved a local bike shop donating a helmet to each participant as a reward for completing the program. In Walgett the police ran a bicycle helmet reward program which involved police giving raffle tickets to young people they saw wearing helmets while riding. At the end of the week a prize of \$20 was drawn. After six months of participation, young people were eligible to win the major prize which was a new bike.

There should be consideration for limited licence use or other sanctions to be available for people in rural areas. The availability of alternatives to fining which also includes education, such as the PCYCs Driver Education Programs, should be extended across the state.

⁵ Working with Local Communities: Audit of the implementation of the NSW Police *Aboriginal Strategic Direction* (2003 – 2006), NSW Ombudsman, April 2005.

Your Call (also known as Your Choice) Program

This program enables police officers to offer minors caught drinking in a public place the choice of either attending a seminar on the health, social and legal implications of underage drinking or paying a fine.

The Council's report notes that 'there are limited accessible options for non-financial penalties to be imposed'. A range of innovative programs are being run in several areas but they are not operating consistently or in each local area command. We recommend that the Council undertakes a closer examination of these types of programs so successful models or practices can be identified and potentially rolled out across the state.

Issuing officers also need to be made aware of the benefits and positive outcomes from these programs so they understand the value in taking the extra time to refer young people to these programs and where possible, participate in their delivery.

Warnings, cautions, conferences

A number of complaints we have received suggest that issuing officers choose to give a penalty notice instead of an alternative, such as a caution because it is less time consuming. It is important for local area commands to ensure that frontline officers are complying with their obligations under the *Young Offenders Act* to issue cautions and warnings and where appropriate, refer young people to conferences, where outcomes might include participation in a diversionary program.

Consideration should also be given to developing a scheme which allows other issuing officers such as transit officers, revenue protection officers and council rangers to provide similar cautions and warnings to young people.

Use of discretion by issuing officers

The Council's interim report states there is little scope for issuing agencies to consider an offender's personal circumstances and means or capacity to pay the penalty. Our report about CINs also noted that a fixed penalty scheme brings with it the inability to tailor a fine having regard to the recipient's capacity to pay. This is a significant difference to a court ordered fine, where the magistrate must consider what an offender can afford when determining the fine. For this reason, the exercise of discretion by issuing officers is critically important and appropriate guidance should be given about factors to consider, such as age, capacity to pay, mental illness and intellectual disability.

We note that in 2005 RailCorp formalised its procedures for the use of discretion by transit officers when issuing infringement notices.⁶ While this is a positive step, there would appear to be merit in issuing agencies developing reasonably consistent procedures in relation to discretion, and for compliance with these procedures to be monitored at both a local and corporate level to ensure that staff are applying these procedures consistently.

Training of issuing officers

Standard guidelines and training for the issue of fines should be developed and implemented across all issuing agencies. This training should include modules emphasising positive strategies to recognise and deal with vulnerable people, including appropriate use of discretion and anti-discrimination principles. Exploration by the Council of the adequacy of existing training would be valuable.

⁶ NSW Ombudsman Annual Report 2005-2006.

In this regard, we note that recommendation 5 from our CINS report highlighted the need for clear guidance to be given to police officers on what does and does not constitute offensive language. Offensive language is also an offence on rail property and therefore similar guidelines could be used by transit officers.

7. The internal review processes

We support the proposed reform option that a system needs to be established which allows issuing agencies to conduct an internal review of penalty notices “where the recipient asserts that the penalty was issued contrary to law, or that there was a mistake as to identity, or that special circumstances exist.”

RailCorp’s system allows for a fine to be withdrawn if an internal review of the circumstances shows that the issue of the fine was inappropriate. The NSW Police Force however, does not have a similar system where a more senior officer can verify the decision of a junior officer to give an on-the-spot fine. In our CINS report we recommended that senior police be given the power to withdraw a fine after assessing the details of the situation that led to it being issued. Once again, this is an example of inconsistencies across issuing agencies within the current system.

Another concern we have is that agencies, which have service agreements with the SDRO, may be abrogating their discretionary decision-making powers. Although, these agencies may argue that it is a more independent process to allow the SDRO to determine these matters, it is important that wherever possible, frontline staff from issuing agencies exercise appropriate discretion to reduce the potential impact of fines on the community, particularly given the available literature about the problems faced by vulnerable people in ‘navigating’ the fines system.

Clearly, the introduction of an internal review process would have resourcing implications for issuing agencies and that this would need to be appropriately explored. In this regard, Railcorp may be able to provide useful insights into the operation of their internal review process.

8. Inconsistencies in penalty amounts

We regularly received feedback through our consultations about perceived inconsistencies in the penalty amounts when compared to the seriousness of certain offences and note the Council’s observation that there is ‘an absence of any consistent cross-government mechanism for the fixing of the level of penalties for which such notices may be issued.’ The penalty for smoking on a railway platform for instance is relatively high and often cited as an example of an unfair penalty when compared to penalties for more serious offences.

We agree that there is value in reviewing the fixing of penalties and that particular consideration should be given to the penalty amounts fixed for young people.

9. Public scrutiny of issuing agencies

We note the Council's view that if agencies are not subject to external scrutiny in this area then there is the potential for 'the development of discriminatory, unfair and negligent or corrupt practices, particularly where net widening is occurring'.

In 2004 we investigated RailCorp's policies and procedures for handling complaints about transit officers, and found that a majority of the RailCorp investigations we audited were essentially flawed. The implication was that some 600 officers with important law enforcement powers and responsibilities were receiving considerably less rigorous scrutiny than the public had a right to expect.

Since then, RailCorp has implemented a number of our recommendations. These reforms have been pleasing, but we have continued to receive some complaints about transit officers that suggest the need for external scrutiny remains vital. The conclusion we drew was that there is an urgent need for RailCorp's complaints handling system to be subject to extensive external oversight.

The value of external scrutiny of issuing agencies was also demonstrated through a series of complaints we received about a number of local councils mistakenly issuing fines under the Australian Road Rules that they were not authorised to issue. Several councils have agreed to cease doing so and a letter about the issue will be sent to all councils.

10. Local Court fines

The decisions made by courts are not within the jurisdiction of the Ombudsman, and for this reason, our research did not cover this issue. However, the alternative sentencing options outlined in the Council's report such as bonds linked to driver education programs, referrals to the MERIT program and Circle Sentencing are initiatives we are familiar with through our ASD auditing work and would appear to be worthwhile options to explore. We also believe that the Council's proposals to improve the fine payment system in relation to applications for time to pay have merit.

11. The State Debt Recovery Office

Limited information

Information gathered through our complaints and liaison work appears to suggest that there is a lack of knowledge by marginalised people about the consequences of certain behaviour that may lead to receiving a fine. There also seems to be a lack of knowledge about what the consequences are for not paying the fine or how to challenge the fine. For example, many young people may not be aware that if they do not wear a bike helmet they can receive a \$50 fine and that if they do not pay fines then other sanctions could be imposed that may prevent them from applying for their driver's licence once they are 18.

For this reason, it is important for the issuing agency to provide information at the time of issuing the fine, as well as clear information being available from the SDRO once the recovery process has commenced about methods of payment. Our CINS report recommended that an explanation of the potential consequences liable to be imposed should be included on notices, as well as clearer information about recipients' rights (see recommendation 22). There is also limited information on the State Transit Authority website explaining the role and processes of revenue protection officers.

After discussions with the SDRO in xxxxx year they have since developed clear guidelines to help people understand the type of evidence required to request a review. The SDRO has also released a fines information pack and an information flyer targeted at Aboriginal people.

Hardship Review Board

During our community consultations with Aboriginal communities in late 2005 and 2006, it was apparent that few people were aware of the role of the Hardship Review Board but were generally aware of the option to apply for 'time-to-pay'. We understand that around this time only a few applications had been made to the Board.

However, our more recent liaison with youth workers and community legal centres suggests that their clients' applications to the Board are being met with positive results, with fines being written off or waived. However, frustration appears to remain that you cannot apply to the Board until the end of the process, in other words, after an application to the SDRO for waiver or write off has been unsuccessful.

Due to what appears to be a general lack of the fine waiver/write off option and the existence of the Board itself, we support the Council's recommendation that the SDRO increase its presence through outreach programs to rural and regional areas in NSW.

Alternative forms of sanctions and relief from sanctions

We agree that more flexibility in the enforcement system in regards to the order of and type of sanctions will relieve the hardship felt by marginalised groups. Our office supports the recommendation that community service orders should be an available option at an earlier stage in the sanctions process.

An example of how the current inflexible procedures can impact on people from marginalised groups is the case of Ahmedul Chowdhury, a 29 year old man with severe intellectual disabilities who received five penalty notices for travelling without a ticket. He was travelling to and from a sheltered workshop by train. His fines totalled \$1,150. His father applied to SDRO for a write-off or waiver⁷ but the application was not accepted.

SDRO Processes

Last year the SDRO agreed to our recommendation that they amend their procedures to allow for enforcement action to be put on hold when they receive clear evidence that a client has lodged a freedom of information application to obtain supporting information to dispute their penalty notice. They will also put a freeze on enforcement action while a person has made representations to the SDRO about the circumstances of the fine.

Another issue that has recently been raised by several complaints to our office is SDRO's apparent failure to cross check with RTA database for up-to-date addresses prior to sending penalty reminder notices and enforcement orders. At times this means that people are not receiving these notices and then they may only find out seven days before their licence is about to be suspended. The RTA has accepted our recommendations to improve their data recording and related systems and is in the process of complying with them.

⁷ Hansard Legislative Assembly 10 May 2007 by MP Michael Richardson (Castle Hill)

Our reference: 2007/061406
Contact: Mandy Loundar
Telephone ☎: [REDACTED]

October 2007

The Hon. James Wood AO QC
Chairperson
New South Wales Sentencing Council
Box 6 GPO Sydney 2001

Dear Mr Wood

Interim Report – *The effectiveness of fines as a sentencing option*

Thank you for the opportunity to provide comments to the Sentencing Council about its interim report on fines. The Council's report highlights many of the issues that have concerned my office for some time about the impact of the current fines system on vulnerable groups in our community. The report also discusses possible options for law reform and practice, many of which we support.

As you know, my office has been closely monitoring the impact of fines through our complaints and inquiries function, community liaison work and our role in reviewing the trial of Criminal Infringement Notices issued by police. Our submission brings together information and observations made to us through this work.

We hope our submission provides useful insights for your further research.

If you would like to discuss our submission further please do not hesitate to contact Julianna Demetrius, Cross Agency Team Manager on [REDACTED]

Yours sincerely

Bruce Barbour
NSW Ombudsman



NSW Ombudsman

Our reference: ADM/8173
Your reference: 13.63
Contact: Justine Simpkins
Telephone ☎: [REDACTED]

Level 24 580 George Street
Sydney NSW 2000
Phone 02 9286 1000
Fax 02 9283 2911
Tollfree 1800 451 524
TTY 02 9264 8050
Web www.ombo.nsw.gov.au
ABN 76 325 886 267

Mr Paul McKnight
Executive Director
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Mr McKnight

Penalty Notices

Thank you for the opportunity to contribute to the NSW Law Reform Commission's Inquiry into Penalty Notices.

As you know, my office has been closely monitoring the impact of fines through our complaints and inquiries function, community liaison work and our role in reviewing the trial of Criminal Infringement Notices (CINs) issued by police, and the impact of the state-wide roll out of the CINs on Aboriginal communities.

The attached submission draws from this work. I hope this information provides useful insights for your Inquiry.

If you would like to discuss our submission further please do not hesitate to contact Justine Simpkins, Senior Project Officer on [REDACTED].

Yours sincerely

[REDACTED]

Bruce Barbour
Ombudsman

16/12/10



Submission by the NSW Ombudsman's Office to the NSW Law Reform Commission Inquiry into Penalty Notices December 2010

1. Submission to the NSW Sentencing Council

As detailed in the Commission's consultation paper, the NSW Sentencing Council has previously investigated the effectiveness of fines as a sentencing option and the consequences to those who do not pay fines. The Ombudsman's Office made a submission to the Sentencing Council's investigation. Many of the issues we raised at that time remain relevant for the current Inquiry into Penalty Notices:

- we observed that marginalised groups generally had less capacity to pay fines and little understanding of how to negotiate 'the fines system'
- our complaint and auditing work showed that transport fines were often the main area of concern for marginalised groups
- we noted the importance of issuing agencies appropriately exercising their discretion to withdraw fines that have been inappropriately issued
- we noted the importance of external scrutiny of the way fine issuing agencies issue fines (and now, how they exercise their discretion to issue cautions)
- we emphasised the importance of clear and comprehensive information about options for review or mitigation of fines being provided to fine recipients, as well as advocacy groups representing vulnerable people who have received penalty notices.

2. Penalty Notices and vulnerable people

Chapter 6 of the Commission's consultation paper considers the impact of penalty notices on young people, and Chapter 7 considers the impact on vulnerable people.

We agree with the observations of the Commission with regard to the difficulties faced by young people and vulnerable individuals who may lack the capacity to negotiate the fines system, due to being in custody, being homeless, having a cognitive impairment or mental illness, or people suffering financial hardship.

While our recent report, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* ('the 2009 Report') focussed on the impact of CINS on Aboriginal communities, a number of the issues arising from that review may also have relevance for other parts of the community. In particular, the impact of accumulated fine debt may have significant deleterious effects on young people, people suffering financial hardship, and people in areas that have poor access to public transport.

Failure to pay accumulated fines debt can result in driver's license sanctions, or for young people it can result in an inability to obtain a driver's license. This can have the effect of perpetuating a cycle of offending or poverty, as a lack of driver's license limits access to work.

The following case studies, drawn from our complaint handling work, illustrate some of the issues which are faced by vulnerable individuals that have accumulated significant fine debt.

Case study 1

We were contacted by a man who had been fined for different offences over a 25 year period resulting in a debt of \$23,000. During this time the man was a drug user and spent time in prison. The man was struggling with making a new life for himself including his aim to have his young daughter returned to his care. There were no further fines since the end of 2007 after he started on a methadone program.

The man made a payment arrangement of \$30 per fortnight with the State Debt recovery office ('SDRO') in September 2009, however, he was unable to afford this on his Newstart allowance and stopped making any payments. After failed attempts to contact the man, the SDRO eventually garnisheed the man's bank account in September 2010. The man borrowed \$5 from a friend to get transport to Centrelink, where he asked for financial assistance from Centrelink. He was advised to contact our office. We made inquiries with the SDRO and suggested he see a financial counsellor.

SDRO staff told the man that his best option was to apply for the fines to be written off on the grounds of financial hardship, however after he was offered a job he was no longer eligible to apply on this basis. The man was not aware of the Work and Development Order option prior to contacting our office. The SDRO confirmed that the man later applied for a Work and Development Order on the basis that he was attending treatment for his drug issues supported by an area health service.

The man had contact with a number of agencies including Centrelink, Job Network, SDRO, doctors who oversighted his methadone treatment and the Department of Community Services.

Case study 2

A man came under a Financial Management Order with the NSW Trustee and Guardian (NSWTG) after a hearing by the Mental Health Review Tribunal. He was also under a Community Treatment Order for his schizophrenia and other mental health issues. The man owes about \$12,000 for 43 outstanding fines including 26 for train and bicycle offences. (One bicycle helmet fine for \$244 has \$200 in enforcement costs.) The fines seemed to happen in clusters. The SDRO wrote to the NSWTG in August 2010 suggesting that the man should apply for the fines to be written off on the grounds of financial hardship. There was no information about any other options for reducing or reviewing the fines.

Our office had previously made suggestions to the NSWTG and the SDRO around management of individuals that repeatedly receive penalty notices, including suggesting they develop an MOU with a view to improving communication and processes between the two agencies. One outcome was that the NSWTG was activated on the SDRO Advocacy Hotline. However, in August 2010 the NSWTG staff member handling the man's case was not aware of the Advocacy Hotline or the Caution Guidelines.

After being made aware of these options by our office the NSWTG wrote to the SDRO on behalf of the man. The letter included supporting information about the man's financial and mental health issues. The NSWTG asked for the fines to be written off or that the fine be withdrawn on the grounds that it was likely he was mentally unwell at the time the fines were issued.

These case studies raise the following issues, which we would suggest are not atypical in the context of penalty notice matters affecting vulnerable parts of the community:

- There is a need for clear information about review mechanisms and fine mitigation options

- Administration costs associated with pursuing enforcement may be high, particularly for people who repeatedly engage in conduct that constitutes a penalty notice offence, particularly if that person lacks capacity to understand or control that conduct
- Multiple agencies are often involved in assisting individuals navigate the penalty notice system or manage their finances
- Financial hardship following accumulated fine debt may be difficult to overcome, putting individuals at risk extended poverty and possibly risk of further offences
- There is a need for discretion to be carefully exercised in issuing penalty notices to avoid issuing them to people who lack capacity to understand or control their conduct
- There is a need to consider the role the SDRO should play in identifying options for reducing and reviewing fines
- For various reasons, it is not uncommon for review of the penalty notices to occur after the fine recipient has already accumulated significant enforcement costs.

2.1 Recent reforms to the fines system

The reforms to the fines system that came into force in March 2010, under the *Fines Further Amendment Act 2008*, and the Attorney General's Guidelines with regard to cautions and internal review are a welcome measure. Increased flexibility in repayment options, the creation of non-pecuniary payment options, and the diversion of vulnerable groups out of the fine system has the potential to make the fines system fairer, and to reduce the incidence of secondary offending brought about by fine default.

We note that the Attorney General indicated the reforms introduced under the *Fines Further Amendment Act* will be reviewed after two years of operation.¹ We also note that the Work and Development Order Scheme runs as a trial for a period of two years, and will presumably be the subject of evaluation after that period.

Given these reforms have only recently come into force, it is perhaps too early to comment in detail on their impact in making the fines system fairer for vulnerable people. However, it is clear to be effective the reforms will require a significant cultural change in the many agencies involved in the fines system in order to appropriately identify and prevent vulnerable people from accumulating debt or entering the criminal justice system as a result of fine defaulting.

We agree with the Commission's observation that '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.'²

As such, we suggest that in addition to the policy review following two years of the operation of the reforms, ongoing monitoring of the way fines are issued and reviewed is essential to

¹ The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 27 November 2008

² NSW Law Reform Commission, *Consultation paper 10 - Penalty Notices*, September 2010; p136

drive the requisite cultural change. In our view, this should consist of both internal monitoring by issuing agencies as well as external oversight and support.

Additionally, we would suggest that in reviewing the Work Development Order Scheme and the other reforms to the fines system, it would be useful for consideration to be given to the role the SDRO can play in identifying options for reducing and reviewing fines that have been issued to youths and vulnerable people. This could include consideration of whether the SDRO should proactively support organisations that represent or are engaged with vulnerable fine recipients in identifying candidates for the Work Development Order Scheme and applying for alternatives to pecuniary repayment options.

2.2 Internal monitoring

Part 6 of the Attorney General's Caution Guidelines require issuing agencies to keep records of cautions issued, where practical. Additionally, issuing agencies are to ensure issuing officers:

- understand the offences for which they are authorised to issue penalty notices and cautions,
- are aware of the Caution Guidelines,
- receive regular and appropriate training.³

It is our view that to properly assess whether the reforms are delivering their intended changes, all issuing agencies should have systems in place to monitor the way cautions and penalty notices are issued. The data agencies hold about the number of cautions and penalty notices issued, internal review requests received and the outcomes of those internal review requests are an important tool to assist in the evaluation of the recent reforms, as well as an ongoing assessment of whether the fines system is working fairly and effectively.

To assist in the ongoing assessment of the fairness and effectiveness of the fines system, we recommend that all issuing agencies should be required report this data in their Annual Reports. This would increase the transparency of the fines system and would assist any policy review or ongoing audit of the effectiveness of the reforms and fairness of the fines system.

We also support the idea of agencies recording additional data to assist in evaluating the impact of the fines system on vulnerable people, such as information about where penalty notices are issued, and demographic data such as Aboriginality, homelessness, disability and age. We acknowledge there may be privacy concerns raised in relation to capturing and analysing information about fine recipients. However, it would be relatively simple for measures to be put in place to ameliorate such concerns, such as removing individual identifying information before any examination or analysis of data takes place.

2.3 Ongoing monitoring and evaluation

While the reforms to the fines system will be reviewed after two years, we consider that ongoing monitoring of such significant change is necessary to ensure the objectives of the reforms are being met. Centralised support in driving requisite cultural change is particularly

³ Part 8, *Caution Guidelines Issued by the Attorney General under the Fines Act 1996*.

important given the large number of agencies that are involved in penalty notice processes, including:

- issuing agencies such as local councils, RailCorp and police,
- enforcement through the SDRO,
- organisations engaged with or representing youth and vulnerable people that are fine recipients, including government agencies like the NSW Trustee and Guardian, non government organisations, financial counsellors and specialist legal advocates.

In Chapter 2 of the Commission's consultation paper, some options for reform of the fines system are suggested, particularly with a view to eliminating inconsistencies in the development of penalty notice offences and penalty notice amounts.

We support the idea of creating guidelines to ensure more consistent development of penalty notice offences and penalty notice amounts. However, in our view, there is a need for ongoing review of the fines system that goes beyond consideration of parity of fines.

In our 2009 Report, we recommended 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 (Recommendation 23 of our 2009 Report). The Attorney General has not signalled whether this recommendation is supported or whether it is to be considered by the interagency working party which is to be established by the Government to consider changes to the CINs scheme recommended in our 2009 report.

In order to enable appropriate ongoing and evaluation of the fines system, as well as supporting and driving change to the fines system, it is our view that the role of such an ongoing oversight body would include:

- regular auditing of the way fines are being issued, including evaluation of the effectiveness of the reform measures (cautions, internal reviews, fine mitigation strategies)
- assessment of data reported by issuing agencies and setting requirements for data collection
- reviewing the extent of secondary offending due to fine default
- evaluating the impact of the fines system on people who may have difficulty in negotiating the fines system, including the recent reforms to the fines system
- provide advice and support to penalty notice issuing agencies with regard to the implementation of the Attorney General's Guidelines about cautions and internal reviews
- advising the Attorney General and the Government on the potential to improve the fines system.

The Commission's consultation paper poses three possible models for reforming inconsistencies in the way fine offences and fine amounts are reviewed.⁴ Given our views about the types of activities an oversight body should undertake, we suggest that a model like that set out at Option 2 (allocating responsibility to a stand-alone body) would be preferable to Option 1 (allocating responsibility to a Minister and agency such as the Attorney General) or Option 3 (requiring the Parliamentary Legislation Committee to report to Parliament on the creation of new penalty notice offences or the amendment of existing offences).

Such a body may be well placed to examine what type of information it is most appropriate and useful to record about fine recipients and the fines enforcement system, and how this information could be used to contribute to increasing the fairness and effectiveness of the penalty notice system.

Using the data collected from issuing agencies and the SDRO, a separate oversight agency may also assist in the coordination of targeted programs aimed at reducing debt accumulation. This could include fostering cooperation between issuing agencies, the SDRO and advocate agencies, to better identify individuals who continue to accumulate fines or parts of the community where penalty notices are issued disproportionately. This may assist in identifying the causes of offence types or reasons why particular individuals might repeatedly receive penalty notices.

2.4 Formalising arrangements between the SDRO and advocates or agencies representing vulnerable clients

There are significant administrative costs involved in pursuing enforcement, particularly in circumstances where the fine is ultimately withdrawn due to factors such as the fine recipient's capacity to understand the offence or control the conduct that constituted the offence. The examples contained in the Attorney General's internal review guidelines include homelessness, mental illness and cognitive impairment.

Increased coordination between advocate organisations, issuing agencies and the SDRO may assist in eliminating some of the costs associated with pursuing enforcement in these circumstances.

The example given in the consultation paper of the ad hoc arrangement between the Intellectual Disability Rights Service and the SDRO is a good example of an agreement that may minimise the administrative costs of those fines that are ultimately unable to be pursued.⁵ The consultation paper notes that the arrangement allows for particular clients to have their fines written off automatically.

The case studies outlined above on page 2 also suggest that advocates and agencies representing vulnerable clients may not be clear about when and how to seek a review of penalty notices.

We have suggested to the SDRO and NSW Trustee and Guardian that a Memorandum of Understanding ('MOU') between these agencies may assist to identify when review action should be sought, and how to efficiently manage interactions in relation to clients who may be 'repeat offenders'. We understand that this arrangement has not yet been finalised.

⁴ NSW Law Reform Commission, *Consultation paper 10 - Penalty Notices*, September 2010, pp28-29

⁵ NSW Law Reform Commission, *Consultation paper 10 - Penalty Notices*, September 2010, p128

Formalised arrangements between the SDRO and other organisations which work with or represent vulnerable persons may help clarify roles and encourage use of the new review mechanisms and alternatives to fine payment in appropriate cases.

In addition to the NSW Trustee and Guardian, relevant agencies could include Juvenile Justice, Corrective Services NSW, Ageing Disability and Home Care, large NGOs, and the peak body for financial counsellors.

A centralised body with responsibility for reviewing the fines system could also provide support to agencies entering arrangements such as MOUs with the SDRO, helping to minimise administrative costs in reviewing penalty notices issued in circumstances that would warrant the penalty being withdrawn.

3. Criminal Infringement Notices

As outlined in Chapter 8 of the Commission's consultation paper, the Ombudsman's Office has completed two legislative reviews in relation to the CINs Scheme in NSW: *On the Spot Justice? The trial of Criminal Infringement Notices by NSW Police* (finalised in April 2005) and *Review of the impact of Criminal infringement Notices on Aboriginal communities* (finalised in August 2009).

The consultation paper sets out in detail much of the findings of our research, particularly in relation to the impact of CINs on Aboriginal communities. In light of this, and the availability of both the 2005 and 2009 reports on the Ombudsman's website (www.ombo.nsw.gov.au), this submission will not summarise that research again. However, we can provide some further information about the response to the recommendations of those reports to date.

3.1 Review of the CINs trial

The Commission's consultation paper refers to Recommendation 14 from the 2005 Report, which recommended principles to guide the assessment of which offences to include in the CIN scheme.

It does not appear that there has been any further assessment of extending the CIN scheme to other offences.

3.2 Review of the impact of CINs on Aboriginal communities

Following the tabling of our report into the impact of CINs on Aboriginal communities ('the 2009 Report'), the Attorney General announced his 'in principle' support for the majority of the recommendations.

The Attorney General has announced that the NSW Government would convene a working party to consider how changes to the CINs Scheme proposed in our 2009 Report could be implemented. In particular, the Attorney General indicated he would refer recommendations 5, 6, 8, 9, 17, 24 and 25 to the working party, which would consist of representatives from the Department of Justice and Attorney General, the Office of State Revenue and Aboriginal Affairs NSW. Recommendations 21, 7 and 11 were not supported.

We have not been provided with any further detail about the progress of the working party to date. My office will continue to monitor the implementation of the recommendations made in the 2009 report.

3.3 Reviewing CINs

At the time of writing the 2009 report, the provisions of the *Fines Further Amendment Act* and the Attorney General's guidelines for internal review processes had not yet commenced. Recommendation 21 of our 2009 Report recommended extending the review processes outlined in the *Fines Further Amendment Act* to police use of CINs.

In responding to the recommendations set out in the Ombudsman's 2009 Report, the Attorney General has advised that CINs are covered by the review processes outlined in the *Fines Further Amendment Act*. As such, the Attorney General has indicated that recommendation 21 of our 2009 report is not applicable.

3.4 Records of cautions issued by police

Recommendation 7 from our 2009 Report was that the NSW Police Force implement enhancements to the Computerised Operational Policing System (COPS) to allow official cautions to be recorded and reported as a legal action taken in relation to CIN offences. The Attorney General has indicated that this recommendation is not supported.

At present, it appears unclear whether police can issue official cautions in accordance with section 19A of the *Fines Act*.

Police have a common law power to issue cautions or warnings in relation to any penalty notices (including CINs). Police also have a statutory power to issue warnings to persons under the age of 18 under the *Young Offenders Act 1997*. While section 19A does not appear to exclude police from having the capacity to issue a caution, during the review of the impact of CINs on Aboriginal communities, the NSW Police Force indicated that the caution system under the *Fines Act* did not apply to police. Certainly, the Attorney General's caution guidelines are not applicable to police officers.

We understand that our recommendation that the Attorney General consider amending Chapter 7, Part 3 of the *Criminal Procedure Act 1986* and the *Fines Act* to give police officers the option of issuing an official caution in accordance with the section 19A of the *Fines Act*, (Recommendation 5) will be considered by the interagency working party announced by the Attorney General.

Drawing from our review of the impact of CINs on Aboriginal communities, we consider that there would be a benefit to police and the community if police officers were given the option of recording official cautions. This measure would enable better data capture about the instances where police have exercised their discretion to avoid issuing a CIN.

As we outlined in Part 6.8 of our 2009 report, changes were made to the way warnings issued to adults were recorded in the COPS system in August 2008. From that time warnings issued under the *Young Offenders Act* can be recorded as 'Warning YOA' in the Legal Processes section of COPS. Warnings issued to adults under the CINs system can still be recorded as 'No Formal Action' and further detail recorded against the option 'Informal Caution Given'.

At the time of our review, information relating to 'No Formal Action' was not included in standard reporting on methods of legal proceedings against alleged offenders. In our focus groups with police officers, we found that some officers only recorded CINs warnings or official cautions in their notebooks, without a corresponding COPS entry, while others strongly held the view that the warning should be recorded on COPS. We were also told by some officers that they recorded warnings or cautions for CIN offences in narrative sections of COPS.

The reduction in the recorded warnings for offensive conduct and offensive language (combined) incidents may be illustrative of the impact of the changes to COPS that were introduced in 2008. For several years, warnings for adult offensive conduct and adult offensive language in NSW had been recorded at between 350-550 warnings per quarter, falling to 130 recorded warnings in July – September 2008 and just two recorded warnings in October – December 2008.⁶ As we found no evidence to suggest a fall in offending behaviour or police activity, we suggest this fall in warnings indicates a change in recording practices.

The variations in the way CIN warnings or cautions are recorded makes it difficult to assess the way police are utilising the option to issue warnings or informal cautions to alleged offenders. A clear system for recording and reporting this information may assist in evaluating the way police exercise their discretion, including how cautions are utilised in relation to vulnerable persons and in Aboriginal communities.

Additionally, variations in the way CIN warnings are recorded may make it difficult for police to get a complete picture of an individual's 'continuity of behaviour', in order to determine whether warnings have previously been issued, and whether a warning, CIN or Court Attendance Notice would be a more appropriate response to an alleged offence.

The absence of reliable data about the use of cautions or informal warnings in relation to 'CIN offences' also makes it difficult to properly assess whether the CINs scheme has had a 'net-widening' effect.

In light of this, we consider it important that the capacity for police to issue caution in relation to CIN offences and other penalty notice offences is formalised, and that cautions are clearly and consistently recorded. This would both assist officers in exercising their discretion in responding to alleged offences, and would assist the NSW Police Force to evaluate options taken by police officers for diverting people from the criminal justice system in appropriate circumstances.

3.5 Suspended and cancelled driver offences

New separate suspended and cancelled driver offences arising from non-payment of a fine or penalty were enacted in March 2009 under the *Roads Transport (Driver Licensing) Act 1998*.

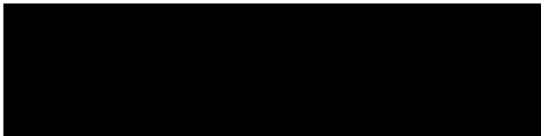
We recommended that the NSW Police Force develop a strategy that assists Local Area Commands to monitor the incidence of these new suspended and cancelled driver offences with a view to devising ways to prevent further offending (Recommendation 11).

⁶ NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p66

The Attorney General did not support recommendation 11, but has indicated that the new suspended and cancelled driver offences will be monitored by other agencies such as the Department of Justice and Attorney General and the Roads and Traffic Authority. The Attorney General indicated that the NSW Police force does not have a role in providing legal or financial advice to offenders. However the Attorney General indicated that NSW Police Force could have regard to the findings of other agencies when devising its enforcement strategies, which may include referring offenders to assistance.

As we outlined in Part 6.12 of our 2009 Report, the intention of recommendation 11 is that local police, with the assistance of the NSW Police Force, take steps to monitor the new suspended and cancelled driver offences, and look for ways to use the data about these offences to inform strategies to prevent further offending. An example of how that data could inform such strategies is for Youth Liaison Officers, Aboriginal Community Liaison Officers or other police to make appropriate referrals to advocates who can assist the fine recipient to negotiate a time-to-pay arrangement or a fine mitigation arrangement.

We also noted in our 2009 Report that the data relating to suspended and cancelled driver offences could also inform strategies to assist non-Aboriginal fine recipients to negotiate the fines system.



Bruce Barbour
Ombudsman