Submission No 32

DEBT RECOVERY IN NSW

Organisation: NSW Ombudsman

Name: Mr Bruce Barbour

Position: Ombudsman

Date Received: 27/05/2014

Ombudsman
New South Wales

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/2014/72 (2014/049323)
Contact: Tom Millett
Telephone: [redacted]

Mr John Miller
The Committee Manager
Legal Affairs Committee
Parliament House
Macquarie St
Sydney NSW 2000

Dear Mr Miller

Inquiry into debt recovery in NSW

Thank you for the opportunity to contribute to the Legal Affairs Committee inquiry into the debt recovery framework in NSW.

My office has a long history of reviewing the way in which the various aspects and elements of the debt recovery system in NSW operate. This has included handling complaints, reviewing systems and processes, and assessing the impact of fines and debt recovery systems on particularly vulnerable groups.

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

Please do not hesitate to contact my Executive Officer, Tom Millett, on [redacted] or by email: [redacted] if my office can provide the Committee with any further assistance.

Yours sincerely

[redacted]

Bruce Barbour
Ombudsman

27/5/14

Submission by the NSW Ombudsman's Office to the NSW Parliament's Legal Affairs Committee inquiry into the debt recovery framework in NSW

As you would be aware, we have completed two legislative reviews in relation to the Criminal Infringement Notice (CINs) scheme in NSW: *On the Spot Justice? The trial of Criminal Infringement Notices by NSW Police* (April 2005) and *Review of the impact of Criminal infringement Notices on Aboriginal communities* (August 2009). These reports can be downloaded from our website at www.ombo.nsw.gov.au

In the past we have also made submissions to the NSW Law Reform Commission's Inquiry into Penalty Notices (2012) and to the NSW Sentencing Council (2006).

We are currently in the process of finalising a legislative review of section 9 of the *Summary Offences Act 1988*, an offence for which a CIN may be imposed. As part of this review, we were required to prepare a report on 'the issue of penalty notices in respect of offences against section 9' (section 36 (1)(a) of that Act). The Attorney General is to table a copy of the report in Parliament as soon as practicable after he receives our report, which we anticipate will be in July. We would be happy to provide the Committee with a copy once it is tabled.

Many of the issues we have raised in our previous reports and submissions remain relevant for the current Inquiry:

- we have found that marginalised groups generally had less capacity to pay fines and little understanding of how to negotiate the fines system
- our work shows that transport fines were often the main area of concern for marginalised groups
- we note the importance of issuing agencies appropriately exercising their discretion to withdraw fines that have been inappropriately issued
- we note the importance of external scrutiny of the way fine issuing agencies issue fines (and now, how they exercise their discretion to issue cautions)
- we emphasise 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.

In this submission, we repeat and summarise the key recommendations and submissions that we have previously put forward. We also discuss issues arising from our complaints work in recent years. Many of the complaints we receive are about the way the State Debt Recovery Office (SDRO) or the issuing authority have handled an individual's request for a fine to be reviewed. Other common complaints relate to concerns about the enforcement action that the SDRO is taking, for example, the use of garnishee orders, or decisions the SDRO has made in relation to fine mitigation.

1. The need for ongoing monitoring and evaluation

The reforms to the fine systems that came into force in March 2010 were aimed at improving internal review and caution procedures and widening the options that people had to deal with

their debts rather than incur further penalties and enforcement costs. While the focus of our 2009 review was the impact of the CINs system on Aboriginal communities, from our analysis we formed the view that these reforms had the potential to reduce the impact of the fine system on vulnerable people overall. We were particularly encouraged by the potential for the work and development order scheme to assist those with limited means to repay their debts.

However, we also identified further needs to strengthen the system. In particular it remains our view that there is a need to establish a body with ongoing responsibility for monitoring the fines enforcement system into the future.

The fines and debt recovery system has been the subject of numerous reviews, including this current Inquiry and, most recently, the NSW Law Reform Commission Inquiry into Penalty Notices 2012. In our view, this demonstrates that the system would benefit from having ongoing monitoring of the way fines are issued and reviewed, rather than ad-hoc review by disparate bodies. As we wrote in our submission to the Law Reform Commission, ongoing monitoring is essential to 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.

Internal monitoring

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.

Ongoing monitoring and evaluation

We consider that ongoing monitoring of the fines system is necessary to ensure the objectives of the 2010 reforms are being met. Centralised support in driving requisite cultural change is particularly important given the large number of agencies that are involved in penalty notice processes, including:

- issuing agencies such as local councils 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 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).

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.

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.

The NSW Law Reform Commission recommended the creation of a Penalty Notice Oversight Agency in line with our views. However, as far as we are aware, the government has not yet provided a formal response to indicate whether this proposal will be adopted.

2. Improving public understanding of their legal rights

Despite there having been an expansion in the number of options available to people to repay their fine debts since 2010, information available to us continues to show that public awareness of legal options to deal with a fine debt could be improved. In our 2009 report, we recommended that the SDRO made strategic use of information from police about the

characteristics of fine recipients, with a view to improving the provision of information and assistance in a more targeted way. This recommendation was not supported by the SDRO.

We are also of the view that there is merit in reviewing the information currently on the SDRO website, so that it more clearly outlines the options that people have should they wish to dispute a fine. For example, that does not appear to be information about an agency's discretion to withdraw a fine for any reason (pursuant to section 24E(3) of the *Fines Act 1996*), including compassionate grounds or other factors that may mitigate the fine recipient's culpability or ability to pay the fine.

In our view, the 2010 reforms may more effectively reduce the impact on vulnerable groups if the public was better educated about their options.

3. Garnishee orders

In recent years we have received an increasing number of complaints from people who have had money taken from their bank accounts under a garnishee order for outstanding fine debt.

Complainants told us they were left with little or no money to support themselves and, in many cases, their dependants. We suggested the SDRO made information about garnishee orders publicly available, including the options available for people experiencing financial hardship as a result of an order.

The SDRO has now published its policy for dealing with applications for a full or partial refund of money deducted under a garnishee order. They have also produced a fact sheet which explains how the orders work and the options for stopping enforcement action and applying for a refund. This guidance makes it clear that one of the options available to people the subject of an order is for an initial refund of $100 to be granted at SDRO officers' discretion over the telephone to alleviate urgent financial hardship. Any further refund would require an individual to submit supporting documentation demonstrating hardship.

While it is a positive step to have publicly available information about requesting a refund, we consider that legislative change is necessary to ensure that individuals are left with sufficient money to meet daily living expenses following the issuing of a garnishee order. This would alleviate the need for refund requests to be submitted by those experiencing urgent financial hardship as a result of a garnishee order. It should be noted that many of the SDRO's vulnerable clients would not be able to take the necessary steps in order to pursue a request for a refund and that an amount of $100 may not be sufficient to cover necessities. For those that do request a refund, the SDRO has to then commit resources to assessing and processing their application.

Under the *Fines Act 1996* the SDRO is entitled to issue a garnishee order to a bank or to an individual's employer in order to recover outstanding debt. Under section 122 of the *Civil Procedure Act 2005*, where a garnishee order has been issued to an employer, the debtor's weekly wage or salary must not be reduced to less than $447.70. There is no such equivalent legislation in terms of a garnishee order issued by the SDRO directly to a bank. In effect, if the outstanding debt to which the garnishee order relates exceeds the balance of the account, an individual will be left with a $0 balance, whereas a similar situation could not occur were the order issued on wages or to an employer. The SDRO has advised my office that under the current legislation, it is unable to instruct banks to retain a protected amount or minimum

amount to be left in an account because a garnishee order attaches to all debts due and accruing. The incongruence between the legislative requirements relating to the two garnishing options leads to an unreasonable adverse impact on those people whose bank accounts are garnished, particularly, as we understand most garnishee orders are issued on accounts and not employers.

We have found that individuals who are in receipt of income support from Centrelink can also be left with a $0 balance following the issuing of a garnishee order to a bank where their payments are made. The SDRO has advised my office that the formula applied by the banks to Centrelink payments is contained in section 62 of the *Social Security (Administration) Act 1999* (Cth). Under that section the garnishee order does not apply to the saved amount (if any) in the account. In effect, this provides little or no protection for individuals depending on the total amounts subtracted from the account over a four week period and the time the order is carried out.

Other jurisdictions

In Queensland, a fine collection notice for the redirection of a debt will be issued under section 75 of the *State Penalties Enforcement Act 1999* (Qld). The office of the Queensland Ombudsman has advised that a fine collection notice issued by the State Penalties Enforcement Registry includes a protected amount which is the minimum amount of money that should be left in a debtor's account.

In August 2013, the Victorian Ombudsman reported[1] that the Victorian Infringement Management and Enforcement Services had never used its garnishee power because "there is no legislated 'protected earnings rate', that is a minimum income to ensure offenders can provide for themselves and dependants, and pay their debts and liabilities" among other reasons.

In the Commonwealth jurisdiction, the Australian Taxation Office (ATO) considers that care must be taken when exercising its coercive garnishee power. In considering whether to issue a garnishee notice, the Commissioner of the ATO will have regard to the financial position of the debtor, the extent of other debt owed by the debtor, and importantly, "...the likely implications of issuing a notice on a tax debtor's ability to provide for a family or to maintain the viability of a business."[2]

The ATO's consideration of an individual's ability to meet daily living expenses appears to be consistent with other Commonwealth agencies such as Centrelink which recovers debts owed to it on a sliding scale based on income, with the standard repayment or recovery rate set at 15% of payments made.[3]

---

[1] Victorian Ombudsman, *Own motion investigation into unenforced warrants – August 2013*, page 20 https://www.ombudsman.vic.gov.au/getattachment/7aa41082-ab39-49bc-b23c-335e63b65987

[2] Australian Taxation Office, Practice Statement Law Administration PS LA 2011/18, paragraph 102, http://law.ato.gov.au/atolaw/print.htm?DocID=PSR%2FPS201118%2FNAT%2FATO%2F00001&PiT=99991231235958&Life=20130517000001-99991231235959

[3] http://www.humanservices.gov.au/customer/enablers/owing-money

We also understand that only a small proportion (15-20%) of garnishee orders issued result in accounts being found for debtors. It is clear that garnishee orders have a high impact on vulnerable individuals including those in receipt of Centrelink income support and low income earners. We understand there are no restrictions on the types of accounts that can be garnished, making it possible to garnish a mortgage account for example. Given that garnishee orders are largely unsuccessful, it would seem that the SDRO requires more sophisticated legislative tools to more effectively and reasonably carry out its statutory functions such as the ability to instruct banks to leave a minimum amount in a garnished account, which could be equivalent to the amount prescribed by section 122 of the *Civil Procedure Act 2005*.

4. Improving communication between the SDRO and the NSW Trustee and Guardian

We continued to receive complaints from and on behalf of clients of the NSW Trustee and Guardian (NSWTG) who had been adversely affected by large debts for fines issued when they were incapacitated and under financial management orders because they lacked the capacity to manage their own financial affairs. We worked with both agencies to make sure processes in place to give vulnerable NSWTG clients a fair and responsive service were improved. In June 2012, the SDRO and NSWTG entered into a Memorandum of Understanding which includes:

- A monthly data exchange between the two organisations. NSWTG clients under a financial management order who have fines to pay have the fines suspended while the NSWTG provides the SDRO with information about their particular circumstances.

- A streamlined system to write off the fines of NSWTG clients.

5. Representations about fines

In 2011-2012, my office reviewed the procedures and practices used to deal with representations and correspondence from members of the public about penalty infringement notices. The SDRO has agreements with agencies, including councils, that issue penalty notices. This can mean people have to deal with both the SDRO and the issuing authority if they ask for a fine to be reviewed.

We recommended the system for dealing with representations about fines would be more efficient and consistent if there was a single avenue of review. While there was support for the SDRO being the single avenue of review by both the SDRO and other issuing authorities it was not possible to achieve within current resources.

6. Review of SDRO refund decisions

Under section 101B of the *Fines Act 1996*, the Hardship Review Board (HRB) may review a decision of the Commissioner with respect to work and development orders, time to pay orders and writing off fine debt. Given the focus of the HRB on reviewing decisions relating to financial hardship, it would seem appropriate that the HRB is also empowered to review decisions of the Commissioner with respect to garnishee order refund requests.

7. Driver disqualification reform

Finally, I have attached a copy of my office's recent submission to the Legislative Assembly inquiry into driver disqualification reform.

Ombudsman
New South Wales

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,

[redacted]

Bruce Barbour
NSW Ombudsman