



17 March 2009

Deborah Sharp
Acting Executive Director
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Ms Sharp

**Consultation Paper – Review of the laws relating to the use of penalty notices in NSW:
Preliminary submission from the Youth Justice Coalition**

Thank you for the opportunity to provide a preliminary submission to the NSW Law Reform Commission review of the laws relating to the use of penalty notices in NSW. While the recent amendments to the *Fines Act 1996* (NSW) are an important step in reforming the NSW fines system, the Youth Justice Coalition (YJC) considers that there are significant areas still to be addressed. Our submission predominantly addresses the matters raised in clause 5 of the terms of reference as being directly relevant to young people.

About the Youth Justice Coalition

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC aims to promote appropriate and effective initiatives in areas of law affecting children and young people, and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate. The YJC have long been active in lobbying for change in the area of fines and the negative impact it has on young people in perpetuating disadvantage.

Members of the YJC include the following organisations:

- Marrickville Legal Centre
- Banardos Streetwork Program - Belmore

- Public Interest Advocacy Centre
- Shopfront Youth Legal Centre
- Youth Action and Policy Association
- Youth Accommodation Association
- NCOSS
- Shopfront Youth Legal Centre
- Marrickville Youth Resource Centre
- Marrickville Youth Interagency
- Rosemount Youth and Family Services
- South Sydney Youth Services
- Inner West Community Development Organisation
- Legal Aid Commission
- National Children's and Youth Law Centre
- Redfern Legal Centre
- Illawarra Legal Centre
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research

In providing this submission, the YJC wishes to endorse the submission delivered by:

- The Shopfront Youth Legal Centre

The YJC also wishes to acknowledge the contribution of Martin Baker in the preparation of this submission.

Summary of Recommendations

- (a) Penalty notices should not be issued to persons under 18 years of age.
- (b) Cautions, warnings and diversionary programs should be used as an alternative to issuing penalty notices to persons under 18 years of age.
- (c) The maximum amount payable under a penalty notice issued to a person under 18 years of age should be \$25
- (d) The “good behaviour” period in relation to write-off applications should be abolished
- (e) In the alternative, a maximum “good behaviour” period imposed on a person under 18 years of age should be 6 months
- (f) Part 4 Division 3 of the *Fines Act 1996* (NSW) should not apply to any fine defaulter under 18 years of age, regardless of the offence to which the fine relates.
- (g) In the alternative, section 65 of the *Fines Act 1996* (NSW) should be amended to include a person under 18 years of age who does not hold a driver license at the time of the offence
- (h) The *Fines Act 1996* (NSW) should be amended to prevent enforcement action being taken under Part 4 Division 3 for unpaid enforcement orders that relate to both traffic and non-traffic offences
- (i) The *Children (Criminal Proceeding) Act 1987* (NSW) should be amended to allow the Children’s Court to hear and determine proceedings in relation to traffic offences.
- (j) The *Road Transport (General) Regulations 2005* (NSW) should be amended to allow Local Courts to review the recording of demerit points for traffic offences

1. Clause 5 - whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15

The appropriateness of fines as a penalty imposed on young people has long been questioned. The Australian Law Reform Commission and the Human Rights & Equal Opportunity Commission's 1997 report "Seen and heard: Priority for Children in the Legal Process" highlighted the many issues associated with fines and young offenders, particularly those who come from financially disadvantaged backgrounds. The report also pointed out the limited rehabilitative value for young offenders when using fines as a sentencing option¹.

Lack of capacity to pay, restricted access to economic resources, lower incomes

A 2008 study by the Youth Action and Policy Association found that approximately 1 in 10 young people experienced multiple forms of disadvantage across different categories including homelessness; access to services; lack of financial means and social exclusion². Of particular concern was the level of economic disadvantage found amongst respondents in that survey, with a combination of 18.1% of young people not having enough money to get by on, and 44.7% not having at least \$500 in savings³.

For those young people who are in receipt of a Centrelink Youth Allowance payment, the level of financial disadvantage is even greater. Currently, the Youth Allowance payment is set at \$203.30 per fortnight, an amount that is well below the OECD poverty line. Even when a young person is engaged in employment, the income earned by a young person is significantly lower compared to that of an adult. Such limited economic capacity and restricted access to economic resources makes young people even more vulnerable to disadvantage when penalty notices have been imposed.

The NSW Sentencing Council's 2007 report: *The effectiveness of fines as a sentencing option* also noted that young people are severely disadvantaged by the fines system⁴. Young people have less access to the resources needed to pay fines and even a single penalty notice can be well beyond their capacity to pay. The impact of incurring a fine is even more severe for those under the age of 16, who are unlikely to have any income at all.

The requirement for young people to attend school until the age of 15 also increases the detrimental impact of penalty notices. The types of penalty notices that young people are most likely to be issued with are public order and transit offences. Most young people use public transport to get to school each day, and must travel whether they can pay the fare or not. This increases the chance that they will be issued with a penalty notice and makes re-offending more likely. Full-time attendance at school significantly limits a young person's earning capacity and makes it harder to comply with any enforcement procedures taken in relation to unpaid penalty notices.

¹ The Australian Law Reform Commission/Human Rights & Equal Opportunity Commission, *Seen and heard: Priority for children in the legal process*, Report No 84 (1997) at 19.34.

² Youth Action and Policy Association, *Poverty and disadvantage amongst young Australians – How are young people going?* (2008) <<http://www.yapa.org.au/yapa/policy/poverty.pdf>> accessed at 3 March 2009

³ *Ibid* at 16.

⁴ NSW Sentencing Council, *The effectiveness of fines as a sentencing option: Court-imposed fines and penalty notices* (2007) at 5

Systemic disadvantage

The vast majority of young people that members of the YJC work with are disadvantaged. Many have experienced homelessness, come from a socio-economic disadvantaged background, experienced domestic violence and family dysfunction, and have low literacy levels. When a fine is imposed these young people have very little capacity to pay and are unable to prevent enforcement action being taken under the *Fines Act 1996* (NSW). This has serious consequences for the young person's work, education and financial stability. The type of fines imposed on young people also increases the rate of re-offending and has little deterrent value. The most common fines imposed on young people relate to railway offences (such as: Travel on a train without a valid ticket; not be holder of a concession card; be on part of platform/restricted area unauthorised) or public order infractions (such as: offensive language).

Case study:

Anna was 15 years old and had fines that she had accumulated over the last 2 years amounting to over \$2000. The majority of these fines were rail related, mostly for travelling on the train without a valid ticket. Anna was a young person who had recently been placed in the care of DoCS and had been living in a number of youth refuges with very little money to live on each day. Anna could not afford to pay for a train ticket, but needed to get public transport to go to TAFE and to visit her family. Despite explaining her circumstances, Anna was repeatedly fined for not having a train ticket – this had a significant influence in Anna eventually dropping out of TAFE due to the number of train fines she was receiving.

Principles of youth justice

It is well recognised in Australia and internationally that children are entitled to special protections under the criminal justice system. One of those special protections is that children and adolescents should be treated differently and separately from adults, according to their developmental needs. It is entirely appropriate and consistent with the current approach to youth justice that young people be dealt with differently under the penalty notice system. This would recognise that due to their lack of maturity, reduced earning capacity and higher rates of disadvantage, it is not appropriate to issue penalty notices to people under 18 years of age

In addition, a young person's reduced capacity to pay a fine increases the chances that they will come into contact with the criminal justice system, primarily through applications to annul enforcement orders in the Children's Court. This is of concern as studies have shown that young people who have contact with the criminal justice system are more likely to re-offend than those who are dealt with through diversionary programs. A 2002 study showed that juveniles dealt with through the Children's Court were 15-20% more likely to re-offend than those referred to a youth justice conference for a similar offence.⁵

⁵ NSW Bureau of Crime Statistics and Research, Crime and Justice, *Reducing juvenile crime: conferencing versus court* Bulletin No 86 (2002) <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_pub_cjb> accessed at 4 March 2009

Case Study:

Jamie is a 15 year old who was fined \$220 for having a texta in his pocket while travelling on the train. The offence he was fined for was for having in his possession a thing intended for the use in damaging property. Jamie had not participated in any tagging and had no intention of using the texta to graffiti the train carriage and attempted to explain this to the transit officer, however a fine was still issued.

As Jamie has no income (he is too young to receive youth allowance) and his parents are financially disadvantaged and unable to assist in paying the fine, Jamie wrote to the SDRO asking for a review of the fine. This was rejected, which gave Jamie no choice but to make an annulment application to have his matter heard at court. His matter is now listed for hearing at a Children's Court.

Jamie has never been in trouble with the police and has never had a matter before the Children's Court – due to this fine, Jamie has now been exposed to the criminal justice system where he arguably should never have been issued with a fine in the first place. The rigidity and inflexibility afforded to Jamie in this situation indicates a departure of the principles of diversion and rehabilitation that is paramount in dealing with young people.

Disproportionate to seriousness of offence

The current practice of issuing penalty notices to young people for minor infractions does not reflect the objective seriousness of the offences to which they relate.

In imposing a significant, fixed monetary penalty the punishment for a minor penalty notice offence is often greater than the sentence for a more serious criminal matter. In addition to being fundamentally inequitable, the imposition of a fixed penalty is not consistent with the principles of the juvenile justice system. The approach to young people in the juvenile justice system has been to move away from inflexible punitive measures and instead to adopt a range of diversionary sentencing options. This reflects the rationale of the juvenile justice system that rehabilitation, reintegration and diversion are the most appropriate and effective principles in addressing youth offending. In the Children's Court, where the available sentencing options under the *Children (Criminal Procedure) Act 1997* (NSW) allow these principles to be taken into consideration when sentencing a young offender, the courts have commonly chosen not to impose fines. In 2007-08 the Children's Court only ordered a monetary penalty in 12% of cases where the juvenile offender was found guilty of the offence⁶. This statistic is evidence that monetary penalties are not the court's preferred method of dealing with young offenders and that such penalties are reserved for more serious offences.

The penalty notice system should adopt more flexible diversionary approaches to youth offenders that accurately reflect the objective seriousness of the offence and emphasise the principles of rehabilitation, reintegration and diversion. The NSW police have utilised the options available under the *Young Offenders Act 1997* (NSW) as a successful alternative to charging young offenders. These same options could be incorporated into the penalty notice system. In addition, emphasis should be placed on the increased funding and provision of community programs that provide an alternative to court for young offenders. Examples of these programs include: distance or outreach educational programs designed to support young people at risk of dropping out of

⁶ Australian Bureau of Statistics, *Criminal Courts, Australia 2007-08* Report No.4513.0 (2008) <<http://www.abs.gov.au>> accessed at 6 March 2009

school; and legal street art programs aimed at educating young people about graffiti, such as the Aerosol Art Program provided by the Marrickville Youth Resource Centre and Dulwich Hill High School.

Recommendations

- (a) Penalty notices should not be issued to persons under 18 years of age.
- (b) Cautions, warnings and diversionary programs should be used as alternatives to the issuing of penalty notices to persons under 18 years of age.

2. Clause 5 (a) - whether penalty amounts for children and young people should be set at a rate different to adults

The NSW Sentencing Council's 2007 report: *The effectiveness of fines as a sentencing option* highlights the issues relating to the arbitrary and uncoordinated system of fixing penalty notice amounts, which has seen certain offences attracting up to 3 times the amount depending on which agency issues the penalty notice⁷. For example, the penalty for a criminal infringement notice issued by the police for using offensive language is \$150, whereas the maximum amount under a penalty notice issued by a transit officer for the same offence is \$400⁸. This system particularly disadvantages young people, given the strict liability nature of penalty notices, and the absence of any discretion for the issuing officer to vary the prescribed amount.

The YJC recommends that the issuing of penalty notices be abolished for young people under the age of 18. As noted above, young people are severely disadvantaged by the fines system. Imposing monetary penalties has little rehabilitative effect, is out of step with the principles of the criminal justice system and increases the likelihood of re-offending.

In the alternative to abolishing penalty notices for young people, the YJC recommends a significantly lower penalty amount to apply to young people. Setting penalty amounts at different rates for young people and adults would be consistent with the current principles used when dealing with young people in the juvenile justice system. Under the *Children (Criminal Proceedings) Act 1987* (NSW) a magistrate must examine a young person's circumstances in considering whether to impose a monetary penalty. This recognises the disadvantage suffered by young people due to their age and limited capacity to pay. The penalty notice system should also recognise the disadvantaged circumstances of young people and set a maximum penalty amount that realistically reflects their capacity to pay.

The Rail Corporation New South Wales (Railcorp) has already recognised the validity of these concerns by introducing a lower penalty for young people issued with penalty notices under some sections of the *Rail Safety (Offences) Regulation 2008* (NSW)⁹. A young person issued with a penalty notice for "travel on a train without a valid ticket" or for "be on part of platform/restricted area unauthorised" must pay \$50, instead of the \$200 prescribed for adults¹⁰. Railcorp is the only government agency to adopt this approach; however it does not apply it to all rail offences. For example a young person issued with a penalty notice for offensive language is still required to pay \$400.

⁷ NSW Sentencing Council *The Effectiveness of Fines as a sentencing Option: Court- imposed fines and penalty notices* (2007) at 3.19-3.24

⁸ *Criminal Procedure Regulation 2005* (NSW) cl 10, *Rail Safety (Offences) Regulation 2008* (NSW) cl 12

⁹ *Rail Safety (Offences) Regulation 2008* (NSW) cl 57 (2)

¹⁰ *ibid*

Recommendations

- (c) The maximum amount payable under a penalty notice issued to a person under 18 years of age should be \$25

3. Clause 5 (b) - whether children and young people should be subject to a shorter conditional "good behaviour" period following a write-off of their fines

The YJC views the entire ‘write-off’ process as problematic as it is a conditional deferral that unfairly sets up young people and other marginalised groups to fail. This deferral is particularly inadequate for young people who are homeless or suffer from a mental illness – these young people are more likely to incur further fines and are consequently disadvantaged by a ‘write-off’. Rather than reducing the “good behaviour” period following a write-off of a fine, the YJC would like to see a ‘write-off’ reflect the true meaning of the word – i.e. a complete unconditional waiver of a fine.

If a “good behaviour” period is to remain then it should be consistent with other conditional periods prescribed under the criminal law. The maximum duration of a good behaviour bond that can be imposed by the Children’s Court pursuant to section 33 (1)(b) of the *Children (Criminal Proceedings) Act 1987* (NSW) is 2 years. Penalty notices are issued for minor infractions of the law and the “good behaviour” period imposed following a write-off is clearly intended to be a less serious consequence and less punitive than a bond imposed under criminal law.

Given that a vast majority of penalty notices imposed on young people relate to transit and public order offences, it would be detrimental and unfair to impose a “good behaviour” period that is more than 6 months

Recommendations

- (d) The “good behaviour” period in relation to write-off applications should be abolished
- (e) In the alternative, a maximum “good behaviour” period imposed on a person under 18 years of age should be 6 months

4. Clause 5 (c) - whether the licence sanction scheme under the Fines Act 1996 should apply to children and young people

The current provisions of the *Fines Act 1996* (NSW) allow the SDRO to suspend the driver license of a person who is under 18 years of age for non-payment of a penalty notice issued for a traffic offence¹¹.

Suspending a young person’s driver license as a means of ensuring the payment of a fine has a significant detrimental impact on the young person’s financial and social circumstances. Suspending the license:

- Increases the likelihood of the young person committing secondary offences, for instance driving while their driver license is suspended
- Reduces their ability to maintain or find employment, further reducing their capacity to pay the fine

¹¹ *Fines Act 1996* (NSW) s 65

- Disproportionately impacts young people from regional and remote areas who may not have access to public transport and who must drive long distances to access essential services and education.

General concerns have also been expressed about the efficacy of license suspensions as a sentencing and enforcement option. A NSW Sentencing Council 2007 survey found that 67% of NSW Magistrates believed that suspending driver licenses for the non-payment of fines was never or almost never appropriate¹². Further, the survey found that:

Respondents noted that licence sanctions fail to deter, fail to alleviate any of the causes of failure to pay and may actually exacerbate the cause of failing to pay ... The “blunt instrument” of sanctions was seen as causing considerable hardship to disadvantaged people, such as the young, the unemployed, and people from rural or regional areas where there is no public transport.¹³

These findings suggest that the suspension of driver licenses as an enforcement method for the non-payment of fines should be reviewed in relation to both young people and adults. The argument for not using license suspension in matters involving young people is particularly strong given their limited capacity to pay and the disproportionate impact of fines on them.

Young people who do not currently hold a driver license

In practice, the SDRO has interpreted section 65 *Fines Act 1996* (NSW) very narrowly, as applying only to young people who hold a driver license at the time of the offence. If enforcement action is taken under Part 4 Division 3 of the *Fines Act 1996* (NSW) in relation to any penalty notice offence and the young person does not currently hold a driver license, the application of section 68 will prevent them from obtaining one. This unfairly disadvantages young people who have not yet obtained a driver license without any apparent justification. In particular, it serves to compound the disadvantage suffered by young people whose social or financial circumstances may have prevented them from applying for a driver license, by exposing them to harsher penalties than those imposed on current license holders.

Combining traffic and non-traffic fines for the purposes of license sanctions

The SDRO has also implemented a policy of combining penalty notices issued for both traffic and non-traffic offences under one enforcement order. This allows the SDRO to impose license restrictions in relation to non-traffic offences where the young person is unable to pay the full amount under the enforcement order. This practice while technically permissible undermines the intention of section 65 that license restrictions should only be imposed specifically in relation to traffic offences.

Hearing a traffic matter in the Children’s Court

A related matter is the omission of traffic offences from the jurisdiction of the Children’s Court under section 28 (2) of the *Children (Criminal Proceedings) Act 1987* (NSW). A young person charged with a traffic offence must appear before the Local Court and does not have the benefit of being dealt with by a specialist court with expertise in dealing with young people. In addition, the availability of Legal Aid representation is limited given that the Children’s Legal Service of the

¹² NSW Sentencing Council, *Judicial Perceptions of Fines as a Sentencing Option: A Survey of NSW Magistrates* (2007) at 4.10

¹³Ibid

Legal Aid Commission does not provide representation where the matter is not being heard in the Children's Court. This reduces the capacity of the court to deal appropriately with the young person and undermines the key principles of the juvenile justice system: rehabilitation, reintegration and diversion.

Magistrate's discretion to review demerit points

Further, young people (and others) are disadvantaged by the inability of the courts to review the recording of demerit points for traffic offences. Under clause 18 (4) *Road Transport (General) Regulation* (NSW) the Local Court cannot review the imposition of a penalty or the level of a penalty imposed in relation to a traffic offence. In practice, this means that a young person on a P1 driver license may automatically lose that license as a result of committing a single traffic offence, even if their matter is dismissed by the Court¹⁴. The lack of any provision for the court to review the appropriateness of the suspension, having regard to the circumstances of the young person, is contrary to the approach to youth offending embodied in the *Children (Criminal Proceedings) Act 1987*.

Recommendations

- (f) Part 4 Division 3 of the *Fines Act 1996* (NSW) should not apply to any fine defaulter under 18 years of age, regardless of the offence to which the fine relates.
- (g) In the alternative, section 65 of the *Fines Act 1996* (NSW) should be amended to include a person under 18 years of age who does not hold a driver license at the time of the offence
- (h) The *Fines Act 1996* (NSW) should be amended to prevent enforcement action being taken under Part 4 Division 3 for unpaid enforcement orders that relate to both traffic and non-traffic offences
- (i) The *Children (Criminal Proceeding) Act 1987* (NSW) should be amended to allow the Children's Court to hear and determine proceedings in relation to traffic offences.
- (j) The *Road Transport (General) Regulations 2005* (NSW) should be amended to allow Local Courts to review the recording of demerit points for traffic offences

Thank you for considering the YJC's submissions – if you have any further queries, please contact me on 9559 2899 or at Katrina_Wong@clc.net.au.

Yours faithfully,

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¹⁴ As per section 10 of the *Crimes (Sentencing Procedure) Act 1999*.