

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

9 March 2009

Dear Ms Sharp

Penalty Notice Review: Preliminary Submission from the Shopfront Youth Legal Centre

Thank you for the opportunity to provide a preliminary submission to this review, and for giving us an extension of time to do so.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged people aged 25 and under. We represent and advise young people on a range of legal issues, with a primary focus on criminal law.

We are based in the inner city of Sydney but work with young people from all over the Sydney metropolitan area.

The Shopfront's experience with young people and penalty notices

In recent years, a large proportion of our workload has involved assisting clients with their outstanding fines. We have also seen increasing numbers of young people charged with "secondary offences" such as driving while unlicensed, suspended or disqualified. Many of our clients have accumulated very lengthy disqualification periods; some have also been declared habitual traffic offenders. In most cases, their unlicensed status is directly attributable to the fact that they have outstanding fines.

In 2008, the Shopfront received 508 new instructions. Of these, 77 (15%) directly concerned outstanding fines. In nearly all cases, the fines had reached SDRO enforcement stage and it was not uncommon for a client to owe at least \$1,000 (often \$10,000 or more) to the SDRO.

In the same period, 312 (61%) of our new instructions involved criminal matters. 163 (32%) were matters where a solicitor from the Shopfront appeared in court on behalf of the client. The other 149 (29%) involved advice or referral. While we are currently unable to provide a statistical breakdown by type of matter, we can confirm that a significant proportion of our court appearances are traffic-related. Of these, the vast majority are licence-related offences (ie. driving while unlicensed, suspended, cancelled or disqualified) where the client was originally suspended or unable to obtain a licence due to fine default.

The majority of our "fines" clients have incurred penalty notices for railway infringements (mainly travelling without ticket or failing to produce evidence of a concession entitlement). A smaller proportion have received penalty notices for traffic offences, the main ones being driving unlicensed, driving as an unaccompanied learner or not

displaying L or P plates. A small proportion have had court fines (including court costs and victims compensation levies) referred to the SDRO for enforcement.

In most cases we advise clients to court-elect if their fine is still at penalty notice stage. However, by the time they come to us for advice, most of our clients' penalty notices have been referred to the SDRO for enforcement. In this situation, we commonly assist our clients to have the penalty notice enforcement orders annulled and the matters placed before the court.

In some cases (most notably offensive language, disobey police direction) we advise court-election or annulment because we believe there is a real issue about the defendant's guilt. However, in the majority of cases, we advise court-election or annulment because the penalty notice amount appears disproportionate to the gravity of the offence, and the client has little or no capacity to pay.

Whether the matters come to court by way of court election or annulment, it is our almost universal experience that courts will impose a significantly lesser penalty than the penalty notice amount and, in many cases, no penalty at all. Young people whose matters are listed in the Children's Court will most commonly have their matters dismissed with a caution. Young adults appearing in the Local Court will often have matters dismissed either under section 10 or section 10A of the *Crimes (Sentencing Procedure) Act*, or receive a comparatively small fine. A significant proportion of clients appearing in both Children's and Local Courts have their matters dismissed under section 32 of the *Mental Health (Criminal Procedure) Act* (recently renamed to the *Mental Health (Forensic Provisions) Act*).

We acknowledge that the Shopfront's clients are among the most socially and economically disadvantaged in our community. However, largely because of the very limited availability of Legal Aid in such matters, we have also acted for a considerable number of young people who might be described as ordinary working-class (or even middle class) kids who have found themselves in difficulty as a result of some relatively minor infringements.

Previous submissions made by the Shopfront Youth Legal Centre

As you may be aware, the Shopfront Youth Legal Centre has previously made a number of submissions, both formal and informal, about fines and their enforcement. We enclose copies of the following submissions and would ask you to take them into account in developing your Consultation Paper:

- *Fines and their Enforcement*, extract from submission to National Youth Commission Enquiry into Youth Homelessness, June 2007
- Submission in response into interim report of Sentencing Council, September 2007
- Initial submission to Sentencing Council, February 2006
- Submission to Ombudsman's review of criminal infringement notice trial, October 2003
- Submission to RTA Review of Fines and Demerit Points, September 2003
- Submission to OSR Review of Fines Act, June 2002

Although some aspects of the fine enforcement system have changed since some of these submissions were written, the central issues remain largely unchanged. Our main concerns are the number and amount of penalty notices issued to young people, and the impact of driving licence sanctions.

Recent legislative reforms

We are of course aware of forthcoming legislative amendments which will:

- reduce the mandatory licence disqualification period for a first offence of driving in breach of a fine default suspension.

- set up a “work and development order” scheme as another alternative for dealing with outstanding fines.
- clarify and formalise the procedure for issuing cautions instead of penalty notices in appropriate cases.
- provide better access to internal review procedures.

While these changes are encouraging, they clearly do not address all of the problems with the current system.

Comments on specific terms of reference

1. Whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate

For some categories of offences (for example, speeding and parking offences) there appears to be some proportionality between the penalty notice and the objective seriousness of the offence.

However, for many classes of offence (ironically, mainly the types of offences primarily committed by young and economically disadvantaged people) the penalty notice amounts are, in our view, grossly disproportionate to the severity of the offence. Some examples are:

- Smoke on train or covered area of railway (\$400) – while smoking is an important public health issue, a fine of \$400 (often imposed in circumstances where the smoker is at the very end of the platform, not exposing others to passive smoking in any significant degree) appears excessive.
- Drinking on train or railway land (\$400) – we concede that alcohol-related violence and other anti-social conduct are a significant and growing concern in our community. However, a \$400 fine would appear disproportionate in circumstances where the offence can be constituted by the mere possession of an open container of alcohol.
- Offensive language on train or railway (\$400) – this is only \$260 short of the maximum penalty available to the Local Court for a similar offence under section 4A of the *Summary Offences Act*, and well in excess of the prescribed criminal infringement notice amount for offensive language, which is \$150.

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

Judicial Commission statistics show that the average fine imposed by Local Courts for offensive language offences under the *Rail Safety (General) Regulation* 2003 from July 2004 to July 2008 was something in the order of \$200. For offensive language under s4A of the *Summary Offences Act*, the statistics covering the period from July 2006 to July 2008 show a similar average fine. 20% of defendants were not fined at all, their matters instead being dealt with under s10 or s10A of the *Crimes (Sentencing Procedure) Act*.

Children’s Court statistics for a similar period show an average fine of \$100 for offences under both s4A of the *Summary Offences Act* and cl. 13(1)(a) of the *Rail Safety (General) Regulation* 2003. Only 39-40% of defendants were fined at all; those who were not fined mostly had their matters dismissed (eg. under s33(1)(a) of the *Children (Criminal Proceedings) Act*).

These statistics would suggest that penalty notices issued for offensive language on railway land are far in excess of what the courts would normally regard as appropriate for this type of offence.

- Custody of knife in public place (\$550) – while knife-related crime is a significant concern in our community, we suggest that a \$550 infringement notice for simply carrying a knife or blade is disproportionate. This offence can be constituted by the possession of items such as scissors and Swiss army knives in circumstances where there is no intention to use it as a weapon. We note that \$550 is the maximum penalty for a first offence of this nature; we suggest it is inappropriate for the penalty notice amount to be set at the maximum penalty.

It should also be noted that it is not uncommon to receive more than one penalty notice at a time. For example, a person who is fined for driving an unregistered vehicle (\$486) will usually also be fined a similar amount for driving an uninsured vehicle.

The case study of **Tina** in our document *Fines and their Enforcement* (which is attached to this Submission) illustrates another relatively common situation where a person is issued with two or three railway infringement notices at a time. Tina was fined for fail to produce evidence of concession entitlement (\$50), fail to comply with requirement of authorised officer (\$100) and offensive language on railway land (\$400), a total of \$550.

2. The consistency of current penalty amounts for the same or similar offences

As we have suggested in our response to 1.1 above, there is an apparent inconsistency between penalty notice amounts for similar offences under different legislative provisions.

An example is offensive language, where an offence under section 4A of the *Summary Offences Act* carries a maximum penalty of \$660 and, if dealt with by criminal infringement notice, a penalty notice amount of \$150. The offence of offensive language on railway land under clause 12 of the *Rail Safety (Offences) Regulation 2008* carries a maximum penalty of \$1,100 and a penalty notice amount of \$400. There is nothing inherently more offensive about language being used on a railway as opposed to any other public place, so this anomaly has no rational explanation.

The penalty notice amount for travelling on a bus without a ticket is \$100, while for travelling on a train without a ticket it is \$200 (for adults) or \$50 (for children). It is difficult to explain why the adult penalty in relation to bus and ferry offences is half of the penalty applicable to railway offences, and why there are no differential amounts for adults and juveniles on buses and ferries as there are on trains.

There are no doubt a myriad further examples of such inconsistencies.

3. The formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices

This will no doubt be a difficult exercise, and we do not profess to have any particular expertise in this area. However, we would comment that penalty notices are generally appropriate for “middle class offences” (if indeed any offences can be categorised in this way).

Most traffic and parking offences, together with all sorts of regulatory offences, are commonly (albeit not exclusively) committed by people with a regular income and are generally appropriate to be dealt with by way of penalty notice. However, offences such as driving unlicensed, uninsured, or as an unaccompanied learner are typically committed by people who are young and/or financially disadvantaged. These may not always be appropriately dealt with by penalty notice, especially at the very large amounts which currently apply.

Public transport infringements are certainly not “middle class offences”, in our view. They appear to be predominantly committed by people who are economically and socially disadvantaged. Issuing penalty notices for such offences is less equitable and is likely to cause further financial hardship to those who can least afford it.

We concede that resource implications of commencing court proceedings or issuing formal cautions for everyone accused of a railway offence would be enormous and this would probably not be a desirable path to go down. We would prefer to see penalty notice amounts for these types of offences significantly reduced, and a greater use of warnings and cautions, particularly for young people.

As discussed in our 2003 submission on the criminal infringement notice trial, we have concerns about the issue of penalty notices for some of the offences covered by this regime, such as offensive language and goods in custody. In many of these cases, penalty notices are issued to disadvantaged people in circumstances where there is a serious doubt about their guilt.

The Ombudsman's recent "stakeholders issues document" about Aboriginal people and criminal infringement notices raises some concerns about the frequent use of criminal infringement notices to deal with Aboriginal people who have allegedly used offensive language.

As already noted above, it is our experience that penalty notices are often issued for language which would not be considered offensive at law. While we do not think the courts' time should be wasted hearing charges of offensive language, we do not believe infringement notices are the answer. We believe it is incumbent on police and other authorised officers to adopt a more tolerant attitude towards rude and disrespectful language, and to save criminal sanctions for language which is grossly offensive.

4. The formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time

At this stage, we have no expertise to offer in this regard.

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

In our view it is generally inappropriate to issue penalty notices to children and young people under the age of 18. This applies particularly to children under 16 who, for the most part, are still at school (or at least of compulsory schooling age), have no independent income and (except in extreme circumstances) have no entitlement to Centrelink benefits.

In some circumstances, there may be justification for issuing penalty notices to children aged 16 and over, particularly traffic infringement notices in circumstances where the young person has a licence.

If penalty notices are to be issued to children, we believe they should be a measure of last resort, not of first resort as they are currently used. We refer to our comments on *Young Offenders Act Options for Juveniles* on page 2 of our September 2007 submission to the Sentencing Council (attached to this submission). The *Young Offenders Act* applies to a wide range of offences including drug possession, shoplifting, trespassing, property damage, offensive language and conduct (when not committed on a railway) and minor assaults. Yet most children accused of committing offences of equivalent or lower criminality (custody of knife in public place, disobey police direction, offensive language/conduct on railway land, or any other public transport offence) automatically receive a penalty notice and the *Young Offenders Act* is not even considered.

We acknowledge that some older juveniles, particularly those who have jobs and lack the time or inclination to attend a police caution or appear at court, may prefer to pay a penalty notice. To accommodate these situations, we would suggest the development of a system where a *Young Offenders Act* intervention (or, in some cases, a court appearance) is the default option and the young person may instead choose to receive a penalty notice. This kind of system would allow the more functional, literate and financially secure young people to "opt in". This is much preferable to the current system, which expects the most disadvantaged and dysfunctional young people to "opt out" by court-electing.

The increased usage of *Young Offenders Act* interventions and court proceedings would obviously consume far more financial resources than issuing penalty notices. However, it is important to factor in the long-term resource implications arising from attempts to enforce fines that are unlikely to be paid, resources expended by legal and advocacy organisations in applying to have penalty notice enforcement orders annulled and written

off, and the substantial burden on the criminal justice system arising from secondary offending.

If so,

(a) Whether penalty amounts for children and young people should be set at a rate different to adults

If penalty notices are to be issued to people aged under 18, the fine amount should be significantly less than for adults. The different rates that currently apply for railway ticketing offences are a good example of how this can work.

(b) Whether children and young people should be subject to a shorter conditional “good behaviour” period following a write-off of their fines

We support this idea.

(c) Whether the licence sanction scheme under the Fines Act 1996 should apply to children and young people

It is our strongly-held view that no licence sanctions should be imposed in respect of fines incurred by children, whether these be for traffic offences or not. Licence sanctions do not serve their intended purpose (as an incentive for defaulters to pay their fines) in respect of people who lack the capacity to pay. Sanctions have a disproportionately negative impact on young people, particularly those who are socially disadvantaged. When secondary offending comes into play, the consequences can be catastrophic.

The attached document *Fines and their Enforcement* discusses some of the problems associated with licence sanctions, and provides the case study of Vicky, who represents an extreme but not isolated case. Two further examples will serve to illustrate the problems that commonly arise when young people are subject to licence sanctions.

Nathan (now aged 20) had a difficult childhood and adolescence. His mum was in and out of jail and his relationship with his dad was not always good. He spent most of his late teens either homeless or living in supported young accommodation. To his credit, Nathan managed to get a driving licence and purchase a cheap car when he was 17.

At 17, he incurred a parking fine which he did not pay (it is unclear whether he was even aware that he had been fined) and, just after he turned 18, his licence was suspended. Nathan did not receive the suspension letter because he had to leave his accommodation and had nowhere else to go, so he was unable to update the RTA with a new address.

About three months later, Nathan was pulled over by the police, told his licence was suspended and charged with driving while suspended and told not to drive again. Because Nathan was basically living in his car, he felt he could not abandon his car by the side of the road and so he continued to drive, only to be pulled over by police later that day and charged with a second count with driving while suspended.

Largely because of his homelessness, Nathan missed the court date. He was convicted of both offences in his absence and disqualified from driving for a total of 3 years. He had already been off the road for over a year when he came to the Shopfront Youth Legal Centre for advice. We assisted him to have both convictions annulled, which was a long and (in the particular circumstances of the case) complicated process. The first charge was eventually dismissed because Nathan did not know his licence was suspended at the time. He pleaded guilty to the second charge and, because he had already spent such a long period off the road, the Magistrate dismissed the charge under section 10 of the *Crimes (Sentencing Procedure) Act*.

This means that Nathan is no longer disqualified and will be able to apply for his licence again. Nathan is fortunate that he had the self-restraint not to drive while he was disqualified, and that he was able to access appropriate legal advice and advocacy.

Ben is a young man from a refugee background who grew up in Western Sydney. Like many young people (especially young men with limited formal education) his ability to drive is central to his identity and, more importantly, to his employment prospects. Ben obtained his learner’s licence at 16 and provisional licence at 17. Unfortunately, he

incurred some traffic fines which, although minor, he did not have the capacity to pay. The fines were referred to the SDRO and his licence was suspended.

When aged 17, Ben was caught driving while suspended. He admitted that he knew about his licence suspension, but he needed to drive for work and couldn't pay the fines and did not know what to do. Before he went to court, he managed to deal with his fines and to get his licence back. However, although he was only 17 and he explained his circumstances to the court, the magistrate recorded a conviction and imposed the mandatory 12-month disqualification. Unfortunately, he did not obtain legal advice about his appeal rights and did not appeal the matter. Had he appealed, especially if legally represented, there is a reasonable chance that a District Court judge would have extended him some leniency and dealt with the matter under section 10 of the *Crimes (Sentencing Procedure) Act*, without conviction or disqualification.

It is worth noting that the Legal Aid Commission does not usually represent defendants on traffic matters, unless they face a real prospect of imprisonment. By the time the real prospect of imprisonment arises (usually a second or third drive whilst disqualified charge) it is often too late to undo the damage that has already been done, even with excellent legal representation.

Several months later, after turning 18, Ben was caught driving while disqualified. By this time he had obtained legal representation from the Shopfront Youth Legal Centre. The magistrate showed Ben some leniency, largely due to the harsh way in which he was treated by the Magistrate on dealing with the driving while suspended matter. Ben was released on a section 10 bond.

Unfortunately, Ben was caught driving while disqualified one day before the expiry of his disqualification period. He was a passenger in a car being driven by his friend. His friend had double-parked the car for a few minutes. Ben got into the driver's seat and reversed the car a few metres in order to let another driver out of her parking spot. Unfortunately, there were police officers in the vicinity who knew Ben and knew he was disqualified. The Magistrate dealing with this matter was of the view that Ben had already "used up his section 10" and could not be extended any further leniency on this occasion. Ben is now serving a further 2-year disqualification period, which is severely hampering his ability to maintain employment. He has also incurred a Habitual Traffic Offender declaration, and has sought our assistance to apply to have it quashed.

It is worth noting that we also have a number of clients whose licences have been suspended for demerit points or speeding offences. This is becoming increasingly common as the demerit points regime becomes tougher for P platers. While some of our clients do drive during this type of suspension, it is our experience that drivers are more likely to respect and abide by such a suspension – because it is imposed for a legitimate reason and for a finite period.

Although it is now a lot easier to have licence sanctions lifted without paying fines in full, young people are less likely to have the means, knowledge or organisational skill to enter and remain in time to pay arrangements. By the time they are in a position to take action on their outstanding fines, they may already be subject to a lengthy disqualification imposed for secondary offending.

The consequences of secondary offending are especially severe due to the draconian automatic disqualification periods imposed by the Road Transport legislation, the fact that Legal Aid is generally not available for defendants charged with traffic offences in the Local Court, and the fact that children of licensable age must appear in the Local Court instead of the Children's Court for traffic offences. In this regard, please see our comments on page 3 of our September 2007 submission to the Sentencing Council.

6. Whether penalty notices should be issued to people with an intellectual disability or cognitive impairment

In our view it is inappropriate to issue penalty notices to people with intellectual disabilities, cognitive impairments or serious mental illnesses. Such people will often (although not universally) be on a very low income and many of the factors discussed

above in relation to children will also apply. Further, cognitively impaired people may find it very difficult to understand and comply with their legal obligations (such as purchasing the correct ticket on the train) and may also be unable to comprehend the nature of the offence for which they are being fined.

One of the major problems is that intellectual disability or other forms of cognitive impairment can be difficult to recognise by those who are untrained or who are only in contact with the person for a short period. Some people with intellectual disabilities carry cards, which are shown to the police in the event of arrest, stating that they are a “vulnerable person” and providing telephone numbers of support people. However, it is to be expected that many people (especially if they are also homeless) will lose these cards. Therefore, a system of notation on police and Railcorp computer systems may be preferable, although this of course raises privacy concerns. We understand that the Intellectual Disability Rights Service will be making a submission to this review, and we imagine they will provide you with some useful suggestions in this regard.

The Shopfront has dealt with a number of young people with intellectual disabilities who have received tens of thousands of dollars in public transport fines.

Sam (now aged 27) is a young man with an intellectual disability who had accumulated \$5,000 worth of train fines. After a considerable amount of work, we managed to have his fines written off – although it must be remembered that this is a deferral for 5 years, conditional on Sam not defaulting on any further fines within that period.

We have approached Railcorp to ask if they will issue Sam with a card, or put some sort of notation on their computer system, to the effect that he has an intellectual disability and ought not to be fined. However, Railcorp has to date been unwilling to do this.

7. Any related matter

Licence sanctions

We have already discussed the devastating effect of licence sanctions on young people. We further support the abolition of licence sanctions in relation to non-traffic fines committed by people of any age. Again, we refer to our comments made in previous submissions on this topic.

Further, even when imposed for traffic offences committed by adults, licence sanctions can be unduly crushing. Although sanctions may be lifted automatically upon payment of 6 regular instalments, this does not apply to people who have previously defaulted on a time-to-pay arrangement. People in this category (who are numerous) face the prospect of being ineligible for their licence until the fines are paid in full. While the SDRO will often lift sanctions if the fine defaulter can show a licence is necessary for employment purposes, we are still concerned that some fine defaulters may find it unduly difficult to get licence sanctions lifted.

We believe it is worth considering a change to the legislation so that RTA sanctions may only be imposed for a limited period (such as 6 months). If the fine defaulter has the capacity to pay and needs his/her licence, it is to be expected that the fines will be paid promptly. If the fine defaulter genuinely lacks the capacity to pay, we suggest it will make little difference whether the licence sanctions last for 6 months or indefinitely. In fact, the fines are more likely to be paid if licence sanctions are lifted.

We concede that this is only an idea at this stage, not a concrete proposal, and is probably beyond the terms of the Law Reform Commission’s reference. However, we suggest that it may be worth exploring, as the current regime of licence sanctions (like that regime of imprisonment that existed under the old system) leads to disproportionate and unjust consequences for people who are unable to pay their fines.

Public transport

Another idea that is no doubt beyond your terms of reference, but which we consider worth exploring, is the provision of free public transport to all people aged under 18 or in receipt of Centrelink benefits. This would prevent the commission of a large number of

ticketing offences (although no doubt there would still be a problem with people being unable to produce evidence of their free transport entitlement).

We concede that it would be difficult to find the funding to provide free transport for such large numbers of people. However, we expect there would be a decrease in the funding needed for law enforcement on public transport.

Alternatively, a scheme could be developed where people in receipt of Centrelink benefits could choose to be issued with discounted weekly travel passes, and the cost deducted from their benefits via Centrepay in the same manner as rent and utility bills.

Conclusion

We would be happy to discuss any issue arising from this submission. I can be contacted by email at jane.sanders@freehills.com or by telephone on 9322 4808.

Yours faithfully

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