



Fine but not fair: Fines and disadvantage

RECENT CHANGES TO THE NSW FINES ENFORCEMENT SYSTEM

In December 2008, a set of changes were made to the fines enforcement system in NSW through the *Fines Further Amendment Act, 2008 (NSW)*. The amendments include: the option for officers to provide an official caution in place of a penalty notice in certain circumstances; more flexible payment options for fines; a two-year trial of a scheme to allow disadvantaged people to apply for a “Work and Development Order” in place of a fine; and the option for fines to be partially written off. In addition, the NSW Law Reform Commission will conduct a review of penalty notice amounts to ensure fines are consistent across government.

These changes — the latest in a series of changes to the fine enforcement process in NSW — occurred after this paper was prepared for publication. Consequently, the fines enforcement process described in this paper is a process that was in place **prior to the December 2008 changes**. While many aspects of the process have remained the same, the new initiatives specifically aim to address the systemic difficulties that fines present to very disadvantaged people. Indeed, some of the options proposed by advocates and agencies, and outlined in this paper, have been included among the changes. Notably, however, the full impact of these amendments will not be evident for some years to come.

Despite the recent amendments to the fine enforcement system in NSW, we are publishing this paper as it was written prior to the changes. This is because the paper illustrates how fines and fine enforcement can present significant access to justice issues for disadvantaged people, issues which are not unique to NSW or even Australia. The paper also highlights the importance of redressing this disadvantage and why reforms to the fine enforcement system operating prior to December 2008 were necessary. Furthermore, by presenting a ‘snapshot’ of the impact of fines on disadvantaged people immediately prior to the December 2008 changes, the paper provides a useful baseline for monitoring the impact of fines on disadvantaged people in NSW into the future.

February 2009



Fine but not fair: Fines and disadvantage

Sophie Clarke, Suzie Forell & Emily McCarron

There are 17 000 offences in approximately 100 legislative instruments for which a penalty notice or 'fine' can be issued in New South Wales (NSW).¹ While many fines are for traffic-related offences, fines are also collected for offences such as fare evasion on public transport, littering and failing to 'move on' when directed by a police officer.

The Law and Justice Foundation's Access to Justice and Legal Needs (A2JLN) Research Program has identified the disproportionate impact fines can have on the lives of disadvantaged people, particularly those who are homeless, mentally ill, young, on low incomes, or in or recently released from prison. Drawing upon our research, this paper illustrates how these groups are both more vulnerable to being fined and how debts arising from fines can further compound existing disadvantage. It details the complexity of the fine enforcement system in NSW and examines options to lessen the impact of fines and fine enforcement on disadvantaged people.

INTRODUCTION

...if it's a choice between being able to pay for your bed in emergency accommodation or paying your fine, you know which one you are going to choose. So this becomes almost like this insurmountable issue that just can't be dealt with.

— Homelessness worker, *No home, no justice?*²

Research undertaken by the Foundation as part of the A2JLN research program suggests that 'fines' and penalty notices can have a significant and disproportionate impact on the lives of disadvantaged people. We particularly noted the impact on those who are homeless, young, on low incomes, who experience mental illness and/or have unstable or chaotic lives, including periods of imprisonment. Some disadvantaged people are more vulnerable to receiving fines, are more likely to accrue multiple fines, have less capacity to pay fines and can accumulate significant debt for unpaid fines. As fines remain unpaid, disadvantage is further compounded as driver licenses and car registration are affected.

THE NSW FINES PROCESSING SYSTEM

A multi-tiered system is in place to issue, collect and enforce fines. Once a fine has been issued, the issuing authority (e.g. NSW Police or RailCorp) refers the fine to the State Debt Recovery Office (SDRO), a department of the Office of State Revenue, for collection and enforcement. On receiving a penalty notice a person may pay the fine, request a review or go to court. The person has 21 days to exercise one of these options before a ‘penalty reminder notice’ is sent. To request a review of a penalty notice on the grounds of ‘special circumstances’, a written request must be received prior to the due date of the penalty reminder notice. Most of these circumstances appear to relate to the offence itself (e.g. broken speedometer, wrong vehicle etc). ‘Mental illness’ is the only personal characteristic listed as a possible special circumstance for some offences (such as parking offences, rail and littering offences).¹⁰

If the fine remains unpaid after 28 days, an ‘enforcement order’ is issued and an additional cost of \$50 is added to the fine. At this point, the person has 28 days in which to pay the increased amount, apply for more time to pay or to pay in instalments, apply for the fine to be written off or apply to have the fine annulled. In 2007–2008 the SDRO issued 823 951 enforcement orders, for penalty notices not paid within the time limit allowed, with a total face value of \$243.7 million.¹¹

If the SDRO does not receive correspondence or payment for the fine within 28 days it can have the person’s driver’s licence suspended, prevent that person from ‘doing business’ with the RTA (e.g. applying for a licence), or have their car registration cancelled. A further cost of \$40 per restriction is imposed. If the fine still remains unpaid the SDRO may initiate civil enforcement proceedings, which can involve the seizure of property by the sheriff or the garnishing of wages to pay the outstanding fine(s). An additional \$50 per sanction imposed is added to the original fine(s). Finally the SDRO can issue a community service order (CSO) to be served to the value of the fines and costs. However, in the experience of the Homeless Persons Legal Service, CSOs are not issued in practice.¹²

While a person cannot be imprisoned for not paying a fine, they may be at risk of imprisonment if they repeatedly drive when they have had their

While changes are being made, the fine processing system in NSW is cumbersome and difficult to navigate. This makes it difficult for disadvantaged people to address their fine-related debt, even when they are willing to do so. This paper will first describe the fine enforcement system before discussing its impact on disadvantage.

Information here is largely drawn from the Foundation’s A2JLN research program. In a number of separate but related projects, this program has employed a mix of methodologies — quantitative, qualitative and analyses of service usage data — to explore the legal needs and access to justice issues facing disadvantaged people in NSW. The specific reports referred to are listed on page 12. The paper also refers to other significant reports on fines and fine enforcement processes.

TYPES OF FINES

In NSW there are two types of fines issued as financial penalties for minor criminal offences: penalty notices and court enforced fines. Penalty notices are the primary focus of this paper because they are both a prevalent form of penalty and a type of penalty which our research suggests is particularly problematic for some disadvantaged groups.

The NSW Sentencing Council reports that there are 17 000 offences in approximately 100 legislative instruments, which can be dealt with by way of a penalty notice.³ Penalty notices (referred to as ‘fines’ in this paper) are on-the-spot fines that can be issued by government agencies including local councils, the NSW Police, the Roads and Traffic Authority (RTA) and RailCorp among others. In the 2007–2008 financial year, 2 889 270 fines were issued, with a total face value of \$453 million. Forty five per cent of these fines were issued by the Crown for traffic offences, including speed and red light camera offences.⁴

However, non-traffic related offences for which fines can be issued include offences such as travelling on a train without a valid ticket,⁵ littering on public land,⁶ drinking alcohol in an alcohol free zone⁷ and ignoring a police officer’s direction to ‘move on’.⁸ The NSW Audit Office found that in 2005, 132 000 penalty notices were issued for fare evasion alone on NSW trains and buses. Only one in four fines for fare evasion was paid within 12 months.⁹

licence suspended or cancelled due to unpaid fines. Also, under section 125 of the *Fines Act 1996 (NSW)*, a person may be imprisoned for breaching a CSO. If this happens, the person is imprisoned for one day for every \$120 of the unpaid fine. However it should be noted that since the *Fines Act 1996 (NSW)* was enacted no one has been imprisoned under section 125.¹³ The practice has been increasingly seen as a last resort after a young man, Jamie Partlic, was assaulted and left in a coma with permanent brain damage while serving a four-day sentence in Long Bay prison for unpaid fines in 1987.¹⁴

DISADVANTAGE AND VULNERABILITY TO BEING FINED

While penalty notices are issued to people from all walks of life for many different misdemeanours, findings from the A2JLN research program suggests that people who are socially or economically disadvantaged are more vulnerable to attracting fines and less likely to have the means and capacity to pay them. For instance, homeless people who live or sleep in public places, such as in parks or on trains, were reported to be particularly vulnerable to being fined for offences such as drinking in public places and public transport offences.¹⁵

...And they will quite frequently, particularly if they were perhaps intoxicated at the time and it was something so minor, such as having feet on the seat or telling a Transit Officer to rack off and picking up a \$400 a piece for that, they quite easily forget it. Until they get picked up on \$1200 worth of fines that are outstanding. All of a sudden they are in court So, they don't deal with them, they don't remember having them and then they lose the paperwork which is another thing. As often as IDs get lost, other related paperwork gets lost so we have people call us saying 'I have to be in court and I have no idea when, what date, who...' and sometimes even 'what for'.

— Homelessness worker,
*Taking justice into custody*¹⁶

Young people are also particularly vulnerable to attracting fines. Figures from the NSW Bureau of Crime Statistics and Research show that, despite 14–24 year olds only making up approximately 14 per cent of the NSW population, of the 463 000 infringement notices issued in 2002, 35 per cent were issued to 14–24 year olds.¹⁷ Similarly, during

the pilot of the *Crimes Legislation Amendment (Penalty Notices Offences) Act 2002 (NSW)*, 45 per cent of criminal infringement notices (CIN) were issued to 18–24 year olds.¹⁸ Peak advocacy bodies for young people report that their clients are vulnerable to receiving fines because they may not earn or receive enough money to cover basic needs such as food and rent as well as transport costs, but still need to catch public transport to meet daily obligations, such as work, training or job interviews.¹⁹

Data from the A2JLN research program also suggest that people with a mental illness are susceptible to receiving fines. Examples were given of people with a mental illness being arrested and fined for behaviour related to their illness that attracted the attention of police or other authorised officers. For instance, recounting her experiences, a young woman with a mental illness said:

One of them (a fine) was issued when I was mentally unstable at the time, and I ran across the train tracks without using the train bridge, so they issued me a fine... Well after the first fine when I ran across the train tracks, I got another one, for smoking on the platform.

— Homeless young woman,
*No home, no justice?*²⁰

A service provider interviewed in *On the edge of justice* gave an example of a mentally ill client who had cut up all identification in a state of paranoia and was then fined for not having a concession card on a bus. In another reported incident, a person was fined for drunk and disorderly conduct after having an epileptic seizure.²¹

In *Taking justice into custody*, a Foundation report on the legal needs of prisoners, the vast majority of prisoners interviewed reported having outstanding fines. One inmate estimated his fine debt was in the order of \$49 000. More common amounts ranged from \$175 to \$15 000. Sources of these fines included traffic and transport fines, as well as court-imposed fines from current and past offences. Many of the fines were accrued in the often chaotic period of people's lives before they went to prison.²²

BARRIERS TO PAYING FINES

A2JLN research suggests that people experiencing social or economic disadvantage face a number of barriers to paying fines and negotiating the fines processing system. These include:

- high fine amounts
- the inability to manage the fines processing system
- barriers to accessing court
- barriers to seeking legal advice/assistance
- barriers to seeking special consideration.

High fine amounts

For a person with secure employment and accommodation, receiving a penalty notice is unwelcome and inconvenient. However, for people on Centrelink benefits, people who have no income or a low or irregular income, paying a fine may be extremely difficult, if not impossible. Hamilton makes the comparison using the example of traffic fines:

*A speeding fine of \$125 represents one third of the weekly income of someone earning \$20 000 a year but only 6 per cent of the weekly income of someone with the income of \$100 000 ... a \$68 parking ticket can cause serious distress to a student or pensioner. The weekly food bill for some is no more than the bottle of wine for others.*²³

As described earlier, the common experience of accumulated fines can result in considerable fine related debt. *Taking justice into custody* identified the overall financial disadvantage of many prisoners, including the limited amount that inmates can earn in prison. Without other ways to ‘repay’ their debt, inmates can leave prison with substantial fine related debt, adding to the challenges they face in successfully reintegrating into the community post release.²⁴

Table 1 provides examples of the fine amounts for certain offences, and, as a point of comparison, a sample of various fortnightly Centrelink payments. As can be seen, fines can pose a significant problem for people who earn or receive little or no money each week.

TABLE 1: AMOUNTS OF FINES ISSUED IN NSW AND CENTRELINK BENEFITS

OFFENCE	FINE AMOUNT	CENTRELINK BENEFIT	MAXIMUM RATE PER FORTNIGHT
Drink alcohol on train Smoke on train or platform	\$400	Disability Support Pension, single adult	\$537.70*
Fail to hold valid ticket for train travel ²⁵	\$200	Newstart (unemployed/looking for work), single person over 21	\$429.80*
Failure to comply with police direction to ‘move on’ ²⁶ Unlawfully erect a structure on public land ²⁷	\$220	Youth Allowance (unemployed or studying full-time), single person under 21	\$348.10*

* Note: Amounts at October 30, 2007

Furthermore, an on-the-spot fine is a set amount, irrespective of the person’s individual circumstances or capacity to pay. In a recent review of the fine enforcement system in NSW, the NSW Sentencing Council observed as a problem:

*The strict liability nature of most offences and fixed penalties, which do not permit ...any allowance for the objective seriousness of the offence, or the personal circumstances of the offender, including their capacity to pay...*²⁸

A further issue raised by the NSW Sentencing Council was the lack of proportionality between the penalty amounts for different offences, and between penalty amounts and the objective seriousness of the offence. For instance, there is a \$50 penalty for not wearing a bicycle helmet and a \$75 fine for parking in a restricted area, but a \$400 penalty for spitting on a train or smoking on a train station.²⁹ These disparities can particularly impact upon disadvantaged people when the fine amounts are high for relatively minor offences.

Inability to manage the fines processing system

While the fines processing system in NSW has been recently streamlined (with the ‘Infringement Processing Bureau’ (IPB) now subsumed into SDRO), it remains a complicated multi-tiered system involving several agencies. Until very recently, accessible information about how to negotiate the system was very limited. Data from the A2JLN research program and other literature suggests this system has been difficult for people — particularly those people experiencing social or economic disadvantage — to understand and negotiate. The Shopfront Youth

Legal Centre observed ‘most young people still find the system virtually impossible to negotiate without competent advice and advocacy’.³⁰

Furthermore, the fines processing system relies heavily on written information and correspondence. This presents particular barriers for people with limited literacy, cognitive impairment or those who communicate in a language other than English. The processes for challenging decisions or making alternative payment arrangements must be in writing and in some cases (e.g. to have an enforced fine postponed or written off) accompanied by a statement of financial or other circumstances.³¹ The emphasis on paper work and written correspondence may cause further difficulties for people who are homeless or experiencing other instability in their lives.³² For instance, as reminder notices are sent out by post, people without a permanent postal address do not receive such notification and may therefore be unaware that they have outstanding fines. Even if they do receive the fine they may not have the documentation (or capacity) required to complete the application form for the fine to be postponed or written off. Lack of documentation, even identification documents, was noted in the A2JLN research as a particular issue for homeless people and prisoners.³³

Another barrier to disadvantaged people paying their fines has been that, until very recently, people could not pay in instalments until an enforcement order was received (at which point an additional \$50 is (still) added to the original fine).³⁴ In the case of some fines (e.g. placing feet on a train seat)³⁵ this adds an additional 50 per cent to the amount needed to be paid. In *No home, no justice?* a caseworker described a homeless client who:

... rang IPB to see if they would accept payments by instalment. They said no, she had to wait until she had received a reminder notice from IPB and then it had gone to the SDRO.

— Caseworker, *No home, no justice?*³⁶

Recent changes to the system now allow people to make part-payments of at least \$20 a payment, as long as the full amount is paid by the due date of the penalty reminder notice.³⁷

Another barrier faced by some people wishing to clear their debts is that fines from other states cannot be paid in NSW, or pooled together with fines

accumulated in this State and paid as one amount. Service providers and homeless people interviewed in *No home, no justice?* spoke about the difficulties homeless and disadvantaged people face when trying to clear multiple fines from different states. Contributing to these difficulties are discrepancies in the ways that different states deal with fines and fine-related debt.³⁸

For people in custody, the process of contacting the SDRO is made more difficult by the additional custodial barriers, over and above the sometimes limited personal capacity of inmates to both organise their affairs from jail and to afford to pay their fine debts. One inmate interviewed for *Taking justice into custody* described the bind he was in whereby he was unable to call the SDRO himself but his wife could not resolve the problem on his behalf either:

I owed some money ... [for] court costs ... I think it was \$80. Fine, I can't get hold of youse, ex-wife can you? ... Rings up, no F#& off ... Two weeks later I get another letter. You now owe \$95 ... Because you haven't contacted us and we've whacked on a little bit extra ... Because it's not me ringing, it's the ex-wife, they don't care'. 'Oh well we've got to speak to him. We're not speaking to you' and you know what I mean? How can you get anywhere?*

— Male prisoner, *Taking justice into custody*³⁹

Barriers to accessing court

People issued with a penalty notice are given the option of electing to have their matter heard at court. To do so, people must fill in the court election form on the back of the notice and send the form to the SDRO before payment of the fine is due.⁴⁰ The advantage of electing to go to court is having the opportunity to appeal the fine. However, as penalty notice amounts are generally set at a proportion of the maximum penalty there is the possibility that if a person elects to have a matter heard at court the fine amount to be paid will become higher than the on-the-spot amount.⁴¹ Further, if a court finds that a person is guilty of the offence for which they have been fined, the court may record a conviction which becomes part of the person's criminal record, as well as charge court costs.⁴² Some authors suggest that ‘not paying the penalty and contesting the offence is made less attractive by the prospect of a heavier sanction if a court determines the matter, in addition to the cost and inconvenience of the proceedings themselves’.⁴³

However, there is also evidence to suggest that if an appeal to the issuing authority of the fine is unsuccessful, going to court may result in the amount of the fine being reduced. Shopfront states that:

In our experience, the court will usually reduce the fine considerably, or impose another option such as a caution (or, for adults, a section 10 dismissal).⁴⁴

By way of illustration, under section s5(1)(b) of the *Rail Safety (General) Regulation 2003* (NSW) the statutory maximum penalty for travelling without a valid ticket is \$550 and the on-the-spot fine for this offence is \$200. Between August 2003 and March 2006, 2 763 people were sentenced in the local court of NSW for this offence. A total of 1 196 people (43%) were given a section 10 order,⁴⁵ and 1 564 people (57%) were fined by the court. Three people were sentenced to a ‘rising of the court’. The average fine amount was \$100, with 80 per cent of these fines being between \$50 and \$200.⁴⁶ These figures suggest that in some cases there may be benefits to electing to have a fine matter heard at court.

However, for many disadvantaged people, especially those unable to access legal advice or representation, going to court is a difficult and frightening experience, an experience to be avoided.⁴⁷ Some, particularly those who have had negative experiences with the law previously, expressed little faith that a court would find in their favour:

...the legal system’s just up there, it’s against us, and there’s nothing you can do about it, you just gotta try and avoid it.

— Male prisoner, *Taking justice into custody*⁴⁸

Given the difficulty of paying the fine or going to court, fines are commonly not addressed.⁴⁹ The Homeless Persons’ Legal Service and the Public Interest Advocacy Centre recommend that penalty notices, reminder notices and enforcement orders should provide clearer information regarding court election and where to seek legal assistance.⁵⁰

Barriers to seeking legal advice/ assistance

The A2JLN data suggest that many people who are disadvantaged experience difficulties in accessing legal assistance and without access to appropriate legal assistance or advice, people may not elect to have their matter heard at court when it is appropriate to

do so. Moreover, people may not have the skills to fill out the court election form without assistance. The barriers prohibiting disadvantaged people from accessing legal assistance include people:

- not recognising that legal help is available for their problem⁵¹
- not knowing where or how to seek help⁵²
- living in rural or regional areas which do not have appropriate services⁵³
- having other problems which take priority over addressing their fines and other legal problems.⁵⁴

Barriers to seeking special consideration

If a person fails to pay a fine or elects to have the matter heard before a court within the due time, a penalty enforcement notice will be sent. At this point they can dispute the fine through the SDRO as long as they have supporting documentation (e.g. proof they were in hospital when they supposedly received a speeding fine). If they don’t have the supporting documentation they can apply to the SDRO to have the fine annulled, at a fee of \$50, at which point the SDRO will refer the matter to the local court. Given the barriers noted above, filling out such forms and participating in this appeal process may be difficult for some disadvantaged people. Furthermore, people who are homeless were reported to have competing priorities that may prevent them from conducting such appeals, for example, finding somewhere to live, dealing with medical issues and finding employment.⁵⁵

At any time, including if the application for annulment is not successful, a person may apply to the Director of the SDRO to postpone or ‘write-off’ the fine. The Director has the discretion to do so if the person applying has ‘severe financial, medical or domestic problems’. An application for postponement or cancellation of the fine must be made in writing and be accompanied by detailed documentation outlining the nature of the person’s problem. This may include a doctor’s letter in the case of a medical problem, evidence that the person does not own any possessions that could be sold to pay the fine and the person’s social security details.⁵⁶ To have the enforcement order written off, the applicant must prove not only to have been suffering hardship at the time, but that they will never be able to pay in future.⁵⁷

The SDRO also has a Fine Enforcement Hardship Review Board made up of representatives from the OSR, the Treasury and the Attorney General's Department, which can review certain decisions made by the SDRO. This Board can review the SDRO's refusal to grant an application for time to pay or to write-off a fine due to financial, medical or personal hardship.⁵⁸ The OSR 2007–08 Annual Report indicates that the Board reviewed 48 decisions of the SDRO, and upheld 25 of these.⁵⁹

THE IMPACT OF FINES ON DISADVANTAGED PEOPLE

The accumulation of unpaid fines and subsequent debt can have a significant impact on the lives of socially and economically disadvantaged people, and can contribute to and worsen their disadvantage in a number of ways.

Accumulated fine-related debt

Across the A2JLN studies, examples were provided of disadvantaged people having outstanding fines ranging from relatively small amounts to several thousand dollars. In *Taking justice into custody* one prisoner reported owing nearly \$50 000 in unpaid fines. When people have come through a period of instability in their lives, for example involving alcohol addiction, drug addiction or mental illness, accumulated fine-related debt can remain an obstacle to rebuilding their lives and overcoming disadvantage. Similarly, debt, including fine-related debt can hinder ex-prisoners from moving forward with their lives after their release from prison. When the *Fines Act (NSW)* was introduced in 1996, prisoners were no longer able to 'cut-out' their fines while serving time for other offences. While this change was to stop people from going to jail for fines, one consequence is that prisoners can leave jail still owing considerable amounts of money for unpaid fines. Hence *Taking justice into custody* noted the high levels of fine-related debt amongst prisoners in this study.⁶⁰ Other literature has also identified the impact that such debt can have on a prisoner once released. For example, in 1999 the Queensland Prisoners' Legal Service undertook research on the extent of indebtedness in the prison population and its effects on the families of prisoners and the wider community.⁶¹ The authors reported that 49 per cent of the respondents to the prisoner questionnaire indicated that they had committed an offence to repay a debt.⁶² Furthermore, in a study of ex-

prisoners, Baldry et al. (2003) found that 51 per cent of the ex-prisoners she interviewed had a debt of some sort. Debt was identified as a factor which contributed to their likelihood of returning to prison.⁶³

Fines also place a financial burden on disadvantaged people that in some circumstances they are simply unable to deal with. Participants and stakeholders interviewed for *No home, no justice?* suggested that having outstanding fines may contribute to people moving states or living a transient, potentially homeless, lifestyle to avoid being punished for unpaid fines:

I got a list like this [arms stretched wide], about \$12 000 in fines at the moment in WA. Here, I'm unknown and that's the way I want to stay — out of trouble.

— Homeless man with mental health issues,
*No home, no justice?*⁶⁴

Licence suspension

As noted previously, if an enforcement order is not paid within 28 days, the SDRO can direct the RTA to suspend a person's driver licence, cancel car registration or prevent that person from 'conducting business with the RTA (including applying for a licence). This is the case for both traffic *and* non-traffic offences and remains in force until the fines are either paid in full, or six consecutive payments have been made under a 'time to pay order'. There are limited circumstances in which licence restrictions will be raised earlier, but again these depend upon the applicant being able to prove certain circumstances in writing and provide supporting documentation.⁶⁵

The suspension of a driver licence can have a significant impact on people who need a licence for employment, job interviews or while caring for children, and on homeless people who use their cars for accommodation. Homeless people and people living in regional or rural areas where there is poor public transport infrastructure are particularly disadvantaged if their licence is suspended.⁶⁶ Loss of licence can mean that people are less able to access services and participate in the community, contributing to the alienation and isolation these people may already be experiencing.

If people drive without a licence they face the risk of being fined and charged with an offence. Being charged for driving without a licence may escalate into more serious consequences:

...A little bit down the track the driving licence gets suspended and ... and then they still can't pay it but they just drive anyway. [He] inevitably gets picked up for driving while suspended. He'd cop another fine for that and then you know again you're disqualified ... we certainly get clients where jail suddenly becomes a prospect very quickly because they just keep driving and often for rational reasons that they can't pay.

— **Homelessness worker,**
*No home, no justice?*⁶⁷

Taking justice into custody noted that license suspension as a result of outstanding fines was an issue for a number of people recently released from prison. As well as contributing to the overall levels of debt described above, this added to the challenges faced in gaining employment and generally re-establishing life after custody. Some inmates were also reported to have not been aware that their licence had been suspended while they were in prison and were at risk of driving without a licence after release, being charged and/or breaching their parole.⁶⁸

POSSIBLE ALTERNATIVES

As outlined in this paper, fines and the system for processing fines in NSW can have a disproportionate impact upon disadvantaged people, particularly young people, homeless people, people on low incomes and those leading unstable or chaotic lives. This section will examine strategies that could be implemented at various stages of the fines process to make the system more manageable for disadvantaged people.

Reviewing fine amounts

The use of penalty notices in NSW has developed in an ad hoc manner, with different issuing authorities responsible for setting the penalty amounts. As a result there is a lack of proportionality between penalty notice amounts for offences with similar levels of objective seriousness.⁶⁹ The NSW Sentencing Council recently identified the need for a review of the 17 000 offences for which a penalty notice may be issued and for the establishment of guidelines for the addition or removal of offences from a penalty notice system. They noted that particular attention needed to be paid to the rational proportionality between offences and between the penalty amounts

and the objective seriousness of the offences. Such a review may address the number and impact of penalty notices for offences that appear to disproportionately affect disadvantaged people.

Alternatives when issuing a fine

A possible alternative to issuing a fine to a person who has committed an offence is to issue a warning or a caution. This alternative has been raised by the Australian Law Reform Commission (ALRC).⁷⁰ Under recent changes to the fine enforcement system in Victoria, there is now provision for an issuing officer to serve a written 'official warning' instead of an infringement notice.⁷¹ In NSW there are already cautioning schemes for certain offences, such as the Cannabis Cautioning Scheme (CCS). Under this scheme, police have the discretion to caution people in possession of small amounts of cannabis for personal use. A caution involves the officer supplying the offender with information on alcohol and other drug treatment services, and on the social and health effects of drug use.

Another alternative to current practices that has been suggested would be to issue fines that are proportionate to a person's income. The Council of Social Services NSW (NCOSS) suggests that people should be able to show their Centrelink concession cards to the issuing officer in order to receive a lesser fine.⁷² The Victorian Public Interest Law Clearing House (VPILCH) suggests the 'day fine' system may be a possible alternative. An offence is given a number of penalty points, reflecting its gravity. Each point is then given a value that is a portion of the person's income. This model may provide a way of ensuring that fines are proportionate to both the gravity of the offence and the person's ability to pay. While this system has been implemented in other parts of the world,⁷³ its potential for effective implementation in an Australian context has not been fully examined.

Alternative processing systems

People who receive a penalty notice in NSW have 28 days to pay the fine in full or to elect to go to court. Until very recently, there was no pay by instalment arrangements available until the fine became an Enforcement Order and had accrued a \$50 fee. Now, people can pay their fines in instalments of at least \$20, as long as the whole amount is paid by the due date on the reminder notice.

In Victoria, a person has a number of options on receiving the first notice of an infringement. These include electing to go to court, asking the serving agency to waive the penalty, electing to pay the whole amount, applying to the agency to pay the fine in instalments or asking for an extension of time in which to pay.⁷⁴ The ALRC suggested that on receiving a penalty notice people should have the opportunity to provide the issuing agency (e.g. the police, RailCorp) with information that may warrant the withdrawal of the notice.⁷⁵

Electing to go to court

In our research, people experiencing social or economic disadvantage reported that going to court was a frightening prospect, even when there was the possibility that they will receive a lesser and more appropriate penalty from the magistrate. A possible solution is the implementation of courts, court sessions or court processes which specifically cater to the needs of disadvantaged people. For example the Victorian Magistrates Court has an Enforcement Review Program (ERP) to assist people who have incurred multiple fines and have ‘special circumstances’ such as homelessness, mental illness, acquired brain injury or a physical or intellectual disability. This program enables the Infringement Court (formerly known as the PERIN court) to impose outcomes that reflect the circumstances of the case. A person or someone on behalf of the person (such as a guardian, case worker, social worker, or a lawyer) can make a written application to ERP who, if appropriate, refers the matter for listing on a set day (the ‘special circumstances list’) in the local magistrate’s court. The magistrate can take into consideration the ‘special circumstances’ of the person and tailor a sentence accordingly, even dismissing the fine.⁷⁶ Such an approach addresses the circumstances or behaviour which led to the fines, potentially reducing the likelihood that further fines will be incurred. Under the new *Infringements Act 2006 (Vic)* the Infringement Court can also divert vulnerable people out of the court system through a formal review procedure that allows people to apply to the issuing agency on the basis of the person’s special circumstances, for a review of the decision to issue the infringement notice.⁷⁷

Another initiative that addresses the issue of fines and disadvantage is the California Homeless Court. The first began in San Diego in 1999 and similar courts are now operating in Los Angeles, Alameda and Ventura counties. These courts operate in locations homeless

people find easier and less frightening to access such as homeless shelters and services. The courts deal with criminal warrants for ‘quality-of-life’ infractions such as unauthorised removal of a shopping cart, disorderly conduct, public drunkenness, and sleeping on a sidewalk or on the beach’. According to the initiative’s website:

*These courts combine plea bargaining with alternative sentencing that substitutes counselling, volunteer work, and participation in agency programs for the traditional fines, public work service, and custody. Defendants are given credit for having entered a shelter, done volunteer work, or enrolled in Alcoholics Anonymous or other self-help and education programs.*⁷⁸

CONCLUSION

Fines are issued for a range of minor offences and are a valuable alternative to matters being taken to court. However, Foundation research suggests that people experiencing social or economic disadvantage are more vulnerable to incurring fines as a result of issues such as homelessness and mental illness. The situation is exacerbated by the number and range of finable offences and the lack of proportionality between some offences and the penalty amounts. Further, fines can disproportionately impact on people who are socially and economically disadvantaged and may lead to the accrual of multiple unpaid fines. This can in turn compound a person’s disadvantage, especially when facing barriers to legal assistance.

The NSW penalty notice system is difficult for disadvantaged people to negotiate, has little accommodation for those with ‘special circumstances’ and has few options available to those who are prepared to clear their fines although their financial means may be limited.

This paper questions whether the NSW fines processing system could draw on other models and initiatives, such as a cautioning scheme, proportional fines or a special court like the California Homeless Court, to become more effective in addressing the access to justice needs of people experiencing social or economic disadvantage.

ENDNOTES

- ¹ NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices, Interim Report*, 2006
- ² Forell, S., McCarron, E. & Schetzer, L., Unpublished section of interview *No home, no justice? The legal needs of homeless people in NSW*, The Law and Justice Foundation of NSW, 2005
- ³ NSW Sentencing Council
- ⁴ Office of State Revenue, *Annual Report 2007–2008*, 2008, pp. 28–29
- ⁵ *Rail Safety (General) Regulation 2003* (NSW), s5(1)(a)
- ⁶ *Crown Lands Act 1989* (NSW) s155(1)(i)
- ⁷ *Local Government Act 1993* (NSW) s642(2)
- ⁸ *Summary Offences Act 1988* (NSW) s28F(6)
- ⁹ New South Wales Audit Office, *Performance audit: fare evasion on public transport: follow-up of 2000 performance audit*, 2006, p. 14
- ¹⁰ SDRO *Review Guidelines* www.sdro.nsw.gov.au/lib/docs/misc/br_001.pdf (accessed October 2007)
- ¹¹ Office of State Revenue, 2008, p. 28
- ¹² Coordinator, Homeless Persons Legal Service, Pers Comm (3/09/07)
- ¹³ Inner City Legal Centre (ICLC) & Redfern Legal Centre (RLC) *Fined Out*, 2.4, www.iclc.org.au/fined_out/fp_part4b.html, (accessed 12/12/05)
- ¹⁴ ICLC & RLC at 1.1
- ¹⁵ Forell et al, p. 105
- ¹⁶ Grunseit, A., Forell, S. & McCarron, E., *Taking justice into custody: the legal needs of prisoners*, The Law and Justice Foundation of NSW, Sydney, 2008, p.115
- ¹⁷ Sanders, J. *Fines and Young People (or all you need to know about the SDRO)*, Prepared for Children’s Legal Service Bulletin, April 2004
- ¹⁸ NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p ii.; *The Crimes Amendment Legislation (Criminal Infringement Offences) Act 2002* (NSW) amends the *Fines Act 1996* (NSW) and the *Criminal Procedure Act 1986* (NSW) to allow NSW police to issue criminal infringement notices (fines) as an alternative to charging people with or arresting them for minor criminal offences, including offensive language and common assault. The scheme has been trialled in twelve local area commands around NSW.
- ¹⁹ Youth Action and Policy Association, YAPA *Response to the Ministerial Inquiry in Public Passenger Transport*; see also Sanders
- ²⁰ Forell et al, p. 106
- ²¹ Karras, M., McCarron, E, Gray, A & Ardasinski, S, *On the edge of justice: The legal needs of people with a mental illness in NSW*, Law and Justice Foundation of NSW, 2006. First example in an unpublished section of an interview. Second example, p 58. See also HREOC, *Human rights and mental illness: Report of the national inquiry into the human rights of people with mental illness*, Vol. 2, HREOC, Canberra, 1993, p. 757
- ²² Grunseit et al, pp. 79–80
- ²³ Hamilton, C. *Making Fines Fairer*, The Australia Institute, December 2004
- ²⁴ Grunseit et al, pp. 119–122
- ²⁵ *Rail Safety (General) Regulation 2003* (NSW), ss. 17(1), 5(1)b and 15(1)
- ²⁶ *Summary Offences Act 1988* (NSW) s28F(6)
- ²⁷ *Crown Lands Act 1989* (NSW), s155(1)b
- ²⁸ NSW Sentencing Council, p. xi
- ²⁹ NSW Sentencing Council, p. 82
- ³⁰ Sanders, p. 1
- ³¹ SDRO *How to have my enforced fine postponed or written off* www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_002.pdf (accessed 3/09/07)
- ³² Forell et al, p. 96
- ³³ Forell et al, p. 99, p. 118; Grunseit et al, pp. 72-73
- ³⁴ SDRO *What does it mean. Fine Processing and Enforcement System.* www.sdro.nsw.gov.au/lib/docs/forms/fl_wdim.pdf (accessed 03/09/07)
- ³⁵ *Rail Safety (General) Regulation 2003* (NSW), cl, 6, schedule 1.
- ³⁶ Forell et al, p. 107
- ³⁷ SDRO *What does it mean. Fine Processing and Enforcement System.*
- ³⁸ Unpublished sections of interviews from *No home, no justice?* project (Forell et al). Also personal communication, HPLS, 3/09/07
- ³⁹ Grunseit et al, p. 176
- ⁴⁰ ICLC & RLC, 2.4
- ⁴¹ Australian Law Reform Commission, Discussion Paper 65: *SECURING COMPLIANCE: Civil and Administrative Penalties in Australian Federal Regulation*, 2002, p. 396
- ⁴² The Shopfront Youth Legal Centre, *Convictions and Criminal Records*, www.theshopfront.org/documents/ConvictionsCriminalRecords.pdf, (accessed 7/8/06)
- ⁴³ ALRC, p. 396
- ⁴⁴ Sanders, p. 3
- ⁴⁵ Under s 10(1)(a)] of the *Crimes (Sentencing Procedure) Act 1999* (NSW) a charge may be dismissed [or less commonly the person may be conditionally discharged [ss10 (1)(b) and 10 (1)(1c)] on condition of good behaviour for 2 years or that the offender undertake a rehabilitation program.
- ⁴⁶ Information provided to the Foundation by the Judicial Commission of NSW, 2006
- ⁴⁷ Schetzer, L. & Henderson, J. *Public Consultations*, The Law and Justice Foundation of NSW, 2003, p. 136
- ⁴⁸ Grunseit et al, p. 117
- ⁴⁹ Sanders, p. 4
- ⁵⁰ The Homeless Person’s Legal Service and The Public Interest Advocacy Centre *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*, Sydney 2006, p. 23
- ⁵¹ Forell et al, p.131, p. 127; Public Consultations, p. 61
- ⁵² Forell et al, p. 113
- ⁵³ *Public Consultations*, p. 73
- ⁵⁴ Forell et al, pp. 114–115
- ⁵⁵ Forell et al, p. 114
- ⁵⁶ SDRO *How to have my enforced fine postponed or written off*
- ⁵⁷ HPLS, pers comm. (3/09/07). Also SDRO *Request a review* www.sdro.nsw.gov.au/your_options/request_a_review/eo_postponed.html (accessed 03/09/07)
- ⁵⁸ OSR *Annual Report 2003–2004*, 2004, p. 14
- ⁵⁹ SDRO *How to apply to the Fines Hardship Review Board for Review of an unsuccessful Time to Pay or Write Off Application*, www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_005.pdf (accessed 03/09/07)
- ⁶⁰ Office of State Revenue, 2008 pp. 29–30
- ⁶¹ Grunseit et al, pp.79–80.
- ⁶² Stringer, A., *Prison and debt*, Prisoner’s Legal Service Inc, Queensland, Brisbane, 1999.
- ⁶³ Stringer, p. 10.
- ⁶⁴ Baldry, E., McDonnell, D., Maplestone, P. & Peeters, M., 2003, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration for ex-prisoners? Final report*, Australian Housing and Urban Research Institute, Melbourne, p.14.
- ⁶⁵ Unpublished interview from *No home, no justice?* project
- ⁶⁶ SDRO www.sdro.nsw.gov.au/your_options/if_you_take_no_action/eo_rta_restrictions.html (accessed 03/09/07)
- ⁶⁷ Forell et al, p. 110
- ⁶⁸ Forell et al, p. 107
- ⁶⁹ Grunseit et al, p. 80
- ⁷⁰ NSW Sentencing Council, p. 82
- ⁷¹ ALRC, p. 416
- ⁷² Crawford, W *The New System for Infringement Notices* Fitzroy Legal Service, Inc. undated, p. 8
- ⁷³ NCOSS *Submission to RTA Review of Fines and Demerit Points*, 2004, www.ncoss.org.au/bookshelf/transport/submissions/0402_RTA_Review_Fines_Demerit.pdf (accessed October 2007)

⁷³ VPILCH, *Public Transport and Poverty Submission to the Department of Infrastructure in relation to the Transport (Ticketing and Conduct) Regulations* 2005, p 22

⁷⁴ Victoria Legal Aid, *Fines, your options for dealing with fines*, 2008 www.legalaid.vic.gov.au/upload/cl.fines.pdf (accessed 25/07/08)

⁷⁵ ALRC p. 416

⁷⁶ The Magistrates Court of Victoria, *The Enforcement Review Program*, www.magistratescourt.vic.gov.au (accessed 27/11/07)

⁷⁷ Victorian Government 'Fine fairer and firmer' *Frequently asked questions*, 2006 www.fines.vic.gov.au/CA2570F400057BC0/page/FAQs?OpenDocument&l=60-FAQs-&2=-&3=-#q6 (accessed November 2006)

⁷⁸ www.courtinfo.ca.gov/programs/collab/homeless.htm, (accessed 13/12/05)

LOOKING FOR INFORMATION . . .

The Law and Justice Foundation of NSW is an independent, statutory organisation which aims to improve access to justice, particularly for socially and economically disadvantaged people in NSW.

Our website — www.lawfoundation.net.au — includes two search tools:

Just Search

www.lawfoundation.net.au/justsearch

Look for information in a range of Foundation and other resources, including the full text of all major research reports in our innovative Access to Justice and Legal Need (A2JLN) program, and find links to justice organisations throughout NSW.



Plain Language Law Search

www.lawfoundation.net.au/pllsearch

Search over 700 current plain language legal information resources, including books, factsheets, videos and DVDs, community legal education programs and material in other languages; or search by law type including consumer, credit and debt, employment, environment and human rights.

KEEPING INFORMED . . .

The Foundation produces a suite of free electronic bi-monthly newsletters to keep you up-to-date with access to justice initiatives.

JAPA (Justice Access Programs Alert)

includes innovative programs improving access to justice for socially and economically disadvantaged people. Evaluations of programs are included if available. Each issue has a focus on a specific theme. To subscribe: www.lawfoundation.net.au/publications/newsletters/japa

PLL (Plain Language Law)

is for individuals interested in plain language legal information and education. Content includes new and forthcoming plain language resources about the law, community legal education programs, and related research and conferences. To subscribe: www.lawfoundation.net.au/publications/newsletters/pll

JARA (Justice Access Research Alert)

covers current research in access to justice and law reform, with a particular focus on economically and socially disadvantaged people. To subscribe: www.lawfoundation.net.au/publications/newsletters/jara

LJF e-bulletin

provides short reports on the range of Foundation activities including the Access to Justice and Legal Needs (A2JLN) research program, Legal and Information Referral Forum, Grants, the annual Justice Awards, and advance notice of new Foundation publications, launches and seminars. To subscribe: www.lawfoundation.net.au/publications/newsletters/ebulletin

The Access to Justice and Legal Needs Program

The Law and Justice Foundation of NSW has undertaken the Access to Justice and Legal Needs (A2JLN) Research Program to identify the access to justice and legal needs of disadvantaged people in NSW. The objectives of the program are to examine the ability of disadvantaged people to:

- obtain legal assistance (including legal information, advice, assistance and representation),
- participate effectively in the legal system,
- obtain assistance from non-legal advocacy and support,
- participate effectively in law reform processes.

The program employs three methodological streams to address these objectives:

- the analysis of legal service usage data, giving particular insight into expressed legal need;
- original quantitative legal need surveys, giving insight into expressed and unexpressed/unmet legal need;
- in-depth qualitative research into the needs of particular disadvantaged groups.

Specific research published as part of this program to date includes:

Public consultations: a summary of the submissions received from organisations and individuals as part of the initial consultation process for the A2JLN Research Program.

The Data Digest: The Data Digest is a database for examining expressed legal need as identified through inquiries handled by public legal services. It currently includes legal inquiries to the Legal Aid Commission of NSW, LawAccess NSW, and community legal centres in NSW. The inaugural Data Digest report, published in 2004, presents service usage data from 1999–2002. A number of reports produced using the Data Digest are available on the Foundation's website www.lawfoundation.net.au. It is planned for public legal services to have secure access to a number of interactive online Data Digest tools.

Justice made to measure: NSW legal needs survey in disadvantaged areas: a quantitative survey of legal needs in six 'disadvantaged' regions of NSW, measuring a wide range of legal events, including those where help is sought from legal or non-legal advisers (expressed legal need), those handled without outside help and events where no action is taken (unmet legal need).

The Bega Valley pilot survey: a quantitative survey of the legal needs of 306 people conducted via telephone in Bega Valley. This was the pilot survey undertaken for the survey reported in *Justice Made to Measure*.

The legal needs of older people in NSW: a qualitative study into the legal issues commonly experienced by older people in NSW and the barriers faced by older people in accessing services to resolve legal issues.

No home, no justice? The legal needs of homeless people in NSW: a qualitative study into the capacity of homeless people in NSW to obtain legal assistance, participate effectively in the legal system and obtain assistance from non-legal advocacy and support agencies. The study also details the legal issues commonly experienced by homeless people.

On the edge of justice: The legal needs of people with a mental illness in NSW: a qualitative study into the legal issues faced by people with a mental illness in NSW, their capacity to obtain legal assistance, participate effectively in the legal system and obtain assistance from non-legal advocacy and support agencies.

Taking justice into custody: the legal needs of prisoners: a qualitative study of the legal and access to justice needs of prisoners and ex-prisoners. The study identifies the range of criminal, civil and family law issues prisoners face at different stages of incarceration, and the opportunities and barriers they face to addressing these issues.



LAW AND JUSTICE
FOUNDATION
OF NEW
SOUTH WALES

Street Address: Level 14 130 Pitt Street Sydney NSW 2000

Mailing Address: GPO Box 4264 Sydney NSW 2001

e: lf@lawfoundation.net.au; t: +61 2 9221 3900; f: +61 2 9221 6280

www.lawfoundation.net.au