Contemporary Comment

'A Very Expensive Lesson': Counting the Costs of Penalty Notices for Anti-social Behaviour

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Abstract

In March 2014, the New South Wales Government dramatically increased penalty notice amounts for a number of summary offences. The fine increases were part of the Government's alcohol- and drug-fuelled violence initiatives, introduced in response to recent 'one-punch' homicides. This comment examines the use of penalty notices, or 'on-the-spot' fines, for the minor offences of offensive conduct, offensive language and the continuation of intoxicated and disorderly behaviour following a move-on direction. It considers the potential impact of these new fines on vulnerable and minority groups, particularly Aboriginal Australians. The comment questions whether police, as opposed to judicial officers, are the appropriate arbitrators for complex (albeit minor) offences that involve ill-defined elements such as offensiveness, community standards and the reasonable person test. It also asks whether these measures will be effective in fulfilling their stated aim to decrease alcohol-fuelled violence.

Keywords: penalty notices – criminal infringement notices – offensive language – offensive conduct – disorderly – intoxication – police powers – police discretion – Aboriginal Australians – homelessness – mental illness

My office has stressed time and again across a number of reviews the impact of fines on vulnerable people. There is a very real risk these fines will have flow-on effects for those fined, their families and broader communities, and I believe this is an area that will need to continue to be monitored carefully.

Bruce Barbour, NSW Ombudsman, August 2014

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Increased fines for anti-social behaviour

Earlier this year, former New South Wales ('NSW') Attorney General Greg Smith announced a range of measures to target alcohol-fuelled violence (NSW Government 2014). Part of these measures (receiving far less media coverage than the 1.30 am bar lockouts and the new 'one-punch' homicide offences) comprised substantial fine increases for the crimes of offensive language, offensive conduct and the continuation of intoxicated and disorderly behaviour following a move-on direction. This comment examines the ways in which these high fines ignore recommendations made by the NSW Ombudsman and NSW Law Reform Commission ('NSWLRC'). It critiques the increasing use of penalty notices for the crimes of offensive language, offensive conduct and the continuation of intoxicated and disorderly behaviour following a move-on direction (*Summary Offences Act 1988* (NSW) ss 4, 4A, 9). The comment then considers the impact of these fines on vulnerable and disenfranchised groups.

Since 31 March 2014, NSW Police have had the power to issue penalty notices (also known as 'criminal infringement notices' or 'CINS') for the following crimes:

- $500 for offensive language in a public place (previously $150);
- $500 for offensive conduct in a public place (previously $200); and
- $1100 for the continuation of intoxicated and disorderly behaviour following a move-on direction (previously $200) (*Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) sch 5).

The NSW Government used populist, punitive rhetoric to justify the fine increases. This rhetoric was replete with 'commonsense', taken-for-granted assumptions that equated tougher penalties with deterrence of criminal conduct, and shunned statistical evidence and expert knowledge (Hogg and Brown 1998). Former NSW Attorney General Greg Smith drew an unqualified link between the punitive measures and deterrence of drunken violence (Smith and Gallacher 2014): 'The message to drunken thugs is clear: violent, offensive and anti-social behaviour simply won't be tolerated. Anyone ignoring that message should prepare to learn a very expensive lesson.'

According to former NSW Premier Barry O'Farrell, it was 'critical' that police could punish offenders with fines that were 'sufficient to act as a deterrent for this unacceptable behaviour' (O'Farrell 2014:26621). Minister for Police and Emergency Services Michael Gallacher repeated the message that the cost of anti-social behaviour will be 'expensive' (Smith and Gallacher 2014): 'We have more than 16,000 officers across the state who will be out in force to hand out Criminal Infringement Notices and make sure anyone who breaks the law has a very expensive night to remember their actions.'

The Government did not produce evidence to demonstrate that dramatic increases in fines for offensive language, offensive conduct, and intoxicated and disorderly behaviour would decrease or prevent violent, alcohol-fuelled homicides. Nor did the Government address the legitimacy of empowering police alone to act as judge and jury in inflicting these more punitive measures. Instead, the fine increases were characterised by a lack of consultation with criminal justice experts. The Government's tough rhetoric about 'drunken thugs' learning 'expensive lessons' also concealed a disturbing reality: that these $500 and $1100 fines will have a disproportionate, deleterious impact on vulnerable people, including those who are homeless or poor, those with a mental illness or cognitive impairment, and Aboriginal Australians.

The fines are contrary to the NSWLRC's recommendation that penalty notice amounts should not exceed 25 per cent of the maximum court fine for an offence (NSWLRC 2012). The NSWLRC stated that only in *exceptional* circumstances should a penalty notice fine reach 50 per cent of the court-imposed fine for an offence (including where the harm caused by an offence is likely to be particularly severe, there is a need to provide effective deterrence because an offender stands to make a profit from the activity, or the great majority of such offences are dealt with by way of penalty notices). The $500 fines for offensive language and offensive conduct amount to 75 per cent of the maximum fine that a court can impose for these offences (currently $660). The $1100 fine for the continuation of intoxicated and disorderly behaviour amounts to 66 per cent of the maximum court-imposed fine (currently $1650). The Government has not provided any 'exceptional' circumstances to justify penalty notice fines amounting to at least 66 per cent of the maximum court fine.

What is a penalty notice?

Following a five-year trial period, from late 2007 NSW police were given the power to serve penalty notices, or CINS, for a limited number of minor criminal offences, including offensive language and offensive conduct, as proscribed in ss 4 and 4A of the *Summary Offences Act 1988* (NSW) ('*SO Act*') (*Criminal Procedure Regulation 2010* (NSW) ('*CP Regulation*') reg 106 and sch 3). The offence of the continuation of intoxicated and disorderly behaviour following a move-on direction was introduced to the penalty notice scheme in 2011 (*Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* (NSW); *CP Regulation* sch 3). These offences are examined in more detail below.

Penalty notices are notices to the effect that, if the person served does not wish to have the matter determined by a court, the person must pay the amount prescribed for the offence within a fixed time period (*Criminal Procedure Act 1986* (NSW) s 334). The relevant provisions that govern the use of penalty notices are set out in the *Criminal Procedure Act 1986* (NSW) ('*CP Act*'). While the *CP Act* uses the term 'penalty notices', this comment also uses the term CINs to be consistent with the terminology used by the NSWLRC and NSW Ombudsman. Unlike penalty notices, CINs may only be issued to persons over the age of 18 and must be issued by a police officer (*CP Act* s 335). Criminal infringement notices were introduced with the purpose of easing congestion in an overstretched court system, as well as saving police officers time and money when processing minor offences (NSWLRC 2012). While these goals may be achieved in the short term, significant costs and resources can be incurred later, if enforcement measures are commenced due to non-payment of fines.

In the first year of state-wide operation, 8861 CINS were issued, mainly for the offences of offensive conduct, offensive language, and shoplifting (NSW Ombudsman 2009:i). In 2009, the NSW Ombudsman reported that CINs had become the most common way for police to deal with minor public order incidents (compared with charging or warning offenders) (2009:iv). Thus police officers are increasingly performing decision-making roles that were traditionally the domain of the courts.

The increasing use of CINs for minor crimes enhances police power and discretion. When faced with behaviour that might amount to a penalty notice offence, a police officer need not issue a CIN (*CP Act* s 342(3)). Police officers can instead choose to ignore the behaviour, use their common law power to issue an informal warning, issue a caution, or serve a court attendance notice ('CAN'). This choice is not, and cannot realistically be, the subject of public scrutiny. The NSW Ombudsman found evidence of 'net widening' for the

use of CINs for offensive language, with police issuing CINs in circumstances where a warning or caution would have been more appropriate, or where a court would likely have acquitted the defendant (NSW Ombudsman 2005:76). Such broad, unexaminable police discretion is particularly problematic when Aboriginal Australians, those who are homeless or poor, and those with a mental illness or a cognitive impairment, have historically been, and continue to be, systematically disadvantaged in the face of broad police powers (Brown et al 2011; Cunneen 2001, 2008; Quilter and McNamara 2013; NSW Law Reform Commission 2012; NSW Ombudsman 2009, 2014; Ronalds, Chapman and Kitchener 1983:168; Walsh 2008; White 2002; Commonwealth 1991).

Once issued with a CIN, a recipient can choose either to pay the fixed amount or to have the matter determined by a court (*CP Act* s 334). Recipients can also request an internal review from the NSW Police, but such requests are rare (NSW Ombudsman 2009; NSW Ombudsman 2014:4). If recipients pay the penalty prescribed for the alleged offence, they are not liable for any further proceedings and no conviction is recorded (*CP Act* s 338). However, should recipients elect to challenge their CIN in court, they risk having a criminal conviction recorded against them (*CP Act* s 334). Statistics collated by the NSW Ombudsman demonstrate that a negligible number of penalty notice recipients choose to challenge their fines in court (NSW Ombudsman 2009:91). Aboriginal Australians, perhaps due to a lack of resources, or a distrust of the system, are even less likely to request an internal review or to elect to have the matter heard in court (NSW Ombudsman 2009:v). Accordingly, there is almost no judicial oversight of guilt or innocence for these offences.

Intoxicated and disorderly behaviour following a move-on direction

The offence of the continuation of intoxicated and disorderly behaviour following a move-on direction commenced in 2011, and is set out in s 9 of the *SO Act*. That section provides that it is an offence for a person who has already been given a move-on direction for being intoxicated and disorderly in a public place to, at any time within six hours after the move-on direction is given, be intoxicated and disorderly in the same or another public place. The laws were introduced by Parliament with the intention of targeting 'drunken and violent hooligans' in entertainment districts and on weekends (Smith 2011:3135). In addition to increasing the CIN amount from $200 to $1100 for s 9 offences, on 31 March 2014, the Government also increased the maximum penalty that a court can impose for this offence from $660 to $1650 (*Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) sch 5).

Parliament tasked the NSW Ombudsman with ensuring that police used their s 9 powers 'appropriately and consistently with the Government's commitment to address problem social drinking' and that these powers were not being directed at 'the homeless and disadvantaged in our society' (Smith 2011:3137). But in a report released in 2014, the NSW Ombudsman found that s 9 was disproportionately targeting vulnerable people, particularly Aboriginal Australians. The NSW Ombudsman also found that police were using s 9 offences to inflict harsher punishments on those who would previously have been charged with the lesser offence of failing to comply with police directions under s 199 of the *Law Enforcement (Powers and Responsibilities Act) 2002* (NSW) ('*LEPRA*') (NSW Ombudsman 2014:1). This latter offence carries a much smaller penalty of $220. For that reason, and the fact that s 9 offences have disproportionately affected vulnerable people, the NSW Ombudsman (2014:5) recommended that 'section 9 be amended so that it relates more

squarely to serious instances of intoxicated and disorderly conduct, including violent or threatening conduct not already covered by section 199 LEPRA'.

Offensive language and conduct

The broad crimes of offensive language and offensive conduct were introduced by the NSW Liberal-National Coalition in 1988, following a strident 'law and order' campaign headed by then Premier Nick Greiner. The crime of offensive conduct is set out in s 4(1) of the *SO Act*, which makes it an offence for a person to 'conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school'. The maximum penalty for offensive conduct that can be imposed by a Court is six penalty units (currently $660) or imprisonment for three months. The crime of offensive language is contained in s 4A(1) of the *SO Act*, which makes it an offence for a person to 'use offensive language in or near, or within hearing from, a public place or a school'. The maximum penalty that can be imposed by a Court is six penalty units ($660).

These laws provide no clear demarcation for police to determine whether language or behaviour is acceptable or deviant, innocent or criminal. 'Offensiveness' is not defined in the legislation. Instead, judicial officers and police must employ the broad, objective definition provided in the case of *Worcester v Smith*, where O'Bryan J stated that offensive conduct is 'such as is calculated to wound the feelings or arouse anger, resentment, disgust or outrage in the mind of a reasonable person'. In assessing the reasonable person's view, a decision-maker must also consider contemporary community standards (*Ball v McIntyre*; *Heanes v Herangi*; *Police v Butler*), as well as the context of the words or conduct (*McCormack v Langham*).

Offensive language and conduct offences have long been exploited by police to punish vulnerable people and innocuous words that often cause no tangible harm (Lennan 2006; Lennan 2007; Quilter and McNamara 2013; McNamara and Quilter 2014; White 2002). In practice, police tend to employ offensive language fines and charges to target swear words, primarily the words 'fuck', 'cunt' or a combination of the two (NSW Ombudsman 2009:57). In *Police v Butler*, Heilpern LCM criticised the illusory notion of 'community standards' on swearing in a society where words such as 'fuck' and 'cunt' were commonplace, peppering everyday conversations, songs, films and even witnesses' evidence in court. Offensive conduct charges cover an array of activities from public urination (*New South Wales v Beck*) to fighting (NSW Ombudsman 2009:57).

The introduction of $500 CINs for offensive language and conduct amplifies an already excessive police power over the everyday activities of the public. Police officers are often both the witnesses to and 'victims' of offensive language and behaviour crimes (NSW Ombudsman 2009). With the increasing use of CINs for these crimes, police are also performing the function of (a less than impartial) judge. As these decisions are of an administrative (as opposed to judicial) nature, they are shielded from public scrutiny (Methven 2012).

Disproportionate impact on vulnerable groups

The NSW Government has not provided evidence to support its claim that these new $500 and $1100 fines will deter drunken 'thugs' or 'hooligans' from violent behaviour. What the Government *does* know, but has ignored, is that these measures will further entrench disadvantage in vulnerable and minority groups, particularly Aboriginal Australians. In 2009, the NSW Ombudsman found that Aboriginal people accounted for 7.4 per cent of all CINs issued (83 per cent of which were for offensive conduct or offensive language), although they comprise just 2.5 per cent of the NSW population (NSW Ombudsman 2009:iv). In the first 12 months of the new offence of intoxicated and disorderly behaviour following a move-on direction, the NSW Ombudsman found that 40 per cent of all fines and charges issued by police were to disadvantaged and marginalised groups (NSW Ombudsman 2014:3). Again, Aboriginal people were particularly overrepresented, accounting for 31 per cent of the 484 fines and charges issued in the review period (NSW Ombudsman 2014:3).

Vulnerable people are often unable or unwilling to pay CIN fines, and can consequently be subjected to more serious fine enforcement measures, including increasing levels of debt and driver licence sanction, which can increase the chance of secondary offending (NSW Law Reform Commission 2012:xxi; NSW Ombudsman 2014:5, 100). If a CIN is not paid within 21 days, a reminder notice is issued to the recipient. After 28 days, enforcement costs are added and enforcement processes commenced (NSW Law Reform Commission 2012:26). In 2009, the NSW Ombudsman found that nine out of every 10 Aboriginal Australians issued with a penalty notice failed to pay on time, resulting in higher numbers of Aboriginal people becoming entrenched in the fines enforcement system (NSW Ombudsman 2009:vi). Driver licence sanctions have a particularly damaging impact on Aboriginal people living in regional, rural or remote communities (Williams and Gilbert 2011). In these communities, private vehicles are often the only practical means of transport available to access work or basic services such as education, food, health, government services and legal aid (NSWLRC 2012:17).

A serious shortcoming of the penalty notices scheme is that police can issue notices without considering the recipient's social or financial circumstances. The NSW Ombudsman recounted a case in which a $150 CIN was issued to a homeless man for using offensive language in Hyde Park, Sydney (NSW Ombudsman 2009:61). The man, who had a fortnightly income of $390, told police, 'Fuck off and leave me alone', 'Go fucking hassle someone else this is my backyard', and 'Just fuck off'. After his application for leniency was rejected, the man appealed to the Local Court. On 16 February 2006, the magistrate dismissed the matter on the basis that the language was not offensive in the circumstances. If such a matter were to arise today, that homeless man could be facing a $500 fine.

Current legislation does not require police officers to consider the vulnerabilities of the recipient when deciding whether to issue a CIN or instead issue an informal warning or a caution (NSW Ombudsman 2014:100). And the NSW Police Force has thus far not adopted guidelines that would require their officers to consider a CIN recipient's individual circumstances at the initial decision-making stage (NSW Ombudsman 2014). It is this preliminary decision that is most critical to vulnerable recipients, given the very low rates of internal review requests or elections to challenge CINs in court (NSW Ombudsman 2014:4).

Conclusion

In state and territory politics, enacting 'tough' laws that enhance police powers is easy. But history attests to the difficulty of tempering the harshness of these laws. In 1979, when the NSW Labor Government enacted a narrow offensive conduct offence with an insubstantial penalty of $200, the NSW Police Association reacted with a hostile campaign, including a full-page advertisement in a Sydney newspaper (Hiller 1983:103), stating: 'You can still walk the streets of NSW, but we can no longer guarantee your safety … Is it possible that the *Offences in Public Places Act* (1979) could be the seed from which a growth pattern of New York style street crime will be the future harvest?'

Politicians listened to the Police Association's veiled threat, and police eventually received broader powers in the form of the *SO Act*, despite there being no evidence that public order had been compromised. It will take a very bold Premier to alleviate the burden of these excessive fines on vulnerable groups. It will take an even bolder Premier to follow the NSWLRC and NSW Ombudsman's recommendations: to conduct an inquiry into the potential abolition of the crime of offensive language (NSWLRC 2012:310–11), and to amend s 9 of the *SO Act* to cover only serious instances of intoxicated and disorderly conduct (NSW Ombudsman 2014:5). And therein lies the frustration. The NSW Ombudsman and the NSWLRC, at the behest of Parliament, have conducted research, collated statistics, engaged with stakeholders and examined countless submissions in order to arrive at thoughtful recommendations for policy and law reform, but so much of this is ignored in a state where criminal laws are dictated more by hard-hitting law and order slogans than evidence-based research. As the Government counts the revenue raised from these 'expensive lessons', it should also count the social costs of a criminal justice system that continues to entrench disadvantage.

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