



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CCW:JvdPvk270422

27 April 2022

The Hon. Dominic Perrottet, MP
Premier
52 Martin Place
SYDNEY NSW 2000

By webform

Dear Premier,

Public health order fines and impact on vulnerable groups

The Law Society of NSW writes to you in respect of the impact of public health order (**PHO**) fines, given your stated commitment to Closing the Gap in NSW. As set out below in more detail, PHO fines have had a disproportionate and unjust impact on certain vulnerable groups of people, and in particular children and Aboriginal people. We note your intention that “all ministers [be] Indigenous Affairs in their own right”¹ and we commend your commitment to delivering better and practical outcomes for Aboriginal people in NSW.²

We examine the scope of the problem and suggest two practical measures that would ameliorate or avoid some of the concerns raised in this submission, without compromising the integrity of the underlying public health orders. These submissions have been informed by the Law Society’s Indigenous Issues, Children’s Legal Issues, Human Rights and Public Law Committees. The Law Society is also grateful to Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) for the information provided.

1. Background

We are cognisant that PHO fines have been an important part of the Government’s toolkit for addressing the public safety concerns arising during the COVID-19 pandemic, and do not wish to detract from the seriousness of the issue that the PHO fines are intended to address. Governments have been required to demonstrate agility, creativity and responsiveness to evidence in order to manage the threat to public safety (and public institutions such as hospitals) and in our view, the NSW government should, on balance, be commended on its actions in respect of managing the COVID-19 pandemic. It is, however, a logical consequence that any issues arising out of the actions necessitated by those extraordinary circumstances require equally agile and creative adjustments to protect against unintended injustice and unnecessary hardship.

¹ Nakari Thorpe, ‘Indigenous leaders welcome NSW Premier’s focus on Aboriginal affairs but call for community consultation’, *ABC News* (Online, 21 February 2022) <<https://www.abc.net.au/news/2022-02-21/indigenous-leaders-urge-nsw-premier-to-meet-with-community/100843696>>.

² Tom Rabe, ‘Premier determined to deliver better outcomes for Indigenous Australians’, *Sydney Morning Herald* (Online, 5 February 2022) <<https://www.smh.com.au/national/nsw/premier-determined-to-deliver-better-outcomes-for-indigenous-australians-20220204-p59ty1.html>>.

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Our members have raised significant issues of concern in respect of how many of their clients have been seriously impacted by sizeable fines, as well as the flow-on impacts for the courts and justice system. We understand that previous advocacy by members of the NSW Legal Assistance Forum for a temporary stay on enforcement have been unheeded, and that many of these matters have now escalated to enforcement. We are concerned also that despite our members attempting to address the issue on a case by case basis, a number of review requests that appear to have merit have been refused. More detail is provided later in this submission.

We suggest that there is a high likelihood that incorrectly issued fines are prevalent and indeed, inevitable, given that the underlying public health orders were changing swiftly and frequently. The data available show at least 71 amendments to the orders between July 2021 and October 2021.³ We note also that at the time, police discretion was directed to “go high-level enforcement” rather than towards community policing.⁴ From a public law and administration perspective, given this climate, the lack of an accessible and meaningful avenue (apart from court-election, discussed further below) to review PHO fines is concerning.

We are raising this issue with you as the postcodes disproportionately affected by PHO fines are areas with high Aboriginal populations.⁵ The punitive and flow on effects of fines are well-known in relation to increasing individuals’ vulnerability to cycles of debt and disadvantage. PHO fines can lead to incarceration in NSW, either through conviction if a person elects to take the matter to court, or through driving while unlicensed. We understand from our members that almost half of those who were issued a PHO fine already have existing fines debt.

In this letter, we provide some detail on the scope and nature of the issues, and suggest a number of possible ways NSW can practically address the significant hardships brought about by the apparently disproportionate issuing of PHO fines in areas of high Aboriginal population and high social disadvantage. We submit that putting in place measures to ameliorate the impacts of fines administration will not detract from the seriousness of the underlying issue (particularly given that many of the public health orders giving rise to the PHO fines are no longer in force). Rather, the provision of a suite of practical administrative measures to address issues now arising will likely be a just, practical and efficient response, consistent with the efforts to implement the National Agreement to Close the Gap in NSW.

2. Scope

We understand that between March 2020 and 31 March 2022, 61,586 PHO fines were issued.⁶ Of these, 45,712 fines are now overdue. According to data provided by the Chief Commissioner of State Revenue, Revenue NSW at a Budget Estimates hearing on 4 March 2022⁷, as at 31 January 2022, Revenue NSW had received 10,853 requests for review of PHO

³ See, eg, NSW Government, ‘Public Health Orders relating to Delta outbreak restrictions’, *NSW Legislation* (Web page, 11 October 2021) <<https://legislation.nsw.gov.au/information/covid19-legislation/temporary-movement-gathering-restrictions>> which shows at least 71 amendments to the orders).

⁴ Angus Thompson, ‘Police Commissioner says officers wrongly issuing tickets won’t be held to account’, *Sydney Morning Herald* (Online, 19 August 2021) <<https://www.smh.com.au/national/police-commissioner-says-officers-wrongly-issuing-tickets-won-t-be-held-to-account-20210819-p58k76.html>>.

⁵ We understand that the top 10 LGAs most affected by PHO fines, adjusted by population size, were Brewarrina, Coonamble, Gilgandra, Moree Plains, Walgett, Bourke, Gunnedah, Sydney, Cumberland and Blacktown.

⁶ Revenue NSW, *COVID-19 offences* (DSF 019, 1 February 2022) <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/COVID-19-offences-DSF-019.xlsx>> (updated 31 March 2022).

⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 4 March 2022, 58 <<https://www.parliament.nsw.gov.au/lcdocs/transcripts/2883/Transcript%20-%20PC1%20-%204%20March%202022%20-%20UNCORRECTED.pdf>>.

finer. Of the requests that had been processed, approximately 1 in 7 reviews resulted in a fine being withdrawn or turned into a caution.

Also as at 31 January 2022, 3,563 PHO fines had been issued to children aged between 10-17 years.

Data obtained from Revenue NSW by Redfern Legal Centre (RLC) and reported on by *The Guardian* on 10 February 2022⁸ shows that Walgett, Brewarrina and Wilcannia were among the towns with the highest number of fines issued per capita during the Delta outbreak. Liverpool and Mt Druitt received over \$1 million in PHO fines each, as compared with suburbs like Bondi (\$83,900) and Rozelle (\$43,200).

Reproduced for your convenience is a table compiled by *The Guardian* based on information obtained under the *Government Information (Public Access) Act 2009 (NSW)* by RLC. The table sets out those areas that received the highest number of fines per capita, and the index of relative social advantage and disadvantage, an index from 1-10, where 1 represents the highest level of disadvantage.⁹

Postcode	Suburb	Number	Value	Fines per 1000 people	IRSAD decile
2832	Walgett	168	148480	67	1
2839	Brewarrina	73	76500	54.4	1
2836	Wilcannia	44	56000	46	1
2829	Coonamble	133	125700	42.9	1
2840	Bourke	105	168000	39.6	3
2838	Goodooga	8	6400	35.2	1
2824	Warren	61	53500	29.2	2
2833	Collarenebri	16	13500	25.9	1
2400	Moree	247	219620	24.6	3
2770	Mount Druitt	1536	1366380	24	1
2827	Gilgandra	85	85000	22.9	1
2559	Claymore	66	51340	21.4	1
2016	Redfern	334	294820	20.7	8
2306	Windale	71	58480	20.6	1
2879	Menindee	11	23000	18.7	1

Guardian graphic | Source: Redfern Legal Centre/NSW government

⁸ Mostafa Rachwani and Nick Evershed, 'Incredible Imbalance: NSW Covid fines during Delta higher in disadvantaged suburbs', *Guardian* (Online, 10 February 2022) <<https://www.theguardian.com/australia-news/datablog/2022/feb/10/incredible-imbalance-nsw-covid-fines-during-delta-higher-in-disadvantaged-suburbs>>.

⁹ Ibid.

Not only were areas with high Aboriginal populations disproportionately represented in the data, but also areas of greatest socio-economic disadvantage, that is, those individuals and families least able to meet the additional financial burden.

3. Rule of law and public administration issues identified

The Law Society has been informed by its members, notably its members who practice in the legal assistance sector, that a number of issues have been identified that are of particular concern from a rule of law and public administration perspective:

3.1. Children have been fined beyond their capacity to pay

As noted earlier, 3,563 PHO fines were issued to children aged 10-17, as at 31 January 2022.¹⁰ Earlier reporting of data to 10 November 2021¹¹ showed that of the 2,844 PHO fines issued to children at that date, more than half were \$1,000 fines, and 56 children were issued fines for \$3,000 to \$5,000. By way of proportion, we note that the Children’s Court jurisdictional limit for fines for children is \$1,100, and that the maximum penalty for PHO fines in Victoria is \$91 for children under 15, and \$454 for children aged 15-18.¹²

We understand that some of the children who have received PHO fines are particularly vulnerable, because of intellectual disabilities or cognitive impairments, or because they are in out of home care, or are situated in rural, regional and remote areas where the infrastructure (such as crowded housing and access to internet and computers) has not adequately supported remote schooling, and made observing stay at home orders difficult.

3.2. Fine reviews of meritorious matters have been refused

Our members have informed us that in their experience, requests for review of matters with legal merit have been refused by Revenue NSW, including in cases where clients are homeless, or are affected by domestic violence, or are suffering mental health challenges affecting their capacity to understand or follow public health orders.

The ALS established the ALS COVID-19 Legal Assistance Clinic in November 2021, in response to the high level of community concern about the extraordinary and disproportionate impact of PHO fines on Aboriginal communities in NSW. The ALS provided the Law Society with the following examples of matters where requests for review were refused in circumstances of significant vulnerability.

Young woman moving into crisis accommodation fined – review refused.

“Kerry” is a 20-year-old Aboriginal woman who lives in regional NSW. In August 2021, while stay-at-home directions were in force, Kerry and her two-year-old needed to urgently leave an unsafe living situation due to risk of violence. They obtained temporary crisis accommodation in a hotel through a homelessness service provider.

Kerry was pulled over by the police while she was driving her belongings between residences. The police told her she would be fined for breaching the stay-at-home orders, and she received a \$1000 penalty notice some days later.

¹⁰ The Law Society is not aware of the number of public health order breaches proceeded against by way of *Young Offenders Act 1997* (NSW) warnings, cautions and Youth Justice Conferences.

¹¹ Christopher Knaus, ‘Almost 3,000 children in NSW hit with fines of up to \$5,000 for minor Covid rule breaches’, *The Guardian* (Online, 16 December 2021) <<https://www.theguardian.com/australia-news/2021/dec/16/almost-3000-children-in-nsw-hit-with-fines-of-up-to-5000-for-minor-covid-rule-breaches>>.

¹² *Ibid.*

Kerry lodged a review request with Revenue NSW explaining that she was moving house when she was fined, which was a “reasonable excuse” under the ministerial directions. Kerry’s review included supporting documents confirming her placement in crisis accommodation on the relevant date.

Revenue NSW refused Kerry’s review on the basis that “The officer considered the circumstances at the time of the offence, and decided it was appropriate to issue a penalty notice. Leniency is inappropriate as it is considered serious due to the need to protect the health of the NSW public. We are satisfied the penalty was issued correctly.”

Court election is the only option for challenging an incorrectly issued fine after internal review is refused. Kerry has Asperger’s Syndrome and finds it difficult to express herself at times. She decided not to elect to have a court decide the matter because she would likely be required to give evidence and be cross-examined by a prosecutor. She also did not want to risk having a criminal conviction recorded. Kerry is now on a payment plan with Revenue NSW where \$50/fortnight is taken out of her income to pay the fine. Kerry works irregular, part-time hours. It will take 12 months for Kerry to pay off the fine and the deduction from her income is causing her financial strain.

Older man on disability support pension fined when attending homelessness outreach service – review refused.

“Gary” is a 58-year-old Aboriginal man who is at risk of homelessness. He recently obtained a Department of Housing lease, but prior to this he spent two years sleeping rough and staying at homelessness shelters around inner Sydney. Gary receives a Disability Support Pension and continues to rely heavily on homelessness support services in the Woolloomooloo area to obtain free or affordable food and clothing.

One Sunday in September 2021, Gary walked approximately 1km from his home to a homelessness outreach service in Woolloomooloo serving free food to the local community. On his way, Gary was stopped by police who issued him a \$1000 fine for being away from his house without a reasonable excuse.

The ALS assisted Gary with lodging a request for review on the basis that he had left his home to obtain food within 1km of his residence, which was a “reasonable excuse” under the ministerial directions. The review included information about Gary’s status as a person at risk of homelessness and his financial vulnerability as a recipient of a disability support pension.

Revenue NSW refused Gary’s review on the basis that “The NSW Police officer advised that he was in breach of The Public Health Covid 19 Temporary Movement and Gathering Restrictions Order 2021.” The ALS is assisting Gary with applying for a write-off of the fine debt due to his acute financial hardship and disability.

3.3. Risks attached to court election

The only option available for challenging a fine if a request for review is refused by Revenue NSW is for an individual to elect for a court to decide the fine. However, court election carries serious risks. If convicted of the fine, a criminal conviction will be recorded by default, and the maximum penalties for the relevant offence are \$11,000 and/or 6 months imprisonment.¹³

Our members inform us that in the overwhelming majority of cases, people with court-elected infringements must self-represent at court unless they are able to afford private legal representation. The ALS advises us that it has received numerous referrals for clients who have court-elected prior to seeking legal advice, thereby unwittingly exposing themselves to the greater risks of criminal liability and higher maximum penalties, including imprisonment. For some individuals, these greater risks include possible breaches of existing bonds/court orders. We understand that the majority of those individuals who have court-elected did so not because they wished to challenge the fine, but simply because they are not able to afford the fine. To be clear, even if a court exercises its discretion and reduces the fine, it can still result in the recording of a conviction. We note that the concerns of the legal assistance sector in respect of impacts on the court system have been raised with the Attorney General.

In our view, these outcomes are inconsistent with the broader goals of Closing the Gap in NSW, and in particular the justice targets.

4. Possible administrative measures

The Law Society notes that while the number of people affected by PHO fines is a large number, there are identifiable cohorts of people who have been disproportionately and unjustly affected. Relief measures can be designed in a targeted fashion.

We are advised that a number of possible options have already been canvassed in the context of the Cross-Agency Covid Fines Working Group, which we understand is chaired by the Executive Director, Fines and Debt, Revenue NSW. We understand also that in 2021, legal services and civil society groups have previously advocated on these issues in open letters to the former Premier, the Attorney General and relevant Ministers,¹⁴ recommending a stay on enforcement for all PHO fines until at least 31 March 2022.

Acknowledging this context, the Law Society requests that you revisit this issue. We urge that you consider implementing the following measures, which in our view would go some way to addressing the undue and disproportionate impact of PHO fines borne by the most vulnerable groups in our community. In our view, taking this action would ameliorate or avoid some of those issues identified in this submission, without compromising the integrity of the public health orders.

4.1. Conversion of all PHO fines issued to children aged 10-17 to formal cautions

The risk of harm to children and young people that might result in pursuing the fines for this relatively small cohort outweigh any risk of either waiving or converting the fines into cautions. We note that pursuing PHO fines issued to children and young people will not only have

¹³ *Public Health Act 2010* (NSW) s 10.

¹⁴ Open letter from Aboriginal Legal Service NSW/ACT, Community Legal Centres NSW, Redfern Legal Service and Public Interest Advocacy Centre to Gladys Berejiklian, *A call to address unjust COVID-19 fines* (15 September 2021) <<https://piac.asn.au/2021/09/16/open-letter-a-call-to-address-unjust-covid-19-fines/>>; Open Letter from Aboriginal Legal Service NSW/ACT, Community Legal Centres NSW, Redfern Legal Service and Public Interest Advocacy Centre to Damien Tudehope and Mark Speakman, *A call for an immediate pause on the enforcement of COVID-19 fines* (6 December 2021) <<https://piac.asn.au/2021/12/07/open-letter-civil-society-organisations-call-for-an-immediate-pause-on-the-enforcement-of-covid-19-fines/>>.

adverse effects on those children, but have the potential to have significant harmful effects on their families, and on their relationships with their families.¹⁵ The deleterious mental health effects of the pandemic are well-documented. In our view this ought to be a relevant factor in deciding to convert PHO fines issued to children to cautions.

We note that the existing legislative framework would enable the implementation of this measure.¹⁶

4.2. Revenue NSW should establish a formal pathway for review of PHO fines, including re-examination of certain refused PHO fines

In addition to the suggested measure at 4.1, we suggest that Revenue NSW should establish an alternative resolution process for PHO fine reviews to ensure that they are dealt with appropriately, and a formal pathway to have certain refused PHO fine reviews scrutinised on request.

Section 24E(2) sets out those circumstances in which Revenue NSW must withdraw a penalty notice.

In addition to those circumstances already identified in s 24E(2)(d), additional circumstances should flag individuals as prioritised for review (or a further review), including requests based on a supported claim that the fine was incorrectly issued,¹⁷ as well as circumstances of particular vulnerability such as housing instability, hardship, bereavement, serious illness and being affected by domestic and family violence.

The Law Society submits that the reviewing officer should adopt a presumption in favour of exercising s 24E(3) discretion where a PHO fine review request has been received raising any unfairness in the issue of the fine, for the reasons set out below.

PHO fines are an unusual enforcement instrument. Penalty notices are ordinarily utilised as a tool for managing low-level, status offences or regulatory offences, not offences of this complexity carrying maximum penalties of \$11,000 or 6 months imprisonment.

¹⁵ Christopher Knaus, 'Almost 3,000 children in NSW hit with fines of up to \$5,000 for minor Covid rule breaches', *The Guardian* (Online, 16 December 2021) <<https://www.theguardian.com/australia-news/2021/dec/16/almost-3000-children-in-nsw-hit-with-fines-of-up-to-5000-for-minor-covid-rule-breaches>>.

¹⁶ The existing legislative framework established by Division 2 of the *Fines Act 1996* (NSW) allows for this measure to be taken at the discretion of Revenue NSW as the reviewing agency.

- Section 19A confers a discretion on an officer authorised to issue a penalty notice to give a person an official caution instead of issuing a penalty notice, taking into account the applicable guidelines.
- The Attorney-General (NSW) *Caution Guidelines under the Fines Act* state that matters to be taken into account when deciding whether it is appropriate to give a person a caution include that "the person is a child (under 18)".
- Section 24A(2)(e) provides that a reviewing agency "must withdraw a penalty notice if it finds ... an official caution should have been given instead of a penalty notice, having regard to the relevant guidelines under s 19A".
- Section 24G provides that, "if a reviewing agency withdraws a penalty notice, following a review under this Division or otherwise, it may, if it considers it appropriate to do so, give an official caution to the person in accordance with Division 1A as if it were an appropriate officer."
- Section 24H of the *Fines Act 1996* provides that a reviewing agency has an unfettered power to "review a decision to issue a penalty notice, or withdraw a penalty notice, on its own motion."

¹⁷ We understand that outcome letters refusing reviews for PHO fines frequently base refusal of the review on the fact that the issuing officer determined an offence had been committed at the time. In our view, if this is the only ground for refusal, given the extraordinary circumstances, it is in the interests of the rule of law and good public administration to make available an accessible and speedy avenue for review.

The offence-creating provision (s 10 *Public Health Act 2010*) and the ministerial directions made by order pursuant to ss 7, 8 and 9 of the *Public Health Act* are complex. Further, as noted above, the public health orders in force during the Delta outbreak were amended over 70 times, sometimes multiple times in a single day. Given the rapid amendments and the complexity of the public health orders, it is unsurprising that legal services have identified large numbers of PHO fines that were incorrectly issued by police.

Given the unusual nature of PHO fines, the circumstances surrounding their issuance, the legal complexity underlying legislation and the increased risks accompanying court-election for individuals, we suggest that establishing a specialised alternative review pathway would likely attenuate the injustice and hardships experienced by some individuals, and on balance create efficiencies. We note that a person is entitled to only one review request under the *Fines Act*. If a review is refused, their only options are to elect to have the fine determined by a court or to accept the fine. Revenue NSW data shows that 2932 people have court-elected in the period 1 March 2019 to 28 February 2022. This is not an insubstantial addition to the Local Court's caseload.¹⁸ An alternative review pathway would also alleviate pressures on the court system, and be consistent with good public administration.

Finally, we acknowledge and note particularly the critical role played by the legal assistance sector in assisting individuals affected by PHO fines. We note that the ALS COVID-19 Legal Assistance Clinic is only funded until 30 June 2022. It is anticipated that the functions played by this clinic will continue to be needed beyond that date. If the Government does implement an alternative review pathway, in order for this avenue to be effective, we urge that legal assistance services be adequately resourced to support individuals through that process, including to provide outreach services.

The Law Society thanks you for your consideration, and would be pleased to discuss further any aspect of these submissions if that would assist. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,



Joanne van der Plaat
President

CC **The Hon. Mark Speakman SC, Attorney General**
 The Hon. Damien Tudehope, MLC, Minister for Finance
 The Hon. Ben Franklin MLC, Minister for Aboriginal Affairs

¹⁸ Revenue NSW, *COVID-19 offences* (DSF 019, 1 February 2022) <<https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics/COVID-19-offences-DSF-019.xlsx>> (updated 1 March 2022).