

CHILDREN AND COVID-19 FINES IN NSW

2024

IMPACTS AND LESSONS FOR THE FUTURE USE OF PENALTY NOTICES



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2. EXECUTIVE SUMMARY

2.1. Introduction

Penalty notices are the most common way through which children come into contact with the criminal justice system.¹ This report shows how the penalty notice regime implemented in New South Wales (NSW) during the COVID-19 pandemic, and intensive policing that involved high-volume issuance of penalty notices, were unsuitable for achieving positive public health outcomes for children. We analyse statistical data and interview responses from lawyers and youth workers to show how COVID-19 penalty notices impacted children (i.e. persons under 18 years of age) in NSW. We also make observations regarding the use of penalty notices for children more generally.

2.2. Children fined for breaching public health orders

In NSW, penalty notices (referred to colloquially as on-the-spot fines or, in other jurisdictions, infringement or expiation notices) played a significant role as a mechanism to enforce compliance with public health orders (PHOs) during the COVID-19 pandemic. From the commencement of the enforcement of PHOs in March 2020 until September 2022, 3,628 children in NSW received penalty notice fines for suspected breaches of COVID-19 PHOs.² More than half of these penalty notice fines were fixed at \$1,000, with some children receiving fines as high as \$5,000.³ By comparison, the maximum fine a child can receive when found guilty of an offence in the NSW Children's Court is \$1,100.⁴ Children were liable to the same penalty notice fine as adults for almost all PHO offences, with the exception of two general age-based offences that concerned the failure to wear a face covering.⁵

¹ David Brown, Chris Cunneen and Sophie Russell, "It's All about the Benjamins": Infringement Notices and Young People in New South Wales' (2017) 42(4) *Alternative Law Journal* 253, 255.

² This refers to the number of infringement notice issued to 10-17 years for a COVID-19 related breach of the Public Health Act 2010 between March 2020 and September 2022. See NSW Bureau of Statistics and Research (BOCSAR), 'Number of persons of interest (POIs) aged 10-17 proceeded against by NSW Police for a COVID-19 related breach of the Public Health Act 2010, by single year age category, method of proceeding and month' (2022, reference:23-22117), as represented in Graph 9.

³ Redfern Legal Centre, 'Over \$2.1 million in COVID-19 fines issues to children' (Media Release, 16 November 2021); Christopher Knaus, 'Almost 3,000 children in NSW hit with fines of up to \$5,000 for minor Covid rule breaches', *The Guardian Australia* (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>>.

⁴ *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c).

⁵ For these two offences, the penalty notice amount for alleged offenders aged 16 or 17 was reduced to \$80, and the penalty for alleged offenders aged between 12 and 15 was reduced to \$40: see Part 6.2 of this Report.

The PHOs under which children received COVID-19 penalty notices were created, modified, and repealed at a frenetic pace — 266 principal and amending PHOs were issued between 15 March 2020 and 31 January 2022,⁶ and on average, a PHO was introduced or amended every 1.5 days during the Delta wave.⁷ The frequent changes made it especially hard for children to understand the rules, and contributed to errors in police decisions that a person had breached a PHO. One interviewee told us:

I'm of the view based on our casework that police got the law wrong and many fines were issued unlawfully. And therefore, you have kids working off COVID fines who probably shouldn't have been issued with one in the first place.

2.3. Impact of penalty notices on vulnerable cohorts

Interviewees reported their experiences of COVID-19 penalty notices being disproportionately issued to Aboriginal and Torres Strait Islander children, children with cognitive impairments or intellectual disabilities, and those experiencing socio-economic disadvantage, unsafe home environments, homelessness, or living in out-of-home care. Many of these children lack the capacity to pay expensive fines. According to one interview participant, it was:

shocking to see how rapidly people were being plunged into fine debt and how distressing this was ... I think it's confronting for anyone to be handed a ticket with a thousand dollars price tag on it, but when you're already living on the bread line ... that's magnified.

Hostile police-children interactions during the pandemic, large fine debts, and fine enforcement actions also resulted in children forming negative attitudes towards police and the law, and in some instances, prolonging their contact with the criminal justice system.

Our statistical analysis reveals that children living in relatively socio-economically disadvantaged suburbs were over-policed during the pandemic. More than half (16) of the 'top 30' suburbs (the suburbs where children received the highest number of penalty notices issued in the period 1 March 2020 to 4 June 2022) have a SEIFA disadvantage percentile of less than 25%. None of the 'top 30' suburbs are located within Sydney's wealthier enclaves of the Eastern Suburbs, North

⁶ NSW Ombudsman, *The COVID 19 Pandemic: Second Report*. A special report under section 31 of the Ombudsman Act 1974 (7 September 2022) 62.

⁷ Ibid 20.

Shore, Northern Suburbs or Northern Beaches. All of the ‘top 30’ suburbs contain a train station, suggesting that train stations may have been ‘hotspots’ for police-child interactions during the pandemic.⁸

2.4. Inadequate use of diversionary options, especially during Delta Wave

The issuance of COVID-19 penalty notices to children peaked in the period July to September 2021, which coincided with the Delta Wave, and also, with more severe restrictions on residents in local government areas (LGAs) located in western and south-western Sydney. This three-month period saw a hardening of police enforcement action and a reduced use of diversionary options for children. Penalty notices comprised 59% of enforcement actions during the Delta Wave, and a further 5% of instances involved issuance of a court attendance notice (CAN). The COVID-19 penalty notices issued to children in this three-month period comprised 73% of the 3,268 COVID-19 penalty notices issued in the 2.5 years from March 2020 to September 2022. Eight of the ‘top ten’ LGAs where children received the highest number of COVID-19 penalty notices in the period April 2021 to March 2022 were ‘areas of concern’ that experienced tougher lockdown restrictions than other NSW LGAs.⁹

2.5. Penalty notices should not be issued to children

We recommend ending the issuance of penalty notices to children in NSW. As one interviewee said: ‘Children should just not be fined. It’s not an appropriate penalty.’

The reasons for this recommendation include that children do not earn enough to pay fixed penalty notice fines, fine amounts are not adjusted to reflect the financial means of disadvantaged recipients, penalty notices are not an effective deterrent when children cannot, and often do not, pay the fines attached to them, fines compound disadvantage, and penalty notices are inconsistent with the juvenile justice objective of diverting children from the criminal justice system.

Our analysis of approaches in jurisdictions other than NSW shows that some jurisdictions within and outside Australia either did not allow COVID-19 penalty notices to be issued to children (as was the case in Tasmania and the United Kingdom), or alternatively, did not issue any COVID-

⁸ See Part 7 of this Report.

⁹ Ibid

19 penalty notices to children despite legislation that allowed children aged 16 or over to be fined for the offence of non-mask-wearing (as occurred in the ACT). The best approaches to the policing and enforcement of COVID-19 rules with respect to children were in jurisdictions that encouraged engagement with, and education of, children about appropriate public health behaviour over punitive mechanisms and prohibited the issuing of penalty notices to children.¹⁰

In early 2022, a coalition of legal organisations called on the NSW Premier to withdraw penalty notices issued to children as a result of suspected breaches of COVID-19 orders, and issue cautions in their place. The coalition argued that children had little capacity to pay the excessive fines or navigate the complex fines enforcement system.¹¹ As at the time of writing this Report, the NSW Government has not agreed to the request to withdraw all COVID-19 penalty notices issued to children.¹²

¹⁰ See Part 9 of this Report.

¹¹ Christopher Knaus, 'NSW Government Suggested Children as Young as 10 Could Work off \$1,000 Covid Fines', *The Guardian Australia* (online, 20 July 2022) <<https://www.theguardian.com/australia-news/2022/jul/21/nsw-government-suggested-children-as-young-as-10-could-work-off-1000-covid-fines>>.

¹² Some COVID-19 penalty notices have been withdrawn as a result of litigation in the Supreme Court of NSW. See discussion in Part 10 of this Report.

3. FINDINGS AND RECOMMENDATIONS

3.1. Findings

Capacity to pay fines

Children overall are a vulnerable cohort who generally lack capacity to pay fines, largely due to their inability to independently earn money. Fine amounts for NSW COVID-19 PHO breaches were far too high for children to pay, and this caused significant hardship and distress. High fixed fines were unfair in that they excessively punished those with little or no means to pay the debt.

Compliance with orders

Children who were socio-economically disadvantaged, many Aboriginal and Torres Strait Islander children, children in out-of-home care, children with cognitive impairments, mental health conditions or disabilities, and those from unstable, unsafe or overcrowded home environments, experienced difficulties over and above other children in complying with COVID-19 PHO requirements. In particular, these difficulties impacted the ability for such children to comply with the order that a person must not be away from their residence without a 'reasonable excuse'. We also found that police applied overly-narrow interpretations of the 'reasonable excuse' provisions in the *Public Health Act* — police failed to take into account how a child's special circumstances, such as their mental health condition, cognitive impairment or disability, or living in an unsafe home environment, meant that they had legitimate reasons to be away from their homes.

Uneven enforcement of orders and net-widening

Uneven enforcement of PHOs against children occurred not only as a result of policing practices during the COVID-19 pandemic, such as the centring of the policing of PHO compliance around major public transport stations in western and south-western Sydney, but also because of PHOs that singled out 'areas of concern' in western and south-western Sydney. Children in 'areas of concern' who were subjected to the strictest lockdown conditions and more coercive policing felt particularly aggrieved by what they perceived to be unfair treatment along class lines. Lawyers reported this to be 'more of the same' differential policing which these children had previously experienced.

Heavy-handed, zero-tolerance and unfair policing practices during the pandemic contributed to net widening. Through the policing of PHOs, children who would not ordinarily come into contact

with the criminal justice system were ensnared in its net. Heavy-handed policing practices also contributed to children and their families forming negative perceptions of police and the legal system and entrenching existing hostile relationships between police and over-policed sections of the community.

Insufficient use of diversionary options

Police officers did not always apply diversionary options, such as informal warnings, or cautions or warnings under the *Young Offenders Act 1997* (NSW) (YOA), as a first option for children suspected of breaching PHOs. 'Zero-tolerance' policing practices encouraged by the NSW Police Commissioner during the Delta wave were inconsistent with youth justice principles that promote the diversion of children away from the criminal justice system.

Difficulty obtaining legal advice

The closure or restricted operation of support services during the COVID-19 pandemic made it difficult for lawyers and youth workers to engage with children to explain the content of complex, ever-changing PHOs, as well as to provide timely advice in relation to penalty notices that had been issued to children. In addition, there was (and continues to be) no obligation for police to arrange for a child to access legal advice before issuing a penalty notice. As a result, many children lacked information about their legal rights and alternatives. Penalty notice review processes were resource-intensive for community workers and lawyers working in the legal assistance sector, causing some to recommend that children apply for a work and development order (WDO) even in circumstances when there might have been valid grounds for review of the decision to issue a penalty notice.

Navigating the internal review system and court-election

The opt-in internal review system of Revenue NSW does not cater well for children. Children are not provided clear verbal and written instructions about how to apply for an internal review when issued with a penalty notice; nor are they informed that it may be more advantageous for them to first seek an internal review rather than court-elect. In many instances, court elections caused significant stress due to the inability of the applicant to 'un-elect'. This was especially the case when a child later learned that, if they had not court-elected, they might have been able to have the fine reviewed or have accessed alternative mechanisms for dealing with the fine (e.g. WDOs).

Children found it difficult to write review applications that provided valid grounds for review, even when such grounds may have existed, particularly in the absence of legal advice. Interview participants raised concerns about independence, transparency, and the suitability of Revenue NSW to perform the dual functions of reviewing fines and collecting fines. This included concerns about the legal qualifications and fact-finding practices of Revenue NSW decision-makers, and a perception that decision-makers worked too closely with NSW Police. Participants also expressed frustration that some Revenue NSW decision-makers did not appear to take into account children's cognitive impairments, mental health conditions and disabilities.

Work and Development Orders

Work and Development Orders were generally viewed positively by interview participants as a fine amelioration method, but it was emphasised that the availability of the WDO scheme did not justify the imposition of penalty notices that should not have been issued in the first place.

3.2. Recommendations

Based on the findings in this Report, we make the following recommendations:

- 1. Where Public Health Orders are created, the NSW Government should produce age-appropriate resources to educate children and young people on the content of the PHOs. Any government public health campaign where children are the audience should be focused on education and encouraging cooperation.*
- 2. The limit on dealing with a child by way of Young Offenders Act caution for a maximum of three occasions should be removed.*
- 3. The NSW Government should convert any COVID-19 penalty notices issued to children that are still outstanding to Fines Act cautions or alternatively, withdraw them. This includes penalty notices that have been 'written off' but remain on children's Revenue NSW customer records as penalty notices.*
- 4. Every penalty notice issued in NSW should clearly and unambiguously identify the suspected offence with reference to the offence-creating provision, the main elements of the offence, and how the facts constitute the alleged offending with reference to the time, date, location, and circumstances of the alleged offending.*

5. *The NSW Government should consider prohibiting penalty notices from being issued to children. This should occur in a way that ensures that children are not subsequently exposed to even more punitive enforcement actions, such as the laying of criminal charges for the same behaviour.*

Based on the criminogenic and pernicious features of penalty notices, and their infringement of international children's rights principles, we are of the firm opinion that penalty notices should not be available for children. However, if the NSW Government determines to continue issuing penalty notices to children, it is recommended that:

6. *The age at which children can receive penalty notices should be raised to 16 — an age at which children may earn a modest income.*
7. *Any penalty notice fines issued to children should be capped at a realistic amount (such as \$40) to reflect children's significantly reduced earning capacity.¹³*
8. *The issuing officer should be required to consider whether a child has a cognitive impairment, mental illness, a disability, was experiencing homelessness, or other relevant factors that may have contributed to their alleged offending or their ability to understand the offence. Penalty notices should not be issued to such children.¹⁴*
9. *The issuing of any penalty notice should be accompanied by clear, age-appropriate oral and written instructions that inform children in simple language about the nature of the suspected offence, their rights to seek an internal review or court-elect, the consequences*

¹³ The NSW Law Reform Commission, in its report on *Penalty Notices* (Report 132, 2012), recommended that penalty notices should be available for children older than 14, but that amounts should generally be set at 25% of the penalty amount for adults. We believe that a low fixed numerical dollar cap for a penalty notice, such as \$40, would provide a more predictable and fairer penalty in case of children.

¹⁴ This recommendation accords with the principles for internal fines review under s 43E(2)(d) of the *Fines Act* according to which a reviewing agency *must* withdraw a penalty notice if it finds that 'the person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless— (i) to understand that the person's conduct constituted an offence, or (ii) to control such conduct'. It also accords with the Attorney General's 'Internal Review Guidelines under the *Fines Act 1996* (NSW Communities and Justice, undated); and the Attorney General's 'Caution Guidelines under the *Fines Act 1996*' (NSW Communities and Justice, undated) – which, although they do not apply to police officers, apply to other issuing authorities (such as transport officers).

of court-electing, payment options in circumstances of hardship, the consequences of unpaid fines, and avenues to access independent legal advice.

10. Internal NSW Police guidelines, the Young Offenders Act and the Fines Act should clarify that, for offences for which a penalty notice is available for children: i) the issuance of a penalty notice should be a second last resort reserved only for serious repeated behaviour; and ii) the default response should be an informal warning or Fines Act caution.

11. Work and Development Orders should be broadened to include more eligible activities.

12. Revenue NSW should adopt penalty notice review guidelines that relate specifically to children, similar to those adopted in Victoria. Guidelines should require decision-makers to consider a child's best interests; and direct decision-makers to take into account age-related considerations including a child's level of maturity vis-à-vis adults, children's diminished ability to understand or control their conduct, and what can reasonably be expected of children of different ages. Review guidelines for children should encourage decision-makers to adopt a flexible approach, and to reconsider whether issuing a formal caution would better promote the purposes of diversion and rehabilitation. Any reasons provided by decision-makers for their decisions should be age-appropriate, providing reasons to the child that clearly explain the relevant offence and how the conduct constitutes an offence.

4. BACKGROUND

4.1. Report aims and approach

This Report was prepared in response to a request from Redfern Legal Centre (RLC), the Public Interest Advocacy Centre (PIAC), and the Aboriginal Legal Service (NSW/ACT) Limited, organisations whose casework during the period in which COVID-19 penalty notices were enforced had alerted them to the experience of children in NSW during the pandemic.

Our brief was to document the ways in which penalty notices for non-compliance with COVID-19 PHOs in operation during 2020-2022 impacted children in NSW and identify lessons for the future use of penalty notices as a method of ‘punishment’ for children.¹⁵ Consistent with the United Nations Convention on the Rights of the Child (UNCRC), we define a child as a person under the age of eighteen.¹⁶

In fulfilment of this brief, the following tasks were undertaken:

- i. we completed literature reviews on: a) challenges faced by children during the COVID-19 pandemic; and b) the use of penalty notices as a method of punishment for children;
- ii. we examined the making of PHOs pursuant to the *Public Health Act 2010* (NSW), focusing on whether and how penalty notices for alleged non-compliance took account of the circumstances of children;
- iii. we analysed the available statistical data on how and where COVID-19 PHOs were enforced against children in NSW, focusing on the issuance of penalty notices;
- iv. we conducted interviews with lawyers and allied professionals with experience representing or working with child clients who received COVID-19 PHO penalty notices during the pandemic (2020-2022); and
- v. we undertook a targeted comparative analysis of how selected other jurisdictions (both within Australia and internationally) approached the task of encouraging or coercing

¹⁵ In preparing this report we have attempted to complement rather than duplicate previous reports that have addressed COVID-19 policing and fines in NSW. See, e.g., Luke McNamara, Jacky Gan, Samuel Mullins, Chloe Waine and Chelsi Williams, *COVID-19 Criminalisation in NSW: A ‘Law and Order’ Response to a Public Health Crisis?* UNSW Centre for Crime, Law and Justice (November 2022); NSW Ombudsman (n 6); NSW Ombudsman, *2020 hindsight: the first 12 months of the COVID-19 pandemic*. A special report under section 31 of the Ombudsman Act 1974 (22 March 2021). See also Sean Mabin, ‘Penalty Notices, Policing and Public Health: Examining the Nature and Impacts of Criminalisation in the COVID-19 Pandemic Response’ (2023) 12(3) *International Journal for Crime, Justice and Social Democracy* 108; and Tamar Hopkins and Gordana Popovic, *Policing COVID-19 in Victoria: Exploring the impact of perceived race in the issuing of COVID-19 fines during 2020* (Inner Melbourne Community Legal, June 2023).

¹⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1 (UNCRC); see also *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

children to comply with public health restrictions during the pandemic, to determine whether a 'better' or 'best' practice could be distilled.

The structure of this Report reflects each of these research activities.

5. LITERATURE REVIEWS

5.1. Impacts of the COVID-19 pandemic on children

Key impacts on children during the pandemic that we identified included those relating to mental health, cognitive impairment, disability and pre-existing chronic conditions, domestic and family violence, social disruption and socio-economic disadvantage. These impacts were exacerbated for many children who experienced concomitant vulnerabilities, including those who already experienced 'poorer health and well-being outcomes than the general population, are at an increased risk of harm, have more complex needs and have increased barriers to accessing health and support services.'¹⁷

5.1.1 Mental health

The COVID-19 pandemic and lockdowns had a generally negative effect on the mental health of children and adolescents. A meta-analysis of twenty-nine studies on child and adolescent mental health during the pandemic found that 25.2% of youth were experiencing clinically elevated depression symptoms, and 20.5% were experiencing clinically elevated anxiety symptoms.¹⁸ This is a significant increase from the pre-pandemic data, which showed the number of young people experiencing clinically elevated depression and anxiety symptoms to be 12.9% and 11.6% respectively.¹⁹ School closures and loss of routine, long periods of social isolation, lack of normally available resources, and increased use of technology have all been associated with deteriorating mental health during the pandemic.²⁰ However, one study suggested that a majority of adolescent participants reported no change in mental health in terms of feelings of anxiety, depression, and loneliness.²¹ Another found a decrease in students' depressive symptoms, with children reporting enjoying having more time at home, with their parents and having freedom over their time.²² These rarer reports of improved youth mental health merely serve as a reminder that children's

¹⁷ See also, Benjamin Jones et al, 'COVID-19 Pandemic: The Impact on Vulnerable Children and Young People in Australia' (2020) 56(12) *Journal of Paediatrics and Child Health* 1851.

¹⁸ Nicole Racine et al, 'Global Prevalence of Depressive and Anxiety Symptoms in Children and Adolescents During COVID-19' (2021) 175(11) *JAMA Pediatrics* 1142, 1148.

¹⁹ *Ibid.*

²⁰ Marcel Almeida et al, 'Editorial Perspective: The mental health impact of school closures during the COVID-19 pandemic' (2022) 63(5) *Journal of Child Psychology and Psychiatry* 608, 609-611.

²¹ Nora Kerekes et al, 'Changes in Adolescents' Psychosocial Function and Well-being as a Consequence of Long-Term COVID-19 restrictions' (2021) 18(16) *International Journal of Environmental Research and Public Health* 8755: 1-22, 15.

²² Mi Xiang, Shohei Yamamoto and Tetsuya Mizoue, 'Depressive symptoms in student during school closure to COVID-19 in Shanghai' (2020) 74(12) *Psychiatry and Clinical Neurosciences* 644, 644.

experiences of the pandemic were diverse, and largely depended on other factors affecting a child's life at the time.²³

Some research found that children who were experiencing mental health problems prior to the pandemic generally experienced an aggravation of their symptoms. For instance, in one Canadian intensive eating disorder program, it was found that patients who attributed COVID-19 and lockdown as triggers for their disorder were more likely to be 'medically unstable' at presentation and require hospitalisation within four weeks of being assessed.²⁴ A separate study found that eating disorder patients expressed serious concern regarding decreased contact and face-to-face accountability with their clinical teams during the pandemic.²⁵ Additionally, children and adolescents with pre-existing obsessive compulsive disorder diagnoses tended to experience an increase in symptom severity, with increased frequency of contamination obsessions and cleaning related compulsions.²⁶ Exposure to significant media coverage encouraging hand washing and emphasising good hygiene practice was deemed to contribute to these intensified symptoms.²⁷ Notably, a number of these studies were conducted in hospital psychiatric settings, indicating that the young people participating in these studies had a severe form of their respective condition. More research may be required assessing how the pandemic impacted the symptoms of young people with less severe diagnoses.

5.1.2 Domestic and family violence

Significant bodies of research have emerged regarding child protection, and family and domestic violence during the COVID-19 pandemic. In Australia, the number of actual allegations of child abuse made to authorised departments generally decreased during the lockdowns and increased once restrictions eased.²⁸ In regards to domestic violence, a survey of 15,000 Australian women conducted by the Australian Institute of Criminology regarding their experience during the pandemic, showed that 22.4% of women in cohabitating relationships experienced 'emotionally abusive, harassing and controlling behaviors', and 8.8% had experienced physical or sexual

²³ Almeida et al (n 20).

²⁴ Wendy Spettigue et al, 'The impact of COVID-19 on adolescents with eating disorders: a cohort study' (2021) 9(1) *Journal of Eating Disorders* 65:1-8, 6.

²⁵ Fernando Fernandez-Aranda et al, 'COVID-19 and implications for eating disorders' (2020) 28(3) *European Eating Disorders Review* 237, 241.

²⁶ Yasar Tanir et al, 'Exacerbation of obsessive compulsive disorder symptoms in children and adolescents during COVID-19 pandemic' (2020) 293(6) *Psychiatry Research* 113363:1-5, 3.

²⁷ Ibid 4.

²⁸ Australian Institute of Health and Welfare, 'Child protection in the time of COVID-19' (Media Release, 15 January 2021) 4.

violence.²⁹ The study found that ‘the COVID-19 pandemic appears to have coincided with the onset of physical or sexual violence or coercive control for many women. For other women, it coincided with an increase in the frequency or severity of ongoing violence or abuse.’³⁰

The decrease in child abuse statistics during the COVID-19 pandemic seems to be a common theme emerging in statistics around the world.³¹ Despite such seemingly promising data, scholars have generally argued that the statistics are not an accurate representation of the true prevalence of child abuse during the pandemic.³² Similarly, despite the increase in calls to domestic violence hotlines in some countries including Australia in the early stages of the pandemic, some have argued that because survivors have largely been forced to isolate alongside their abusers, safe opportunities to report have been minimised, and these statistics remain a significant underrepresentation of domestic violence incidents during the pandemic.³³

A common justification for these misleading statistics is that survivors of domestic violence or child abuse were presented with fewer safe reporting opportunities during the pandemic. Stay-at-home restrictions meant that survivors lacked privacy when accessing services remotely due to the more frequent presence of the perpetrator in the home.³⁴ In terms of child abuse, school closures limited opportunities for educators to observe potential signs of child abuse and fulfill their mandatory reporting obligations.³⁵ The Australian Institute of Health and Welfare found that in all Australian states and territories, the number of child abuse notifications coming from schools

²⁹ Hayley Boxall, Anthony Morgan and Rick Brown, ‘The prevalence of domestic violence among women during the COVID-19 pandemic’ (Australian Institute of Criminology, July 2020), 6.

³⁰ *Ibid* 16.

³¹ Robert Sege and Allison Stephens, ‘Child physical abuse did not increase during the pandemic’ (2022) 176(4) *JAMA Pediatrics* 338; Barbara Chaiyachati et al, ‘Emergency Department child abuse evaluations during COVID-19: A multicenter study’ (2022) 150(1) *Pediatrics* e2022056284:17-19; Paulo Martins-Filho et al, ‘Decrease in child abuse notifications during COVID-19 outbreak: A reason for worry or celebration?’ (2020) 56(12) *Journal of Paediatrics and Child Health* 1980; Joanna Garstang et al, ‘Effect of COVID-19 lockdown on children protection medical assessments: a retrospective observational study in Birmingham, UK’ (2020) 10(9) *BMJ Open* e042867:1-6.

³² Elizabeth Thomas et al, ‘Spotlight on child abuse and neglect response in the time of COVID-19’, 2020 5(7) *The Lancet Public Health* e371:1-1, 1.

³³ Jennifer Neil, ‘Domestic violence and COVID-19: Our hidden epidemic’, (2020) 49(25) *Australian Journal of General Practice* 32539247: 1-2.

³⁴ Naomi Pfitzner, Kate Fitz-Gibbon and Silke Myer, ‘Responding to women experiencing domestic and family violence during the COVID-19 pandemic: exploring experience and impacts of remote service delivery in Australia’ (2022) 27(1) *Child & Family Social Work* 30. Those in situations of domestic violence will generally refrain from calling emergency services until the perpetrator is no longer in the household, a far rarer occurrence during what were prolonged periods of isolation and stay-at-home orders; Andrew Campbell, ‘An increasing risk of family violence during the COVID-19 pandemic: Strengthening community collaborations to save lives’ (2020) 2 *Forensic Science International: Reports* 100089:1-3, 2.

³⁵ Stephen Teo and Glenys Griffiths, ‘Child protection in the time of COVID-19’ (2020) 56(6) *Journal of Paediatrics and Child Health* 829, 839.

decreased in April 2020, and then increased in May or June when restrictions eased.³⁶ Reduction of staff and funding at child helplines or child protective services in some countries has been another explanation for deceptively low numbers of child abuse reports.³⁷ Alternatively, where parents may have historically taken their child to a medical professional ‘as a “cry for help”’, the risk of contracting COVID-19 in these settings may have deterred such presentations, or overworked healthcare professionals may have been more likely to miss tell-tale signs of abuse.³⁸

Scholars have proposed various justifications for the likely increased incidence of child abuse and domestic violence during the pandemic. Prolonged periods of forced close proximity between victims and abusers, reduction in victims’ opportunity for external contact or escape, and accumulating COVID-19 related stressors are all risk factors for domestic violence.³⁹ While heightened stress levels due to unemployment, income issues, and social disconnect alone can be problematic, these cumulative stressors can be a precipitating factor for alcohol abuse, ‘a commonly reported risk factor for family violence’.⁴⁰ Indeed, there have been recorded correlations between natural disaster incidents, and increased rates of domestic and family violence, indicating that external stressors of this nature can act as a risk factor.⁴¹

Ultimately, the general consensus of the literature is that children were more likely to find themselves in situations of child abuse or family violence during the COVID-19 pandemic.

5.1.3 Disability and pre-existing chronic conditions

School closures in response to the pandemic adversely affected many children with disabilities. While children with disabilities have diverse learning needs, many children in this cohort benefit from education services being provided in-person rather than at-home.⁴² Two key challenges faced by children with disabilities who were learning remotely were: the difficulty of adapting to a changed learning environment and routine, and the inability of under-resourced schools to provide

³⁶ Australian Institute of Health and Welfare (n 28) 4.

³⁷ Martins-Filho et al (n 31) 1980.

³⁸ Teo and Griffiths (n 35) 839.

³⁹ Matteo Antonio Sacco et al, ‘The impact of the COVID-19 pandemic on domestic violence: The dark side of home isolation during quarantine’ 2020 88(2) *Medico-Legal Journal* 71, 72.

⁴⁰ Campbell (n 34) 1-2.

⁴¹ Andrew Campbell, ‘Improving the prevention of family violence during (and after) disaster: Lessons learned from the COVID-19 pandemic’ (2021) (3) *Forensic Science International Reports* 100179:1-6, 4.

⁴² UNICEF, ‘Policy Brief: The Impact of COVID-19 on children’ (15 April 2020) 12.

adequate support or accommodations.⁴³ Further, a number of parents of children with a disability reported keeping their child at home even after school closures had ended, due to concerns over their child's increased susceptibility to becoming seriously ill if they were to contract COVID-19, leading to further risks of falling behind at school.⁴⁴ Children with chronic health conditions who had to undertake enhanced social distancing measures were likely to experience higher levels of distress and isolation, as well as difficulty accessing services, support, and supervision.⁴⁵

A smaller number of parents reported positive experiences with remote learning for their children with disabilities, for reasons such as their child being less anxious or distracted in the home, or teachers providing effective support.⁴⁶ Many children with disabilities find the school environment distressing, leading some parents to observe their child displaying significantly less anxiety and improved learning with fewer distractions while learning remotely.⁴⁷ A number of children with autism, for instance, thrived while learning at home, despite the initial transition into online learning being challenging.⁴⁸ During the remote learning period, many of the children and parents surveyed reported that the children were calmer, more communicative, more comfortable, and were developing confidence in their 'ability to self-regulate' and learn independently.⁴⁹ Learning in the familiar home environment, and having freedom without a fixed schedule, aligned well with the needs of some children with autism.⁵⁰ The variable experiences of children with disabilities throughout the pandemic can be attributed to the diverse nature of children's disabilities, and intersecting disadvantages such as poverty, mental health conditions, or not having caregivers in a position to provide support as required.⁵¹

5.1.4 Social disruption

A key theme in the emerging research is the social and developmental issues that have accompanied the disruption caused by the COVID-19 pandemic and consequent regulations. School closures deprived children of key social lessons, such as social skills and interaction,

⁴³ Kate Averett, 'Remote Learning, COVID-19, and Children with Disabilities' (2021) 7(1) *International Journal of Environmental Research and Public Health* 2332-8584:1-12, 4-7; Melanie Heyworth et al, "It just fits my needs better": Autistic students and parents' experiences of learning from home during the early phase of the pandemic' [2021] 6 *Autism & Developmental Language Impairments* 2396-9415: 1-20, 7-9.

⁴⁴ Helen Dickinson et al, 'Not even remotely fair: experiences of students with disability during COVID-19' (Report on CYDA's Education Survey 2020, July 2020) 20.

⁴⁵ Jones et al (n 17) 1852.

⁴⁶ Averett (n 43) 7-9.

⁴⁷ Dickinson et al (n 44) 29

⁴⁸ Heyworth et al (n 43) 6.

⁴⁹ Ibid 8-10.

⁵⁰ Ibid 12-13.

⁵¹ Dickinson et al (n 44).

critical thinking and discussion, and exposure to worldviews that are different to those which are displayed in a child's own household (for example, seeing women and men perform roles different to what a child is exposed to in their own household).⁵²

Many academics have also commented on how increased use of technology and exposure to the digital world during the pandemic have contributed to social and developmental issues. Children's screen time during the pandemic increased dramatically, with some reports suggesting it as much as doubled.⁵³ Screen time increases may have been the result of caregivers' difficulty in monitoring children's use of devices, and the fact that children's use of technology 'can give an adult respite during their stressful everyday life'.⁵⁴ However, increased screen time and exposure to the digital world also increases children's risk of exposure to 'inappropriate content and online predators'.⁵⁵ In the period of time in which stay-at-home restrictions were active, there was a significant increase in the amount of abusive or cyberbullying content shared on social media platforms including Twitter and Reddit.⁵⁶

5.1.5 Socio-economic disadvantage

Scholars seem to agree that the aforementioned issues impacted children of lower socioeconomic status more severely.⁵⁷ School shutdowns and remote learning were particularly problematic for children in poverty.⁵⁸ Remote learning is especially disadvantageous for these students who may struggle with reliable internet access, adequate electronic devices, and who rely on food and health services provided at school.⁵⁹

In China, Wen Li et al found that children who were already experiencing socio-economic disadvantage experienced a disproportionate worsening of mental health during the pandemic.⁶⁰ Justifications offered were that children from lower socio-economic areas tended to seek mental

⁵² Gabriel Lemkow-Tovias et al, 'Impact of COVID-19 inequalities on children: An intersectional analysis' (2022) 45(1) *Sociology of Health and Illness* 147, 153.

⁵³ Jason Nagata, 'Screen time use among US adolescents during the COVID-19 Pandemic' (2022) 176(1) *JAMA Pediatrics* 94, 94-5.

⁵⁴ Laura Korhonen, 'The good, the bad and the ugly of children's screen time during the COVID-19 pandemic', (2021) 110(10) *Acta Paediatrica* 2671, 2671.

⁵⁵ UNICEF (n 42) 10.

⁵⁶ Pouria Babvey et al, 'Using social media data for assessing children's exposure to violence during the COVID-19 pandemic' (2021) 116 *Child Abuse and Neglect* 104747:1-14.

⁵⁷ See, eg, Jones et al (n 7); Danielle Dooley, Asad Bhandeally and Megan Tschudy, 'Low-Income Children and Coronavirus Disease 2019 (COVID-19) in the US' (2020) 174(10) *JAMA pediatrics* 922.

⁵⁸ Dooley, Bhandeally and Tschudy (n 57).

⁵⁹ Ibid 922-3.

⁶⁰ Wen Li et al, 'Socioeconomic inequality in child mental health during the COVID-19 pandemic: First evidence from China' (2021) 287 *Journal of Affective Disorders* 8, 9.

health support at school, which had been shut down, and telehealth services were less accessible to those with limited financial resources.⁶¹

5.1.6 Lockdown 'benefits'

While the literature indicated that the COVID-19 pandemic and subsequent lockdowns generally had a negative impact on children, a few studies highlighted some benefits to children. A large study conducted by Nora Kerekes et al, with a sample spanning over five countries of varying socio-economic status, found that the pandemic and Covid-19 restrictions had some positive impacts on young people.⁶² Approximately one third of the sample indicated that Covid-19 restrictions had led to an increase in exercise, and increased feelings of control over their lives.⁶³ The study also found that of those adolescents who changed their alcohol consumption habits, a majority had actually reduced their alcohol intake, though this may have been the result of fewer opportunities to drink socially.⁶⁴ Other possible benefits of the pandemic and consequent restrictions included children having more time to spend with their parents and families, having an opportunity to learn about health and hygiene, and the possible reduction of school-related issues such as bullying.⁶⁵ As such, while evidence of the pandemic's overwhelming negative impact on the lives of children is strong, some may have had more positive experiences.

5.2. Penalty notices and children

The most common way children are documented as coming into contact with the criminal justice system is through receipt of a penalty notice.⁶⁶ In NSW, s 53 of the *Fines Act 1996* (*Fines Act*) stipulates that its penalty notice regime applies to children aged 10 years or over at the time they are alleged to have committed the penalty notice offence.⁶⁷ If the alleged offence is instead dealt with by a court, the proceedings are subject to the *Children (Criminal Proceedings) Act 1987* (NSW).

Children face greater challenges paying penalty notices, navigating the penalty notice system, and fulfilling fine enforcement orders when compared with adults, largely because of their age

⁶¹ Ibid 13.

⁶² Kerekes et al (n 21).

⁶³ Ibid 16-7.

⁶⁴ Ibid 17.

⁶⁵ Peter de Winter et al, 'A safe flight for children through COVID-19 disaster: keeping our mind open' (2020) 179(8) *European Journal of Pediatrics* 1775, 1776.

⁶⁶ Brown, Cunneen and Russell (n 1) 255.

⁶⁷ *Fines Act 1996* (NSW) s 53.

and relative immaturity. These challenges are exacerbated by concomitant vulnerabilities experienced by many child fine recipients.

5.2.1 Capacity to pay

Children are generally financially unable to pay the fines issued to them,⁶⁸ making non-payment less about defiance or refusal to pay and more about inability to pay. The majority of children in NSW attend school full-time, putting a limit on their capacity to work, and most children who do work earn a reduced percentage of the adult minimum wage.⁶⁹ Additionally, many children who come into contact with the criminal justice system are financially disadvantaged, and poverty is often a key contributor to the behaviour that attracts the attention of the police.⁷⁰ In recognition of children's reduced capacity to earn money, in 2012, the NSW Law Reform Commission recommended that while penalty notices should be available for children older than 14, the penalty amount should generally be set at 25% of the amount for adults.⁷¹ However, even when set at 25% of the adult penalty notice amount, fines can still be insurmountable for children. Penalty notice fines can also place an unfair and excessive financial burden on the parents or caregivers of children in low-income families.

5.2.2 Enforcement of unpaid fines

If a penalty notice fine is not paid by the allocated due date, provided that no internal review is in progress, the NSW Fines Commissioner (Fines Commissioner) may make an order for the enforcement of the amount payable under a penalty notice.⁷² Enforcement action may include action against the fine defaulter's licence or vehicle (div 3); civil enforcement such as a property seizure order or garnishee order (div 4), or a community service order if civil enforcement is not or is unlikely to be successful (div 5). A fine defaulter may seek further time to pay. In relation to driver licence sanctions, the driver licence of a fine defaulter must be suspended 'for the balance of the period of the licence' or until the fines are resolved, whichever occurs first.⁷³

⁶⁸ NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices* (Interim Report, October 2006) 22.

⁶⁹ NSW Law Reform Commission (n 12), 326. For example, a 17-year-old who works in a shop is entitled to 60% of the adult pay rate under the relevant award: 'Junior Pay Rates - Fair Work Ombudsman' <<https://www.fairwork.gov.au/pay-and-wages/minimum-wages/junior-pay-rates>>.

⁷⁰ NSW Sentencing Council (n 68) 21.

⁷¹ NSW Law Reform Commission (n 12) 332, 334, 337.

⁷² *Fines Act 1996* (NSW) div 4.

⁷³ *Ibid* s 66.

Section 65 of the *Fines Act* modifies this regime for fines resulting from (non-traffic related) penalty notices issued to a person when they were under 18 years of age. Enforcement action that includes licence suspension, licence cancellation, or cancellation of vehicle registration is not to be taken in respect of such fines.⁷⁴ However, non-traffic related penalty notice fines may still impede a young person's attempt to obtain a learner's permit or provisional licence as a result of restrictions imposed on dealing with Transport NSW due to unpaid fine debt.⁷⁵

Apart from these restrictions on enforcement actions, the general NSW fines enforcement system — administered by Revenue NSW — only accommodates the circumstances of children to a modest extent. Where an adult defaults on a fine they will be liable for additional enforcement costs, with the possibility of further enforcement action where it remains unpaid.⁷⁶ Under s 102A(1)(b) of the *Fines Act*, this additional enforcement cost is to be waived where the original fine was issued for an offence committed while the alleged offender was under the age of 18.⁷⁷ However, the alleged offender is still liable to pay a \$25 enforcement cost for the issue of the fine enforcement order.⁷⁸ Community service orders (CSOs) for children are governed by the *Children (Community Service Orders) Act 1987* (NSW) and a CSO issued to a child must not exceed 100 hours.⁷⁹

5.2.3 Work and Development Orders

As a fine mitigation method, the Fines Commissioner may alternatively write off unpaid fine debts if the fine defaulter fulfils certain conditions (s 101); extend the time for payment (s 100); or make a WDO in respect of the fine defaulter to satisfy all or part of the fine (div 8, sub-div 1). To be eligible for a WDO, the person must fulfil a number of conditions (s 99B), including that they must either have a mental illness; have an intellectual disability or cognitive impairment; be homeless; be experiencing acute economic hardship; or have a serious addiction to drugs, alcohol or volatile substances. Concerns about the use of WDOs as they relate to children are further examined in Part 8 of this Report.

⁷⁴ *Ibid* s 65(3)(a)(ii).

⁷⁵ *Ibid* s 68.

⁷⁶ *Ibid* pt 4.

⁷⁷ Section 102A of the *Fines Act 1996* (NSW) entitled 'liability of minors for enforcement costs', was introduced in 2004 via the *Fines Amendment Act 2004* (NSW).

⁷⁸ *Fines Regulation 2020* (NSW) cl 4(1)(a).

⁷⁹ *Fines Act 1996* (NSW) s 81.

5.2.4 Compounding disadvantage

The imposition of fines can be ‘a contributing factor to entrenching long-term disadvantage’ for children.⁸⁰ Children can accrue very serious amounts of fine debt at a time in their lives when they are not fully able to understand ‘the consequences of the resulting debt’.⁸¹ Fines also compound pre-existing disadvantage, causing disproportionate detriment to children who are already in vulnerable situations.⁸² Young people experiencing homelessness and those living in unsafe or hostile home environments are particularly susceptible to both being issued fines, and facing the additional consequences of their eventual default on those fines.⁸³ For example, during the pandemic, a 15-year-old boy dealing with mental health and developmental issues began staying with friends, after having left his family home due to escalating tension and conflict in the household.⁸⁴ When questioned by police, he admitted that he had not been staying at home, and was fined \$1,000 for breach of the NSW stay-at-home orders.⁸⁵

Accumulated debt from fines and additional costs incurred when those fines go unpaid (i.e. enforcement costs) can entrench young people further into poverty.⁸⁶ When a child has no or limited access to money, they may be compelled to choose between repaying their debts and affording basic living necessities.⁸⁷ Additionally, unpaid fine debt can lead to problems dealing with Transport NSW as detailed above, and the lack of a driver licence can make gaining secure employment more difficult, further exacerbating economic disadvantage.⁸⁸ These impacts can be especially acute for people living in rural and regional areas with limited public transport infrastructure. Ultimately, fining children can escalate economic disadvantage and punish young people well beyond their childhood years.

⁸⁰ NSW Law Reform Commission (n 12) 327.

⁸¹ Legal Aid NSW, Submission PN11 to NSW Law Reform Commission, *Consultation Paper 10: Penalty Notices* (30 November 2010) 18.

⁸² See generally NSW Sentencing Council (n 68).

⁸³ *Ibid* 32.

⁸⁴ Jane Sanders, ‘Homeless young people and COVID fines in New South Wales’ (2022) 35(10) *Parity* 37, 37.

⁸⁵ *Ibid*.

⁸⁶ Katherine Beckett and Alexes Harris, ‘On Cash and Conviction: Monetary Sanctions as Misguided Policy’ (2011) 10(3) *Criminology and Public Policy* 509, 517.

⁸⁷ *Ibid*.

⁸⁸ Legal Aid NSW (n 81) 19; Julia Quilter and Russell Hogg, “[I]f It’s a Public Health and Safety Thing ... Why Not Just Give the Kids Helmets?”: Policing Mandatory Helmet Laws in New South Wales’ (2021) 44 *University of New South Wales Law Journal* 39.

5.2.5 Issues experienced by Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander people are overrepresented as recipients of penalty notices.⁸⁹ Aboriginal and Torres Strait Islander people are also more likely to experience language and literacy barriers which make it difficult to understand and seek advice on payment options, review and appeal rights with respect to penalty notices.⁹⁰ In addition, Aboriginal and Torres Strait Islander people are less likely to reliably receive their mail and therefore may miss out on Revenue NSW communications.⁹¹ For these reasons they are therefore at risk of accumulating fine debt and being subject to enforcement mechanisms including driver licence sanctions.⁹²

Aboriginal and Torres Strait Islander children are more likely to socialise and be the subject of increased surveillance and police-citizen interactions (or interactions with other enforcing officers, such as transit officers) in public places,⁹³ which puts such children at greater risk of being issued penalty notices. Infringement notices can accumulate into expensive debt when children are subject to multiple fixed fines for the same interaction. For example, the Australian Law Reform Commission (ALRC) documented how a young Aboriginal girl who skipped school was given an infringement notice for fare evasion, and when she told the transit officer ‘you got to be fucking kidding’, was issued an infringement notice for offensive language, amassing fines in excess of \$1,000.⁹⁴

5.2.6 Impacts on family relationships

Fining children can negatively affect a child’s relationship with their family or caregiver. The inability of most children to pay hefty fines can place responsibility for payment on their caregiver.⁹⁵ This may put significant strain on the relationship between these young people and their caregivers.⁹⁶ With regard to the implications of economic penalties for children generally, parents have reported increased conflict over discussions of who was going to be responsible for

⁸⁹ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No No. 133, 2018) 387 <<https://www.alrc.gov.au/publications/indigenous-incarceration-report133>>.

⁹⁰ NSW Law Reform Commission (n 12) 377-380.

⁹¹ *Ibid* 379.

⁹² *Ibid* 377–380; Australian Law Reform Commission (n 89).

⁹³ Rob White, ‘Indigenous Young Australians, Criminal Justice and Offensive Language’ (2002) 5 *Journal of Youth Studies* 21; Jarrod White, ‘Power/Knowledge and Public Space: Policing the “Aboriginal Towns”’ (1997) 30 *The Australian and New Zealand Journal of Criminology* 275.

⁹⁴ Australian Law Reform Commission (n 89) 394.

⁹⁵ Redfern Legal Centre (n 3); Brown, Cunneen and Russell (n 1) 258.

⁹⁶ Juliana Amadi, ‘Piloting Penalty Notices for Disorder on 10-to 15-year-olds: result from a one year pilot’ (Ministry of Justice Research Series No 19/08, Ministry of Justice, November 2008) 25.

the repayments, and also feeling ashamed about having to admit to their children that they are financially unable to make the required payments.⁹⁷ It has been argued that fines for children are 'discriminatory' in the sense that 'they discriminate in favour of children whose parents can afford to pay them'.⁹⁸

5.2.7 Questionable deterrent effect

Children who are fined repeatedly may feel they are being 'targeted by police', and as a result of their significant accumulated fine debt, adopt a defeatist attitude.⁹⁹ An assessment of the infringement system in New Zealand found that once a child's fine debt reached around \$2,000, they considered themselves no longer capable of repaying their debt, and stopped caring about adding to their debt by offending further.¹⁰⁰ One study which followed 1,167 young people who had been issued economic sanctions (including fines, fees, restitution etc.) for two years, found that the higher the costs owed by an adolescent offender, the higher their likelihood of recidivism.¹⁰¹

Several factors can reduce the effectiveness of fines as a tool to deter children from committing crime. A general trend can be identified with respect to economic sanctions more broadly: recidivism is lower amongst juveniles who paid their economic sanction, and higher amongst those who failed to pay.¹⁰² Where caregivers pay for economic sanctions on their child's behalf, the deterrent value of the fine is markedly decreased.¹⁰³ Fines are also unlikely to be a strong deterrent for children where the nature of their offending is opportunistic and impulsive, rather than premeditated.¹⁰⁴

Rather than attaining the desired outcome of reducing crime, it has been suggested that fining children is a 'gateway' to further contact with the criminal justice system.¹⁰⁵ Fines enforcement

⁹⁷ Jessica Feerman et al, 'Debtor's Prison for Kids?: The High Costs and Fines and Fees in the Juvenile Justice System' (Juvenile Law Centre, 2016). Note that this article refers to fines and fees predominately charged directly to the parents for their child's contact with legal system.

⁹⁸ Sentencing Advisory Council, *Sentencing and Young People in Victoria* (April 2012) 115.

⁹⁹ Litmus Limited, 'Young People and Infringement Fines: A Qualitative Study' (Research Report, Ministry of Justice, October 2005) 34.

¹⁰⁰ Ibid.

¹⁰¹ Alex Piquero and Wesley Jenning, 'Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders' (2017) 15(3) *Youth Violence and Juvenile Justice* 325, 334.

¹⁰² Stacy Hoskin Haynes, Alison Cares, R. Barry Ruback, 'Juvenile Economic Sanctions: An Analysis of Their Imposition, Payment, and Effect on Recidivism' (2014) 13(1) *Criminology & Public Policy* 31, 51.

¹⁰³ Ibid 52; Brown, Cunneen and Russell (n 1) 258; NSW Sentencing Council (n 68) 22.

¹⁰⁴ Brown, Cunneen and Russell (n 1) 258; NSW Sentencing Council (n 68) 22.

¹⁰⁵ Quilter and Hogg (n 88) 39; Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9.

mechanisms may make a child more vulnerable to committing crime. An example of this is where a young person receives additional criminal sanctions for driving while their licence is suspended as a result of unpaid fines.¹⁰⁶ A young person's circumstances may compel them to drive unlawfully. For instance, younger people in remote Aboriginal communities have reported that driving Elders to and from essential services and cultural ceremonies is 'non-negotiable, with or without a licence'.¹⁰⁷ Licence suspension may also lead to difficulty attaining and maintaining employment, and serious fine debt can lead to difficulty securing accommodation. In turn, unemployment and homelessness can force individuals into further contact with the criminal process.¹⁰⁸

5.2.8 Diversionary alternatives to penalty notices

Alternatives to penalty notices outlined under the YOA include warnings, cautions, youth justice conferences, and criminal court proceedings.¹⁰⁹ Guided by a philosophy of diversion, the YOA outlines that 'the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under this Act'.¹¹⁰ The YOA also places limits on the circumstances in which young people can be eligible for diversionary mechanisms. For instance, a warning 'may be given for a summary offence' covered by the YOA 'other than a graffiti offence or any other offence prescribed by the regulations for the purposes of this section'.¹¹¹ In addition, a child is ineligible for a warning if 'the circumstances of the offence involve violence'.¹¹²

While a child does not have to admit to any offence in order to receive a warning, to receive a formal police caution under the YOA, the child must admit to the offence and consent to the giving of a caution.¹¹³ An admission of guilt is also a precondition for a child to be eligible for a youth justice conference (YJC).¹¹⁴ Police have significant discretion to choose which action to pursue when they determine 'it is not in the interests of justice' for the matter to be dealt with in a particular fashion.¹¹⁵ However, s 20(7) of the YOA disentitles a child from receiving a caution for an offence

¹⁰⁶ Quilter and Hogg, 'The Hidden Punitiveness of Fines' (n 105).

¹⁰⁷ Thalia Anthony and Harry Blagg, 'STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia' (2013) 22(1) *Social & Legal Studies* 43, 58.

¹⁰⁸ Legal Aid NSW (n 81) 19.

¹⁰⁹ Brown, Cunneen and Russell (n 1) 259, *Young Offenders Act 1997* (NSW) (YOA) pts 2, 4, 5.

¹¹⁰ YOA s 7.

¹¹¹ YOA s 13.

¹¹² YOA s 14(2)(a).

¹¹³ YOA s 19.

¹¹⁴ YOA s 36(b).

¹¹⁵ YOA ss 14(2)(b), 20(2), 37.

where the child has been dealt with by way of caution on three or more occasions. A similar legislative limit does not apply to warnings or YJCs.

The summary of penalty notice procedure in the *Fines Act* provides that a decision maker should first determine whether an official caution pursuant to s 19A of the *Fines Act* is 'more appropriate', and only if it determined that it 'is not appropriate to give an official caution' should a penalty notice be issued.¹¹⁶ The Attorney General has published guidelines in relation to the giving of official cautions, but *they do not apply to police officers*.¹¹⁷ We address whether penalty notices should be considered a form of diversion at Part 5.2.9.

Criminal proceedings should only be commenced if a child is not entitled or eligible to be dealt with by other diversionary options (i.e. a warning, caution or YJC under the YOA). Chan et al's research found that, in the three years after the introduction of the YOA, 'the percentage of cases dealt with by caution and referred to conferences steadily grew' and alongside this, there was 'a reduction in the proportion of cases referred to court'.¹¹⁸ The use of warnings also grew substantially.¹¹⁹ However, there was significant regional variation in the use of diversionary options, and Aboriginal and Torres Strait Islander youth were less likely to be cautioned, and more likely to be referred to court than non-Aboriginal and Torres Strait Islander youth.¹²⁰ Chan et al suggested that the mandatory requirement of admissions for eligibility to receive a caution meant that Aboriginal and Torres Strait Islander children exercising their 'right' to silence may have a reduced likelihood of being cautioned. Their research therefore identified how the exercise of this right can put such children at a disadvantage. More recent research has supported this and identified that minority children, including Aboriginal and Torres Strait Islander children, may be deemed by police as 'unsuitable' candidates for diversionary options if they have prior offending histories, are 'uncooperative', or 'refuse to admit guilt because of unfavourable attitudes towards

¹¹⁶ *Fines Act 1996* (NSW) s 19.

¹¹⁷ NSW Attorney General (n 14), 1.

¹¹⁸ Janet Chan et al, 'Regulating Police Discretion: An Assessment of the Impact of the New South Wales Young Offenders Act 1997' (2004) 28 *Criminal Law Journal* 72, 84.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* 86.

police'.¹²¹ In 2013, Pheeny concluded that the YOA had not lived up to its promise to reduce the overrepresentation of Aboriginal and Torres Strait Islander children in detention.¹²²

NSW Bureau of Crime Statistics and Research (BOCSAR) data for 2022¹²³ show that Aboriginal children are still *less* likely than non-Aboriginal children to receive cautions, and *more* likely to receive YJCs: 'the "diversionary" option that brings children closest to a criminal charge'.¹²⁴ The least serious form of diversion — a warning — was given to just 889 Aboriginal children, compared to 2889 non-Aboriginal children.¹²⁵

In mid-2014, the Protected Admissions Scheme (PAS) was introduced to encourage the use of cautions and later, YJCs by police and to counteract the barrier established by the requirement in the YOA for an admission of guilt in order to access cautions and YJCs. Pearce summarises the operation of the scheme:

if an offender does not admit an offence for which they could be dealt with under the YOA, they can be offered the option to make a 'protected admission'. Under the PAS, a 'protected admission' means that offenders are able to make admissions to an offence while preserving their right not to provide self-incriminating evidence that can be used in court. When the offender signs the document indicating that they will make a protected admission, they are given a written undertaking by police that the admission will not be used under any circumstances. Following this, the offender can be interviewed. If the offender is not cautioned or sent to a YJC and instead is charged and sent to court, the information gathered in the interview cannot be used.¹²⁶

From interviewing police officers to ascertain their views on the PAS, Pearce found that the PAS was underutilised. Its constraint on how admissions could be used was seen by police as

¹²¹ Estrella Pearce, 'Why "Admission of Guilt" Is Not Working in Youth Diversionary Schemes in NSW – Exploratory Findings from Interviews with Police Officers' (2021) 33(3) *Current Issues in Criminal Justice* 285, 287; citing Chris Cunneen, 'Understanding Restorative Justice Through the Lens of Critical Criminology' in Chris Cunneen and Thalia Anthony (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 290.

¹²² David Pheeny, 'Understanding the Importance and "potential" of the Youth Offenders Act 1997 (NSW) in Addressing the over-Representation of Aboriginal Juveniles in the Criminal Justice System' (2013) 8(9) *Indigenous Law Bulletin* 27. See YOA s 7, which provides that one of the principles guiding the YOA scheme is '[t]he principle that the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of youth justice conferences, cautions and warnings.'

¹²³ BOCSAR, 'NSW Recorded Crime Statistics January to December 2022: Number of proceedings under the Young Offenders Act initiated by NSW Police by postcode of incident, Aboriginality of person of interest, type of YOA proceeding, and proportion that were a warning (excl. transport regulatory)' (2023; reference: ac23-22377).

¹²⁴ This evocative phrase was used by an ALS solicitor consulted during the course of this project.

¹²⁵ *Ibid.*

¹²⁶ Pearce (n 122) 288 citing unpublished material provided by NSW Police Force, 2015.

incompatible with their law enforcement objective of collating admissible evidence to help prove a suspect's guilt. Pearce has argued that the scheme's apparent ineffectiveness:

makes for a strong argument to have admissions of guilt excluded as a requirement for the purposes of the YOA or for a reconsideration of the 'not denied' option, similar to that available in New Zealand (see Becroft Judge & Norrie, 2015 for an overview of New Zealand's model). The 'not denied' option is considered a useful mechanism in New Zealand's youth justice system, because it triggers a Family Group Conference without the need for an absolute admission of guilt (O'Driscoll, 2008). The 'not denied' option may well be worth revisiting in light of the difficulties that have emerged and been outlined in this paper. Diversion should be available without admission of guilt.¹²⁷

Unlike penalty notices, which have limited deterrent value and can even operate in a criminogenic fashion, research has found that warnings and cautions are effective in reducing recidivism for children, while also protecting children in vulnerable situations from additional economic disadvantage.¹²⁸ These alternative options may prevent children's future contact with the criminal justice system, rather than entrenching them in cycles of disadvantage and future offending.¹²⁹

5.2.9 Incompatibility with international children's rights principles

Australia is a party to the UNCRC.¹³⁰ This commits Australia to diverting children from criminal proceedings, 'providing that human rights and legal safeguards are fully respected.'¹³¹ The Convention also dictates that children alleged to have committed an offence should be dealt with in a manner that is age-appropriate, and that juvenile justice systems should not be based around retribution, but should promote the child's reintegration into society.¹³²

Diversion from the criminal justice system is said to fulfil the 'best interests of the child'¹³³ principle for several reasons. These include that children's brains are still maturing; adolescent decision-making is heavily influenced by peer pressure; most children will grow out of offending behaviour; children generally commit less serious offences than adults (such as property offences, rather than violent offences against the person); and that charges and criminal court proceedings

¹²⁷ Ibid 295.

¹²⁸ Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders* (December 2019) 91.

¹²⁹ Brown, Cunneen and Russell (n 1) 259.

¹³⁰ UNCRC (n 16).

¹³¹ Ibid art 40(3)(b).

¹³² Ibid art 40(1).

¹³³ Ibid art 3.

increase the risk of further offending.¹³⁴ Contact with the criminal justice system can result in stigmatisation, criminal records, and hostility to police and the law.¹³⁵ In addition to avoiding these outcomes, a diversionary approach ‘yields good results for children, is congruent with public safety and has proved to be cost-effective.’¹³⁶

Penalty notices have, at times, been characterised as a form of ‘diversion’ in the literature. Despite this characterisation, they do not achieve many of the positive outcomes of a diversionary approach outlined above, especially in light of the fact that penalty notice debt accrual and fines enforcement consequences result in prolonged exposure to the criminal justice system, as detailed above. Nor do penalty notices resemble the examples given by the United Nations Committee on the Rights of the Child (CRC) of diversionary measures for children, which are said to comprise ‘a variety of community-based programmes ... such as community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims.’¹³⁷

The system for administering and reviewing penalty notices issued to children in NSW lacks appropriate procedural safeguards and due process, raising doubts over its compatibility with international law.¹³⁸ For instance, individuals reviewing the issuance of penalty notices may lack the necessary legal expertise and relevant information when making a review decision. Concerns about the independence of the penalty notice review system were raised by interview participants in this study (see Part 8). In addition, penalty notice recipients may be ‘compelled to ... confess guilt’¹³⁹ when penalty notices are issued to avoid criminal proceedings. Interview participants reported to us that, in some instances, police officers issuing penalty notices for alleged offending inform the suspect that should they choose not to admit to the offending, they may be charged. The CRC has advised that children should ‘freely and voluntarily’ admit criminal responsibility, ‘without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding.’¹⁴⁰

¹³⁴ Pearce (n 121) 288–9.

¹³⁵ Ibid; United Nations Committee on the Rights of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) (‘CRC General Comment No. 24’).

¹³⁶ Ibid [15].

¹³⁷ Ibid [17].

¹³⁸ Art 40(3)(b) of UNCROC provides that states that institute measures that deal with children alleged as, accused of, or recognised as having infringed the penal law without resorting to judicial proceedings should ensure that ‘human rights and legal safeguards are fully respected’.

¹³⁹ UNCRC (n 16) art 40(2)(b)(iv).

¹⁴⁰ CRC General Comment No. 24 (n 135) [18].

The issuance of penalty notices to children under the age of 14 for suspected criminal offences displaces the principle of *doli incapax*, where children are presumed to be incapable of wrongdoing. It is also of significance that the legislated minimum age of criminal responsibility in NSW is 10,¹⁴¹ which is remarkably low compared to the minimum ages of criminal responsibility of other state parties. On this aspect, the CRC has observed that the ‘most common minimum age of criminal responsibility internationally is 14’,¹⁴² and argued that:

Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. ... adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, *to at least 14 years of age*. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age [emphasis added] ...¹⁴³

5.2.10 Review of fines and court election

A child may seek to have the decision to issue the penalty notice reviewed by Revenue NSW, but this is a process that can be difficult to navigate — a point we explore further in Part 8 of this Report. A child alleged to have committed a penalty notice offence also ‘has the right to elect to have the matter dealt with by a court.’¹⁴⁴ This right extends to situations where all or part of the penalty notice has already been paid. However, once a child elects to have the matter dealt with in court, the system makes it very difficult to retract that decision.¹⁴⁵ This can be problematic for children who court-elect before exhausting their internal review options. While court election may result in a favourable outcome — such as dismissal or a YOA outcome — this is not guaranteed, and court proceedings can cause significant stress and result in stigma.¹⁴⁶

¹⁴¹ *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

¹⁴² CRC General Comment No. 24 (n 135) [21].

¹⁴³ *Ibid* [22].

¹⁴⁴ *Fines Act 1996* (NSW) s 35.

¹⁴⁵ *Ibid* s 37.

¹⁴⁶ Quilter and Hogg (nn 88, 106); NSW Law Reform Commission (n 12).

6. COVID-19 PUBLIC HEALTH ORDERS IN NSW

6.1. Introduction

A distinctive feature of the NSW Government's response to the COVID-19 pandemic was high-volume and fast-moving lawmaking and amending.¹⁴⁷ The primary manner through which new rules were created in NSW was the making of non-disallowable PHOs. PHOs were made under the authority of the *Public Health Act 2010* (NSW), and, unlike in some other jurisdictions,¹⁴⁸ were able to be made by the Minister for Health or their delegates, even in the absence of a State of Emergency declaration.¹⁴⁹ Throughout 2020, 2021, and 2022, new offences were created — and existing offences amended — with haste as the NSW Government attempted to adapt PHOs and Regulations to the rapidly changing COVID-19 situation. The volume of orders made was overwhelming: 266 principal and amending PHOs were issued between 15 March 2020 and 31 January 2022 as COVID-19 related offences were introduced, modified and repealed.¹⁵⁰ 123 amendments were made to the PHOs during the June 2021 to November 2021 period.¹⁵¹ On average, a PHO was introduced or amended every 1.5 days during this Delta wave period.¹⁵²

Another feature of the NSW Government's pandemic response was the unclear communication of the contents of PHOs.¹⁵³ There was a 'communication gap'¹⁵⁴ between the text of the PHOs, government advice regarding their content, and the policing approach undertaken, which resulted in significant public confusion.¹⁵⁵ Populations including 'residents with low levels of English literacy such as those from a migrant background, or individuals with a cognitive or mental impairment,' found it especially challenging to keep up with the changes.¹⁵⁶ In response to the 'rushed drafting of unclear rules, coupled with insufficient police training', lawyers raised concerns

¹⁴⁷ For further details, see the reports listed above (n 15).

¹⁴⁸ In Victoria, for instance, the Government's ability to respond to the COVID-19 pandemic was reliant upon a declared and frequently extended State of Emergency.

¹⁴⁹ *Public Health Act 2010* (NSW) s 10.

¹⁵⁰ NSW Ombudsman (2022) (n 6) 62.

¹⁵¹ McNamara et al (n 15) 20.

¹⁵² *Ibid* 20.

¹⁵³ Elyse Methven, "'There Is No Need for Anyone to Be Concerned": The Discursive Legitimation of Coercive Police Powers during the COVID-19 Pandemic' (2022) 77 *Revista de Llengua i Dret* 54; Rachel Maher and Blaise Murphet, 'Community Engagement in Australia's COVID-19 Communications Response: Learning Lessons from the Humanitarian Sector' (2020) 177(1) *Media International Australia* 113.

¹⁵⁴ Methven (n 154) 58.

¹⁵⁵ See: *ibid*; Maher and Murphet (n 154); Ben Mostyn and Niamh Kinchin, 'Can I Leave the House? A Coded Analysis of the Interpretation of the Reasonable Excuse Provision by NSW Police During the COVID-19 Lockdown' (2021) 49(3) *Federal Law Review* 465.

¹⁵⁶ Methven (n 154) 63; Samantha Lee and Elyse Methven, 'Why \$5000 COVID Fines Might Backfire', *The Sydney Morning Herald* (online, 16 August 2021) <<https://www.smh.com.au/national/why-5000-covid-fines-might-backfire-20210815-p58iw8.html>>.

that penalty notices were ‘being issued in circumstances where a court would have determined the conduct to be lawful’.¹⁵⁷

Amongst the first regulatory measures to be introduced by way of a COVID-19 PHO were density limits, mass gathering restrictions,¹⁵⁸ and quarantine requirements for international travelers coming or returning to Australia.¹⁵⁹ Some of the first key individual COVID-19 offences concerned self-isolation requirements upon testing positive, prohibitions on visitation to aged care facilities in a number of circumstances,¹⁶⁰ and early iterations of spitting and coughing offences.¹⁶¹

6.2. Penalty notices for mask-related offences

Mask wearing mandates were first introduced in January 2021.¹⁶² Initially, the wearing of a fitted face covering was only required in Greater Sydney — on public transport, in an extensive list of indoor premises, and for hospitality workers.¹⁶³ Mask wearing orders were frequently amended and expanded, as the NSW Government added new locations where mask wearing was mandatory, including NSW airports and airspace, and public transport waiting areas.¹⁶⁴ The strictest and most extensive mask wearing rules were instituted during the Delta wave, with the wearing of a fitted face covering becoming mandatory in all indoor and outdoor premises other than a place of residence for those in, or who had visited, ‘stay at home’ areas in August 2021.¹⁶⁵ Children 12 years of age or younger were exempted from these mask wearing mandates from the first relevant PHO to the most recent, providing some degree of distinction between adults and children.¹⁶⁶ Later, further distinctions were made in relation to the penalty notice amount applying to different age groups, but only for some categories of mask wearing offences, as detailed below.

¹⁵⁷ Methven (n 154) 63–64.

¹⁵⁸ *Public Health (COVID-19 Public Events) Order 2020* (NSW).

¹⁵⁹ *Public Health (COVID-19 Quarantine) Order 2020* (NSW).

¹⁶⁰ *Public Health (COVID-19 Residential Aged Care Facilities) Order 2020* (NSW).

¹⁶¹ *Public Health (COVID-19 Spitting and Coughing) Order 2020* (NSW).

¹⁶² *Public Health (COVID-19 Mandatory Face Covering) Order 2021* (NSW) as at 2 January 2021.

¹⁶³ *Ibid.*

¹⁶⁴ *Public Health (COVID-19 Mandatory Face Covering) Order 2021* (NSW) as amended by *Public Health (COVID-19 Mandatory Face Coverings) Amendment (No 2) Order 2021* (NSW).

¹⁶⁵ *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2)* (NSW) as at 21 August 2021.

¹⁶⁶ *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* (NSW) pt 2 sub-cl 5; *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021* (NSW) pt 2 sub-cl 2; *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021* (NSW) pt 2 sub-cl 6(a); *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) pt 3 sub-cl 2(a); *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) div 3 cl 2.7 sub-cl 1; *Public Health (COVID-19 Order) Order 2021* (NSW) div 4 cl 2.15 sub-cl (1); *Public Health (COVID-19 Order (No 2) 2022* (NSW) pt 2 cl 6 sub-cl (1); *Public Health (COVID-19 Order (No 3) 2022* (NSW) pt 2 cl 6 sub-cl (1).

On 30 July 2021, the Minister for Health and Medical Research, Brad Hazzard, implemented the *Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 4) 2021*.¹⁶⁷ The effect of this regulation amendment was twofold. First, the penalty for an individual adult (aged 18 or above) who failed to comply with a direction to wear or carry a face covering was increased from \$200 to \$500.¹⁶⁸ Second, the penalty for children who failed to comply with a direction to wear or carry a face covering was lowered — with the penalty for alleged offenders aged 16 or 17 reduced to \$80, and the penalty for alleged offenders 15 or younger reduced to \$40.¹⁶⁹ Prior to this amendment, the Public Health Regulations did not distinguish between adults and children — all alleged offenders were subject to the same \$200 fine.¹⁷⁰ Children 12 years of age or younger remained exempt from being fined for failing to comply with a direction to wear or carry a mask.¹⁷¹

Note that the reduced fines for children only applied to two general mask-related PHO offences. During the entire duration of the pandemic, these two age-based mask wearing offences became the only COVID-19 PHO offence categories in NSW to distinguish fine amounts on the basis of age (see Table 1).

No change was made to the penalty notice amount for the raft of other mask-wearing offences that were based on location or situation. For example, the failure to wear a fitted face covering in a public transport waiting area retained the penalty notice fine amounts of either \$200 or \$500 (noting the fine amount for some of these offences changed between these two amounts throughout the period referred to). As seen below, despite the availability of age-based penalty notice fines and their frequent use, NSW Police continued to issue a significant number of penalty notices based on location or situation (rather than age-based mask wearing offences) to children, which carried a higher penalty. As will be demonstrated in Part 7, from August 2021 to September 2022, a total of 1,033 fines were issued to children for breach of the location or situation-based masking wearing offences, while 2,189 fines were issued for breach of the age-based mask wearing offences.

¹⁶⁷ *Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 4) 2021* (NSW), made under the authority of the *Public Health Act 2010* (NSW) ss 10, 118, 134.

¹⁶⁸ *Public Health Regulation 2012* (NSW) sch 4 pt 1, as at 20 July 2021, *Public Health Regulation 2022* (NSW) sch 6.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Public Health Regulation 2012* (NSW) sch 4 pt 1, as at 20 July 2021.

¹⁷¹ See *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* (NSW), *Public Health (COVID-19 General) Order 2021* (NSW).

6.2.1 Table 1: Penalties for selected NSW COVID-19 PHO breaches

Offences	Penalty notice for adult individuals ¹⁷²	Reduced penalty notice amount or other accommodation for children
Failure to comply with a direction to wear or carry a fitted face covering	\$500	Yes. The ministerial direction to wear a fitted face covering did not apply to children under 12 years of age. ¹⁷³ On 30 July 2021, the penalty for children aged 15 or younger was set at \$40, and for children aged 16 or 17 was set at \$80. ¹⁷⁴
Not wearing a fitted face covering on public transport/taxi etc.	\$500	No
Not wearing a fitted face covering in retail/business premises	\$500	No
Not wearing a face covering in an indoor area, which is a non-residential premises	\$500	No
Fail to comply with any other wear face covering directive	\$500	No
Fail to comply with a carry face covering directive	\$500	No
Failure to register a positive rapid antigen test result	\$1,000	No
Unlawfully participate in an outdoor gathering in a stay-at-home area	\$3,000	No
Fail to comply with outdoor public gatherings direction	\$3,000	No
Failure to comply with a direction prohibition coughing or spitting on a public official or other worker	\$5,000	No
Failure to comply with a direction to self-isolate if diagnosed with COVID-19	\$5,000	No

¹⁷² Via penalty notice issued in relation to an offence under s 10 of the *Public Health Act 2010* (NSW); *Public Health Regulation 2022* (NSW) sch 6.

¹⁷³ See *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* (NSW) *Public Health (COVID-19 General) Order* (NSW).

¹⁷⁴ *Public Health Regulation 2022* (NSW) sch 6. The tiered system of age-based fine amounts was only introduced into the (then) *Public Health Regulations 2012* (NSW) on 30 July 2021, as a result of the *Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 4) 2021* (NSW).

6.3 Breach of other PHOs

The months of July and August 2021 were notable for the significant number of breaches of PHOs recorded by NSW Police, with most (approximately 25,000) relating to the broad offence of failure to comply with a ministerial direction without a reasonable excuse.¹⁷⁵ This was by far the most common offence recorded during the period 26 June 2021 to 31 August 2021, and largely covered the offences of a person being outside their local government area (LGA) or permitted radius of travel without a reasonable excuse, and non-permitted visiting of residences, gatherings, and carpooling.¹⁷⁶ The fixed penalty notice fine for this offence was \$1,000, which applied to children and adults equally. It should be noted that this is almost equal to the NSW Children's Court jurisdictional limit for court-ordered fines for children, which is \$1,100.¹⁷⁷

¹⁷⁵ Sara Rahman, *Breaches of COVID-19 Public Health Orders in NSW* (Bureau Brief No BB157, NSW Bureau of Crime Statistics and Research, October 2021) <<https://www.bocsar.nsw.gov.au/Publications/BB/2021-Report-COVID-breaches-BB157.pdf>>.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Children (Criminal Proceedings) Act* (n 4) s 33(1)(c).

7. QUANTITATIVE DATA ON COVID-19 PENALTY NOTICE ENFORCEMENT

7.1. Introduction

In this part of the report, we present data on the enforcement of COVID-19 PHOs against children in NSW. The data was sourced from the BOCSAR and from the NSW Police Force via *Government Information (Public Access) Act 2009* (NSW) (GIPA) applications.

7.2. Penalty notices in the first year (including ‘waves’ 1-3)¹⁷⁸

Table 2 summarises the number of penalty notices issued to people under 18 in the first 12 months of the pandemic to March 2021. It outlines the corresponding LGA resident population (which includes both adults and children) and Socio-Economic Indexes for Australia (SEIFA) disadvantage percentile in the state of NSW.¹⁷⁹ A total of 122 penalty notices were issued across 31 of the 107 NSW LGAs. The highest number of penalty notices were issued in Blacktown, an LGA in western Sydney, where 28, or just under one-quarter, of all penalty notices were issued. Over half (52%) of all penalty notices were issued in just five local government areas (LGAs), predominantly in western and south-western Sydney. These were, in descending order, Blacktown (28 penalty notices), Wollongong (11 penalty notices), Parramatta (10 penalty notices), Campbelltown (8 penalty notices) and Liverpool (7 penalty notices). The ‘top 10’ LGAs, where the most penalty notices were issued to children, accounted for 69% of penalty notices issued in the 12 months to March 2021 (see Graph 1).

¹⁷⁸ We have adopted the date parameters for defining the various ‘waves’ of the COVID-19 pandemic that were employed by the NSW Ombudsman (2022), (n 6) 10.

¹⁷⁹ The SEIFA index measures economic disadvantage by allocating a ranking of relative disadvantage based on the socio-economic characteristics of an area from 2021 Australian Bureau of Statistics (ABS) Census data (such as income, education, employment, occupation, housing and family structure). The Socio-Economic Indexes for Australia Index of Relative Socio-economic Disadvantage percentile, 2021 for the corresponding LGA is relative to the state of New South Wales and is sourced from the ABS. All LGAs are scored from lowest to the highest score, so that the lowest 1% of areas are given a percentile of 1, and the highest 1% are given a percentile of 100. This means that the lower the number, the greater the level of disadvantage for that LGA when compared to other LGAs in the state of New South Wales: ABS, ‘Table 2 Local Government Area (LGA) Index of Relative Socio-Economic Disadvantage, 2021’.

7.2.1 Table 2: Number of COVID-19 penalty notices issued in NSW to children (aged 10-17 years) by LGA – April 2020 to March 2021¹⁸⁰

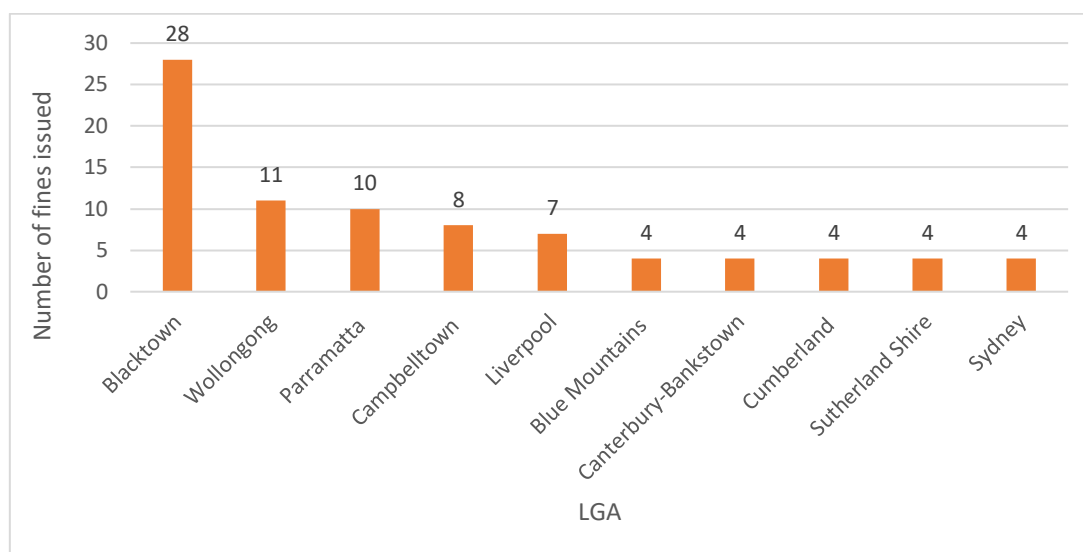
Local Area ¹⁸¹	Government	Penalty notices issued to children	SEIFA disadvantage percentile in NSW	Usual resident population ¹⁸²
Albury		3	40	56093
Balranald		1	31	2208
Blacktown		28	59	396776
Blue Mountains		4	85	78121
Byron		2	77	36116
Campbelltown		8	24	176519
Canterbury-Bankstown		4	8	371006
Central Darling		1	3	1725
Cessnock		1	20	63632
Cobar		3	35	4059
Cowra		1	17	12724
Cumberland		4	6	235439
Eurobodalla		1	56	40593
Fairfield		2	1	208475
Georges River		1	74	152274
Hornsby		1	93	151811
Inner West		2	87	182818
Ku-Ring-Gai		3	98	124076
Lake Macquarie		1	71	213845
Liverpool		7	16	233446
Maitland		2	60	90226
Newcastle		3	75	168873
Northern Beaches		2	94	263554
Parramatta		10	81	256729
Port Macquarie-Hastings		1	57	86762
Shoalhaven		3	51	108531
Sutherland Shire		4	92	230211
Sydney		4	81	211632
The Hills Shire		2	96	191876
Waverley		2	94	68605
Wollongong		11	71	214564
TOTAL		122	NA	NA

¹⁸⁰ BOCSAR, 'NSW Recorded Crime Statistics April 2020 to March 2022: Number of persons of interest (POIs) proceeded against by the NSW for a COVID-19 related breach of a COVID 19 Direction incident by way of infringement notice (fine), by Local Government Area of incident and Aboriginal status of the POI' (2022; reference: kf22-21655). This table includes only those LGAs in which COVID-19 penalty notices were issued to children.

¹⁸¹ LGAs are in alphabetical order. Note that where an LGA is not listed in the above figure, no recorded incidents occurred in that LGA which led to the issuing of a fine to a child in the specified period.

¹⁸² This number includes adults and children: ABS (n 180).

7.2.2 Graph 1: Top ten LGAs by number of fines issued to children (aged 10-17) – April 2020 to March 2021¹⁸³



These data show that even during the first three waves of the pandemic, when the volume of penalty notice issuance was relatively low (compared to during the 4th (Delta) wave from June 2021), many of the children issued with COVID-19 penalty notices lived in just a handful of LGAs, most of which experienced greater socio-economic disadvantage than other parts of NSW (according to the SEIFA index).¹⁸⁴

7.3. Penalty notices issued by NSW suburb from 1 March 2020 to 4 June 2022

For further insight into the geographic distribution of COVID-19 penalty notices to children during the pandemic, we requested data on the number of penalty notices issued to children for each suburb from 1 March 2020 to 4 June 2022. A total of 3,707 penalty notices were issued to children in 662 NSW suburbs during this period. 1,498 (40%) of the 3,707 penalty notices issued to children were issued in the ‘Top 30’ suburbs. What is striking is that all suburbs in the ‘Top 30’ COVID-19 penalty notice suburb locations for children, displayed in Table 3, contain a train

¹⁸³ BOCSAR (n 181).

¹⁸⁴ See ABS (n 180). A limitation of the LGA data is that the relative socio-economic disadvantage of an LGA does not accurately portray the socio-economic disadvantage of suburbs within, or partially within, it. For example, children in the LGA of Blacktown, which has a SEIFA percentile of 59, received the highest number of penalty notices (28). However, the socio-economic disadvantage experienced by residents in different parts of Blacktown LGA varies significantly: the suburbs of Mount Druitt (SEIFA percentile 6) and Blacktown (SEIFA percentile 19), for instance, have very high levels of socio-economic disadvantage compared to the suburbs The Ponds (SEIFA percentile 96) and Kellyville Ridge (SEIFA percentile 93).

station, including 14 major rail interchanges¹⁸⁵ and 3 major regional rail or rail/bus interchanges.¹⁸⁶ This suggests that police may have concentrated their public health order policing of children during the COVID-19 pandemic around train stations, especially major transit locations. The geographical concentration of pandemic policing of children around train stations supports the argument advanced by Boon-Kuo et al that policing practices during the pandemic ‘extended opportunities for the intensification of long-standing coercive police tools including stop, search and questioning, arrest and fines and their punitive effects’¹⁸⁷, with train stations constituting a major site for police interactions with children more generally.¹⁸⁸

The suburb data also conveys a starker depiction of how children in relatively disadvantaged suburbs were over-policed. More than half (16) of the Top 30 suburb locations are suburbs with a SEIFA disadvantage percentile of less than 25%, and more than 85% (26) of the Top 30 suburbs have a SEIFA disadvantage percentile of less than 50%. None of the Top 30 suburbs are within Sydney’s wealthier enclaves of the Eastern Suburbs, North Shore, Northern Suburbs or Northern Beaches.

7.3.1 Table 3: Number of COVID-19 penalty notices issued in NSW to children (aged 10-17 years) by suburb – 1 March 2020 to 4 June 2022¹⁸⁹

Suburb	Number of penalty notices	SEIFA disadvantage percentile in NSW	Usual resident population ¹⁹⁰
Blacktown	220	19	50961
Parramatta	128	44	30211
Liverpool	111	2	31078
Penrith	84	13	17966
Mount Druitt	81	6	16986
Campbelltown	73	15	16577
St Marys	70	9	13256
Bankstown	51	3	34933

¹⁸⁵ Blacktown, Parramatta, Liverpool, Campbelltown, Haymarket (Central station), Sydenham, Wolli Creek, Glenfield, Strathfield, Redfern, Sydney (Town Hall, Circular Quay, Wynyard and Martin Place stations), Seven Hills, Cabramatta and Lidcombe.

¹⁸⁶ Dubbo, Gosford and Broadmeadow.

¹⁸⁷ Louise Boon-Kuo et al, ‘Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic’ (2021) 33(1) *Current Issues in Criminal Justice* 76, 81.

¹⁸⁸ Bec Smith and Gillian Davy, ‘Safe Space: a toolkit for dealing with police/youth conflict’ (Policy Report, Springvale Monash Legal Service and Western Suburbs Legal Service, 2012) 7; Rob White, ‘Young People and the Policing of Community Space’ (1993) 26(3) *Australian and New Zealand Journal of Criminology* 207, 212.

¹⁸⁹ BOCSAR, ‘NSW Recorded Crime Statistics April 2020 to March 2022: Number of persons of interest (POIs) proceeded against by the NSW for a COVID-19 related breach of a COVID 19 Direction incident by way of infringement notice (fine), by Local Government Area of incident and Aboriginal status of the POI’ (2022; reference: kf22-21655). This table includes only those LGAs in which COVID-19 penalty notices were issued to children.

¹⁹⁰ ABS (n 180).

Haymarket	47	11	8305
Dubbo	43	37	43516
Hurstville	40	18	31162
Merrylands	39	5	32472
Cronulla	37	84	17899
Sydenham	35	51	1100
Wolli Creek	35	63	10654
Glenfield	34	43	10536
Strathfield	32	47	25915
Gosford	31	32	4873
Granville	31	6	16716
Guildford	31	2	24091
Auburn	28	2	39333
Miranda	27	58	17942
Redfern	26	30	13072
Rockdale	26	26	15475
Sydney	26	26	16667
Broadmeadow	23	37	1688
Seven Hills	23	31	20095
Cabramatta	22	1	21142
Coffs Harbour	22	12	27089
Lidcombe	22	20	23663
Total	1498	NA	653373

7.4. Penalty notices during the Delta Wave

The arrival of the ‘Delta variant’ of the COVID-19 virus in June 2021 saw a significant hardening of PHO enforcement practice and a major spike in the number of penalty notices issued. McNamara et al report that more than 80% of the value of COVID-19 penalty notice fines issued during the period in which COVID-19 PHOs were actively policed (2020-2022) arose from penalty notices issued in the three month period July-September 2021.¹⁹¹ Children were caught up in this ‘zero tolerance’ approach to ever-changing PHO restrictions.

Graph 2 shows that penalty notices were unevenly issued across NSW: seven of the ‘top ten’ NSW LGAs in which children received penalty notices were located in south-western and western Sydney, and four of these areas — Canterbury-Bankstown, Campbelltown, Cumberland, and Liverpool — have populations with levels of relative socio-economic disadvantage that are lower than the 25th percentile in NSW. The ‘top ten’ LGAs in Graph 2 accounted for 1,839 (53%) of the total number of penalty notices issued. The 425 fines issued in Blacktown represented 12% of all fines issued to children during the specified period. Together with the neighbouring Penrith LGA,

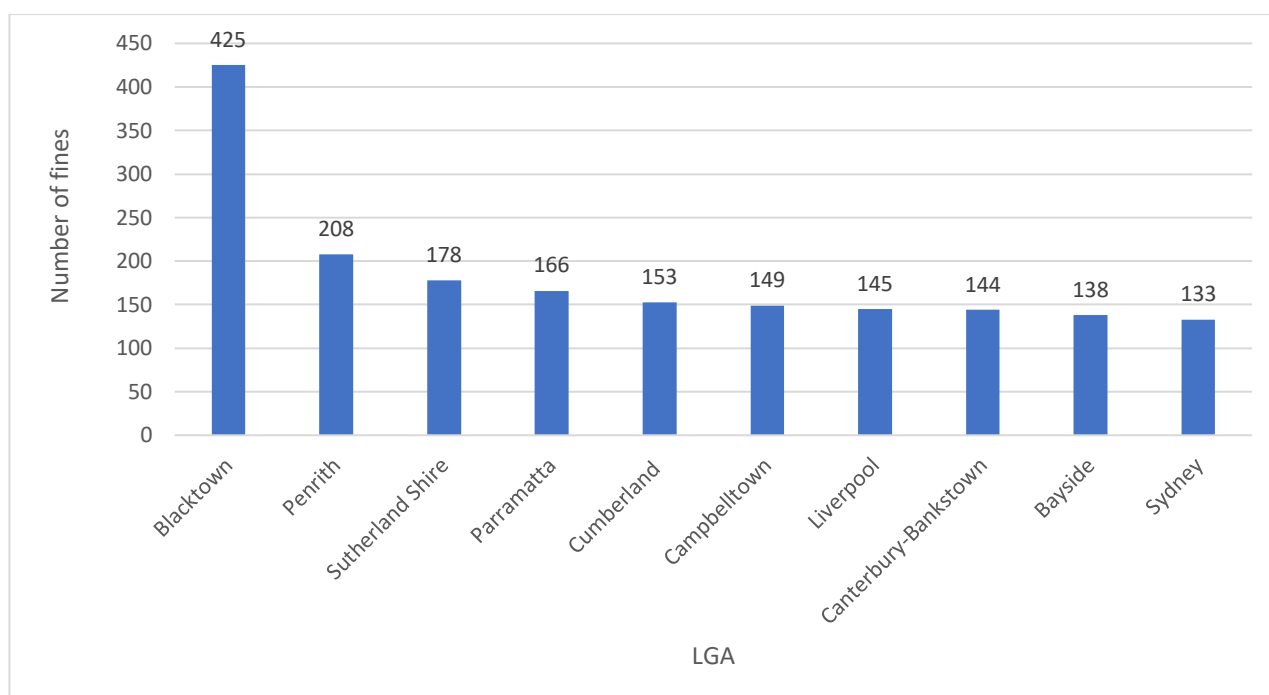
¹⁹¹ See McNamara et al (n 15) 5.

these two western Sydney LGAs accounted for 18% of COVID-19 penalty notices issued to children under 18 years of age.

The ‘top ten’ LGAs in Graph 2 included eight of the NSW Government’s ‘LGAs of concern’ which were subject to tougher lockdown restrictions during the Delta wave, namely Blacktown, Penrith, Parramatta, Cumberland, Campbelltown, Liverpool, Canterbury-Bankstown, and Bayside.¹⁹²

Police Area Command (PAC) data also provide insights into the geographical distribution of penalty notices from the onset of the Delta wave, when restrictions tightened and police officers adopted a more coercive approach to policing suspected breaches of PHOs. Graph 3 shows the NSW 11 PACs in which more than 100 COVID-19 PHO penalty notices were issued to children.

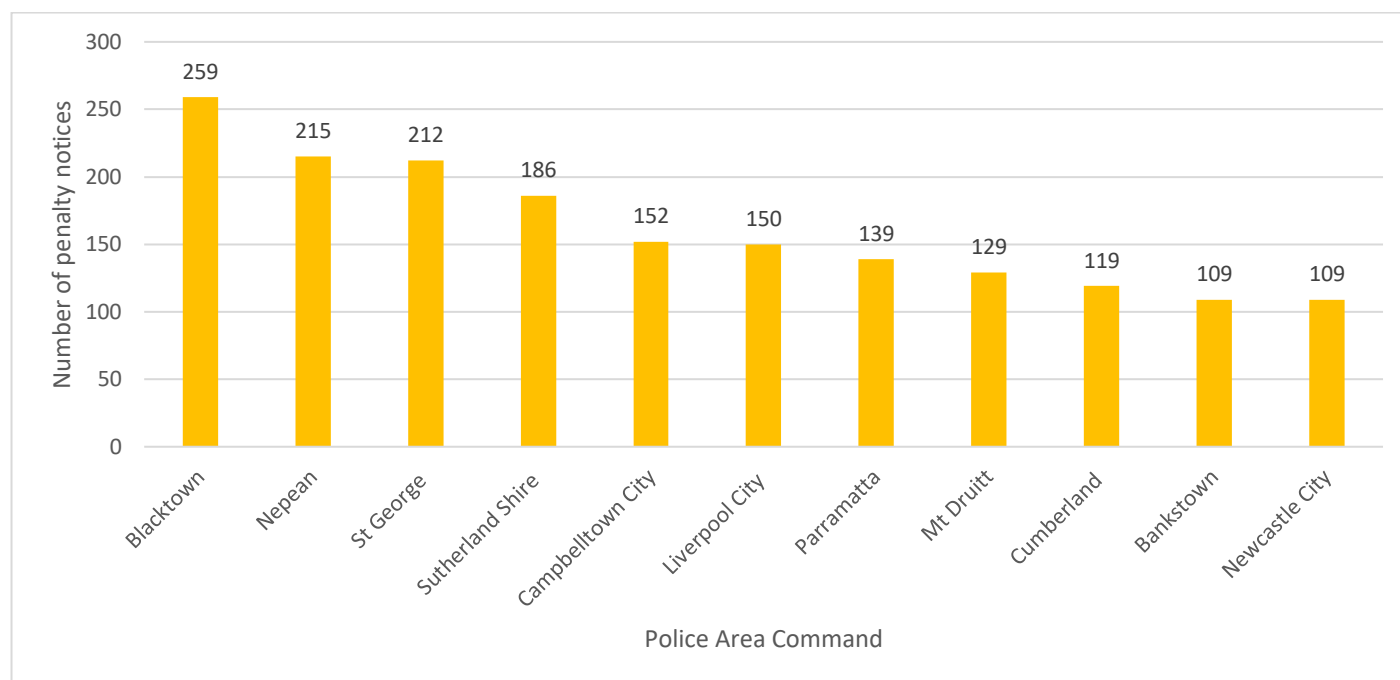
7.4.1 Graph 2: Top ten NSW LGAs by number of fines issued to children (aged 10-17) – April 2021 to March 2022¹⁹³



¹⁹² See *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) sch 1 pt 3 as at 25 August 2021.

¹⁹³ *Ibid.*

7.4.2 Graph 3: Penalty notices issued to children (10-17 years) by Police Area Command – 1 July 2021 to 4 June 2022¹⁹⁴



7.5. Penalty notices issued to Aboriginal children

We obtained data from BOCSAR on the number of penalty notices issued to Aboriginal and non-Aboriginal children across NSW LGAs from April 2020 to March 2021 — during which a total of 114 penalty notices were issued to children, and from April 2021 to March 2022 — during which a total of 3,363 penalty notices were issued to children. In the first of these periods, 2 (1.8%) of the 114 child penalty notice recipients were recorded as ‘Aboriginal’, with 8 recorded as ‘unknown’, and 104 recorded as ‘non-Aboriginal’.¹⁹⁵ In the second period, 83 (2.5%) of the 3,363 child penalty notice recipients were recorded as ‘Aboriginal’, with 159 ‘unknown’, and 3,121 ‘non-Aboriginal’. As displayed in Table 4, the highest number of Aboriginal child penalty notice recipients by LGA in the period April 2021 to March 2022 were Dubbo Regional (14), followed by Coonamble (9), Blacktown (6), Sydney (6), Cowra (4), Lachlan (4), Parkes (4), and Walgett (4). Many of the LGAs in the list are remote, regional, or rural locations with higher-than-average Aboriginal populations when compared to NSW. It should be noted that data on POI Aboriginal

¹⁹⁴ Data provided by Infolink, Policelink Command, NSW Police Force, released under the *Government Information (Public Access) Act 2009* (NSW) on application by Redfern Legal Centre. GIPAA-2022-0188402. Note, only PACs in which over 100 fines were issued in the specified period have been included.

¹⁹⁵ BOCSAR, ‘NSW Recorded Crime Statistics April 2020 to March 2022: Number of persons of interest (POIs) aged 10-17 years proceeded against by NSW Police Force for breach of a COVID 19 Direction incident by way of infringement notice (fine), by Local Government Area of incident and Aboriginal status of the POI’ (2022; reference: kf22-21655).

status can be unreliable, with data recorded as 'unknown' indicating police may not know whether the person that they are interacting with is Aboriginal or not. A mandate was introduced in January 2022 to require NSW Police officers to ask victims and POIs if they identify as Indigenous.¹⁹⁶

7.5.1 Table 4: Number of COVID-19 penalty notices issued in NSW to children (aged 10-17 years) by LGA identified as Aboriginal, non-Aboriginal or Unknown – April 2021 to March 2022¹⁹⁷

LGA	Aboriginal	Non-Aboriginal	Unknown	Total
Dubbo Regional	14	27	7	48
Coonamble	9	9	0	18
Blacktown	6	405	14	425
Sydney	6	121	6	133
Cowra	4	4	0	8
Lachlan	4	1	3	8
Parkes	4	6	0	10
Walgett	4	1	0	5
Ballina	3	9	0	12
Campbelltown	3	139	7	149
Penrith	3	200	5	208
Armidale Regional	2	5	7	14
Camden	2	24	3	29
Central Coast	2	92	6	100
Gilgandra	2	6	0	8
Goulburn Mulwaree	2	5	0	7
Griffith	2	1	0	3
Inner West	2	45	6	53
Liverpool	2	143	0	145
Northern Beaches	2	56	8	66
Parramatta	2	162	2	166
Sutherland Shire	2	167	9	178
Warren	2	1	0	3
Albury	1	5	0	6
Bayside	1	130	7	138
Bourke	1	2	0	3
Brewarrina	1	2	0	3
Canterbury-Bankstown	1	136	7	144
Coffs Harbour	1	18	9	28
Georges River	1	74	4	79
Inverell	1	4	2	7
Kempsey	1	8	0	9
Kiama	1	8	0	9

¹⁹⁶ NSW Police Force, 'Aboriginal People and Communities'

<https://www.police.nsw.gov.au/safety_and_prevention/your_community/aboriginal_people_and_communities>.

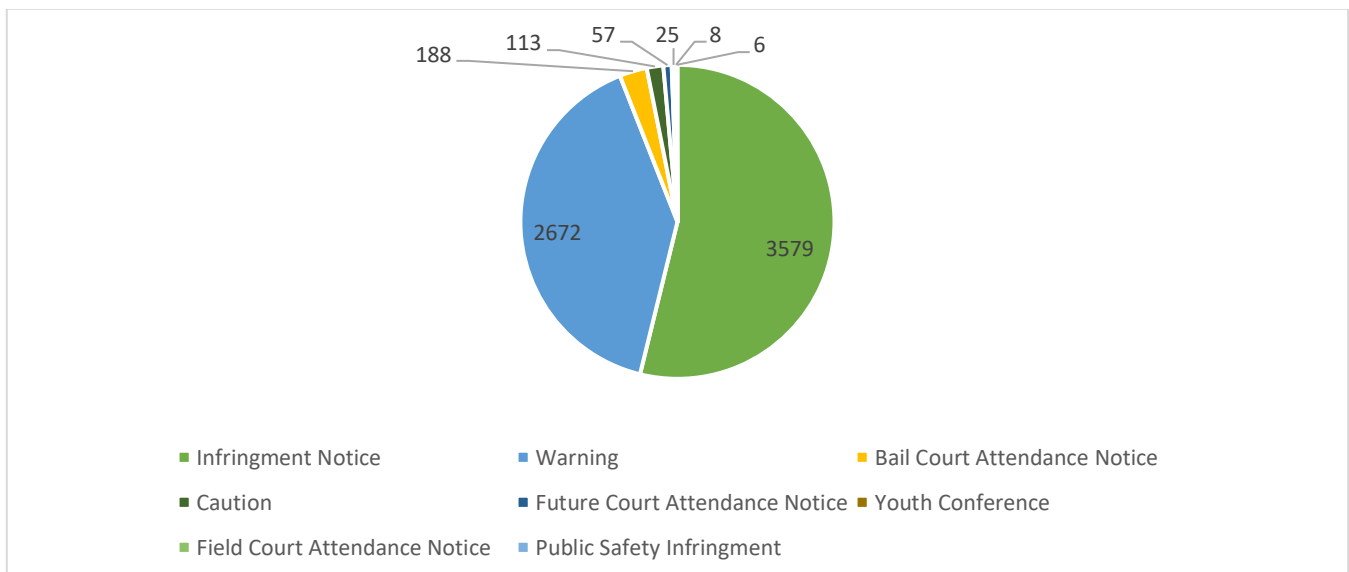
¹⁹⁷ BOCSAR (n 195).

Lake Macquarie	1	97	18	116
Mid-Coast	1	6	1	8
Narrandera	1	3	0	4
Newcastle	1	106	4	111
Orange	1	8	1	10
Richmond Valley	1	3	0	4
Shellharbour	1	26	0	27
Tamworth Regional	1	14	1	16
Tweed	1	22	5	28

7.6. Type of enforcement action taken

Although our primary concern in this Report was to document the use and effects of penalty notice fines for COVID-19 PHO non-compliance, we were also interested in how frequently the police undertook other enforcement responses to alleged PHO breaches by children. Table 5 summarises data on the type of enforcement action pursued over the course of 2.5 years (March 2020 to September 2022). The issuance of a CAN — that is, a decision to charge a person with an offence and require a court appearance — was preferred in 312 or 4.1% of cases. All other enforcement actions took the form of the issuance of a penalty notice, which amounted to 3,628 or 47.4% of cases, or a diversion option: warnings, cautions or referrals to a youth justice conference under the YOA, which amounted to 3,713 or 48.5% of cases.

7.6.1 Graph 4: Nature of proceedings initiated against children for COVID-19 offences from 1 July 2021 to 4 June 2022¹⁹⁸



¹⁹⁸ NSW Police Force (n 197).

7.6.2 Table 5: Manner in which persons of interest aged 10-17 were proceeded against by the NSW Police for a COVID-19 PHO breach – March 2020 to September 2022¹⁹⁹

Month ²⁰⁰	Court attendance notice (CAN)	Penalty Notice	Diversion	Total
Mar 20	0	0	1	1
Apr 20	28	56	35	119
May 20	3	14	3	20
Jun 20	2	0	4	6
Jul 20	2	0	0	2
Aug 20	3	1	2	6
Sep 20	0	1	2	3
Oct 20	0	4	0	4
Nov 20	0	0	0	0
Dec 20	0	0	0	0
Jan 21	1	11	218	230
Feb 21	1	25	217	243
Mar 21	1	12	180	193
Apr 21	0	0	1	1
May 21	0	0	86	86
Jun 21	1	15	75	91
Jul 21	30	398	570	998
Aug 21	104	1137	583	1824
Sep 21	82	866	324	1272
Oct 21	26	309	194	529
Nov 21	8	175	149	332
Dec 21	4	184	275	463
Jan 22	4	167	247	418
Feb 22	7	144	139	290
Mar 22	0	63	137	200
Apr 22	0	18	101	119
May 22	0	14	102	116
Jun 22	3	11	30	44
Jul 22	2	3	18	23
Aug 22	0	0	18	18
Sept 22	0	0	2	2
TOTAL	312	3628	3713	7653

¹⁹⁹ BOCSAR (n 2).

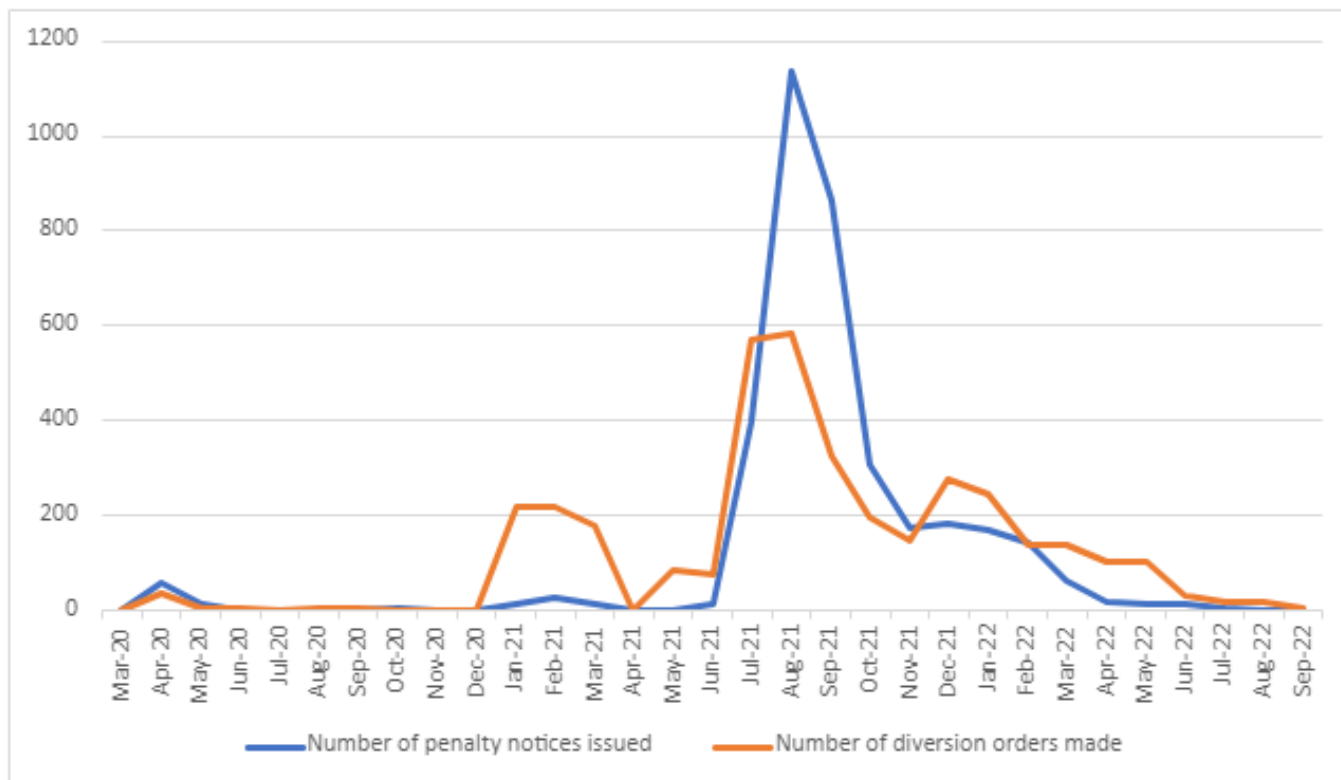
²⁰⁰ The figure for March 2020 is for the part-month from 17 March.

From March 2020 to September 2022, enforcement actions for children were roughly equally divided between penalty notice (47% of non-CAN actions) and diversion (48%). However, this distribution was not constant over the course of the pandemic (see Graph 5). The point is illustrated by comparing the (small) enforcement peak in the three months from January to March 2021 with the very large enforcement peak in the three months from July to September 2021 (which coincided with the Delta Wave). In the first of these periods, 94% of enforcement actions against children were diversion measures. In the latter period, which saw a dramatic hardening of the enforcement strategy of the NSW Government and the NSW Police Force,²⁰¹ only 36% of enforcement actions for children took the form of diversion. Penalty notices were used in 59% of enforcement actions for children during the Delta Wave, and a further 5% of instances involved issuance of a CAN. The penalty notices issued to children in this three-month period alone constituted almost three-quarters (73%) of the 3,268 penalty notices issued in the 2.5 years from March 2020 to September 2022. As the Delta outbreak passed, by the end of 2021, diversion again became the most common method by which children were proceed against by police for COVID-19 PHO breaches.

Police data for the period from the start of the Delta wave in July 2021 to June 2022 (Graph 4) provides further evidence that there was a shift toward penalty notice issuance as the dominant enforcement action, with penalty notices accounting for 3,579 (54%) of 6,648 proceedings initiated against children during this period. The data in Graph 4 show that where police *did* use diversion, it was mainly in the form of a warning under the YOA (2672 or 40%), with only very small numbers of cautions (113 or 2%) or youth conference referrals (25 or 0.4%).

²⁰¹ McNamara et al (n 15); BOCSAR (n 2).

7.6.3 Graph 5: Penalty notices compared to diversion orders for children (aged 10-17) – March 2020 to September 2022²⁰²



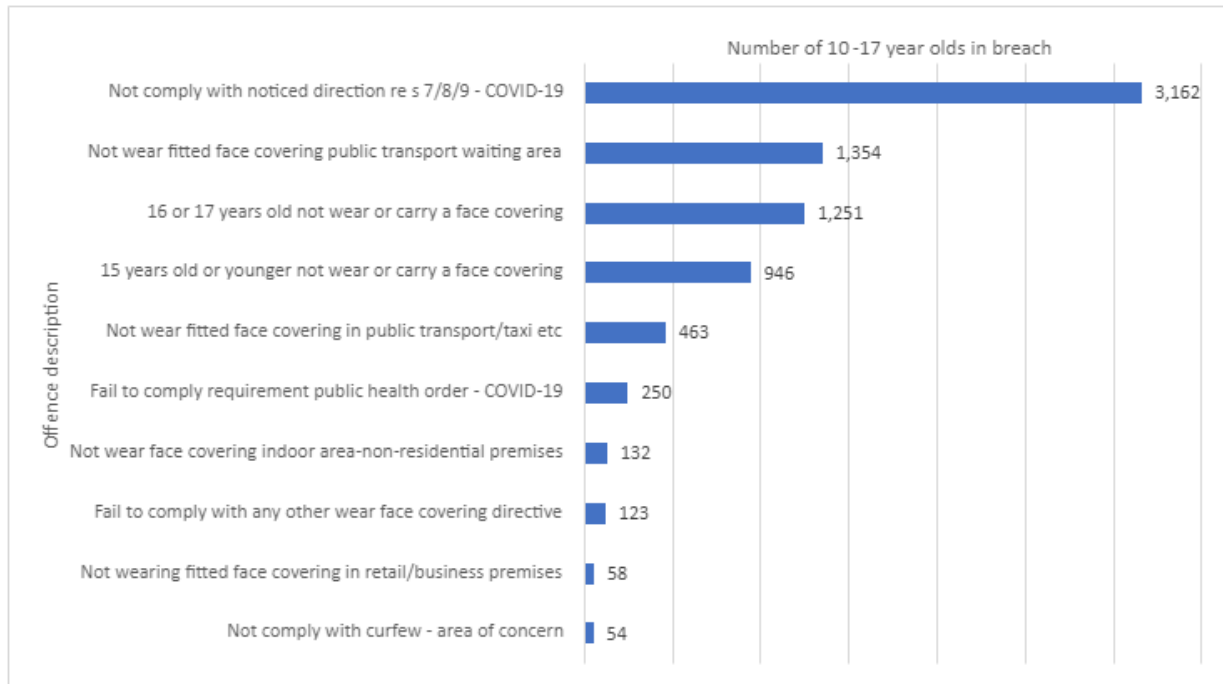
7.7. Offence types for which children were proceeded against

Graph 6 shows that the most common offence for which children were proceeded against for breach of a COVID-19 PHO for the period March 2020 to September 2022 was the offence of ‘not comply with noticed direction re s 7/8/9 – COVID-19’, amounting to 3,162 (41%) of 7,793 proceedings. Only 28% (2,197) of the COVID-19 PHO breaches for which children were sanctioned during this period involved the mask-wearing restriction for which an age-specific reduced fine was available from 30 July 2021 (see also above, Part 6 and Table 1). In all other instances (more than 70%), on those occasions where the child was proceeded against by way of penalty notice, the dollar value of the fine would have been the full adult amount. Note that this included 2,130 instances related to mask-wearing requirements where the police applied a discrete PHO breach category for which no reduced age-specific fine was available (e.g. failure to wear a mask in a public transport waiting area, failure to wear a mask while on public transport, see also Graph 7). Neither dataset reveals why a police officer would have chosen to proceed against the child by way of a context-specific ‘adult’ non-mask-wearing offence in these

²⁰² BOCSAR (n 2).

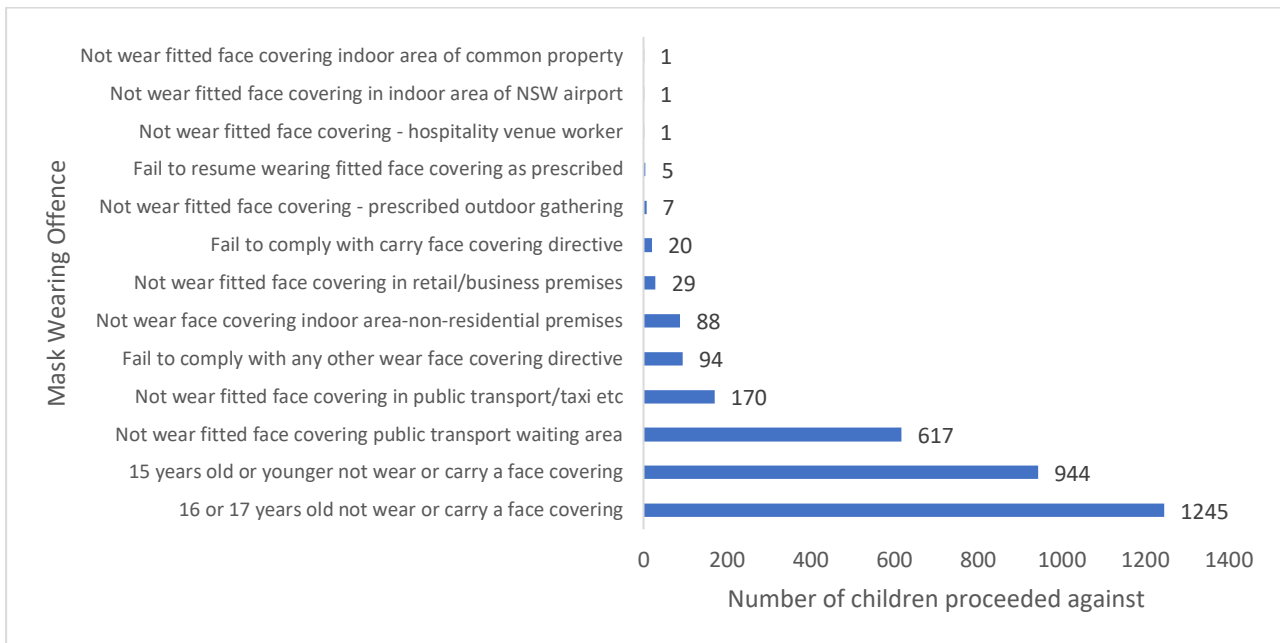
circumstances, rather than by way of the general mask requirement breach to which an age-reduced penalty notice fine was attached.

7.7.1 Graph 6: Top ten COVID-19 PHO breaches for which a child (aged 10-17) was proceeded against by NSW Police – March 2020 to September 2022²⁰³



²⁰³ BOCSAR (n 2).

7.7.2 Graph 7: Number of children (aged 10-17) proceeded against by NSW Police for mask requirement breaches – August 2021 to September 2022²⁰⁴



As illustrated by Graph 5 (above), the most active period of COVID-19 PHO enforcement and penalty notice issuance was during the month of August 2021 — at the height of the Delta wave.²⁰⁵ We obtained data for the two week period from 16-30 August 2021, which provided a breakdown of the age of penalty notice recipients.²⁰⁶ Graph 8 shows that 775 penalty notices were issued to children during this two-week period. Although the majority of penalty notices (78%) were issued to 16- and 17-year-olds, 170 penalty notices were issued to children under 16, including children as young as 13.²⁰⁷ BOCSAR data for the longer period from March 2020 to September 2022 (Graph 9) shows that COVID-19 PHO penalty notices were also issued to a 12-year-old child and a 10-year-old child.

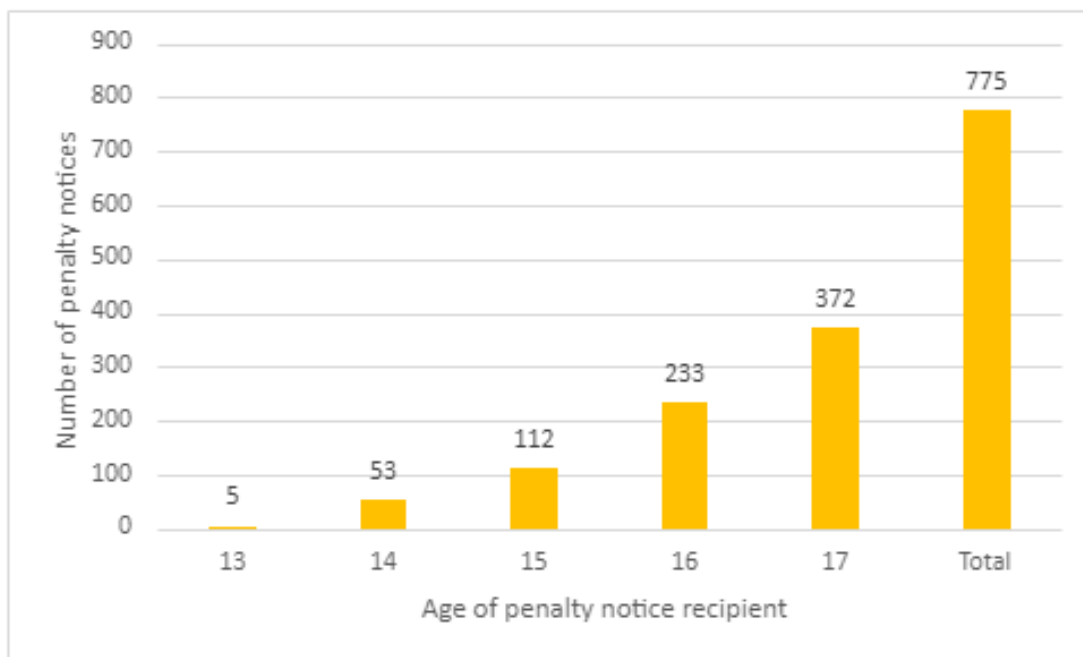
²⁰⁴ BOCSAR (n 2).

²⁰⁵ See McNamara et al (n 15).

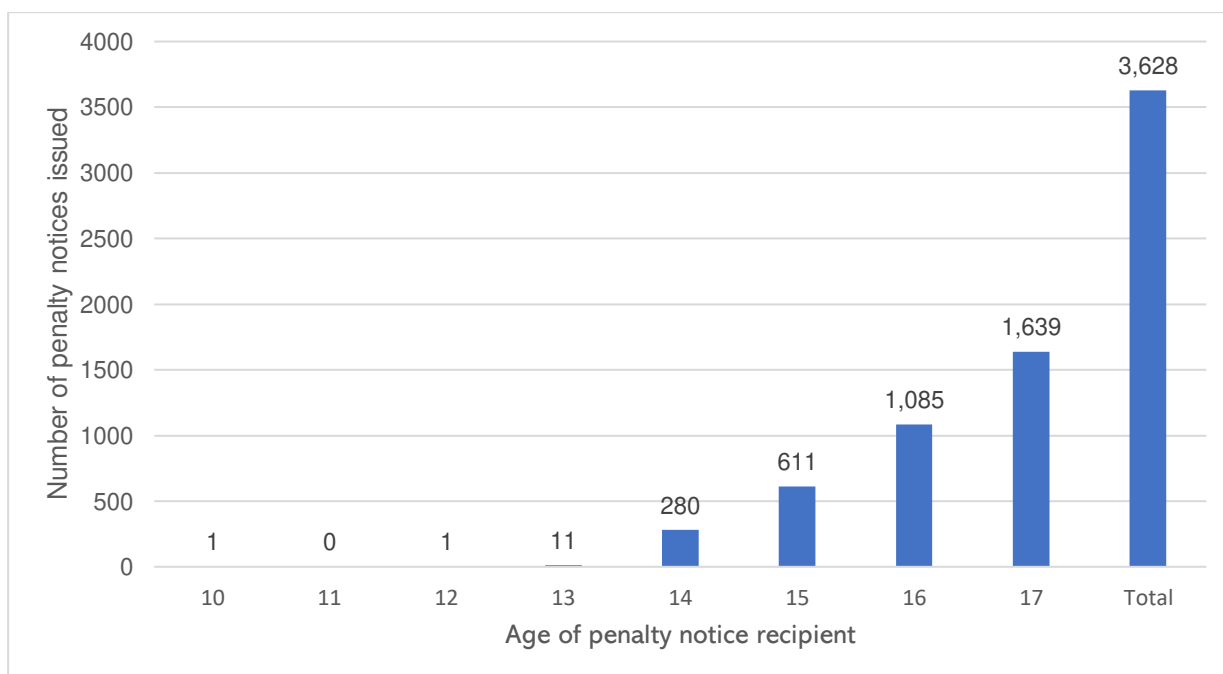
²⁰⁶ NSW Police Force (n 197).

²⁰⁷ Ibid. This dataset shows that during the same two-week period, 59 CANs were issued to persons under 18, including 14 CANs to 15-year-olds, 15 CANs to 14-year-olds and 1 CAN to a 13-year-old.

7.7.3 Graph 8: COVID-19 PHO penalty notices issued to children by age – 16 August to 30 August 2021²⁰⁸



7.7.4 Graph 9: COVID-19 PHO penalty notices issued to children by age – March 2020 to September 2022²⁰⁹



²⁰⁸ Data provided by Infolink, Policelink Command, NSW Police Force, released under the *Government Information (Public Access) Act 2009* (NSW) on application by Redfern Legal Centre. GIPAA-2021-0081249.

²⁰⁹ BOCSAR (n 3).

8. INSIGHT FROM LAWYERS AND ALLIED PROFESSIONALS

8.1. Introduction

We identified legal and other services that advise and provide support to children as a source of insight into both the impact of COVID-19 penalty notices and the operation of the fines enforcement system more generally. They also had the capacity to share (anonymous) discrete case studies about COVID-19 penalty notice issuance practices and effects.

After obtaining ethics approval,²¹⁰ we conducted semi-structured interviews with twelve lawyers and youth workers with experience in providing services in Sydney and across NSW.²¹¹ The audio-interviews were transcribed and transcripts were subjected to qualitative content analysis. Here we present the most significant themes identified from our analysis.

8.2. Findings

Unsafe, unstable and overcrowded home environments made it difficult for some children to comply with the PHOs

The PHOs that operated most harshly on children were the stay-at-home orders. Compliance with this requirement was especially challenging for children whose homes were unsafe or unstable for reasons including domestic or family violence or drug abuse. Interviewees told us that:

... Young people were experiencing multiple challenges, so whether that's housing instability, whether that's family and domestic violence situations, there were lots of reasons why young people couldn't adhere to the public health orders and they were out in public areas when they shouldn't have been or outside their 5 kilometre radius, and so they were getting a lot of fines ... A young person might live in Maroubra but their family and their peer network and ... the services they were engaged with, friends that they connected with, were in Waterloo or in Redfern or in Glebe which is obviously outside the LGA, so those young people were getting picked up by police.

**

²¹⁰ UOW HREC 2022/221, 13 September 2022.

²¹¹ Interviews were conducted during November and December 2022.

Look, being locked in the home is not necessarily ... the safest place to be. There were child protection issues. There were families that were dealing drugs and having young person exposed to those sort of unsavoury activities.

... Although people were locked in their homes and locked supposedly in a safe environment there were a lot of places which weren't a safe environment and which exposed young people to things that normally they might not have been exposed to as much because they were either at school or either after school down at the shopping centre ... [or] playing a game of footy.

Inadequate government resources and overcrowded housing meant that many socio-economically disadvantaged children lived in a home environment that was not conducive to online learning.

[Where there is] ... overpopulation in the house, houses that haven't got enough room, not even having devices so they don't have devices — schools were shut down. Parents were told to keep the kids at home and to do online learning. I had to go on newspaper and TV to notify the government that [in one western Sydney location] the internet tower ... [was] knocked down six months ago and hasn't been replaced so how are those young people supposed to engage in online learning when they don't have internet? They're already at a disadvantage. They're in social housing.

There was confusion about rules, and difficulties accessing advice and support

Interviewees told us that because many support services were not operating as usual during COVID-19 lockdowns, it was difficult to educate children about PHOs and provide appropriate advice and support. This led to children being confused about what they were (and were not) allowed to do:

But there were just lots ... of young people not understanding what the regulations were, and one of the problems is that during that time, and particularly during the lockdown time, normally the people for those more socially excluded groups of young people, the people that would explain [... the rules] would be youth workers and services [which] were shut then. So ... the only way young

people could engage was online or by phone and this is a group where that's not always the best way to do that and so there was ... misunderstanding ...

COVID-19 penalty notices became another tool to target over-policed kids

Interviewees told us that some children experienced COVID-19 policing as 'more of the same'; that is, police continued to apply routine policing practices during the pandemic that incorporated an over-policing of children who were Aboriginal, lived in disadvantaged areas or were otherwise 'known to police'. Police interactions for suspected breaches of PHOs were sometimes coupled with interactions for minor offences, such as offensive language. Kids in areas with relatively higher populations of Aboriginal children were also more likely to be surveilled for suspected non-compliance with PHOs.

The ones we dealt with, there was a pattern of the kids being known by police. They've ... had an interaction with the police before. They may not have been charged with anything, but maybe just cautioned or their name and address taken previously. That seemed to be the majority of cases.

**

My view is that this was just another tool given to police to engage in practices that they already engage in particular areas where there is disproportionate proactive policing or disproportionate numbers of interactions between police officers and individuals, particularly kids.

**

I think you look at the data it shows it kind of followed. Where there were high instances of offensive language or something there's high instances of COVID fines. Policing practices follow policing practices...

**

[Y]ou can't look at the way fines work in NSW without looking at the kind of patterns of issuing behaviour.... it wasn't any surprise that these [areas most impacted by Covid fines] were areas where a lot of Aboriginal people live and also where a lot of people who are poor live.

That follows normal policing practices, that's where you get more arrests for breach of bail, it actually just followed lockstep with that pattern, it just made it worse.

**

... What we do know is that when adjusting for population size that the top seven communities that were greater, you know, the most impacted by public health order fines were communities with high populations of Aboriginal people. ... the public health order penalties highlighted what we already knew, I guess, about over policing in some of those communities and, yeah, that the public health order fines and penalties became ... another tool for police to be able to kind of over - over police in some of those areas.

The availability of COVID-19 penalty notices produced net-widening

We heard that the policing of PHOs produced net-widening, in the sense that some of the children who received penalty notices for suspected breaches of COVID-19 PHOs, in non-pandemic times, would have been unlikely to come into contact with the criminal justice system.

... Sadly, the young people who are in contact with law and justice systems ... they're used to that, but there's a whole other group of young people who would normally not have any contact, or very limited contact, with the police who were continually being moved on, told to – you know, all of those things by police in ways that were threatening and aggressive.

I think that for me it was just that a net was widened, so a way that Aboriginal young people and more broadly young people are treated by police just kind of got extended to the wider population in some ways. ... other people got to see what it's like being an Aboriginal young person for a few months where every time they see a police officer they're stopped-

Heavy-handed policing contributed to negative police-citizen relationships

Overzealous policing practices contributed to more children and their families forming negative attitudes towards police and the justice system. This was especially the case where people felt like they were being treated unfairly.

And look, again, talking about those young people in those areas – and there were other young people who spoke a lot about feeling intimidated and harassed and afraid were young people who didn't have contact with police previously. So they found that really frightening, they found it really frightening that the police

were the ones that were – you know, they weren't doing anything wrong and the police were kind of jumping on them or their families ... that comes up in consultations for us all the time ... I just think that there's been a huge amount of damage done in terms of how young people see how they were felt and how they were treated and then that kind of perception of '... We were treated like criminals and we weren't'.

The experience of how COVID-19 PHOs were enforced was seen as causing longer-term damage to community-police relationships. This was especially the case for already over-policed populations, where intensive policing of such populations for suspected COVID-19 breaches undid 'a whole lot of good work' that had taken place.

Especially in Bankstown, there's been a lot of hard work to – over decades – to build on positive relationships between young people in particular and police and the last couple of years has definitely put a big dent in those relationships. A big dent in trust. A big dent in sort of – young people, especially Middle Eastern young people, do feel that they're targeted. They were targeted during the lockdowns and continue to be targeted. That's just the voice that is being stated out there from young Middle Eastern young people.

**

[T]here'd been a lot of work done to improve the relationship between police and young people and so this just sent it backwards ... It's undone a whole lot of work that was good work that was happening.

Unequal laws and policing practices divided kids along class lines

Interviewees reported that kids who lived in those parts of Sydney that were subjected to the strictest and longest lockdowns (termed 'areas of concern', primarily in south-western and western Sydney) felt aggrieved about the discriminatory restrictions and targeted by police. They could see a stark difference between how they were being treated, and how kids in more affluent areas were being treated.

... It really opened up not only the relationships between young people and police or the community and police, but also opened up other issues of 'us and them'

within Sydney, the 'haves' and the 'have nots', and south-western Sydney obviously [is] more socioeconomically disadvantaged [compared to] the eastern suburbs and northern beaches of Sydney. So it really opened up some of that class disadvantage sort of debate again.

... There's still a lot of hurt over that experience of those most affected LGAs and the media images of what it was like in other areas. ... I live on the northern beaches and I'd be walking around and everybody was out and young people are out, kids are out, and the police are lined up getting coffee, and it was a different world. ... Police could have been fining people over and over and over and over again if they wanted to, so there was a very different experience in policing in different parts of Sydney and that in itself kind of created an antagonism with young people about police as well.

One interviewee told us that during COVID-19 lockdowns, PHOs were sometimes enforced by police officers from outside the area, and this meant that they were 'not the police officer that would normally see that young person or have a sense of that young person's context'. Another interviewee indicated that the inadequate provision of services meant that police were the only public servants that some children engaged with during the lockdown periods. This was not conducive to achieving positive public health outcomes.

Look, it's interesting. One of the workers in Moree said – because they had quite a lot of trouble re-engaging young people after COVID – and one of the comments that they make up there is that for a long time the only people young people had contact with were police which is a really – like that's just a crazy kind of thought, because services just weren't there any more and weren't doing that face-to-face stuff, so the only people kind of chasing them were police, you know, the only people chasing them for anything were police. ...

So yeah, I just look at using police to do the public health stuff just sent that back so much.

Police failed to apply diversionary alternatives prior to issuing penalty notices

Interviewees explained that police officers often went ‘straight to the fine’ — issuing penalty notices to children as a first option without engaging (informal or formal) diversionary options. This was perceived as inconsistent with the philosophy of diversion promoted by the YOA, unfair, and excessively punitive.

... The police have gone straight to the fine. They haven't provided any cautions or said, you know, 'You need to get home, or you need to wear a mask'. It's really, like, 'Well, you should be doing this' and then, 'Here's a fine for you'.

**

... A common theme with these COVID fines for both children and adults is that there was no warning. It was pretty much just straight into, you're out, out of your house without a reasonable excuse. You, you've breached the public health orders. We, we are going to fine you or you'll get a fine in the mail. Or they weren't really sure what happened until the fine came later on.

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From the young person's instructions no enquiries were made by that officer at the time around whether or not that young person would have even been eligible for a diversionary option under the Young Offenders Act. What I know now from having reviewed his court alternatives history is that ... he was in fact eligible. He hadn't been given any cautions, warnings or any diversionary options available under the Young Offenders Act, so he would have been eligible.

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With the young people we work with, it was definitely the harsher the penalty such as the fines – they were issued strongly. There wasn't much negotiation around a warning or anything like that.

The quantitative data presented in Part 7 revealed that, over the course of the pandemic, police *did* often issue warnings or cautions, or make referrals to youth conferencing, but use of diversion for children declined notably during the Delta wave, when penalty notice issuance escalated dramatically. Some interviewees suggested that this change was actively encouraged by NSW Police Force leadership, referencing reports of when NSW Police Commissioner Mick Fuller in August 2021 instructed police to depart from a ‘community-based policing’ approach and instead

'take a strong approach to enforcement'. Commissioner Fuller also told police that he would not hold them 'to account' if they 'write a ticket and ... get it wrong'.²¹²

... I didn't see it as a change, because they give fines to people out here all the time. I think the big difference was like the – they kind of had the backing of the 'up tops' so that even if they were doing the wrong thing they knew they were covered... I remember the Commissioner had said something like ... 'Just fine them, we've got your back' kind of thing, even if it's a dodgy thing.

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...the Police Commissioner came out and said 'I make no apologies for my police issuing incorrect fines, they're doing the right thing.' The system gave licence to some pretty poor practises and kind of made bad practices worse.

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So, there may be some situations where the police tried a different approach and they may not have worked. But I think, yeah, there are quite a lot of circumstances in which they're really not exercising much discretion. You know when you had, during the lockdown period last year when you had Commissioner Fuller basically saying ... 'My officers are not going to, if they get it wrong, they're not going to get into trouble for that' or whatever. ...

... The message really that [the Commissioner] was conveying is that police are going to be totally unaccountable and basically if we stuff up, we're not going to review things, we're going to double down and have people's back.

Interviewees noted how, during press conferences, the police leadership would single out LGAs known for having relatively higher Middle Eastern populations in south-western Sydney (such as Bankstown or Fairfield) as areas where significant numbers of police would be deployed.²¹³

²¹² *NSW Coronavirus Update - Saturday 14th August 2021* (Directed by 7 News, 14 August 2021) <https://www.youtube.com/watch?v=pQu_iSA-LJ0>; Angus Thompson, 'Police Commissioner Says Officers Wrongly Issuing Tickets Won't Be Held to Account', *The Sydney Morning Herald* (online, 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>>.

²¹³ See, eg, when Deputy Commissioner Worboys stated: 'I want to send a very clear message that we will double down our efforts in terms of visibility and compliance in southwestern sydney in particular around that Auburn, Bankstown area in those shopping areas': 'Latest COVID-19 Update from Deputy Commissioner Worboys 1 July' (Directed by NSW Police Force, 1 July 2021) <<https://www.youtube.com/watch?v=41O378m5yyw>>; Commissioner Fuller later stated to police: 'And just to give you some hope, if you look at Fairfield, finally, we are seeing a decline in the positive Covid cases. And why? Because police have been out in the field enforcing the health orders:' Thompson (n 214).

I mean I take note that I think there was a press conference and the Police Commissioner ... that he had particular issues with young men in the Bankstown LGA. ...

So when we have the top brass of the police identifying that they are identifying young men in a particular area as being a problem, then obviously I guess from a top down approach which police obviously operate under then obviously it sets the scene of where the police are really coming from. So really targeting young – I hate to say it but ... Middle Eastern young men in that particular area and that's what we also definitely saw ...

The statements of the Police Commissioner referenced here are analysed further in the report, *COVID-19 Criminalisation in NSW*. McNamara et al argue that Commissioner Fuller's instructions to police in August 2021, including: 'if you write a ticket, and you get it wrong, I understand, and I won't hold you to account for that. We have to shape the behaviour of people to get out of lockdown,' and his public statement: 'I'm not apologetic, please don't write and complain to me', suggested:

a cavalier approach to PHO enforcement and penalty notice issuance. This would be concerning at any time, in relation to any form of 'on-the-spot' fine or police enforcement action or exercise of powers. It is especially concerning where: restrictions were directed at public health objectives; the pace of PHO-making during the Delta Wave presented real knowability challenges – for both police officers and residents of NSW generally; and the value of penalty notices was so high.²¹⁴

Police-led enforcement of PHOs and high dollar-value penalty notices constituted a harsh and unfair way to address the behaviour of children during a public health crisis

The consensus of lawyers and others who were interviewed for this study was that it was a mistake to attempt to pursue legitimate infection control objectives via a strategy that involved intensive policing and high-volume issuance of penalty notices. The frequency with which PHOs were amended made it especially hard for children to 'know' the rules, and contributed to police errors in relation to decisions that a person had breached a PHO. The high dollar value of COVID-19 penalty notice fines made this approach especially unfair for children.

²¹⁴ McNamara et al (n 15) 57-8.

They [the young people] had very negative views about the whole experience because often they felt that they were quite justified. There was one instance where I spoke to a young person where he was simply just sitting on a park bench that was just a little far from his home and the police came and fined him. He felt that he was doing nothing wrong. He wasn't with a group of people or with anyone else. He was just too far from home and he received a fine and he was very upset about not only the size of the fine, but the fact that the police had come and, you know, he perceived them to be harassing him ...

The clients that I work with are frequently subjected to disproportionate levels of over-policing and the areas disproportionately impacted by COVID-19 policing and fines are the areas that are already impacted by over-policing and general fines. Giving police another tool to use that looks like a punitive tool doesn't make those communities safer and better able to comply with public health orders or understand risks and make decisions about how to manage that public health crisis. It just leads to more punishment. So I think that that's my answer. I don't think police-led fine enforcement is an appropriate mechanism for ensuring positive public health outcomes.

High penalty notice fines have ongoing negative ramifications

The high dollar-value of COVID-19 penalty notices made them an especially harsh punishment. Expensive fines have ongoing ramifications for children's schooling, employment, and socialisation.

The amount of the individual fines is the biggest thing. You might get - if you're travelling on a train and you don't have a ticket then it's a very modest fine as opposed to a great big whacking \$1000 fine because of the COVID public health order ...

... They were huge fines in some circumstances for 13-year-olds to have to pay, and they will sit on their record for several years.

But they were huge amounts of fines which we're talking about marginalised young people who have no real means to pay these fines back who then are

caught in a cycle where they don't pay those fines, they can't get their licence. Then they can't get employment. Then we have high rates of youth unemployment across south-western Sydney.

There's a whole interaction of connections based on this fining a young people yet a young people doesn't have the means because they don't have a job and even if they do have a job their jobs are casualised jobs anyway in casual employment which during COVID that was one of the first jobs to be knocked off in terms of hospitality. ... these young people aren't in an ability to actually address that and pay those fines off to then move forward in terms of getting an employment to then be participants and citizens of the country.

COVID-19 penalty notices exacerbated existing fine debt for children and young people experiencing disadvantage

[T]he fact that the COVID 19 fines carried such a huge price tag really enabled us to see that playing out in real time. So often we're reliant on reviewing this data after sort of longer term you know, periods of certain practices or policies or laws being in operation. And this allowed us to see it play out in a matter of months. ... And us working with clients on the ground, it was quite shocking to see how rapidly people were being plunged into fine debt and how distressing this was and how much community concern there was.

I think it's confronting for anyone to be handed a ticket with a thousand dollars price tag on it, but when you're already living on the bread line ... that's magnified.

[T]here's data ... which shows that COVID-19 fines were disproportionately issued in low socioeconomic areas and communities with significant Aboriginal populations across the state. ^[215] ... The fine debt in those areas is nothing new. Those are areas that already had huge accumulated fine debts and disproportionate fine debts per capita. Those are areas where people have very old fine debts, you know, fine debts going back years and years and years.

So from my point of view, the COVID-19 fines, they kind of waved a magnifying glass over an existing issue, and they just made it very easily discernible in a

²¹⁵ See McNamara et al (n 15); Hopkins & Popovic (n 15).

very short period of time. The fine debt balloons in those areas, people are seeking assistance or, you know, there's no services available because it's locked down and there are travel restrictions and we can't go anywhere and reach anyone. But it all sort of happened in a very short period of time, and because of the fine amounts, the fine debt was, was really easily discerned to go up.

Police failed to consider mental health impairments, cognitive impairments, disabilities and cultural obligations

Interviewees told us about instances in which police decision-making failed to account for how a child's mental health impairment, cognitive impairment or disability might affect their understanding of, and/or ability to comply with, the PHOs. One interviewee expressed frustration with how police would continue to overlook what they perceived to be 'self-evident' reasons why a child with ADHD and autism spectrum disorder, who lived in out of home care, was finding it difficult to stay at home. The client received several thousands of dollars of penalty notice fines in just five weeks.

We had a young client who was a girl in her early teens who has a number of challenges around behavioural and developmental issues, diagnosed conditions, which you know, should pose a few challenges to her just in her day to day, in her interactions with the world, and with institutions that she has to come into contact with.

So, she's a client who is in out of home care ..., has severe ADHD and ... also is diagnosed with autism spectrum disorder. Behaviourally, she had a really hard time complying with stay-at-home directions and just generally has a lot of difficulty complying with directions and following instructions and making ... consistent and reasoned choices about the way she conducts herself when she's told to conduct herself in a certain way.

And this young person received ... a total of eight COVID fines over about a five-week period ... Five of those fines were \$1,000 fines for failing to comply with stay-at-home orders. In terms of the inappropriateness of fining her, I think it's sort of self-evident. I mean, ... the personal characteristics particular to her, which you would think that any police officers coming into repeated contact with her

might be aware of. But even if they weren't, the fact that this is a young person in out-of-home-care, finding it hard to stay in an out-home-of-care setting who's got clear difficulties complying with directions and complying with instructions. The fact that she was fined so many times for not being at home raised so many issues to do with the use of fines as a tool for trying to encourage supposedly safe behaviour in relation to a public health concern.

The enforcement of the PHOs, it was reported, also failed to recognise the cultural obligations of Aboriginal people:

But it was very – it was less about people's health than it was about just controlling people's movements. Because it didn't take into account mental health or any of these other things like Aboriginal fathers' connection to country. Stuff like that, burials. I had family that only getting buried, their ashes are getting taken in a couple of weeks but they died in middle of COVID. But they couldn't go home.

COVID-19 penalty notices provided a vivid illustration of the injustice of penalty notices as a method of enforcement and punishment for children

Interviewees told us that the experience of COVID-19 penalty notices highlighted pre-existing barriers to exercising internal review and court-election rights, including provision of information. 'Safeguards', like the opportunity for court election or seeking internal review from Revenue NSW, were perceived to be illusory. Interviewees told us that children and young people often did not understand the significance of the COVID-19 penalty notice they were given until some time later, when Revenue NSW commenced enforcement action — by which time the deadline for court election has passed.

A lot of kids don't know what to do when they get a fine just from the very beginning. And there's very little information even on the fine itself about the options or even the pros and cons of, of taking a fine to court.

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By the time that they're generally reaching out to a legal service I think it's - they've either received follow up correspondence from Revenue NSW saying, you know, 'Your licence is going to be suspended' or, you know, they're going to cancel car registration or something along those lines. Or they've come into contact with another service who has asked them if they have any fines and

who's then referred them directly for legal advice about those fines. In speaking with the client at that time you become aware they've got the COVID fine, they might have other fines and, you know, other legal issues.

Most clients are coming to us at the point where an unpaid fine debt is stopping them from doing something. With young people, I would say that they're not coming to us at all and we are coming across them. We are screening young people for fine debt through the delivery of other legal services and we're assisting where we can and when they want us to.

Even for children and young people who attempted to deal with the penalty notice soon after receipt, the fact that recipients are not automatically provided with, or do not know that they could apply for, Part A of the penalty notice,²¹⁶ means that they did not have access to the recorded police account of the alleged transgression. This made it very difficult for fine recipients to dispute the allegation and mount a 'defence'.

*... When people were ringing in for advice, we really couldn't tell them what the prosecution needed to prove in order for them to be found guilty ... or not guilty.
... The actual penalty notice also didn't tell us; ... it just told us a date and a time.*

Without legal assistance, children experienced difficulties writing review applications

Interviewees expressed that providing reasons for an internal review can be complex. Children are usually not well-equipped to do so without legal advice. If and when children seek this advice, it can be very late in the process, when they are already subject to enforcement actions. Interviewees relayed instances in which the internal review process essentially shifted the burden of proof by requiring the applicant to prove their innocence or establish extenuating circumstances.

We have seen a few clients after the fact they've tried to request a review themselves and they've really, they've stuffed up, they've really not made a good job of it. The review request has been refused. It's too late for them to court elect. If only they'd managed to find their way to a legal service early on and we could

²¹⁶ This is true of all NSW penalty notices – the explanation of the facts that constituted the offence from Revenue NSW is not provided to the recipient unless they apply to Revenue NSW for a copy of it.

have, you know. So, yeah, it's all those young people who are not reaching any kind of advice or advocacy that I really worry about. Also, their licence may be suspended due to fines and then they're driving while they're suspended and then they get disqualified.

He did submit a review himself to Revenue saying, 'I thought that the penalty was less for a young person. I'm only 16. I can't afford \$500.' ... He kind of - I think he went back and looked at some part of a website, I'm not sure which government it was. But where there was some material about lower penalties for young people. So he submitted a review on that basis. The review was rejected [without reasons] and then he court elected.

Decision-makers could be unsympathetic to a child's circumstances

Participants reported that when children attempted to 'appeal' a COVID-19 penalty notice through Revenue NSW, decision-makers displayed limited sensitivity to the child's personal circumstances and the uniqueness of the COVID-19 pandemic.

I don't think they have shown any greater discretion or sensitivity in relation to COVID fines in particular. In my experience, they're just very black and white about it. If it doesn't fit in their guidelines, then they're just going to reject the review and then have to pursue an alternative option.

The experience with COVID-19 penalty notices highlighted flaws, inefficiencies, and unfairness in fine management practices

Interviewees told us that many people find it difficult to engage with Revenue NSW processes, and that it is even worse for children.

... The review system is not catered for kids at all. It's an opt-in system. It expects people to know that it exists. It's quite a complex system to navigate.

Interviewees reported that large amounts of time and energy were being spent by multiple organisations/agencies trying to work out how to manage debts from COVID-19 penalty fines, which underscores just how costly and resource inefficient these penalty notices were.

A lot; a lot of time. There was at one point so many working groups and meetings and advocacy. It was hours and hours every week spent doing this work; writing letters, you know, yeah; a lot...

... I mean, I think if - if we were able to get a better systemic response it would have been okay because of the scale of people impacted by public health order fines. But certainly, there were some working groups where we spent a lot of time going through options and it appeared that there was a willingness to look at, you know, nothing was kind of off the table. But then after meetings and consultation and more meetings ended up just being, 'Well, we already have existing kind of hardship measures, so the public health order response is not going to be kind of anything extraordinary. We're not going to take any additional steps to deal with it'. So there was a lot of frustration certainly, yeah.

Belying its official status as a civil debt recovery office, Revenue NSW is a de facto part of the criminal justice system playing a central role in decisions about punishment

Some interviewees told us that their experience supporting children and young people in their interaction with Revenue NSW over COVID-19 penalty notices caused them to reflect on the nature of Revenue NSW as a government institution. They observed that there should be a greater appreciation of the role the agency plays in criminal justice administration, as a basis for expecting greater transparency, scrutiny, and accountability.

I mean, I can understand from a government point of view; you've got now one agency that is responsible for managing all of the payments of fines ... I can certainly appreciate from that point of view that it's a great system. But I think that, yeah, as you say, it does make it very difficult when you've got this civil body that's administering all these criminal penalties.

Concerns were expressed about whether decisions were made independently from police, and Revenue NSW exercising the potentially conflicting functions of collecting revenue and determining whether a fine should stand.

I think the fact that Revenue [NSW] is part of Treasury and work for the ... [Treasurer] mainly, that's a ... potential conflict of interest when it comes to them

reviewing fines and also collecting the revenue from fines. I don't think it's equipped to review fines, from looking at COVID fines. I think there's a very cosy relationship between Revenue and Police ... Clients' files that have alerted me that maybe Police are trying to lead a role in the decision making around the review of fines. And that the body is not independent enough from Police and therefore you're not getting a proper recourse or review system as it stands at the moment.

There is a need, according to one interviewee, to reconsider how the review and payment system is structured.

... It's not the people [at Revenue NSW] themselves. I'm not targeting the people, but I am targeting the system and, and the way it's structured, which I think is really problematic and no one's really looked at it before.

The inability to 'undo' court-elections produces injustice

In the event where a child *did* exercise their 'right' to contest the penalty notice in court, interviewees expressed concern that this was often done without proper legal advice, and exposed applicants to a criminal record and/or a greater penalty. Children may not realise how serious the decision to court-elect is, especially when the *Fines Act* provides no capacity to 'unelect'.

The difficulty with court election can be that once you elect you can't unelect ... you are sent forms by the court once your matter's been given a listing date and you can enter a written plea, for example. But you can't unelect essentially. Once it kind of goes through that process then you must attend court.

... Really common [to think if I'd had this earlier I would have advised you not to go to court]. Particularly for young people who – because... people open themselves up to criminal convictions once their matter's determined by a court. Also, courts have higher jurisdiction so can impose more severe penalties. So those issues, but also there may be people who may already be involved in the criminal justice system, who might be subject to some sort of conditional liberty like a good behaviour bond, being on bail. Then they're bringing another matter to court through this court election process. That can also trigger breaches which,

yeah, may be problematic for people. So, yes, it happens quite a lot where you look at – you get a matter, someone's court elected and you think, 'That was unfortunate'.

In the following instance, a young person with an intellectual disability received a \$1000 penalty notice, and Revenue NSW declined to exercise their discretion to withdraw the penalty notice.

Section 24E of the Fines Act ... says that Revenue [NSW] should withdraw a penalty notice if you can establish that a particular circumstance like mental illness, cognitive impairment, intellectual disability, contributed to the offence or ... [the] person was unable to understand that their conduct constituted an offence. ... So ... we outlined the circumstances. We asked Revenue to withdraw – to exercise their discretion and to withdraw the penalty on that basis. Revenue said, 'No, the penalty is to stand'. They went back to the issuing authority. Then I obtained instructions from that young person about, you know, what he wanted to do. We spoke about court election but for a number of reasons that wasn't the right option for him. So we made a write off application and that was approved. So Revenue wrote off the client's debt.

While the result was that the young person was not left with a fine debt, the case illustrates how difficult it was to challenge the legitimacy of the original penalty notice issuance.

Driver licence suspension and cancellation are draconian harms arising from penalty notices and fine debt

Interviewees told us that the experience with COVID-19 penalty notices has exacerbated and highlighted the harms done by one of the 'centrepieces' of the fine debt recovery system — the suspension or cancellation of a person's driver licence, or the prevention of a person from obtaining a driver licence.

We've had quite a lot of clients contact us because they've recently gone to try and get a licence for the first time and fine debt that they accumulated as a young person is stopping them from getting their learner licence and then, you know, thereby stopping them from taking up employment or study opportunities or starting an apprenticeship. So, it's made their fine debts bigger and it's made that

hurdle harder to overcome when they reach the age where enforcement action starts to be taken and prevents them from doing things that allow them to succeed in their endeavours in life.

[Driving is] ... part of them becoming independent, part of them obviously getting a licence to drive to wherever they're working, whether it's a job site or – so once you eliminate or prevent them from getting their licence, they require now an Opal Card to travel by public transport to different areas. I think to a certain degree, I think these fines as well as the COVID-related fines, you just further isolate and marginalise these young people in the community because when they've got such a hill to climb in terms of debt, it pushes them back towards a negative type of lifestyle where they're involved in any type of antisocial behaviour or negative types of behaviours to make money.

The impact of driver licence sanctions is even greater in rural and regional locations.

It's a significant impact. ... In the Hunter area ... public transportation is just shocking. ... [There are] very limited bus services into Maitland or Newcastle. The trains don't run regularly. There's really no way, if you don't have a licence, to be able to get around. For a young person who's either trying to get to school or education or a job, if they don't have a licence because it has been cancelled because they've got fines, they're just stuck and it's a terrible cycle that they're then not able to get out of.

The most obvious impact is licence sanctions, so for kids who are trying to get their Ls they find they can't because they've got these sanctions on or for people who do have a licence, they find that it's suspended.

... Getting your licence suspended in a regional area cuts you off from so many things. So I think, again, it's that disproportionate impact that some of the punishments have ... [The have] a disproportionate impact on young people with low incomes or complicated circumstances or living in regional areas.

WDOs have some utility as a debt amelioration method for small fine debts but do not compensate for, or justify, unnecessarily punitive penalty notice issuance in the first place

Participants expressed a range of views about WDOs. One view expressed during interviews was that, pragmatically, organising a WDO could be the best way to help a child with fine debt.

I just say as someone who has spent a lot of time trying to connect their kids with their lawyers, there's a reason why it's easy to do a WDO. ... It's quite hard ... when you're time poor already, when you have to balance up: What's the easiest thing to do? For me to report the work that they have done with me, or for me to chase up this lawyer ... It's often easier just to do a WDO, especially for young people ...

For some, fines are 'fake money' – there being no expectation that anyone will pay them back with actual money, but will simply do a WDO to wipe the fine.

... a \$1,000 fine is fake money. That's the way we used to view it at [a youth services organisation]. Like fines, they obviously have a real impact, but it's also like no one ever expects to actually pay them off in money. So, it's kind of like, yeah, I got that fine, you know. So we were just referring them all to people, we all set up WDOs to pay them off and if they're young it's gone in two months.'

Others mentioned 'creative' ways WDOs were used during the COVID-19 pandemic:

There was a partnership between Legal Aid and Revenue NSW and Kimberwalli which is an Aboriginal school out in Western Sydney and Kimberwalli I think became a bit of a hub for community, and they had a thing going where you could pay off \$1000 if you went and had a COVID vaccination and underwent a health conversation with someone so that the vaccination wasn't able to be counted against your WDO but the health conversation could, but they coupled that with trying to get people vaccinated, and there was a few other examples of those around I think, but I definitely know that one out there.

...

Yeah, because you literally just went and got a vaccination and you sat and talked to a health professional for 15 minutes and there was \$1000 worked off. Because I think you can work off \$1000 a month and certainly entering into counselling pays off quite a lot in a hit. So they were really open to looking at creative ways to get peoples' fines brought down pretty quickly.

Others were uneasy about the way in which the 'success story' of the WDO system is used to prop up a system that relies far too heavily on police using penalty notices as a form of 'instant justice'.

I can see how [arranging a WDO] ... could be a valid option, but it shouldn't be the first port of call, and saying, 'Look what we're doing for young people; they can go on a WDO'. I think you need to start at the very beginning and ... 1) whether children should be issued fines [at all]; and 2) if they are issued fines, that they should be capped on the basis that children don't have an income coming in.

Although young people cannot be compelled to participate in the WDO scheme, one interviewee expressed the view that WDOs were akin to community services orders that can be imposed by a court, and that this level of punishment is disproportionate to the nature of the 'offence' that resulted in the penalty notice being issued. Another was especially reticent about relying on WDOs as a method of dealing with a child's COVID-19 penalty notice, given their high dollar value, and the circumstances in which so many of them were issued.

I'm of the view based on our casework that police got the law wrong and many fines were issued unlawfully. And therefore, you have kids working off COVID fines who probably shouldn't have been issued with one in the first place. So it's not that I'm against WDOs, but I really think in this circumstance, it's seen as [and spoken of by Revenue NSW] as, 'Look at what good we've done for kids by moving them onto the Work and Development Order system', instead of looking at whether the kids should have been issued with a caution in the first place, or whether these fines should have been withdrawn anyway because the actual COVID fine system was such a mess.

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If you owed a smaller amount there's a buffer with that. ... if you're only working off 1000 bucks that's doable but to do 10,000 – that's a long time to have to be caught in the system and having to go regularly, your WDO supervisors having to report back about whether you did things. So I mean I think the disproportionate impact on that group is huge because it just tangles them up in a system that they can't get out of and there's just more risk that they're going to end up being breached on their WDO and then they're back before the – you know, the fine reactivates. And for kids in the country it would mean things like their licences were cancelled and, you know, transport's a huge issue in a lot of areas. ... the complexities are just magnified for young people who are already facing complex challenges.

Even supporters of the WDO system recognised that it has its limitations. One identified weakness is that not all children and young people with a fine debt have access to a suitable service or organisation that can sponsor their WDO.

... There's obviously a lot of areas that that might not have a sponsor or young people don't have access to those Work and Development Order programs or sponsors, so I think we need to look at a way to ensure that all these young people, especially those that come from vulnerable and disadvantaged communities, have access to sponsors in their community and the activities of those sponsors need to be relevant to the community. ...

When services were closed due to lockdowns, it made it practically difficult to find sponsors.

A lot of services had to close their doors and a lot of programmes didn't run. So during that time it was really difficult to find clients WDO sponsors. We were making a lot of write off applications at the time.

Interviewees also told us that WDOs are best suited to single fines or modest fine debts. It is not a feasible debt amelioration method for people who have accrued large fine debts.

But, yes, most of the young people, their view is they've come to realise: 'Look, I skipped the train or I've got \$1000 worth of tickets, I just want to pay it off and I want to get my license'.

So they just want that quick fix sort of thing and they see that WDO payment where we have them just working in the food truck while we do our outreach serving hotdogs or whatever ...

It's [WDO] going to take forever. Forever. With really large amounts of fines we do link them in to getting some legal representation to see if at least, maybe not all, but at least some parts of it reduced because ... we've had some with \$20,000 fines. So that instance we would then sort of look at maybe touching base with Shopfront Legal or Marrickville Legal Service or Macarthur Legal Service to see what rights or what avenues they can take to at least reduce it to a bit more of a manageable amount because ... the limit at the moment is they can only work off \$1000 within that month.

Managing such large numbers of children and young people on WDOs is difficult and resource-intensive.

I think we've got 50 or 60 on the WDO portal of young people. So trying to manage 60-odd young people with fines and they all want to pay it off – it's hard and like I said, it's resource intensive because we also have to manage that and have them in an activity that they can do.

Interviewees indicated that the size and number of fines had resource implications for WDO sponsors, often stretching cash-strapped organisations and diverting them from their main services. On the intensive work associated with WDOs, one interviewee said:

... I mean ... we are street work focused, but then it's taking our street workers off the road, off the street, to then do the work that we're not supposed to, but that we're funded to do. But again, having these amounts of fines and numbers of young people to really look at getting them back into a productive society again, it's very resource intensive and, like every small NGO, funding's always an issue. Staffing's always an issue. We're running off the smell of an oily rag in

terms of funding. Then on top of that having to deal with, say, our core funding with DCJ and then having to report back as well. So it is very resource intensive to I guess manage and navigate the whole WDO, even as a sponsor. ...

Penalty notices are not appropriate for children

The highest reform priority identified by interviewees was ending the issuance of penalty notices to children.

The reasons cited for this included that children do not earn enough to pay fines, fine amounts are not adjusted to reflect the financial means of the recipient, penalty notices are not an effective deterrent when children cannot and do not pay the fines attached to them, and penalty notice fines compound disadvantage.

I don't know what Revenue's view is ... why we fine young people when they ... don't have the means to pay these fines back. ...Revenue NSW or the State Government, they really need to have a look at what is the purpose of fining? Is it revenue raising? Well, that's fine. Okay. ... But I can't see it as revenue raising because they're not going to be getting the money from young people and if they're doing WDOs then they're still not going to be getting the money from young people. So obviously that part of it is out. So what is the message that we're trying to tell young people when they get a fine and really they're not going to pay it? They ignore it. It gets worse and it just compounds a lot of the other issues that then creeps in that they're unable to resolve because they have these outstanding issues/fines.

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Children should just not be fined. It's not an appropriate penalty. They don't have independent, you know, most of them don't have the funds to pay for them. It's a penalty that just, you know, I think mak-s - it's one of those things where, you know - and I know that we talk about fines kind of more broadly that they're quite arbitrary in that it's the same fine regardless of how much money you make. So people who are on lower incomes are disproportionately impacted by fines ... [compared] someone who, you know, is working or is quite well off. But it's even more the case for young people.

Interviewees expressed frustration that the Police do not utilise the mechanisms under the YOA, such as warnings, when dealing with children:

I guess the frustration from my perspective is that there is already a mechanism under the Young Offenders Act to deal with young people for low level offending, and yet it's not utilised. ... when I worked as a children's court lawyer, I used to work a lot of the Youth Hotline and that is where a young person is brought into the police station for an offence. They have the right to legal advice, so we would provide legal advice and speak to the police about what their intentions are to deal with the matter. We'd always ask, you know, 'Are you considering a Young Offenders Act option?'

In six years I recall one, maybe two instances where the police gave a warning under the Young Offenders Act as opposed to a formal caution. Because a formal caution process requires an admission, it requires them to sign a notebook statement saying that they admit the offence. Then they kind of formally receive the caution. There's a bit more of a process around it. But I'm always shocked in how little that Young Offenders Act warning option is utilised and I think it would have been an appropriate resolution option in almost all public health order fine-related matters for young people.

**

I don't know, I think police know about it [the YOA and cautions] obviously, but they obviously seem to think of penalty notices as just something different. I guess they seem to think of penalty notices as the least restrictive option. I think they seem to think of it as lower in the hierarchy than Young Offenders Act interventions. ... I think there should be a procedure where a young person can elect to opt into a Young Offenders Act caution if they want to after having received legal advice.

**

[There is] ... another thing ... with under 18s which really pisses me off and we just seem to be getting no traction with. Because as you know under the Fines Act if you're applying for a review, one option is for them to withdraw it outright. Another option is to withdraw it and give the person a caution instead, like an informal caution under the Fines Act. So, for kids, every time we write a review application for, under 18, we say look they are under 18, the Young Offenders

Act applies. The presumption is because it's a summary offence not involving violence, they should be getting an informal warning under the Young Offenders Act, that should be the first option, the first resort, not a penalty notice.

If an informal warning is not appropriate then they're entitled, if they admit the offence, to a formal caution under the Young Offenders Act. That's not even being considered and so therefore, at the very least, if you're not willing to withdraw the fine outright, at the very least because this person is under 18 you should be giving them a caution, withdrawing it and giving them a caution. It's what they would be entitled to if the police were bothering to apply the Young Offenders Act and that just seems to get no traction.

Until abolition of penalty notice fines for children occurs, interviewees recommended the setting of a reduced dollar value for any penalty notices that can be issued to children, and greater use of non-punitive diversion options for children.

... For children, I would make it mandatory that a caution be the first port of call for any fine offence. ... At the very least fines for children should be capped and that should be at a very low rate. I think fines should be means tested.

8.3. Reflections on interview insights

The insights shared in this part of the Report suggest that although the policing of suspected breaches of COVID-19 PHOs in NSW had some unique characteristics, the issuance of COVID-19 penalty notices to children was illustrative of wider established policing practices that are problematic. It aligns with the findings of previous research — including the work of Quilter and Hogg on the policing of mandatory helmet laws for bicycle riders²¹⁷ — that officers are using on-the-spot fines as a frontline tool for policing children and young people. Such interactions have negative implications for future contact with the criminal justice system,²¹⁸ particularly for vulnerable populations, including Aboriginal children and young people, and those with cognitive and intellectual disabilities.²¹⁹ The findings reported here also draw attention to the

²¹⁷ Quilter and Hogg (n 88).

²¹⁸ Don Weatherburn and Stephanie Ramsay, 'Offending over the Life Course: Contact with the NSW Criminal Justice System between Age 10 and Age 33' (Issue Paper No 132, NSW Bureau of Crime Statistics and Research, April 2018).

²¹⁹ Barry Goldson et al, *Youth Justice and Penalty in Comparative Context* (Routledge, 2020).

disproportionately punitive effects of saddling young people — many of whom are living in circumstances of socio-economic disadvantage — with crippling fine debt that will materially affect their education and employment opportunities. These problems are exacerbated by a fine debt management system in NSW that is opaque and insufficiently sensitive to the circumstances of children and young people.

9. APPROACHES TO COVID-19 ENFORCEMENT FOR CHILDREN IN OTHER JURISDICTIONS

9.1. Introduction

This part considers Australian state and territory jurisdictional approaches to enforcing COVID-19 PHOs beyond NSW. We also consider approaches taken in select jurisdictions outside Australia — namely Canada, New Zealand (NZ), and the United Kingdom (UK). It does not purport to exhaustively describe the policing approach, and penalty/infringement notice system of each jurisdiction. Instead, salient fine-setting, policing, and enforcement practices are highlighted. The analysis is limited by the data that was publicly available at the time of writing, with some jurisdictions (such as NSW and Victoria) publishing more comprehensive penalty notice data than others. From the analysis, we attempt to distil a ‘better’ or ‘best’ practice model that informs the recommendations of the Report.

The analysis reveals a lack of consistency between jurisdictions as to the age at which penalty notices should be issued to children, fine amounts, and whether non-payment should be channelled through child-specific enforcement regimes. The ad hoc nature of how penalty notice fine amounts were set and applied to children, if applied at all, points to an absent overriding logic guiding how the public health behaviour of children should be regulated in Australia.

9.2. Context

In Australia, which has a federal legal system, approaches to the policing and enforcement of COVID-19 PHOs were instituted on a state and territory basis, usually by the Chief Health Officer or Health Minister of the jurisdiction.²²⁰ The nature of Australia’s federal legal system meant that each state and territory established a unique regime that responded to their local context. For instance, Victoria and NSW experienced larger ‘waves’ of coronavirus cases in 2020 and 2021, and in response, instituted lengthy and restrictive lockdowns. Less populous and more geographically isolated jurisdictions, such as Tasmania, the Northern Territory (NT) and Western Australia (WA), experienced fewer cases and relied more heavily on tight border controls.

From March 2020, most Australian states and territories introduced laws that enabled on-the-spot fines to be issued for the failure to comply with a public health direction without a ‘reasonable

²²⁰ For example, in the ACT, directions were given by the ACT Chief Health Officer in relation to a COVID-19 emergency declaration.

excuse'. Jurisdictions drew on existing penalty notice infrastructure, with some differentiation between the 'class' of penalty notices that were issued for COVID-19 breaches. New South Wales, for example, applied its penalty notice regime under the *Fines Act 1996* to breaches of COVID-19 public health orders. Western Australia, on the other hand, applied its narrower Criminal Code Infringement Notices (CCIN) regime, which is tailored to select criminal offences of a minor nature and only available for persons aged 17 and older.²²¹

The year 2021 gave rise to significant variations in Australian state and territory COVID-19 policy responses, largely due to their differing levels of exposure to the coronavirus.²²² Edwards et al summarise the two 'general policy strategies' that emerged:

States and territories with low coronavirus exposure used strict border controls (to prevent the virus entering from jurisdictions with higher case numbers) and instigated brief stay-at-home orders ('snap lockdowns') in response to even very few cases being detected in the community. States with higher coronavirus exposure (particularly New South Wales and Victoria) used stringent policies including stay-at-home orders, remote learning, and workplace closures for extended periods of time. A stated focus of both policy strategies was to suppress COVID-19 case numbers until vaccine supply could be secured and high vaccination rates achieved.²²³

9.3. Policing approaches

Approaches to the enforcement of PHOs during the first two years of the pandemic were adjusted as the pandemic progressed, with governments and police commissioners directing police to variously give precedence to educative and diversionary measures or punitive sanctions.

For some jurisdictions, such as the **Australian Capital Territory** (ACT) and **South Australia** (SA), the imposition of infringement fines lingered as a possibility that in practice was rarely applied. In others, such as **Victoria** and **NSW**, penalty notices were zealously enforced during periods that mainly coincided with higher case numbers and tougher restrictions, with high monetary penalties issued to both adults and children.²²⁴

²²¹ *Criminal Code (Infringement Notices) Regulations 2015* (WA); *Criminal Code Compilation Act 1913* (WA) ss 721-723.

²²² Ben Edwards et al, *Variation in Policy Response to COVID-19 across Australian States and Territories* (No BSG-WP-2022/046, June 2022) <https://www.bsg.ox.ac.uk/sites/default/files/2022-06/BSG-WP-2022-046_1.pdf>.

²²³ Ibid.

²²⁴ Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Parliament of Victoria, February 2021) 262–263.

9.3.1 Education-focused approaches

The **ACT** is notable for its police having adopted a ‘softer’ approach to encouraging PHO compliance, focused on education, particularly in the early stages of the pandemic. Police decision-making in the ACT is also constrained by human rights legislation.²²⁵ By March 2021, ACT Policing had only issued six criminal infringement notices, 15 cautions, and arrested one person for breaching public health directions.²²⁶ By November 2021, this had increased — ACT Policing had ‘issued 121 cautions, 74 infringements, made 7 arrests for alleged breaches solely of health directions, and 49 arrests for alleged other offences, which included charges relating to breaching health directions’.²²⁷ No COVID-19 penalty notices were issued to children in the ACT.²²⁸

Queensland Police adopted an ‘organisational enforcement posture’ of ‘compassion, communication and compliance’ in the initial stages of the pandemic, on the basis that ‘[m]aintaining community confidence and cooperation is crucial to achieving the public health objectives.’ However, Queensland Police noted that ‘behavior that recklessly or deliberately endangers public health has been the subject of appropriate enforcement action.’²²⁹ Queensland Police were able to issue warnings, infringement notices, or commence prosecution for blatant and serious breaches of relevant *Public Health Act 2005* (Qld) offences. There do not appear to

²²⁵ See *Human Rights Act 2004* (ACT) ss 11, 20 and 40B. Section 20 provides that:

- (1) An accused child must be segregated from accused adults.
- (2) An accused child must be treated in a way that is appropriate for a person of the child’s age who has not been convicted.
- (3) A child must be brought to trial as quickly as possible.
- (4) A convicted child must be treated in a way that is appropriate for a person of the child’s age who has been convicted.

Section 40B provides:

- (1) It is unlawful for a public authority—
 - (a) to act in a way that is incompatible with a human right; or
 - (b) in making a decision, to fail to give proper consideration to a relevant human right.

See also Kylie Evans and Nicholas Petrie, ‘COVID-19 and the Australian Human Rights Acts’ (2020) 45(3) *Alternative Law Journal* <<http://journals.sagepub.com/doi/full/10.1177/1037969X20942861>>.

²²⁶ ACT Policing is the community policing arm of the Australian Federal Police Rachel Stephen-Smith, *Chief Health Officer Report on the Status of the Public Health Emergency Due to COVID-19* (No 11, The Legislative Assembly for the Australian Capital Territory, 15 February 2021)

<https://www.parliament.act.gov.au/__data/assets/pdf_file/0010/1740466/Chief-Health-Officer-Report-on-the-status-of-public-health-emergency-due-to-COVID-19-Report-11-15-February-2021.pdf>.

²²⁷ Rachel Stephen-Smith, *Chief Health Officer Report on the Status of the Public Health Emergency Due to COVID-19* (No 20, The Legislative Assembly for the Australian Capital Territory, 11 July 2021)

[https://health.act.gov.au/sites/default/files/2022-](https://health.act.gov.au/sites/default/files/2022-08/Chief%20Health%20Officer%20Update%20on%20the%20Status%20of%20the%20Public%20Health%20Emergency%20-%20Report%2029%20-%20August%202022.pdf)

[08/Chief%20Health%20Officer%20Update%20on%20the%20Status%20of%20the%20Public%20Health%20Emergency%20-%20Report%2029%20-%20August%202022.pdf](https://health.act.gov.au/sites/default/files/2022-08/Chief%20Health%20Officer%20Update%20on%20the%20Status%20of%20the%20Public%20Health%20Emergency%20-%20Report%2029%20-%20August%202022.pdf)

²²⁸ Email communication with ACT Policing dated 4 September 2023.

²²⁹ The State of Queensland, ‘QPS Response to COVID-19’ in *2019-20 Annual Report Queensland Police Service* (The State of Queensland) 22 <<https://www.police.qld.gov.au/sites/default/files/2020-09/QPS-AR-2019-20-Full-Report.pdf>>.

be any publicly reported cases where children were issued with infringement notices for COVID-19 breaches in Queensland.

The **SA** Government adopted an education-focused approach to encourage compliance with COVID-19 directions.²³⁰ The SA Government's Covid Compliance Enforcement Framework reflected this, stating: 'Education has been SA Health's main approach to compliance throughout the COVID-19 pandemic'; however, compliance officers had discretion to enforce compliance via the issuing of expiation notices.²³¹ According to media coverage, by August 2020, SA Police had issued cautions instead of expiation notices to the majority of 162 people travelling from interstate who had failed to quarantine in accordance with stay-at-home orders.²³² We could not locate any publicly reported cases of children being issued expiation notices in SA.

Several overseas jurisdictions, including the **UK** and **NZ**, officially adopted a 'Four Es' graduated approach that prioritised education and engagement with the community over harsher enforcement actions such as the issuing of infringement notices. A critique of whether an education-focused approach was, in fact, followed by these jurisdictions is provided in Part 9.11 of this Report.

9.3.2 Greater reliance on strict border control policies

Western Australia (WA) ostensibly adopted a 'softer' approach to law enforcement during the pandemic. According to the WA Government's 2020 Pandemic Plan, their 'human epidemic management arrangements' relied on '*voluntary compliance and support*, rather than legal enforcement *to the greatest extent possible*'.²³³ As detailed above, WA's population experienced

²³⁰ See restrictions in other states outlined in Matthew Doran, 'Coronavirus Fines Vary across the Country, Prompting Calls for Clearer Guidelines', *ABC News* (online, 17 April 2020) <<https://www.abc.net.au/news/2020-04-17/how-coronavirus-fines-are-hitting-australia/12155274>>; Chelsea Heaney, 'NT Police Warn Travellers Not to Come in from COVID Hotspots without Exemption', *ABC News* (online, 10 August 2021) <<https://www.abc.net.au/news/2021-08-10/nt-people-turned-away-darwin-airport-covid-hotspot-border-rules/100363846>>; (no author), 'Coronavirus Rules: How Different States in Australia Are Implementing New Restrictions and What the Penalties Are', *ABC News* (online, 31 March 2020) <<https://www.abc.net.au/news/2020-03-31/how-australian-states-are-enforcing-coronavirus-measures/12106774>>.

²³¹ Government of South Australia, *COVID-19 Fact Sheet: COVID Compliance Enforcement Framework* <<https://www.sahealth.sa.gov.au/wps/wcm/connect/8f48cf18-5031-46d1-a07f-256234b3960d/COVID+Compliance+Enforcement+Framework+fact+sheet.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-8f48cf18-5031-46d1-a07f-256234b3960d-o93lfZP>>.

²³² Emily Olle, 'COVID Fines Issued to 16 People out of 162 Caught Breaking the Rules in SA | 7NEWS', *7news* (online, 20 July 2020) <<https://7news.com.au/lifestyle/health-wellbeing/covid-fines-issued-to-16-people-out-of-162-caught-breaking-the-rules-in-sa-c-1179475>>.

²³³ Government of Western Australia, *Western Australia Government Pandemic Plan* (March 2020) 10 <<https://www.wa.gov.au/system/files/2020-06/Western%20Australia%20Government%20Pandemic%20Plan.pdf>> (emphasis added).

very few COVID-19 cases, minimal restrictions, and only a handful of short-lived lockdowns during the first two years of the pandemic, with its government maintaining strict border control policies dubbed 'fortress WA'.²³⁴ WA Police practised a 'policing with consent' approach to enforcing public health directions, which, according to the 2021 and 2022 WA Police Force annual reports, included 'issu[ing] masks rather than infringements'.²³⁵ In June 2021, WA Police 'conceded' that they were 'not actively enforcing mandatory contact tracing registers'; nor had they 'issued a single fine or warning to a business or patron for not checking in at a venue' on the basis that 'shared community responsibility, early intervention and a compassionate approach remain the main focus to achieving compliance in this area'.²³⁶ The police spokesperson said that in the 'rare' instances where police had issued infringement notices 'the breaches have been pretty obvious and careless of other people's health, safety and lives.'²³⁷

By 6 October 2021, WA Police had prosecuted 315 people for breaching quarantine directions during the past year, predominantly for breach of self-isolation quarantine directions. Prosecution numbers were roughly equivalent to the 383 infringement notices issued during that year in WA. Police also issued 42 cautions and 10 juvenile cautions.²³⁸

In contrast to the more moderate policing approach outlined above, sentences handed down by the Magistrates Courts of WA for breach of COVID-19 directions were remarkably punitive, with '[o]ne in every six people' charged with breaching border and quarantine laws jailed.²³⁹ Significantly, the punishments imposed by the lower courts were 'deemed excessive on each occasion the penalty has been appealed.'²⁴⁰

²³⁴ Jarrod Lucas, 'WA Police Prosecute 315 People for Breaching COVID-19 Border Laws', *ABC News* (online, 6 October 2021) <<https://www.abc.net.au/news/2021-10-06/wa-police-have-prosecuted-315-people-for-breaching-state-s-tough/100515104>>.

²³⁵ WA Police Force, *2022 Annual Report* (Government of Western Australia, 2022) <<https://www.police.wa.gov.au/~media/20220919--WA-Police-Force-Annual-Report-2022--FINAL.pdf?la=en>>; WA Police Force, *2021 Annual Report* (Government of Western Australia, 2021) <https://www.police.wa.gov.au/~media/Files/WA-PoliceForce--Annual-Report-202021_WEB.pdf?la=en>.

²³⁶ Heather McNeill, 'Zero Fines in Six Months: WA Police Are Not Actively Enforcing Mandatory COVID Check-Ins', *WA Today* (online, 17 June 2021) <<https://www.watoday.com.au/national/western-australia/zero-fines-in-six-months-wa-police-are-not-actively-enforcing-mandatory-covid-check-ins-20210616-p581ly.html>>.

²³⁷ Sophie Meixner, Alicia Nally and Jason Dasey, 'Australian States Raise Millions from Coronavirus Fines — but One State Stands out from the Rest', *ABC News* (online, 3 August 2020) <<https://www.abc.net.au/news/2020-08-03/coronavirus-covid19-public-health-breach-fines-money-revenue/12498310>>.

²³⁸ Lucas (n 236).

²³⁹ Heather McNeill, 'WA Government Defends COVID Breach Punishments after 64 People Jailed', *Sydney Morning Herald* (online, 13 September 2021) <<https://www.smh.com.au/national/wa-government-defends-covid-breach-punishments-after-64-people-jailed-20210909-p58qdm.html>>.

²⁴⁰ *Ibid.*

Like WA, the more sparsely populated **NT** prioritised enforcing compliance with border controls and quarantining of interstate travellers.²⁴¹ The NT shut its borders, banned travel to remote Aboriginal communities, and restricted indoor gatherings to no more than 10 people. Border controls and travel bans to Aboriginal communities were largely designed to protect those Aboriginal people who were more vulnerable to the disease due to high rates of chronic illness.²⁴² Early in the pandemic, NT Police claimed to have adopted an ‘educational approach’²⁴³ to compliance with PHOs. Despite this, residents of some NT towns received more heavy-handed treatment than those of others. For instance, the Australian Defence Force were deployed to assist police enforcing social distancing restrictions in the predominantly Aboriginal outback town of Tennant Creek, resulting in multiple complaints to Amnesty International.²⁴⁴ As of 30 May 2020, Tennant Creek had received 14 of the 24 infringement notices issued in the Territory for breaching social distancing rules. According to traditional owner, Norman Frank, ‘the rules set up to protect his people were instead criminalising them’.²⁴⁵ NT Police reported that they had ‘tried to educate the community about the expectation of social distancing ... But unfortunately, in Tennant Creek specifically there was a reluctance for that social distancing to be obeyed.’²⁴⁶ The number of COVID-19 infringement notices issued in the NT was not insignificant, considering its population of 250,000 people — a total of 677 COVID-19 infringement notices were issued in the Territory since March 2020.²⁴⁷ There were no reports of COVID-19 infringement notices issued to children in the NT.²⁴⁸

²⁴¹ Doran (n 232); Heaney (n 232); (no author) (n 232).

²⁴² Isabella Higgins and Penny Timms, ‘Tensions Simmer in Outback over “bully-Boy” Police Claims during Coronavirus Crisis’, *ABC News* (online, 14 May 2020) <<https://www.abc.net.au/news/2020-05-14/tennant-creek-coronavirus-nt-police-defence-force-adf-afp/12241766>>.

²⁴³ NT Police, Fire & Emergency Services, ‘COVID-19: Infringements Issued – Katherine’, *Newsroom* (19 November 2021) <<https://pfes.nt.gov.au/newsroom/2021/covid-19-infringements-issued-katherine>>.

²⁴⁴ Tennant Creek has a population of 3080 residents, 1707 of whom are Indigenous ‘2021 Tennant Creek, Census All Persons QuickStats | Australian Bureau of Statistics’ <<https://abs.gov.au/census/find-census-data/quickstats/2021/SAL70251>>; Higgins and Timms (n 244).

²⁴⁵ NT Police also stated they were ‘no longer taking an educative approach when it comes to compliance’ in January 2022 in relation to people participating in a protest: NT Police, Fire & Emergency Services, ‘COVID-19 – Infringements Issued – Breach of CHO Directions’, *NT Police, Fire & Emergency Services* (11 January 2022) <<https://pfes.nt.gov.au/newsroom/2022/covid-19-infringements-issued-breach-cho-directions>>.

²⁴⁶ Higgins and Timms (n 244).

²⁴⁷ Email communication with Business and operational support services/ Police infringement office, NT Police, Fire and Emergency Services dated 6 September 2023.

²⁴⁸ According to the NT Police Information Office, they ‘did not believe’ that infringement notices were issued to juveniles, but confirmation of this would require interrogation of each individual infringement notice: email dated 6 September 2023.

9.3.3 Heavy use of penalty notices

Victoria is generally agreed to have undertaken one of the most hard-line approaches to enforcing compliance with COVID-19 public health directions in Australia, at least during the initial phases of the pandemic, 'with COVID related fines outnumbering those in NSW and other states'.²⁴⁹ This led to criticism of the 'overzealousness' and 'heavy-handedness' of Victorian police officers,²⁵⁰ prompting new guidelines for police being issued in 2021. These guidelines instructed police 'to hand out cautions for unpaid infringements rather than proceed with charges.'²⁵¹ This approach appeared to be subsequently retracted in February 2021, when Victoria Police said that there had been 'no policy shift whatsoever' in terms of their approach to infringement fines and their importance.²⁵²

On the issue of how this was applied to children, Chief Commissioner of Victoria Police, Shane Patton, maintained in December 2020 that police would have only issued infringement notices to children 'because of deliberate, obvious and blatant breaches.'²⁵³ This official line conflicts with reports from lawyers working with children on the ground. A solicitor from Flemington and Kensington Community Legal Centre gave the example of a 15-year-old client who 'was fined for breaching stay-at-home orders while going with his young girlfriend to Centrelink and to get her a pregnancy test.' The fine was issued 'two days after restrictions were first enforced.'²⁵⁴ The solicitor explained that the police interaction and rejection of the client's application to review the fine 'was very daunting for him and elevated his distress level dramatically. He is someone who has mental health issues, particularly depression and anxiety, and obviously this has significantly exacerbated his sense of being powerless and not being heard.'²⁵⁵

²⁴⁹ Covidpolicing.org.au, 'Covid Policing Weekly Roundup #6', *COVID-19 Policing in Australia* (20 May 2020) <<https://covidpolicing.org.au/summary/2020-05-20/covidpolicing-weekly-roundup-6/>>.

²⁵⁰ Tammy Mills, 'Ahead on Penalties: Victoria Leads Nation on COVID-19 Lockdown Fines', *The Police Association Victoria* (27 May 2020) <<https://tpav.org.au/news/news-coverage/2020-news-coverage/ahead-on-penalties--victoria-leads-nation-on-covid-19-lockdown-fines>>.

²⁵¹ The Age, 'Police to Drop Most COVID-19 Fines and Hand out Cautions', *The Police Association Victoria* (online, 17 January 2021) <<https://tpav.org.au/news/news-coverage/2021-news-coverage/police-to-drop-most-covid-19-fines-and-hand-out-cautions>>.

²⁵² Simone Fox Koob, 'Call to Waive \$2.3m of "Excessive" COVID Fines Imposed on Young People', *The Age* (online, 2 February 2021) <<https://www.theage.com.au/national/victoria/call-to-waive-2-3m-of-excessive-covid-fines-imposed-on-young-people-20210202-p56ypg.html>>; Cameron Houston and Simone Fox Koob, 'Police Vow to Pursue Unpaid COVID Fines, despite "poorly Worded" Memo', *The Age* (online, 18 January 2021) <<https://www.theage.com.au/national/victoria/police-vow-to-pursue-unpaid-covid-fines-despite-poorly-worded-memo-20210118-p56v0y.html>>.

²⁵³ Callum Godde, 'More Vic COVID Fines Cancelled than Paid', *Australian Associated Press* (online, 16 December 2020).

²⁵⁴ Koob (n 254).

²⁵⁵ *Ibid.*

Regarding best practice in relation to police interactions with children, Victoria's Internal Review Guidelines: Fines and Enforcement Services, released in August 2022, encourages the use of official warnings for children, stating: 'Official warnings can also be an important tool in educating children without imposing a financial penalty.'²⁵⁶

9.3.4 Preference for criminal charges

It was not until May 2020 in **Tasmania** that police were able to issue penalty notices for COVID-19 breaches. Until then, they could only issue a warning, summons to appear in court, or arrest a person.²⁵⁷ Tasmania Police used infringement notices sparingly, deciding an educative approach was 'very important' to influence behaviours, with infringement notices, summonses, and charges reserved for more 'blatant' breaches.²⁵⁸ This generally allowed people the chance to adhere to the rules before more punitive action was taken. Tasmania's low reliance on infringement notices is reflected by media reporting and statistics: since March 2020, Tasmania Police issued only 38 COVID-19 infringement notices for breach of COVID-19 public health directions. Significantly, infringement notices *cannot* be issued to children in Tasmania.²⁵⁹ Of note, however, is that charges and summonses were more popular than infringement notices for adults accused of breaching public health directions.²⁶⁰ For example, in July 2020 it was reported that '332 charges and summonses had been issued since March 25 for [failing to comply with a coronavirus direction], with 18 fines and cautions handed out.'²⁶¹

9.4. Minimum age

The minimum age at which children could receive penalty notices for non-compliance with public health directions varied between jurisdictions. This lack of consistency is illustrated in Table 6.

²⁵⁶ Justice and Community Safety, *Internal Review Guidelines: Fines and Enforcement Services* (Victorian State Government, August 2022) <<https://files.justice.vic.gov.au/2022-08/Internal%20Review%20Guidelines%20-%20Aug%202022.pdf>>.

²⁵⁷ Matt Maloney, 'Tasmania Police given New Powers to Issue Fines Which Break Coronavirus Rules | The Advocate | Burnie, TAS', *The Advocate* (online, 20 May 2020) <<https://www.theadvocate.com.au/story/6764015/police-given-power-to-issue-new-fines/>>; Doran (n 230).

²⁵⁸ Tasmania Police, 'Two Tasmanians Fined for Failing to Comply with Stay-at-Home Order', *Media Releases* (8 April 2021) <<https://www.police.tas.gov.au/news-events/media-releases/two-tasmanians-fined-for-failing-to-comply-with-stay-at-home-order/>>.

²⁵⁹ 'A police officer can give a person an infringement notice if they reasonably suspect that person has not followed the emergency orders. If you receive an infringement notice you will have 28 days to pay, unless you choose to contest the infringement notice in court. An infringement notice cannot be given to person under 18 years of age': <<https://www.legalaid.tas.gov.au/factsheets/emergency-orders-and-police-powers-during-covid-19/>> (last updated 13 April 2021).

²⁶⁰ Email communication with Media and Police Communications, Department of Police, Fire and Emergency Management Tasmania dated 7 September 2023.

²⁶¹ 'Covid Charges Laid', *Hobart Mercury* (online, 12 July 2020).

The states with the lowest minimum age at which penalty notices could be issued for COVID-19 related breaches were **New South Wales** and **Queensland**, being 10 years of age. This is also the age of criminal responsibility in both states.²⁶² As shown in Graph 9 above, however, most children who received COVID-19 penalty notices in NSW in the period March 2020 to September 2022 were aged 13 or older, with only one 10-year-old, no 11-year-olds and one 12-year-old being issued a COVID-19 penalty notice. In Queensland, although children can receive a penalty infringement notice (PIN), they are not subject to the state penalties enforcement regime that applies to adults.²⁶³

9.4.1 Table 6: Minimum age for receipt of COVID-19 penalty notices in Australia²⁶⁴

Jurisdiction	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Minimum age penalty notices	16 (non-mask-wearing) 18 (other offences)	12 (non-mask-wearing) 10 (other offences)	14	10	16	18	10 or 14 ²⁶⁵	17

In **Victoria**, according to the Minister for Police and Emergency Services in a statement on 16 December 2020, of the 1553 fines issued to children between the ages of 14–18, none were issued to children under the age of 14. Police Chief Commissioner Patton added that: ‘If, by default’ anyone under the age of 14 had received an infringement notice ‘by accident that would have been withdrawn’.²⁶⁶ In the twelve months to June 2021, 260 infringement notice fines were issued to children in Victoria for the offence of non-mask-wearing, including twenty-nine \$40

²⁶² *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Fines Act 1966* (NSW) s 53(2); *Criminal Code Act 1899* (Qld) s 29(1); *Youth Justice Act 1992* (Qld) s 68.

²⁶³ *State Penalties Enforcement Act 1999* (Qld) s 5 with the exception of alleged driving offences of children aged 17.

²⁶⁴ *Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020* (ACT); cl 7; *Fines Act 1996* (NSW) s 53(2); *Fines and Penalties (Recovery) Act 2001* (NT) s 7(1); *Expiation of Offences Act 1996* (SA) ss 4, 6(1); *State Penalties Enforcement Act 1999* (Qld) s 5; Email communication with Queensland SPER Engagement dated 3 October 2023; Caxton Legal Centre, ‘Sentencing Regime and Other Orders for Child Offenders’, *Queensland Law Handbook Online* (5 October 2022) <<https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/children-and-the-criminal-law/sentencing-regime-and-other-orders-for-child-offenders/>>. Tasmania Legal Aid, ‘Emergency orders and police powers during Covid-19’ (last updated 13 April 2023) <<https://www.legalaid.tas.gov.au/factsheets/emergency-orders-and-police-powers-during-covid-19/>>; *Criminal Code (Infringement Notices) Regulations 2015* (WA).

²⁶⁵ The *Infringements Act 2006* (Vic) s 3(1) defines a child as ‘a person who at the time of the alleged commission of an infringement offence was under the age of 18 years but of or above the age of 10 years’. In an email dated 6 October 2023, however, Victoria Police stated that ‘Infringement notices cannot be issued to any persons under 14 years of age.’ The minimum age established by legislation therefore appears to differ from police policy.

²⁶⁶ Godde (n 255).

fines issued to children between the ages of ten and 14.²⁶⁷ According to Victoria's Crime Statistics Agency, the majority of these 29 fines were issued to 14-year-olds, with only a small number (between one and three) issued to 13-year-olds.²⁶⁸ There were contradictory reports about whether children aged under 14 could *legally* be issued fines in Victoria. A Victoria Police spokesperson stated that 'police policy was for infringement notices not to be issued to any person under 14' and that '[w]herever possible, police will issue a warning or caution to a child (of any age) rather than a fine'.²⁶⁹ The spokesperson could not explain why 'fines were issued to one or more 13-year-olds in apparent contradiction to police policy'; however, added that 'all fines may be challenged and reviewed'.²⁷⁰ It appears that Victoria Police policy provides that 14 is the minimum age at which fines may be issued in Victoria, however according to legislation, infringement notices may be issued to children from the age of 10.²⁷¹

The minimum age at which a COVID-19 penalty notice could be issued in the **NT** was 14, and 16 in **SA**. Two jurisdictions — the **ACT** and **Tasmania** — set 18 as the minimum age at which a penalty notice could be issued for breach of public health directions. The ACT made an exception for infringement notices for non-mask wearing directions, which could be issued once a child attained 16 years of age.²⁷²

The minimum age at which a COVID-19 criminal code infringement notice (CCIN) could be issued to **Western Australians** was 17. That age was set when the CCINs regime was first introduced to WA Parliament in 2011, on the basis that a person has a better ability to pay the \$500 fixed

²⁶⁷ The remaining fines of \$80 were issued to children aged between 14 and 18: Susie O'Brien and Susan Delibasic, 'Kids Fined \$80 for Mask Breaches', *Herald Sun* (online, 5 November 2021).

²⁶⁸ According to an AAP Fact check, 'The agency would not confirm the exact number of fines issued to 13-year-olds, citing its data confidentiality policies, but said the figure was at least one but not greater than three.' Australian Associated Press, 'No, 10-Year-Olds Aren't Being Fined for Going Maskless in Victoria' (online, 20 November 2021) <<https://www.aap.com.au/factcheck/no-10-year-olds-arent-being-fined-for-going-maskless-in-victoria/>>.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ See above (n 267).

²⁷² *Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020* (ACT) cl 7; The WA Ombudsman noted, however, that the age at which a child finishes schooling in WA was increased until at least 17 years 6 months from 2014. The WA Ombudsman therefore recommended the CCINs minimum age be increased to 18 (rec 21). This recommendation has not been adopted; nor have the Ombudsman's recommendations that • if young people aged 17 years are still eligible to be issued a Criminal Code infringement notice, the Minister considers an amendment to lower the modified penalty associated with their Criminal Code infringement notices (rec 22). • if young people aged 17 years are still eligible to be issued a Criminal Code infringement notice, the Minister considers the necessary measures to establish that a referral to a juvenile justice team is preferred to the issuing of a Criminal Code infringement notice (rec 23). Ombudsman Western Australia, *A Report on the Monitoring of the Infringement Notices Provisions of The Criminal Code - Volume 3: The Impact on Aboriginal and Torres Strait Islander and Other Communities* (Ombudsman Western Australia, (no date)).

penalty once they have attained that age. The Minister representing the Minister for Police explained:

A person 17 years and over has finished schooling and we would presume is generating an income and therefore some capacity to pay a modified penalty. A young person under this age would not have such a capacity to pay a modified penalty as they would still be at school and therefore not earning an income. When we consider that ... [for a] person under the age of 17 ... there are better options for dealing with the matter under the Young Offenders Act, it is logical that [CCINs] be issued only to persons over 17. Further, there is eligibility for government assistance schemes, such as the assistance scheme available through Centrelink, which are not generally available to persons under 17. Secondly, a person 17 years and over may have a driver's licence, which means that the Fines Enforcement Registry will have more ability to enforce the provisions of the Fines, Penalties and Infringement Notices Enforcement Act, which would see a person's licence suspended on the failure to pay the modified penalty.²⁷³

When dealing with 17-year-olds, WA Police must apply a different approach to adults under the *Youth Offenders Act 1994 (WA)* and WA Police's CCIN Policy.²⁷⁴ This requires police to consider alternatives to court proceedings such as taking no action, a written caution, or a juvenile justice team referral.²⁷⁵ The law stipulates that police should preference infringement notices over juvenile justice team referrals.²⁷⁶ This legislative approach has been criticised by the WA Commissioner for Children and Young People on the grounds that 'it restricts a young person from accessing assistance in addressing the behaviour, and does not allow an opportunity for the young person to apologise to the victim or otherwise make reparation for their offence.'²⁷⁷

9.5. How many children received penalty notices for COVID-19 breaches?

The publicly available data on how many children received penalty/infringement notices for breaching COVID-19 public health directions is patchy and jurisdiction-dependent. **Victoria** had the largest number of infringement notices issued to children in the first year of the pandemic,

²⁷³ The Hon Peter Collier MLC, Minister representing the Minister for Police Western Australia, *Parliamentary Debates*, 23 February 2011, Legislative Council, 23 February 2011, 909c–916a.

²⁷⁴ Ombudsman Western Australia (n 274), 50. Section 25 of the *Youth Offenders Act 1994 (WA)* states: 'If an offence is one for which an infringement notice can be given, the giving of an infringement notice for the offence is to be preferred to referring the matter to a juvenile justice team unless there are circumstances that make the giving of an infringement notice inappropriate.'

²⁷⁵ Ibid 51; *Youth Offenders Act 1994 (WA)* pt 5.

²⁷⁶ *Youth Offenders Act 1994 (WA)*.

²⁷⁷ Ombudsman Western Australia (n 274) 51–52.

with 1,560 COVID-19 fines issued to children as at 15 December 2020 in Victoria.²⁷⁸ There were no *publicly reported* cases of infringement notices being received by children in **Queensland** (where the minimum age was 10), the **NT** (minimum age of 14), **SA** (minimum age of 16) or **WA** (minimum age of 17).²⁷⁹ There were no infringement notices issued to children in **Tasmania** (minimum age of 18)²⁸⁰ or the **ACT** (minimum age of 16 for non-mask-wearing offences and 18 for all other COVID-19 offences).²⁸¹

9.6. Could children still be prosecuted in court for public health order breaches?

While infringement notices could not be issued to children under 14 in the **NT**,²⁸² children aged 10-14 could still be prosecuted in court for COVID-19 breaches and potentially fined if it could be proved that they knew what they were doing was wrong. The NT Police could not confirm whether any children received infringement notices for breaching coronavirus restrictions.²⁸³ At least one 'youth' (age not stated) was arrested and charged under section 497 of the *Biosecurity Act 2015* (NT) in April 2020.²⁸⁴

In **Tasmania**, children under 18 cannot receive infringement notices. Under the *Youth Justice Act 1997* (Tas), police are only able to proceed against children by way of informal caution, formal caution, convening a community conference, of filing a complaint and summons for the offence before the court, or arrest (if the offence is serious enough). At least one 17-year-old was proceeded against by summons for a non-compliant gathering under the *Youth Justice Act 1997*.²⁸⁵ As at December 2021, at least 10 juvenile cautions had been issued for breaching

²⁷⁸ Koob (n 254).

²⁷⁹ This could be the subject of further freedom of information requests. There were some news reports of 'youths' being fined for breaching restrictions in Queensland. Thomas Chamberlin and Kate Kyriacou, 'Why \$1300 Fines Might Not Stand up in Court', *Courier Mail* (online, 14 April 2020).

²⁸⁰ Email communication with Media and Public Communications, Tasmania Department of Police, Fire and Emergency Management dated 7 September 2023.

²⁸¹ Email communication with Media Officer, ACT Policing dated 4 September 2023.

²⁸² NATSILS, National Justice Project and UTS Jumbunna Institute for Indigenous Education and Research, *First Nations Guide to COVID-19 Law - NT* (1 December 2020) <<https://justice.org.au/wp-content/uploads/2020/12/1-December-2020-Northern-Territory-First-Nations-Guide-to-COVID-19-Law.pdf>>.

²⁸³ Email communication with Business and operational support services/ Police infringement office, NT Police, Fire and Emergency Services, 6 September 2023.

²⁸⁴ 'Nine Arrested for Entering Remote Community without Going into COVID-19 Quarantine', *ABC News* (online, 18 April 2020) <<https://www.abc.net.au/news/2020-04-18/nt-police-arrest-nine-people-for-breaching-biosecurity-act/12161080>>.

²⁸⁵ Tasmania Police, 'Proceedings under the Public Health Act', *Media Releases* (04 2020) <<https://www.police.tas.gov.au/news-events/media-releases/proceedings-under-the-public-health-act/>>.

COVID-19 directions in **Western Australia**.²⁸⁶ In addition, two 17-year-olds and one 15 year-old had been charged with failure to comply with a COVID-19 direction.²⁸⁷

9.7. Penalty amounts

Victoria had some of the highest COVID-19 infringement fines in the country, with children aged between 14 and 18 required to pay the same amount as adults for all COVID-19 offences, with the exception of offences relating to mask-wearing. Children could be issued a \$1,652 infringement fine for failure to comply with general public health directions and, from 28 September 2020, a \$4,967 infringement fine for taking part in an unlawful gathering.²⁸⁸ These amounts were far greater than the maximum fines a Victorian court could give a child under 15 (\$165.20), and children aged between 15 and 17 (\$826.60), for a single offence. As noted by the Federation of Community Legal Centres Victoria, a COVID-specific fine of \$1,652 issued to a 14-year-old in Victoria was 10 times greater than the maximum fine a court could impose if that child were charged and found guilty of the same offence.²⁸⁹ The Federation of Community Legal Centres Victoria criticised Victoria's high COVID-19 infringement fines for children on that basis, and because of their failure to 'take into account their age, financial capacity, developmental stage, and understanding of appropriate behaviour.'²⁹⁰

From the start of the pandemic until 15 December 2020, 1,560 COVID-19 infringement fines valued at \$2.3 million had been issued to Victorians aged under 18.²⁹¹ The two most popular fine categories were failure to comply with general public health directions (1,322) and failure to wear

²⁸⁶ Jarrod Lucas, 'Police Reveal COVID Workload to Keep "Fortress WA"', *ABC News* (online, 6 October 2021) <<https://www.abc.net.au/news/2021-10-06/wa-police-have-prosecuted-315-people-for-breaching-state-s-tough/100515104>>.

²⁸⁷ Lauren Pilat, 'Teen COVID Breacher Fined for Speeding through WA Checkpoint to See Terminally Ill Mum', *WA Today* (online, 23 November 2021) <<https://www.watoday.com.au/national/western-australia/teen-covid-breacher-fined-for-speeding-through-wa-checkpoint-to-see-terminally-ill-mum-20211123-p59bjf.html>>; 'Three Males Charged for Alleged Breach of Quarantine in WA', *Mandurah Mail* (online, 9 December 2021).

²⁸⁸ On 27 September the fine for gathering in breach of Victoria's health directions was increased from \$1,652 to \$4,957: Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Parliament of Victoria, February 2021) <https://new.parliament.vic.gov.au/49706e/contentassets/9c4e489fe9834121826347ad523e87d2/paec_59-08_vic_gov_response_to_covid-19_pandemic.pdf>; *Public Health and Wellbeing Further Amendment (Infringement Offences) Regulations 2020 2020* (Vic).

²⁸⁹ Federation of Community Legal Centres VIC, *PAEC Inquiry into the Victorian Government's Response to COVID-19 Pandemic* (Submission to the Inquiry into the Victorian Government's Response to the COVID-19 Pandemic No Submission no. 101, 1 October 2020) <https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/101._Federation_of_Community_Legal_Centres.pdf>.

²⁹⁰ *Ibid* 23.

²⁹¹ 'Covid-19 Inquiry - Questions Taken on Notice'

<https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Questions_on_Notice_Round_3/Attachment_A_-_COVID_PAEC_QONs_-_Attorney-General.pdf>.

a face covering (221).²⁹² While children under 14 were not meant to be issued infringement notices, there were suggestions that some children under 14 were issued fines in error and that these were later withdrawn.²⁹³

9.8. Fines for non-mask-wearing

It was reported that in the twelve months to June 2021, 260 children in **Victoria** had been fined for not wearing a mask. This included 29 children aged between 10 and 14 who received a \$40 infringement notice, with the remainder of children aged between 15 and 18 receiving \$80 infringement notices.²⁹⁴ The infringement fine for non-mask wearing for 16- and 17-year-olds in the **ACT** was \$200, which was justified by the Standing Committee on Justice and Community Safety on the basis that this was 'reasonable in the context of that age'. While the Committee relied on public health advice on the 'effectiveness of masks' to support the sanction, it did not cite any evidence to the effect that infringement notices were an effective way to encourage mask-wearing.²⁹⁵ Despite the implementation of infringement notices for 16- and 17-year-olds in the ACT for non-mask-wearing, according to ACT Policing, no children in the ACT were issued COVID-19 infringement notices since March 2020.²⁹⁶

9.9. Enforcement of fines

Victoria is noteworthy as having a separate fines payment and enforcement system that has been established for children. This is known as the specialist Children and Young Persons Infringement Notice System (CAYPINS). Under this system, when a child does not pay an infringement notice by the reminder notice date, the child will receive a document called 'Notice of Court Case (CAYPINS)'. If a child does not pay the fine before the hearing date, and chooses not to contest the fine in front of a magistrate, they can appear before the CAPYINS court registrar to explain their financial circumstances. The registrar will consider the child's financial situation

²⁹² A further 11 were issued for leaving a restricted area in Victoria without a valid reason or excuse; 4 for breaching gathering restrictions; 1 for failing to self-isolate or self-quarantine; and 1 for failing to provide a name and address: Koob (n 254).

²⁹³ Godde (n 255).

²⁹⁴ O'Brien and Delibasic (n 269).

²⁹⁵ *Human Rights Act 2004* (ACT). However, s 40B(2) provides: 'Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and— (a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or (b) the law cannot be interpreted in a way that is consistent with a human right.'

²⁹⁶ Email communication with ACT Policing dated 4 September 2023.

and come up with an instalment plan, or might waive or reduce the fine amount. If the child disagrees with the registrar's decision, they can apply to have it reviewed by a magistrate.²⁹⁷

While infringement notices are ordinarily processed through CAYPINs, during the pandemic, Victorian police had the discretion to instead channel COVID-19 infringement notices through the same system as adults via *Fines Victoria*. It was reported that despite the existence of the separate CAYPINs system, a number of children were subject to the same enforcement actions as adults.²⁹⁸ Youthlaw Victoria also reported awareness 'of cases where Victoria Police, rather than registering unpaid fines with CAYPINS, [were] withdrawing the fines and converting them to criminal charges and not considering a diversion order.'²⁹⁹ The existence of the separate CAYPINs fines enforcement system for children in Victoria has not ameliorated concerns expressed by Youthlaw that '[t]he fines system for under 18s is a waste of resources, resulting in little recovery. It is unfair and unwieldy and in our view needs to be abolished.'³⁰⁰ According to Youthlaw, CAYPINs:

seems to treat young people less favorably than if they were in the adult system. There is no central agency managing unpaid fines in the children's system and no special consideration for young people with special circumstances. Young people who have their fines dealt with by the CAYPINS system typically receive a fine, even if they have special circumstances. This means that children are being punished more severely than adults for the same offence. Challenging fines in the Children's Court results in a police criminal record which has other lasting consequences for young people, especially in seeking employment.³⁰¹

Unlike for adults in **Queensland**, non-payment of infringement notices by children in that state cannot be enforced by the State Penalties Enforcement Registry.³⁰² If a child does not pay an infringement notice or enter into an instalment plan within 28 days, the fine 'will be referred to police who can issue a complaint and summons or a notice to appear' in court.³⁰³ Police must consider alternatives to proceeding against children, including taking no action, cautioning the

²⁹⁷ State of Victoria, 'Fines', *Childrens Court of Victoria* (2021) <<https://www.childrenscourt.vic.gov.au/criminal-division/fines>>.

²⁹⁸ Federation of Community Legal Centres VIC (n 291); 'Submission to Inquiry into the Victorian Government's Response to the Covid-19 Pandemic', Letter from Youthlaw, 30 November 2020 <https://new.parliament.vic.gov.au/493020/contentassets/7424bfd3644c4bd3937745562db2e26a/submission-documents/209.-youthlaw_redacted.pdf>.

²⁹⁹ Letter from Youthlaw (n 300).

³⁰⁰ Youthlaw, 'Fairer Fines' <<https://youthlaw.asn.au/campaigns-advocacy/fines-system/>>.

³⁰¹ Ibid.

³⁰² *State Penalties Enforcement Act 1999* (Qld) s 5.

³⁰³ Caxton Legal Centre (n 266).

child, or referring the offence for a restorative justice process.³⁰⁴ These actions do not result in a criminal record.³⁰⁵ If the police do proceed against a child for non-payment of the infringement notice, in sentencing, the court can:

- reprimand the child;
- order a good behaviour bond;
- place them on probation;
- order participation in a restorative justice process;
- order them to perform unpaid community service or an intensive supervision order (depending on their age); or
- issue a fine to a child, but 'only if it is satisfied that the child has the capacity to pay the amount'.³⁰⁶

According to the Queensland Law Handbook, the operation of these provisions means that, because children often do not have capacity to pay an infringement notice, children who receive infringement notices are at a greater risk than adults of being prosecuted in court for minor offences. Those offences 'may appear on a child's criminal history (at least for court purposes) until they turn 18.'³⁰⁷

The **ACT**, **NSW**, the **NT**, **SA**, and **WA** did not have a separate enforcement system for infringement notices issued to children during the pandemic.

9.10. Internal review processes as they relate to children

In **Victoria**, where an infringement notice is served on a child, an internal review can take place at any time before the infringement fine is registered with the Children's Court.³⁰⁸ If the applicant requests that their matter be referred to the Magistrates' Court of Victoria or the Children's Court, any internal review application that may be on foot must be terminated by the enforcement agency.³⁰⁹

In August 2022, Victoria published guidelines in respect of the review of infringement fines to guide the decision-making of enforcement agencies. Consistent with s 17(2) of the *Charter of*

³⁰⁴ *Youth Justice Act 1992* (Qld).

³⁰⁵ Caxton Legal Centre (n 266).

³⁰⁶ *Youth Justices Act 1992* (Qld).

³⁰⁷ Caxton Legal Centre (n 266).

³⁰⁸ *Infringements Act 2006* (Vic) s 22(2)(a)(i)(B).

³⁰⁹ *Ibid* s 16.

Human Rights and Responsibilities Act 2006 (Vic), the guidelines remind decision-makers of their obligation to consider the child's 'best interests':

If an application is made by or on behalf of a child, the decision maker should take note of additional considerations in recognition that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.³¹⁰

The guidelines direct decision-makers to take into account age-related considerations, including a child's different 'level of maturity' vis-à-vis adults; that they 'may have a diminished ability to understand or control their conduct'; and 'what can reasonably be expected of children of different ages'.³¹¹ They also provide that decision-makers, when considering applications:

... may choose to be more flexible in the evidence required, the threshold that needs to be met, or the outcome that is most appropriate. After a decision is made, the decision maker may consider providing reasons to the child that clearly explains the relevant offence and how the conduct constitutes an offence. This will support an educative approach to internal review matters involving children.

Official warnings can also be an important tool in educating children without imposing a financial penalty.³¹²

9.11. Approaches outside Australia

9.11.1 United Kingdom

Policing approach

In the UK, fixed penalty notices (FPNs) were the main legislated mechanism used by police to enforce suspected breaches of COVID-19 offences.³¹³ Police in England and Wales were instructed to follow what was labelled the *Four Es* approach: 'Engage. Explain. Encourage. Enforce.'³¹⁴ Under this approach, the issuing of FPNs for alleged breaches of COVID-19

³¹⁰ Justice and Community Safety, *Internal Review Guidelines: Fines and Enforcement Services* (Victorian State Government, August 2022) 13 <<https://files.justice.vic.gov.au/2022-08/Internal%20Review%20Guidelines%20-%20Aug%202022.pdf>>.

³¹¹ Ibid.

³¹² Ibid.

³¹³ House of Commons Justice Committee, *Covid-19 and the Criminal Law* (Fourth Report of Session 2021–22 No HC 71, 24 September 2021) <<https://committees.parliament.uk/publications/7439/documents/77794/default/>>.

³¹⁴ Joint Committee on Human Rights, *The Government Response to Covid-19: Fixed Penalty Notices* (HL Paper No Fourteenth Report of Session 2019-21, 27 April 2021); Camilla De Camargo, 'We were the Guinea pigs': Police

directions should have been a last resort, with police having first tried to engage with the person, explain how they had broken the rules and encourage compliance with the public health regulations.³¹⁵ Police in the UK faced a similar challenge to police in NSW of having to explain rapidly changing regulations that they themselves found complex and confusing, leading to inconsistencies in policing approaches.³¹⁶ FPNs for breaching public health restrictions could only be issued to adults. If children were suspected of breaching public health restrictions, the 'responsible adult' could be issued an FPN in place of the child.³¹⁷

Application to children

In Scotland, police were originally permitted to issue FPNs to children aged 16 and over for non-compliance with COVID-19 restrictions. This was brought in line with the rest of the UK on 27 May 2020, following an objection to 16 and 17-year-olds being issued FPNs by the Children and Young People's Commissioner Scotland (CYPCS) on the basis of this age limit being 'incompatible with the definition of a child under the UN Convention on the Rights of the Child and in areas of Scots law.'³¹⁸ McVie found that FPNs were disproportionately issued to young people in the first 2 months of the pandemic: one fifth (20.4%) of all COVID-19 FPNs in Scotland were issued to people aged under 21, who accounted for only 6.5% of the population. Outside of Scotland, early in the pandemic, police wrongly issued 39 fines to children under 18 years of age, which were subsequently rescinded.³¹⁹

9.11.2 New Zealand

Policing approach

uncertainty enforcing coronavirus regulations in the UK' (2023) 72 *International Journal of Law, Crime and Justice* 100566.

³¹⁵ His Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Policing in the Pandemic – The Police Response to the Coronavirus Pandemic during 2020* (20 April 2021) <<https://www.justiceinspectors.gov.uk/hmicfrs/publication-html/the-police-response-to-the-coronavirus-pandemic-during-2020/>>.

³¹⁶ Camilla De Camargo (n 316).

³¹⁷ *Health Protection (Coronavirus) Regulations 2020* (UK) reg 8(5)-8(6), 5(4) and 15(4). Also see Gavin Bevis and Eddite Bisknell, 'Parents Hit with Covid Fines after Teenage Party in Derbyshire', *BBC News* (online, 16 May 2022) <<https://www.bbc.com/news/uk-england-derbyshire-61463224>>.

³¹⁸ Victoria Gorton et al, *Police Use of Covid-19 Fixed Penalty Notices in Scotland: Trends in Enforcement from March 2020 to May 2021* (The University of Edinburgh, August 2022) 51 <<https://www.scadr.ac.uk/sites/default/files/Fourth%20FPN%20Data%20report%20FINAL%20-%20Aug%202022.pdf>>; this was done by amendment of the *Coronavirus (Scotland) (No 2) Act 2020*; Fiona Dyer, Nina Vaswani, and Claire Lightowler, 'Exacerbating, Illuminating and Hiding Rights Issues: COVID-19 and Children in Conflict with the Law' (2023) 27(9-10) *The International Journal of Human Rights* 1426.

³¹⁹ Lizzie Dearden, 'Police Wrongly Fining Children under Coronavirus Law', *The Independent* (online, 15 April 2020) <<https://www.independent.co.uk/news/uk/crime/coronavirus-lockdown-uk-children-fine-police-latest-a9466541.html>>.

Similar to the UK, NZ Police ostensibly adopted a ‘graduated’ *Four Es* response of ‘engage, educate, encourage and enforce’.³²⁰ This meant that more formal police actions — ‘warning, pre-charge warning, summons, arrest’ — were to be resorted to if ‘absolutely necessary’.³²¹ In the initial lockdown period, the policing approach of NZ was ‘cautiously light-handed: only 25 people were prosecuted and only a couple of hundred warnings issued’. Prosecutions soon increased, however, and, as at 8 June 2020, NZ Police had ‘prosecuted 998 people for offences and issued 6352 warnings, with [m]ost breaches relat[ing] to health orders’ and ‘a handful relating to directions under civil defence legislation’.³²²

Fine amounts

Infringement notice offences for failure to comply with a public health direction were initially introduced on 13 May 2020 under the *COVID-19 Public Health Response Act 2020* (NZ). New Zealand adopted infringement notices as a primary means of enforcing breaches of COVID-19 restrictions. Infringement fees were initially set at NZD \$300. By comparison, fines of up to NZD \$1,000 could be imposed by a court. In December 2021, infringement fines for individuals reached up to NZD \$4,000, depending on if the offence was classed as low, medium, or high risk.³²³ Fines imposed by courts increased to a maximum of NZD \$12,000 for individuals and NZD \$15,000 for companies.³²⁴ Infringement fine amounts applied to children and adults equally.

Application to children and criticisms of approach

Youth justice principles which guided how infringement notices should be applied to children were suspended in relation to COVID-19 breaches in NZ.³²⁵ According to NZ Police statistics up to 8 June 2020, 788 10–20-year-olds were recorded as having breached COVID-19 restrictions, and 289 youth referrals were made.³²⁶ As these statistics were published early in the pandemic, they do not indicate the total number of infringement notices issued to children.

³²⁰ New Zealand Police, ‘Operational Policing Guidelines - Alert Level 4, Scenarios for the Frontline’ (4 March 2020) <<https://www.police.govt.nz/sites/default/files/publications/operational-policing-guidelines-04-04-2020.pdf>>.

³²¹ *Ibid* 2.

³²² Dean Knight, Oxford University Press, *Oxford Constitutional Law* (online at 6 January 2023) The Oxford Compendium of National Legal Responses to Covid-19 [OCC19], ‘New Zealand: Legal Response to Covid’.

³²³ *COVID-19 Public Health Response Amendment Act (No 2) 2021; Infringement Offence Regulations*

³²⁴ Radio New Zealand, ‘Covid-19 Breaches: Infringement Fines to Increase Dramatically’, *RNZ* (online, 21 September 2021) <<https://www.rnz.co.nz/news/national/451969/covid-19-breaches-infringement-fines-to-increase-dramatically>>.

³²⁵ *Oranga Tamariki Act 1989 - Children’s and Young People’s Well-Being Act 1989* (NZ) s 272(3).

³²⁶ New Zealand Police, ‘Covid-19 Response Data’, *policedata.nz* (12 June 2020)

<<https://www.police.govt.nz/about-us/statistics-and-publications/data-and-statistics/covid-19-response>>. See ‘Demographic Data on Breaches of COVID-19 Restrictions’ and ‘Police Action in Relation to Breaches of COVID-19 Restrictions’ tabs.

In a submission to the Inquiry into the Operation of the COVID-19 Public Health Response Act 2020 dated 5 June 2020, the NZ Office of the Children’s Commissioner (OCC) criticised the application of ‘identical sanctions’ for breaching coronavirus restrictions to children and adults on the basis that the approach did ‘not align with the principles of our youth justice system or child rights more generally’ in the Children’s Convention, the Treaty of Waitangi and the Oranga Tamariki Act 1989 and recommended that COVID-19 infringement notices not be issued to children.³²⁷ The OCC stated that ‘the response required for COVID-19 has shone a light on parts of our systems that could work better. The infringement notice procedure is one such example. It is flawed in its application to children and young people’.³²⁸ Reasons the OCC provided to justify this assertion included that children under working age do not have access to their own money; families should not be expected to cover large fines given to children; the Police’s ‘engage, encourage, educate’ approach is more appropriate for children; and the targeting of young people is likely to disproportionately negatively impact Māori children.³²⁹ These echo many of the criticisms raised by interview participants in Part 8 of this Report. The OCC added that if infringement notices were to remain available to be issued to children, they should ‘be an absolute last resort following a Police Youth Aid process’.³³⁰ The Finance and Expenditure Committee’s final report from the Inquiry concluded:

we are confident that police officers would encourage compliance by children through education and warnings, and not resort to issuing infringement notices except in extreme circumstances. The youth justice principles of the Oranga Tamariki Act allow police to consider alternative enforcement measures for youth offending. *Any enduring health emergency response legislation should distinguish between adults and children. We believe that it is important for enduring health emergency legislation to reflect that it is not appropriate to apply identical sanctions to children.*

³²⁷ NZ Office of the Children’s Commissioner, ‘Submission to the Finance and Expenditure Select Committee: Inquiry into the Operation of the COVID-19 Public Health Response Act 2020’ <<https://www.occ.org.nz/documents/493/Covid19-Submission-Childrens-Commissioner.pdf>>.

³²⁸ Ibid.

³²⁹ In relation to the disproportionate targeting of Māori children, the OCC relied on ‘Recent research (published this year) shows that Māori who come into contact with the police for the first time are 1.8 times at risk of a Police proceeding and seven times more likely to be charged by Police, than Europeans.’ Further criticisms by the OCC of New Zealand’s application and enforcement of the same infringement notices for children and adults included that for more serious breaches, it would be more appropriate to make a referral to Youth Aid officers ‘who have expertise in dealing with young people and their families’; children and young people (especially in groups) are ‘highly visible in society, and simple acts of gathering together and sharing friendship can often be misconstrued by Police and ... targeted through enforcement’; and Non-payment of fines ‘results in automatic enforcement in the adult courts, which can have disproportionately negative effects on children and their families/whānau, and can result in significant inequities.’ Ibid.

³³⁰ Ibid.

This would reflect the rights of children that are in the United Nations Convention on the Rights of the Child, and the Oranga Tamariki Act.³³¹

9.11.3 Canada

Policing approaches

Like Australia, Canadian approaches to public health policing during the COVID-19 pandemic depended on the respective province or territory, and while there was ‘considerable cooperation’ with the federal government, the latter largely ‘focused on issues like international border closings and managing federal stockpiles of personal protective equipment, testing kits, and ventilators’.³³² Physical (or ‘social’) distancing was the main way in which infections were limited, with gathering limits and encouragement for residents to stay-at-home.³³³

Monetary on-the-spot fines were used as ‘a central mechanism of social control’ during the pandemic in Canada, although the rate at which fines were ‘used by police and bylaw officers varie[d] widely from jurisdiction to jurisdiction’.³³⁴ For instance, infringement notices were issued early in the pandemic in Quebec, while British Columbia (BC) only began issuing infringement notices during its ‘second wave’.³³⁵ Some provinces placed greater emphasis on education and encouraging voluntary compliance with public health recommendations, with ‘many provinces very effectively “flattened the curve” of the pandemic by adopting this approach’.³³⁶ Other provinces ‘turned to punitive enforcement to secure compliance.’³³⁷ Fine amounts for individuals and businesses varied significantly between provinces, as summarised by McClelland and Luscombe.³³⁸ In Quebec, for example, 30,488 COVID-19 infringement notices totalling more than CAD \$45 million were issued between 1 April 2020 and 31 December 2021, with only CAD \$5.7 million of that amount paid as reported in January 2022.³³⁹ By comparison, the province of BC

³³¹ (Emphasis added). Dr Deborah Russell, *Inquiry into the Operation of the COVID-19 Public Health Response Act 2020* (Report of the Finance and Expenditure Committee No 1.3Y, NZ House of Representatives, July 2020) <https://www.parliament.nz/resource/en-NZ/SCR_99623/490dd746ad574d91a42a76c447459083b0e4e7d0>.

³³² Allan Detsky and Isaac Bogoch, ‘COVID-19 in Canada: Experience and Response’ (2020) 324(8) *JAMA* 743.

³³³ *Ibid.*

³³⁴ Alex Luscombe and Alexander McClelland, “An Extreme Last Resort”: Monetary Penalties and the Policing of COVID-19 in Canada (November 2020) 8.

³³⁵ *Ibid.* 9.

³³⁶ Canadian Civil Liberties Association, *Stay Off the Grass: COVID-19 and Law Enforcement in Canada* (June 2020) <<https://ccla.org/wp-content/uploads/2021/06/2020-06-24-Stay-Off-the-Grass-COVID19-and-Law-Enforcement-in-Canada1.pdf>>.

³³⁷ *Ibid.*

³³⁸ Alexander McClelland and Alex Luscombe, ‘Policing the Pandemic: Counter-Mapping Policing Responses to COVID-19 across Canada’ (2021) 10 *Annual Review of Interdisciplinary Justice Research* 195, 208–209.

³³⁹ Joe Lofaro, ‘Quebec Has Issued \$45M in Fines during the Pandemic, but Only a Fraction of Them Have Been Paid’, *CTV News* (online, 27 January 2022) <<https://montreal.ctvnews.ca/quebec-has-issued-45m-in-fines-during-the-pandemic-but-only-a-fraction-of-them-have-been-paid-1.5755180>>.

handed out far fewer infringement notices than Quebec — just 2,362 infringements totalling CAD \$1,630,700 were issued in BC between 21 August 2020 and 14 January 2022.³⁴⁰ The heavy policing of Quebecois was encouraged by Premier François Legault, who told police to ‘crank up the number’ of infringement notices issued to people alleged to be violating the public health rules to ‘send a clear message’ to the small minority of Quebecois breaching the rules.³⁴¹

Were children fined?

Public reporting indicates several provinces fined and charged under 18-year-olds for non-compliance, including Alberta, Quebec, and Nova Scotia.³⁴² These appeared to correspond with the provinces adopting more punitive enforcement approaches.³⁴³ For example, a house party in BC, a province which adopted a public education approach,³⁴⁴ only resulted in the host being fined, not any guests (many of whom were young people).³⁴⁵ Some provinces adopted fine differentiation for children; for example, in Quebec, children aged 14 years and over received a CAD \$560 fine in 2020, compared to the adult fine of CAD \$1,546.³⁴⁶ McClelland and Luscombe argue that the significance of these fine amounts should not be downplayed, particularly considering the spike in unemployment rates and evictions during the pandemic, and the fact that a fine of CAD \$1,546 is more than the average Montrealer pays in rent.³⁴⁷

9.12. Reflection on comparative insights

Jurisdictional approaches to policing COVID-19 public health regulations and directions ranged from not issuing penalty notices to children; not issuing penalty notices to children in younger age brackets; tailoring penalty fine amounts to children’s reduced financial capacities; and holding caregivers responsible for children’s actions. The issuing of costly penalty notices to children for

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² For examples, search ‘young’, ‘youth’, ‘teenage’ and specific ages 10-18 years old in: Policing the Pandemic Mapping Project, ‘Policing the Pandemic-Searchable Database’ (15 March 2021) <<https://policingthepandemic.github.io/database/>>. Also see: CBC News, ‘Youths Fined Following 2nd Police Warning about Breaking COVID-19 Public Health Regulations | CBC News’, *CBC* (online, 23 December 2020) <<https://www.cbc.ca/news/canada/british-columbia/11-teens-fined-230-each-for-large-gathering-1.5853019>>; Terry Bridge, ‘Father Fined for Flouting COVID Rules at Sarnia’s Canada-U.S. Border Crossing’, *The London Free Press* (online, 23 June 2022) <<https://lfpres.com/news/local-news/father-fined-for-flouting-covid-rules-at-sarnias-canada-u-s-border-crossing>>; Canadian Civil Liberties Association (n 338).

³⁴³ Canadian Civil Liberties Association (n 338).

³⁴⁴ Ibid.

³⁴⁵ Simon Little, ‘Victoria Party Host Fined \$2,300 under New Coronavirus Enforcement Rules’, *GlobalNews* (online, 22 August 2020) <<https://globalnews.ca/news/7292909/victoria-party-host-fined-coronavirus/>>.

³⁴⁶ The Canadian Press, ‘Quebec City Police Crack down on Illegal Gatherings, Dole out Fines to Coronavirus Rule-Breakers’, *Global News* (online, 28 December 2020) <<https://globalnews.ca/news/7544329/quebec-city-fines-coronavirus-illegal-gatherings/>>.

³⁴⁷ McClelland and Luscombe (n 340) 209.

suspected breaches of COVID-19 regulations and directions, which occurred in jurisdictions including NSW, NZ and Victoria, was the subject of criticism from children's rights advocates, legal groups and community organisations on several grounds. These included:

- the significantly reduced capacity of children to pay a fixed fine due to restrictions on their ability to generate an income or receive government assistance payments;
- the potential for fine debts to damage family and caregiver relationships;
- penalty notices draw children into the criminal justice system;
- children experience difficulties navigating payment, review and enforcement systems;
- the policing and enforcement of penalty notices disproportionately impacts children who are financially disadvantaged and/or belong to minority groups;
- aspects of penalty notice systems are inconsistent with internationally recognised children's rights principles;
- there is an absence of evidence that penalty notices deter children from participating in harmful public health behaviour.³⁴⁸

The 'best' approaches to the policing and enforcement of public health regulations with respect to children, which avoided the negative outcomes of issuing penalty notices to children outlined above, were those which prioritised engaging with children, encouraged compliance and education over punitive mechanisms, and prohibited the issuing of penalty notices to children under the age of 18.

For those jurisdictions that did issue penalty notices to children under 18, better features of such systems included:

- a prohibition against issuing penalty notices to children in younger age brackets (such as children under 16);
- the tailoring of fine amounts to take into account children's unique financial circumstances;
- requirements for decision-makers (law enforcement and those reviewing infringement fines) to consider a child's best interests, age-related considerations, and prioritise education over retribution or general deterrence;

³⁴⁸ See, eg, NZ Office of the Children's Commissioner, 'Submission to the Finance and Expenditure Select Committee: Inquiry into the Operation of the COVID-19 Public Health Response Act 2020'. <<https://www.occ.org.nz/documents/493/Covid19-Submission-Childrens-Commissioner.pdf>>; Youthlaw (n 300).

- requirements for decision-makers to clearly explain the rules, the reasons for the child's suspected breach of the rules, and review rights in an age-appropriate manner; and
- tailoring the penalty notice system for children to reflect international children's rights principles.

10. COVID-19 FINES ADVOCACY AND LITIGATION

In the Executive Summary of this Report, we noted that shortly after the massive spike in COVID-19 penalty notice issuance associated with the 2021 ‘Delta Wave’,³⁴⁹ community legal centres and other organisations began to draw attention to the injustices associated with high volume indiscriminate use of penalty notices. Penalty notices issued to children featured prominently in this advocacy work.³⁵⁰ The Aboriginal Legal Service (NSW/ACT) Limited, Redfern Legal Centre and the Public Interest Advocacy Centre, along with Community Legal Centres NSW, called on the NSW Government to withdraw or convert to cautions all COVID-19 penalty notices issued to children.³⁵¹ The campaign attracted considerable media coverage.³⁵² By late July 2022, Revenue NSW had unilaterally written off 1,981 (52%) of the 3,840 COVID-19 fines issued to children during the pandemic because they were ‘uneconomical to pursue’. A Sydney Morning Herald article on 25 July 2022 reported that:

Revenue NSW said of the nearly 4000 fines issued to minors, only 17 were unresolved. More than 90 per cent had been paid, written off or withdrawn, and the rest were being resolved through WDOs.³⁵³

As explained in Part 6 of this Report, vague ‘catch-all’ offences were a notable feature of the NSW COVID-19 PHO regime. The most common ‘offence’ for which people (both adults and children) in NSW received penalty notices was described in the notices as ‘Fail to comply with noticed direction in relation to section 7/8/9 – COVID-19 – individual’.³⁵⁴ Police commonly issued penalty notices with this descriptor for suspected breaches of PHOs such as carpooling, non-essential travel, and protesting.³⁵⁵ The lack of specificity in these penalty notices also became a focus of advocacy work and calls for redress.³⁵⁶

³⁴⁹ See McNamara et al (n 15).

³⁵⁰ See, for example, Redfern Legal Centre (n 3).

³⁵¹ Knaus (n 3).

³⁵² See, for example, Michael Koziol, ‘Hundreds of NSW children paid of COVID-19 fines through “work orders”’, *Sydney Morning Herald* (online, 25 July 2022) <<https://www.smh.com.au/national/nsw/hundreds-of-nsw-children-placed-on-work-programs-to-pay-off-covid-fines-20220722-p5b3s9.html>>; Knaus (n 3); Knaus (n 11).

³⁵³ Koziol (n 355).

³⁵⁴ See Graph 6 in Part 7 of this report, citing BOCSAR (n 2).

³⁵⁵ Rahman (n 176).

³⁵⁶ See, eg, Redfern Legal Centre, ‘“We cannot fine our way out of the pandemic”: Legal profession calls on NSW Premier to revoke unlawful COVID-19 fines’ (Media Release, 16 September 2021); Aboriginal Legal Service (NSW/ACT), ‘Independent review into Australia’s pandemic response is extra proof that COVID fines must go’ (Media Release, 25 October 2022).

On 29 November 2022, Revenue NSW released a statement announcing that the Commissioner of Fines Administration would be withdrawing all PHO fines for the offence of 'Fail to comply with noticed direction in relation to section 7/8/9 – COVID-19'.³⁵⁷ This led to the withdrawal of 33,121 penalty notices,³⁵⁸ representing more than half of the total 62,138 COVID-19 penalty notices issued throughout the pandemic in NSW.³⁵⁹

As a result of the withdrawal, any penalty notice debts already paid by the recipients were to be refunded to the recipient, and any fines enforcement sanctions ordered in response to non-payment of the fines (including driver licence restrictions or garnishee order activity) were stopped.

The withdrawal of these fines by the NSW Commissioner of Fines Administration occurred in response to test cases filed by Redfern Legal Centre, with Revenue NSW announcing the withdrawal the day that the cases were due to be heard by Yehia J in the NSW Supreme Court.³⁶⁰ The two plaintiffs, Mr Beame and Ms Els, represented by Redfern Legal Centre, argued that the penalty notices they had each received were invalid, as the issuing body had failed to comply with s 20 of the *Fines Act 1996* (NSW) which requires specification of the offence each of them was alleged to have committed. Section 20 of the *Fines Act* provides that:

A penalty notice is a notice issued under a statutory provision to the effect that—

(a) the person to whom the notice is issued has *committed the penalty notice offence specified in the notice*, and

(b) if the person does not wish to have the matter determined by a court, the person may pay, within the time and to the person specified in the notice, the amount for the offence specified in the notice.³⁶¹

Just prior to the scheduled hearing in the NSW Supreme Court, the defendants conceded that the penalty notices were invalid for non-compliance with s 20 of the *Fines Act* because it could not be 'sufficiently discerned from each of the notices what is the offence said to have been committed'. The NSW Supreme Court made a declaration that Mr Beame's penalty notice issued for 'failing to comply with a noticed direction in relation to section 7/8/9 – COVID-19 – Individual'

³⁵⁷ Revenue NSW, 'Statement by Revenue NSW' (Media Release, NSW Government, 29 November 2022).

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Redfern Legal Centre, 'State Concedes Covid Fines are Invalid' (Media Release, 29 November 2022).

³⁶¹ Emphasis added.

offence, and Ms Els' fine issued for 'unlawfully participate in an outdoor public gathering – Area of concern – Individual' offence, were not penalty notices within s 20 of the *Fines Act*. They were therefore invalid. Justice Yehia ordered that the Commissioner of Fines Administration refund the amounts of \$436 and \$826 respectively to the plaintiffs, Mr Beame and Ms Els.

The reasons for the decision were published by Yehia J on 6 April 2023.³⁶² Her Honour held that there was public interest in the Court providing full reasons for the decision, given the significant number of penalty notices that had been issued in the same form as that received by Mr Beame, totaling approximately \$33 million in fines.

Despite the defendants' concession that the penalty notices were invalid, there remained a dispute between both parties about what was required, at a minimum, to 'specify' the penalty offence properly in the notice. Justice Yehia observed that the superior courts have consistently construed the word 'specify' to signify 'a requirement for clarity and precision' or 'unambiguous clarity'.³⁶³

Her Honour held that the statutory context and purpose of s 20 'favours an interpretation whereby the penalty notice offence must be *clearly and unambiguously* specified in the notice itself. Providing information that gives the recipient a clue or an indication from which they might be able to deduce or infer (using material outside the notice) the penalty notice offence is not sufficient.'³⁶⁴ As to what words or descriptor might be used to meet that requirement of specificity, her Honour referred to the case of *Smethurst v Commissioner of Australian Federal Police*,³⁶⁵ where Kiefel CJ, Bell and Keane JJ held:

What is sufficient to be conveyed about the offence in question in a given case may vary with the nature of the offence. Some offences may be shortly described ... On the other hand, when a statute provides for the commission of a somewhat indeterminate number of offences, a general reference to a section may not be sufficient. No verbal formula is possible, rather in each case it is necessary to apply the principle that the warrant should describe the nature of the offence so as to indicate the bounds of the search, and to assess the sufficiency of what is provided from the point of view of those reading it.³⁶⁶

³⁶² *Beame v Commissioner of Police* [2023] NSWSC 347 (*Beame*).

³⁶³ *Ibid* [75]-[76], quoting *Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 51 FCR 554, 569-569E, among other cases.

³⁶⁴ *Ibid* [84] (emphasis in original).

³⁶⁵ (2020) 272 CLR 177.

³⁶⁶ *Beame* (n 338) [84], quoting *Smethurst v Commissioner of Australian Federal Police* (2020) 272 CLR 177, [30].

Justice Yehia held that the penalty notices received by Mr Beame and Ms Els ‘not only failed to identify the offence-creating provision’ (i.e. s 10 of the *Public Health Act*), they also did not correctly identify the elements of the offences the plaintiffs were alleged to have committed.³⁶⁷ Although both penalty notices included the corresponding ‘Law Part Code’ to the alleged offence, Yehia J commented that ‘the Law Part Code is simply a number maintained on an external database. It does not identify on the face of the notice, with unambiguous clarity, what the offence is’.³⁶⁸

Beame v Commissioner of Police (Beame) highlights the problems faced by penalty notice recipients when the notice they receive contains inadequate information to identify the offence committed. Commenting on this issue, Justice Yehia questioned how the plaintiffs were:

... to know what offence they had committed or to make an informed decision as to whether to pay the fine or elect to have the matter determined by a court? Had the offence-creating provision been identified, the requirements of s 20 of the *Fines Act*, that the penalty notice offence be *specified* in the notice, would have been satisfied. This ... would have enabled the plaintiffs to look up the section and find out what offence they had allegedly committed, that is, it would have provided the unambiguous clarity required by the use of the word “specified” in s 20.³⁶⁹

It may be that in a particular case more information should be included in order to “specify” a penalty notice offence under s 20(a). However, I am not of the view that I need to determine this issue at present. In the proceedings before me, the short description identifying the offence was, in each case, insufficient to meet the requirements of s 20 of the *Fines Act*. As a minimum requirement, the offence-creating provision should have been included on the penalty notice in order to comply with s 20.³⁷⁰

Justice Yehia made orders declaring the penalty notices issued to Mr Beame and Ms Els to be invalid, that the Commissioner of Fines refund the plaintiffs the amounts they had already paid, and that the Commissioner may not validly make any enforcement orders pursuant to the notices.³⁷¹

³⁶⁷ Ibid [113].

³⁶⁸ Ibid [116].

³⁶⁹ Ibid [118].

³⁷⁰ Ibid [119].

³⁷¹ Ibid [120].

The *Beame* decision had significant implications for those children issued with a penalty notice for 'Fail to comply with noticed direction in relation to section 7/8/9 – COVID-19 – Individual', since Revenue NSW determined to withdraw all penalty notices with that descriptor, and to cancel or debts and fines enforcement action undertaken pursuant to non-payment of the penalty notice fines. What remains unclear at the time of writing this Report, however, is whether Revenue NSW also intends to withdraw penalty notices issued to children and adults for the alleged offence of 'unlawfully participate in an outdoor public gathering – Area of concern – Individual'. Samantha Lee, Senior Solicitor at the Police Accountability Clinic, Redfern Legal Centre, stated in July 2023 that 'We expected Revenue NSW to withdraw all remaining COVID fines following the Supreme Court's judgment earlier this year, but this has not occurred'.³⁷²

Since *Beame*, Redfern Legal Centre has commenced further proceedings against the NSW Police and the Commissioner of Fines Administration seeking a declaration that additional penalty notices are invalid. The case concerns a 37-year-old woman who was issued a \$3000 penalty notice for 'leaving greater Sydney for prescribed purposes without a permit'. The plaintiff was experiencing homelessness and living in a van when she left Sydney to seek accommodation that she was offered from a friend in South Australia.³⁷³ At the time of writing, the matter is still before the NSW Supreme Court.

³⁷² Georgina Mitchell, 'Court challenge aims to cancel all remaining NSW COVID fines', *Sydney Morning Herald* (online, 16 July 2023) <<https://www.smh.com.au/national/nsw/court-challenge-aims-to-cancel-all-remaining-nsw-covid-fines-20230713-p5do4z.html>>.

³⁷³ Redfern Legal Centre, 'Redfern Legal Centre pursues a public interest outcome in COVID fines case' (Media Release, 30 August 2023).

11. CONCLUSION

The COVID-19 pandemic exposed a number of structural issues within the NSW criminal justice system. Among these is the current system that regulates the issuance, review, and enforcement of penalty notices for children. The evidence presented in this Report supports the conclusion that penalty notices are an excessively punitive, discriminatory, and ineffective mechanism for sanctioning the behaviour of children. Although this problem was vividly illuminated by the heavy-handed issuance of penalty notices during the pandemic, it is a long-standing problem — and it continues. Changes to law, policy, and practice are urgently required so that children are not vulnerable to the long-term consequences of fine debt, including compounding disadvantage and the greater risk of criminalisation as adults.