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## **SPECIAL SUPPLEMENT**

### **Caution Guidelines under the *Fines Act 1996***

These Guidelines are issued by the Attorney General under section 19A(3) of the *Fines Act 1996*. Officers who issue penalty notices under the *Fines Act 1996* must have regard to these Guidelines in deciding whether to give a person a caution for a penalty notice offence.

The Guidelines are to assist officers in exercising their discretion. They do not create any right or obligation to give a caution. These Guidelines do not apply if the officer is a police officer, or the officer is employed or engaged by an agency that has issued its own guidelines for the use of cautions.

In the event of any inconsistency between these guidelines and the *Fines Act 1996*, the *Fines Act 1996* prevails.

### **Essential Summary**

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Officers who issue penalty notices may give cautions instead.<sup>1</sup> The *Fines Act 1996* states that a caution may be given if the officer believes:

- on reasonable grounds that a person has committed an offence under a statutory provision for which a penalty notice may be issued; and
- it is appropriate to give a caution in the circumstances.

The matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:

- (a) The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public;
- (b) The person is homeless;
- (c) The person has a mental illness or intellectual disability;
- (d) The person is a child (under 18);
- (e) the person has a special infirmity or is in very poor physical health;
- (f) The offending behaviour is at the lower end of the seriousness scale for that offence;
- (g) The person did not knowingly or deliberately commit the offence;
- (h) The person is cooperative and/or complies with a request to stop the offending conduct;
- (i) It is otherwise reasonable, in all the circumstances of the case, to give the person a caution.

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<sup>1</sup> Section 19A, *Fines Act 1996*

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## 1 Scope

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- 1.1 Officers who issue penalty notices (other than police officers) must have regard to applicable guidelines in deciding whether to give a person a caution instead of a penalty notice. The applicable guidelines will be these Guidelines, unless the officer is employed by, or acts on behalf of, an agency that has issued its own guidelines.
- 1.2 Agencies may make their own caution guidelines with additional detail to suit their operational environment. However, to ensure minimum standards and consistency across Government, agency guidelines must not be inconsistent with these Guidelines.<sup>2</sup>
- 1.3 These Guidelines relate to the giving of cautions. Officers are expected to comply with their agency's policies and procedures in relation to the issue of penalty notices.
- 1.4 Nothing in these Guidelines limits officers' existing discretion to deal with minor breaches, in accordance with the policy and practice of the issuing agency.

## 2 Purpose

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- 2.1 The purpose of these Guidelines is to ensure that officers exercise good judgment and take into account relevant considerations when deciding whether to give a caution for a penalty notice offence.

## 3 Definitions

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**Offence** means an offence under a NSW law for which a penalty notice may be issued.

**Issuing officer** means a person (other than a police officer) authorised to issue a penalty notice for an Offence.

**Issuing agency** means the agency that has employed or engaged the officer who issued the penalty notice or the caution.

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<sup>2</sup> See 19A(3)(b) of the *Fines Act 1996* (NSW)

## 4 When may a caution be given instead of a penalty notice?

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### Overview

4.1 A caution may be given if:

- (a) The offence is one for which a penalty notice may be issued;
- (b) The issuing officer has reasonable grounds to believe that an offence has been committed; and
- (c) The issuing officer believes it is appropriate to give a caution in the circumstances.

4.2 In deciding whether to give a person a caution, the officer must exercise his or her discretion based on the facts of each individual case, and having regard to these Guidelines or other applicable agency guidelines.

### The offence is one for which a penalty notice may be issued

4.3 Schedule 1 of the *Fines Act 1996* and the *Fines Regulation 2005* identify most of the laws under which penalty notices may be issued.

### There are reasonable grounds to believe that an offence has been committed

4.4 An issuing officer or agency must only give a caution if there are reasonable grounds to believe that an offence has been committed. This is the same test used when deciding whether or not to issue a penalty notice.

4.5 Every element of the offence must appear to be present and there must be sufficient evidence to prove the offence. For example, when an officer intends to issue a caution for travelling on a train without a valid ticket, the officer must be satisfied that there is sufficient evidence to prove all of the following in the same manner as if he or she were intending to issue a penalty notice:

- (a) that the person travelled on a train,
- (b) without possessing a valid ticket (either personally or with someone else on their behalf), and
- (c) the person did not have a lawful excuse.

### It is appropriate to give a caution in the circumstances

4.6 The decision to give a caution, rather than issue a penalty notice, requires the exercise of good judgement, involving an assessment of all the circumstances.

- 4.7 Without limiting the discretion to give a caution, the matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:
- (a) The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public;
  - (b) The officer has reasonable grounds to believe that the person has a mental illness or intellectual disability;
  - (c) The officer has reasonable grounds to believe that the person is homeless;
  - (d) The officer has reasonable grounds to believe that the person is under 18;
  - (e) The officer has reasonable grounds to believe that the person has a special infirmity or is in very poor physical health;
  - (f) The offending behaviour is at the lower end of the scale of seriousness for that offence or is minor in nature. For example, where there are signs prohibiting eating and drinking in a train carriage, and a person is observed eating a meal in a sensible and tidy manner.
  - (g) The person claims on reasonable grounds that they did not knowingly or deliberately commit the offence;
  - (h) The person admits the offending behaviour and shows remorse; The person is cooperative and/or complies with a request to stop the offending conduct. For example, a person stops in a no parking zone for longer than the required time but does not leave the vehicle unattended and agrees to move the vehicle when directed.
  - (i) There are other reasonable grounds for giving a caution in all the circumstances of the case. For example, the offence was committed because of a medical or other serious emergency, or the person is a visitor from interstate or overseas and was not aware that their conduct constituted an offence.
- 4.8 The fact that one or more of these factors is present does not mean that the officer is obliged to issue a caution. All the circumstances of the case should be taken into account to determine whether a caution is an appropriate and reasonable response to the offence.

- 4.9 In considering whether there are reasonable grounds to believe that a person has a mental illness, intellectual disability, special infirmity, is in very poor physical health or is homeless, officers should form their own judgment having regard to all the circumstances, including the appearance, speech and behaviour of the person. Any documentary evidence produced by the person may also be taken into account.
- 4.10 In deciding whether to issue a caution, it may be relevant to consider whether the person has been issued with a caution for the same or similar offence before. However, the fact that someone has been issued with a caution previously does not mean that they cannot be given another caution.

## 5 When a caution must not be given

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- 5.1 An issuing officer must not give a person a caution if they are not able to issue the person with a penalty notice for the same behaviour.
- 5.2 For example, an issuing officer must not give a caution if:
- 5.2.1 he or she does not have reasonable grounds to believe that an offence has been committed, or
  - 5.2.2 each element of the offence is not present, or
  - 5.2.3 there is insufficient evidence to prove the offence, or
  - 5.2.4 the person has a lawful excuse. For example, under section 4 of the *Rail Safety (Offences) Regulation 2008*, a lawful excuse for travelling on a train without a valid ticket is where a person does not have a ticket because the ticket machine was broken and no alternative facilities were available at their station to enable them to purchase one before getting on the train.
- 5.3 An officer must not give a person a caution if the offence has been identified in the issuing agency's own caution guidelines as one for which cautions may not be given (eg. offences which involve risks to public safety).
- 5.4 There are very few and exceptional circumstances in which a person under the age of 14 may be issued with a penalty notice or a caution (eg. offences under the *Fisheries Management Act 1994* and regulations). In cases where more guidance is required, please consult the relevant agency's guidelines.

## 6 Do cautions have to be recorded?

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- 6.1 Where practical, the fact that a caution has been given to a person should be recorded.
- 6.2 The method of record keeping will vary from agency to agency, and may include notebook or computer entries.
- 6.3 Where a record is made, it should include, if practical :
- (a) The date of the caution;
  - (b) The name of the officer who gave the caution;
  - (c) The offence for which the caution was given;
  - (d) The name and address of the person given the caution; and
  - (e) The date, place and approximate time that the offence was alleged to have been committed.

## 7 What if a caution is given by mistake?

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- 7.1 The *Fines Act 1996* makes it clear that giving a caution in relation to an offence does not affect the power of the issuing agency to take other action it would otherwise be allowed to take in respect of an offence.
- 7.2 This provision is intended to be a safeguard so that alternative action can be taken by the issuing agency instead of a caution if it later becomes apparent, having regard to applicable guidelines, that a caution was not the most appropriate response.
- 7.3 For example, if the issuing agency later discovers that a person's conduct was, in fact, so serious that a caution was not the most appropriate response, it could issue a penalty notice or commence court proceedings instead of the caution. Any other action must take place within the applicable statutory limitation period (eg. further action would have to be taken within 6 months of the date of the alleged offence for summary offences, or 12 months for traffic-related offences).
- 7.4 Similarly, if an issuing agency discovers that a person's conduct was lawful and that a caution should not have been given, it must update any record of the caution accordingly.
- 7.5 An agency should have good reasons for taking alternative action after an issuing officer has already cautioned a person for an offence.

- 7.6 It is **not** intended that a person should receive both a caution and a penalty notice for the same offence. Officers should decide which is the most appropriate response in all the circumstances of the case.

## 8 Agency roles and responsibilities

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- 8.1 Agencies should ensure that all Issuing officers
- (a) have a good understanding of the actual offences for which they are authorised to issue penalty notices and cautions.
  - (b) are aware of these Guidelines, and
  - (c) receive regular and appropriate training to assist in the interpretation and use of these Guidelines, tailored to meet their particular needs and areas of responsibility.

(End)

## 9 Document history

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Version	Date	Reason for Amendment

## 10 Approval by Attorney General

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(John Hatzistergos)