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'[I]F IT'S A PUBLIC HEALTH AND SAFETY THING … WHY NOT JUST GIVE THE KIDS HELMETS?'[1]: POLICING MANDATORY HELMET LAWS IN NEW SOUTH WALES

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In the early 1990s Australia became the first country in the world to introduce laws mandating the wearing of helmets by bicyclists. Road safety – particularly for child bicyclists – was the primary driver of change. This article considers the operation of the mandatory helmet law in New South Wales ('NSW') with the aim of assessing whether, in light of recent changes to the law and contemporary enforcement practices, its operation is consistent with the animating concern for cyclist safety. Analysis of quantitative data on issued penalty notices shows the law has been heavily enforced and with significant geographical disparity. Analysis of qualitative data derived from interviews with lawyers and others with knowledge of the operation of the law (n = 27) reveals a punitive fine-based enforcement system that is producing serious unintended and ancillary harms. The most significant of these are disturbing levels of over-policing and the accumulation of crippling levels of fine debt.

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1 The quote in our title comes from one of our interviewees: Interview with C1 (Julia Quilter and Russell Hogg, 25 November 2011) 14 ('C1'). See below Part IV. In this article our focus is on both adults and children in relation to the mandatory helmet laws ('MHLs').

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I INTRODUCTION

When the COVID-19 global pandemic struck Australia in early 2020 exceptional measures were adopted to arrest the spread of the virus. These included giving police special powers to enforce social distancing with on-the-spot fines.[2] It was not uncommon for ministers in their daily press conferences to announce the number of fines issued in the previous 24 hours, much as they issued updates on new infections and deaths. Some senior police adopted a policy of reviewing all fines issued for breaches of social distancing rules.[3] A website was established by legal and human rights advocacy organisations to gather, monitor and report cases,[4] and the media has regularly reported on controversial instances.[5] The concern and scrutiny was entirely appropriate, given the intrusiveness of the public health controls and severity of the penalties, but it was in striking contrast to the paucity of public interest in the police enforcement of fines of this kind the rest of the time.[6]

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2 See, eg, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW), *Public Health (COVID-19 Self-Isolation) Order 2020* (NSW), and *Public Health (COVID-19 Spitting and Coughing) Order 2020* (NSW) made under section 7 of the *Public Health Act 2010* (NSW) ('*PH Act*') and which apply the section 10 offence in the *PH Act* (offence of not complying with Ministerial direction under section 7). By virtue of the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* (NSW) cl 3 and *Public Health Regulation 2012* (NSW) sch 4, such offences are penalty notice offences and the fine for breach amounts to: $1,000 for restrictions on gathering and movement; $1,000, self-isolation; and $5,000, for spitting and coughing.

3 See, eg, Adrianna Zappavigna, 'NSW Police Commissioner Cancels 32 COVID-19 Related Fines', *news.com.au* (online, 26 April 2020) <https://www.news.com.au/national/nsw-act/nsw-police-commissioner-cancels-several-covid19-related-fines/news-story/1a42c34f8ef3d4498bf0e3b47d4b01d8>; Natalie Oliveri, 'Fines for Breaking Social Distancing Rules in Victoria under Review', *9News* (online, 15 April 2020) <https://www.9news.com.au/national/coronavirus-fines-in-victoria-under-review-says-top-police-officer/17a80b2e-fd83-4d20-bfcc-ff8ecc9d8ed8>.

4 'COVID Policing', *COVID-19 Policing in Australia* (Web Page, 2020) <https://covidpolicing.org.au>. Organisations involved included Amnesty International, Police Accountability Project, Liberty Victoria, NATSILS and Community Legal Centres Australia. They were backed by a network of policing academics with a coordinator in each state.

5 See, eg, Michael McGowan, 'Victorians Describe Feeling "Intimidated" by Police Enforcing Lockdown Laws', *The Guardian* (online, 21 April 2020) <https://www.theguardian.com/australia-news/2020/apr/21/victorians-describe-feeling-intimidated-by-police-enforcing-lockdown-laws>.

6 Although we note there has been growing academic literature on fines: see, eg, 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; Melanie Schwartz, 'Low-End Penalty, Big-Time Impact: The Effect of Fines on Indigenous People' (2017) 8(29) *Indigenous Law Bulletin* 14; Elyse Methven, 'Cheap and Efficient Justice? Neoliberal Discourse and Criminal Infringement Notices' (2019) 45(2) *University of Western Australia Law Review* 65; Elyse Methven, '"A Very Expensive Lesson": Counting the Costs of Penalty Notices for Anti-social Behaviour' (2014) 26(2) *Current Issues in Criminal Justice* 249; Patricia Faraldo-Cabana, *Money and the Governance of Punishment: A Genealogy of the Penal Fine* (Routledge, 2017); Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (Russell Sage Foundation, 2016); Frank R Baumgartner, Derek A Epp and Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge University Press, 2018); Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge-Cavendish, 2009).

Every year around 2.8 million *penalty notices*[7] are issued in NSW, a multiple of over 20 times the number of penalties imposed by NSW criminal courts.[8] One of the few researchers to devote sustained attention to the area, Richard Fox, commented some years ago:

> Australian figures indicate that if the proportion of accusations reaching the criminal justice system as on-the-spot fines is a fair measure of the significance of this measure in the overall system, it is proper to conclude that the main business of criminal justice is no longer serious crime. Nor even is it crime which is pursued in the criminal courts. The number of cases of alleged wrong-doing handled through the on-the-spot fine procedure clearly outstrips all other classes of offence.[9]

Penalty notice regimes remove conventional legal safeguards, like the presumption of innocence and judicial oversight. They are a form of *administrative* justice, mostly administered at the discretion of the police.[10] Where courts administering fines are required to take account of the means of an offender (ie, her/his capacity to pay),[11] penalty notice fines are *fixed* penalties and are thus deeply regressive in impact. Rarely do they even differentiate between adults and children.[12] As will become clear below, the amounts of such fines are far from trivial and often exceed penalties imposed by magistrates in like matters before the courts. While a person issued with a penalty notice is entitled to have the matter decided by a court, there are major practical disincentives to doing so, regardless of the merits, and few people do. The New South Wales Law Reform Commission estimated that no more than 1% of on-the-spot fine recipients elect to go to court.[13]

In this article we examine a 'crime' that is routinely dealt with by the police issue of a penalty notice and which has received almost no scholarly attention: the offence of failing to comply with the legally mandated requirement for bicyclists to wear an approved and properly fitted helmet (the mandatory helmet law

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7 Variously referred to also as infringement notices, tickets or 'on-the-spot' fines. In this article we will refer to them as penalty notices.

8 New South Wales Law Reform Commission, *Penalty Notices* (Summary Report No 132-S, February 2012) 1.

9 Richard Fox, 'Criminal Sanctions at the Other End' (Conference Paper, National Outlook Symposium on Crime in Australia: Mapping the Boundaries of Australia's Criminal Justice System, 22–3 March 1999) 6–7, quoted in NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices* (Interim Report, October 2006) 81 [3.14]. See also Richard Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, 1995); Richard Fox, 'Infringement Notices: Time for Reform?' (Report, Trends and Issues in Crime and Criminal Justice No 50, Australian Institute of Criminology, 1 November 1995).

10 On policing and police discretion see David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Oxford University Press, 1997) and the references in below n 122.

11 *Fines Act 1996* (NSW) s 6.

12 One exception in NSW is the difference in certain public transport fines for adults and juveniles. For example, under the *Passenger Transport (General) Regulation 2017* (NSW), travelling without a valid ticket under section 77A is a penalty notice offence of $200 for adults but $50 for persons under 18 years: see *Passenger Transport (General) Regulation 2017* (NSW) sch 3. It is noted that recently the *Fines Amendment Act 2019* (NSW) sch 1 [16], inserted sections 23(6)–(7) into the *Fines Act 1996* (NSW) which allows the Commissioner of Fines to reduce, by 50%, the fines of those who are recipients of 'Government benefits'. This amendment commenced operation on 1 July 2020. In doing so, the Commissioner is to have regard to the relevant guidelines: see *Fines Act 1996* (NSW) s 23(6)(b); Minister for Finance and Small Business, '50% Reduction of a Penalty Notice Amount' (Ministerial Guidelines, July 2020).

13 New South Wales Law Reform Commission (n 8) 1–2 [6].

('MHL') offence).[14] To many this is likely to appear as a minor offence, and hardly worth the attention of academic research. However, in our view, the tendency to trivialise such offences distracts from a number of important questions that are raised by their enactment (indeed proliferation)[15] and day-to-day administration. It also ensures that, in addition to the removal of judicial oversight, other forms of scrutiny are effaced. While there are many important issues specific to the MHL offence, a case study of the MHL offence also provides a window into some general issues pertaining to penalty notice regimes and their administration in NSW (which are doubtless shared by other jurisdictions).[16]

This article is in five parts. Part II considers the development of the MHL offence in Australia and NSW in particular. In Part III, we examine quantitative data relating to the enforcement of the offence. In Part IV we present a qualitative analysis of MHL enforcement, fine debt and reform options based on interviews with lawyers and others with direct experience of how the law is administered. Part V is a brief conclusion.

II HISTORY OF THE MANDATORY HELMET OFFENCE

Under the *Australian Constitution*[17] the Commonwealth does not have power to make laws with respect to roads and road users. These are matters for State and Territory Parliaments. Nevertheless, Australia has a long history of successful legislative change aimed at modifying behaviour in order to reduce road trauma. Success stories include compulsory helmet wearing for motorcyclists (1971),[18] compulsory seat belts in cars (1971)[19] and, progressively across the country, the introduction of drink and drug driving laws.[20] Drawing upon analogies with these earlier successes, advocacy for MHLs for *bicyclists* began to gather momentum with the case for uniform legislation developing gradually from the 1970s.

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14 For some exceptions see the analysis of how such laws adversely affect those living with a disability: Carlo Dellora, 'As Easy as Riding a Bike? How Mandatory Bicycle Helmet Laws May Harm Those Who Can Least Afford It' (2019) 44(3) *Alternative Law Journal* 214. On the legal means by which governments regulate cyclists, see Gabrielle Appleby and Adam Webster, 'Cycling and the Law' (2016) 39(1) *University of New South Wales Law Journal* 129.

15 See David Brown, 'Constituting Physical and Fault Elements: A NSW Case Study' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 13; James Chalmers, '"Frenzied Law Making": Overcriminalization by Numbers' (2014) 67(1) *Current Legal Problems* 483; James Chalmers and Fiona Leverick, 'Tracking the Creation of Criminal Offences' (2013) 7 *Criminal Law Review* 543.

16 See, eg, Royce Kurmelovs, 'Violent Arrest of Young Aboriginal Man by South Australian Police Caught on Camera', *NITV* (online, 16 June 2020) <https://www.sbs.com.au/nitv/article/2020/06/16/violent-arrest-young-aboriginal-man-south-australian-police-caught-camera>.

17 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

18 Meredyth-Ann Williams, 'Evaluation of the NSW Introduction of Compulsory Bicycle Helmet Legislation' (Research Note No 17/94, Roads and Traffic Authority, May 1995) 1.

19 Ibid.

20 Julia Quilter and Luke McNamara, '"Zero Tolerance" Drug Driving Laws in Australia: A Gap between Rationale and Form?' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 47.

In 1972 the Commonwealth Parliament established a Select Committee on Road Safety[21] with broad terms of reference to, inter alia, inquire and report into the main causes of 'the present high level of the road toll in Australia'. Cycling (and motorcycling) had been rising in popularity in Australia from the mid-1960s.[22] Alongside this trend concern grew for their safety. In 1976, the Select Committee on Road Safety undertook a specific inquiry into motorcycle and bicycle safety.[23] While most of the report was devoted to motorcycling, the chapter on cycling safety described its largely unregulated nature:

> Bicycles are currently not approved to any standard and are not subject to registration or insurance as are other road vehicles. Cyclists are not licensed and traffic laws relating to bicycle use appear to be rarely enforced.[24]

The Committee made a number of recommendations in relation to primary and secondary cycling safety. As regards bicycle helmets, the following relatively 'gentle' recommendations were made:

- Cyclists be advised of the safety benefits of protective helmets by publicity or other suitable means; and
- The possibility of requiring cyclists to wear helmets be kept under review.[25]

The Government accepted the first of these recommendations[26] but, in relation to the second, determined that further investigation was required.

In 1985 the Committee (by then the Transport Safety Committee) returned to the topic of bicycle helmet safety.[27] The Committee's final report expressed particular concern with 'the extremely high over-representation of children in bicycle accident casualty statistics'.[28] The Committee reported on low helmet wearing rates across Australia,[29] although noted jurisdictional differences (eg Victoria) where helmet campaigns had been established. In considering helmet campaigns the Committee noted:

> Education and publicity programs need to be carefully targeted to ensure that particular bicycle user groups are reached to increase their use of helmets. … The Committee heard of instances where children who wear helmets have been called

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21 Later this Committee became the House of Representatives Standing Committee on Road Safety.

22 House of Representatives Standing Committee on Road Safety, Parliament of Australia, *Motorcycle and Bicycle Safety* (Report, May 1978) 5 [10]. See also the data included in Table 11 which indicates that manufactured or assembled and imported bicycles increased by 114% between 1970 and 1975: at 26.

23 The 1976 Committee undertook most of the work in relation to this inquiry; however, the report was not completed until 1978 because of the dissolution of Parliament on 10 November 1977.

24 House of Representatives Standing Committee on Road Safety (n 22) 79 [211].

25 Ibid 103 [289].

26 In May 1985 the Federal Office of Road Safety introduced its 'Molly' (Molly Meldrum) campaign publicising the need for children to wear helmets and trying to target those who believed wearing a helmet was 'sissy'.

27 House of Representatives Standing Committee on Transport Safety, Parliament of Australia, *Bicycle Helmet Safety: Final Report on the Motorcycle and Bicycle Helmet Safety Inquiry* (Report, November 1985). While the Committee finalised its report on motorcycle safety in 1984, the Committee was dissolved before completing its inquiry into bicycle helmet safety and had to be continued under the new Parliament.

28 Ibid 6 [19]. See also at 7 [22].

29 Ibid 13 [42].

> 'sissy' or 'egghead' by their friends. This negative pressure is occurring at ages where peer group pressure to conform is strongest … Overcoming this reluctance to helmet usage by children and young teenagers should be a major objective of education and publicity campaigns. The Victorian Government has directed their education campaigns predominantly to the parents of primary school children. It is of great concern to the Committee that the highest risk group of cyclists, the under 17 year olds, has the lowest usage rates.[30]

The Committee report emphasised Victoria's early successes in increasing helmet use through various campaigns. These included the first bulk helmet purchase scheme in 1982;[31] school poster education campaigns encouraging helmet wearing; and the introduction of compulsory helmet wearing 'rules' in schools (in 1984). Buoyed by early success, the Victorian Government introduced two further helmet rebate schemes (1984 and 1985) with purchasers of a new approved helmet receiving a cash rebate. The Committee concluded that: 'The public responded dramatically to the two Victorian rebate schemes and there are now 43,000 cyclists wearing approved helmets as a result of the schemes'.[32]

The Committee's final report recommended that the Minister for Transport widely publicise helmet bulk-purchasing programs and co-ordinate a national program for all schools; and Ministers for Education and Transport seek the cooperation of their State and Territory counterparts to encourage all schools to introduce 'compulsory' helmet wearing when cycling to school.[33]

Over the course of the 1980s in NSW, various inquiries, wide-ranging consultations, surveys and public awareness campaigns were initiated in relation to helmet wearing. These efforts reflected a range of concerns, including likely community acceptance of what some saw as an intrusion on personal freedom, the affordability of helmets, helmet standards and the importance of attending not only to 'secondary safety' (reducing the gravity of injury by wearing helmets) but also 'primary safety'.[34] Questions were also raised as to whether compulsion should apply to cycling in all public places (including parks, cycleways) or only to roads. Surveys sought to uncover attitudes in relation to the use of helmets; information campaigns conducted throughout the state promoted their safety benefits; and rebate schemes were established.[35] In 1988 the NSW Parliamentary STAYSAFE Committee recommended the introduction of a MHL.[36] This was widely supported at the time including by the medical profession and some bicycle groups.[37]

In the context of this article, this brief history is important for two reasons. First, it reveals that the movement supporting the introduction of MHLs for cyclists

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30 Ibid 14–15 [45].

31 The Victorian Education Department and the RTA of Victoria allowed parents to purchase helmets at school at a reduced cost: ibid 17 [56].

32 Ibid 20 [68].

33 Ibid vii, Recommendations (1)(a) and (2).

34 Williams (n 18) 14–18 [3.4.1]–[3.5.1].

35 Although these were said to be less successful than in Victoria: ibid 6–11 [2.3.3.1.1]–[2.3.3.8].

36 Joint Standing Committee on Road Safety, Parliament of New South Wales, *STAYSAFE 12: Bicycle Safety* (Report, October 1988) 45 [R6.1(e)].

37 Including the Bicycle Institute of NSW and the Roads and Traffic Authority's Bicycle Advisory Council. Nevertheless, there was resistance from within sections of the cycling community to both the wearing of helmets *per se* and more especially to legal compulsion: Williams (n 18) 10–11 [2.3.3.6]–[2.3.3.8].

approached it as a *multi-faceted* public safety issue, focused in particular on *child* safety. As we show in Parts II and III, this is in stark contrast to the primacy accorded to enforcement in the contemporary policing of non-compliance with MHLs. Secondly, it underlines the fact that, initially, 'front line' implementation focused on a combination of education, helmet standards, and financial incentives to change behaviour. The criminal law was very much a 'background' tool. Only one recommendation in the 1985 Standing Committee on Transport Safety report dealt ('softly') with enforcement:

> The Minister for Transport and the Special Minister of State in conjunction with their State counterparts;
>
> (a) investigate more effective enforcement techniques to ensure cyclists, particularly children, follow the traffic code; …[38]

The Committee recommended that the cooperation of the states and territories be sought to 'review the benefits of bicycle helmet wearing' and, unless there were persuasive arguments to the contrary, 'introduce compulsory wearing of helmets by cyclists on roads and other public places'.[39]

In 1989 compulsory helmet wearing was adopted as federal policy[40] – backed by threats to reduce federal government funding if not adopted by the states and territories.[41] A mandatory helmet standard was also introduced at that time under the *Trade Practices Act 1974* (Cth).[42]

On 1 July 1990, Victoria became the first state to introduce the MHL by the *Road Safety (Bicycle Helmets) Regulations 1990* (Vic).[43] NSW soon followed, introducing a similar law applying to adults on 1 January 1991 and for children under 16 on 1 July 1991. The offence was added to the *General Traffic Regulations 1916* (NSW) regulation 3A ('Wearing of protective helmets').[44] Other states and territories followed.[45] While the Northern Territory ('NT') enacted the offence on

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38 House of Representatives Standing Committee on Transport Safety (n 27) vii, Recommendation 4.

39 Ibid ix, Recommendation 12(c).

40 Senate Economics References Committee, Parliament of Australia, *Personal Choice and Community Impacts: Bicycle Helmet Laws* (Interim Report, May 2016) 4 [1.16].

41 See 'Helmet Laws: Northern Territory' *Bicycle Helmet Research Foundation* (Web Page) <http://www.cyclehelmets.org/1114.html>.

42 Senate Economics References Committee (n 40) 4 [1.16].

43 The offence of non-compliance was contained in the *Road Safety (Traffic) Regulations 1988* (Vic), and carried a penalty of one penalty unit (at the time, $15): Senate Economic References Committee (n 40) 17 [2.34].

44 The maximum penalty appears to have been $200: see *General Traffic Regulations 1916* (NSW) reg 14(1), which states that '[a]ny person committing a breach of any of these Regulations shall be liable to a penalty not exceeding $200'.

45 South Australia by the *Road Traffic (Alcohol, Speed and Helmets) Amendment Act 1991* (SA) which came into effect on 1 July 1991 (see '*Road Traffic Act 1991* (Act No 12 of 1991): Day of Commencement' in South Australia, *South Australian Government Gazette*, No 50, 9 May 1991, 1483, 1484). Section 15 of this Act amended section 162C of the *Road Traffic Act 1961* (SA). The amendments repealed/replaced sections 162C(1)–(2) and made it an offence to ride a 'cycle' unless wearing a 'safety helmet that complies with the regulations and is properly adjusted and securely fastened'. Western Australia on 1 July 1992 by the *Road Traffic Code 1975* (WA) reg 1307 with the penalty at the time of repeal being 16 penalty units for the first offence and 32 for subsequent offences: *Road Traffic Code 1975* (WA) reg 1901. Queensland enacted on 1 January 1993 by the *Traffic Regulation 1962* (Qld) reg 159C which inserted it in a regulation (Queensland, *Queensland Government Gazette*, 29 June 1991, 1285–305). This was by the *Traffic Amendment Regulation (No 6) 1992* (Qld), which commenced on 1

1 January 1992,[46] in 1994, following a public petition,[47] the law was amended permitting bicyclists over 17 years to ride without a helmet along footpaths or on cycle paths which are not roads.[48] The NT remains the only jurisdiction to 'flexibly' apply the MHL.

Tracking the impact of the MHL in NSW continued in the early years following its introduction. Surveys and other research indicated a high level of acceptance of the safety advantages of helmets (over 90%).[49] Likewise, there was a rapid increase over the period 1990–93 in the actual usage of helmets by adults and young persons (from 26% to 83% for adults; 12% to 74% for those under 16 years).[50] There was also impressive evidence of a decline in fatalities and serious injuries involving bicyclists.[51] The consensus by the mid-1990s seemed to be that the changes had been highly successful. Outstanding issues noted at the time of the 1995 evaluation related to the correct wearing of helmets and that some suburbs lagged in the wearing of helmets.[52]

In 1999 the federal *Australian Road Rules* ('*ARRs*') were adopted by the Australian Transport Council.[53] The *ARRs* make specific provision for bicycle riders with a series of 'Additional rules'.[54] Since then all state and territory laws have modelled their legislation relating to bicyclists on these *ARRs*. Australia became the first and one of only a few countries in the world[55] to introduce a blanket legal requirement to wear a bicycle helmet.

January 1993: see reg 2. The Australian Capital Territory on 1 July 1992 by section 6C and other associated sections introduced into the *Traffic Act 1937* (ACT) by way of the *Traffic Amendment Act 1992* (ACT), which commenced on 1 July 1992 (see ACT, *Australian Capital Territory Gazette*, No SG 62, 2 June 1992). In the NT, the offence was inserted by the *Amendments of Traffic Regulations No 75 1991* (NT): see list of amendments annexed to the *Traffic Regulations 1995* (NT). In Tasmania the offence was inserted in the *Traffic Act 1925* (Tas) commencing on 1 January 1992: see Senate Economics References Committee (n 40) 5, citing Mr Colin Clarke, Submission No 4 to Senate Economics References Committee, Parliament of Australia, *Personal Choice and Community Impacts* (2015) attachment 1.

46 Through the *Amendments of Traffic Regulations (No 75) 1991* (NT).

47 See 'Cycling Participation in the Northern Territory', *Cycle-helmets.com* (Web Page) <https://www.cycle-helmets.com/northern-territory-participation.html>.

48 *Traffic Regulations 1999* (NT) reg 86. The petition was signed by 8% of the NT's population. There was less public support for rescinding the law for children. The compromise to continue to require helmets on roads was to avoid a penalty from the federal government. Since the change in the law to exempt adults, NT Police do not often enforce helmet wearing for any cyclists: ibid.

49 Williams (n 18) 21–3 [4.1.1]–[4.1.4].

50 Ibid 24–8 [4.2.1]–[4.2.4].

51 Ibid 30–5 [4.4.1.1]–[4.5.4].

52 Ibid 43–4 [5.3].

53 Now the Transport and Infrastructure Council.

54 See also Appleby and Webster (n 14).

55 New Zealand, Argentina, the United Arab Emirates, Spain, Singapore and Togo are amongst the others. Mexico introduced a MHL in 2009 but repealed it the following year. Some provincial governments in Canada have enacted MHLs as have some states in the United States of America. Some other national and local jurisdictions around the world mandate helmets for children only: see 'Bicycle Helmet Laws', *Bicycle Helmet Safety Institute* (Web Page, 22 February 2021) <https://www.helmets.org/mandator.htm#international>.

In NSW the *ARRs*[56] are now found in Part 15 of the *Road Rules 2014* (NSW).[57] Part 15 includes a large number of offences applying to cyclists, including the MHL rule 256:

> 256 Bicycle helmets
>
> (1) The rider of a bicycle must wear an approved bicycle helmet securely fitted and fastened on the rider's head, unless the rider is exempt from wearing a bicycle helmet under another law of this jurisdiction.
>
> Maximum penalty–20 penalty units.

Looking back on the period of reform 30 years on, it is interesting that so much attention was devoted in the early years to educative, consultative, supportive and research activity, with the central focus on public safety and reducing the adverse human and economic consequences of injury and death associated with cycling accidents. These efforts clearly proved effective in producing high levels of voluntary compliance and public acceptance of the safety benefits of wearing a helmet. Despite this success and the multi-faceted approach that lay behind it (or perhaps because of this), these wider aspects of the issue have over time faded into the policy background in favour of a primary emphasis on enforcement. This is particularly so in NSW since March 2016 when important changes were made to the offence.

While the MHL offence in NSW (and in other states and territories) is a summary offence, in practice it is dealt with by way of a penalty notice issued by a police officer.[58] In March 2016, the *Road Transport Legislation Amendment (Bicycle Riders) Regulation 2016* moved the offence from a level 1 penalty notice offence (then $71)[59] to a level 5 offence (then $319).[60] This 350% increase is an important part of the story of the emergence of MHLs as an excessively punitive policing tool. Unlike maximum penalties for offences tried summarily, penalty

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56 See the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999* (NSW) made under the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) which had the object of incorporating the *Australian Road Rules* ('*ARR*s') as published by the National Road Transport Commission on 19 October 1999 into NSW Law. Clause 6 incorporated the *ARRs* into NSW law (to be read together with the Regulation).

57 'Additional rules for bicycle riders'. The Part 15 rules are separate to those in Part 14, Division 2, which apply to 'Rules for persons travelling in or on wheeled recreational devices and wheeled toys' – a wheeled recreational device is defined in the Dictionary so as to exclude bicycles and 'wheeled toy' is defined as 'a child's pedal car, scooter or tricycle or a similar toy, but only when it is being used only by a child who is under 12 years old'.

58 Under section 195 of the *Road Transport Act 2013* (NSW) a police officer or other authorised officer can deal with an 'offence against the road transport legislation' by way of penalty notice. Section 6 defines 'road transport legislation' to include the 'statutory rules' which in turn are defined in section 4 as '"the statutory rules" means the regulations and rules made by the Governor under this Act' which includes the *Road Rules 2014* (NSW). While 'authorised officer' is defined in regulation 121(1) of the *Road Transport (General) Regulation 2013* (NSW), in practice as this article will show, police officers generally issue penalty notices for the MHL offence. In the data discussed in Part III, park rangers issued a mere 18 penalty notices in the financial years between 2014–15 and 2019–20. The *Road Transport (General) Regulation 2013* (NSW) regulation 122 defines penalty notice offences and schedule 5 provides the class and level for each penalty notice offence.

59 *Road Transport (General) Regulation 2013* (NSW) reg 122, sch 5.

60 See *Road Transport Legislation Amendment (Bicycle Riders) Regulation 2016* (NSW) sch 2.

notices are indexed annually in NSW. As at 1 July 2020,[61] the MHL penalty notice imposed a staggering $349 fine.[62]

The changes in March 2016 were said to be part of a package of bike safety measures including the introduction of a new offence for motorists who fail to keep a safe distance when passing a cyclist, carrying a maximum penalty of 20 penalty units or a level 5 penalty notice offence.[63] Yet as Part III will demonstrate, cyclists rather than motorists have been the ones in the policing frame.

As Table 1 shows, the 2016 increase (together with yearly indexation) in the on-the-spot fine for the MHL offence puts NSW wildly out-of-step with the penalty notice amounts in other jurisdictions.

Table 1: Value of Penalty Notice for Riding a Bicycle without a Helmet, March 2020

Jurisdiction	Dollar Amount
NT[64]	25
WA[65]	50
SA[66]	109
Tas[67]	126
Qld[68]	133

61 And will be the amount until 30 June 2021 after which time the offence will be indexed.

62 *Road Transport (General) Amendment (Penalties) Regulation 2020* (NSW) sch 1 provides that a Class 1, Level 5 offence is $349 from 1 July 2020.

63 *Road Rules 2014* (NSW) r 144-1; *Road Transport (General) Regulation 2013* (NSW) sch 5.

64 *Traffic Regulations 1999* (NT) regulation 41(1) provides a police officer with the power to issue a 'traffic infringement notice' if it is believed that an offence has been committed. Pursuant to *Traffic Regulations 1999* (NT) regulation 44, the penalty for such offences are contained in schedule 1. *Traffic Regulations 1999* (NT) schedule 1 creates a penalty liability of $25 for a breach of rules 256(1)–(2) of the *ARRs*.

65 See: *Road Traffic Administration Act 2008* (WA) s 79; *Road Traffic (Administration) Regulations 2014* (WA) reg 24; then *Road Traffic Code 2000* (WA) s 222; the penalty unit amount is $50 as per the definition in *Road Traffic Act 1974* (WA) s 5.

66 *Expiation of Offences Act 1996* (SA) s 5(1) provides that, if an expiation fee is fixed by or under an Act, regulation or by-law in respect of an offence, an expiation notice may be given under this Act to a person alleged to have committed the offence. *Road Traffic (Miscellaneous) Regulations 2014* (SA) sch 4 pt 3 lists offences and the expiation fee with respect to offences against the *ARRs*. For a contravention of rules 256(1)–(3), a fee of $111 is payable.

67 *Traffic Act 1925* (Tas) s 43H allows a police officer/authorised officer to serve a 'traffic infringement notice' on a person the officer is satisfied has committed a prescribed offence. *Traffic Act 1925* (Tas) s 43N states that the 'Governor may make regulations prescribing offences for the purposes of this Part and the penalty applicable to each such offence'. *Traffic (Compliance and Enforcement) Regulations 2017* (Tas) sch 1, pt 1 prescribes such offences and penalties for offences under the *Road Rules 2019* (Tas). Rule 256(1) is prescribed as 0.75 penalty units: *Traffic (Compliance and Enforcement) Regulations 2017* (Tas) sch 1 pt 1 item 349. Under the *Penalty Units and Other Penalties Act 1987* (Tas) a penalty unit amount at 1 July 2019 – 30 June 2020 is $168.

68 *State Penalties Enforcement Act 1999* (Qld) s 13 states that '[i]f an authorised person reasonably believes a person has committed an infringement notice offence, the authorised person may serve an infringement notice on the person for the offence'. *State Penalties Enforcement Act 1999* (Qld) sch 2 defines 'infringement notice offence' as 'an offence, other than an indictable offence or an offence against the person, prescribed under a regulation to be an offence to which this Act applies'. *State Penalties Enforcement Regulation 2014* (Qld) reg 4(1) states that 'Schedule 1 prescribes infringement notice

ACT[69]	153
Victoria[70]	207
NSW	349

Even before the recent substantial fine increase in NSW, MHLs had their critics. The evidence for injury reduction from wearing a helmet has been disputed.[71] It has also been argued that they: reduce participation in cycling, an activity otherwise having significant health and social benefits;[72] divert attention from accident prevention measures like the provision of better cycling infrastructure; and constitute a form of 'hard paternalism' which infringes the personal liberty of citizens whose behaviour does not harm or threaten others.[73] Attempts at easing MHLs, however, have not been met with enthusiasm by governments.[74]

While acknowledging the ongoing arguments for and against the MHL, this article adopts a different critical perspective on MHLs. We argue that because MHLs address the risks of cycling injury through the lens of criminalisation – specifically, punitive enforcement via a system of penalty notice offences – they have significant hidden and unintended consequences. Understanding and

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offences and infringement notice fines for the legislation (the *nominated laws*) mentioned in it'. Regulations 256(1)–(3) of the *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld) are prescribed as 'infringement notice offences', with a penalty of 1 penalty unit. *Penalties and Sentences Regulation 2015* (Qld) reg 3 prescribes the value of a penalty unit at 1 July 2019 as $133.45. The Queensland Government has determined not to increase the penalty unit amount for the 2020 financial year under section 5A of the *Penalties and Sentences Act 1992* (Qld): see 'Value of a Penalty Unit', *Department of Local Government, Racing and Multicultural Affairs* (Web Page, 30 November 2020) <https://www.dlgrma.qld.gov.au/local-government/governance/laws/value-of-a-penalty-unit>.

69 *Road Transport (Offences) Regulation 2005* (ACT) reg 5 states that 'An infringement notice offence is an offence mentioned in sch 1 for which an infringement penalty is provided in column 5 …'. *Road Transport (Offences) Regulation 2005* (ACT) prescribes an infringement penalty amount of $153 for contravention of rules 256(1)–(3) of the *ARRs*: at sch 1 pt 1.12A items 447–9.

70 *Road Safety Act 1986* (Vic) s 88(1AA) provides that an offence referred to in section 88(1) for which a traffic infringement notice may be served is an 'infringement offence' within the meaning of the *Infringements Act 2006* (Vic). *Road Safety (General) Regulations 2009* (Vic) reg 74 states that, for the purposes of section 88(5) of the *Road Safety Act 1986* (Vic), the infringement penalty for a traffic infringement prescribed in column 4 of schedule 7 is the amount prescribed in column 5 of that schedule. *Road Safety (General) Regulations 2009* (Vic) sch 7 provides that the penalty for contravention of rules 256(1)–(3) is 1.25 penalty units. The current value of 1 penalty unit is $165.22 (as of 1 July 2020). Therefore, 1.25 penalty units = $206.52. Victoria has not indexed penalty unit values for the financial year commencing 1 July 2020: see Victoria, *Victoria Government Gazette*, No G 16, 23 April 2020, 20.

71 Senate Economic References Committee (n 40) 9–12 [2.3]–[2.12]; Transport, Housing and Local Government Committee, Queensland Parliament, *A New Direction for Cycling in Queensland* (Report No 39, November 2013) 39 [4.3.3].

72 Senate Economic References Committee (n 40) 12–15 [2.13]–[2.25].

73 Ibid 2–3 [1.8]–[1.11].

74 For example, a recent Queensland proposal to trial exempting cyclists 16 years and over from MHLs when riding in parks, footpaths and shared/cycle paths and on roads with a 60 km/hr limit or less, was rejected by the Queensland Government, noting that the 'weight of evidence confirms the importance of wearing a bicycle helmet while riding': see Transport, Housing and Local Government Committee (n 71), 11 and 47, Recommendation 15.

consideration of these effects is, in our view, an essential component of future policy development and law reform in pursuit of bicycle road safety. In the next part we document the heavy enforcement of the MHL offence in NSW.

III MHL ENFORCEMENT: QUANTITATIVE DATA

In this section we present quantitative data relating to the administration of the MHL offence in NSW.[75]

A Volume of Penalty Notices

Table 2: Total Penalty Notices for All Bike Offences, MHL Offence, and Safe Distance Offence and Total Value of Fines by Year, 2014–15 to 2019–20, NSW

Year	1. Total Bike Offences No.	2. Total Value of All Bike Offences $	3. MHL Offence Only No.*	4. Total Value MHL Offence	5. Safe Passing Offence No.**	6. Total Value Safe Passing Offences
2014–15	7,152	$494,234	4,814 (67%)	$332,166	---	---
2015–16	7,896	$1,159,789	5,329 (67%)	$888,743	---	---
2016–17	9,696	$2,459,766	5,750 (59%)	$1,868,750	32	$10,400
2017–18	10,420	$2,705,413	6,260 (60%)	$2,065,800	28	$ 9,240
2018–19	9,950	$2,689,813	6,108 (61%)	$2,058,396	29	$ 9,773
2019–20 (till end Feb '20 only)	7,202	$1,944,507	4,095 (56%)	$1,408,680	19	$ 6,536

* % Number in bracket is MHL offences as proportion of total bike offences.
** Safe Passing Offence enacted in March 2016.

75 Some of this data is available from the Revenue NSW website: 'Data and Statistics', *Revenue NSW* (Web Page) <https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics>. Other data were obtained by the authors through applications made under the *Government Information (Public Access) Act 2009* (NSW) ('*GIPA Act*'). We take the opportunity to thank officers within Revenue NSW for their generous assistance in this regard. Yet other data are the fruit of *GIPA Act 2009* (NSW) applications made by others which are posted on the Revenue NSW website for other public users.

The total number of penalty notices issued for all bike offences each year is shown in column 1. There are 80 bicycle-related penalty notice offences listed by Revenue NSW.[76] The MHL offence (column 3) accounts for the substantial majority of penalty notices issued in every year and as many as two thirds in some years. The other bike offences for which penalty notices are commonly issued include riding on the footpath,[77] riding a bike that has no working warning device (ie a bell)[78] and offences relating to lights on bikes.[79] As will be discussed later, violations of the MHL offence are readily detectable and often serve as a 'gateway' to the issuing of penalty notices for other bike offences. Of the more than 50,000 penalty notices recorded in Table 1 all but 18 of the penalty notices were issued by police officers.[80]

Taken at face value, column 4 suggests that the MHL offence has been a substantial source of public revenue, especially after the offence moved from a level 1 ($71) to a level 5 ($319) penalty notice offence in March 2016. Not surprisingly, the total value of MHL fines more than doubled in the following year to be just short of $2 million, and it has exceeded $2 million in successive years. The total value of MHL penalty notice fines for the period July 2014 to February 2020 is over $8.5 million.

However, these 'impressive' sums take no account of the failure to pay MHL fines. As will become clear in Part IV, there are many reasons why a large number of these fines remain unpaid. In each of the years 2017–18 and 2018–19 over 5,000 enforcement orders were issued due to the recipient's failure to pay, and enforcement costs averaged around $300,000 for each of those years.[81] In the event that the fine(s) and enforcement costs remain unpaid, other sanctions will normally be imposed with the most common being driver's licence suspension.[82]

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76 The list contains a further 13 offences that relate to 'wheeled recreational devices' and/or 'wheeled toys', which are found in the *Road Rules 2014* (NSW) pt 14, div 2 'Rules for persons travelling in or on wheeled recreational devices and wheeled toys'. A 'wheeled recreational device' includes: 'rollerblades, rollerskates, a skateboard, scooter, unicycle or similar wheeled device': see *Road Rules 2014* (NSW) Dictionary. See also above n 57.

77 See *Road Rules 2014* (NSW) r 250.

78 See ibid r 258.

79 See ibid r 259, which includes three offences for failing to have: (a) a flashing or steady white light that is clearly visible for at least 200 metres from the front of the bicycle, and; (b) a flashing or steady red light that is clearly visible for at least 200 metres from the rear of the bicycle, and (c) a red reflector that is clearly visible for at least 50 metres from the rear of the bicycle when light is projected onto it by a vehicle's headlight on low-beam.

80 Park rangers issued 18 of the penalty notices.

81 Data provided to the authors by Revenue NSW under the *GIPA Act 2009* (NSW): 'Offences 2017/18 and 2018/19 for the Offence of Ride Bicycle Not Wearing an Approved Helmet Properly Fitted or Fastened' (Dataset GIPR 19/311, Data.NSW, 9 September 2019) ('GIPR 19/311'). Enforcement orders relate to additional amounts incurred in relation to enforcement action which is added to the fine debt. An unpaid fine resulting in the issue of an enforcement order (made under *Fines Act 1996* (NSW) s 42) incurs additional costs of $65 for an adult or $25 for a person under 18: see *Fines Regulation 2020* (NSW) reg 4(1)(a).

82 See *Fines Act 1996* (NSW) pt 4, div 3. See also Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 21–3. Other enforcement actions include the imposition of a customer business restriction which prevents a person with outstanding debt from engaging in certain transactions with the Roads and Maritime Services

Alternatively, eligible persons can 'cut out' the debt under a work and development order ('WDO').[83] Although it is not possible to accurately calculate the number of MHL fines that are never paid,[84] the evidence of the number of enforcement orders issued each year together with data relating to other enforcement actions suggests fewer (perhaps substantially fewer) than half are ultimately paid.

By way of contrast with the numbers of MHL penalty notices issued each year, the new offence requiring motorists to observe a safe distance when passing a cyclist (columns 5 and 6), has scarcely been used since it was added to the statute books in March 2016.[85]

B Age

Other data we obtained from Revenue NSW[86] breaks down the number of penalty notices issued for the MHL offence according to whether the offender was an adult or a juvenile. It is noted that the age of criminal responsibility in NSW commences from 10 years.[87] Between 2016 and 2019 the annual proportion of fines issued to children ranged from 10% to 14%. We will have more to say about the enforcement of the MHL offence against juveniles in Part IV, but it is worth noting that the fine is the same for a juvenile as for an adult.

(eg obtaining a learner's permit or a driver's licence) (*Fines Act 1996* (NSW) s 68) and the issue of a garnishee order or property seizure order: see *Fines Act 1996* (NSW) pt 4, div 4.

83 See *Fines Act 1996* (NSW) pt 4, div 8, sub-div 1. As of September 2019, a large number of WDOs (in excess of 10,000) involved persons who had been issued with at least one penalty notice for the MHL offence: data provided to the authors by Revenue NSW: GIPR 19/311 (n 81). A person may also enter into a time-to-pay agreement (*Fines Act 1996* (NSW) pt 4, div 8, sub-div 2) and there are hardship provisions under which applications can be made to have a debt cancelled (pt 4, div 8, sub-div 3).

84 It is not possible to precisely match the number of enforcement orders issued in a given period to the number of penalty notices issued in the same period as there is an obvious time lag before enforcement is initiated. Moreover, enforcement action of various kinds will, depending upon the circumstances in particular cases, be undertaken over varying (sometimes lengthy) periods with different payment outcomes.

85 The new safe passing offence under the *Road Rules 2014* (NSW) r 144-1, might quite plausibly be seen as something of a quid pro quo for the colossal increase in the MHL penalty, but one with little effect in practice.

86 'Penalty Notices for Non-parking Offences in Local Government Handbook Issued by Councils and NSW Police' (Dataset GIPA FA#238, Data.NSW, 6 August 2019) <https://data.nsw.gov.au/data/dataset/penalty-notices-for-parking-offences-issued-by-councils-and-nsw-police/resource/d373dc9d-b490-4aeb-9e2d-c2b8464342b1> ('GIPA FA#238'); GIPR 19/311 (n 81).

87 See *Children (Criminal Proceedings) Act 1987* (NSW) s 5. Between the ages of 10–14 years children are presumed incapable of wrongdoing; they are *doli incapax*. This presumption may be rebutted by the prosecution by proving beyond reasonable doubt that the child knew that it was morally wrong to engage in the conduct constituting the physical elements of the offence and not simply that the child was being naughty or mischievous: *C (A Minor) v DPP* [1996] AC 1. A subjective test of the individual child must be applied: *RP v The Queen* (2016) 259 CLR 641, 650–1 [12] (Kiefel, Bell, Keane and Gordon JJ). It is unclear how *doli incapax* would apply to the MHL offence which is essentially an amoral 'crime' of non-compliance. We have some evidence, however, that this issue does not usually arise with at least one of our interviewees (below) indicating that, '[g]enerally, police have a policy of not issuing fines to under 14s and mostly they're pretty good with that. There's not all that many. They mostly stick to that policy.': Interview with L1 (Julia Quilter, 19 August 2019) 3 ('L1').

C Location

Statistical data on the enforcement of the MHL offence demonstrate great geographical disparity. Currently there are 128 Local Government Areas ('LGAs') in NSW. In the fiscal year 2018–19 at least one MHL penalty notice was issued in 117 of those LGAs, but the volume of fines issued varied greatly between LGAs. Of course, LGAs also differ greatly in population size, but this only goes a small way to explaining the differences in the enforcement of the MHL offence. Over 25% of LGAs registered zero or less than five penalty notices.[88] The picture is very different for other localities.

Table 3 presents data on the number of penalty notices issued in 2018–19 for the 12 LGAs in which the most penalty notices were issued. These 12 LGAs (less than 10% of all LGAs) account for 51% of the total number of MHL penalty notices for the state.

Table 3: MHL Offence: Penalty Notices for Selected LGAs, 1.7.18-30.6.19, NSW[89]

Local Government Area	**Penalty Notices Numbers**
Blacktown	667
Campbelltown	199
Central Coast	169
Inner West	117
Liverpool	215
Mid-Coast	125
Newcastle	530
Penrith	187
Shellharbour	121
Sydney city	419
Wagga Wagga	127
Wollongong	256
Total of top 12	**3,132**
Total MHL offence	**6,101**[90]
% top 12	**51%**

88 Some of our interview data indicated that there was no enforcement of the MHL offence in their areas: see below Part IV.

89 Data provided to the authors by Revenue NSW: see GIPR 19/311 (n 81).

90 A small discrepancy exists between the total of 6,101 in Table 3 and the total for the MHL offence in Table 2 (6,108). This is because of a time lag in the provision of data to Revenue NSW by the issuing authority. Data provided by Revenue NSW at different dates will consequently witness small changes in the numbers.

From one point of view, some of the numbers are not surprising. We would expect to see higher numbers in large population or busy urban and suburban centres, like Blacktown (2016 Census population: 336,962),[91] Campbelltown, Liverpool, Newcastle, Penrith, Wollongong and Sydney city. On the other hand, other large population suburban LGAs, some of them neighbouring those in the top 12 table, had much lower numbers (eg Canterbury-Bankstown (57 penalty notices; 2016 Census population: 346,302),[92] Parramatta (57), Fairfield (84), Ryde (8) and Hornsby (17)). These are not year-on-year fluctuations, as the pattern of low numbers in these areas has also been constant over at least a three-year period.

Similar disparities exist when we turn to rural and regional LGAs. Given their generally lower population numbers they would not be expected to appear in the 'top 12' list.[93] However, some small population rural LGAs also have very high numbers. For example, Kempsey (2016 Census population: 28,885)[94] averaged 161 penalty notices for MHL offences each year from 2016–17 till 2018–19. The number dropped in 2018–19 to 88, but 184 MHL fines were issued in 2016–17 and 210 in 2017–18. In Walgett (2016 Census population: 6,107)[95] an average of 69 fines were issued annually, with a high of 90 in 2016–17. These two LGAs also stood out in 2016–17 as having very high rates at which juveniles were issued with penalty notices relative to adults. Compared to the state-wide average for penalty notices issued to juveniles (13%, see above), in Kempsey it was 33% and in Walgett 43%.

The evidence suggests that MHL 'hotspots' disproportionately contribute to the total number of penalty notices issued each year. We are led to ask whether this is the result of wide geographical variation in helmet wearing behaviour or, rather, of police enforcement practices? Whatever contribution variable cyclist attitudes and practices with respect to wearing helmets makes to the numbers, the sheer scale of the differences is unlikely to be explicable without carefully considering the differential policing of the offence. We will turn to this issue in more detail in Part IV, but will take the opportunity here to briefly highlight the most striking MHL 'hotspot', Blacktown LGA.

As Table 3 indicates Blacktown saw 667 penalty notices issued for the MHL offence in 2018–19, the highest by far of any LGA in the state – accounting for 11% of the total penalty notices issued in that year. This is not a one-off occurrence with Blacktown accounting for over 12% in 2017–18 and 13% in 2016–17.[96] It is

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91 Australian Bureau of Statistics, *2016 Census QuickStats: Blacktown (C)* (30 October 2020) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA10750?opendocument>.

92 Australian Bureau of Statistics, *2016 Census QuickStats: Canterbury-Bankstown (A)* (30 October 2020) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA11570?opendocument>.

93 The regional LGA of Shoalhaven had the 13th largest number of MHL penalty notices in 2018–19 (115).

94 Australian Bureau of Statistics, *2016 Census QuickStats: Kempsey (A)* (30 October 2020) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA14350?opendocument>.

95 Australian Bureau of Statistics, *2016 Census QuickStats: Walgett (A)* (30 October 2020) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA17900?opendocument>.

96 Data provided to the authors by Revenue NSW: see GIPA FA#238 (n 86); GIPA 19/311 (n 81).

not credible that helmet wearing behaviour differs so much in this one LGA from other areas across the city and state.

Other data[97] shows dramatic increases in the number of penalty notices issued for the MHL offence and for other bike offences by Mount Druitt police (part of the Blacktown LGA) beginning in the calendar year 2016. In 2014 Mount Druitt police issued 23 penalty notices for the MHL offence and 11 for other bike offences. In 2015 this increased to 72 for MHL and 39 for other bike offences, but in 2016 (coinciding with the increase in the penalty for the MHL offence) this leapt to 418 for the MHL offence and 511 for other bike offences. Further increases occurred in 2017, to 664 for the MHL offence and 943 for other bike offences. In 2018 the numbers dropped back to 387 for MHL and 292 for other bike offences, but still remained extremely high compared with other localities.

Although a detailed examination of local enforcement practices is largely beyond the scope of this article, these illustrative local data suggest that, at least in some areas, policing policy and practice appears to have become wholly detached from the public safety approach that originally ushered in the MHL offence and focuses more closely on proactive fines enforcement. This poses a further question of whether such localized strategies are primarily concerned with targeting the offence or whether the MHL, and other bike offences, are used to target particular sectors of the community for ulterior reasons. Under such circumstances the MHL offence becomes little more than an adjunct to street-level police powers unrelated to safety and which are open to arbitrary use as a pretext to stop (and possibly search, question, harass) citizens on grounds that escape any form of meaningful legal accountability. The following section provides further evidence which supports the conclusion that this is precisely the way the MHL offence is administered in some areas.

IV MHL ENFORCEMENT: QUALITATIVE DATA

A Methodology

The quantitative data presented in Part III of this article raised significant questions about the high volume of fines for riding without a helmet and the disproportionate policing of the offence in certain locations. In order to develop a richer and more grounded appreciation of the operational features and impacts of the MHL – to illuminate the practices and experiences that sit beneath these figures – we undertook a qualitative study of insights from lawyers, bicycle advocacy groups, government agencies and community groups.[98]

The eligibility criterion for participants was experience in a professional (or allied) role that involved exposure to the day-to-day operation of the MHL in NSW. We identified this cohort as well-suited to the objectives of this study

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97 'Bicycle Related Penalty Notices Issued by NSW Police from 1 Jan 2014 to 31 Dec 2018' (Dataset GIPR 19/159, Data.NSW, 17 May 2019) <https://data.nsw.gov.au/data/dataset/bicycle-related-penalty-notices-issued-by-nsw-police-between-01-jan-2014-and-31-dec-2018>.

98 Ethics approval for this interview-based qualitative study was granted by the University of Wollongong's Social Science Human Research Ethics Committee, HE 2018/453, 19 October 2018.

because they could give us (indirect) access to the lived experiences of being on the receiving end of MHL fines and enforcement – and not just based on a single individual, but based on multiple clients about whose circumstances our interviewees have knowledge. This also gave our informants a basis for wider reflections about MHL laws, police practices and the fine enforcement system.[99] In order to ensure that our research yielded insights about the state-wide operation of NSW MHLs, our sample includes interviewees with expertise and experience that spans NSW, including central and western Sydney, and a range of regional, rural and remote locations.[100]

Semi-structured interviews were conducted with 27 persons between August 2019 and March 2020, either in person or by phone.[101] The 27 interviewees were drawn from four types of organisations: legal (n = 18);[102] bike advocacy (n = 3);[103] government (n = 3); and community group (n = 3).

Most participants were recruited by email in the first instance by one or both of the authors. Some lawyers contacted us on becoming aware of the project mainly through presentations we made at meetings at Legal Aid NSW/ACT, Aboriginal Legal Service (NSW/ACT) ('ALS'), and the NSW Legal Assistance Forum ('NLAF'). After written consent was obtained, most interviews took place by phone with eight interviews conducted face-to-face (which were done by both authors aside from one). The duration of interviews ranged from 10 to 110 minutes. All interviews were audio-recorded to facilitate the production of a complete transcript.[104]

As explained above, the primary aim of the interviews was to reveal how MHLs operate in practice including their impact on those policed. We did not set

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99 Using lawyers and allied professionals as intermediaries also meant that it was unnecessary to expose disadvantaged individuals to the burden of being questioned about their experiences. Having said that, the findings of this initial NSW study suggest that there is a need for further national research that provides a platform for affected persons to voice their personal experiences on MHLs specifically, and the fines enforcement system more generally. Although we have not undertaken interviews with NSW Police for this study, we acknowledge that the experiences and insights of police officers are an important part of the enforcement story, and that it would be desirable if future qualitative research included interviews with police officers.

100 We acknowledge that one of the limitations of our approach is that it is skewed towards those who have had *negative* experiences of MHLs – in that it is these individuals who are more likely to seek out the services of lawyers or professionals in relation to adverse flow-on consequences (such as accumulated debt and/or additional criminal charges). It is plausible that a number of cyclists support MHLs and have no objection to their enforcement. Ultimately, our claim is not that the practices and experiences reported by our informants are representative of all cyclists in NSW (indeed, it is highly likely that they are not), but that they *do occur*, and this is sufficient reason to be concerned and to advocate for reform.

101 Of the 27 people interviewed: one interview included five persons; one interviewee did three different interviews as different case studies became known to the interviewee; another interviewee did two interviews as different case studies became known to the interviewee.

102 One interviewee coded as 'Lawyer' is a paralegal, Legal Aid, and one was a Field Officer, ALS. To maintain anonymity both have been classified as 'Lawyer'.

103 Which have national coverage.

104 All interviews were conducted on a confidential basis to facilitate full candour. For reporting purposes, each participant/interview was assigned an alphanumeric code (eg 'L1' = Lawyer Number 1; 'B2' = Bike Advocacy Group Number 2; 'G3' = Government Employee Number 3; 'C1' = Community Group Number 1). This system guarantees anonymity while providing some non-identifying context in terms of the type of organisation from which the interviewee's experience and expertise derive.

out to interview a representative sample of lawyers (and others), or to generate quantitative data. Rather, by asking a range of open-ended questions of persons involved in representing, supporting, advocating or advising persons who have received fines for MHLs, our objective was to produce original qualitative data on the operation of MHL laws to complement our law 'on the books' and quantitative data analyses. A central concern was to understand how the penalty notice offence was being used on the street including the context in which persons received fines or other action was taken by police, how many fines they received, how many fines remained unpaid and what if any other impact the laws have.

Interview data was subjected to thematic content analysis, following Creswell's data analysis spiral of data management; reading; classification and interpretation; and representation.[105] Data was manually coded. Coding and theme development were largely inductive, although the aims of the larger project and the quantitative study component were touchstones for analysis.

B Findings

The qualitative data strongly support the thesis advanced in Parts II and III of this article: the contemporary operation of MHLs has travelled a very long way from the road safety paradigm and education-based compliance strategies which characterised their original introduction. Interviewees told us that a punitive fine-based enforcement system was not only an ineffective compliance method, but one which produced serious unintended and ancillary harms. The most significant of these are: disturbing levels of over-policing; and the consequences of fine debt accumulation.

We support these findings by discussing the four main themes to emerge from the interviews:

1. MHLs were not perceived to be a fair, proportionate or effective road safety mechanism;
2. MHLs are employed by some police as a tool of aggressive over-policing in pursuit of ends unrelated to road safety and with significant escalation effects;
3. The selectively heavy enforcement of MHLs contributes to the serious problem of accumulated fine debt, with serious adverse effects for bicycle riders already experiencing socio-economic disadvantage; and
4. Reform of MHLs and the manner in which they are enforced is necessary in order that they be returned to their original road safety mission.

1 Not Fair, Disproportionate and Ineffective

Our informants were not a representative population sample, and so their opinions do not provide any basis for concluding as to how the wider community regard MHLs. It is nonetheless noteworthy that lawyers and others with a good understanding of the operation of MHLs did not regard them as an appropriate

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[105] John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (Sage Publications, 4th ed, 2018).

method of promoting road safety. The (mandatory) size of the on-the-spot fine attracted criticism, particularly when (as inevitably happens for a large number of people) enforcement costs are added. The total impost is over $400 (now $374 for a juvenile because of the reduced enforcement costs):

> Like, 401 dollars for a bike helmet, that's like your whole Centrelink for two weeks, you know?[106]
>
> … the fines are quite ridiculous now … Way too extreme.[107]
>
> [A client was fined] 401 dollars for not wearing a helmet, and I'm like, how is this 400 dollars? Where did they come up with that figure of 400 dollars?[108]

There was particular concern that, although the enforcement costs are reduced for children, the underlying fine (of $344 at the time of interview; $349 since 1 July 2020) is the same for juveniles as for adults:

> Yeah, it's obviously extremely high [the MHL fine]. Completely impractical for young people, who I believe most of the time, until they get their first fine, are not even aware that there's a mandatory rule to wear a helmet.[109]
>
> [A] kid is not going to be able to afford $344. They're simply not and there's no point to it. What's the point then of having the fine? If you're issuing say a 13-year-old $344, good luck getting that.[110]

Interviewees reported that the existence of the offence is not a deterrent to riding a bicycle without a helmet. They suggested that some people did not even know that helmet wearing was mandatory.[111] Even where there is awareness, there may be social or local cultural disincentives to helmet-wearing. An observation made by a number of interviewees is that their clients, especially young people, regarded helmet wearing as 'uncool':

> I wouldn't say it's very cool to wear a helmet. I myself am Aboriginal and growing up with a lot of cousins around, I don't know whether it was a cultural thing, but none of us ever wore helmets and I think it's the same today, I think it's kind of daggy and they don't really do it and they don't really see it as an important safety thing you know?[112]

The expense of buying a helmet can also contribute to non-compliance.[113]

Interviewees also pointed out that, as a method of deterrence, a fine lacks potency when levied against a person with no capacity to pay. This is especially so if the person has received multiple fines and had accrued a substantial fine debt.

> If you've got $10,000 outstanding why not get another fine, it kind of becomes insignificant, it doesn't really matter.[114]

This is especially so for young people:

> For the young people I see … getting a bicycle fine is just not a big deal.[115]

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106 C1 (n 1). At the time of interview, the MHL fine was $344 with enforcement costs of $65.

107 Interview with L3 (Julia Quilter, 23 August 2019) 8 ('L3').

108 C1 (n 1) 15.

109 Interview with L12 (Julia Quilter, 19 September 2019) 8 ('L12').

110 Interview with L15 (Julia Quilter, 1 November 2019) 11 ('L15').

111 L12 (n 109) 4.

112 Interview with L6 (Julia Quilter, 5 September 2019) 6 ('L6'); also L15 (n 110) 2, 7.

113 L15 (n 110) 7; L3 (n 107) 8.

114 Interview with G2 (Julia Quilter and Russell Hogg, 16 September 2019) 20 ('G2'). See also Interview with L17 (Julia Quilter and Russell Hogg, 25 November 2019) 20 ('L17').

115 L12 (n 109) p 8.

> … [T]he fines are not a deterrent at all for the young people that I see in the criminal justice system. These young people, they have other priorities, and other things going on in their lives; so they might be homeless or at risk of homelessness, have DV in their families, and not even know where food's going to come from the next day. So me talking to them about their fines, or them getting fined, is the last thing they're worried about, especially if it's something like bicycle or helmet-related fines …[116]

Interviewees did not think MHLs were being enforced for road safety reasons. Recalling that the 'safe passing' law is rarely enforced against motorists, some saw the MHL as part of a regulatory regime that was mainly concerned with supporting car use:

> I think they're performing a road safety narrative that suits people with an interest in mostly motor vehicle traffic and in targeting bicycles. They're sending a clear message that the vulnerable are not as important as those people who drive motor vehicles.[117]

A number of interviewees supported their assertion that MHLs were not about cyclist safety by drawing attention to the physical context in which the fine was issued – such as the country or remote location, the nature of the relevant streets or prevailing traffic conditions:

> I don't see how it could be [performing a road safety function], to be really blunt. … There's no way she was a danger to herself on a bicycle. The roads are very quiet, you see cars in advance. The chances of her falling off and hitting her head are low. [J]ust knowing the town and the remoteness and just the pure isolation and everything else, I was quite shocked to hear about clients getting fines for offences like this.[118]

> It's quite a flat town. … it's flat open roads. Even the footpaths are … super wide. … [I]t's not like Sydney where, you know, everyone is squished. I've never seen traffic, ever. And people are patient. It's not like you've got cars threatening you, and beeping at you. It's quite a laid back town.[119]

2 MHLs as a Potent Multipurpose Policing Tool

One of the most striking things revealed by our interviewees was that, far from being a benign road safety measure, MHLs are employed for aggressive over-policing purposes. The 'on-the-street' wielding of police authority – deriving both from express powers such as in statutes like the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW),[120] and police organisation policies like the NSW Police Force's Suspect Targeting Management Plan ('STMP')[121] – has long been the subject of controversy and critique.[122] Against this backdrop, it was

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116 Ibid 12.

117 Interview with B1 (Julia Quilter, 20 August 2019) 6–7 ('B1').

118 Interview with L10 (Julia Quilter, 20 September 2019) 4–5 ('L10').

119 Interview with L14.1 (Julia Quilter, 30 October 2019) 6.

120 Michael Grewcock and Vicki Sentas, 'Rethinking Strip Searches by NSW Police' (Report, Redfern Legal Centre, August 2019).

121 Vicki Sentas and Camilla Pandolfini, 'Policing Young People in NSW: A Study of the Suspect Targeting Management Plan' (Report, Youth Justice Coalition, 2017).

122 Police discretion has been the subject of a sustained body of scholarship since the 1960s and 70s. In his classic analysis of the issue Goldstein observed, '[p]olice decisions not to invoke the criminal process largely determine the outer limits of law enforcement. By such decisions, the police define the ambit of discretion throughout the process of other decision-makers': Joseph Goldstein, 'Police Discretion Not to

shocking to hear from our informants numerous stories which suggest that a transgression as minor as failing to wear a helmet while riding a bicycle can be the catalyst for intense and aggressive levels of policing.

The MHL offence arms police with a tool that makes it relatively easy to justify surveillance of, and interaction with, particular individuals. Our analysis of the interview data suggests that harmful effects can be categorised into two types of 'escalation'. *Enforcement* escalation occurs where the MHL becomes a 'gateway' (justification or pretext) for officers to exercise other police powers: stops; questioning; search; arrest; charging; confiscation of bicycles; and bail warnings. *Incident* escalation occurs when tension arises after a person is approached by a police officer in relation to MHL non-compliance, and the person engages in behaviour which may constitute additional (and more serious) offences – such as if the person attempts to flee, swears at the police officer ('offensive language'),[123] resists arrest or assaults the police officer.

(a) Enforcement Escalation

Although rarely recognised as such, the imposition of an on-the-spot fine for MHL non-compliance constitutes a 'direct interaction with the criminal justice system'.[124] Our interviewees told us that, not uncommonly, the interaction extends beyond the 'mere' issuance of a penalty notice.

Police officers do not have an 'at large' power to stop and question a person they encounter on the street.[125] Observed non-compliance with MHLs provides police with an opportunity to do so, specifically for individuals who are already 'known to the police':

> I think [MHLs are] a mechanism for them to approach young people and just engage them.[126]
>
> [T]he clients that I see, … the majority of them are already on the police radar.[127]
>
> [I]t seemed like an easy target to see him riding down the road without a bicycle helmet, well known to police on [a STMP] … [S]o it was a reason to stop him and he would end up with these fines.[128]

There is strong evidence in the literature that police interactions of these types have negative future offending implications – particularly for vulnerable

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Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice' (1960) 69(4) *Yale Law Journal* 543, 543 (citations omitted). Goldstein's observations were made with respect to the discretionary powers of police to arrest and charge individuals, which required police to take alleged offenders before a court and were therefore at least subject to a routine measure of judicial supervision. The observations are surely that much more pertinent to police powers to summarily sanction citizens without reference to a court (ie issue a penalty notice) – described by the NSW Sentencing Council in 2006 as a system of 'executive sentencing': NSW Sentencing Council (n 9) 102–3 [3.95]. See also Laurence Lustgarten, *The Governance of Police* (Sweet & Maxwell, 1986); R Hogg and B Hawker, 'The Politics of Police Independence' (1983) 8(4) *Legal Service Bulletin* 160.

123 *Summary Offences Act 1988* (NSW) s 4A.

124 L17 (n 114) 13.

125 The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides for only limited powers to stop persons and request identification: see pts 3–4.

126 Interview with L16 (Julia Quilter, 12 November 2019) 2 ('L16').

127 L12 (n 109) 2.

128 L6 (n 112) 3; Interview with L14.2 (Julia Quilter, 13 January 2020) 1–2 ('L14.2').

populations, including Aboriginal and young people.[129] These 'events' may also have other negative ramifications including for bail,[130] sentencing or other proceedings. Our interviewees told us that police records of these interactions (even over a minor MHL fine matter) may be tabled and relied on in later (unrelated) proceedings:

> It just starts building an evidence base, which may be completely irrelevant to what may happen later, but it's just there, it's this cloud of negative interactions.[131]
>
> One of the things that we see … is how much they get pulled up, because the prosecutor will print off … their contacts with police, just randomly, … from the COPS records, … it's very much they know everything.[132]

Where MHLs result in fine debt (as they often do) decision-makers may draw adverse inferences in later proceedings involving unrelated charges. It was thought that a record of non-payment of fines might incline a magistrate towards imposing a more serious punishment ('Well you've got all these fines, you obviously don't pay them, it's not an appropriate penalty, we'll give you something else, we'll give you a conviction on your record'),[133] or denying bail ('"[W]ell, he's a person that keeps offending. … He's a person who can't comply with orders" …[T]hat won't help the bail decision').[134]

Police may use the MHL offence as an opportunity to intimidate, particularly young people, and gather intelligence:

> [P]olice use it to gather intel. … They'll see a young kid riding a bike, they'll pull him up, ask him his name, details. And they'll intimidate the kid, and they'll ask him certain questions [such as:] 'Who was down at Woollies causing problems?' Because all the information they've got is 'kids on bikes'. So they'll pick other kids on bikes and the other kids are generally younger so they'll basically tell the police what they want to know.[135]
>
> [T]hey'll say, 'Well, I won't give you this fine, if you tell me what happened down at the … shopping centre last Friday.'[136]

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129 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).

130 Noting that bail conditions include to be of 'good behaviour' – we were told (Interview with L2 (Julia Quilter, 22 August 2019) ('L2'); L15 (n 110)) that the committing of any offence while on bail including a minor offence like the MHL offence, is a breach of this condition and can constitute the basis for police giving a bail warning: see *Bail Act 2013* (NSW) s 77(1)(b). In turn, such bail warnings may impact future bail decisions: see *Bail Act 2013* (NSW) ss 18(1)(f)(ii), (f1).

131 Interview with L18 (Julia Quilter and Russell Hogg, 25 November 2019) 38 ('L18').

132 C1 (n 1) 35.

133 L6 (n 112) 5.

134 L15 (n 110) 7.

135 L3 (n 107) 2; also Interview with L4 (Julia Quilter, 23 August 2019) 5 ('L4').

136 L18 (n 131) 22.

Interviewees told us that, in some areas,[137] police are moving straight to a fine, rather than using diversionary mechanisms such as warnings or cautions:[138]

> No, no [they don't give warnings or cautions], … it's straight away fines …[139]
>
> This fella [who has approximately $6,000 – $7,000 worth largely of bicycle fines] has never been cautioned. He's just had the fine written out.[140]
>
> They never do [issue a caution first] in my experience … Police just don't seem to consider [a caution] ... they think to consider a penalty notice as a first option …[141]

This approach is particularly problematic where used for young people:

> [T]hey just went straight to the fine. [The young person] did explain to the officer what he was doing and tried to explain his situation. He still ended up with … six bike fines … [A]n officer could use discretion in that circumstance, do something else, especially with a young person, but yeah, the fines were definitely the first resort rather than the last resort in my experience.[142]

A number of our interviewees believed that some police are using MHL breaches as a pretext for undertaking searches for which the police would otherwise lack lawful authority:[143]

> [I]nvariably, the kids would say that there was a search attached to … [receiving a MHL fine]. … [T]he riding without a helmet became, in their eyes, … a pretence to not only fine them, but perform some sort of search …[144]
>
> [I]f police officers want to do a search on a kid and he's riding a bike without a helmet, it's an easy fix to say, 'Oh, well that's the reason I stopped him, it's not that I wanted to search him, and then after I [fined] … him, he was nervous and wouldn't give me anything, didn't tell me where he was going, and then I decided to search him'.[145]

In some instances, the attention paid by police to bike riders appeared to be targeted:

> Often, it'll start off that they've been in trouble for not huge things. But then the police will target them, and it might be around not wearing a helmet … And then often the young person will say, 'you're always targeting me'. And then I think you

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137 Our interviews also reflect that in some areas police do not police the MHL, or do not police it against certain populations. For example, L11 stated:

> That's a thing that I've spoken about it a lot with young people and school staff, as well as youth workers in this area, because I do a lot of community legal education, and we do talk a lot about fines in that. During the discussions I've had over the last few months, anecdotally what's come out is that in this area, no one really wears helmets, and the police do not police it. So people are quite surprised to find that it is an offence, and that they can get a really massive fine for it.

Interview with L11 (Julia Quilter, 19 September 2019) 2 ('L11'). See also L1 (n 87).

138 We note that under the *Fines Act 1996* (NSW) s 19A, an authorised officer may issue a caution instead of issuing a penalty notice and, in doing so, the officer has to have regard to the Attorney-General's Guidelines: see Attorney-General (NSW), 'Caution Guidelines under the *Fines Act 1996*' (Guidelines, 2010). However, police officers are expressly excluded from this provision: see *Fines Act 1996* (NSW) s 19A(2).

139 Interview with C2 (Julia Quilter and Russell Hogg, 25 November 2019) 2 ('C2').

140 Interview with G1 (Julia Quilter, 5 September 2019) 3 ('G1').

141 L1 (n 87) 2.

142 L6 (n 112) 4; also L2 (n 130) 2.

143 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21; *R v Rondo* (2001) 126 A Crim R 562.

144 L2 (n 130) 2, 6; L14.2 (n 128) 2; Interview with B2 (Julia Quilter, 22 August 2019) 3–4 ('B2'); G1 (n 140) 2.

145 L2 (n 130) 3.

> get that cyclical sort of escalating effect where individuals then accumulate more COPS event records, and they accumulate more interactions with the police. And then their criminal record starts to grow and so they do come to the attention of police more and more. And so it just escalates from there.[146]
>
> Yes it [not having a helmet on] makes them likely to be stopped and accused of perhaps stealing the bike or having drugs. The idea is that a person without a helmet is more likely to be a criminal.[147]

Sometimes the aggressive enforcement of MHLs appears to be related to the person being on a Local Area Command's STMP list:

> [The STMP system] disproportionately affects a lot of our younger clients and our Aboriginal clients. … [One client] told me that … he was constantly stopped, he felt that police were just looking for something to bring him back into jail. … He was constantly stopped on his bicycle … [T]he interactions with police were probably daily …[148]

Extraordinarily (generally, and in light of the road safety origins of MHLs), some interviewees revealed that clients had told them that police had attempted to 'knock them off their bikes.'[149] In another instance, police were said to have pursued and 'rammed' a bike rider who had gone through a red light:

> [W]e felt it was an extraordinary response [by the police]. … It wasn't like he was taking off on a crime spree or something.[150]
>
> My dad, he got hit by [the police]. They knocked him off. They hit the back of his pushbike, he got grazes all over the side of his face, and all the side of his face was grazed, and then they turned around and gave him a fine for no helmet.[151]

Other forms of escalation resulting from a police stop based on MHL non-compliance relate to suspicion of the bike being stolen, and may include questioning about ownership, confiscation of the bike and charges of having goods in custody:[152]

> [T]hey often question him about the legitimacy of him having the bike. So they ask him if it's been stolen and where he got it from and stuff like that. He's then made to produce a receipt for his bike to prove that he purchased it.[153]
>
> [F]or quite a few of our clients [police] have confiscated their bikes and have said, 'We're suspicious about this. Where did you get it from? Who did you get it from? This looks too expensive for you.' We had one boy who was so called riding a girl's bike and that has to be suspicious because it's a girl's bike. He got charged with goods in custody and we had to take it all the way to hearing and eventually got the bike back. It belonged to his sister or a friend …[154]

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146 Interview with L7 (Julia Quilter and Russell Hogg, 16 September 2019) 1 ('L7'). See also L15 (n 110) and the 'Blake' case study below Part IV(B)(2)(a)(i).

147 B1 (n 117) 6. Another interviewee said: '[A]lmost every week there'd be at least two or three [clients] that had been fined for not wearing helmets on bicycles. … [O]ut of those there'd be at least … one out of the three where the stop led to searches, that led to custody charges or … possession of drug charges. It seemed to be … that people were targeted. It seemed to be sort of a look and a type of person targeted': see L4 (n 135) 1.

148 L6 (n 112) 3. See also L15 (n 110) and the 'Blake' case study below Part IV(B)(2)(a)(i).

149 C1 (n 1) 37.

150 Interview with B3 (Julia Quilter, 30 October 2019) 4 ('B3').

151 Interview with C3 (Julia Quilter and Russell Hogg, 25 November 2019) 37 ('C3').

152 *Crimes Act 1900* (NSW) s 527C.

153 L14.2 (n 128) 1-2.

154 L1 (n 87) 3-4; also L3 (n 107) 3; L14.1 (n 119) 3–4; L17 (n 114) 34.

Another form of enforcement escalation of which our informants gave examples involves police officers issuing multiple fines after stopping a person for not wearing a helmet. Multiplication takes different forms. Sometimes an individual is issued with a number of helmet fines within a short period of time. One interviewee reported the experience of a young person who received different bicycle fines[155] on three occasions in the one day:

> [H]e felt the police were targeting him … I did think it was a bit of abuse of police powers, because it was quite evident that they had seen him [at] … 11:30 in the morning, and then caught him again at 12:00, and then caught him again at 12:30. … [R]ather than allowing the young person to … ponder on the consequences of what they had just done, … they … caught him again and fined him, and caught him again and fined him, and it seemed a bit vexatious.[156]

In a different case:

> [A 16 year old, well-known to police, unemployed, with an intellectual disability, and thousands of dollars already owed in fines] … told me [about] a specific day where he was … fined … multiple times in the same day. So basically fined, then he's riding back home, fined again. … [I]t was … three times … in one day, by the same police officer as well.[157]

In another instance, a young Aboriginal man with a history of homelessness, received six bicycle fines on the one occasion (totalling approximately $1,500). As described by one of our interviewees, 'Ben'[158] had learning difficulties, was living with his 16 year old partner and 3 month old son. They were living off her Centrelink payments because he didn't have a birth certificate (required to register with Centrelink), being unable to afford one. Ben was riding his bike to buy food and formula for their son, having previously received fines for riding without a train ticket, unable to afford an Opal card. He 'thought he was doing the right thing, not jumping the train, he'd ride his bike down to the shop …'.[159] He was stopped by police and issued with six fines for

> riding without a helmet, riding in the dark without a rear red light, riding in the dark without a red reflector, one without a visible front white light, one without a working warning device which I'm assuming is a bell, and not stop for red bicycle crossing lights. So that was a huge slather of bicycle fines.[160]

For some individuals, such forms of overzealous enforcement practice don't just occur on a single 'bad' day. Interviewees reported instances where police have repeatedly fined a person for MHL non-compliance (and/or other bicycle offences) over a period of time. For example, 'Roger', a middle-aged Aboriginal man living in a regional area of NSW,[161] and reliant on Newstart, received 10 fines[162] in a

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155 Including riding without a helmet; no working bell; and no working light.

156 L12 (n 109) 4.

157 L2 (n 130) 2.

158 A pseudonym.

159 L6 (n 112) 2.

160 Ibid 1–2.

161 In order to ensure the anonymity of our participants (and their clients), we will not refer to the specific towns or geographic areas from which case studies and examples are drawn. We note, however, that our interview data suggests overzealous policing practices occur unevenly throughout the state.

162 1) Ride bicycle on footpath; 2) Not wear helmet; 3) Ride bicycle without visible red reflector; 4) Ride bicycle in dark without visible rear red light; 5) Ride bicycle without effective brake; 6) Ride bicycle in dark without visible front white light; 7) Drive while under the influence of alcohol/drugs; 8)

single instance. Eight fines were bicycle related and the other two (offensive language and recklessly destroy/damage property)[163] appeared to be examples of *incident* escalation (discussed below). On another occasion, Roger received four bicycle fines, including three 'not wear helmet' fines in the space of 13 minutes. Since 2009, Roger had received 18 fines for failing to wear a helmet, together with another 20 bike-related fines (often riding on the footpath). As at March 2020, Roger owed more than $10,000 in unpaid fines – the majority of which were the result of bike offences.[164]

Roger's experience is not unique. Other interviewees revealed similar stories, including of a person who had accrued 'just under $6,000 worth of pushbike fines, predominantly bicycle fines'[165] before turning 18. The person is now 20 and his fine debt has doubled to $13,000.[166] In another case, Trevor, a young Aboriginal man with an intellectual disability, living in regional NSW, received 77 fines between October 2015 (when he was 16 years old) and January 2019.[167] By September 2019 his accumulated debt with Revenue NSW had risen to $15,000.[168]

The crippling financial effects of enforcement on this scale are discussed below.

In two especially troubling instances reported during interviews,[169] both involving young people, enforcement escalation took an even more draconian form: the policing of MHLs escalated from the issuance of multiple penalty notices to the charging of multiple MHL offences by way of Court Attendance Notice ('CAN'). The following story is powerfully illustrative.

(i) Case Study: 'Blake'

'Blake', an Aboriginal boy from regional NSW, 'wasn't a very school person'. He was a carer for his mother 'who was struggling with drug dependency and also because she had a disability'.[170] Over the course of 18 months, Blake received 28 penalty notices for not wearing a bicycle helmet. In the space of a month, police then issued Blake with nine CANs for the MHL offence – including on one occasion charging him two times with the offence. On one of these occasions, Blake was arrested.

The interviewee who shared Blake's story with us, described why he thought the police had escalated to policing the offence in these ways:

> [P]olice already had their eye on him and coupled with the fact that, at the time, [Blake] was also involved in some other alleged offences. So I think the police [were] … pulling him over just to see if they'd got anything and everything on him and when they didn't find anything, that's when they issued him with a court

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Intentionally or recklessly destroy/damage property; 9) Not drive on the far left side of the road; 10) Offensive language.

163 *Crimes Act 1900* (NSW) s 195.

164 Interview with L9 (Julia Quilter, 5 March 2020) 3 ('L9 March 2020').

165 G1 (n 140) 2.

166 Ibid 3.

167 Interview with L9 (Julia Quilter, 19 September 2019) 1, 3 ('L9 September 2019').

168 Ibid 4.

169 See Interview with L13 (Julia Quilter, 20 September 2019) ('L13') and L15 (n 110).

170 Ibid 7.

> attendance notice for a bike helmet [offence]. … [The 9 CANs show] that police are actually specifically targeting him.[171]

Blake and his family were said to be well-known to police and Blake was on a STMP.[172] Blake was later arrested and charged with unrelated bike offences and was in custody at the time we interviewed his lawyer, who told us:

> [Blake] felt he was being targeted and he felt basically he was being marked as a criminal. So, in his eyes, … he started thinking, well, if police are constantly picking on me, I might as well just go and basically commit some offences for which I should actually be arrested … [T]hat really messed him up. Particularly because he's constantly coming to court. … So to hang around for hours as a kid waiting for court for something as ridiculous as not wearing a bike helmet, I think that caused [Blake] to basically have a very negative view of himself and from one of my previous conversations with him, he didn't mind being locked up because that meant that police would stop harassing him.[173]

Stories such as Blake's raise serious doubts about whether MHLs can be said to be operating as a fair and appropriate road safety measure.

(b) Incident Escalation

Some bike riders who are subjected to high levels of police attention may readily comply, to 'get it over with', even when, following a stop for riding without a helmet, the police intervention extends to a request that the person submits to a search:

> Oh yeah, every time I get pulled up, I have to empty my pockets, because I know what's coming. If I refuse, then they just hold me there for more stuff. I just comply with them as quick as possible, get away from them as quick as possible.[174]

Others respond typically to the experience of being on the receiving end of forms of enforcement escalation. How police enforce the MHL offence may often build antagonism towards police:

> That's the thing, like if they know it or not, all those little things with the fines, it just builds up this attitude of, like – this adversarial attitude of it's us versus them. It either concretes something that they've been brought up thinking, *or it just spills that over* ...[175]

Alongside *enforcement* escalation, our interview data reveal a second set of harmful effects of overzealous policing of MHLs, which we refer to as *incident* escalation:

> Look definitely there is escalation because often the person who's fined, because they don't believe they've done anything wrong reacts in an angry manner and it then escalates.[176]

We found evidence that such responses may result in a version of the notorious public order 'trifecta' – where a person resents being approached by police, a tense confrontation escalates, and the person finds themselves charged with and arrested

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171 Ibid 5, 8.
172 Ibid 5.
173 Ibid 9–10.
174 C2 (n 139) 3.
175 C1 (n 1) 14 (emphasis added).
176 B1 (n 117) 4–5.

for three offences (traditionally, offensive language, resist arrest, assault police).[177] Our interviewees told us that MHL non-compliance can be a catalyst for this type of escalation:

> It would have started off with this fine [for MHL offence], because you feel you are being targeted, and you know, if you can't manage your … anger, which is legitimate at the time, you then start resisting arrest, you know, and then they take you down so hard. Who knows what could happen, you know, from then on, but those fines are definitely like a gateway.[178]

Another interviewee told the story of a boy who was riding his bike at the local skate park, who '[s]ees the police coming, jumps off the bike and starts walking':

> Police still pulls him up, basically has a go at him because he's got a bike with no helmet. And he says, 'Yeah, okay'. They ask him his name and the kid knows his rights, he's quite an intelligent kid. He tells the police, 'I know my rights, I haven't done nothing wrong. I don't have to give me name.' Police said, 'Oh, you're obligated to give me your name'. He said, 'No I don't. I haven't committed anything criminal. If I'm a suspect for a criminal matter then you need to tell me what are you investigating me for'. And the police get upset, and in the end … the police got out, police went to grab the young bloke; they're going to question him. And as they grab him he's pulled his hand away, and that's a resist arrest. Police grabs him, chokes him to the point where he passes out, loses consciousness. Wakes up a few seconds later, … he doesn't know what's going on. He's confused and dazed. And the police basically … charge him for resisting arrest, assault police, that type of stuff. … And, it turns out … the kid's clean skinned, no history of any offences. … Quite a role model for the other Aboriginal kids, and he's treated like a criminal.[179]

(i) Case Study: 'AJ'

The interplay between enforcement and incident escalation is reflected in the experience of 'AJ' who lives in a regional town and is known to the 'local police station'.[180] Over an 18 month period AJ received 22 penalty notices for bicycle-related matters – including 15 fines for riding without a helmet.[181] Later, AJ was charged (via CAN) with multiple bike-related offences on six separate occasions

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177 See NSW Law Reform Commission, *Penalty Notices* (Report No 132, February 2012) 300; Robert Jochelson, 'Aborigines and Public Order Legislation in New South Wales' (Crime and Justice Bulletin No 34, NSW Bureau of Crime Statistics and Research, February 1997).

178 C1 (n 1) 37. Referring to the case of 'Roger' (above), one of our interviewees told us:

> [M]y feeling is that probably the interaction with the police officer has not gone smoothly, and so then there's been some bad language used, … and the police [officer] has decided to charge him with [offensive language], and then the malicious damage as well. I can say that the client is an Aboriginal man, and … I can fairly safely say that the client has felt like he's been targeted by police, and so that interaction could have escalated to the bad language and malicious damage from that interaction of the police not using his discretion just to give one fine and let it go, but to fine him for one thing after another, after another.

L9 March 2020 (n 164) 2.

179 L3 (n 107) 5.

180 L13 (n 169) 3.

181 The remaining seven were: 3 x ride bicycle in the dark without a visible front light; 2 x ride bicycle in the dark without a visible red light; and 2 x ride bicycle on footpath, 12 years or older. The last offences were committed prior to the amendment of this law in 2018 which raised the age to 16 years or older: see *Road Rules 2014* (NSW) rr 250–1 as amended by the *Road Amendment (Bicycles on Footpaths) Rule 2018* (NSW) cl 3.

and on two other occasions for offences that occurred, in a 'bicycle context'.[182] The six instances directly involving bicycle offences display both enforcement and incident escalation. On two separate occasions, AJ was chased by a police car while riding a bike. On three occasions AJ was arrested (and, in one instance, denied bail) for finable offences which could have been addressed by police mailing a penalty notice to a home address. On five occasions further charges were laid against AJ, including a combination of multiple bicycle offences and/or offensive language, resist arrest and assault police. For example, on one evening the police laid six charges against AJ:

> There was one CAN for not wearing a helmet, one CAN for riding furiously, one for riding a bicycle when it was dark with no white light, one for no visible red light and then there was a section 58 charge [assault police][183] and also an offensive language charge. … [T]he context was that at about 2am the police had been patrolling on bikes and they saw the young person with no helmet or lights and they required [the young person] to stop and [the young person] rode away and eventually they caught up with [the young person] and it seems like quite a significant scuffle took place and the young person was ultimately handcuffed and was swearing and arrested.[184]

On another occasion, AJ was charged with eight offences: riding a bicycle recklessly; riding without an approved helmet; riding a bicycle in the dark without a visible white light; riding a bicycle in the dark without a visible back red light; being on inclosed lands; two charges of assault police; and offensive conduct.[185]

In both of these instances of police overreaction (the latter pursuit involved a number of police officers),[186] the precipitating event was police sighting AJ committing the 'crime' of riding a bicycle without wearing a helmet, and attempting to avoid the police: '[AJ] was absolutely scared of police and this is how it all played out'.[187]

Remembering that one of the primary motivations for the introduction of MHLs was the safety of young people, AJ's story is a vivid illustration of just how far some MHL enforcement practices have departed from that original intent.

3 MHLs Contribute to Fine Debt Which Exacerbates Socio-economic Disadvantage

We noted that the burden imposed by aggressive enforcement of MHLs ('enforcement escalation', above) is not limited to the issuance of a single fine. For many people, *accumulated* fine debt is a major problem with adverse impacts that

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182 L13 (n 169) 3.
183 *Crimes Act 1900* (NSW) s 58.
184 L13 (n 169) 4.
185 Ibid 9–10.
186 Ibid.
187 Ibid 10.

continue for many years.[188] MHLs are not the only contributor to fine debt,[189] but the heavy enforcement of MHLs is a contributor to fine debt, as are enforcement costs which are imposed in the great majority of cases:

> A lot of the young people that are either referred to us or come in for assistance from Legal Aid for fines are bike-related fines. …Yeah, riding a bike without a helmet is common.[190]
>
> This young fella had just got out, well, four months after he got out from high school and already had just under $6,000 worth of pushbike fines, predominantly pushbike.[191]

As this last quote suggests, the quantum of an individual's fine debt can be enormous. Figures reported in interviews ranged from $5,000 to $50,000,[192] and young people with debts of $10,000 to $20,000.[193]

If we consider the socio-economic circumstances of many people fined, these amounts are extraordinary. Many interviewees advise clients who are children or on welfare payments.[194] Many affected individuals have intellectual and other disabilities, or are struggling with mental illness, and live in regional, rural or remote locations. A large number are Aboriginal persons. Many of these people would struggle to afford a single fine,[195] and certainly have no capacity to pay thousands of dollars in accumulated fines:

> Yeah, well, we fine people. … it seems to me like we fine the poorest people in our communities, as a general rule.[196]
>
> Most of the people … who are getting these fines, they … have … traumatic home lives … So the fines are completely disproportionate to the amount of money that they have and they become quite meaningless. If you earn maybe nothing, or $300 a week … on Newstart and you get … a $400 fine, and then you're like, I can never pay that, I can't pay it, I don't know how to deal with it.[197]

(a) The Hidden Nature of MHL Fine Debt

One of the problems with a system that allows fines to be issued on-the-spot, is that these police actions and their impacts are largely 'hidden'[198] with very little

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188 For example, L2 (n 130) 1–2; L10 (n 118) 1; L12 (n 109) 12; L16 (n 126) 3. Unlike the legislative provisions that ensure children's criminal convictions are 'spent' after 3 years (see *Criminal Records Act 1991* (NSW) ss 8, 10) and that convictions or other diversionary techniques employed under the *Young Offenders Act 1997* (NSW) (eg a youth justice conference) cannot be relied on in future criminal proceedings: *Children (Criminal Proceedings) Act 1987* (NSW) s 15. There are no provisions in the *Fines Act 1996* (NSW) or otherwise to 'expunge' juvenile fines which continue on into adulthood.

189 We heard from our interviewees that other significant fines include for riding without a ticket, parking fines, and victims' restitution fines. While no panacea to the upstream imposition of fines, as indicated in above n 12, the Commissioner now has power to reduce the fines of those on Government benefits by up to 50%.

190 L9 September 2019 (n 167) 2.

191 G1 (n 140) 2; also L2 (n 130) 1–2.

192 L9 September 2019 (n 167) 1; Interview with L14 (Julia Quilter, 30 October 2019) 3 ('L14'); L16 (n 126) 4; G1 (n 140) 1.

193 L12 (n 109) 3; C1 (n 1) 10.

194 Including Centrelink, Newstart or disability support pensions.

195 L14 (n 192) 6; L15 (n 110) 11; L12 (n 109) 8.

196 C1 (n 1) 15.

197 Interview with L8 (Julia Quilter, 18 September 2019) 2 ('L8').

198 See Quilter and Hogg (n 82).

oversight.[199] Of course, a person can elect to have the matter dealt with in the Local Court,[200] but this is not a realistic option for most people:

> I know that it's good you can take it to court and contest it, but … [i]t's so labour intensive to even get to that point, you know? It's like, 'fuck it, I'll just cop it [the fine], and get it done,' you know?[201]
>
> It is often people with the [financial] means … to think about challenging it. Unless you don't pay the fine and then at some point a lawyer gets it. But maybe by then it's too late. And so it often is not really scrutinised. Whereas if you're charged with something that comes before a court, you can have a lawyer look at it.[202]

Legal Aid is unavailable for minor matters like challenging a MHL fine, and so a person must pay for a lawyer or appear unrepresented. We heard from other interviewees that they discouraged clients from taking MHLs matters to court because bicycle-related offences (as with most statutory offences) are usually 'pretty black and white'.[203] Electing to go to court carries other dangers including that magistrates have the power to impose significantly higher penalties to the fineable amount.[204] Even a 'successful' court election can prove expensive. A 'good' outcome may be that the magistrate imposes a lesser fine to the penalty notice(s) amount(s).[205] However, if matters are proven, the defendant will also have to pay a mandatory victims support levy ($83) and court costs levy on each matter ($85).[206]

These issues are starkly demonstrated by the experience of 'Trevor' (introduced above), the recipient of 77 bike-related fines with accumulated debt of

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199 Under the *Fines Act 1996* (NSW) s 24A(3)(b) specifies that an internal review application can be made at any time prior to the due date specified in a penalty reminder notice. There are also mandatory grounds for withdrawing a penalty notice (see section 24E) including under section 24E(2)(d), if 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. We did not find any evidence from our interviewees that their clients sought such internal reviews. NSW Police have adopted the 'Internal Review Guidelines' issued by the Department of Attorney General and Justice under s 120 of the *Fines Act 1996* (NSW): Attorney-General (NSW), 'Internal Review Guidelines under the *Fines Act 1996*' (Guidelines, 2010); and the 'SDRO Review Guidelines' issued by the State Debt Recovery Office in conducting its reviews: State Debt Recovery Office, 'SDRO Review Guidelines' (Guidelines, September 2010). See also NSW Police Force, 'Internal Review Guidelines for Penalty Notices under the Fines Act 1996' (Guidelines, March 2014) ('NSW Police Guidelines'). The NSW Police Guidelines state, at 8:

> The requirement to withdraw the penalty notice on the basis of a person's intellectual disability, a mental illness, a cognitive impairment or is homeless in (d) above is based on a nexus between the person's relevant condition and their ability to understand or control their conduct. The reviewing officer is not expected to have the knowledge or expertise to establish this medical condition. The reviewing officer should require the person seeking the review to establish this nexus by providing sufficient additional information reported on an official letter head from a medical practitioner, supporting agency or government department as outlined on page 11 of the SDRO guidelines.

200 *Fines Act 1996* (NSW) s 23A(1).

201 C1 (n 1) 17; B2 (n 144) 3–4.

202 L7 (n 146) 3–4. See also New South Wales Law Reform Commission (n 8).

203 L8 (n 197) 4.

204 Under the *Road Rules 2014* (NSW) r 256 provides for a maximum penalty of 20 penalty units or $2,200.

205 L8 (n 197) 4; B1 (n 117); B2 (n 144); B3 (n 150) 5.

206 See *Victims Rights and Support Act 2013* (NSW) s 106 ($83 for summary offences); *Criminal Procedure Act 1986* (NSW) s 211A (currently $85 (as at 1 July 2019) for summary proceedings); *Criminal Procedure Regulation 2017* (NSW) reg 10.

$15,000. On advice, he elected to take six bike fines issued on the one occasion to the Local Court. The Magistrate reduced the penalties to two $100 fines and dealt with the others by way of conviction but with no penalty imposed.[207] However, each of the six matters proven incurred court costs of $166[208] with the result that Trevor ended up owing $1,196. As the court fine was unpaid, enforcement costs ($65) were added, producing a total debt of $1,261. In the words of the interviewee: 'I don't see that justice occurred in this particular circumstance. … I think it just defeats the purpose of taking it to court'.[209]

At the point that people come in contact with services like Legal Aid or ALS (usually, for other matters), if they reveal that they have a fine debt, the time for review or court election is well past. By then, enforcement action is on foot, and the focus of legal advice and assistance is dealing with the accrued debt, rather than examining the merits of the underlying penalty notices.[210]

For all of these reasons, the 'upstream' imposition of on-the-spot fines for MHL non-compliance remains largely hidden from scrutiny.

(b) Effects of Accumulated Debt

For many recipients of multiple MHL (and other) fines, the effects of accumulated debt are serious: driver's licenses are cancelled or young people are disqualified from obtaining one. Without a licence, work is harder to obtain, which exacerbates the challenge of paying off debt.[211] If the person lives in an area with limited public transport, the effect of licence cancellation is even more pronounced.[212] As one interviewee put it, the dishing out of fines 'really does set them up for failure'.[213] If a person has little or no capacity to pay, fine debt can feel like a permanent feature of their lives.[214] For young people, unlike a juvenile criminal record, fine debts (and their flow-on effects, like obtaining a licence) continue from childhood to adulthood.[215]

Accumulated debt creates other stresses and pressures. One interviewee said of a client: '[p]robably more stress than anything else, in the sense that it was kind of adding to her concerns around being able to afford everything and by everything, I mean food, groceries, uniforms for the kids, basic living expenses'.[216]

Another told us: 'There's a real hopelessness about these debts that people have'.[217]

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207 Under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.

208 While not specified by the interviewee it would appear that the figures of $166 comprises the mandatory victims support levy and the mandatory court costs levy referred to in above n 206: *Victims Rights and Support Act 2013* (NSW) s 106; *Criminal Procedure Act 1986* (NSW) s 211A.

209 L9 September 2019 (n 167) 5–6.

210 L10 (n 118) 2; L11 (n 137) 1.

211 L16 (n 126) 4; C2 (n 139) 6. See above n 82.

212 L9 September 2019 (n 167) 1.

213 G1 (n 140) 8.

214 Ibid 4.

215 L3 (n 107) 4. See n 186.

216 L10 (n 118) 4.

217 L8 (n 197) 4. See also L16 (n 126) 4.

One of the few positives we heard during interviews was that the availability of the WDO system to ameliorate fines debt,[218] can have significant positive impacts on the lives of individuals,[219] including by connecting them with services that they really need.[220] However, there is a certain irony in the fact that it is only through being punished (ie fined) way beyond the point of capacity to pay that a person gets access to supportive or 'therapeutic' interventions.

A different perspective on the WDO system is that it can involve a form of servitude akin to a community service order – a punishment traditionally considered more serious than a fine. One interviewee told us:

> I don't think it's any answer to the unfairness of the amounts of the fines and the way that young people are getting fined … to just say, 'Oh well, they can do a WDO. They're not going to have to pay it anyway'. Because what they're essentially doing, is they're doing community service work … [Y]es, it's voluntary, but they're sort of doing this activity in their own time to satisfy a debt which is way out of proportion to the criminality of their conduct.[221]

Another negative of WDOs is that the obligation imposed on a person may last a long time. We were told of one young person who was on a WDO for five years (having commenced at the age of 16) to pay off a $15,000 debt.[222]

Also, not everyone with a fine debt is suitable for a WDO for reasons that include: unavailability of sponsors;[223] the debt is very large; or the person's life circumstances may be such that fulfilling the obligation of a WDO is impossible.[224] In such circumstances, another possible option is to seek a 'write-off' of the debt, based on hardship,[225] but not everyone will qualify:

> A WDO is a huge commitment [so] if you don't have … proof of severe hardship, Revenue [NSW] can find it much more difficult now to write off those fines. So we have this … gap where people just go 'Oh well, I can't do anything about my fines, I'll just leave them' and then they get this huge fine debt when they can't get a licence and things like that and the spiral continues.[226]

While the WDO system has positive features and the willingness of Revenue NSW to write off some debts is useful, these 'solutions' are a long way

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218 *Fines Act 1996* (NSW) pt 4, div 8, sub-div 1.

219 See also the positive reviews of the WDO system: NSW Attorney General and Justice, *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (Report, May 2011); INCA Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, May 2015).

220 For example: L8 (n 197) 1; Interview with L9 (Julia Quilter, 3 December 2019) ('L9 December 2019'); L12 (n 109) 5.

221 L1 (n 87) 5.

222 C1 (n 1) 11. Another wider negative effect of WDOs reported by one interviewee is that persons using services (such as mental health counselling) in fulfilment of WDO obligations may be occupying scarce resources in a particular location beyond their need in order to fulfil the terms of a WDO, with adverse effects for the delivery of services to other members of that community: see L9 September 2019 (n 167) 7–8.

223 One interviewee noted in relation to a remote area where the client lived, there was only one WDO sponsor and as the interviewee said the client would have to travel an hour and a half to get there (and back) making it impractical particularly given the client had child care responsibilities: see L10 (n 118) 4.

224 Ibid.

225 Eg, L6 (n 112) 3. See *Fines Act 1996* (NSW) pt 4 div 8 sub-div 3.

226 L6 (n 112) 4–5. The Commissioner of Fines now also has power to reduce the debt by 50% for those on Government benefits as discussed in above n 12.

downstream from the source of the problem: the overzealous policing of MHLs (and other minor 'offences') and the issuance of (often multiple) hefty fines to people who have no capacity to pay. As one interviewee put it, an early intervention model would be preferable:

> [O]ne of the biggest limitations of the … [WDO and write-off system] is that it's a reactive program, … often … accessed quite far downstream; …what we're saying is that the fines system isn't right for these people so they need an alternative way to resolve their fines … We would like to either see it [accessible] much earlier or some other type of system that would divert those people from the fine system immediately.[227]

In short, downstream debt amelioration does nothing to alter the seriously problematic 'upstream' enforcement practices documented in this article.

4 Reform of MHLs and Enforcement

Our interviewees suggested a range of reforms to MHLs and the manner in which they are policed, to return them to their original road safety mission. We have organised interviewee responses on this theme into five sub-themes: decriminalisation; diversion; fine proportionality; creative solutions; and broader reform.

(a) Decriminalisation

A number of interviewees advocated for full decriminalisation of MHLs although for different reasons. Some were actively opposed to MHLs ('conscientious objectors') and believed that better road design (including separated bike paths) was preferable '[s]o the vulnerable road user, the pedestrian or the cyclist is more highly valued as a road user'.[228] Others favoured decriminalisation because they believe the current offence of riding without a helmet is not changing behaviours and is having negative impacts, particularly on young people.

> Maybe decriminalisation could be a good thing … and have other measures like education in schools. … I don't think criminalising this did anything to their behaviour … Police can still talk to a young person without issuing the penalty notice and perhaps that could be enough.[229]

Others suggested the MHL law should be 'relaxed', and follow the NT approach which only mandates helmets for persons under 18 years.[230]

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227 G2 (n 114) 6.

228 B1 (n 117) 8.

229 L13 (n 169) 12. Another said: '[T]he criminal justice system needs to basically take a less stringent view on bike helmets because kids will be kids. … Make it an optional choice. … Maybe it will be good if kids could all have helmets, maybe. So maybe some education there might help them. … So yeah probably I would decriminalise not wearing a bike helmet'.

L15 (n 110) 10.

230 B3 (n 150) 3. Others advocated for 'depenalisation' so that the offence could not be a chargeable offence (L13 (n 169) 12), although, of course, this would not address the overzealous issuance of on-the-spot fines (and the adverse consequences) documented in this article. 'Depenalisation' encompasses a range of measures including the downward classification of offences from indictable to indictable triable summarily, but also from summary to on-the-spot fine: see generally Luke McNamara et al, 'Theorising

(b) Better Use of Diversion

Many of our interviewees, concerned with the harmful effects of policing practices, called for more use of diversion by police. Put simply, issuing fewer fines in the first place would reduce the need to fix the 'downstream' consequences of 'over-policing and over-surveillance'.[231] Specifically, interviewees called for a stop to the issuing of multiple fines,[232] and for the introduction of mandatory police warnings, especially for children:[233] 'I'd like to see warnings, a couple of warnings before people get fined … [so] that first jump to a financial penalty isn't there'.[234]

It was suggested that the giving of a warning could be used as an opportunity to explain the rationale for MHLs with a view to encouraging future compliance.[235]

Some interviewees pointed to the general need for police to better use their discretion to *refrain* from issuing fines, particularly when policing vulnerable populations, including Aboriginal and young people, and those experiencing mental illness.[236] Change of this sort is not simply the responsibility of individual officers:

> I think the police have a huge role to play in advocating for change with the way that fines are dished out and I think that even new recruits in police need to get more culturally appropriate training, you know, working with young people, working with mental health, working with Aboriginal people … I don't know if the police have a policy on how to exercise discretion and when would be appropriate [to issue a fine] … [A] lot of clients are saying it's the same police who are dishing out these fines, … not giving warnings and things like that, and asserting this power, and it seems like it could be better regulated from the police even before we get … [statutory] fines reform.[237]

When asked how police could do things differently, some interviewees had simple suggestions: 'don't be arseholes';[238] be 'a bit … kinder'.[239]

(c) Proportionate Fines

Many interviewees were strongly of the view that the MHL fine should be reduced to make it more proportionate to the 'offending' behaviour: 'the fine

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Criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91.

231 L17 (n 114) 13.

232 L9 September 2019 (n 167) 10.

233 Under the *Fines Act 1996* (NSW) s 19A an issuing authority may issue a caution rather than a fine. This provision, however, does not apply to police as discussed at above n 138. Under section 19A(3) the Attorney-General has issued Guidelines and an issuing officer must have regard to these in deciding whether to give a caution rather than issuing a fine. Brown, Cunneen and Russell (n 6) 259–60 have queried whether infringement notices should be given to children at all; and that if they are the age should be restricted to at least 16; and that the penalty amount for children should be set at 25% the rate for adults, as recommended by the New South Wales Law Reform Commission in their Report: see above n 8.

234 L4 (n 135) 5; also L2 (n 130) 6; L15 (n 110) 5.

235 L12 (n 109) 9.

236 L4 (n 135) 6; L6 (n 112) 8.

237 L6 (n 112) 8.

238 C2 (n 139) 8.

239 C3 (n 151) 30.

should not be as high. Why does it have to be so high? Where it's higher than a good quality helmet'.[240]

Fine reduction was considered especially important for young people and vulnerable people, including those on low incomes:

> [The fine should be] … drastically reduce[d], because often these kids don't have an income and then it either falls on their parents who again often are getting Centrelink benefits or the kids sort of go through life with this debt hanging over their head before they even enter the workforce.[241]

> I just don't think it's appropriate that children or young people should have to pay the same fines as an adult … it just seems a bit ridiculous. … [Y]ou're just pulling them 200 metres behind the start line and then screaming at them about why they're running last, you know? They're being set up to fail with this fine system.[242]

(d) Creative Solutions

A number of interviewees expressed the view that road safety and helmet wearing are not really criminal law problems and demanded creative solutions outside the criminal law. Improved education campaigns were identified as preferable to fines in producing behavioural change. Victoria's 'Light Up' and 'Respect the Red' (light) campaigns were cited with approval:

> [W]e used to work closely with the police running campaigns and particularly the Light one which was a classic example where we'd work with the police, we'd be on the street and if someone didn't have lights on, pull them over and we'd have a word with them, we'd have a talk to them, we'd educate them, we'd give them some lights and off they go. This was about trying to change the behaviour … rather than just pulling them over and saying, 'Here's a fine' …[243]

Bringing schools into the education campaign was also suggested.[244]

Another suggestion was that non-complying riders, especially children, should be given helmets rather than fines: 'if it's a public health and safety thing … why not just give the kids helmets? Why don't the police just drive around with helmets, and just give them to people when they pull them up?'[245]

Helmet 'give aways' are not new – but they remain a good idea. One interviewee told us of a 'police officer in a regional community [who] after seeing all the kids ride home from school with no bike helmets on, went out and bought a whole bunch of bike helmets and handed them out'.[246] This was seen as a much more constructive form of policing that was more likely to increase helmet wearing than punitive fines enforcement. Another spoke positively about a NSW Roads

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240 L4 (n 135) 5. Another said that the MHL fine is 'completely disproportionate for somebody who's on Centrelink … In an ideal world fines would be proportionate to what you earn and if you were on Centrelink you could suspend them, for example, if you're on Newstart and looking for work they just don't apply': L6 (n 112) 7.

241 L2 (n 130) 6.

242 L6 (n 112) 7. Another said: 'I would definitely have a smaller fine for a young person than a person over 18, a hundred percent. It's 300 and something dollars, isn't it? … What kind of a kid has that kind of money lying around?': L14 (n 192) 11.

243 B3 (n 150) 9.

244 G1 (n 140) 7.

245 C1 (n 1) 14.

246 L6 (n 112) 6–7.

and Maritime Services program that specifically catered for the Aboriginal community.[247]

Such initiatives[248] appear to more closely align with the history of the introduction of MHLs described in Part II.

(e) Other Reform Recommendations

Interviewees made a number of broader suggestions regarding the fines system. Three warrant particular mention. First, some suggested that juvenile fines debt should be expunged upon adulthood, akin to how juvenile criminal records are treated:

> [T]he reason that you have a juvenile record is that the Court accepts that you are a child and your brain isn't developed and you haven't formed that decision making part of your brain and all these other things that go along with being a young person and being a kid, … but when you have a bike fine from when you're 14 you can have that until when you're 46, it seems insane.[249]

Secondly, it was suggested there be an alternative system for seeking a review of a fine – one which didn't require a person to take the 'high-risk' option of electing to take a penalty notice to court.[250]

Finally, it was proposed that police should be guided by an express policy that identifies the circumstances in which it is appropriate to issue a fine – and those in which it is not.[251] Interestingly, police in the UK have recently developed an approach to enforcing COVID-19 powers based on the idea of procedural justice. The 'Four E's approach', as it is known, seeks to expressly guide police use of their novel enforcement powers by requiring them to *engage* with the public, *explain* social distancing regulations and shared responsibilities under them, *encourage* compliance and only have recourse to *enforcement* as a last resort. The point is not to criminalise people, but to ensure that they follow lifesaving

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247 L9 December 2019 (n 220) 2–3:

> It was a really fantastic NAIDOC Day event. The RMS [Roads and Maritime Services] were actually there with a stall at the event, and they were giving out bike helmets for free to attendees, and the bike helmets had a really beautiful Aboriginal design on them, obviously aimed at making them more enticing to young people to wear when they're riding their bikes. … [T]hat was a really fantastic way … to encourage people once again to wear helmets, and to avoid getting fined for riding a bike without a helmet.

248 We were told that NSW Roads and Maritime Services is trialling three such creative programs: 'Helmet Instead of a Fine'; 'Bike Safety'; and 'Helmet Exchange': L9 December 2019 (n 220) 2–3. The 'Helmet Instead of a Fine' involves police issuing a card to a person riding without a helmet which indicates that they must attend the police station within 21 days. If they do not, they will be issued with the normal penalty notice. Once they come to the police station, they talk with a general duties officer and they must register for one of the Bike Safety Programs in lieu of getting a ticket; they are also given a new helmet. See also Nigel Gladstone, 'Cycling Without a Helmet in These Suburbs the "Quickest Route to Police Search"', *The Sydney Morning Herald* (online, 25 May 2020) <https://www.smh.com.au/national/nsw/cycling-without-a-helmet-in-these-suburbs-the-quickest-route-to-police-search-20200514-p54svz.html>.

249 L6 (n 112) 7. See above n 188.

250 L9 September 2019 (n 167) 10.

251 L6 (n 112) 8.

guidance.[252] Such an approach seems wholly appropriate for the policing of other public safety regulations, like the MHL offence. It would restore the offence to the back-up role it was intended to have at the time of its introduction.

V CONCLUSION

Tracking the emergence of the MHL offence in the 1980s and considering its administration in the present day, we have seen a long-term movement away from the original multi-faceted policy framework in which the offence was introduced to support an approach centred on education and public safety. Enforcement, at least in some localities, appears to have become an end in itself or, worse, an instrument to serve police ends unrelated to public safety. To be fair, we have not interviewed police for this research, although we hope to do so in the future; and, as the statistical data suggests, police discretion is likely to be exercised in widely varying ways across the state: perhaps in some places (it would appear) to overlook violations altogether, perhaps to caution and educate offenders, and perhaps (as in instances referred to above) to adopt proactive problem-solving approaches like supplying helmets to young people. We have concentrated on what we see as the highly problematic use (or misuse) of the MHL offence and some of its baleful consequences, especially for the vulnerable, including the poor, young and Aboriginal persons. It is essential that capricious and unjust enforcement practices and their consequences be exposed and combated *and* that greater attention is given to positive, alternative approaches to policing in the service of public safety.

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252 See National Police Chiefs' Council, 'Engage, Explain, Encourage, Enforce: Applying the Four "E"s' (Guidance, 2020) <http://web.archive.org/web/20210112021754/https://www.college.police.uk/What-we-do/COVID-19/Documents/Engage-Explain-Encourage-Enforce-guidance.pdf>.