Policing mandatory bicycle helmet laws in NSW: Fair cop or unjust gouge?

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Abstract
Australia was the first country to introduce laws mandating the wearing of helmets by cyclists with the aim of enhancing road safety for cyclists. Examining the law and its administration in NSW, we point to some serious problems and anomalies with the law. We argue safety concerns have been relegated and the fine for the offence has lost any sense of proportionality with offending, parity with penalties imposed in other states and with penalties for other road safety offences in NSW. We also discuss concern over potential police misuse of the law and of its collateral consequences for the vulnerable.

Keywords
Penalty notices, bicycle fines, mandatory helmet laws

Australia was the first country in the world to introduce laws mandating the wearing of helmets by cyclists.1 Victoria legislated in 19902 and the other states followed, New South Wales (NSW) in 1991.3 They were among a raft of laws (including the introduction in 1971 of compulsory seat belt laws for motorists and mandatory helmet laws for motor cyclists, and random breath testing from 1976 in Victoria) that aimed to enhance road safety and reduce road related injury and death. In this article we examine the law and its administration in NSW and point to what we see as some serious problems and anomalies. We argue that the safety concerns that originally animated the mandatory helmet law has, at least in NSW, receded behind what can only be described as a brazen exercise in revenue-gouging of its citizen-cyclists. The penalty is now ludicrously excessive. Along with safety, a number of other principles and concerns have been relegated, including any sense of proportionality between penalty and offence, parity with penalties imposed in other states for the same offence and with penalties imposed for other road safety offences in NSW, and recognition of the potential for police

1In this article, the word ‘cyclists’ is used to refer to riders of bicycles with the phrase ‘motor cyclists’ used where relevant to differentiate them from bicyclists.
2See Road Safety (Bicycle Helmets) Regulations 1990, reg 2 which introduced the offence in Road Safety (Traffic) Regulations 1988 (Vic) reg 1305.
3Originally, the offence was found in the General Traffic Regulations 1916 (NSW) reg 3A ‘Wearing of protective helmets’.

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misuses of the law and of its collateral consequences for the vulnerable.

The helmet law in NSW

As with the other road safety measures of the time, the introduction of mandatory helmet laws in the early ‘90s was accompanied by public campaigns, including in the case of the helmet laws school-based programmes and rebate schemes, that sought to persuade and support citizens and especially the young to adopt the practice of wearing helmets in order to reduce the risk of serious head injury. Helmets, it is almost too obvious to state, are not aimed at protecting other users of roads or public space and cannot protect a cyclist against other injuries than those involving the head in the event of an accident. In the worst collisions, with motor vehicles for example, the protection afforded by a helmet is limited indeed. Their utility as a safety measure should not therefore be exaggerated.

Riding a bicycle without wearing an approved helmet securely fitted and fastened is one of a large number of bike offences under NSW Road Rules for which a penalty notice may be issued. A penalty notice is a fixed on-the-spot fine which a person is required to pay within 28 days unless they choose to challenge it in court. The helmet offence is by far the most common bicycle offence for which penalty notices are issued by police, although on occasions it is accompanied by additional penalty notices for other bicycle offences. Very few are taken to court. Until March 2016 the offence of riding a bicycle without wearing an approved helmet was categorised as a Level 1 Penalty Notice (PN) offence under NSW law which meant it carried a fine of $71. An amendment in March 2016 recategorised the offence as a Level 5 PN offence, carrying a fixed penalty of $319, an overnight increase of 349 per cent. The change was justified as part of a package of bike safety measures which included a new penalty notice offence applying to motorists failing to pass a cyclist at a safe distance. The new offence appears to have been something of a quid pro quo for the massive overnight hike in the penalty for the helmet offence. The two offences were treated as being of equal gravity, with the new safe passing offence also carrying a fine of $319.

Penalty notice offences are indexed in NSW, so the penalty for these offences as of July 2019 was $344. As Table 1 indicates, the penalty for not wearing a helmet in NSW is wildy out of kilter with the penalty for the equivalent offence in other Australian jurisdictions, which range from a low of $25 in the Northern Territory to a high of $207 in Victoria (or 7 per cent to 60 per cent of the penalty in NSW).

There is no evidence that a penalty of the order of the NSW fine is necessary to ensure general compliance with the law, that compliance is higher in NSW than elsewhere, or that cyclists in the 'premier state' are with the law, that compliance is higher in NSW than elsewhere, or that cyclists in the 'premier state' are safer than their counterparts in other states and territories as a consequence of the higher fine.

It is also revealing to compare the penalty for the helmet offence with other road safety offences in NSW that are subject to penalty notices: see Table 2.

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Table 1. On-the-spot fines for failing to wear a bicycle helmet, Australian states and territories (at July 2019)

| Territory                  | Fine  |
|----------------------------|-------|
| Northern Territory         | $25   |
| Western Australia          | $50   |
| South Australia            | $109  |
| Tasmania                   | $122  |
| Queensland                 | $133  |
| Australian Capital Territory | $151  |
| Victoria                   | $207  |
| New South Wales            | $344  |

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4For an analysis of how such laws adversely affect those living with a disability, see 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.

5On this history, see Senate Economics References Committee, Interim report: bicycle helmet laws (term of reference d) (Commonwealth of Australia, 2016); see also Meredith-Ann Williams, Research Note 17/94, Evaluation of the NSW Introduction of Compulsory Bicycle Helmet Legislation, Road Safety Bureau, Roads and Traffic Authority, May 1995. See also www.rms.nsw.gov.au/documents/roads/using-roads/bicycles-law-compliance/helmet-use-nsw-1994.pdf.

6There is a significant body of literature on this topic but see, eg, Luke Turner, ‘Australia’s Helmet Law Disaster’ (2012) 64(1) Institute of Public Affairs Review 28; Chris Rissel, ‘Politics Trumps Hard-Headed Reason on Bicycle Helmets’, The Conversation (online, 4 December 2013) https://theconversation.com/politics-trumps-hard-headed-reason-on-bicycle-helmets-20973. See also Ross Petty, ‘The Impact of the Sport of Bicycle Riding on Safety Law’ (1998) 35 American Business Law Journal 185; Dani Cooper, ‘Helmets Reduce Head Injury Severity’, ABC Science (online, 6 May 2013) http://www.abc.net.au/science/articles/2013/05/06/3751304.htm.

7The offence is contained in Road Rules 2014 (NSW) rule 256 and the combined operation of the Road Transport Act 2013 (NSW) s 195(1)(a) and Road Transport Act 2013 (NSW) ss 4 and 6(1)(a) allow a police officer/other authorised officer to serve a penalty notice on a person for alleged contravention of the Road Rules 2014 (NSW) including rule 256.

8Road Transport (General) Regulation 2013 (NSW) r 122(1)(a) and sch 5.

9Road Transport Legislation Amendment (Bicycle Riders) Regulation 2016 (NSW).
Although the NSW Roads and Maritime Services (RMS) website announces on its ‘Speeding’ webpage that ‘Speeding is the most common contributing factor to road fatalities in NSW’ (that it is speeding drivers therefore, not unhelmeted cyclists, who present a danger to others), a driver has to be exceeding the speed limit by more than 20km/hr before the fine exceeds that of failing to wear a bicycle helmet. Exceeding the speed limit by 10km/hr will incur a fine barely one third that of the bicycle helmet offence. The penalty for offences like negligent driving and failure to stop at a red light is not much more than $100 above the helmet offence. Although the risks and incidence of serious injury associated with motorised forms of transport are unquestionably greater than those associated with bicycles, the failure to wear a seatbelt in a motor vehicle and the failure to wear a helmet on a motor cycle carry the same fixed penalty as riding a bicycle without a helmet. The driver of a motor vehicle who chooses to drive in a dedicated bicycle lane faces a penalty little more than half the amount a cyclist will be pinged for driving in that same lane without a helmet.

Are we really talking safety here? Is there any nexus or proportionality between the penalties and the gravity of the offences and risks?

What we do know is that the helmet offence has risen to be a terrific little earner for NSW governments. Table 3 shows the number of penalty notices issued for riding without a helmet and the value of the fines imposed for each of the years for which data are available. It also shows the same for the new safe-passing law introduced in 2016. From 2012–13 to 2018–19, the number of penalty notices issued for riding without a helmet slightly more than doubled. The value of the penalty notices issued for the offence increased by $1,727,203 – well over 700 per cent. But it was in the year before (2017–18) that the numbers peaked, with over 6000 penalty notices valued at over $2 million. Compare the paltry number of penalty notices issued for the safe passing law offence since its introduction, a total of 95 over four years. Cyclists might reasonably wonder whose safety and welfare is the priority here.

### Table 2. Penalty notice value for selected other road safety offences, NSW (at July 2019)

| Offence                                      | Value  |
|----------------------------------------------|--------|
| Exceed speed limit by 10 km/hr and under     | $121   |
| Exceed speed limit over 10 km/hr             | $280   |
| Exceed speed limit over 20 km/hr             | $481   |
| Failure to stop at red light                 | $457   |
| Drive MV in dedicated bicycle lane            | $191   |
| Failure to wear seatbelt                     | $344   |
| Ride motor-cycle w/out helmet                | $344   |
| Negligent driving                            | $457   |

What we know about cyclist injury and mortality

The goal of law and policy relating to cycling should be to ensure a safe environment for cyclists. According to injury data from 1999 to 2015–16 compiled and published by the Australian Institute of Health and Welfare (AIHW), cyclists accounted for one in five people hospitalised as a result of injuries occurring on Australian roads, streets and paths. The national incidence of injuries to cyclists rose steadily over the entire period and at a higher rate in the latter few years, but the number of deaths, although fluctuating from year to year, is low. Over the study period there was an average each year of 38 cyclist deaths compared to over 1000 people in total killed in transport-related incidents. For the three years 2013–14 to 2015–16 almost half the cyclist deaths involved a principal injury to the head and neck. In almost four in 10 deaths, injuries were sustained to multiple parts of the body. Data on the presence or otherwise of a helmet in these fatal accidents are not available. The majority of injuries suffered by cyclists in this period were fractures, and most of these involved upper limbs. The age profile of hospitalised cyclists has changed over time, with the number of those over 25 years of age increasing and those under 25 declining. Injury severity also increased with age: those over 45 were more likely to have life-threatening injuries and longer stays in hospital.

Cyclists do not themselves present a significant risk to others. The AIHW data for 2015–16 indicate that for all cases of land transport-related injury resulting in hospitalisation a bicycle was the counterpart in only 1.3 per cent of crashes, much the same as for pedestrians or animals (at 1.2 per cent). It is the greater speed and mass of motor vehicles that constitute the dominant risk of severe injuries to cyclists, pedestrians and other motorists. There is even some recent evidence from an Australian pilot study that self-reported driver aggression toward cyclists is linked to negative attitudes towards cyclists as a group, confirming the anecdotal reports of some cyclists that they are subject to harassment and intimidation by motorists.

In keeping with the available data, a strategy which has as its primary concern the safety of cyclists would focus on infrastructure (like dedicated bike paths or lanes) and the education and regulation of drivers with respect to their impact on other road users. As is clear from the above data relating to its enforcement, the safe passing law represents little more than a hollow gesture in this regard. The emphasis so far as cyclists themselves are concerned should also be (as it was when the helmet law was originally introduced) on education, encouragement and support to ensure that individuals ride safely to avoid mortal injury associated with motorised forms of transport.

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1. Alit-HW, Pedal cyclist deaths and hospitalisations 1999–00 to 2015–16 (2019) [https://www.aihw.gov.au/reports/injury/pedal-cyclist-injury-deaths-hospitalisations-related-material](https://www.aihw.gov.au/reports/injury/pedal-cyclist-injury-deaths-hospitalisations-related-material).
2. Alex Delbosc et al, ‘Dehumanization of cyclists predicts self-reported aggressive behaviour toward them: A pilot study’ (2019) 62 Transportation Research Part F: Traffic Psychology and Behaviour 681.
accidents and limit the risk of serious injury in the event that they do occur. Helmets obviously have a valuable role to play in relation to reducing the risk and severity of head injury, but it is a limited role given the many factors affecting safety for cyclists. We accept the case for a law that mandates helmet use, in appropriate circumstances, as a way to reduce those particular risks. However, the penalty and its enforcement should reflect some sense of proportionality with respect to both the risks against which it affords a measure of protection (given that wearing a helmet does not touch most of the factors affecting cycling safety) and the minor nature of the offence, involving no risk to other persons (unlike motor vehicle speeding, for example). A small fine to provide an additional incentive for compliance may be justified, but in our view there is no case for a punitive fixed financial penalty such as the current one under NSW law.

The question of enforcement

In its 2006 report on the effectiveness of fines, the NSW Sentencing Council carefully examined the general issue of penalty notice provisions as well as court-based fines. It underlined the fact that penalty notice regimes involve a form of ‘executive sentencing’ which attract little in the way of public oversight. The Council warned of ‘the potential for the development of discriminatory, unfair and negligent or corrupt practices’ given the lack of accountability. This is a serious concern with respect to an offence like the failure to wear a bicycle helmet. The power to impose a quite punitive on-the-spot fine with no meaningful oversight requires that police exercise their discretion with great care. The risks associated with riding without a helmet vary enormously depending upon location and circumstance (for example, riding on a busy highway, a backstreet, a park, a dedicated bike path, etc). It is likely that many police use their discretion in issuing penalty notices with such legitimate considerations in mind and in recognition that they generally have much more serious crimes to attend to. However, there is also evidence from our research of quite arbitrary enforcement where unstated and sometimes discriminatory factors – rather than legitimate safety considerations – dictate enforcement practices.

For a start, there is enormous geographical disparity in the number of penalty notices issued for failure to wear a bicycle helmet. In 2018–19, of the 117 NSW local government areas (LGAs) in which at least one penalty notice was issued for failure to wear a helmet, the 12 LGAs (barring Sydney) in which the majority of penalty notices were issued accounted for just short of half the total. Most but not all of these are larger urban population LGAs, but this does not account for the fact that other large population urban LGAs see many fewer penalty notices issued or that, in some rural LGAs with small populations, large relative numbers of penalty notices are issued. The year-to-year pattern in some LGAs appears to be consistent in this respect. Blacktown in Sydney’s west accounts for a remarkably high proportion of penalty notices – between 11 per cent and 13 per cent of the total in each of the three years since 2016–17. Its surrounding LGAs account for nothing like these totals. In other LGAs, the numbers fluctuate significantly from year to year. In Byron LGA, there were a total of 31 penalty notices issued in 2017–18 with 70 issued in 2018–19. In September 2019 the Northern Star newspaper, which services the Lismore LGA, quoted the local Police District Inspector to

| Offence ride without approved helmet by year – offence increased March 2016 | Number | Value $ |
|---|---|---|
| 2018–19 | 5551 | 1,870,687 |
| 2017–18 | 6259 | 2,065,470 |
| 2016–17 | 5750 | 1,868,750 |
| Total 2016–19 | 17,560 | 5,804,907 |

| Car – safe passing offence – offence from March 2016 | Number | Value $ |
|---|---|---|
| 2015–16 | 10 | 3190 |
| Total 2016–19 | 95 | 31,255 |

Note: Table includes penalty notices with an offence date between 1/01/2013 and 30/06/2019. Includes data released by Revenue NSW under Government Information (Public Access) Act 2009 (NSW) as well as data available from Revenue NSW website.

*aFine increased from $71 to $319 in March 2016.*

*bOffence commenced March 2016.*
the effect that 80 fines had been issued by highway patrol officers over just one recent weekend (which amounts to nearly $30,000 worth of revenue). Was this the result of a sudden outbreak of defiance of the helmet law on the part of Byron residents and visitors – or a case of the police most of the time ignoring the offence until a decision was taken to enforce a crackdown in which more fines were issued in a weekend than in the entire previous year and more than twice as many as in the year before that? As one local observed, 'I think it’s a dirty tactic by the police to allow non-compliance most of the time in Byron Bay and then have a “blitz” without warning and fine $350 a pop'. It is impossible to discern any legitimate safety rationale in such an enforcement strategy. Similarly, it is difficult to explain the other enormous local disparities in the enforcement of the helmet law by reference to patterns of cyclist behaviour in choosing to wear or not wear a helmet. Does this behaviour vary so widely between localities? Or is the most satisfactory explanation that the numbers are predominantly a function of police, rather than cyclist, behaviour? So, it begs the question: are enforcement decisions taken with the safety of cyclists in mind or for other undisclosed reasons?

More worryingly, our interviews with legal aid lawyers and others indicate that the law is not infrequently used for a range of purposes clearly unrelated to bicycle safety, including to gather intelligence about other offences and suspects, to justify searches and to harass targeted individuals (particularly among young people). On occasion this can involve the repeat issue of penalty notices for failure to wear a helmet (eg, a child or teenager issued with a penalty notice while cycling both to and from school on the same day). Draconian enforcement of this kind does nothing to address the safety issue and is more likely to engender cynicism, resentment and resistance which may in turn produce escalation effects, including confiscation of the bike where a person cannot prove ownership and/or further offences like resist police, offensive language, goods in custody and so on.

There are, so far as we are aware, no formal guidelines which seek to guide enforcement discretion to ensure that enforcement serves a legitimate safety purpose rather than some other questionable aim. Guidelines should be developed and made widely accessible which would require police to consider the real risks of injury involved in the particular context before taking any action. Police procedures should mandate a caution for an initial breach (and perhaps also a second one) before a penalty notice could be issued. McBarnet’s ‘ideology of triviality’ can be evoked here: offences like the failure to wear a bicycle helmet are ‘trivial’, and so it is considered acceptable to punish them by way of on-the-spot fines that elude meaningful legal accountability. This is convenient for many whose financial security enables them to treat such penalties as akin to other household bills, but it can be highly misleading with respect to the impact of such penalties and their collateral consequences on others, especially the poor and the otherwise vulnerable. Consider that the 2016 Household, Income and Labour Dynamics in Australia (HILDA) Survey found that over 12 per cent of Australian households did not have $500 in savings to meet an emergency. For these households, a $344 fine represents no small financial burden the discharge of which may often have to be weighed up against that of other debts and expenses, let alone when cumulative fines quickly multiply the household debt. And then there are the collateral consequences where the debt is not repaid. Enforcement action includes driver’s licence suspension or, in the case of those who do not have a licence, a restriction on obtaining any form of licence or learner’s permit. The possible flow-on effects of this, like secondary offending where a person is caught driving without a licence, can then land individuals in serious legal trouble.

The offence of riding a bicycle without a helmet can impose particular burdens on the young who are more likely to be dependent on cycling as a mode of transport but less likely to be able to afford to purchase a helmet or to pay the fine if issued with a penalty notice for failure to wear one. There is no differentiation of the penalty based on age and this is just one dimension of a more fundamental problem. Provisions, for example those under the Young Offenders Act 1997 (NSW) and the Criminal Records Act 1991 (NSW), that seek to protect the young from the full force of the law by providing for cautions and other diversionary measures and treating certain juvenile convictions as ‘spent’ so that a juvenile record does not follow the person into adulthood, have no application to this penalty notice offence or to most others. There are some penalty notice offences (those that used to be known as criminal infringement notices or CINs, and which relate to offences like offensive language and minor theft) where a penalty notice cannot be issued to a juvenile. There is no obvious reason for these distinctions: it is a fundamental anomaly that young people are less protected under most penalty notice provisions involving minor offences than under

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15Ibid.
16University of Wollongong Ethics Committee approval (2018: 453) was obtained to undertake interviews.
17Doreen McBarnet, Conviction: Law, the State and the Construction of Justice (Palgrave Macmillan, 1983) 143.
18Roger Wilkins, The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 14, 11th Annual Report (2016), 85 https://melbourneinstitute.unimelb.edu.au/hilda.
19See Julia Quilter and Russell Hogg, ‘The Hidden Punitiveness of Fines’ (2018) 7(3) International Journal for Crime, Justice and Social Democracy 9.
20The NSW Parliament recently passed (22 October 2019) the Fines Amendment Act 2019 (NSW) which amends the Fines Act 1996 to insert s 23(6) allowing the Commissioner of Fines Administration on application of a person who is ‘in receipt of a Government benefit’ to reduce the fine by 50 per cent.
the general criminal law. The impacts on some young people can be far from inconsequential. As an example, unpaid fine debt can increase the risk of a young person being pushed into poverty or prevent them from obtaining a driver’s licence upon which employment and other opportunities may depend.

**Conclusion: The wider picture**

The penalty notice regime applying to this one minor offence of failure to wear a bicycle helmet raises multiple issues, but it also provides a glimpse into what is a much greater problem. Currently around 2.8 million penalty notices are issued each year in NSW. More than 20 penalty notice fines are issued for every sentence imposed by the courts. Many of the problems noted here with respect to the helmet offence pervade the entire area of penalty notice provisions. It is a hidden justice system, devoid of the safeguards assumed to apply to the administration of justice. That a more than threefold increase in the penalty for failure to wear a bicycle helmet can be instituted overnight by simply amending a regulation attests to the capriciousness and paucity of meaningful accountability that characterises the legislative process as it pertains to penalty notice regimes. The same problems pervade enforcement, as penalty regimes effectively concentrate all power in the executive.

The 2006 NSW Sentencing Council Report made some withering criticisms of the penalty notice system and pointed to:

> The absence of any coherent or consistent cross-government mechanism for the fixing of the level of the penalties for which such notices may be used, or of guidelines for their adjustment in circumstances where there seems to be little in the way of any rational proportionality between many of the available penalties and the objective seriousness of the relevant offences…

The Council concluded:

Extension of the scheme to cover additional offences, whether regulatory or criminal presents significant difficulties and should not occur unless and until there is wholesale review of the system for their issue and enforcement, and unless and until suitable safeguards and guidelines are established applicable to each agency.

In the intervening years, there have been constant efforts to mitigate some of the unfair hardship and injustice to which penalty notice regimes give rise. One example is the introduction of work and development orders that allow eligible persons to cut-out fine debt and a very recent development is an allowance by the Commissioner of Fines Administration to reduce a fine by 50 per cent for persons on a government benefit. However, no willingness has been shown by successive NSW governments to respond to those general criticisms and recommendations of the Sentencing Council, nor to tackle the fundamental structural problems with what continues to be a sprawling, ever-expanding and largely invisible system characterised by irrationalities, anomalies and injustices of the kind that we have noted with respect to the helmet offence.

**Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

**Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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21Quilter and Hogg (n 19) 13.
22NSW Sentencing Council (n 12) 10.
23Ibid [3.89].
24See Fines Act 1996 (NSW) Pt 4, Div 8, Sub-div 1.
25NSW Parliament (n 20).