The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices

Interim Report

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NSW Sentencing Council

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The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices : Interim Report

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1. The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council.
2. Mr Norman Laing was appointed to the Council on 18 April 2006.
3. The Hon Alan Abadee served as Chairperson of the NSW Sentencing Council until 26 April 2006.

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Officers from the NSW Bureau of Crime Statistics and Research (BOCSAR).

TERMS OF REFERENCE

On 16 November 2005, the Sentencing Council received terms of reference from the Attorney General inter alia in the following terms:

> *Pursuant to section 100J(1)(d) of the Crimes (Sentencing Procedure) Act 1999 I refer the following issues to the Sentencing Council for consideration and report:*
>
> *(a) Fines*
>
> (i) *The effectiveness of fines as a sentencing option;*
>
> (ii) *Consequences for those who do not pay fines, paying particular regard to increases in imprisonment for offences against sections 25 and 25A of the Road Transport (Driver Licensing) Act 1998.*

EXECUTIVE SUMMARY

The Sentencing Council provides this Interim Report in relation to its reference concerning the use of fines and their consequences. By reason of the common issues that arise, particularly in the enforcement context, the Report deals both with court imposed fines and penalties incurred following the issue of a penalty notice (which expression is to be taken here as including Criminal Infringement Notices (CINS).

The Council has dealt with the matter by way of an Interim Report as sufficient problems have been detected that would justify further consideration being given to the topic, both by it and at an intergovernmental level. They are sufficient to make any further extension of the penalty notice system undesirable until the identified deficiencies are considered, at a policy level, and addressed.

By way of executive summary, the Report deals with the following matters which emerged from its extensive literature review, some 50 consultations, an analysis of some 56 submissions, and a survey of magistrates.

Fines in the Local Court

The Council accepts that the court imposition of fines is an appropriate sentencing option for the majority of minor offences and does not suggest that their use be curtailed, however it has identified a number of problems in relation to the practices and procedures concerning their imposition and enforcement, including the following:

- The limited availability of alternative sentencing sanctions which would be more meaningful for impecunious, vulnerable and disadvantaged offenders, Aboriginal offenders and young offenders, for whom fines can have disproportionately harsh consequences or lead to secondary offending, particularly, acquisitive crime directed towards obtaining the means to meet the fine, as well as deeper contact with the criminal justice system;

- The practical difficulties for magistrates in taking into account the means and capacity of the offender to pay a fine and the impact of that fine upon the offender's dependants, when quantifying the fine, having regard to the paucity of information available and the fact that a significant number of offenders are fined in their absence;

- The inability of magistrates to grant an extension to pay a fine beyond 28 days or to approve a scheme for payment by instalments;

- The requirement for the provision of complex financial information where time to pay is sought from court registrars;
- The absence of any consistent system for the provision of meaningful advice or assistance to fine recipients (particularly disadvantaged offenders from the Aboriginal community, the homeless, and those with intellectual and mental disabilities), in relation to their obligations and entitlements concerning the payment of the fine, and the imposition of court costs and victim compensation levies;
- The lack of the capacity in the courts to accept periodic payments or direct debits;
- The substantial default and low recovery rate of fines, attributable in part to their inappropriate imposition on certain classes of offenders, and in part to poor collection of current contact information, with consequent disproportionate enforcement expenses;
- The problems associated with the enforcement process noted in *Part Four: The State Debt Recovery Office;* and
- The mandatory disqualification provisions and the automatic imposition of Habitual Traffic Offender Declarations which have led to 'crushing' periods of disqualification, particularly for young people without qualifications for whom the lack of a licence significantly impacts on their chances of employment, and arguably contains little incentive to refrain from driving – examined in *Part Five: Licence Sanctions and Secondary Offending.*

Penalty Notices

The Sentencing Council similarly accepts that the use of penalty notices is, for the most part, a cost effective, prompt and appropriate means of providing a sanction and of creating a deterrent for a wide range of regulatory and minor offences that do not merit the acquisition of a criminal record, or require more than the payment of a pecuniary penalty.

However it is a system which several studies, and our own overlapping research, show has some significant problems that need to be addressed, both in the use of such notices and their enforcement.

The Council considers that attention should be given to these deficiencies before there is any further extension of the system, including the NSW Police trial of CINS.

It is also of the view that if the legislation is amended to deem that matters dealt with by way of a penalty notice should have the status of a conviction, an amendment which it considers wholly undesirable and possibly unconstitutional, then there should be a review power to exclude that consequence, where it would be unjust for a conviction to be recorded, or at least that consequence should be confined to a narrow band of offences, dealt with by way of a CIN.

In no circumstances should the regulatory penalty notices issued by agencies other than the NSW Police have that consequence. Nor should any deeming legislation be introduced without a careful review and establishment of suitable safeguards.

The problems, identified in this Interim Report, include the following:

- 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 need for a general review of the range and kinds of offences (currently 17,000 in number arising under approximately 100 legislative instruments) for which the penalty notice system is appropriate, and for the establishment of guidelines for their addition or removal from the system;
- The reduction in judicial and public scrutiny over the relevant issuing agencies, with the potential for the development of discriminatory, unfair and negligent or corrupt practices, particularly where net widening is occurring;
- The absence of a discretion available to issuing agencies, for the issue of a caution or a warning, or option for referral to a diversionary program or to performance of community service, in place of a penalty notice, as well as the absence of any power in such agencies to agree to payment of the penalty by instalments;
- The need for additional training for staff of relevant issuing agencies in accommodating the special problems of marginalised sections of the community (such as impecunious offenders, the homeless, members of the Aboriginal community, the young, those with mental or intellectual disabilities, illnesses or disease) who are the most likely recipients of penalty notices, as well as those from remote communities;

- The risk that innocent recipients of penalties will simply pay the penalty rather than incur the cost and inconvenience of contesting the matter in court;
- The strict liability nature of most offences and fixed penalties, which do not permit of any allowance for the objective seriousness of the offence, or the personal circumstances of the offender, including their capacity to pay, and which potentially permit their discriminatory issue for trivial offences;
- The absence of a procedure for internal review by issuing agencies where the penalty is contested or special circumstances are demonstrated; and
- The problems associated with enforcement mentioned in the SDRO section below.

The State Debt Recovery Office

The Council recognises the value of the existence of a single central agency which is tasked with the collection of fines and penalties, and which is responsible for the collection of a significant amount of money for the State that would not otherwise be recovered.

It accepts that the existence of such an agency, and the power to impose or require the imposition of sanctions on defaulters, is an effective and justifiable means of collecting fines and penalties, particularly from recidivists and recalcitrant offenders who have the capacity to pay the debt, but who refuse or neglect to do so.

The Council also notes that the SDRO has introduced a number of changes and has other measures in train that will improve the system, such as the introduction of a Direct Debit system (Centrepay), and procedures that should require less formality in applying for time to pay arrangements than those which have been used.

Nevertheless, the submissions and consultations have identified a number of areas where the SDRO appears to have adopted procedures for which there is no statutory basis, as well as some other problems. Improvements could be made for the benefit of the system as a whole, and in the interests of offenders, particularly those from the disadvantaged and marginalised sections of the community.

The problems include:

- The absence of a sufficient or comprehensive procedure for any administrative review of SDRO decisions;
- The fact that some of the current procedures of the SDRO, for example, its willingness to consider appeals in relation to

penalty notices upon leniency grounds, do not appear to have a legislative basis;

- The limited information available to most offenders concerning their entitlements or the consequences of default, and the absence of published guidelines as to the enforcement process;
- The absence of any user-friendly system for direct contact with the SDRO by those having problems in payment, or with the enforcement action, whereby they could be provided with appropriate advice and assistance.

The Council notes that phone contact has been productive of inconsistent results and dissatisfaction, and that many offenders are illiterate or unable to obtain internet access, or have limited education and experience in dealing with government agencies. As a consequence, fines, penalties and enforcement action taken against them are likely to be overlooked or ignored as too difficult to confront;

- The existence of hardship resulting from the imposition of sanctions as part of an automatic progression following default. This can have escalating and counter-productive effects for marginalised members in the community, as well as for those in remote or regional communities lacking public transport, and for young offenders, particularly in circumstances where provision exists for the reinstatement of written off debts, in the event of there being any reoffending even for a trivial offence;
- The limited flexibility of the enforcement system in providing alternative forms of sanction, or relief from those sanctions, subject to appropriate conditions that could assist in their rehabilitation and satisfaction of their SDRO debt;
- The costs and time expended in attempts to recover irrecoverable debts, which could be avoided if there was more flexibility in the system and an earlier capacity to have such debts written off;
- A general lack of published information, accessible in a user friendly way, as to the enforcement procedures, and as to the entitlement of offenders to obtain relief from the debt, or a relaxation of the sanctions.

Licence Sanctions and Secondary Offending

The Council is further concerned at a number of issues which span both court and agency practice, including:

- The excessive or indiscriminate use of licence or vehicle or RTA business sanctions, with the adverse consequences attaching thereto (including a reduction in many cases of the offenders' ability to pay the fine or penalty) particularly where used in relation to debts arising by reason of fines or penalties for non-driving offences, and where they effectively constitute a double penalty that is not directed to the improvement of road safety; and
- The absence of any differentiation between suspension or cancellation of a licence by way of a sanction for the non-payment of a fine or debt, and that which results from the commission of a serious driving offence, particularly in circumstances where the offender is subsequently charged with driving while suspended or unlicensed.

General

The Council also notes with concern the absence of reliable and consistent statistics on the part of the Local Court, SDRO and other agencies as to:

- the imposition of fines and penalties;
- the respective default rate;
- offender profiles;
- the reasons for default;
- the impact of the enforcement procedures; and
- their deterrent value,

such that it is difficult to evaluate the net widening effect of any increase in the range of offences for which fines and penalties are available, or the extent to which they may be unfairly or inappropriately imposed.

Options for Reform

The Report identifies a number of potential reform options, including the following:

A: The Local Court

a) Alternate sentencing options for those within marginalised groupings of society

These would involve the use of alternative sentencing options to fines for vulnerable offenders in appropriate instances, particularly where they may have been convicted of a relatively minor offence arising from an underlying unresolved issue, or where they have accumulated a large number of fines or penalties, to the point where they have no realistic chance of satisfying the resulting debt.

They could include:

- dealing with intellectually disabled and mentally ill offenders under sections 32 or 33 of the *Mental Health (Criminal Procedure) Act 1990*, permitting the making of a treatment order that could address the underlying offending issues in lieu of the repeated imposition of fines, which are only likely to exacerbate their problems;
- dealing with offenders with an underlying drug related issue through programs such as the *Magistrates Early Referral into Treatment* (MERIT);
- dealing with young offenders by referral to the Youth Drug and Alcohol Court or to Youth Conferencing;
- imposing Bonds with conditions for participation in programs such as Driver Education Programs;
- using a Fine Option Order (FOO), allowing magistrates the option of imposing a community-service type sanction on impecunious or other suitable offenders; and
- using Circle Sentencing.

b) Improvements to the system for fine payment including applications for time to pay

This would involve the adoption, and consistent use, of the following procedures:

- Magistrates to be encouraged to take positive steps to take an offender's means into account, as well as the impact of the fine on any dependents, when determining a sentence, and to be given the power to approve of time to pay arrangements;
- Collection and enforcement to revert immediately to the SDRO after the court (either the magistrate or registrar) has determined a time to pay application, or if no such application is made, as soon as the time for payment fixed by the sentencing order has passed without payment;

- Reference to financial counselling to be encouraged;
- The requirements concerning proof of means to be relaxed, for example, by approving time to pay arrangements automatically on production of Centrelink or Health Care card, in place of the current complex procedures requiring detailed proof supported by a statutory declaration.

B: Penalty Notices

a) A review of all offences (some 17,000 in number, arising under approximately 100 Acts) where a penalty notice can be issued

Such a review would involve a comprehensive examination of their continued appropriateness for disposition by way of a penalty notice and would analyse and rationalise the current penalty amounts in light of the relative seriousness of each offence, their prevalence and any deterrent value attaching;

b) The conduct of a review for the fixing of penalties

Such a review would involve developing guidelines under the lead of the Attorney General (although involving cross-government input) so as to establish a uniform and transparent method for the fixing of penalty amounts and for their adjustment.

c) The development of guidelines and training for the issue of a penalty notice and for alternative responses

Such guidelines could be developed for each agency as to their use of penalty notice, and of alternatives such as cautions, voluntary community service or diversion into appropriate programs designed to modify offending behaviour, that could be supplemented by training of officers of issuing agencies in their use.

d) Provision for greater flexibility in time to pay applications

This would involve conferring a clear legislative authority in the issuing agency, and in the SDRO (when the penalty notice is first referred to it) to approve of time to pay arrangements rather than deferring it to the enforcement stage, as well as a power to accept payment by instalments, including by direct debit.

e) Developing clear guidelines

These would identify what constitutes financial hardship and what factors the issuing agency or SDRO should take into consideration when assessing a time to pay application, the substance of which should be made publicly available.

f) Internal Review

This would involve establishing a system whereby issuing agencies could conduct an internal review of penalty notices where the recipient asserts that the penalty was issued contrary to law, or that there was a mistake as to identity, or that special circumstances exist.

C: The State Debt Recovery Office

a) Better access to the SDRO and improved supply of information

This would involve establishing a more proactive physical presence of the SDRO (particularly in prisons and rural areas) through Government Access Centres or similar facilities. It would also require the publication and supply to those whose debts are referred to the SDRO, of information in Plain English advising of:

- their entitlements to seek relief in relation to penalty notices, and
- in relation to their rights during the enforcement process, for example, concerning the waiver or annulment of enforcement orders, time to pay and debt write offs.

b) Time to Pay

This would involve providing for greater flexibility and less formality in time to pay applications, for staff training in their equitable and consistent processing, and for the introduction of payment by instalments, including direct debit (for example via Centrepay).

c) Flexibility in sanctions

This would involve encouraging greater flexibility in the use of sanctions, including altering the sequence of their application, where appropriate, and providing for modified licences and motor vehicle sanctions that would allow some limited use and early restoration, upon conditions for example, involving part payment and /or entry into suitable programs.

d) Debt write off

This would involve improving the procedures for the writing off of obviously unrecoverable debts at an early stage, thereby avoiding the harsh consequences of the sanctions that can apply inequitably to the impecunious and marginalised sections of the community.

e) Leniency appeals

This would involve providing a legislative basis for the current informal practice whereby the SDRO is prepared to consider complaints or “appeals”, concerning the issue of penalty notices, prior to inception of the enforcement process;

f) Prisoners

This would involve adopting means whereby prisoners, particularly those with mental or intellectual disabilities, could be given particular consideration at the time of reception and pre-release, for the potential write off of their debts and / or for the pro rata reduction of their debts by deductions from their prison wages.

g) Administrative review

This would involve the establishment of an SDRO Review Board in place of the Hardship Review Board, with a broader representation than the existing Board, with an extended jurisdiction permitting it to review all administrative decisions made by the SDRO in relation to the enforcement process.

D: Licence Sanctions and Secondary Offending

Reconsideration of mandatory licence disqualification and Habitual Traffic Offender Declarations

This would involve:

- Reconsidering the mandatory penalties, and allowing for a differentiation between cases involving secondary offences of driving while suspended or disqualified, where the suspension or disqualification resulted from a fine default sanction, and those where the suspension or disqualification arose by reason of an earlier serious driving offence;
- Dispensing with the automatic imposition of Habitual Traffic Offender Declarations, or if they are to be retained, requiring that a separate application be brought before the court requesting that such a declaration be imposed, in lieu of the current default option; and
- Removing the offence of drive while cancelled or disqualified due to fine or penalty default from the category of offences which give rise to a Habitual Traffic Offender Declaration.

Part 1 Introduction and Overview

- Terms of Reference
- Scope of Terms
- Methodology
- Reasons for an Interim Report
- General Concerns Identified by some of the Major Studies and Organisations

PART 1: INTRODUCTION AND OVERVIEW

TERMS OF REFERENCE

1.1 On 16 November 2005, the Sentencing Council received terms of reference from the Attorney General, directing the Council to consider and report on the effectiveness of fines as a sentencing option.

1.2 The Council was specifically requested to examine the consequences for those who do not pay fines, paying particular regard to increases in imprisonment for offences against sections 25 and 25A of the *Road Transport (Driver Licensing) Act* 1998.

SCOPE OF TERMS

1.3 The terms of reference specify that the Council is to consider fines as a *sentencing* option.

1.4 Accordingly, the Council originally limited its investigations to the true sentencing issues related to court imposed fines, excluding consideration of the imposition of penalty notices or 'on the spot fines', imposed for offences such as illegal parking, speeding, driving through a red light, catching public transport without a ticket, having a dog that is not under effective control, or not voting in a government election.

1.5 In confining its project in such a way, the Council noted the number of related projects within the Attorney General's Department specifically focusing on penalty notices. For example:

- The Crime Prevention Division (CPD) is considering some of the administrative aspects of penalty notices. CPD has two quite specific projects on foot: *Lismore Driver Education Program*, which aims to address a number of barriers to Aboriginal people obtaining driver's licences including disqualification due to unpaid fines; and *Offence Targeting Project in Dubbo* – which is being trialed to reduce driving licence offences committed by adult Aboriginal people in Dubbo;
- The Legislation and Policy Division (LPD) has examined aspects relating to penalty notices, fines and their enforcement, primarily focusing on improving payment options and methods of paying fines and penalty notices as their first priority; and
- The Criminal Law Review Division (CLRD) has a project on foot considering the potential for the expansion of penalty notices.

1.6 In August 2006, following discussions with the Attorney General and by reason of the common issues that arise, the Council agreed to widen its terms to include the imposition and judicial review of penalty notices.

1.7 In due course the Council will examine the imposition of fines and penalties in relation to environmental and occupational health and safety issues. This will be the subject of separate papers, produced as part of the Fines Reference.

METHODOLOGY

1.8 The Council commenced work on this reference by conducting an assessment of the fines regime in all Australian jurisdictions, and reviewing the national and international literature on fines. An annotated bibliography of approximately 300 references will be included as an Appendix in the Council's Final Report.

1.9 The Council invited submissions from government and community agencies. Fifty-six (56) submissions were received, 12 of which addressed purely environmental, occupational health and safety or corporate crime matters. As previously indicated, these submissions will inform the Council's Final Report on Fines. A list of submissions received is at *Appendix B*.

1.10 The Council also engaged in extensive consultation, undertaking 50 face to face meetings, featuring approximately 150 participants. Four regional communities (Lismore, Kempsey, Dubbo and Broken Hill) were visited.

1.11 Several meetings with key agencies, such as the State Debt Recovery Office (SDRO), the Roads and Traffic Authority (RTA) and the Department of Corrective Services (DCS) were conducted.

1.12 Interviews with staff and prisoners were conducted in six correctional centres: the Metropolitan Reception and Remand Centre (MRRC); and Dilwynnia; John Moroney; Broken Hill; Silverwater and the Mid North Coast correctional centres.

1.13 The consultations undertaken are listed at *Appendix C* and copies of the questionnaires used to facilitate discussion at the various consultations are at *Appendix D*.

1.14 In order to gauge judicial views and assess current practices in the imposition of fines, a survey was distributed to Local Court Magistrates at the Judicial Commission's 2006 Annual Magistrates Conference. The return rate exceeded 60 percent.

1.15 The NSW Sentencing Council developed the questions; the Judicial Commission is providing assistance with data coding and analysis.

1.16 A preliminary analysis (conducted by the Council) of a quarter of the responses received has been incorporated into the Council's Interim Report. A copy of the questionnaire is at *Appendix E*.

REASONS FOR AN INTERIM REPORT

1.17 A number of significant reports and major submissions have identified the need for an overall review and revision of a number of aspects of the current fines and penalties regime. These suggestions have financial and other implications that extend beyond the justice system. Given the different sector interests, there is a need for cross-government consideration of the problems and possible options for reform.

1.18 Where possible, the Council has met with the agencies most directly affected to discuss relevant issues with them. It is believed that the proposals identified in this report would benefit from further and more detailed consideration before the issue of a Final Report, which would also deal with the issues arising in relation to the use of penalties or fines for environmental and occupational health and safety offences.

1.19 The Council's Interim Report is intended to initiate further consideration, consultation and examination of the issues in advance of a Final Report.

GENERAL CONCERNS IDENTIFIED BY SOME OF THE MAJOR STUDIES AND ORGANISATIONS

1.20 A number of weaknesses in the current system for fines and penalty imposition and enforcement have been identified in the course of the Council's work on the Fines reference.

1.21 They include:

- the lack of discretion when a penalty is imposed pursuant to a penalty notice;
- the absence of any consistent or coherent basis for fixing or adjusting penalties;
- the inability of the courts or penalty issuing agencies adequately to reflect an individual offender's financial circumstances when imposing a fine or penalty respectively;
- the lack of available sentencing alternatives;

- the absence of any effective system for administrative review in relation to penalty notices; and
- the cumbersome enforcement system which allows for little consideration being given to the individual circumstances of the offender, and which can be an occasion of unnecessary hardship.

Vulnerable Communities

1.22 It is clear beyond question that current enforcement procedures applicable to fines and penalties contribute to the difficulties of vulnerable people, particularly the unemployed, the young, prisoners, the Aboriginal community and those with intellectual or mental disability.

1.23 Problems identified include:

- Bureaucratic restrictions on court time to pay arrangements and the penalty enforcement hierarchy;
- the associated administrative costs imposed in addition to the original fine;
- procedural delays;
- lack of information at crucial points;
- unnecessarily 'dense' forms requiring extensive proof of financial circumstances; and
- the limited payment methods (such as the inability to direct debit court-imposed fines or to pay SDRO debts and Court fines at the same location) which actively discourage early or sustained debt repayment.

Driver Licence Sanctions

1.24 It is clear that the sanctions for fine default imposed by the Roads and Traffic Authority (RTA) at the request of the State Debt Recovery Office (SDRO), such as the imposition of driving licence and vehicle registration sanctions, can cause undue hardship and have serious adverse consequences for particular sections of the community.

Secondary Offending

1.25 The most troubling consequence arising from the imposition of driver sanctions for fine default is the advent of secondary offending consequent upon the sanction, generally for drive while suspended and drive while disqualified offences.

1.26 The Council was consistently told that people are being convicted for driving offences attributable to licence sanctions imposed for fine

and penalty default, and that the sanctions interfere with employment, particularly in rural areas where there is a need to drive to hold down a job (unless they are ignored with the risk of secondary offending). This is a source of grave concern.

1.27 Particularly is that so in circumstances where many of the fines or penalties are imposed for offences not involving the use of a motor vehicle, and where the reason for imposing the sanctions is not associated with the primary purpose of ensuring road safety.

Part 2 Court Imposed Fines

- The Use of Court-Imposed Fines
- Fundamental Sentencing Principles and their Application
- Advantages and Disadvantages of Fines
- Impact on marginalised sections of the community
- Court collection procedure
- Victims Compensation Levy and Court costs
- Default rates
- Problems identified in courtroom practices
- Problems identified regarding payment methods
- Problems identified in collection procedures
- Defendants dealt with in their absence
- Options for Reform

PART 2: COURT-IMPOSED FINES

The Use of Court-Imposed Fines

Local Courts

2.1 The use of fines has declined in NSW Local Courts over the last ten years.[1] However, the fine remains by far the most common sentencing option imposed in the Local Court[2] for both Aboriginal and non-Aboriginal offenders.[3] In 2005, a fine was the principal penalty imposed on approximately one half (49.8 percent) of all local court offenders, with just over 56,500 fines imposed.[4]

2.2 Although the use of fines has declined, the monetary amount imposed in the Local Court has increased in recent years. Most fines imposed (56.7 percent) are between $200 to $500, with the most common fine amount being $500 (imposed on 13.8 percent of fined offenders). The Judicial Commission suggests that this may be attributable to increases in maximum fine amounts for many offences. For example, in 1998 the maximum fines for various driving and PCA offences were increased dramatically, in some cases by as much as 200 and 300 percent.[5]

NSW Children's Court

2.3 Fines are considerably less utilised in the Children's Court. In 2005 a fine was imposed in only 11.3 percent of Childrens Court matters.[6] According to the Court, fines are an inadequate deterrent, in instances where, for example, the parents of an offender pay the fine due to youth's inability or unwillingness to pay, whereupon the young person learns nothing from the sentence.

2.4 The Court is also concerned that a fine may accelerate or add to the seriousness of an offence – for example, the case where a penalty notice is imposed (often for an offence not involving a motor vehicle);

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1. Keane and Polleti, Common Offences in the Local Court' (2003) 28 *Sentencing Trends and Issues*: NSW Judicial Commission.
2. NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics* 2005.
3. NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics* 2005 pg 5. Baker Joanne, 'The Scope for reducing indigenous imprisonment rates' *Crime and Justice Bulletin No 55*, NSW Bureau of Crime Statistics and Research, 2001.
4. NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics* 2005.
5. Common Offences in the Local Court" (2003) 28 *Sentencing Trends*, Judicial Commission of NSW.
6. NSW Bureau of Crime Statistics and Research *New South Wales Criminal Court Statistics 2005* at 9. This is down from 15.1 percent of matters in 2004, according to Senior Children's Magistrate Judge Mitchell (Submission: 3).

the offender fails to pay; the offender becomes disentitled to a drivers licence if he or she holds one, or it is suspended; the offender then drives regardless and a significant court fine or other significant sentence is imposed.

Dominant penalty internationally

2.5 The fine dominates as the most commonly imposed penal sanction in comparable Western jurisdictions such as Scotland,[7] England and Wales.[8]

2.6 As in NSW however, their use is declining, particularly in relation to indictable offences. This has been attributed to:

- the increased use of 'fixed penalties' (eg on-the-spot fines, that are imposed outside the court system);
- a steady shift towards more 'up-tariff ' responses to crime; and
- a diminishing confidence in the fine among sentencers by reason of the growing problems of non-payment and the rising costs of enforcement.[9]

Sentencing hierarchy

2.7 Like most other Australian jurisdictions, NSW does not have a strict sentencing hierarchy, however, legislation and case law provides guidance on the relative severity of the various sentencing options. As in most comparable jurisdictions, fines fall toward the bottom end of the sentencing regime.[10]

2.8 The Australian Law Reform Commission (ALRC)[11] has recently suggested that a "broad hierarchy" of the main sentencing options could be understood to escalate as follows:

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7. The Sentencing Commission for Scotland, *Basis on which Fines are Determined*, 2006
8. Moore R 'The use of financial penalties and the amounts imposed: the need for a new approach' *Criminal Law Review* 13-17 2003.
9. Raine & Mackie 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' *The Howard Journal of Criminal Justice* Volume 43 Page 518- 538, December 2004
10. In Western Australia a fine is the third "lowest" sentencing option in that state, following release of the offender without sentence, and a conditional release order - section 39 *Sentencing Act 1995* (WA). In Victoria, a fine is the second 'lowest' sentencing option following dismissal, discharge or adjournment - section 5(3)-(7) *Sentencing Act 1991* (VIC). In England, fines are considered to be at the bottom end of the sentencing hierarchy, as indicated their listing as the first of the "bottom tier" sentencing options in a recent sentencing review - *Halliday Report: Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, Home Office, 2001 p 41.
11. See ALRC *Discussion Paper 70 – Sentencing* released 29 November 2005, at 7.127. The 'broad hierarchy' was suggested by the Commonwealth DPP in its submission to the ALRC.

- Non-conviction bond;
- Conviction bond;
- Fine;
- Community Service and like orders;
- Suspended sentence;
- Sentence with custody component including Home detention and Periodic Detention;
- Full time custody

2.9 It is noted however, that in NSW both the Bureau of Crime Statistics and Research (BOCSAR) and the NSW Judicial Commission place the fine below a section 9 conviction bond.

Imposition for certain offences

2.10 Practically speaking, a fine can be imposed for most offences. It is available where:

- it is specified as a penalty for the offence, including most summary offences. For example, the fine was an available penalty for all 20 of the most common offences in the Local Court in 2002. The top 20 offences accounted for 74.4 percent of all offences sentenced that year;[12]
- an indictable offence is dealt with on indictment: a fine of up to 1,000 penalty units may be imposed unless otherwise specified;[13]
- a Table 1 offence is dealt with summarily: potentially attracting a fine of up to 50 penalty units;[14] or where
- a Table 2 offence is dealt with summarily: potentially attracting a fine of up to between 20 and 50 penalty units as set out in legislation.[15]

Imposition of a fine in conjunction with other penalties

2.11 Fines can also be imposed in conjunction with other penalties imposed for an offence, including:

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12. Judicial Commission of NSW 28 *Sentencing Trends: Common Offences in the Local Court*, 2003. The Commission has advised that this figure does not include most regulatory offences, as this data was not provided to the Commission until 2003.
13. Section 15(2)
14. Section 267 of the *Criminal Procedure Act 1986*
15. Section 268 *Criminal Procedure Act 1986*

- Full time imprisonment;
- Home detention;
- Periodic detention;
- Community service orders; and
- Good behaviour bonds, (except where a section 10 bond is used);[16]

so long as the offence is dealt with on indictment.

2.12 The legislation is silent with respect to summary offences, or indictable matters dealt with summarily, however, section 14 suggests that for these categories of offence, a fine can be used with sentencing options other than a section 10 bond.[17]

2.13 In some jurisdictions a fine can be imposed without recording a conviction,[18] whereas in other jurisdictions a fine is considered to be essentially a punitive order, and a conviction must first be recorded.[19]

Imposition of a fine in conjunction with Section 10 Bonds and Dismissals

2.14 At present, section 14 of the *Crimes (Sentencing Procedure) Act* 1999 (the *Act*) provides that a fine cannot be used in conjunction with a section 10 bond. This is because it would be inconsistent to use section 10 and also impose a penalty that is fundamentally of a punitive nature. The *Act* is silent upon whether a fine can be used in conjunction with a section 10 dismissal, but it could be argued that it would be inconsistent to dismiss a matter under section 10 and also impose a fine, which is fundamentally of a punitive nature.

2.15 The NSW CCA considered section 556A of the *Crimes Act 1900*, the predecessor of section 10 of the *Act*, and held that it is impermissible to impose conditions in a bond of a punitive nature after a matter has been discharged without a conviction recorded.[20] On this reasoning, it had been assumed that it was not possible to impose a fine in conjunction with the equivalent of a section 10 dismissal.

2.16 There are some changes between former section 556A and the new section 10 of the *Act*. Nothing in section 10 requires the Court to be satisfied that it is "inexpedient to inflict any punishment (other than nominal punishment) on the person" before dismissing a matter under section 10(1)(a). This is in contrast to the former section 556A.

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16. Section 14 *Crimes (Sentencing Procedure) Act 1999*
17. Section 15 *Crimes (Sentencing Procedure) Act 1999*
18. See for example Victoria and Queensland
19. For example, Tasmania
20. See *R v. Ingrassia* (1997) 41 NSWLR 447

2.17 However, there may be common law and statutory construction arguments that would suggest that it is still impermissible to impose a fine with a section 10(1)(a) dismissal:

- First, the reasoning in *Ingrassia* would suggest it is impermissible to impose punitive measures following the dismissal of a matter.
- Secondly, section 10(3) sets forth matters the Court must have regard to in deciding whether to dismiss a matter under section 10(1)(a) or (b). Once the Court has considered the matters in section 10(3) and come to the conclusion that it is appropriate to dismiss the charge, arguably it would be inappropriate to impose additional orders of a punitive nature.
- Thirdly, section 14 of the *Act* explicitly provides that a fine may be imposed in addition to a good behaviour bond (other than a section 10 bond). Section 15 explicitly provides that a fine may be imposed in addition to imprisonment where a matter is being dealt with on indictment (but the section does not apply to an offence for which the penalty that may be imposed includes a fine).

  The legislation makes explicit that a fine cannot be a condition of a community service order[21] and it would be unlikely that a fine would be imposed under section 11, because sentencing is being deferred.

  However, a person could be fined when a section 11 matter is called back for sentencing. This is in contrast to the predecessor of section 11. Former section 558 of the *Crimes Act 1900* explicitly provided that nothing in the section prevented the imposition of a fine for the offence, so the court was able to both defer sentence and also impose a fine.

2.18 The value of one penalty unit is currently $110. The number of penalty units that apply for any given offence is set by the legislation creating the offence.

21. Section 90 *Crimes (Sentencing Procedure) Act 1999*

Fundamental Sentencing Principles and their Application

2.19 Where a fine is to be imposed, general sentencing principles such as proportionality and consistency are paramount, as in any sentencing exercise. In essence, the punishment must be proportionate to the crime;[22] and similar matters should be sentenced in a similar way.[23]

2.20 In addition to the fundamental sentencing options, there are legislative and common law constraints in imposing a fine. For example, the Court must consider the offender's means of paying a fine.

2.21 There is no statutory limit on the aggregate of fines that a Court may impose, however, the Court must consider the principles of proportionality and totality.[24]

Proportionality

2.22 Proportionality has been called the golden rule of sentencing. Essentially, the punishment must be proportionate to the crime.[25] Most fundamentally, the principle of proportionality operates as a *limiting* principle. That is, the principle of proportionality places an upper limit on the sentence that may be imposed.[26]

2.23 The principle of proportionality can also operate to avoid sentences that are manifestly lenient. The objective gravity of the offence must be remembered, and the subjective features of the case must not be allowed to produce a sentence that fails to reflect the objective seriousness of the crime.[27]

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22. See for example *R v Geddes* (1936) 36 (NSW) SR 554, per Jordan CJ at 556. See also the seminal High Court case of *Veen v. The Queen (no 2)* (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson, Toohey JJ at 486, per Wilson J at 491, per Deane J, both cited in the Judicial Commission's *Principles and Practice* at Proportionality – Generally.
23. Consistency is interpreted to mean consistency of approach rather than consistency in outcome, as per the Council's previous reports.
24. See for example *Sgroi* (1989) 40 A Crim R 197
25. See for example *R v Geddes* (1936) 36 (NSW) SR 554, per Jordan CJ at 556. See also the seminal High Court case of *Veen v. The Queen (no 2)* (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson, Toohey JJ at 486, per Wilson J at 491, per Deane J, both cited in the Judicial Commission's *Principles and Practice* at Proportionality – Generally.
26. See Victorian Sentencing Manual at paragraph 7.2.1
27. See for example *R v. Dodd* (1991) 57 A Crim R 349 at 354; and *R v. Murray* (Unreported) NSWCCA, 29 October 1997 per Barr J, both cited in the Judicial Commission's *Principles and Practice* at Proportionality – Balancing objective and subjective features.

Consistency

2.24 Consistency is another fundamental sentencing principle. It necessitates that similar matters will be sentenced in a similar way. Consistency is interpreted to mean consistency of approach rather than consistency in outcome, and has been discussed at some length in other Sentencing Council reports.[28]

Parsimony

2.25 In some jurisdictions, the principle of parsimony is also established as a sentencing concept.[29] It requires the selection of the least severe sentencing option open to a sentencer which achieves the purposes of punishment in the instant case, and so achieves the ultimate aim of protecting society. [30]

2.26 In NSW, case law has not developed to explicitly acknowledge a principle of parsimony. However, the fact that proportionality is fundamentally a limiting principle may have a similar influence.

2.27 In addition, there is a legislative requirement that imprisonment is only to be imposed once the Court is satisfied that no penalty other than imprisonment is appropriate.[31]

Capacity to pay

2.28 It is well established at common law that a fine should not be imposed where an offender is unable to pay. In 1989 the NSW CCA (per Finlay J with Smart and Studdert JJ agreeing) held that:[32]

> "It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment."

2.29 If the offender is not able to pay the proposed fine, the Court should consider adjusting the amount of the fine or consider using an alternative sentencing option.

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28. NSW Sentencing Council *How Best to Promote Consistency in Sentencing in the Local Court*, 2004
29. See for example Victorian Sentencing Manual at paragraph 7.7.1
30. See *Milne* (1982) 4 Cr App R (S) 397; *Taylor* (1984) 6 Cr App R (S) 394; *Fyfe* (1985) 40 SASR 120; *Skipper* (1992) 64 A Crim R 260 (CCA WA) *Bell* 9/8/1990 CCA Vic, *Crawley* (1981) 5 A Crim R 451 (FCA) at 456 – all referred to in the *Victorian Sentencing Manual* at 6.3 http://www.justice.vic.gov.au/emanuals/VSM/default.htm
31. See for example section 5 of the *Crimes (Sentencing Procedure) Act 1999*
32. *R v. Rahme* (1989) 43 A Crim R 81 at 86

2.30 Legislative constraints requiring the Court to consider an offender's circumstances before imposing a sentence have existed in NSW since 1985.[33] Section 6 *Fines Act 1996* requires the Court to take into account the offender's financial circumstances before sentencing, but only where the information is reasonably and practicably available to the court for consideration. Although section 33(1) *Children (Criminal Proceeding) Act 1987* places a limit on the court insofar as it can only impose a fine up to but not exceeding 10 penalty units, it does not specify the factors to be taken into consideration when fixing the amount of the fine.

The excessive fine

2.31 There is some authority to suggest that an excessive fine that will never be paid may be permissible on the basis of its deterrent effect. However, such authority arises from a unique situation. A prisoner, serving a life sentence and with an income of $12 per week and debts in the order of $400,000 was fined $60,000 for contempt of court when refusing to give evidence in a murder case. The majority held that the fine was permissible as it was a serious case of contempt and justice required that it be seen to have an appropriately serious punishment. In the circumstances an additional gaol sentence would have served no purpose.[34]

2.32 In a dissenting judgment Kirby J recognised that there is a "deep rooted and understandable feeling" that the amount of a fine should reflect the "moral wickedness" of the conduct being punished, yet noted that this understandable sentiment imposes burdens, which, as a penalty, can have a disproportionate effect on the poor, unemployed and disadvantaged. His Honour observed that:

> The imposition of a fine which is totally beyond the means of the person fined and which the Court, the prisoner and the community realise has no prospect whatsoever of being paid, does nothing for the deterrence of others. Such a fine is seen by the community for what it is: a symbolic act of the law without intended substance which neither coerces the particular prisoner nor convinces the community. The recent and beneficial move away from such charades in criminal punishment should restrain this

33. Section 80A of the *Justices Act 1902* was inserted in 1985. Section 440AB of the *Crimes Act 1900* was inserted in 1989. Both sections were in similar terms to section 6 of the *Fines Act 1996*, and both were repealed when the *Fines Act 1996* commenced.
34. See *Smith v. The Queen* (1991) 25 NSWLR 1 per Mahoney and Meagher JJA, Kirby P dissenting.

> Court, in punishment for contempt, from proceeding against the appellant in this way." [35]

2.33 A similar reservation was made by Dr Clive Hamilton, who observed in relation to penalty notices for traffic offences, that

> "no-one would argue that rich people should receive shorter jail sentences or have fewer demerit points deducted than poor people. Yet the system of flat rate fines... is grossly unfair in just this way" because a particular quantum of fine is bound to impose much more pain on a low-income earner."[36]

Payment by third parties

2.34 Generally it will be incorrect in principle to set a fine on the basis that it can and will be paid by a third party, such as an employer,[37] on the grounds that the fine will serve neither as a punishment or as a deterrent to the offender.[38] However, a fine likely to be paid by a third party (such as a family member) may nonetheless be appropriate where it is likely to place the offender under a sense of obligation.[39]

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35. Per Kirby J at 21
36. Submission 2: Dr Clive Hamilton *Making Fines Fairer* The Australia Institute, Canberra (December 2004)
37. See contempt of court cases - *Hinch v AG* (VIC) [1987] VR 721; *R v Thompson* [1989] WAR 219
38. *R v Repacholi* (1990) 52 A Crim R 49; *Perez v R* (1999) 21 WAR 470.
39. *R v Rahme* (1989) 43 A Crime R 90

Advantages and Disadvantages of Fines

Advantages of Fines

2.35 Fines have long been popular with policy-makers. They are seen as:

- flexible;
- relatively cheap to administer (compared with community punishments and imprisonment);[40]
- felt to 'hit where it hurts most' (in the personal pocket);
- capable of serving the principles of retribution, rehabilitation and deterrence; and
- being more humane than prison in that they avoid the harmful effects of incarceration.

2.36 Submissions to the Council's Inquiry expressed general support for the use of fines.

2.37 Noting that they remain the most common form of sentence imposed in the Local Court, the former Chief Magistrate stated that fines remain an effective measure of punishment.[41] The Legal Aid Commission maintained that the current fines regime is an effective part of the sentencing armoury.[42]

2.38 While NSW Young Lawyers supported the option as part of the preservation of judicial discretion and independence of sentencing options, they saw fines as less effective than other options in that they fail to conform with the ideology of consistency in sentencing.[43]

Judicial views

2.39 A preliminary analysis of the survey distributed to magistrates by the Sentencing Council reveals that they accepted that fines have several advantages as a sentencing option.

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40. *OSR 2004-05 Annual Report* at p 2. $88 million was collected from SDRO fines, and $159 million from Infringement Processing Bureau fines.
41. Submission 7: Former Chief Magistrate of New South Wales, His Honour Judge (now Justice) Price.
42. Submission 17: NSW Legal Aid Commission - Accompanied by appropriate publicity, the imposition of a fine can be a means of controlling illegal conduct, and by causing 'some hardship' to the offender, can have a deterrent effect.
43. Submission 12: NSW Young Lawyers. The varied income status of offenders can lead to disproportionality in fines and disproportionality in punishment compared to the offence committed.

2.40 Magistrates reported that they believed that fines:

- achieve the goals of sentencing;
- are flexible - universally applicable / easy to apply / immediate and fast;
- useful for property or greed crimes;
- enable consistency while reflecting the seriousness of an offence;
- are the least intrusive and moderate option for minor offences; and
- act as both a personal and general deterrent.

2.41 The fine was generally seen an effective sentencing option where a person is convicted of a fairly trivial offence for which a court does not consider any other sentencing option to be appropriate. In such cases, the imposition of a fine satisfies sentencing theory and permits the offender to dispose of the matter in a relatively short period of time and without any curtailment of their liberty.

2.42 However, some respondents qualified their statements, noting that a fine may be the only option available or suitable, especially for absent defendants, or noting that it was 'better than gaol' and an advantage for that reason alone.

Disadvantages of Fines

2.43 Fines are also seen to possess significant disadvantages, in that they

- carry a potential for unfairness and perverse effects when imposed on persons with reduced financial means;
- can be associated with considerable collection and enforcement difficulties;
- are expensive to enforce – that is, it is questionable, on economic grounds alone, to use a method of enforcement which costs several times more than the value of the fine);[44] and
- carry a risk that the requirement to pay a financial penalty will simply encourage other acquisitive crime.[45]

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44. Economic models have assumed fines are cost effective, but this generally ignores problems of fine enforcement and assumes all fines are collected at no cost: Lewis, Donald E (Uni of Wollongong) 'A Linear model of fine enforcement with application to England and Wales' *Journal of Quantitative Criminology*, Vol 4 No 1 1988

Judicial views

2.44 Respondents to the Council's judicial survey identified a number of disadvantages of the fine as a sentencing option, including:

- The adverse impact on family or dependents;
- The unevenness of a financial burden caused by the differential between the rich and poor offenders;
- The impact of a relatively inflexible penalty regime when imposed on those with special disabilities, such as a mental illness;
- Problems with the SDRO and RTA inflexible procedures; and
- Practical difficulties in contesting fines and in obtaining time to pay.

Adverse effects of default

2.45 A number of respondents drew attention to the fact that fines have the potential to have extreme adverse effects if unpaid, noting that the ramifications of default are not always understood either by offender or by the Bench.

2.46 Licence suspension issues in particular proved a concern to respondents, specifically, the commission of further offences arising when suspended drivers find it necessary to drive by reason of work or family emergencies. Almost half noted that the failure to pay a fine can lead, by fine default, to licence suspension and catastrophic consequences, such as the commission of driving offences unrelated to the fine offence, and the potential escalation towards imprisonment.[46]

Inability to enforce fines

2.47 The inability to enforce fines, due to defaulters' poverty or unwillingness to pay, was regarded as a negative aspect of the sanction.

2.48 Magistrates complained that they are often faced with the choice of adjusting the fine so it becomes so small that it fails to reflect the offence or community attitudes and thus brings the sentencing system into disrepute, or imposing a fine of such severity that family and dependents are harshly penalised, and which leads to subsequent breaches, even prison.

2.49 It was generally agreed that fines imposed on an offender with no capacity to pay are absolutely useless as a penalty.

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45. Significantly, 49 percent of people who commit do crime do so to pay off debt – see Stringer, Anne, *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc Queensland 1999.
46. Judicial Survey 1; 4; 5; 8; 10; 13; 14 and 17.

Impact on marginalised sections of the community

2.50 The majority of submissions and consultations cautioned that the legitimacy of the fine is nullified when imposed on a person who lacks the capacity to pay.[47] The imposition of a large fine on an already disadvantaged person simply opens the door to excessive interaction with the criminal justice system, with consequent negative impacts for family life, employment, individual morale and often, the wider community.[48] This was consistently reflected in consultations undertaken with local courts, police, legal officers, community and agencies in each of the four regional centres visited by the Sentencing Council.[49]

2.51 The Law and Justice Foundation's comprehensive survey of legal need amongst disadvantaged populations has established that socio-economic disadvantage is associated with increased vulnerability to legal problems.[50] Compounding their inherent disadvantage, respondents were very unlikely to seek or to receive legal advice. Traditional legal advisers, such as private lawyers, local courts, Legal Aid NSW, LawAccess NSW, Aboriginal legal services and community legal centres (CLCs), were used very rarely — in only 12 percent of cases where help was sought. Barriers to obtaining assistance were reported in relation to almost two-fifths of the events where participants sought help. The report also noted that credit and debt problems were common, ranking as the eighth most common legal problem experienced by respondents.

2.52 A number of submissions noted that members of disadvantaged groups are especially susceptible to incurring fines and even more so in the case of 'on the spot' fines or penalty notices imposed by transit officers and police.[51] Contesting fines or obtaining time to pay may be difficult, stressful and time consuming, requiring literacy skills and self-confidence. For people living in poverty or who are otherwise

47. Submission 4: Commission for Children and Young People; Submission 5: The Salvation Army; Submission 8: NCOSS; Submission 10: Uniting Care; Submission 13: The Shopfront Legal Centre; Submission 15: Youth Advisory Council; Submission 19: The Coalition of Aboriginal Legal Services (COALS); Submission 20: Youth Justice Coalition; Submission 21: Combined Communities Legal Centre Group (NSW) Ltd; Submission 24: Anonymous prisoner, Mid North Coast Correctional Centre; Submission 25: Anonymous prisoner, Mid North Coast Correctional Centre.
48. Submission 18: The South Eastern Aboriginal Legal Service (SEALS).
49. Annexure B: Consultations List. Consultations were held in Kempsey, Lismore, Dubbo and Broken Hill.
50. The Law and Justice Foundation, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* 2006.
51. Submission 21: Combined Communities Legal Centre Group (NSW) Ltd.

disadvantaged, the prospect of facing multiple court dates and venues to deal with outstanding charges can be daunting.

2.53 This is especially the case for people who may already face other legal, social and economic problems in addition to their potential fines. People with little hope of being able to afford to pay their fines are subjected to lengthy delays as the fines collection process runs its course, in order to access the option for community service as an alternative to financial penalties. Additionally, there are limited accessible options for non-financial penalties to be imposed.[52]

Multiple disadvantage

2.54 The adverse consequences of a fine are most keenly evidenced when it is imposed on an offender experiencing multiple disadvantage, whether homelessness,[53] intellectual disability or mental illness,[54] Aboriginality,[55] State care[56] or imprisonment.[57]

Young people

2.55 Young people are at particular risk of incurring fines,[58] particularly if they are homeless or a member of an otherwise disadvantaged group.

2.56 Noting that many young offenders come from financially disadvantaged backgrounds and that poverty is often one of the root causes of their offending behaviour, the Australian Law Reform Commission and the Human Rights & Equal Opportunity Commission argued that serious questions as to the appropriateness of fines as a sentencing option for juvenile offenders remain.[59]

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52. See too: PIAC / PILCH *Not Such a Fine Thing*, Public Interest Advocacy Centre 2006;
53. Submission 16: Public Interest Advocacy Centre (PIAC);
54. Submission 27 Office of the Protective Commissioner / The Public Guardian; Submission 29 Department of Ageing, Disability and Homecare (DADHC); Submission 40: Department of Corrective Services;
55. Submission 18: South Eastern Aboriginal Legal Service (SEALS); Submission 19: Coalition of Aboriginal Legal Services (COALS);
56. Submission 6: The Positive Justice Centre.
57. Submission 25: Office of the NSW Ombudsman.
58. The NSW Law and Justice Foundation, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Sydney 2005 - While young people aged 15 to 24 years constitute only 14 percent of the population in NSW, in 2002 14 to 24 year olds received approximately 35 percent of fines.
59. The Australian Law Reform Commission / Human Rights & Equal Opportunity Commission, Report No: 84 *Seen and heard: Priority for children in the legal process*, 1997.

NSW Children's Court

2.57 The NSW Children's Court hears the majority of criminal charges brought against young people. Its jurisdiction extends over all offences, except certain driving matters and 'serious indictable offences' such as homicide, certain serious sexual offences and matters which involve imprisonment for life or 25 years or more.[60]

2.58 The Court advised that it has reduced its reliance on fines in the children's jurisdiction in recent years, in the belief that fines are an inadequate deterrent, and out of concern that sanctions may actually accelerate or add to the seriousness of an offence. Young people, the Court argued, are less likely to be able to pay a fine, less likely to understand the consequences of non-payment, less likely to make payment arrangements, and are therefore more likely to incur additional expenses.[61]

2.59 The Shopfront Legal Centre submitted that the imposition of fines on young people generally fails to achieve accepted sentencing purposes, adding that the deterrent value of the penalty is questionable given that offending is not generally the product of rational choice, and rehabilitation is often undermined by the imposition of the fine itself, which pushes people beyond their capacity. Shopfront argued that the imposition of fines on young people without the capacity to pay conflicts with principles of s6 *Children (Criminal Proceedings) Act* and called for the *Fines Act* to be amended accordingly.[62]

Payment by third parties

2.60 While not contesting the general importance of the fine as punishment, several submissions stated that its deterrent value is eroded if the penalty is borne by an offender's parents or guardian.[63] For that reason a number of Government agencies indicated that they expected the responsibility for payment to be placed squarely on the child or young person under their care.

2.61 The Department of Community Services' policy, for example, is that

> "wherever possible, payment of fines should remain with the child or young person – to assist them understand the

60. *Children's Court Act* 1987 (NSW) and *Children and Young Persons (Care and Protection*) Act 1998 NSW sections 3, 7, and 28.
61. Submission 3: Snr Children's Magistrate Scott Mitchell; Similar concerns were expressed in Submission 13: Shopfront Legal Centre; Submission 15 Youth Advisory Council; Submission 20: Youth Justice Coalition
62. Submission 13: Shopfront Legal Centre.
63. Submission 3: Senior Childrens Magistrate, NSW Children's Court

> implications of their actions and prevent them from re-offending. The policy requires staff to discuss the fine with the young person so as to inform them of their responsibility to meet payment, and may include arranging for payments by instalments....Where a carer pays the fine, the carer is encouraged to negotiate with the child or young person for them to repay the fine." [64]

Fine default and licence sanctions

2.62 Other submissions highlighted the inevitable relationship between a young person's inability to obtain a drivers licence as a result of fines accumulated as a child, together with the subsequent likelihood of secondary offending and possible imprisonment.[65] For example, Magistrate Hamilton of Dubbo Local Court noted that it is not uncommon for people to come to court unlicensed for things accumulated while they are juveniles. Youth and people with no prior traffic matters are coming before court, he stated, primarily because of unpaid fines.[66]

Fine default and imprisonment

2.63 The Commission for Children and Young People[67] noted the existence of laws that protect juveniles who commit minor crimes. For example, section 210 *Criminal Procedure Act* allows a court to use children's criminal sentencing options when dealing with juveniles on traffic offences, including restricting courts from imposing a sentence of imprisonment on a young person found guilty of a traffic offence. The Commission submitted that the present law provides an ineffective deterrent that is especially onerous for young people, and was vehemently opposed to the idea of imprisonment as punishment for young people who do not pay fines, regardless of the circumstances.

2.64 The Shopfront Legal Centre recommended that the *Fines Act* be amended so that a fine defaulter cannot be imprisoned for a fine incurred for an offence committed when under the age of 18, irrespective of their later offences. This would require an amendment to section 92(2) of the *Act*.

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64. Submission No 33: Department of Community Services (DOCS). Comparable polices were referred to in Submission 29: Department of Ageing, Disability and Homecare (DADHC); and Submission 31: Department of Juvenile Justice.
65. Submission 3: Snr Children's Magistrate Scott Mitchell; Submission 4: NSW Commission for Children and Young People; Submission 13: Shopfront Legal Centre; Submission 15 Youth Advisory Council; Submission 20: Youth Justice Coalition.
66. In consultation Dubbo Local Court, 7 August 2006.
67. Submission 4: NSW Commission for Children and Young People.

2.65 The Council notes that the Department of Juvenile Justice has advised that it is not aware of any juvenile sentenced to detention for fine default, although a number of its clients in custody or under community supervision do have fines – either for unrelated matters or imposed concurrently with their term of incarceration. The Department advised that in 2004/05, 1589 fines (worth $283,877) were imposed on Departmental clients.[68]

Data limitations

2.66 Many of the agencies were unable to provide details on the numbers or quantum of fines imposed on clients in their care.[69] Given the importance many submissions and consultations placed on identifying the characteristics of fine defaulters as a means to better enforcement of fines, this information would seem worthy of collection.

Aboriginal People

2.67 Submissions noted that while fines may be an effective sentencing option for those with the means and inclination to pay and an interest in avoiding consequent drivers licence sanctions, fines are not very effective for people on limited incomes who cannot afford to pay them.[70]

2.68 The Council was advised that the clients represented by Aboriginal Legal Services and the Legal Aid Commission are universally poor, generally either in receipt of social security benefits or receiving no income at all. This is supported by research conducted by the Aboriginal Justice Advisory Council (AJAC) which found that 42 percent of the Aboriginal women surveyed stated that they did not receive a formal income, including any social or welfare payments, prior to entering gaol, indicating a significant level of poverty among Aboriginal women that is not being addressed through the current welfare system.[71]

2.69 However, as the Western Australia Law Reform Commission has recently identified, the extent of indigenous poverty may not be reflected in the level of fine imposed on Aboriginal people.[72] It was further submitted that the practice of imposing court costs for each

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68. Submission 31: NSW Department of Juvenile Justice.
69. Data restrictions were noted by the Office of the Public Guardian / Protective Commissioner (Submission 27) Department of Community Services (Submission 33) and the Department of Corrective Services (in consultation).
70. Submission 18: South Eastern Aboriginal Legal Service (SEALS).
71. Lawrie, Rowena *Speak Out Speak Strong: Researching the needs of Aboriginal women in custody*, Aboriginal Justice Advisory Council, 2002.
72. The Western Australian Law Reform Commission Discussion Paper*: Aboriginal Customary Law* (2005).

offence rather than imposing a single penalty for all minor offences heard at once, adversely impacts upon impecunious Aboriginal offenders.[73] Imposed without a real attempt to examine the financial circumstances of each defendant, fines may only serve to further increase indirectly the incarceration rate of Aboriginal people.[74]

Traditional practices

2.70 It was submitted that the high fines or penalties associated with traditional Aboriginal practices such as fishing means that a single offence can impose a significant financial burden and lead quickly to default.[75] For example, shucking abalone carries a fine of 50 penalty units or $550, while possessing in excess of the fish bag size incurs up to 100 penalty units or a $1100 fine.

2.71 The Council notes that the lack of community-based sanctions for such offences has been the subject of adverse comment by AJAC[76] and that the NSW *Fisheries Management Act* is the subject of a constitutional challenge on the basis that it contravenes the free exercise of Aboriginal spiritual and religious beliefs and practices.

Driving without a licence

2.72 Aboriginal people are also at a risk of incurring substantial fines arising from driving without a licence. According to consultations, driving unlicensed is a far more prevalent offence in each of the regions visited than other driving offences. The offence is especially common among young people, who as they are seldom working, lack the means either to pay for a licence or the fine imposed for not having a licence.[77]

2.73 According to the Western Aboriginal Legal Service (WALS) an unpaid fines or penalties history means Aboriginal people have no chance of gaining a licence, and so they do not even apply.[78]

2.74 Other significant barriers to gaining a licence identified in submissions[79] include:

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73. Submission 18: South Eastern Aboriginal Legal Service (SEALS).
74. Submission 19: Coalition of Aboriginal Legal Services (COALS).
75. Submission 18: South Eastern Aboriginal Legal Service (SEALS).
76. Aboriginal Justice Advisory Council (AJAC) *Caught Hook Line and Sinker: Incorporating Aboriginal Fishing Rights into the Fisheries Management Act*' NSW 2003
77. In consultation, Aboriginal Legal Service Solicitor Rebecca Simpson, Lismore 12 July 2006.
78. In consultation, Aboriginal Legal Service Solicitor Richard Davies, Dubbo 7 August 2006.
79. Submissions 50 and 52 'On the Road' Lismore Driver Education Program.

- the lack of valid identification (many people do not have a birth certificate and lack awareness of how to obtain one);
- lack of funds to pay for driver knowledge handbooks or driving lessons;
- limited literacy and computer literacy levels; and
- high levels of illiteracy.

2.75 The almost complete lack of access to roadworthy vehicles in which to learn to drive and an absence of licensed drivers willing to provide the 50 hours driving practice required by the NSW graduated licensing scheme is also a significant impediment to young Aboriginal people gaining a licence. The remoteness and lack of transport however, means that they will drive anyway, running the risk of incurring serious driving-related charges.[80]

2.76 In consultations conducted throughout the State, participants were united in their assertion that if the risk of serious driving offences is to be averted, much more needs to be done to ensure young Aboriginal people obtain and retain their drivers licence, for example, by introducing greater flexibility in the enforcement system.

Inflexible hierarchy of default sanctions

2.77 It was submitted that the inflexible hierarchy of fine default sanctions negatively impacts on Aboriginal people. The imposition of driving sanctions for fine default in areas where limited or unreliable public transport means people will drive regardless, may lead to consequent driving offences being committed. This lengthens an offender's criminal history, which in turn results in the imposition of progressively harsher penalties until imprisonment is inevitable.[81]

Community based sanctions

2.78 The lack of appropriate infrastructure in areas where Aboriginal communities tend to reside mean that alternatives to fines, driver licence sanctions or imprisonment may not be available.[82]

2.79 The NSW Sentencing Council has previously noted that the lack of viable community-based sanctions has a disproportionate effect on

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80. In consultation, the Mid North Coast Correctional Centre Community Offender Services, Kempsey, 6 July 2006
81. Submission 19: Coalition of Aboriginal Legal Services (COALS).
82. Submission 19 Coalition of Aboriginal Legal Services (COALS); Legislative Council, Standing Committee on Law and Justice Legislative Council, Standing Committee on Law and Justice 'Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations' *Final Report* March 2006

Aboriginal people, and may account in part, for the over-representation of Aboriginal people serving short custodial sentences.[83]

2.80 In recognition of the adverse impact on Aboriginal communities, the Dubbo Circle Sentencing Court deliberately attempts to stay away from imposing fines on offenders. The Circle Elders advised that fines impact negatively on an offender's family and wider community, who share the financial burden of repayments and suffer the consequences of licence loss upon default. As a consequence, the imposition of a fine tends to impede the reunification of families, jeopardising the Circle's primary objective of achieving an offender's rehabilitation.[84]

2.81 According to a recent review of Circle Sentencing in NSW, Circles imposed fines relatively rarely – in only 2 of the 13 offences analysed. A community service order was seen as more appropriate.[85] The case studies indicate that Circle may provide a useful way to incorporate solutions to outstanding fines for Aboriginal offenders.

Impediments to payment

2.82 Data limitations (discussed elsewhere in this Report) have meant that the Council has been unable to determine conclusively the extent to which Aboriginal people are more likely to default on fine payments than others in the community. What is certain is that Aboriginal offenders are confronted with a number of impediments to successful payment of their fines or penalty notices.

2.83 Illiteracy, for example, presents an extremely problematic barrier to payment, particularly when the fine or penalty may stem from fairly inconsequential offences (such as riding a bike without a helmet). Unable to read the penalty notice, unlikely to seek legal or financial advice or assistance, and lacking the means to pay, the matters invariably accumulate until fine default licence sanctions apply.[86] Itinerant lifestyles and homelessness increase the likelihood of fine-accumulated debt[87] and may account in part, for the reportedly high proportion of Aboriginal people convicted in their absence.

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83. NSW Sentencing Council, *How Best to Promote Consistency in the Local Court*, 2004 at 58ff; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less: Final Report*, 2004 at 15.
84. In consultation, Dubbo Circle Sentencing elders Paul Taylor and Russell Ryan, and Project Officer Ken Clark, 7 August 2006.
85. The NSW Judicial Commission and the Aboriginal Advisory Council, *Circle Sentencing in New South Wales- A Review and Evaluation*, 2003
86. Submissions 50 and 52 'On the Road' Lismore Driver Education Program; Submission 7: former Chief Magistrate His Honour Judge (now Justice) Price; in consultation Yaegul Yelgun CDEP, Lismore; Kempsey Local Court; Richmond Valley Local Council; Dubbo Police; Broken Hill Police.
87. Submissions 50 and 52 'On the Road' Lismore Driver Education Program.

2.84 Historically, the imposition of fines on Aboriginal offenders has been a major factor in the over-representation of Aboriginal people in the prison population.[88] As one of the driving motivators behind the overhaul of the NSW fines regime was to eliminate imprisonment for fine default,[89] it would be of major concern if people can eventually find themselves imprisoned as a result of relatively minor offences for which imprisonment was considered inappropriate in the first place. Submissions argued that if fines only serve to increase the incarceration of Aboriginal offenders, even though indirectly, then they are rendered wholly ineffective as a sentencing option.[90]

People with an intellectual disability or a mental illness

2.85 People with an intellectual disability or a mental illness can be particularly disadvantaged by the imposition of fines or penalty notices. Commonly, they are unemployed and unable to deal effectively with the courts or the SDRO. As a result they face similar problems to the Aboriginal community, and commonly they incur a number of fines or penalties for minor street offences, attributable to their behavioural disorders, which they are unable to pay.[91] They also face the problem of insufficient advisory or support services.

2.86 Agencies mandated to provide assistance for people with intellectual disabilities and mental illnesses agreed that the lack of effective options for dealing with people with disabilities who come into contact with the criminal justice system is a major concern. The closure of institutions over the past 20 years and lack of support services has resulted in people with disabilities coming more into contact with the criminal justice system than should be necessary.[92]

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88. The NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96, 2000; Royal Commission into Aboriginal Deaths in Custody, *National Report* 1991; Houghton J *Fine Default* NSW Bureau of Crime Statistics and Research, 1984. See too Submission 19: The Coalition of Aboriginal Legal Services (COALS): in 2001-2002 Aboriginal people comprised over 75 percent of the Western Australian fine defaulter prison population.
89 Ms Lo Po' Minister for Fair Trading and Minister for Women, NSW General Assembly, Second Reading Speech, *Fines Bill*, 30 October 1996 – "The present system provides a number of non-custodial options in an attempt to avoid imprisonment. Accordingly, a high incarceration rate for fine defaulters can be taken as a failure of the system…the Government is very conscious of the need to keep defaulters out of prison as far as possible" at pg 5545.
90. Submission 19: Coalition of Aboriginal Legal Services (COALS).
91. In consultation, Julia Foulkes, Disability Services, NSW Department of Corrective Services, 21 June 2006
92. Submission 27: Office of the Protective Commissioner / Office of the Public Guardian.

2.87 While the agencies do not keep statistics on fines imposed on their clients by courts, they noted that there is little or no evidence that fines, or the consequent enforcement fees, work to deter these people from re-engaging in the behaviour for which the fines are imposed.[93]

2.88 The Department of Disability, Ageing and HomeCare advised that people with an intellectual disability may make poor choices about the use of income they receive (which is almost invariably income support received through the disability pension), especially if they are without family or carer support. They tend not to plan and generally demonstrate poor understanding of budgeting and the relative value of money, with the result that the fining exercise can be rendered meaningless. This lack of understanding, rather than reducing recidivism, may result in mounting debt, fine default and eventual incarceration for non-payment of fines for vulnerable individuals.[94]

2.89 The Department of Corrective Services advised that having a poor understanding of social norms leads to the commission of offences that commonly attract fines as a penalty. A tendency to be very 'easily led' by others, and failing to appreciate the difference between a friend and someone who is using them for personal advantage, can lead to involvement in more serious criminal matters. Poor communication skills have an impact on offences such as failure to appear and giving false information. People with intellectual disabilities may also lack an understanding of abstract concepts, ie whether something is only illegal if they are caught doing it.[95]

2.90 The Council was advised that the imposition of fines is likely to erode still further a disadvantaged group's access to positive engagement with the community. Even a trip to the movies or lunch in a cafe becomes an unthinkable luxury. The deficits in comprehension of the relative worth of the money they are forfeiting makes the fines fairly meaningless. Even where a client has the good fortune to be supported by their family through the process of charge and fine, the lack of understanding of the relative costs and the significance of their crime often robs the situation of any power to 'educate.[96]

93. Submission 27: Office of the Protective Commissioner / Office of the Public Guardian.
94. Submission 29: Department of Ageing, Disability & Homecare (DADHC).
95. Submission 40: Julia Foulkes, Disability Services, NSW Department of Corrective Services.
96. In consultation, Manager DADHC Behavioural Unit, Frances Roberts, NSW Department of Ageing, Disability and HomeCare, 12 April 2006.

2.91 The fact that there has been a fine can even be construed as a hostile act (particularly in the absence of adequate understanding of the relevance of the crime) and can lead to feelings of persecution.[97]

Penalty notices

2.92 As with illiterate and some Aboriginal offenders, many people with intellectual disabilities do not recognise the seriousness of 'on the spot' fines or penalty notices, and may not comprehend the nature of the process which they receive. As such, these penalties are often not recognised as involving anything more than a piece of paper that can be thrown away.

Intellectual disability and the courts

2.93 The Council was advised that:

> "Having read a lot of the sentencing comments that come through for our offenders, there is a misunderstanding on the actual impact that intellectual disability has on life. … sometimes people think they are being nice by giving a fine. Sometimes they are not, because that person doesn't have the capacity to pay it back."[98]

2.94 Historically, courts have tended to impose a fine on an intellectually disabled offender, in preference to a community service order, by reason of the difficulties that they have in accessing community-based options. Offenders with an intellectual disability

> "'have difficulty accessing community-based sentencing options due a major shortage of interventions to meet the criminogenic needs of such offenders. In addition, such offenders have difficulty accessing stable accommodation and stable supported accommodation, which hinders assessments for eligibility for community-based sentencing options.'" [99]

2.95 People with intellectual disabilities facing court for a criminal offence generally lack understanding of the criminal justice system and are often unable to understand what has occurred during the hearing. Support may not be available, and often solicitors have very limited contact with the offender prior to any hearing. Afterwards,

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97. In consultation, Frances Roberts, NSW Department of Ageing, Disability and HomeCare, 12 April 2006.
98. In consultation, Julia Foulkes, Disability Services, NSW Department of Corrective Services, 21 June 2006
99. Legislative Council, Standing Committee on Law and Justice '*Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations*' Final Report March 2006.

they may be unable to explain adequately what has occurred to their client, who may be unaware of the fine, irrespective of whether they have also been given paperwork.

> "They are basically getting 5 to 10 minutes with their Legal Aid solicitor, if that, prior to court. Most of them won't even acknowledge themselves that they have an intellectual disability, let alone inform their solicitor of it. The solicitors aren't trained enough in that area to be able to identify it. I have actually contacted solicitors - or, tried to - and tried to explain the situation, sent through faxes saying, "This person has an intellectual disability, could you please try to meet with them earlier or spend a bit more time with them before court?", and we don't have much success." [100]

Court Access Program

2.96 The Council notes that the Department of Corrective Services and the Criminal Justice Support Network are currently piloting a court access program for people with disabilities. The program provides court support for both victims and offenders with intellectual disabilities, to help them understand the court process.

2.97 The Council further notes the State Government's recent announcement of a $1billion funding package for the support of people with disabilities. This includes a component for post-release support for people with intellectual disabilities coming out of gaol and to a limited extent, those on external leave programs.[101] It would be helpful if this could be extended to offenders who would be likely to face significant difficulties if fined.

Homeless or itinerant people

2.98 This group shares many of the features of the last two groups surveyed and suffers from similar problems in accessing support services, in understanding the court procedures as well as the enforcement procedures, and in paying fines or penalties. Moreover the itinerant lifestyle, the nature of their offending and absence of any permanent home makes it difficult for the court or SDRO to remain in contact, with the result that commonly their fines and recovery expenses accumulate to a point where they can never be paid.[102]

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100. In consultation, Julia Foulkes, Disability Services, NSW Department of Corrective Services, 21 June 2006
101. In consultation, Department of Corrective Services, 21 June 2006.
102. Submission 13: Shopfront Legal Centre; Submission 15 Youth Advisory Council; Submission 20: Youth Justice Coalition, see too The NSW Law and

2.99 Homeless young homeless people (particularly those with a mental illness) are especially susceptible to receiving fines for transport, traffic and graffiti-related offences, such as ride a pushbike without a helmet; parking fines; smoking at a train station or speeding matters, and are particularly vulnerable to subsequent default and accumulated sanctions.[103]

Rural and remote areas

> "The impact of the use of fines is very different, both in Aboriginal communities and for low income workers in rural areas. The capacity to manage a fine is very, very different, particularly if it is tied to driving offences, where there is a big link. In the urban area, there is more leeway, because people can utilise public transport, if they buy a ticket - and a lot of our folk often don't. In the rural area, by and large, there is nothing, particularly in Aboriginal communities in more isolated areas, so it compounds." [104]

2.100 The Council undertook several consultations in four regional areas: Kempsey, Lismore, Dubbo and Broken Hill. Participants noted the definite disadvantage faced in the country in terms of restricted sentencing options and in the potentially harsh practical consequences of drivers licence and vehicle sanctions for the non-payment of fines, particularly those unrelated to motor vehicle offences.

2.101 It was stated that particular problems arise in rural areas by reason of the absence of public transport and the need to drive to maintain a job or to respond to emergencies. The loss of a licence through fine default further reduces the capacity to pay a fine and the inevitable result is an escalation of the offender's financial and family difficulties, which is only compounded if the offender continues to drive and becomes involved in secondary offending.

2.102 Discussions with judicial officers and court staff also suggested that there may be a relationship between geography and the penalty amount imposed. The Council was advised that magistrates from metropolitan areas tend to impose harsh fines for the first year that they preside in regional areas, and that they then gradually reduce the penalty severity as they grow to appreciate the financial reality of rural life.

Justice Foundation, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Sydney 2005.

103. Karras, M, E McCarron, A Gray & S Ardasinski, *On the edge of justice: the legal needs of people with a mental illness in NSW*, The NSW Law and Justice Foundation, Sydney, 2006.
104. In consultation, Barry Bell, Principal Advisor Families and Community, Department of Corrective Services, 21 June 2006.

2.103 In order to test this hypothesis the Council has asked the NSW Bureau of Crime Statistics and Research to determine whether fine amounts for particular offences vary according to region.

Community-based sanctions

2.104 The Sentencing Council has commented on the availability of community-based sanctions in its report on consistency in sentencing in the Local Court.[105] The Council found that geographic limitations exist despite all forms of community based sentencing options being legislatively available across the State. While theoretically available, in practice, alternatives to fines are limited.

2.105 The limitations on the availability of alternative sentencing options increases disparity in sentencing outcomes between different geographic areas throughout the State. The ability to achieve the purposes of sentencing in respect of a given case is adversely affected, which raises equity and fairness issues for the particular offender as well as holding longer term implications for the public at large. The desirability of consistency in approach is also undermined because not all magistrates are able to consider the full range of sentencing options. Consequently, residents of rural areas may receive more severe sentences than residents of Sydney metropolitan areas.

2.106 The recent Parliamentary Inquiry into community-based sentences confirmed the Council's findings, noting that the only community-based sentence available throughout NSW is unsupervised bonds.[106] This has particular implications for those offenders whose offending behaviour may result from the lack of other services in the community; people in full-time custody serving relatively short sentences of imprisonment, which may be in part the result of the lack of available alternatives; and young offenders.

2.107 Although alternatives to full-time imprisonment can help to prevent offenders from entering a lifetime of crime, the Council notes that the Department of Juvenile Justice has advised that the options for non-custodial sentences for juveniles (such as referral to a Youth Justice Conference or community based supervision) is limited in remote areas, although available in other areas of NSW.[107]

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105. NSW Sentencing Council, *How Best to Promote Consistency in the Local Court*, 2004 .
106. Legislative Council, Standing Committee on Law and Justice Legislative Council, Standing Committee on Law and Justice '*Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations*' Final Report March 2006.
107. Submission 31: Jenny Mason, NSW Department of Juvenile Justice.

2.108 The Council also notes recommendation 243 of The Australian Law Reform Commission / Human Rights & Equal Opportunity Commission, Report No: 84 *Seen and heard: Priority for children in the legal process*, 1997, which urged greater development and use of community-based sentencing alternatives for juvenile offenders.

Judicial views

2.109 Preliminary analysis of the responses to the Council's Judicial Survey has indicated a strong element of judicial unease regarding the restricted availability of sentencing options in rural areas.

2.110 A number of respondents indicated that they imposed a fine only because of the lack of sentencing alternatives. A significant proportion of respondents indicated that they would like to have the option of imposing bond-type sentences or community service orders for some defendants in lieu of fines, provided adequate supervision and community-based sanctions are realistically available. These responses suggest that magistrates are imposing fines in cases where they believe a fine is not the appropriate penalty.

2.111 It is important that the courts do not impose sentences that cannot be enforced. If magistrates are compelled to impose fines because no other options are available, even in cases where they know the fine is unlikely to be paid, this is likely to undermine community respect for the law and the court system.[108]

2.112 As Magistrate Zdenkowski warned, judicial attempts to avoid potentially unjust outcomes brought abut by undue severity, 'can in turn, lead to unjust outcomes because of excessive leniency', such as an over-reliance on section 10 orders resulting either in outright dismissal or a conditional discharge that avoids the usual consequences of a recorded conviction and sentence.[109]

2.113 Concern about systemic leniency in sentencing has previously prompted the Attorney General to request that the Court of Criminal Appeal deliver a guideline judgment for drink-driving (high range PCA). In its analysis of the impact of the guideline judgment, the Judicial Commission found a strong relationship between the location of the sentencing court and the use of s10 non-conviction orders for high-range PCA offences. Generally speaking, the use of s10 orders was higher for courts outside Sydney, due perhaps to the absence of viable transport in many NSW country and regional areas.

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108. See Poletti, Patrizia *Impact of the High Range PCA Guidelines Judgment on Sentencing Drink Drivers in NSW*, Potas (ed) in Sentencing Trends & Issues, Judicial Commission of NSW, No 35 September 2005.
109. Submission 55, Magistrate Zdenkowski, Katoomba Local Court.

2.114 The Council is currently examining this issue and will make further comment on the use of section 10s as alternatives to the imposition of fines in regional areas in its Final Report.

People in custody

> 'We do recognise the fundamental statement, I should say from the outset, that debt is a significant impediment for people staying out of custody. It is not just to do with fines but debt associated with all sorts of things, overpayments from Centrelink…or housing debt and those are the types of problems that really need to be addressed. We can put in place all of these programs for people in gaols to change the way they think and behave but, when faced with a very compromising situation, no matter how resilient they are on leaving, faced with no education, nowhere to live and no support then their prospects of staying out of gaol are very, very limited.'[110]

2.115 There is substantial evidence that people in custody come from backgrounds characterised by high levels of disadvantage, with limited eduction, histories of extensive drug use, abuse and social dislocation.[111]

2.116 They are likely to have unresolved legal matters that pre-date their incarceration, such as a history of debt due to unpaid fines or penalty notices. A series of Australian studies have established that 80 percent of people who come into custody come in with debts, while a further 25 percent accumulate debt when they are in there. Significantly, 49 percent of people who commit do crime do so to pay off debt.[112]

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110. In consultation, Assistant Commissioner Offender Services Luke Grant, 21 June 2006. Similar points were made in Submission 6: The Positive Justice Centre; Submission 25: NSW Ombudsman and Submission 30: The NSW Legal Aid Commission
111. Submission 6: The Positive Justice Centre; see too the NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, 2004; Butler & Milne, NSW Corrections Health Service, *The 2001 NSW Inmate Health Survey*, 2003; NSW Parliament Select Committee Inquiry into the Increase in Prisoner Population, *Final Report*, 2001.
112. See Stringer, Anne, *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc Queensland 1999; Stringer, Anne, 'Women Inside In Debt: The Prison and Debt Project' CRC Justice Support, *Women in Corrections: Staff and Clients Conference*, Australian Institute of Criminology / SA Dept of Corrective Services conference, 31 Oct-1 Nov 2000; Hyslop, Deirdre *Doing Crime to Pay the Fine: Prisoners and Debt, a Reintegration Issue*, NSW Department of Corrective Services, 2005.

2.117 Those in custody also face considerable barriers in meeting their legal needs while imprisoned, including:

- limited access to legal services;[113]
- limited access to common forms of communication such as telephones and the Internet;
- difficulty in accessing information and understanding official documents due to illiteracy;
- alienation from, and distrust of, the legal system; and
- low expectations of the system's capacity to provide redress for their wrongs or to recognise their rights.[114]

2.118 The Legal Aid Commission advised that there is no specific policy covering outstanding fines applications (whether by people in custody or by other members of the community). A person wishing to resolve outstanding fines, who has other Commission matters, might be granted 'minor assistance' – however, the assistance required can sometimes be time consuming and complex and the resolution of the issue may go beyond what the Commission regards as minor assistance. Fines assistance may be provided to those people with other matters for whom aid has been granted.

2.119 Submissions and consultations indicated that that it is common for prisoners to be released from custody owing large debts for fines and for penalties that were imposed prior to commencement of their sentence, with little or no ability to meet those payments. For people who, on release, will be facing problems arising from their earlier dislocation from family, and in securing employment, accommodation and re-adjustment, the added burden of carrying a large and on-going debt is only likely to set up a cycle of re-offending.

2.120 The Department of Corrective Services has advised that prisoners with a debt issue may be identified at three stages during their incarceration: [115]

- During initial reception assessments on admission to the correctional system;
- Further down the track in custody when their initial assessments are linked with information to make up a case plan for their management; and

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113. Submission 30 (Supplementary submission) NSW Legal Aid Commission
114. The Law and Justice Foundation *The Legal Needs of Prisoners and People Recently Released from Prison Background Paper*, 2005
115. In consultation, Department of Corrective Services, 21 June 2006

- Following self-reference (to a welfare officer for example) because something has gone wrong or the family at home can no longer assume the debt burden.

2.121 Identification at any stage of the process is essentially dependent upon a prisoner self-reporting a debt issue.

2.122 A more proactive approach that actively identifies debt history has been implemented for inmates with intellectual disabilities. For example, staff at 18 Wing Long Bay Correctional Centre obtain prisoners' general consent to run financial checks to determine whether a prisoner has a debt history, and with the prisoners involvement, negotiate repayment or indemnity from enforcement with the State Debt Recovery Office. [116]

2.123 A general extension of this approach would be of benefit.

Life After Debt, Responsibilities and Rights

2.124 The Department has advised that it is moving towards implementing a more systematic way of responding to prisoners' debt needs through a series of programs aimed at prisoners on entry to on exit from the system.

2.125 The Life After Debt project, a joint initiative with the Departments of Fair Trading, Housing and Industrial Relations; Centrelink and the Child Support Agency; the Office of State Revenue; RTA, Electricity and Water Ombudsman, and a range of non-government agencies, is designed to train prison welfare staff to identify and resolve debt and other issues.

2.126 Prisoners in all centres will have access to a DVD and face to face contact with key agencies on entry to custody, with the aim of addressing debt before it accumulates. Manuals will be translated into community languages and pamphlets will be placed in the visitor areas so that families can find out where to go for assistance.

116. In consultation, Julia Foulkes, Department of Corrective Services, 21 June 2006.

Court collection procedure

2.127 In summary, the procedures for paying a court imposed fine are as follows:[117]

(a) Court order

A fine imposed by a court is payable to the registry of the court within 28 days after it is imposed.[118] The court cannot grant additional time to pay beyond the initial 28 days as part of its order imposing the fine.[119]

(b) Notification of fine

The person on whom the fine is imposed is notified of:

- the fine;
- the facilities available for paying the fine; and
- the enforcement action that may be brought to enforce the fine, if it is not paid.

(c) Time to pay

A court registrar may allow further time to pay the fine on the application of the offender.[120] Current practice requires the offender to provide a good deal of financial information in support of the application.

(d) Enforcement order

If payment of the fine is not made by the due date, the registrar may allow further time to pay[121] or refer the matter to the SDRO for enforcement action.[122]

(e) Withdrawal of enforcement order

A court fine enforcement order must be withdrawn by the SDRO if an error has been made.[123]

In some jurisdictions other than NSW the court has the power to order time to pay or payment by instalments when imposing a fine.[124] In other jurisdictions a separate entity has such power.[125]

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117. Section 5 of the *Fines Act 1996*
118. Section 8 *Fines Act 1996.*
119. Section 7 *Fines Act 1996*
120. Sections 10 and 11 of the *Fines Act 1996*
121. Section 11 *Fines Act 1996*
122. Section 13 *Fines Act 1996*
123. Section 17 Fines Act 1996 – for example, if there was a mistake as to the offender's identity.
124. For example, Victoria and Queensland
125. For example, South Australia and the Northern Territory

Victims Compensation Levy and Court costs

Victims Compensation Levy

2.128 The Victims Compensation Levy[126] is a monetary charge imposed on offenders convicted of an offence that is punishable by imprisonment, irrespective of whether the offence is also punishable by another sentence (such as section 10 bond, a fine or a community service order). Provision for payment and enforcement of the levy is now made in the *Fines Act 1996*.

2.129 Currently, the levy is $70 when the person is convicted on indictment or pleads guilty under Division 5, Part 2, Chapter 3 of *Criminal Procedure Act 1986* (NSW), and $30 if the person is convicted otherwise. For people under 18, the Court in which the person is convicted can direct that the person is not liable to pay any victims compensation levy.

2.130 The levy is imposed in addition to any pecuniary penalties or orders for payment of compensation for the offence. For example, it is in addition to the compensation that the offender must pay, if the victim receives compensation from the Victims Compensation Fund. Its stated purpose 'is to force those persons committing criminal offences to make a personal contribution to the compensation of victims of crime.'[127]

2.131 Any money paid by the offender is to be applied towards discharging the levy, before it is applied to discharging any other pecuniary penalties.[128] The levy is paid into the Victims Compensation Fund, from which compensation is paid to victims under the *Act*.

2.132 The levy is imposed administratively, that is, it is imposed by executive act rather than by a court, however, it is taken to be a court imposed fine for the purposes of the *Act*.[129] Accordingly it is enforced as a court imposed fine by the Registrar, as an additional monetary obligation imposed on offenders.

2.133 If an offender defaults on payment of a victims compensation levy, the registrar is required to refer the debt to the SDRO.[130] On receipt of the referral the SDRO is to make a fine enforcement order in

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126. Established by ss 78 – 81 of the *Victims Support and Rehabilitation Act 1996* (NSW). It is imposed if the offence was dealt with by the Supreme Court, the District Court, the Drug Court, a Local Court or the Children's Court (section 78).
127. Second Reading Speech, *Fines Amendment (Payment of Victims Compensation) Act* 2006, NSW Legislative Council, 9 March 2006.
128. Section 79 *Fines Act 1996*
129. Section 4 *Fines Act 1996*
130. Section 13 *Fines Act 1996*

respect of the debt, in the prescribed form.[131] At this stage, an enforcement cost becomes payable to the SDRO. Enforcement costs are also payable to the RTA, or the sheriff, if these agencies take enforcement action in relation to the fine or levy before it is paid.

2.134 In March 2006 the NSW Parliament passed the *Fines Amendment (Payment of Victims Compensation Levies) Act 2006*, which empowers the Commissioner of Corrective Services to deduct a percentage of prisoners' earnings, and apply the amount to repay the prisoner's victims compensation levy debt. The Act also retrospectively deems any such enforcement action taken before the Act was passed to be valid.

2.135 Some submissions were critical of the administrative practice of imposing a prescribed and automatic levy on impecunious offenders, since its imposition is only likely to make it more difficult for the offender to meet his or her financial obligations, thereby increasing the likelihood of default and the possibility of the commission of further acquisition offences. For example, the South Eastern Aboriginal Legal Service observed that the levy does not allow a magistrate to consider whether the prescribed amount is just and reasonable for the offender's circumstances.[132]

2.136 In consultations, registrars noted that defendants are posing a particular problem for the court by failing to go to the registry after their court appearance. Consequently, these offenders are not receiving information about their liability to pay the victims compensation levy. Concern was expressed that offenders may end up as fine defaulters simply through failing to pay a victims compensation levy that they were not aware of their obligation to pay.[133]

Court costs

2.137 If an offender is convicted of an offence, including a conviction under section 10 *Criminal Procedure Act 1986* (NSW), the court may order that the offender pay court costs. The costs may include court filing fees and any other fees that the court considers just and reasonable in the circumstances of the case.[134] Court costs can be ordered against an absent defendant.

131. Section 15 *Fines Act 1996*
132. Submission 18: SEALS.
133. In consultation, Lismore Local Court 12 July 2006 and Broken Hill Local Court 9 August 2006.
134. Sections 215 *Criminal Procedure Act 1986*.

2.138 Summary matters in the Local Court currently incur a court cost of $67.[135]

2.139 Court costs are also defined as 'fines' for the purposes of the *Fines Act*.[136] If an offender defaults on payment of court costs, the registrar is required to refer the outstanding debt, including court costs, to the SDRO.[137]

2.140 While there were no criticisms of the policy reasons for imposing court fees, the practical effect of the policy, whereby magistrates can impose court fees for each offence, rather for each court date, was viewed as problematic. This was said to have the potential to significantly increase the offender's liabilities where he or she is charged with multiple offences, and it was recommended that orders be limited to one court fee per hearing, rather than one fee per offence.[138]

Judicial views

2.141 Preliminary analysis of the Council's Judicial Survey suggests that there are inconsistencies in the practice of magistrates in making costs orders. Fifty-five percent of respondents indicated they 'always' order court costs (while 20 percent of magistrates said that they 'often' impose court costs). In comparison, 10 percent of respondents indicated that they only 'sometimes' order court costs and 15 percent of the respondents stated they 'rarely' or 'never' order costs.

2.142 This discrepancy is likely to lead to inconsistent sentencing outcomes and inconsistent pecuniary burdens, particularly for low-income offenders who are convicted of more than one offence. Fees and levies set at a level that the offender cannot pay, or cannot pay within a reasonable time, are 'much less likely to be paid.'[139]

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135. Part 1, Schedule 3 of *Criminal Procedure Act 1986*
136. Section 4 *Fines Act 1996*
137. Section 13 *Fines Act 1996*
138. Submission 21: The Combined Communities Legal Centres; Submission 18: The South Eastern Aboriginal Legal Service (SEALS).
139. Challinger (1985) "Payment of Fines" in *Australian and New Zealand Journal of Criminology*, vol 18, pp95-108

Default rates

Court debt

2.143 Details of total outstanding court debt are included in the Attorney Generals' Department's annual financial reports to the Auditor General's Office.[140]

2.144 The Department maintains a record of total outstanding debt, comprising outstanding matters that have not yet been referred to the SDRO for enforcement as well as matters where fines are being paid through time to pay plans.

2.145 As at 30 June 2006 NSW local courts held $22,313,179 in unpaid debts. Unpaid fines accounted for approximately 84 percent of this amount (or $18,688,664). Victims compensation levies made up 12 percent ($961,886) and court costs accounted for approximately 4 percent ($2,661,629).[141] This does not include any fines, costs or levies already referred to the SDRO for collection during this period.

Data limitations

2.146 Informal advice from the Department indicates that courts fail to collect approximately 80 percent of all fines imposed.[142]

2.147 However, these figures do not convey an accurate indication of the default rate for fines imposed by the local courts. The figure includes fines imposed in the current financial year, as well as historic fines or fines from previous years that are still being managed through court registries. It is not known how many individual fines or individual defaulters this figure represents.

2.148 Moreover, while just over 56,500 fines were imposed as the principal penalty in the local courts in 2005,[143] it is not known how many fines were imposed as lesser consequential penalties or the proportion of these fines that subsequently led to default.

2.149 Individual courts were generally unable to provide the Council with comprehensive data on the number of fines imposed each year or on the number that they successfully collected, blaming inadequate data collection and analysis systems.

2.150 At the Council's request, Kempsey Local Court manually interrogated its court files for the past three years and reported that

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140. In consultation, Attorney Generals' Department.
141. Analysis of data provided by the Attorney Generals' Department, 15 August 2006.
142. In consultation, Attorney Generals' Department 28 July 2006
143. NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics* 2005.

default rates during that period had increased from 1 in 3 matters to 1 in 2.[144]

Table 1: Kempsey Local Court Referrals to the State Debt Recovery Office

Year	Fines imposed	Matters referred to SDRO	%
2006	743	341[145]	46%
2005	1634	867	53%
2004	2166	883	41%
2003	2103	726	35%

2.151 Lismore Local Court estimated that it imposes 200 fines a month on average, of which 150 matters or 75 percent, are referred to the SDRO for follow-up enforcement.[146]

Court debt referred to the State Debt Recovery Office (SDRO)

2.152 Outstanding court debt, including unpaid court-imposed fines, is eventually referred to the SDRO for enforcement.

2.153 As at 30 June 2006 the SDRO held $291m in unpaid local court-related debt,[147] of which $245m was due to unpaid court fines.[148] The remaining $46m comprised uncollected court costs and victims compensation levies.

2.154 Money collected from court fines by the SDRO is directed to Consolidated Revenue. Recovered court costs and victims compensation levies are returned to the Attorney General's Department via monthly transfers, in the form of a lump sum. The Department does not reconcile the amount received with records relating to individual debtors.[149]

Data Limitations

2.155 The Attorney General's Department has advised that it does not maintain a record of the amount of court fines that are collected, or remain uncollected, by the SDRO. Nonetheless, its assessment is that court-imposed fines have a lower recovery rate than that for penalty notices.

144. In consultation, Kempsey Local Court, 5 July 2006.
145. As of July 2006 – incomplete year.
146. In consultation, Lismore Local Court, 12 July 2006.
147. Of which $222.8m was GLC referred debt and $68.2m PES referred debt.
148. Information supplied by Attorney Generals' Department, 15 August 2006.
149. Information supplied by Attorney General's Department 15 August 2006.

2.156 The precise figure is the subject of some uncertainty: the Council was informally advised that approximately 15 percent of court fines are recovered,[150] whereas the SDRO has assessed a collection rate of approximately 25 percent for the estimated 78,000 court-imposed fines which it processes, mainly due to the poor level of contact information supplied by the courts.[151] This is compared with a recovery rate of just over 26 percent of the 2.6 million penalty notices referred to the SDRO for the same period.[152]

150. In consultation, Attorney General's Department.
151. In consultation, SDRO 13/10/06. See too Submission 34: The State Debt Recovery Office: for the period 2004-05 78,225 court fine enforcement orders were issued. Of these, approximately 24 percent or just under 19,000 were paid in full. 4,700 time to pay arrangements were entered into (involving at least one court-imposed fine) and 1099 such arrangements were breached.
152. Information supplied by Fine Enforcement Branch, State Debt Recovery Office, 22 September 2006 and confirmed in consultations 13/10/06.

Problems Identified in Courtroom Practice

2.157 For the purpose of the Interim Report, this discussion is confined to matters dealt with in the Local Court. Fines imposed elsewhere in relation to land and environment matters and occupational health and safety breaches will be dealt with in the Final Report.

Absence of obligation to assess means and capacity to pay

2.158 Very often insufficient attention is given to the offenders' means to pay a fine, either because the offender is dealt with in absentia, or insufficient information is given, or the pressures of court lists do not allow sufficient time for attention to be given to this issue. Absent evidence as to the limited means of the offender, insufficient attention can be given by the court to using an alternative sentencing option.

2.159 Under section 6 *Fines Act* 1996, a court is required to consider the financial circumstances of the offender only in so far as the information is reasonably and practicably available to the court. There is no positive requirement on the court to undertake any investigation or verification of an offenders' financial capacity.

2.160 A similar qualification is found in Scotland: under s211(7) of the *Criminal Procedure (Scotland) Act 1995*, in determining the amount of any fine to be imposed the courts must take into account, among other things, the offender's means 'so far as known to the court'.

2.161 This has been criticised by the Sentencing Commission for Scotland, which commented

> "although sentencers are required to take an offender's means into account in determining the amount of fine to impose, this is only to the extent that information is known to the court. Evidence of means, such as benefits statements, wage slips and bank statements, together with vouched evidence of outgoings, is rarely available to the sentencer. The sentencer must base his or her judgment on the information that is before the court without having the opportunity to have it verified. In the day to day reality of sentencing, therefore, sentencers give what consideration they can to the income of individual offenders when they first appear in court for sentence but the information that is available in this regard is, more often than not, limited and unverified.[153]

153. The Sentencing Commission for Scotland, *Report: The Basis on which Fines are Determined*, 2006 at para 5.1 pg 23.

2.162 In contrast, South Australian legislation imposes a positive duty on the court *not* to impose a fine where the court is satisfied that the means of the defendant are such that they would not be able to comply with a fine, or where compliance would cause undue prejudice to the welfare of the defendant's dependants.[154] The court is not obliged to inform itself about the defendant's means, but is should consider any evidence tendered by the prosecution or defence.[155]

2.163 The Act also provides that, in situations where an offender cannot afford to pay both a fine and a compensation payment, priority must be given to compensation for victims.[156]

2.164 The qualification in NSW legislation has been criticised in a number of submissions received by the Sentencing Council as being unnecessary and overly cautious, resulting in:

- Inadequate and inconsistent consideration of offenders' circumstances within each Court and across the board;
- Sentences being imposed that are inappropriate to the offender's circumstances, especially their financial circumstances; and
- An increased likelihood that the offender will default, leading to loss of licence and potentially to imprisonment for subsequent drive whilst disqualified offences.

2.165 It was also said to have an adverse impact on the rehabilitation of prisoners, many of whom are released from custody with a heavy debt still owing to the SDRO.[157] There is strong evidence 'that an unmanageable debt burden is associated with an increased risk of recidivism', with one study finding that forty-nine percent of prisoners interviewed said that they had committed crime to repay debt.[158]

2.166 The Scottish practice is one in which there is a process of negotiation between the sheriff and the offender in relation to the amount of a fine and terms for payment.[159]

2.167 In some cases in NSW where the offender is represented submissions are entertained by the court regarding the fine amount or repayment schedule, based on the minimum amount which it is

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154. Section 13(1) *Criminal Law (Sentencing) Act 1988* South Australia
155. Section 13(2) *Criminal Law (Sentencing) Act 1988* South Australia
156. Section 14 *Criminal Law (Sentencing) Act 1988* South Australia
157. Submission 25: NSW Ombudsman.
158. Hyslop, Deirdre *Doing Crime to Pay the Fine: Prisoners and Debt, a Reintegration Issue*, NSW Department of Corrective Services, 2005 at pg 7.
159. Young, P. (1989) 'Punishment, Money and a Sense of Justice' cited in The Scottish Commission for Sentencing Report: *The Basis on which Fines are Determined*, 2006 at para 5.4 pg 24

understood the court will find acceptable, although it does not always reflect what the defendant can afford.

2.168 Given the time constraints faced by most magistrates, it appears to be rare for extensive inquires to be undertaken as to the defendant's financial capacity. Consultations and judicial survey responses note that lack of court time is a main cause of the Court's failure to inquire about the offender's circumstances.

2.169 Faced with the problem of a lack of financial information provided by defendants, especially when dealing with absent defendants, the *Courts Act 2003* (UK) introduced an offence of failing to provide information to the court on financial means. Ironically, failure to supply this information is punishable with a maximum penalty of a 500 pound fine.[160]

2.170 However, the Council is of the view that this has a potential for increasing the potential debt burden of offenders, and is likely to be an occasion for considerable difficulty in compliance for the marginalised offenders, unless, for example, production of a Centrelink or Health Care card was accepted as sufficient compliance.

Lack of knowledge of outstanding fines and penalties

2.171 It became apparent from the Council's inquiries that the courts make little attempt to check administrative records of existing fines and penalty notices before imposing new fines, despite the fact that many defendants are 'regulars' well known to the court, and despite the courts' acknowledgment of the enforcement problems created by the accumulation of multiple fines and penalties for different offences.

2.172 Community Offender Services have advised that outstanding fines are sometimes detected when a pre-sentence report is being prepared for a court, at which point inquiries and recommendations can be made as to the offender's capacity to pay.[161] This is entirely dependent on the offender volunteering the information and being aware that he or she has outstanding fines or penalties.

2.173 Preliminary analysis of the Council's judicial survey shows that magistrates do not routinely ask an offender for information about current fines and penalties. Only a minority of respondents (45 percent) indicated that they 'regularly' or 'sometimes' ask offenders whether they have outstanding fines, otherwise they are dependent on court records or on the information being volunteered from the Bar table.

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160. Section 95 *Courts Act 2003*
161. In consultation, Community Offender Services, Department of Corrective Services, 21 June 2006.

2.174 Some respondents questioned whether the existence of prior unpaid fines was a relevant factor in sentencing.[162] However, a number of responses to the Council's survey by magistrates indicated that they would decrease a fine or impose a section 10 bond if the offender was shown to be unable to afford to pay a fine.

2.175 At least one magistrate identified the value of having ready access to such information, noting that in the UK 'the Registry provides a print out of all outstanding fines and the Court deals with default and can adjust the amount of fines payable. A printout of outstanding fines would be of assistance.'[163]

Inadequate information and communication given to the offender

2.176 There is no obligation for the courts, or for the SDRO, to ensure that offenders receive an explanation as to their rights and obligations when they receive a financial penalty.

2.177 Consultations with local magistrates, registrars and court staff confirmed the impression that there is a general paucity of reliable information given to offenders, or at least an inconsistency in its provision, at the point of imposition of sentence. Several magistrates conceded that the process of pronouncement of a penalty was cursory and sometimes incomplete or unclear as to important details as to the manner, method and time of payment of a fine.

2.178 While local courts may have fines-related information available in the Registry, offenders are not consistently given these materials. In any event, it is apparent that a significant proportion of offenders do not read the material when it is provided, either because of their sense of alienation from the legal process, or because they are illiterate, or lack the experience or intelligence to understand it.

2.179 It was noted during regional consultations that many offenders, particularly those from the most disadvantaged socio-economic groups, failed to seek an extension of time to pay their fine, or to apply for a payment plan. Most panicked and did nothing, hoping it would go away. In the UK, this led to many people ending up before special enforcement sessions, at further cost to the court system.

2.180 It would seem that these offenders are intimidated by the court environment, or feel so disenfranchised that they disregard the advice to speak to the registry, and simply walk away from the court. As such, the group most likely to default on a fine is also the group least likely to seek the registry's help to take advantage of deferred payment options.

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162. Judicial survey response 9 and 15.
163. Judicial survey response 18.

2.181 Several agencies, including UnitingCare and the Community Relations Commission, noted that offenders from disadvantaged socio-economic groups often do not understand the process and regard the fine enforcement process as arbitrary and 'impossible' to navigate. As a result, very often they are insufficiently prepared to meet their obligations.

2.182 The Council is concerned that this has serious implications additionally for the collection of the victims compensation levy. If offenders fail to attend the registry, particularly if they are given a section 10 bond without a fine, they may be unaware that they have incurred a levy. This gives rise to the potential for default that could have been avoided had there been better communication between the Bench and the offender.

Lack of court discretion in allowing time to pay

2.183 The NSW Law Reform Commission has commented that:

> "It is unnecessarily arbitrary and bureaucratic to fix a general 28 day time limit for the payment of fines. It is also improper to remove the discretion to order time to pay from the sentencing court and vest it instead in the court registrar, with no opportunity to appeal from the registrar's decision. Moreover, the procedure may have adverse practical repercussions.
>
> First, there is the inevitable delay involved in requiring offenders to initiate applications to the registrar rather than have the matter heard at the same time as the sentencing court imposes the fine. Secondly, the incidence of fine default will increase with the arbitrary nature of the time limit." [164]

2.184 A number of submissions made the same point, namely that the right to set time to pay arrangements ought to lie with the magistrate rather than at the discretion of the registrar, and that limiting magistrates' discretion in this manner has the potential to pose difficulties where an offender is mentally ill or otherwise socially disadvantaged.[165]

2.185 Submissions suggested that amending the *Fines Act* to remove the 28 day time limit for payments and to give the court a discretion to fix a time in which the fine must be paid, would allow offenders the chance to enter into a realistic payment plan at first instance, rather than having to apply to the SDRO for time to pay after one or more

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164. NSW Law Reform Commission *Report 79 (1996) Sentencing* at Chapter 3
165. Submission 10: UnitingCare.

defaults with the burden of additional enforcement fees and penalties.[166]

2.186 It has been suggested that requiring that the fine be paid at the time of sentencing, unless special circumstances to the contrary are shown, instead of courts following a universal practice of allowing 28 days to pay, could increase the percentage of completed fine payments. This would encourage offenders with the means to pay to settle their debt on the same day and while they are at court, rather than deferring the problem and then overlooking or neglecting it.[167]

166. Submission 4: Commission for Children and Young People; Submission 8: NCOSS; Submission 15: Youth Advisory Council; Submission 16 PIAC: Submission 21: CCLCG; Submission 27: Office of the Protective Commissioner.
167. Challinger, D. (1985) "Payment of Fines" in *Australian and New Zealand Journal of Criminology*, vol 18, pp95-108.

Problems Identified regarding Payment Methods

Direct debit

2.187 The SDRO and courts do not currently have the facility to accept periodic deductions from offenders' pensions, unemployment benefits, or other welfare payments (commonly known as Centrepay) even though recipients of welfare payments are accustomed to using this facility to pay their other bills.

2.188 There was general support in the submissions and consultations for the establishment of a direct debit facility in this context. Broken Hill Local Court for example, estimated that more than 95 percent of people ask the court about the availability of direct debit to pay off their fines.[168]

2.189 If Centrepay debits were available, for example in the minimum $10 deduction which was generally accepted as reasonable, that could reduce the incidence of default. It would have particular merit in regional areas where offenders need to travel considerable distances to make repayments, a difficulty that is increased if their licence is suspended or cancelled.

2.190 Although Centrepay was originally designed to allow the easy payment of utility bills, it has expanded to include the payments of court fines in other jurisdictions.[169]

2.191 It is understood that the SDRO will move to allow direct debit payments of court fines and penalty notices in the very near future. It would be helpful if its introduction was monitored to determine whether it results in an improvement in the rate of payment and for its potential impact on disadvantaged communities.

2.192 The Council notes that there are District Court Civil Claims Court rules on garnishee orders that allow only a certain proportion of an offender's income to be deducted, and queries whether the CentrePay scheme is intended to operate along the same lines.

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168. In consultation, ACS officer Nichole Lihou, Broken Hill Local Court, 9 August 2006
169. Such as Queensland. See also McDonnell S & Westbury N 'Banking on Indigenous communities: Issues, options and Australian and international best practice' *CAEPR Working Paper No 18/2002* Indigenous Economic Policy Research Centre, ANU (www.online.anu.edu.au/caper).

Registrar's discretion to approve time to pay arrangements

2.193 The registrar of a local court has a general discretion to grant further time to pay, or to direct payment by instalments.[170] There is however, no right of appeal from the registrar's decision to grant or refuse such an application,[171] and this has been the subject of criticism.

2.194 There are no readily available statistics in relation to the incidence of time to pay arrangements or the level of compliance. While registrars noted that they approve such payment plans on a regular basis there appears to be a wide variation in the estimates provided by the courts as to their use.

2.195 For example, Kempsey Local Court reported that time to pay arrangements were entered into in 95 precent of matters, while Lismore Local Court reported that such arrangements were made in only 10 percent of cases where fines were imposed, and that the 'bulk' of fines imposed in the court are referred to the SDRO for enforcement action - approximately 60 percent. Dubbo Local Court reported that the 'majority' of fine offenders who received a fine entered into and complied with time to pay arrangements.

2.196 There was some criticism of the Departmental practice of remitting or reducing the minimum amount to be paid on the application of the offender, which sometimes means that minimum monthly repayments are reduced to as little as $1 a month due to the offender's 'special circumstances'. While acknowledging that these arrangements generally relate to historical fines, it was observed that this made the registrar's job in dealing with the applications 'more difficult'.[172]

2.197 On the other hand, some court staff saw it as sufficient to ensure that an offender is committed to paying the fine in instalments even in small amounts, although the view generally taken was that an instalment of at least $10 per fortnight was appropriate, being seen as a reasonable payment that most people can afford without incurring great hardship.

2.198 Research undertaken by Chapman *et al* indicates that fines and levies set at a level that the offender cannot pay within a reasonable time, are much less likely to be paid. The Council considers that this proposition, for which there was a degree of empirical support following the increase in the penalty fixed for fare evasion, should be generally accepted and taken into account by the courts.

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170. Section 10 *Fines Act* 1999 NSW
171. Section 11(5) *Fines Act* 1999 NSW
172. In consultation, Lismore Local Court, 12 July 2006.

2.199 Other research as well as experience in the private sector seems to suggest that compliance rates are higher where there is a short time frame for payment or where a significant amount is paid "up front" with the remainder being scheduled over a limited number of payment periods.

2.200 As noted above, the practical problem that arises in this respect, is the absence of any consistent practice in ensuring that offenders are sufficiently informed of their entitlement to seek time to pay arrangements, and in encouraging them to do so.[173]

2.201 In addition, the procedure involved can be complex in so far as applicants are required to complete statutory declarations requiring the disclosure of a significant amount of financial information which is often beyond their capacity to provide. This may be the reason why a large number of socio-economically disadvantaged offenders, particularly Aboriginal offenders, do not contact the court or seek time to pay arrangements when they cannot pay a fine.

2.202 It was noted the courts are trying to improve their service delivery in this respect through initiatives such as Aboriginal Client Specialists (ACS). This pilot program has been operational through the Attorney Generals' Department for almost nine years, but would benefit from expansion to all courts in communities where there is a significant Aboriginal population. It is not known at this stage whether the involvement of Aboriginal Client Specialists in this area leads to fines being paid either in full or in part, as there has been no evaluation of the program undertaken to date.

173. In consultation, Dubbo Local Court, 7 August 2006 and Lismore Local Court, 12 July 2006.

Problems Identified regarding Collection Procedures

Inadequate and out of date contact information

2.203 The Attorney General's Department has advised that the large proportion of outstanding court fines is, in part attributable to the difficulty that courts face in locating debtors.[174]

2.204 There is a need to improve the provision of information from the courts in order to maximise fine recovery.[175] In consultation, the SDRO highlighted the poor quality of information which it receives from the courts regarding the address of defendants and other contact information.[176] The Council's own consultations uniformly confirmed that there is 'very poor' quality information kept in relation to offenders dealt with by the courts.

2.205 Information that may be significantly out of date hampers the fine enforcement and collection process and also wastes human resources, including that of staff in the NSW Sheriff's Office, who are expected to collect the outstanding fines or seize goods from offenders yet have no current contact information.

2.206 The SDRO appears to have considerably more success in locating people issued with penalty notices for parking and traffic notices because the licence or registration number is generally recorded at the time of the offence. The SDRO is then able to access RTA records to locate the alleged offender.[177] This assistance is not available in respect of offenders fined for street or similar misconduct offences, many of whom are not able to provide any sufficient or reliable identification.

2.207 The Council notes that identity issues stemming from incorrect data matching between the RTA and SDRO has however, been a significant and historic source of complaint.[178] While these issues are said to have been resolved in more recent times, without reliable data that can be cross-referenced between the courts or issuing agency and the SDRO and the RTA, that assertion cannot be supported by statistical findings.

2.208 It has been suggested that a significant proportion of defaulters for court-imposed fines are absent defendants, for whom the court may have outdated or no contact information.

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174. Written communication, Attorney Generals' Department 15 August 2006.
175. Submission 11: Office of State Revenue.
176. In consultation, Fine Enforcement Branch, 28 July 2006.
177. Written communication, Attorney Generals' Department 15 August 2006.
178. Submission 54: Community Relations Division, Attorney General's Department.

2.209 Likewise, a significant proportion of defendants are homeless or itinerant, and as such are less likely to maintain regular contact with government agencies such as the RTA or the courts.

2.210 However, while it is likely that absent or itinerant defendants are more likely to fail to meet their debt obligations, this cannot conclusively be determined since neither the courts or the SDRO were able to provide the Council with a fine defaulter profile.

2.211 The Council is currently working with BOCSAR to further refine this data, to determine whether repeat offenders are accounting for the bulk of this default, and whether a particular 'fine defaulter profile' can be determined.

Reminder letters

2.212 The Council has found that there is considerable disparity in the collection practices of local courts in relation to reminder letters. For example, some courts routinely sent offenders letters reminding them of their outstanding fines, and urging immediate payment. Others however, never sent such reminders. At least one court indicated that although reminder letters were sent out, there was little point as false addresses and inaccurate court data result in staggering proportions of undeliverable mail.[179]

2.213 In the absence of court statistics the Council has been unable to determine whether the issuing of reminder letters is a successful strategy in minimising default. It is noted however that research indicates that court-based default can be reduced if reminder letters are sent to recalcitrant offenders; that abandonment of the practice compounds fines collection problems; and that reminder letters have advantages over means summons (or warrants) as an initial fine enforcement step.[180]

Rationalisation and centralisation

2.214 Both magistrates and court staff expressed concern that the rationalisation and centralisation of local court houses and counter facilities works against the successful enforcement of outstanding fines.

2.215 While centralisation of courts into fewer but larger administrative units has economic advantages, the process was said to

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179. In consultation, , Lismore Local Court, 12 July 2006.
180. See Raine & Mackie 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' *The Howard Journal of Criminal Justice* Volume 43 Page 518- 538, December 2004. See too Lewis, Donald E 'A Linear model of fine enforcement with application to England and Wales' *Journal of Quantitative Criminology*, Vol 4 No 1 1988.

reduce the scope for the exercise of discretion and professional judgment, and to diminish the kind of front-line intelligence that might otherwise be useful to determine why people default, and to distinguish between a wilful evader and an the erratic payer who nonetheless is actually making an effort to repay the fine in difficult circumstances.

2.216 Some geographically isolated courts also saw advantages in deferring the referral of outstanding matters to the SDRO, for similar reasons, so as to allow them to maintain contact with the offender and encourage payment.

Inability to access other court data (in some instances)

2.217 There are two distinct data collection systems operating in the 177 local courts throughout NSW. Approximately 60 courts use the General Local Courts (GLC) system. The remaining courts operate under the old Penalty Enforcement System (PES). The GLC and PES systems are not compatible and do not allow for cross interrogation.

2.218 This can cause practical problems for the fine collection process. For example, although they are neighbouring courts, which share registry staff and have clients in common, Broken Hill and Wilcannia have different computer systems. Broken Hill operates under the GLC system, Wilcannia under the PES database. Neither court can access the computer records of the other to determine amounts outstanding so as to inform a defendant how much remains due on his or her fine debt. This has led to intense frustration among staff and clients, and has acted as a disincentive for those attempting to 'do the right thing' and pay off their fines promptly. As a consequence both courts exhibit lengthy delays in recouping monies and serial default.

2.219 The difficulty posed by part-time courts was also seen as contributing to the problem of non-payment of fines, particularly in those instances where Centrelink pay day does not coincide with the court's designated operating day or days.

Inability to pay SDRO fines at the court

2.220 SDRO debts (either court-fines that have progressed to the SDRO for enforcement or unpaid penalty notices issued by various agencies) cannot be paid at local courts. Instead these fines must be paid by cheque at the local post office or at other authorised facilities. Even the Sheriff must exchange money collected from defaulters for a cheque at court, and then pay the cheque to the SDRO via a post office.

2.221 This becomes a problem when someone has multiple fines and attempts to pay both at the one time – invariably, the court's inability

to accept SDRO payments means that the offender elects just to pay that debt, delaying the court payment 'for another day'.[181]

2.222 Privacy concerns regarding shared SDRO and court databases can present a barrier to permitting debt to be paid at the one location – regardless of its origin.[182] Nonetheless this is an issue that would seem worth exploring further.

181. In consultation, MRRC Welfare staff, 15 August 2006.
182. In consultation, Broken Hill Local Court, 9 August 2006.

Defendants dealt with in their absence

2.223 According to the NSW Bureau of Crime Statistics and Research, 17.6 percent of convictions in the local court in 2005 were imposed ex parte.[183] Of the 43,289 people who failed to appear in 2005, 62.7 percent (or 27,156) received a fine.[184]

Available penalties

2.224 Section 25 of the *Crimes (Sentencing Procedure) Act* 1999 provides that the local court must not make any of the following orders in the absence of the offender:

(a) an order imposing a sentence of imprisonment,

(b) a periodic detention order,

(c) a home detention order,

(d) a community service order,

(e) an order that provides for the offender to enter into a good behaviour bond,

(f) a non-association order or place restriction order,

(g) an intervention program order.

2.225 As a result, the most likely penalty that a local court will impose in the offender's absence is a fine.[185] In the alternative, the matter may be adjourned or a warrant issued to bring the offender before the court for sentencing on another date. The warrant power is rarely utilised and given the pressure on courts to reduce long waiting lists, it is uncommon for an adjournment to be given, at least for relatively trivial offences.

Court procedures

2.226 Where a person is convicted in their absence and a fine imposed, the registry will issue a Notice of Penalty – not necessarily with any advice on possible options.[186] The notice is sent to the address previously provided to the court. If there is no response, a warning or default letter may be sent.

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183. NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics 2005* pg 3.
184. Data analysis undertaken by the NSW Bureau of Crime Statistics and Research at the Sentencing Council's request.
185. The Local Court may also impose a section 10 dismissal, but could not impose a section 10 bond.
186. In consultation, Dubbo Local Court, 7 August 2006.

2.227 The inaccuracy of court data, which is often dependent on police information or outdated court records, means that an absent defendant may not receive or understand any of these court documents. This is particularly the case where the defendant is homeless, itinerant or illiterate, and is not assisted by the fact that the current system allows fines notices and enforcement notices to be served by ordinary post.

2.228 An estimate putting the number of incorrect addresses held by a regional Court at 10percent was deemed to be 'conservative.'[187] Research studies have confirmed that poor verification procedures, particularly in relation to the absent defendant, account for a significant amount of subsequent fine default.[188]

2.229 The practical effect is that an absent defendant may be unaware of the existence of a fine or of default until enforcement procedures are commenced, and licence sanctions applied. Very often the first knowledge they have of the fine occurs when they are stopped for a minor traffic offence and informed that as the result of an enforcement sanction they are driving while suspended. The result, in many cases, is that absent offenders, when subjected to licence or motor vehicle sanctions, face the prospect of being charged with more serious offences and of accumulation of fines if convicted of those offences,[189] ie unless police deal with the matter by way of a caution because of the difficulty in proving knowledge of the suspension.

No assessment of capacity

2.230 There is no obligation under the legislation to obtain information in relation to the means of offenders who are absent at the sentencing stage, if their financial circumstances are not already 'reasonably and

187. In consultation: Broken Hill Local Court, 09/08/06.
188. WA Auditor General, Report 9: Third Public Sector Performance Report 2005; Ferrante, Anna, The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA Crime Research Centre, University of WA, 2003; Auditor-General's Office State Debt Recovery Office: Collecting Outstanding Fines and Penalties, 2002; NSW Auditor General Fare Evasion on Public Transport: Performance Audit Report 2000; Raine & Mackie 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' *The Howard Journal of Criminal Justice* Volume 43 Page 518- 538, December 2004; City of San Jose Office of the City Auditor, An Audit of The City of San Jose's Traffic Citation Collection Process Report 96-03, 1996. But see too Rich v NSW (1996) 23 MVR 154 (NSW) Appellant claimed that his licence cancellation was unlawful, as he had not received the notice advising that non-payment of fines would lead to licence cancellation, because it had been sent to the wrong address. The appeal was held to be frivolous and vexatious.
189. Submission 16: *Public Interest Advocacy Centre 'Not Such a Fine Thing – Options for reform of the Management of Fines Matters in NSW*" 2006; Submission 21: Combined Community Legal Centres Group (NSW Ltd).

practicably available'. In most instances no such information will be available, and as a result the means of the absent offender will not be taken into account, the offender being sentenced upon the assumption that the or she can pay the fine.

Higher fines

2.231 Consultations indicated that fines imposed in the offender's absence will generally be higher than if the person had attended court. Consistent with international research,[190] data obtained from BOCSAR confirmed that defendants convicted in their absence receive harsher financial penalties than those imposed on defendants who are present for sentencing. The median fine imposed on defendants physically in Court was $350. For absent defendants, the median fine was $400.[191]

Appeals

2.232 A defendant has the right to request an annulment of a conviction and penalty imposed in his or her absence. An application must be made within two years of the relevant sentence or conviction being imposed.[192]

2.233 The Local Court must grant the annulment if satisfied that the defendant:

- was not aware of the court proceedings until after the proceedings were completed;
- was otherwise hindered by accident, illness, misadventures or other cause from taking action in relation to the original court proceedings; or
- having regard to the circumstances of the case, it is in the interests of justice to do so.[193]

2.234 An absent defendant may also make an application for an annulment of a conviction or sentence to the Attorney General,[194] who may refer the matter to the Local Court for a rehearing if satisfied that a question or doubt exists as to the defendant's guilt or liability for a penalty.

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190. Raine et al 'Financial Penalties as a Sentence of the Court: Lessons for Policy and Practice' *Criminal Justice*; Vol 3: 181-197, 2003.
191. Data analysis provided by BOCSAR 29 September 2006.
192. Section 4 *Crimes (Local Courts Appeal and Review) Act* 2001. An application must be made within two years of the relevant sentence or conviction being imposed.
193. Section 8 *Crimes (Local Courts Appeal and Review) Act* 2001.
194. Section 5 *Crimes (Local Courts Appeal and Review) Act* 2001.

2.235 The Council is unaware of the number of successful applications made by absent defendants to either the Local Court or to the Attorney General, since there do not appear to be any available statistics.

Options for Reform

2.236 Several recommendations for reform have been identified. In essence, the NSW court-imposed fine system could be enhanced by providing a better framework for:

- The provision of alternative sentence options for the protection of vulnerable people;
- The use of fine option orders (FOOs);
- Referral to financial counselling at point of sentence;
- Fine payment and applications for time to pay;
- Fine collection (particularly ensuring the offender receives notice of the fine and sanctions after default); and
- Data collection (especially development of a fine defaulter profile).

Alternate sentencing options for the protection of vulnerable people

2.237 There are already numerous alternative sentencing options for particular groups of offenders which could be expanded to provide suitable alternatives to court imposed fines, in appropriate instances, particularly where an offender may have been convicted for a relatively minor offence arising from an underlying unresolved issue. For example:

- Intellectually disabled and mentally ill offenders may be more appropriately dealt with under sections 32 or 33 of the *Mental Health (Criminal Procedure) Act 1990*. This would enable a treatment order to be made to address the underlying offending issues in lieu of the repeated imposition of fines, which are only likely to exacerbate their problems.
- Offenders with an underlying drug related issue could be more appropriately dealt with through programs such as the *Magistrates Early Referral into Treatment* (MERIT).
- Young people could benefit from referral to the Youth Drug and Alcohol Court or to Youth Conferencing.
- Circle Sentencing, community conferencing or other diversionary programs could be beneficial in cases where the offender has no realistic prospects of paying a fine, and its imposition is only going to result in secondary offending, or an eventual write-off of the debt.

2.238 The Sentencing Council has examined these alternative sentencing and diversionary options as part of other projects, and considers that they should be further utilised or expanded for vulnerable people who would otherwise be fined, particularly for those who may have accumulated a large number of fines or penalties, to the point where they have no realistic chance of satisfying the resulting debt.

2.239 Magistrates should be encouraged to apply a more flexible approach in those cases where it is obvious that the fine will not be capable of being paid in a reasonably timely manner.

Fine Option Orders

> 'So far as those offenders who have very little or no income are concerned, we recommend that they should not be fined and that the courts should impose an alternative sanction, such as a SAO or a Community Reparation Order. Imposing a financial penalty in such cases is in our view simply setting-up the offender to fail.'[195]

2.240 The Local Court currently has no ability to impose an alternative sentence in lieu of a fine, even when faced with an impecunious offender.

2.241 The SDRO can impose a Community Service Order (CSO) on a fine defaulter, but under the current inflexible hierarchy for fine and penalty notice default sanctions, each enforcement option must be exhausted before moving on to the next.[196] A CSO is the second last enforcement option (before imprisonment) that can be imposed. Debt is discharged at the rate of fifteen dollars for each hour of community service performed, with a maximum of 300 hours CSO imposed per enforcement order for an adult, and 100 hours maximum for a child.

2.242 In 2004-2005 the SDRO issued 17 Community Service Orders involving at least one court-imposed fine. Two were completed and one breached.[197]

2.243 By the time a person is eligible for a CSO for fine default, he or she will have had their driver's license suspended or registration cancelled, which may have impacted upon their capacity to earn an income, and would have accumulated considerable administrative and enforcement charges, which may be equal or even substantially higher than the original fine. It also means that their community service

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195. The Scottish Sentencing Commission, Rt Hon Lord Macfadyen, Chairman's Foreward, *The Basis on which Fines are Determined*, 2006 at i.
196. Section 81(1) and 81(2) *Fines Act 1996* NSW
197. Submission 34: State Debt Recovery Office

obligations become more onerous. If they have persisted in driving, they may have been charged with additional driving offences. This may in fact have had the effect of excluding persistent offenders from the SDRO community service option.

2.244 The Council sees considerable merit in allowing the court to impose a Fine Option Order (FOO) at the point of sentencing. This would permit the impecunious offender to apply to the court, at the time of the imposition of a fine or thereafter, for an order that he or she be allowed to work off the fine by way of community service.

2.245 The FOO differs from a community service order in that it diverts the offender from the fine default and enforcement process at the point of fine imposition, and as result avoids the delay, distress and additional expense of working through the progressive regime for default sanctions. It would also be appropriate for the court to be empowered to order non-impecunious offenders to community service in appropriate and prescribed circumstances. For example, the proposed, more flexible criteria would give courts the discretion to make fine option orders for wealthy offenders for whom a fine would not have significant penal impact, or where a fine will have a detrimental impact on the offender's family.

2.246 As noted by the Queensland Government in 1990, 'community service orders are not a soft option. In many ways they can be more demanding than a short prison term or a substantial fine.'[198] For this reason, the Council believes a fine option order may be a more appropriate penalty for wealthy offenders with significantly higher than average financial means. It ensures that proper deterrence is imposed, and a fine is not perceived as a tax on unlawful activity.

2.247 The proposal received overwhelming support in a large number of submissions and consultations on the grounds that inclusion of the FOO in the sentencing options would:[199]

- Provide an alternative means of payment of a fine for those offenders who have limited financial resources;

198. Queensland Legislative Assembly, 25 November 1990, page 4323.
199. See Submission 5: Salvation Army; Submission 10: UnitingCare; Submission 13: Shopfront; Submission 15: Youth Advisory Council; Submission 16: PIAC; Submission 21: CCLCG; Submission 27: Office of the Public Guardian / Protective Commissioner; Submission 29: DADHC and Submissions 50 and 52: On the Road Lismore Driving Education Program. See to consultations at courts (Kempsey, Dubbo, Broken Hill), gaols (Silverwater, Mid-North, Dilwynnia, John Moroney, MRRC), and other agencies (Broken Hill CC, Lismore ACE, Broken Hill Police, Dubbo Police, Dubbo Circle Sentencing, Dubbo WALS, Kempsey Council, Kempsey Centrelink, Kempsey Probation & Parole).

- Assist disadvantaged groups (such as those suffering mental illness or intellectual disability) to avoid the accumulation of debt arising from the imposition of the fine and the default and enforcement process;
- Benefit the individual with regard to future employment prospects by reason of the knowledge and experience acquired in performing community service; and
- Benefit the community in terms of projects completed.

Use in other jurisdictions

2.248 Fine option orders are currently available in Queensland for both court-imposed fines and penalty notices,[200] have been operating in Canada since 1975[201] and were recently endorsed by the Sentencing Commission of Scotland.[202]

2.249 In Queensland, the offender is informed by the magistrate at the time of sentencing, that he or she can verbally apply for a fine option order in court. Alternately, the offender may apply for such an order any time before the final date for payment of the fine. The criteria for applications are payment of the fine would cause the offender or offender's family financial difficulties, and assessment that the offender is suitable for community service work. The legislation stipulates that receipt of social security payments satisfies the financial criteria; it also stipulates that a person is not considered unsuitable for community service simply because of 'physical, intellectual or psychiatric disability. There were 7,410 fine option orders made in 2003– 2004.[203]

2.250 The Scottish Commission for Sentencing noted the success of a pilot scheme (operational since 2005) which permits community service to be used as a first instance disposal in cases where the court considers the individual would be unable to pay the appropriate fine in a timely manner, determined by reference to 'locally known criteria', including whether the person is known to be unemployed or is known to the court as a regular fine defaulter.

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200. Division 2, Part 4, *Penalty and Sentences Act 1992* (QLD), and section 43, *State Penalties Enforcement Act 1999* (QLD)
201. The National Council for Welfare, *Justice and the Poor*, 2000.
202. The Scottish Sentencing Commission, *The Basis on which Fines are Determined*, 2006
203. Bell, Sue *Queensland's Criminal Justice System Bulletin 2003-04*, Qld Department of Premier and Cabinet, 2005

Operation in NSW

2.251 It is acknowledged that some aspects of the proposal could face practical challenges if the FOO is to be available in regional and remote NSW, due to the:

- Limited availability of suitable community service in the area;
- Need for assessment of the offender's suitability for community service;
- Need to cater for specific disadvantaged groups, such as those with intellectual disabilities;
- The need to ensure compliance and program completion; and
- Need to provide transport for some offenders to the work sites.

2.252 The Council notes that notwithstanding such impediments, key stakeholders expressed confidence that the fine option order can be successfully implemented in NSW.

2.253 The Department of Corrective Services advised that it is currently in the process of strengthening community service orders, in light of recent adverse findings by the Independent Commission Against Corruption. This involves increasing the level of supervision of CSO participants and employing DCS staff to run work groups, identify projects in communities, and work in partnership with local councils.[204]

2.254 Departmental staff in a number of regional areas stated that sufficient community service could be made available to accommodate fine option orders, particularly in areas with existing work programs on public infrastructure. Welfare agencies and local councils also advised that they would be willing to provide community service work in a FOO type of arrangement, if supervision costs and training costs could be accommodated. It was suggested that to effect coordination between various agencies, the court could maintain a list of approved charities and community groups and the nature of the work available at each. A fine defaulter could then approach the charity to complete an ordered number of community hours, and present the court with a document signifying that the work was undertaken.

2.255 The Department of Corrective Services, Community Offender Services (COS), currently undertake assessments of offenders as part of the Pre Sentence Reports ordered by the sentencer. COS advised that a FOO assessment should include the same questions as a regular court-ordered CSO assessment, noting the need to be careful about

204. In consultation, Department of Corrective Services, 21 June 2006

where people are placed in terms of the agencies, in terms of the credibility of the program and community safety. The exercise of discretion would be based on assessments of the offender's suitability for community service, including their history and means. Only offenders who are prepared to undertake community service would apply and receive fine option orders. While noting the possible resources implications in such a program, COS commented that the FOO would hang off the existing CSO assessment system, thus minimising costs. [205]

2.256 Submissions noted that due to the accumulation of penalties and enforcement costs, a significant period may be required to complete a community service order at the current cut-out rate. As such, many offenders would be under a CSO for a lengthy period of time, which increases the risk of failure. This is particularly so for socially isolated offenders and offenders with an intellectual disability, who may have difficulty managing time. [206] However, while conceding that people with intellectual or cognitive disabilities are likely to need special programs with a high level of support and supervision if they are to successfully complete an order and avoid a breach, there was a general consensus that it would be possible to incorporate an offender's special needs into a Fine Option Order.

2.257 Both the local courts surveyed and the Department of Corrective Services noted the potential for FOOs to include a training or rehabilitation assessment component.[207]

2.258 The Council has also been advised that an informal FOO-type scheme is currently operating in some regional areas. For example:

- some of the Arakwal people from Byron Bay have organised to do an extra days work each week with National Parks & Wildlife Service to assist paying of their fines (as part of NPWS traineeship);
- A CSO person is working off his obligation supervising a Learner Driver from Lismore through ACE;
- A young woman is paying off her fines through work experience in two different organisations; and
- The Casino Riverbank Restoration project is run by a local Aboriginal group and work is being done to enable Aboriginal

205. In consultation, Department of Corrective Services, 21 June 2006
206. Submission 40: Julia Foulkes, Statewide Disability Services, Department of Corrective Services. See too Submission.16: PIAC; Submission 21: CCLCG, and Submission 29: DADHC
207. In consultation, Department of Corrective Services, 21 June 2006

community members to pay off fines by contributing time and work to the project.

Judicial Views

2.259 Preliminary analysis of the Council's survey of magistrates indicates that forty-five percent of respondents 'sometimes' or 'often' impose a fine knowing that an offender cannot, or will not pay. In most instances, respondents imposed a fine because it was the only sentencing option available to them.

2.260 Eighty percent of respondents supported the court being able to impose a community service type penalty or FOO as a first instance alternative to a fine.

Criticisms of the FOO

2.261 It is accepted that FOOs have been subject to a number of criticisms from a sentencing and from a revenue perspective, in so far as they:

- Effectively empower the offender to covert between sentencing options;
- Might result in a perceived sentence creep for impecunious or disadvantaged offenders; and
- Might lead to an initial reduction of state revenue.

Sentence conversion

2.262 The Australian Law Reform Commission is of the view that offenders should not be entitled to convert between sentencing options once a sentence has been imposed, on the basis that judicial officers should retain the ultimate responsibility for imposing appropriate sentences after considering the purposes, principles and factors of sentencing.[208]

2.263 However, the Council believes that the proposed fine option order regime differs from a penalty conversion order by empowering the court consider applications for fine option orders, and to exercise judicial discretion when determining whether an offender is suitable for a fine option order, rather than permitting an offender to elect an alternate penalty after the Court has determined and imposed a sentence.

Sentence creep

2.264 The Council notes concerns that offenders who receive a fine option order instead of a fine would be perceived to have received the equivalent of a community service order, a penalty higher in the

208. Australian Law Reform Commission, *Discussion Paper 70 – Sentencing* 2005 at 7.138

sentencing hierarchy that is regarded as a sentence of imprisonment. If this was to occur, it would result in 'sentence creep' for impecunious or disadvantaged offenders.

2.265 In order to avoid this perception, judicial education would need to be available to sentencers. A Practice Direction could also be issued to instruct magistrates of the differences between the FOO and the traditional CSO.

2.266 In order to minimise the risk of sentence creep, it is also suggested that:

- the 'cut-out' rate for fine option orders should be higher than the cut-out rate for a CSO;
- the number of hours that can be ordered by the court be set lower than for a CSO (currently a CSO must not exceed 500 hours for an adult and 100 hours for a juvenile); and
- that the penalties for breach of FOO be distinguished from the penalty for breach of CSO.

2.267 Currently, the SDRO may commit the defaulter to a period of imprisonment following a breach.[209] It is suggested that offenders who breach a fine option order should be brought back before the local court to be re-assessed. The court would not be required to impose a harsher penalty, but has the option of tailoring other good behaviour bonds to fit the offender's circumstances.

Reduction in State revenue

2.268 In recommending the introduction of the FOO in NSW a decade ago, the NSW Law Reform Commission noted criticisms that initially, fine option orders would reduce state revenue 'ordinarily generated from payment of fines, and increased costs in administering community service.'[210]

2.269 However, the cost of administering fine option orders must be balanced against the cost savings from minimising unproductive enforcement costs, where enforcement measures including court time, legal counsel, and sheriffs are used to enforce debts that are unlikely to be repaid.

2.270 The Council notes that in 2005-06 the SDRO wrote off 10,129 fines (and penalty notices) worth $4.68 million. It is feasible that at least part of the agencies' enforcement costs (and those of the court and Sheriff's office) associated with this written-off debt may have

209. Section 87 *Fines Act 1996*
210. NSW Law Reform Commission, *Report 79: Sentencing* (1996) at 3.17

been able to be saved through the imposition of a FOO, rather than an initial fine, on clearly impecunious or otherwise disadvantaged offenders.

Referral to financial counselling at point of sentence

2.271 The Council notes that numerous submissions were made in support of increasing the level of assistance and advice for offenders at the point of sentence, and considers that the provision of such advice may be of benefit, particularly to impecunious offenders. A recent evaluation of the UK's Citizens' Advice Bureau pilot program - an 'at-court' financial advice service – found the service to be very effective at overcoming fearful defaulters concerns about an unsympathetic and inflexible court process, leading to an increase in prompt full payment of court fines.[211]

2.272 Referrals to appropriate agencies could be made in court as part of a conditional bond. Alternatively, offenders could be referred through the registries and through Circle Sentencing or other diversionary program. There is potential for offenders to be require to complete a financial counselling program with the aim of establishing a plan for payment of the fine, in lieu of having a licence or vehicle sanction imposed.

2.273 Consideration should also be given to the referral becoming part of a 'rewards' scheme, whereby successful completion of financial counselling programs could be 'rewarded' by a review and possible write-off of some of an offender's fines.

2.274 The Council notes advice that care should be taken if Aboriginal people are sent to non-Aboriginal agencies, as it is important to ensure that Aboriginal offenders have trust in these agencies if the financial counselling is to be effective.[212]

Fine payment and applications for time to pay

2.275 The likelihood that fines will be paid promptly and in full is likely to be improved if the following proposals are implemented consistently and routinely into local court practice:

- Magistrates should be encouraged to take positive steps to take an offender's means into account, as well as the impact of the fine on offenders and their dependents, particularly in the light of any accumulated fines and penalties, when determining a sentence;

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211. Raine & Mackie 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' *The Howard Journal of Criminal Justice* Volume 43 Page 518- 538, December 2004
212. In consultation, Dubbo Circle Sentencing, 7 August 2006

- Better information to be provided to the courts regarding accumulated fines and penalties;
- Magistrates to have the power to extend the time for payment and to approve time to pay arrangements;
- Better provision and recording of information as to offenders' personal details;
- Better supply of information to offenders of their rights;
- Single court costs where there are multiple offences dealt with at one time;
- Abandonment of the automatic 28 days time to pay order, reserving a power to the court to order offenders (with means) to pay their debt in a shorter period, preferably the same day; [213] and
- Personal service to be required for service of fines notices for defendants who fail to appear.

2.276 Although a number of submissions favoured the introduction of a positive requirement, in each case, for magistrates to take the means of an offender into account, in place of the current requirement to do so only where that information is reasonably and practically available,[214] the Council accepts that the size of court lists, and the incidence of absent defendants would render this impractical, by reason of the delay and difficulty in the collection of the necessary information.

2.277 It accordingly prefers the adoption of a practice whereby magistrates would positively encourage its production and require somewhat less formal proof of lack of capacity than that which is currently required, for example, proof that the offender is in receipt of social security benefits.

Personal service

2.278 The *Victorian Infringements Act (2006)* requires that defendants personally be handed a notice of penalty by the Sheriff. This safeguard measure is designed to ensure that individuals are aware that they

213. Challinger, D. (1985) "Payment of Fines" in *Australian and New Zealand Journal of Criminology*, vol 18, pp 95-108 - requiring that the fine be paid upon sentencing, except under special circumstances, such as an impecunious offender, could increase the percentage of completed fine payments.
214. For example, through legislative amendment to section 6 *Fines* Act and section 33(1) *Children (Criminal Procedure)* Act 1987 to *require* the court to take an offender's means into account.

have the fine, aware of the consequences of default and aware of the seriousness of the position that they are in.

2.279 Requiring the use of personal service or a notice with similar effect as a committal warrant to advise absent defendants of the court-imposed penalty would alert the courts if an offender is no longer at their last address, and avoid a sequence of events that wastes fine enforcement resources.

2.280 Implementing these safeguards in the service of notices stage would protect people who do not receive notice of their financial liability, as well as providing the fine enforcement agencies with better quality information to ensure a more effective and efficient process.

Fines collection by the court

2.281 Fine collection by the courts would be enhanced if the system allowed for the following:

- Direct debit to be available for both court-imposed fines and penalty notices;
- Capacity for cross court supply of information (to allow courts to be able to 'talk' with one another despite differing databases);
- Simpler requirements for time to pay – eg, production of Centrelink or Health Care card should be enough;
- Establishment of a procedure for administrative review by the SDRO Review Board later mentioned, of time to pay decisions made by the registrar or by the court, when the situation has changed from the time when the fine was imposed, or when means information is supplied that was not available or provided when the fine was imposed;
- Reminder letters to be issued to all defaulters; and
- Statistics as to court default and collection rates to be routinely collected.

Fine defaulter profile

2.282 It is noted that neither the courts nor the SDRO were able to provide any information on the profile of a fine defaulter, as current data collection currently excludes this analysis.

2.283 The Council is of the view that as fines are enforced through a centralised system, it would be helpful if a fine defaulter profile was available to the court at sentencing, in addition to a person's criminal history, although not as a circumstance that might aggravate the penalty. This would allow the court to evaluate the likelihood of the offender paying a fine, the level of any outstanding debt and whether

other types of enforcement action have either succeeded or failed in relation to the offender. This may assist the court in imposing a more effective sentence.

2.284 Although no profile exist of a typical fine defaulter in NSW, some guidance can be obtained from research studies conducted internationally. A detailed analysis of more than 2,000 cases of default on financial penalties that had been imposed by some 20 different Magistrates' courts across England and Wales found that a typical defaulter was:

- a young male (21-30 years of age);
- from a poor neighborhood;
- unlikely to be legally represented or was represented by a duty solicitor rather than their own defence; and
- was likely to fail to attend the court session, leading to tougher sanctions being decided in their absence.[215]

215. Raine et al 'Financial Penalties as a Sentence of the Court: Lessons for Policy and Practice' *Criminal Justice*; Vol 3: 181-197, 2003. See too: Cole G, 'Monetary Sanctions: The Problem of Compliance' in *Smart Sentencing – The Emergence of Intermediate Sanctions*, Byrne, Lurigio & Petersilia (eds), Sage Publications, 1992, pp 142-151.

Part 3 Penalty Notices

- Background
- Availability and Use of Penalty Notices
- Difference between Criminal Prosecutions and the Penalty Notice System
- Advantages and Disadvantages of the Penalty Notice System
- Impact of the Penalty Notice System on Marginalised Sections of the Community
- Procedures for Contesting the issue of a Penalty Notice
- Current Procedures for Payment
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- The Victorian Infringement Act (2006)
- Expansion of the Penalty Notice System
- Deemed Convictions
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PART 3: PENALTY NOTICES

3.1 In this chapter the Sentencing Council has had the benefit of a report prepared by Maureen Tangney (Director of the Legislation and Policy Division of the NSW Attorney General's Department) in relation to the use of penalty notices and it acknowledges the assistance thereby provided.

3.2 The Council has considered it necessary to deal with penalties issued pursuant to penalty notices in this Interim Report because of the considerable overlap in their use with court imposed fines, and in the enforcement and recovery procedures applicable to each.

Background

3.3 The use of penalty notices in New South Wales developed in an ad hoc manner. Beginning with legislation enacted in 1930 to cover parking offences, their use expanded in 1961 to include other traffic offences.[1] Enacted largely due to the fact that NSW courts had fallen 40,000 cases behind in dealing with traffic prosecutions, the introduction of a 'ticket' system for general vehicle offences was the first to operate in Australia.[2] By 1988 the power to issue penalty notices for both parking and moving traffic offences was combined under the *Transport Administration Act 1988* (NSW).

3.4 The use of penalty notices has since expanded considerably to cover a broad range of offences. Pursuant to the *Fines Act 1996* (NSW), penalty notices can be issued for offences found within 97 separate items of legislation, involving a number of agencies including the police, local government, transport authorities and various Government departments. A list of the laws that permit the issue of penalty notices is found in Schedule 1 of the *Fines Act 1996* (NSW).[3] It is understood that some 17,000 offences can be currently dealt with by penalty notice.

3.5 In 1996 the NSW Law Reform Commission considered the expansion of the penalty notice system to include certain public order offences and offences for which a fine was the usual penalty imposed by the courts.[4] While acknowledging the potential risks involved with

1. Fox, R *Criminal Justice On the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology, Canberra, 1995 at 31.
2. *Traffic Act 1909* (NSW). Until 1988 called the *Motor Traffic Act 1909*.
3. See *Annexure E*.
4. NSW Law Reform Commission, Sentencing, Report No 79, Sydney, 1996 at [3.44]

the use of penalty notices,[5] the Commission (by majority) recommended the expansion of the penalty notice system to cover such conduct. The main arguments for expansion related to the potential benefits in saving offenders the stigma and trauma of court proceedings, and the economic and administrative advantages of diverting minor cases away from the courts.[6]

3.6 In recommending an expansion of the penalty notice system, the Commission noted that certain safeguards would be needed in order to minimise the risks involved. These included:

- No conviction is to be recorded if a penalty notice is received and payment is made;
- The issuing of a penalty notice must be discretionary with clear guidelines governing this discretion; and
- Agencies who have the power to issue penalty notices should be effectively monitored to safeguard against any abuses of power and to trace any net widening effects.

3.7 In 2002 the *Crimes Legislation Amendment (Penalty Notice Offences) Act* was passed, widening the reach of the penalty notice system by allowing, on a trial basis, police officers to issue a Criminal Infringement Notice (CIN) for certain offences having more of a criminal rather than a regulatory nature. The CIN system is subject to certain restrictions, for example:

- They are not available in respect of offenders aged under 18 years;
- A maximum of four CINS can be issued to any one offender; and
- They are not available in relation to offenders who are intoxicated or drug affected to the point that the officer believes them incapable of comprehending the procedure.

3.8 Examples of CIN offences include: common assault, larceny of goods up to the value of $500, obtaining money or benefit by deception, goods in custody, offensive language or conduct, obstructing traffic, and entering a vehicle or boat in a public place without the owner's consent.

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5. NSW Law Reform Commission, Sentencing, Report No 79, Sydney, 1996 at [3.49]
6. NSW Law Reform Commission, Sentencing, Report No 79, Sydney, 1996 at [3.50]

3.9 In April 2005 the NSW Ombudsman completed a review of the trial of the CIN scheme.[7] Overall the Ombudsman considered the trial successful in providing police officers with a further option in dealing with minor offences, however, a large number of recommendations were made relating to the implementation of the scheme and the maintenance of safeguards.

3.10 Particular reference was made to the disproportionate impact that the CIN system can have on vulnerable groups within the community including:

- Aboriginal people;
- People with intellectual or developmental disabilities;
- People with mental illness; and
- People who have limited financial means.

3.11 Relevant portions of the Report included the identification of the principles that would determine whether a criminal offence is suitable to be dealt with by a CIN, and recommendations that:

- Clear guidance be given to police officers on what does and does not constitute offensive language, for which a CIN might be issued;
- Consideration should be given to developing guidelines for senior police officers regarding the circumstances in which a CIN could be withdrawn, such as where it has been inappropriately issued;
- Data relating to the issue of CINS to Aboriginal people for language and conduct offences should be recorded, monitored and evaluated for its effectiveness and consequence;
- Education and training using case studies should be implemented to illustrate the appropriate and inappropriate use of a CIN; and that
- The CIN system should be monitored and kept separate from other penalties in order to determine:
    - whether they are being paid;
    - whether net widening is occurring;
    - whether they are acting as a deterrent; and

7. *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police,* NSW Ombudsman, Sydney, 2005.

  - whether they are having an adverse knock-on effect such that other existing options and possible alternatives should be examined.

- There be education and consultation at local level, particularly in rural and remote communities, and those with significant Aboriginal populations, to address concerns about their use and the consequences of default in payment (if the scheme is extended);
- Safeguards be established concerning the use in courts of CIN histories where the relevant notices have been satisfied by payment;
- The CIN should include information in relation to the possible consequences of non-payment, and of failure to defend a matter successfully in court; and that receipt and payment of a CIN does not amount to a finding of guilt or result in a conviction;
- The capacity of the Infringement Processing Bureau (IPB) (now absorbed into the SDRO) should be developed to allow review of a CIN prior to an election to go to court or referral to the SDRO, in the course of which the recipient could make representations and have them considered by the IPB or a senior police officer, and this would allow the review without prejudicing the recipients right to pay the penalty or to elect to go to court;
- The IPB, or currently the SDRO, be empowered to deal with applications for payment of a CIN by instalments, without the recipient incurring the additional costs that are currently charged in the enforcement process; and that a standard form be developed which provides sufficient advice and a capacity in the applicant to select an available arrangement.

3.12 The Public Interest Advocacy Centre (PIAC) and the Homeless Person's Legal Service[8] recently delivered a report on options for the management of fines matters. The Report drew attention to the impact of penalty notices upon the marginalised sections of the community, who incur penalties that they cannot pay and who are, as a consequence, driven deeper into debt and the criminal justice system, through the sanctions and enforcement costs that follow. The Report identified suggestions for the amelioration of the impact of the penalty imposition and enforcement regime similar to those elsewhere set out in this Interim Report.

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8. Submission 13: Public Interest Advocacy Centre (PIAC) and the Homeless Person's Legal Service, *Reform of the Management of Fines Matters in New South* Wales (2006).

3.13 Similar issues were identified in the report of the Standing Committee on Law and Justice into *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, referred to in the previous chapter of the Interim Report.[9]

9. NSW Parliament, Standing Committee on Law and Justice into *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations,* Final Report March 2006.

Availability and Use of Penalty Notices

3.14 The majority of "fines" in NSW are issued by way of a penalty notice. As Professor Richard Fox has commented:

> 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.[10]

3.15 Penalty notices can be issued for a broad range of offences with varying degrees of seriousness, many of which are of a regulatory nature arising under legislation creating standards concerning road and public transport, the protection of national parks and fisheries, occupational health and safety and the environment, for example:

- failure to pay fishing fee;
- riding on an escalator rail;
- breaking glass in a public place;
- taking animal into a park;
- exceeding the speed limit by more than 45 km;
- spitting in public;
- fare evasion;
- failure to wear a bicycle helmet; and
- failure by a taxi driver to drive by the shortest route.

3.16 While their use has spread well beyond traffic and vehicle related offences to other areas of regulation, the majority of penalty notices are still issued for traffic and vehicle related offences. The primary issuing agencies are the police, local councils, RailCorp and the RTA.

3.17 The Council has been informed that for the year 2005 the SDRO was collecting on 2.6 million penalty notices with a total value of $363

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10. Fox, R 'Criminal Sanctions at the Other End', paper presented at *3rd National Outlook Symposium on Crime In Australia: Mapping the Boundaries of Australia's Criminal Justice System*, Australian Institute of Criminology, Canberra, 1999 at 6-7

million, and that 74 percent required no further enforcement than an initial warning letter from that office. Current statistics on the number of penalty notices issued by each agency, and for which offences, is currently not available.

3.18 The Council, for its final report, will be undertaking further investigations into the number of penalties issued over the past years to provide further observations as to their breadth of application and default rate.

3.19 Under the current penalty notice system, the Acts, and in many cases the Regulations, prescribe the amount of the penalty that may be imposed for individual offences. The process by which an agency or department fixes the amount of the penalty notice however is not detailed in either the Acts or Regulations, in practical terms being left to determination by the individual government departments concerned with the administration of the relevant legislation.

3.20 While these departments have developed policies regarding offences arising under the legislation within their area of administration, attention has rarely been given to any coordination of the operation of penalty notices as a whole. As a result, the fixing of penalty amounts is uncoordinated, leading to considerable differences between offences which do not seem to be justified by the differences in their objective seriousness, as can be seen from the following penalties:

- $50 for not wearing a bicycle helmet;
- $75 for parking in a restricted zone;
- $100 for feet on a train seat;
- $225 for exceeding the speed limit by more than 15kph;
- $300 for not stopping at a red light;
- $400 for smoking on a train station;
- $400 for spitting on a train.

3.21 Moreover, there are inconsistent penalties available for certain offences dependent upon the issuing agency. For example, under the CIN trial, the maximum penalty that can be imposed for offensive language is $150, whereas if issued by a Transit officer under the *Rail Safety (General) Regulation 2003*, a penalty of $400 can be imposed.

3.22 The effect of the arbitrary system of setting penalty notice amounts needs to be viewed in the light of the strict liability nature of penalty notices and the absence of any discretion in the issuing officer to fix a penalty other than in the prescribed amount.

3.23 In his earlier (1995) report on the penalty notice scheme[11], Professor Fox concluded that there was a need for a model legislative scheme to regulate the use of penalty notices which contained, inter alia, the following elements:

- Their application to summary offences alone;
- The non-recording of a conviction if payment is made;
- The fixing of a maximum penalty;
- The preservation of a discretion in the issuing officer to issue a warning or caution, to be exercised in accordance with guidelines which should be settled and disseminated;
- Preservation of an election to have the matter referred a court; and
- A discretion in the issuing agency to withdraw the notice upon the supply by the recipient of the notice, of additional factual information justifying such as course.

3.24 Where there is little avenue for the kind of independent review and due process in the imposition of penalties pursuant to notices which is inherent in the issue of court imposed fines, it is appropriate to ensure that reasonable limits and guidelines are placed upon their use. Particularly is this so in circumstances where it appears that the number of offences being detected and punished by penalty notices is growing at a significant rate.

11. Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology, 1995.

Difference between Criminal Prosecutions and the Penalty Notice System

3.25 There are some key differences between the penalty notice system and standard criminal prosecutions.

3.26 Offenders charged with a criminal offence are:

- presumed innocent until proven guilty beyond reasonable doubt;
- entitled to present their case before an independent judicial officer;
- entitled to have the prosecution prove all the elements of the offence including the mental element (although not the latter in offences of strict liability); and
- Entitled to have the objective circumstances of the offence, as well as the subjective circumstances taken into account when the court considers the appropriate penalty.

3.27 The penalty notice system operates differently, inter alia, in that:

- Guilt is determined on the basis of strict liability;
- The offender has the option of either paying the amount immediately or electing to have the matter dealt with by a court;
- The amount of the penalty is fixed, there being no avenue for the authority issuing the notice to take into consideration the objective gravity of the offence or the financial means of the offender; and
- The penalty is determined by the agency issuing the notice rather than by an independent, judicial officer.

Advantages and Disadvantages of the Penalty Notice System

Advantages

3.28 Advantages of the penalty notice system include the following:

- The courts and criminal justice system save considerable time and money which would otherwise be involved in the formal prosecution of a high volume of minor criminal and regulatory offences (estimated to be in the order of 3 million per year) most of which would not be contested;
- Offenders and issuing agencies are saved the cost, time and inconvenience of having to prepare for a court appearance;
- Offenders will usually (but not invariably) be fined a lower monetary sum than that which may be imposed by the courts;
- Issuing agencies may receive the revenue received from payment;
- Penalty notices are relatively easy to administer with some offences being detected by automatic or semi automatic devices such as speed cameras, red light cameras and video surveillance. They are also adaptable to the needs of different agencies from police to local councils to road transport authorities;
- The penalty is immediate and certain, and for some offences widely known, which can act as a deterrent (for example red light and speed cameras); and
- Court costs and victims compensation levies are not added to the penalty.

3.29 Generally, offenders avoid having a conviction recorded for the offence, the existence of which can present significant problems for travel to those countries that deny visas to persons with any form of criminal conviction.

3.30 This was recognised in recently enacted Victorian legislation, which provides specifically for no conviction to be attached to the imposition of a penalty notice.[12] The Council notes however, proposed Tasmanian legislation, which provides for deemed convictions where an offender accepts and pays an infringement notice.[13]

12. *The Infringements Act* 2006 (VIC) Section 33(1)(b): no conviction is to be taken to have been recorded against that person for the offence.
13. *Monetary Penalties Enforcement Bill* 2005 (TAS)

Disadvantages of the penalty notice system

3.31 Disadvantages of the penalty notice system include the following:

- Penalty notices may have a net widening effect. Given the ease from which a penalty notice can be issued and the availability and use of automatic detection devices, penalty notices may be issued for conduct that could be more appropriately dealt with by a warning or caution and which was previously dealt with on that basis;
- Penalty notices operate on the concept of strict liability. This results in practically no avenue for independent review of the conduct, or for moderation of the penalty to take into account the objective seriousness of the offence, or for any review of the practices of the issuing agency involved, unless the offender opts to challenge the penalty notice by going to court;
- The convenience of disposing of a penalty notice as opposed to challenging it in court may lead some people to admit guilt where they may be innocent. (Particularly for conduct which the courts have found does not constitute offences (eg in the context of offensive language);
- Penalty notices may be used for revenue purposes as opposed to correctional or behaviour modifying purposes or for purposes designed to improve community safety;
- There is little scope, or obligation upon issuing agencies, to consider an offender's personal circumstances and means or capacity to pay the penalty;
- Limited discretionary powers available to the police, transit, Local Council and Parks officers to proceed by way of a caution instead of a penalty notice.
- The reduction of judicial and public scrutiny over the investigation and enforcement procedures of the relevant agencies, with a consequent potential for discrimination, corruption, and arbitrary and negligent use of penalty notices; and
- The issue and service of notices without proper identification of the offender, such that there is a risk of innocent people being caught up in the enforcement process and sustaining a sanction, although unaware of that process being initiated.

3.32 Some specific groups within the community are also more susceptible to receiving a penalty notice than others, often in circumstances where they have little real understanding of why it is

that they are said to have offended or capacity to control the offending conduct. So for instance, young people, the intellectually and mentally disabled, the homeless, and Aboriginal persons, who are more visible, tend to make up the bulk of those who receive penalty notices for minor conduct offences and street offences.

Impact of the Penalty Notice System on Marginalised Sections of the Community

3.33 Submissions to the Council have commented on the negative impact the penalty notice system has upon marginalised sections of the community.[14] Significant penalties are capable of being imposed for relatively trivial offences affecting most notably: young offenders; the homeless; indigent; mentally or intellectually disabled and Aboriginal people, with the prospect of these offenders incurring a large and accumulating debt which they are unable to pay.

3.34 At the imposition stage of the penalty notice system, a person within a marginalised section of the community is relying upon the authorising officer to exercise discretion. Such discretion is limited where the authorising officer has not been trained effectively in identifying when it is appropriate to issue a penalty notice, or is unsympathetic to the marginalised sections of the community.

3.35 Contesting a penalty notice in court, applying for withdrawal or annulment, or obtaining a time to pay arrangement for a person within a marginalised section of the community may also prove difficult. The process requires literacy skills, time, extra expenses and knowledge of the options available and where to seek help. In this regard the available resources are likely to be stretched in responding to other areas of the justice system, and barely, or if at all, available to provide assistance to those who wish to contest a penalty notice.

3.36 Submissions and consultations have suggested that the absence of a physical point of access to the SDRO, at Local Courts, or at Government access centres, and the absence of accessible guidelines or at least a framework, makes it difficult for defaulters to deal with the SDRO, or to obtain information as to the available procedures. It was alleged that the only regularly available advice (accessible via the telephone) comprises inconsistent information and responses.[15]

3.37 Currently the SDRO only accepts payment of a penalty by cheque, money order or credit card either in person at a post office or online for credit card payments. There is no capacity to pay by direct debit, Bpay or via a Centrepay arrangement with Centrelink. For

14. Submission 4: Commission for Children and Young People; Submission 5: The Salvation Army; Submission 8: NCOSS; Submission 10: Uniting Care; Submission 13: The Shopfront Legal Centre; Submission 15: Youth Advisory Council; Submission 19: The Coalition of Aboriginal Legal Services (COALS); Submission 20: Youth Justice Coalition; Submission 21: Combined Communities Legal Centre Group (NSW) Ltd; Submission 24: Anonymous prisoner, Mid North Coast Correctional Centre; Submission 25: Anonymous prisoner, Mid North Coast Correctional Centre.
15. Submission 16: Public Interest Advocacy Centre (PIAC)

many this is unduly restrictive and creates problems for people in remote areas and for those who are financially inexperienced.

3.38 As in the case of fines, the imposition of driver licence and vehicle sanctions following default in the payment of penalties, can lead to an escalating problem either by reason of the loss of employment when a licence or vehicle is needed, or by the commission of a serious driving offence if the offender elects to continue to drive or use an unregistered vehicle so as to maintain employment or provide transport for family needs and emergencies. The problem is aggravated for those living in regional areas or outlying metropolitan areas where access to regular public transport is limited.

Procedures for Contesting the issue of a Penalty Notice

3.39 A person may contest a penalty notice by either applying to the SDRO or electing to have the matter dealt with by a local court. The matter may also be contested after the imposition of a penalty notice enforcement order.

Applying to the SDRO

3.40 Previously a person given a penalty notice could appeal to the Infringement Processing Bureau (IPB) for a review of the issued notice. The IPB would then consult with the issuing agency as to the merits of any appeal. The IPB has now been integrated with the operations of the SDRO.

3.41 The SDRO has advised that it will now consider an "appeal" against a penalty notice (although there does not appear to be any legislative authority for it to do so) if:

- It was incorrectly issued; or
- There are special circumstances that warrant leniency.

3.42 The appeal must be lodged with the SDRO before the due date for payment of the penalty notice or of the penalty reminder notice. There are no enforcement fees payable at this time.

3.43 After considering the application, the SDRO may:

- decline the application (in which case the penalty notice stands);
- determine that a penalty notice has been incorrectly issued and cancel the notice so that it does not proceed further; or
- find an offence proven but issue a caution in light of extenuating circumstances, for example, where a driver has had a good driving record for a number of years.

3.44 The SDRO website provides fairly limited information on what constitutes special circumstances sufficient to justify leniency. The applicant is advised only to provide a statutory declaration providing details of the person in charge of a vehicle or the new owner if the applicant was not driving at the time of the offence; or a letter explaining the circumstances and attaching documentary evidence to support the case.

3.45 The SDRO has advised that applications are reviewed using strict guidelines by either SDRO staff or the issuing agency. These guidelines are not published due to concerns regarding client commercial in-confidence and the risk that offenders would tailor their applications to take advantage of the guidelines and escape liability.

3.46 While appreciating these concerns, the Council is nonetheless of the view that more guidance could be provided to applicants on what constitutes special circumstances at the penalty notice stage. The provision of publicly available guidelines could also address criticisms relating to poor SDRO communication and lack of community knowledge on practice issues.

3.47 The Council further notes that none of the penalty notices examined by it in the course of its Inquiry inform an offender they he or she may appeal against a penalty notice on the grounds of 'special circumstances.'

3.48 The Council would welcome clarification as to whether penalty notices currently reflect the right to appeal on the grounds of special circumstances, since the absence of such knowledge effectively negates the benefits of the SDRO adopting the practice.

Court Election

3.49 A person can choose to go to court to dispute a penalty notice (before it becomes a Penalty Enforcement Order) by contacting the SDRO and electing to have the matter heard in the local court.[16]

3.50 Only the person named on the penalty notice or the registered owner of vehicle can elect to go to court, and the matter will be listed at the local court nearest to where the offence was alleged to have occurred.

3.51 The grounds upon which a person can apply to the local court are not exhaustively defined, however some options identified in the standard application include the following:[17]

- For driving offences the offender has held an Australian licence for the last 10 years without any demerit point offences;
- The vehicle which it is asserted the offender was driving was stolen at the time the offence was committed or was being driven by another named person;
- The offender did not receive advice of the penalty notice because he or she was in gaol, hospital or overseas;
- The offender holds a valid ticket or concession card (where the offence is one of fare evasion);
- The parking meter was faulty and the offender has a fault reference number from the Council (for parking offences);

16. Section 35 *Fines Act 1996*.
17. http://www.sdro.nsw.gov.au/appeals/pn_options.html

- The vehicle had broken down (for parking offences);
- The offender was subject to a medical emergency (for driving offences); or
- The offender had changed his or her address (at the RTA) and did not receive the penalty notice.

3.52 Where a matter is contested in court following one or other of the grounds mentioned above, the matter proceeds on the basis that a penalty notice or penalty reminder notice had not been issued. The matter is thus removed from the SDRO database and will only re-appear if the offender is convicted by the court and subsequently defaults on the court generated time to pay arrangements, thus necessitating referral to the SDRO for enforcement action.

3.53 Available to the court are all the possible sanctions that apply to the offence in question. This may involve dismissing the penalty or imposing a different penalty such as a bond or a higher or lower fine amount. If imposing a fine, a court is required, pursuant to section 6 of the *Fines Act 1996,* to take into account the financial circumstances of the offender when assessing the amount of the fine if they are reasonably and practically available.

3.54 A disadvantage of a reference to the local court, however, is that if the contest is unsuccessful, and a fine or other sanction is imposed, this has the same status as if the proceedings were instituted in a court, including the recording of a conviction. Moreover such proceedings can be costly if legal representation is obtained although they are unlikely to succeed if conducted in person.

Penalty Notice Enforcement Order

3.55 The State Debt Recovery Office may, on application or its own initiative, withdraw a penalty notice enforcement order (PNEO) on the following grounds:[18]

- Mistaken identity;
- Wrong owner of the vehicle or vessel;
- Order made in error.

If a notice is withdrawn it is unenforceable.

3.56 A PNEO may also be annulled. The grounds for annulment are set out under section 49 and include:

18. Section 46 *Fines Act* 1996.

- Absence of knowledge of the notice until issue of the enforcement order;
- The recipient did not act on the notice because of accident, illness or misadventure or other cause;
- The recipient's liability is in doubt;
- There is just cause for annulment in the circumstances of the case.

3.57 If a PNEO is annulled the matter is referred to the local court for determination.

3.58 Before the SDRO annuls an enforcement order on the grounds that liability is in doubt, it must refer the matter to the officer or the issuing agency, which must review the matter to determine whether the notice to which the enforcement order applies should be withdrawn.

3.59 If an annulment application is refused then the applicant may apply to the local court to have the application dealt with by the court. If the enforcement order is annulled then the court is to hear the matter de novo as if no enforcement order has been made, in a procedure akin to an earlier election (under section 35) to have the matter dealt with by the court.

3.60 The extent to which offenders are informed of the withdrawal or annulment options is unclear, although it seems unlikely that they would be used by those from the marginalised sections of the community or by young offenders unless they were provided with legal assistance.

3.61 There are no guidelines detailing the manner in which an application to the SDRO is determined or reviewed except to say that each is assessed on an individual basis. Once an application is received the fine is placed on hold pending the review.

Current Procedures for Payment

Payment

3.62 The procedures governing the payment and enforcement of penalty notices are found in Part 3 of the *Fines Act 1996*.

3.63 Payment may be made in person at a post office by cash, cheque, money order or credit card; by credit card online; or by sending a cheque or money order to the SDRO.

Penalty Notice

3.64 Once a penalty notice has been issued, it must be paid in full within the time specified (usually 21 days), unless the person alleged to have committed the offence elects to have the matter dealt with by a court or applies to the SDRO for leniency (see below). Payment of the full amount specified on the penalty notice results in there being no further liability for the offence to which the notice relates.

Penalty Reminder Notice

3.65 If the penalty notice remains unpaid after the date specified, and the person has not elected to contest the notice, then a Penalty Reminder Notice (PRN) is issued by an authorised officer of either the issuing agency or the SDRO. A PRN must provide the offender with at least 21 days to finalise payment. If payment is made at this stage then the matter is finalised and no further liability ensues.

Penalty Notice Enforcement Order

3.66 If payment remains unpaid after the issue of a PRN and the person has not elected to have the matter dealt with by a court or has not entered into discussions with the SDRO, then a Penalty Notice Enforcement Order (PNEO) will be issued by the SDRO. Administratively it would seem the SDRO treats this as a Fine Enforcement Order under section 57 of the *Act*.

3.67 Enforcement costs are generally $50 at each additional stage of the enforcement process. However, if the offender was a juvenile (under 18) at the time of incurring the fine or penalty notice (and the matter was enforced after 1 September 2004) the enforcement costs will be $25.

3.68 If the person does not pay the amount (including the enforcement fee) within 28 days, enforcement action by way of sanctions may be taken in the same way as that for court imposed fines, that is, via the SDRO.

Time To Pay

3.69 The position is unclear in relation to the stage at which an entitlement arises in the recipient of a penalty notice to seek time to pay the penalty.

3.70 There have been some suggestions that the issuing agency might have a capacity to grant approval for time to pay arrangements although no statutory basis for any such power appears to exist.

3.71 The SDRO has advised the Council that in recent months, it has adopted an informal process of approving such applications and allowing payment by instalments at inception, that is, at the stage of a penalty reminder notice, although the only relevant statutory power seems to be that contained in section 100 of the *Fines Act*. It permits an offender to apply to the SDRO for time to pay, but only after the issue of a fine enforcement order (that is, if a court fine enforcement order or a penalty notice enforcement order remains unpaid) and before the issue of a community service order.

3.72 There would be advantages in:

- Empowering issuing agencies to approve time to pay arrangements before referral of the matter to the SDRO for enforcement;
- Clarifying and confirming the capacity of the SDRO to approve time to pay arrangements at the stage of the penalty reminder notice; and
- Establishing transparent guidelines that would include the provision of suitable information informing the recipients of penalty notices of their entitlements to seek time to pay arrangements (including payment by instalments).

Enforcement Procedures

3.73 If a penalty enforcement order remains unpaid after 28 days, and there has been no election for it to be dealt with by a court or a reference to a court consequent upon annulment, then the enforcement procedures within Part 4 of the *Fines Act 1996* apply.

3.74 Section 58 of the *Fines Act* details the enforcement procedures that apply to both a penalty enforcement order and a court enforcement order (that is, relating to an unpaid court-imposed fine). They are as follows, in summary:

- Service of enforcement order
- Driver licence or vehicle registration suspension or cancellation
- Suspension of dealings with the RTA
- Civil enforcement
- Community service order
- Imprisonment on failure to comply with community service order

3.75 These enforcement procedures are discussed further in Chapter Four: State debt recovery Office, at paras 4.8 – 4.41.

Fines payable by corporations

3.76 The procedures for enforcement (other than CSOs and imprisonment) also apply to fines and penalties payable by corporations.

Difficulties with the Current Penalty Notice Enforcement Procedures

3.77 A number of difficulties associated with the procedures for the issue of penalty notices and for the enforcement of outstanding notices have been identified, some of which apply in common with those applicable for the recovery of fines.

Offender's financial circumstances

3.78 There is uncertainty as to the capacity to take into account the financial means of the offender at the beginning of the process. While time to pay arrangements are available to offenders experiencing financial difficulties, they are strictly only available once the penalty notice has reached the fine enforcement order stage, with the consequence that the SDRO has to assume the burden of attempting to deal with penalties that should not have been imposed, or that offenders have no capacity to pay.

3.79 The Council acknowledges that the SDRO website now advises of the existence of an option for offenders who are experiencing financial hardship to contact the SDRO immediately upon the issuing of a penalty notice in order to obtain a possible extension of the due date.[19]

3.80 The exact grounds upon which a person can have the due date extended are not specified, and while the procedure is somewhat informal, it seems that as a rule of thumb an 8 week extension is generally granted for a $300 penalty. It is understood that the SDRO is working towards establishing a procedure that would permit arrangements to pay by instalments.

Lack of alternative penalties

3.81 There is no scope for alternative penalties such as community service or a bond, in situations where they are more appropriate, for example where the offender does not have the means to pay the penalty. That is, until the earlier enforcement provisions undertaken by the SDRO have been exhausted, whereupon community service may be considered for a defaulter.

Lack of confirmation of service

3.82 There is absent any requirement that either the SDRO or the issuing agency confirms the service on the offender of either the original penalty notice or any subsequent correspondence.

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19. http://www.sdro.nsw.gov.au/appeals/pn_options.html and http://www.sdro.nsw.gov.au/no_action/pn_cant_pay.html accessed on Wednesday 4th October 2006 at 9:00am

Predetermined penalty quantity

3.83 The quantity of the penalty imposed is predetermined and cannot be varied at the time the notice is issued or subsequently unless it is later written off.

3.84 While the amount of the penalty and of any accrued penalties can obviously be taken into consideration when a time to pay application is made, earlier attention to the quantity of any accrued penalties could flag a potential fine defaulter and indicate that an alternative sanction is appropriate. Likewise, the existence of some procedure other than withdrawal or annulment for review of the penalty which could make allowance for the objective circumstances of the offence and the subjective circumstances of the offender, and lead to some variations in the penalty.

Limited provisions for administrative review

3.85 As noted later in this report, the procedure for administrative review of the decisions of the issuing agency and of the SDRO are limited.

The Victorian Infringement Act (2006)

3.86 The *Victorian Infringement Act* 2006 will come into effect on 1 July 2007. While it has a good deal in common with the NSW *Fines Act* , it provides a more effective framework for regulating the issue of infringement notices and for the protection of vulnerable offenders.

3.87 In particular, it contains the following features:

- Provision for the Attorney –General to
  - make guidelines identifying the offences that are suitable for notices and the level of penalties applicable, in consultation with relevant ministers;
  - establish a model code for their issue; and to
  - identify the criteria for allowing time to pay.
- The use of warnings in appropriate cases instead of infringement notices;
- The creation of a procedure for internal review by the issuing agency on the grounds that:
  - The penalty was issued contrary to law;
  - There was a mistake as to identity;
  - The recipient satisfies the special circumstances criteria; and
  - The offending conduct should be excused because of exceptional circumstances;

  Special circumstances comprise:
  - the existence of a mental illness or intellectual disability, or other disorder or illness that results in the offender being unable to understand that the conduct constitutes an offence or to control that conduct;
  - the existence of a serious substance addiction that has a similar effect; and
  - homelessness where it results in an inability to control the relevant conduct.
- A deemed withdrawal of the notice unless the review is completed within the prescribed time.
- A requirement for referral to court where the agency confirms the notice in those cases where special circumstances have been raised;

- Payment of the notice does not constitute an admission of guilt in relation to the offence or an admission of liability, and is not to be referred to in any sentencing report;
- A natural person may apply for a payment plan where eligibility criteria identified in the Attorney-General's guidelines are met and, where granted, the existence of such a plan is to be notified to a Central Payment Facility, which must be provided with up to date contact details;
- Permission for unpaid community work for people with outstanding infringement warrants.
- Provision for community work permits, to be supervised by community correction offices for penalties of less than $10 000 (one hour of work for each 0.2 penalty unit, with a minimum of 8 hours and a maximum of 500 hours work).

Expansion of the Penalty Notice System

3.88 The Council considers that attention should be given to any deficiencies in the system for the use of penalty notices, and for their enforcement by the SDRO, before there is any further extension of the existing trial.

3.89 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.

3.90 Warnings to similar effect have been given by the NSW Ombudsman[20] and The Homeless Person's Legal Service / Public Interest Advocacy Centre.[21]

3.91 The reasons for deferring any extension of the use of penalty notices and CINS include:

- The uncoordinated nature of the system;
- The risk of adverse consequences, particularly to marginalised sections of the community;
- The general undesirability of ' executive sentencing';
- Risks associated with net-widening; and
- Adverse public perceptions.

3.92 For these reasons, considerable care would be required in extending the system and should not occur until suitable safeguards are in place to avoid abuse of the system, and to ensure that the enforcement process has sufficient mechanisms and flexibility for its equitable application.

The uncoordinated nature of the system

3.93 The system for selecting offences that are amenable to be dealt with by notices, and for setting (and adjusting) penalty amounts, is uncoordinated. This is evidenced by the current wide variations in existing penalties which bear little rational relationship to the severity of those offences, as well as the lack of cross government scrutiny of that system.

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20. NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, Sydney, 2005
21. The Homeless Person's Legal Service / Public Interest Advocacy Centre, *Not Such a Fine Thing!* 2006

The risk of adverse consequences, particularly to marginalised sections of the community

3.94 There is a risk of adverse consequences, particularly to the marginalised sections of the community, who are most likely to be the recipients of these notices (excluding traffic offenders), if more and more offences are to be dealt with by penalty and infringement notices, in circumstances amounting to net widening where:

- Their issue effectively involves an administrative act which for the most part (save in the small number of cases which go to the Courts) will escape any form of judicial or public scrutiny;
- Their issue does not permit, of any, alternative other than a monetary penalty, even though in very many cases, other alternatives such as a caution or warning, or diversion to a suitable program, or a disposition under sections 32 or 33 of the *Mental Health (Criminal Procedure) Act* 1990, or a s 10 bond, would be more appropriate;
- They potentially attract a double penalty under the existing rigid system for enforcement which permits very little (if any) effective administrative review, and which provides for escalating sanctions resulting in a large proportion of the recipients being fixed in a debt trap and having their prospects employment and rehabilitation adversely affected;
- The system does not permit the same attention to be given to the objective seriousness of the offence, or to the subjective circumstances of the offender, or to any of the general principles of sentencing including punishment, retribution, deterrence, community protection, rehabilitation and so on which the courts take into account in fixing a sentence, since the issue of a penalty or infringement notice is for a fixed and mandated amount, which was arbitrarily determined by a legislative instrument and which is applicable to every case meeting the description of the offence, no matter what the circumstances of its commission.

The general undesirability of ' executive sentencing'

3.95 Any wholesale shift from judicially determined sentences for offending conduct, to what amounts to 'executive sentencing' determined by individual police officers or by employees of Government Departments or of Local Government (who possess no judicial training or experience but are vested with significant powers that can have far reaching consequences both financially and otherwise if enforcement action is undertaken) and where there is

little available in the way of any review or public oversight, is generally undesirable.

Risks associated with netwidening

3.96 There is a risk that net widening will have the consequence of large numbers of people who are served with notices being punished for offences which they did not commit, because they lack the means or the ability to contest the notice in court – a risk that is evidenced by the large proportion of offenders dealt with by way of notices for offensive language or behaviour which would not stand up in court.

Adverse public perceptions

3.97 Perceptions are likely to arise that the net widening is designed either to:

- Simplify the ability of police to deal with an offender and obtain a conviction, so far as the normal court safeguards are sidestepped and so far as the onus of establishing innocence is passed to the recipient of the notice; or
- To raise revenue without regard to the more desirable social outcomes of modifying behaviour.

3.98 Neither of these perceptions would reflect well on the government in the mind of the public.

Deemed Convictions

3.99 There are also serious and obvious disadvantages in any amendment of the law that would elevate the issue of penalty notices so as to have the status of a deemed conviction, or so as to constitute an admission of liability, whether or not payment is made.

3.100 They are as follows:

- They are issued, and attract a potential monetary liability, as the result of the act of an officer of the issuing agency, who effectively has the status of a prosecutor. They are not the subject of an adjudication by an independent judicial officer, which is the recognised normal precondition for the entry of a conviction against any person, giving rise incidentally to a potential constitutional question as to the validity of a conviction following upon a non judicial act.
- While there is an available election to contest a notice by having it referred to a court, many offenders, and virtually all within the marginalised sections of the community, cannot afford the costs or inconvenience of such an election, and those that do, face the additional consequences of court costs and a victims compensation levy if they are unsuccessful;
- For the most part, the offences dealt with are trivial, and the monetary penalty is such that many offenders are currently prepared to accept the burden, rather than face the costs and inconvenience of taking the matter to court, in the knowledge that the matter will end there without a conviction;
- If the bare issue of an unadjudicated penalty is now to be accompanied by a conviction, there is the potential for a very substantial increase in the work load of the Local Court because the consequences which follow the acquisition of a criminal record are likely to cause more persons to contest the notice;
- The greatest incidence of the use of CINS, in particular, occur with the marginalised sections of the community, i.e. the homeless, Aboriginal people, the indigent, the mentally and intellectually disabled and the young. The receipt of a further deemed conviction and consequent exposure to the SDRO sanctions, risk only driving them deeper into a debt trap, secondary offending, and subsequent imprisonment, even though in most cases, because of their disadvantaged state, they had little appreciation of, or ability to control the conduct.
- By reason of the inadequate training of those empowered to issue notices, the lack of guidelines and unavailability of or

reluctance to use a power to issue a caution or a warning in lieu of a notice, there is the real prospect of this power being abused, and in particular for it being the occasion for discriminatory use or for corruption if officers use the threat of the issue of a notice, with the consequence of a deemed conviction, to extract a bribe.

- The presence of deemed convictions in criminal histories, in many instances for minor offences, risks distorting those histories and causing an unfair detriment to an offender facing sentence for a matter dealt with in court, because the lack of the objective seriousness of these offences will not be apparent on the record.
- There is a significant risk of inconsistency between the penalties imposed of those who do not contest the notice and those who go to court for whom a section 10 bond is a likely outcome.
- To elevate the "administrative" penalty notice to criminal status is inconsistent with the policy behind its adoption.

3.101 It is not to be overlooked that the consequences of a conviction, and the acquisition of a criminal record, can be very far reaching, and unjustified by the trivial nature of many of the offences potentially covered by penalty notices and CINS.

3.102 They include:

- Disentitlement to a visa and travel to many countries, e.g. the USA, which require disclosure of all convictions and which adopt a very hard line in refusing visas in such instances.
- The need for disclosure of any convictions in many routine aspects of life for example applications for employment, applications for insurance and credit facilities and applications for working with children checks.
- Exposure to infringement of privacy in so far as such applications find the way into accessible data banks, and become fodder for media interest leading to unfair and sensational reporting.
- The potential for automatic revocation of Parole.
- Apart from the risk of a substantial increase in the work load of the Local Court and the Probation and Parole Board, there would also be a substantial increase in the workload of government ministries or agencies, which would involve additional cost, delay, and the risk through pressure of work of missing cases that do require particular attention, inter alia, concerning:

- the working with children checks which already are either affected by a backlog or are not being carried out at all, with the consequent risk of permitting paedophiles to have access to children;
- the processing of spent convictions; and
- the compilation of criminal histories.

3.103 It may be noted that a number of studies, as well as legislation in one other State, have set their face against treating penalty and infringement notices as giving rise to deemed convictions.[22] For NSW to take any different approach would be to ignore most of the contemporary and informed examination of the problem.

3.104 The Council is also of the view that if, as a result of any extension of the trial or otherwise, the legislation is amended to deem that matters dealt with by way of a penalty notice or CIN should have the status of a conviction (an amendment which it considers wholly undesirable) then there should be:

- a review power to exclude that consequence, where it would be unjust for a conviction to be recorded; and
- the development of a body of principles, which would identify a relatively narrow body of offences which, if dealt with by way of a penalty notice, would lead to a conviction being recorded, and
- which would also identify the extent to which such an entry could be taken into account by a Court when it subsequently sentences an offender for a later offence.

22. NSW Ombudsman *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, Sydney, 2005; NSW Law Reform Commission Report 79 (1996) *Sentencing*; Australian Law Reform Commission, Report 95 (2002) *Principled Regulation: Federal Civil and Administrative Penalties in Australia*; Professor Richard Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology, Canberra, 1995; and *The Infringements Act 2006* (VIC).

Options for Reform

3.105 The Council notes that the following options for reform of the current system of penalty notices have been identified. These include:

- A general review of all offences where a penalty notice can be issued.
- Review the system for the fixing of penalties.
- Provision for greater flexibility in time to pay applications.
- Provision of Direct Debit and BPay facilities.
- Administrative review
- Guidelines on the appropriateness of a penalty notice
- The establishment of procedure for writing off accumulated penalties.
- Community Service and Diversionary Options
- Waiver of enforcement and annulment fees

A general review of all offences where a penalty notice can be issued

3.106 Such a review could investigate the relevance of the many current offences where a penalty notice can be issued, analyse and rationalise the current penalty amounts in relation to the seriousness of these offences, and their prevalence and any deterrent value attaching. It could also provide a vehicle to explore which classes of offences should be made the subject of a penalty notice as well as those that are not suitable.

Review the system for the fixing of penalties

3.107 The arbitrary and uncoordinated system of fixing penalty notice amounts leads to incongruous results. A review could assist in developing guidelines under the lead of the Attorney General, although involving cross-government input, into the fixing of penalty amounts rather than leaving them to determination by the relevant Ministry.

3.108 It could also develop guidelines for their adjustment and examine the possibility of prescribing maximum penalties for penalty notice (for example 20 percent of the maximum penalty for the offence) in order to promote consistency and transparency.

Provision for greater flexibility in time to pay applications

3.109 The regularisation through amendment of the *Act* of time to pay options including instalment plans which would be accessible via the issuing agency or via the SDRO when the penalty notice is first

received rather than deferring it to the enforcement stage, would present those experiencing financial hardship with a more viable means of paying the fine.

3.110 Clear guidelines could be drafted identifying exactly what constitutes financial hardship and what factors the issuing agency or SDRO should take into consideration when assessing a time to pay application.

3.111 For example, it would seem that the provision of a Centrelink health care card or pension card should suffice to establish an entitlement to time to pay without the need for the provision of some detailed financial statement which is beyond the capacity of many offenders to prepare

Provision of Direct Debit and BPay facilities.

3.112 These should be available, in particular permitting payment by instalments, particularly by those in receipt of Centrelink benefits, or when the production of a Health card or Pension card should give rise to an automatic right to payment by instalments.

3.113 Clear guidelines could also be drafted defining what constitutes special or exceptional circumstances for the purposes of either annulling, or withdrawing the penalty notice or granting time to pay, either through an extension of the due date, or by establishment of an instalment plan.

Administrative review

3.114 There are significant limitations on the extent to which there can be effective administrative review following the issue of a penalty notice, and of SDRO decisions concerning its enforcement.

3.115 The issuing agency currently lacks any capacity to review the imposition of a penalty, save for the circumstance where, following an application for annulment of a penalty notice enforcement order, a matter is referred to it for the reason that a question has arisen as to the applicant's liability for the penalty. It also lacks the ability, it would seem, to agree to or to review any applications for an extension of the time to pay or for an instalment plan consequent upon the issue of a penalty notice.

3.116 The SDRO can, in the circumstance mentioned earlier:

- cancel a penalty notice (assuming its current practice has a proper basis);

- withdraw a penalty notice enforcement order;[23] or
- annul such an order (following an internal review, normally in the absence of the parties).[24]

3.117 While it is true that in the case of a refusal of an annulment application, the applicant can lodge an application with a Local Court to have the matter determined in the court, no such right exists where an application for withdrawal of a PNEO or for leniency in relation to a penalty notice, is refused.

3.118 Conflicting views exist in relation to the time at which the Hardship Review Board can review decisions of the SDRO refusing applications for time to pay, or to write off debts. The SDRO maintains that it can do so any time once the Director has refused such an application; consultants to the Council and submissions received, however, suggest that it only exercises this power at the end of the enforcement process, a view which might gain support from the limited number of applications that are made.

Proposals for Reform

3.119 In these circumstances there would seem to be merit in the following:

- Conferring a power in the issuing agency to conduct an internal review leading to withdrawal of the penalty notice on the same grounds as those identified in the *Victorian Infringement Act* 2006, namely that:
  - The penalty was issued contrary to law,
  - There was a mistake as to the identity of the offender,
  - The offender satisfies special circumstances criteria identified in the Act, or
  - The conduct should be excused because of exceptional circumstances.
- Providing a power in the Agency to allow for an extension of the time to pay the penalty, including payment by instalments, would also be of assistance.
- There would be merit in maintaining the existing power of the SDRO to cancel a penalty notice (assuming it has such a power); and to withdraw or to annul a penalty notice enforcement order, subject to the creation (in lieu of the section 50 appeal to the

23. Section 46 of the *Act*.
24. Section 46 of the *Act*.

Local Court) of a right of administrative review by an SDRO Review Board.

The Review Board would have the power to:

- Revoke or confirm the SDRO decision, and to
- Refer the matter to the Court for determination where it is of the view that a Court should determine whether or not an offence was committed, and to fix an appropriate penalty.

- Extending the jurisdiction and composition of the Hardship Review Board, reconstituting it as an SDRO Review Board, and making it a more representative body, that could deal, on an administrative law basis, with appeals from all decisions of the SDRO concerning penalty notices referred to it, for example, in relation to:
  - time to pay applications,
  - the imposition of sanctions,
  - the writing off of penalties, the cancellation of penalty notices and the withdrawal and annulment of penalty notice enforcement orders.
- Permitting the SDRO Review Board to deal with appeals relating to decisions of the SDRO in relation to court fines referred to it, including, for example, decisions concerning the imposition of sanctions, time to pay applications, write offs, and so on.

3.120 It is accepted that to create a general right of appeal or of administrative review in relation to the issue of penalty notices or the enforcement of penalties or fines, within the Local Court, or the Administrative Decisions Tribunal, or some other specialist Tribunal, could generate a potential workload that would be beyond the reasonable capacity of such a Tribunal or Court.

3.121 However it is the Council's view that this could be avoided by the general structure which it envisages would involve the following elements:

- Decisions concerning the liability of offenders dealt with by way of fines in local courts, either because the prosecution was instituted there, or because the matter was referred to the court following a contested PNEO, would be subject to judicial determination and to the appeal procedures applicable to local

courts, such that they would not call for administrative review in relation to their disposition.

- The availability of a system for internal review within the agencies that issue penalty notices would resolve many cases, avoiding the need for further review concerning their issue; and
- The remaining cases, which would relate essentially to administrative decisions by the SDRO concerning the enforcement of fines or penalties, would be capable of determination by a reconstituted SDRO Review Board, which could establish guidelines, including for example leave requirements, to filter out unmeritorious claims.

3.122 The creation of such a structure, it is believed, would permit of an early resolution of many disputes and encourage a more informed response and capacity for flexibility on the part of the SDRO, which would improve the recovery procedure. This would also avoid the wastage of time and expense for cases where the offender had no capacity to pay, and where the sanctions would have little meaning other than to drive the defaulter into a debt trap, into secondary offending, and into a general deterioration of their prospects for rehabilitation.

Guidelines on the appropriateness of a penalty notice

3.123 *The Fines Act* currently does not provide adequate guidance on when it is appropriate to issue a penalty notice. Its application would be enhanced by the development of guidelines and a model code of conduct for issuing officers, which would permit greater discretion in, and guidance for, the use of a warning or a caution in those cases where that would be more appropriate than the issue of a penalty notice.

3.124 Training in their use would be desirable and appropriate for officers empowered to issue penalty notices, particularly in remote and regional areas and in regions with a significant Aboriginal population.

The establishment of procedure for writing off accumulated penalties.

3.125 In the course of its consultations the Council became aware of the existence of a significant body of offenders, many of whom are in custody, who have accumulated a very significant debt as the result of unpaid fines, penalties, levies and administrative charges, which they have no hope of paying.

3.126 Being deprived of a licence and work opportunities where that is linked to a capacity to drive, and facing an impossible debt burden, their natural reaction is one of hopelessness with its consequent adverse effects on rehabilitation and escape from a debt trap.

3.127 It would be appropriate to develop guidelines to allow for the writing off of or reduction of such debts (in part or in full) at an earlier date than that which appears to be permitted by the current system, which seems to depend on an informal policy that contemplates a 5 year payment period, and deferring any write off until most sanctions have been tried and failed.

3.128 A further option worthy of consideration would be the grant of a power to the SDRO to refer offenders who have accumulated a default for unpaid fines or penalties over a certain threshold to an appropriate administrative Tribunal which might then determine whether they are recidivists who have the capacity to pay but elect not to do so, or whether they are persons who meet the special circumstances criteria, or lack the capacity to pay the debt, such that some special order including a write off should be made.

3.129 The Council notes that the Scottish Commission for Sentencing made a similar recommendation in relation to people exiting prison with substantial debt, with the intention that the debt would be wiped to give the person a 'clean slate' or an appropriate payment plan entered into, depending on the offender's circumstances.[25]

Community Service and Diversionary Options

3.130 As with the case for fines, consideration could usefully be given to the establishment of a mechanism where recipients of penalty notices could engage in voluntary community service, utilising reputable welfare and community organisations, or for diversion into an appropriate rehabilitation program to encourage behavioural change, where they are unable to meet the penalties imposed.

Waiver of enforcement and annulment fees

3.131 These should be waived in the case of offenders who can produce a Centrelink Pension card or Health Care card.

25. The Scottish Commission for Sentencing, *The Basis on Which Fines are Determined*, 2006.

Part 4

The State Debt Recovery Office

- History and Function
- Enforcement Statistics
- Enforcement Procedures
- Provisions for Addressing Disadvantage
- Difficulties identified regarding SDRO Procedures
- Options For Reform

PART 4: THE STATE DEBT RECOVERY OFFICE

History and Function

4.1 The State Debt Recovery Office (SDRO) is a division of the Office of State Revenue (OSR) within NSW Treasury. The SDRO manages the fine and penalty enforcement system in accordance with the *Fines Act 1996,* and in this capacity, is concerned with ensuring that the integrity of a fine or penalty notice as a sentencing option is maintained through the efficient and effective use of sanction against non-compliance.[1]

4.2 The SDRO commenced operations in January 1998.

Enforcement Statistics

4.3 The SDRO commences over 300 new fine or penalty enforcement matters each day.[2] It collected $88m, or one percent of OSR revenue in 2004/05[3] and during that year, it processed over 2.6 million penalty notices and approximately 78 000 court imposed fines.

4.4 The Council was advised that the SDRO has assessed a court-imposed fine collection rate of approximately 24 percent for 2004-05 and a recovery rate of just over 26 percent of penalty notices referred to the SDRO for the same period.

Data Limitations

4.5 The SDRO was unable to provide the Council with a breakdown of court-imposed fines and or penalty notices. This is because debt is recorded against a defaulter's name and not by whether it was incurred by virtue of a fine or penalty notice.[4]

4.6 Thus, it is not possible to determine conclusively whether penalty notices or court-imposed fines are most likely to be paid, or paid in a timely manner.

4.7 Likewise, it has not been possible to determine a breakdown by offender demographics (such as Aboriginality, ethnicity, age or gender) or by offence type, as this information is not recorded.

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1. Submission 11: The Office of State Revenue.
2. Redfern Legal Centre and Inner City Legal Centre (December 2004) Fined Out at p 5
3. NSW Office of State Revenue 2004-05 Annual Report at p 2
4. Submission 34: SDRO.

Enforcement Procedures

4.8 If a person does not pay a court imposed fine or defaults on an agency-issued penalty notice, the enforcement procedures in the *Fines Act* are invoked. [5]

4.9 The enforcement provisions are taken and co-ordinated by the SDRO.

4.10 Enforcement action consists of the following steps:

- Service of court fine enforcement order or a penalty notice enforcement order, or by a fine enforcement order;
- Imposition of driver licence or vehicle registration sanctions;
- Customer business restrictions precluding the obtaining of a licence or vehicle registration;
- Civil enforcement;
- Community Service Order (CSO); and
- Imprisonment.

4.11 Under the current inflexible hierarchy for fine and penalty notice default sanctions, each enforcement option must be exhausted before moving on to the next.[6]

4.12 At each stage in the enforcement process an enforcement cost of $50 is added to the penalty or fine.

Licence sanctions

4.13 If the sum due is not paid within the period specified, the RTA, at the request of the SDRO, will suspend the drivers licence of the defaulter, and may also cancel the registration, of the defaulter's vehicle. If the drivers licence is suspended and the debt remains unpaid for 6 months, the RTA cancels that driver licence.

4.14 If the driver licence or vehicle registration is suspended or cancelled, or the RTA is unable to take action (eg by reason of the fact that the offender does not have a licence or vehicle), then the RTA must (unless the SDRO otherwise directs) refuse to:

- issue or renew the offender's licence or registration of the offender's vehicle; or
- transfer that vehicle; or

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5. Section 58(1) *Fines Act 1996.*
6. Section 81(1) and 81(2) *Fines Act 1996*.

- engage in several other dealings relating to the licensing, registration and use of vehicles, including sitting for a driving test.

4.15 The RTA has advised that in the period 01/07/04 to 30/06/05, the SDRO made over 256, 500 requests to apply a *Fines Act* sanction:

- 65 percent of sanctions were applied to a licence (approximately 165,000 matters);
- 19 percent of sanctions were applied to a registration (approximately 48,000 matters);
- 16 percent resulted in a customer business restriction (approximately 40,500 matters).[7]

4.16 The Council notes the existence of a slight inconsistency between the figures supplied by the SDRO and the RTA for the period 2004-2005. In comparison with the RTA's figure of approximately 256,000 licence sanctions, the SDRO indicated that 245,500 sanctions were imposed.[8]

4.17 The effectiveness and impact of licence sanctions imposed for fine default are discussed further in Part 5 of this Report.

Civil enforcement

4.18 If the defaulter does not have a drivers licence or a registered vehicle, or the debt remains unpaid after 6 months, civil action is taken to enforce its recovery. This takes the form of a property seizure order, a garnishee order or the registration of a charge over any land owned by the defaulter.

4.19 The SDRO has advised that 769 garnishee orders (comprising at least one court fine enforcement order) were imposed during 2004-05. No charges on land were imposed.[9]

4.20 The NSW Sheriff's Office advised that, for the same period, 21,435 property seizure orders were issued to the Sheriff's Office by the SDRO.

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7. That is, a licence would not be renewed or issued until all fines are paid to the SDRO. Advice provided by the RTA in October 2006.
8. Advice from the SDRO Fines Enforcement Branch, 22 September 2006. This includes sanctions imposed for default of both court-imposed fines and penalty notices.
9. Advice from the SDRO Fines Enforcement Branch, 22 September 2006. The SDRO was not requested to provide figures on the number of garnishee orders or charges on land arising from penalty notice default.

4.21 Of these:

- 19 percent were paid in full; and
- 23 percent led to payments in instalments.

4.22 The Sheriff's Office was unable to provide information on the total value of property seized.[10]

Time to Pay Applications

4.23 Where a request is made to the Sheriff for time to pay it must be sent to SDRO for consideration as the Sheriff has no power to approve a time to pay application. The Sheriff can however, recommend to the SDRO that a matter be written off - such as when a defaulter has no goods to seize.

4.24 The Council was advised that often the SDRO will grant a defaulter a stay at the last possible moment - literally when the Sheriff is at the door trying to seize goods. This was said to constitute a waste of the Sheriff's time and resources.

Determining the value of seized goods

4.25 Property seizure orders can be actioned for 12 months. If the Sheriff does not recover the full value of the fine from the auction of the confiscated goods, the defaulter will still owe the balance of the fine.

4.26 Seized goods are not given their true value – they are recorded for what they get at auction rather than what the defaulter actually paid for them or what it would cost to replace the items. For example a $3000 plasma TV might sell for $200 at auction, meaning that only $200 comes off the fine, leaving the defaulter still owing a considerable amount on the original fine as well as any additional enforcement costs.[11]

4.27 It was submitted in consultations that this constitutes a 'double penalty' in that the goods seized do not recoup the fine in their real value.

4.28 The Council recommends that a replacement value should be attributed to the goods seized by the Sheriffs' Office under Property Seizure Orders, which might be set off against the fine or penalty instead of the significantly reduced amount that might be expected to be received at auction.

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10. Submission 28: NSW Sheriff's Office.
11. In consultation, Dubbo Sheriff's Office, 7 August 2006.

Community Service Orders

4.29 If civil enforcement action is not successful, a Community Service Order (CSO) is served on the defaulter.

4.30 Compliance with a CSO serves to cancel out or repay the outstanding debt.

4.31 Debt is discharged at the rate of fifteen dollars for each hour of community service performed, with a maximum of 300 hours CSO imposed per enforcement order for an adult, and 100 hours maximum for a child.

4.32 Seventeen community service orders (consequent upon at least one court fine enforcement order) were issued in 2004-05. The SDRO has advised that two CSO's were completed and one was breached.

Imprisonment

4.33 Imprisonment no longer exists as a direct response to fine default. Since 1998 no person has been placed in custody for non-payment of a fine.[12]

4.34 However, imprisonment can follow failure to complete a community service order imposed by the SDRO for fine default.

4.35 Children cannot be committed to a correctional centre or a detention centre if under 18 years of age when the offence concerned was committed, and or if under 21 years of age when charged with the offence or issued with a penalty notice (as the case requires). [13]

4.36 As with a community service order, completion of a term of imprisonment satisfies the outstanding debt.

4.37 The defaulter may apply to serve a period of imprisonment by way of periodic detention. In this instance, one detention period is taken to be equivalent to 2 days of imprisonment or $240.[14]

4.38 The formula for calculating the period of imprisonment based on the outstanding fine is one day for each $120 owed, with some qualifications. For example, an offender must not be sentenced to less than one day (or one detention period where it is to be served by periodic detention); or for more than three months (or 45 detention periods where it is to be served by periodic detention).

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12. Submission 11: Office of State Revenue.
13. Section 92 *Fines Act 1996.*
14. Section 91 *Fines Act 1996.*

Outstanding orders

4.39 At the end of the 2004-05 financial year, 1,255,292 court fine enforcement orders remained outstanding.

4.40 As at 30 June 2006, 1,400 825 fine defaulters had outstanding Enforcement Orders.[15] It is not known how much money this represents.

15. Advice from the SDRO Fines Enforcement Branch, 22 September 2006.

Provisions for Addressing Disadvantage

Time to Pay / Payment by instalments

4.41 A defaulter may seek time to pay following the issue of a Fine Enforcement Order (FEO).[16]

4.42 An application to pay by instalments may also be made following the issue of a FEO.

4.43 As discussed at paragraph 3.71 in relation to penalty notices, the SDRO has advised the Council that recently, it has adopted an informal process of approving time to pay applications and allowing payment by instalments at the penalty reminder notice stage, although the only relevant statutory power seems to be that contained in section 100 of the *Fines Act*. It permits an offender to apply to the SDRO for time to pay, but only after the issue of a fine enforcement order (that is, if a court fine enforcement order or a penalty notice enforcement order remains unpaid) and before the issue of a community service order.

Writing off debt

4.44 The SDRO may write off unpaid debts after a FEO is made and before a CSO is made, at its own discretion or on the application of the defaulter, if:

- it is satisfied that the defaulter does not have sufficient means to pay the penalty and is not likely to have the means to do so; and
- enforcement action has not been or is unlikely to be successful; and
- the defaulter is not suitable for a community service order.

4.45 A written off fine can be reactivated and enforcement action renewed within the following five years, if the defaulter receives a further fine enforcement order and the SDRO is satisfied that:

- the defaulter has the means to pay, or
- that the enforcement order is likely to be successful; or
- the defaulter is suitable for a CSO.

4.46 The SDRO has advised that it wrote off 10,129 fines to the value of $4.68 million in 2005-06.

16. Section 100 *Fines Act 1996*.

4.47 The SDRO has advised that it has adopted an informal policy of writing off debts if satisfied that payment cannot be obtained within 5 years.

4.48 The existence of the policy seems to have been unknown to those who made submissions or advised the Council of the problems experienced by many offenders who have a long term liability to the SDRO; particularly is this so in the case of serving prisoners.

Debt Waiver

4.49 The SDRO may also waive or extinguish a fine defaulter's liability for payment of an amount owing under a fine enforcement order.

Hardship Review Board

4.50 The Hardship Review Board (HRB) was established on 1 September 2004. It is an independent panel comprising the Chief Commissioner of State Revenue, the Secretary of the Treasury, and the Director-General of the Attorney General's Department or their nominees.

4.51 The HRB can review decisions by the SDRO to refuse applications for time to pay or to have a fine or penalty written off.[17]

4.52 The HRB advised that to date, it had received 96 applications.[18] Of these:

- 3 were pending hearing at the time that this report was prepared.
- 20 were eligible for listing; and
- 73 were ineligible, either because
  - they were premature (because the applicant had not applied to the SDRO for time to pay or write-off or because the matter had not yet been determined) or
  - the applicant was disputing liability for the fine or appealing against the SDRO's refusal to grant a community service order or to lift RTA licence sanctions.

4 53 Of the 20 applications heard, the HRB directed the SDRO to:

- allow time to pay arrangements for 6 matters;
- write-off the outstanding fines for 9 matters; and to

17. Section 101B *Fines Act 1996.*
18. Submission 51: The Hardship Review Board.

- postpone time to pay arrangements until Centrepay was introduced in 3 cases.

  Further information was requested in 2 matters.

4.54 The HRB advised that while it does not collect information on the characteristics of applicants, or data on common offences:

- generally the offences giving rise to the debt were fairly minor;
- commonly applicants will have both outstanding court-imposed fines and penalty notices; and
- applicants are sometimes represented by community advocates via written submissions (8 cases). The HRB does not permit applicants to appear in person before it.

4.55 The Council was informed via submissions and consultations that, although the HRB has the statutory power to review SDRO debts on prescribed hardship grounds, this review mechanism is only available at the end of the civil enforcement process, by which stage defaulters may have accrued hundreds of dollars in enforcement costs, and have suffered significant disadvantage by reason of the imposition of sanctions, affecting their employment prospects and otherwise.

4.56 The SDRO however informed the Council that it does not agree with this assertion, and says that the HRB is prepared to consider such applications at any stage of the enforcement process so long as the Director has considered and refused the relevant application.

4.57 This however, does not accord with the understanding of those who represent offenders within the enforcement process, at least so far as the submissions and consultations disclose. Nor does its potential availability appear to be well publicised or known.

4.58 Submissions received by the Council highlighted the hardship and distress experienced by defaulters who suffer from mental illness or intellectual disability, as well as the existence of a considerable body of defaulters who experience other family hardship and financial difficulties, but who, because of lack of knowledge or assistance, have been unable to obtain relief from the Hardship Review Board.[19]

19. Submissions 16 PIAC; 21 CCLCG; and Submission 40: Department of Corrective Services.

Remissions

Pre Fines Act 1996

4.59 Prior to the *Fines Act 1996*, an applicant could apply to the Attorney General's Department for a remission or cancellation of a fine(s):

- On the general ground that the fine was contested
- On Hardship or compassionate grounds; or
- On a "cut out" basis.

Contested fines

4.60 Fines may be remitted on the general ground that the fine was contested, and that remission was a fairer or more cost effective resolution than referral of the matter to the Local Court under relevant provisions of the then *Justices Act* 1902.

Hardship grounds

4.61 The Attorney General's Department has advised that applications based on hardship or compassionate grounds were rarely successful, and usually depended on a person demonstrating extreme financial hardship and other compassionate grounds, such as a severe medical condition.[20]

Cut out basis

4.62 Applications for the fine to be remitted on a cut-out basis arose in situations where a person had served time in custody, other than for fine default. Remission was possible if the person could have "cut out" the fine by serving time in gaol if a warrant had been executed, but for some reason the warrant had not been so executed.

4.63 Infringements enforced by the issue of an enforcement order by a court and subsequently by way of warrant of commitment (under the old Self Enforcing Infringement Notice System SEINS) were able to be cut out, however, this process was not available in respect of penalty notices which were enforced by direct referral from the Infringement Processing Bureau to the Roads and Traffic Authority.

4.64 The Council was advised that the grounds used to support a remission application went to questions about a person's guilt for the offence, procedural problems with the enforcement of the fine, and broader considerations of justice or expediency. The vast majority of remissions were a result of the fine being disputed, rather than arising because of incapacity to pay.

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20. Submission 54: NSW Attorney General's Department

4.65 The majority of fines remitted related to infringement or penalty notices, rather than court imposed fines, as analysis of a small sample of remissions approved by the Department (in 2001) reveals. In that sample:

- approximately 90 precent of fines related to traffic matters (eg parking infringements, bicycle offences, speeding, driving unlicensed/unregistered/ uninsured);
- 5 percent related to other transport fines (eg travel without valid ticket);
- 2 percent related to 'public order' offences (including resist police, offensive language);
- 2 percent to minor drug offences; and
- 1 percent related to other criminal matters (often the Victims Compensation Levy related to a conviction for which the person received a sentence other than a fine).

4.66 This presumably reflected the fact that penalty notices were issued in larger numbers than court imposed fines, as well as the fact that it was less likely that a court imposed fine would be remitted on an administrative basis.

Administrations by Attorney Generals' Department following the *Fines Act* 1996

4.67 During the period when the *Fines Act* was administered by the Attorney General's Department, it remitted disputed fines, both to avoid congesting the court system and as a matter of fairness to applicants, particularly in relation to older fines.

4.68 Remission on hardship grounds was however, only considered after the SDRO had refused to grant a waiver. If the Department received a request directly from an applicant, it was referred to the SDRO for consideration in accordance with the SDRO's write off policy.

Transfer to the State Debt Recovery Office

4.69 Following the transfer of the SDRO to the Office of State Revenue, the Attorney General's Department has only processed remissions, in relation to penalty notice matters, on referral from the SDRO.

4.70 A number of cut-out applications continue to be received, which are often referred by the SDRO, based on time spent in custody and fines imposed prior to 1998.

4.71 The Council was advised that arrangements for the remission of fines on hardship grounds remain in place, however no remissions

have been made on this basis since the transfer of the SDRO to the OSR.

4.72 Requests for remission on hardship grounds are referred to the SDRO. The Council was advised by the SDRO that 39 remissions, worth just under $30,000 were made in 2004-05. [21]

21. Submission 34: State Debt Recovery Office.

Difficulties Identified Regarding SDRO Procedures

4.73 The Council notes the previous examination of this issue undertaken in *Part Three: Penalty Notices* of this report.

4.74 The submissions received and consultations conducted by the Council have identified a number of additional difficulties arising from SDRO procedures that result in ongoing disadvantage particularly impacting on marginalised communities. These include:

- Limited and inflexible SDRO procedures, such as write-off and waiver;
- Inability to access community service before other enforcement options;
- Lack of confirmation of service;
- Limited administrative review;
- The absence of published guidelines; and
- Perceptions of SDRO inaccessibility.

Limited and inflexible SDRO procedures

Write-off applications

4.75 The existence of inflexible procedures have been criticised in the submissions and consultations as do not catering for disadvantage, such as that evidenced by defaulters with an intellectual or mental disability.

4.76 For example, the Council has received case studies as part of some submissions, instancing circumstances where an offender was medically certified as suffering from mental illness or intellectual disability, and there was strong evidence that the offences were the direct result of the offender's mental illness or intellectual disability. Despite assistance and advocacy from community legal centres on behalf of these offenders, there appeared to be some unwillingness on the part of the SDRO to exercise its discretion to 'write-off' their fines.

4.77 Concern was also expressed regarding restrictions placed on the SDRO write-off provision. A write-off is subject to a condition that the offender does not incur any further debts to the agency during the following five years. If any new fines or penalties are incurred during that period and are sent to the SDRO, then the deferred fines or penalty can be reinstated if the SDRO is satisfied that the defaulter has the means to pay the fine, that enforcement action is likely to be successful, or the defaulter is suitable for a CSO.

4.78 Due to the complex issues regarding offending, particularly for people with an intellectual disability or mental illness or experiencing

any other form of disadvantage, it is very likely that further fines and penalties would be incurred with the risk of the original debt being reactivated.

Waiver applications

4.79 The policy regarding waiver applications made by those in custody serves as another example. The SDRO requires that be waiver applications be made once the offender has been released from custody, so that their financial circumstances can be viewed in light of actual income and outgoings in the community. However, many offenders do not have the support required to make these applications post-release.

4.80 Moreover, the current waiver guidelines generally exclude even those offenders with a moderate intellectual disability (i.e. IQ of 40-55) as the waiver focuses on medical conditions, and intellectual disability is not a medical condition.

4.81 It was submitted that the SDRO has difficulties understanding the permanent nature of intellectual disability and thus refuses the waivers. For example, an application for waiver was made for an offender and SDRO requested that a medical report be supplied detailing how the offenders condition was likely to improve in the future, even though a comprehensive welfare report had been provided detailing the disability and noting that such a disability is for life and cannot be treated. Even though a psychological report was then provided, the waiver was still refused.[22]

Inability to access community service

4.82 In 1996 the NSW Law Reform Commission noted that fine default enforcement procedures

> "do not appear to assist those fine defaulters who are able to satisfy their fines by community service work but who must first default in payment and undergo all other non-custodial enforcement procedures before community service is available."[23]

4.83 This criticism still holds true. Community service is currently not available to an offender until they have progressed through and exhausted all civil enforcement alternatives. The inability of an offender to access community service until all other enforcement options are exhausted has been identified as a major difficulty with the SDRO process.

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22. In consultation, Department of Corrective Services, June 2006.
23. NSW Law Reform Commission Report 79: Sentencing (1996) at 3.16.

4.84 The Legal Aid Commission submitted that the SDRO 'does not seem interested in the alternate possibilities of a community service order, periodic detention or full-time custody' persisting instead with an emphasis on civil remedies.[24] Stating that it can take up to two or three years for an impecunious offender to become eligible for a community service order, the Commission noted that as the SDRO adds enforcement costs and sheriff's costs at each stage of the enforcement process, most outstanding fines have increased substantially in value by the time offenders become eligible for a community service.

4.85 While the policy intention is to ensure that people do not choose the 'soft' option and avoid paying their fine, this provision does not recognise that a small number of people need alternatives to monetary payments because they simply have no income or assets with which to satisfy the fine. The Commission warned that where people with a large number of outstanding fines have little capacity to repay them, this will result in an ongoing debt which will incapacitate them in efforts to gain a drivers licence and obtain employment. Thus, the system also 'entrenches' people into a cycle of fine default, traffic offences, and further crime.

Lack of confirmation of service

4.86 Problems can arise due to the absence of any requirement that either the SDRO or the issuing agency confirm the service on the offender of the original penalty notice and of any subsequent correspondence.

Limited administrative review

4.87 Concern was expressed regarding the limited nature of the review that is available in relation to the administrative decisions made by SDRO during the enforcement process (referred to in the preceding chapter on penalty notices).

4.88 Consultations, submissions, and case studies provided by community credit and debt lawyers consistently highlight the difficulty of seeking and receiving review, which has created a perception of the system's inequity for indigent or otherwise disadvantaged offenders and criticisms of SDRO file management from an enforcement, rather than diversionary perspective.[25]

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24. Submission 30: The NSW Legal Aid Commission
25. Submission 13: The Shopfront Legal Centre; Submission 16: Public Interest Advocacy Centre (PIAC); Submission 24: Anonymous prisoner, Mid North Coast Correctional Centre; Submission 25: Anonymous prisoner, Mid North Coast Correctional Centre.

Lack of publicly available guidelines and information

4.89 There is an absence of published guidelines detailing the manner in which an application to the SDRO for time to pay or for the write off of a debt is determined or reviewed, except for the fact that each is assessed on an individual basis.

4.90 The SDRO has indicated that Guidelines exist but that they are not publicly available.

4.91 Currently offenders rely on a diverse range of agencies for information concerning SDRO procedures and options. These include the RTA, court registries, word of mouth and anecdotal information, and community legal centres.

4.92 Contesting fines was said to be difficult, stressful and time consuming, requiring skills such as literacy and self-confidence. SDRO forms are 'very dense' and difficult to understand, and the website is difficult to negotiate. Information on the Hardship Review Board is difficult to access and staff do not readily provide people with information about how to access this option. For people without education, immense patience, literacy or access to a telephone, the SDRO was seen as too difficult to deal with.[26]

4.93 It was further submitted that the lack of SDRO case managers for individual matters leads to inconsistency, with practices differing widely and different officers give differing responses to the same information.

4.94 A number of submissions emphasised that self represented defendants, in particular, need greater assistance to navigate the fines and penalty system. Information and assistance on how to elect to contest a fine or penalty in court, and on the consequences of election if the defendant succeeds or fails, was seen as essential.[27]

4.95 It was submitted that the SDRO guidelines (particularly on the general power to 'write-off' fines under the *Fines Act*) should be made available to the general public.

4.96 The Council notes that by section 120 of the Act, the Minister (the Treasurer) may issue guidelines on the exercise of functions under the Act, including for example, writing off unpaid fines, the issue of fine enforcement orders or community service orders and the taking of other enforcement action.

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26. Submission 23: The Community Relations Commission; Submission 10: UnitingCare; Submission 50 and 52 On the Road ACE Lismore Driver Education.
27. Submission 16: PIAC and Submission 22: The Combined Community Legal Centres Group (CCLCG).

Perceptions of SDRO inaccessibility

4.97 There is a strong community perception that the SDRO is inaccessible, arising because of the agency's:

- Lack of a public face, particularly in remote locations and in prisons;
- Lack of publicly available guidelines and an inconsistency in outcomes for applications for time to pay arrangements;
- Prioritisation of debt collection, and insufficient flexibility in the imposition of sanctions; and
- Lack of the supply of sufficient information when enforcement action commences following default.

4.98 It was noted during regional consultations that the SDRO does not have any regional offices. As a result, fine defaulters are required to contact SDRO through a 'hopeless' telephone number or by mail. This was criticised as 'slow' and 'impersonal'. In contrast to other agencies who have branch offices and offer a human 'face' for the agency, the SDRO is perceived as 'remote' and as a result unable to appreciate defaulters' individual circumstances.

4.99 It is suggested that these perceptions pose a serious impediment to the effective collection of outstanding fines, as the bureaucratic 'red tape' actually prevents people from entering suitable arrangements to pay off their fines.

Options For Reform

4.100 A number of possible options for reform have been identified by the Council, arising from its consideration of the submissions and consultations, several of which have been identified in the concluding sections of the preceding chapters of this Interim Report. As a consequence they will be noted by appropriate cross-references, without repetition of the detail.

4.101 These options include the following:

- Reversing the sequence of enforcement by resorting to civil recovery options before the imposition of licence or vehicle sanctions;
- Establishing a more proactive physical presence of SDRO (particularly in prisons on reception but also at pre-release and in rural areas) through Government Access Centres or similar facilities with the aim of assisting offenders to access any available options for time to pay arrangements, for a lifting or relaxation of sanctions, or for a debt write off;
- Providing facilities for payment by instalments utilising direct debit facilities, particularly through Centrepay (which it is understood the SDRO plans to introduce by January 2007);
- Attributing a replacement value to the goods seized by the Sheriffs' Office under Property Seizure Orders, which might be set off against the fine or penalty instead of the significantly reduced amount which might be expected to be received at an auction by the Sheriff;
- Providing a proper legislative basis for the current practice of the SDRO to receive and deal with appeals against penalty notices and, in appropriate cases, to cancel those notices or to extend leniency.
- Regularising the practice whereby time to pay applications can be received and processed before the issue of a Fine Enforcement Order, and permitting less formality in the making and processing of such applications;
- Training SDRO staff in order to ensure a more equitable and consistent treatment of hardship and time to pay applications than currently applies;
- The introduction of an administrative review procedure by an SDRO Review Board in place of the Hardship Review Board, with the wider jurisdiction noted in the preceding chapter in relation to enforcement decisions concerning fines and penalties;

- Encouraging the SDRO to expand its current practice of liaising with the agencies that issue penalty notices, in relation to repeat offenders, particularly the homeless, or the intellectually and mentally disabled, for the purpose of avoiding the further issue of penalty notices and adopting alternative strategies that might discourage repetition;
- Better data collection than that currently available for fine and penalty default and the impact of sanctions, which could provide a geographic breakdown and demographic characteristics, and which could be used to evaluate and develop appropriate interventions.

Provision of Guidelines and Information

4.102 The drafting of clear and transparent guidelines identifying what constitutes financial hardship and what factors the SDRO should take into consideration when assessing a time to pay application. For example, the provision of a Centrelink health care card or pension card should suffice to establish an entitlement to time to pay without the need for the provision of some detailed financial statement which is beyond the capacity of many offenders to prepare.

4.103 The drafting and release of transparent guidelines defining the circumstances in which Penalty Notice Enforcement Orders can be withdrawn or annulled, and in which Court Fines Enforcement Orders can be withdrawn;

4.104 More information, including written materials, about the enforcement process generally, framed in linguistically and culturally diverse ways, should be made available at the time of imposition of the fine or penalty and subsequently at each step of the enforcement process.

Assistance to low income individuals

4.105 It is suggested that consideration be given to the provision of funding equivalent to that provided for employment preparation and support, by way of loans or otherwise, to help low-income individuals satisfy their debt, tied to completion of job training programs or other rehabilitation programs.

4.106 For example, a loan scheme from welfare agencies was proposed during consultation. Currently welfare agencies are not permitted to use allocated funds to pay people's debts. Under this proposal, offenders would be permitted to borrow funds from welfare agencies to repay their debt, and to repay the debt through volunteer work.

Court-imposed Fines

4.107 Because of the inconsistency in the practice seen between courts as to the time of reference of a matter to the SDRO, it is recommended that a comprehensive system be introduced whereby:

- In cases where an application to pay by instalments, or to extend the time for payment, is made to the court, it is allowed to retain the matter until the application is determined (by the court or registrar as the case may be); and
- Following determination of the application for time to pay where one is made, or, in all other cases once the time for payment has passed without any such application, the matter is immediately referred to the SDRO with such up to date contact information as the court can produce.

4.108 This would involve the SDRO at a relatively early stage (when contact information would be more likely to be current), and provide for a consistency in practice that could be beneficial, particularly if no enforcement fees were to attach prior to the issue of a Fines Enforcement Order.

Options for Reform relevant to People in Custody

4.109 In the course of its consultations the Council became aware of the existence of a significant body of offenders, many of whom are in custody, who have accumulated a very significant debt as the result of unpaid fines, penalties, levies and administrative charges, which they have no hope of paying. According to the NSW Department of Corrective Services, Australian prisoners owe $8000 each in outstanding debt.[28]

4.110 Prisoners' potential to earn money in custody is extremely limited. The Council was advised that prisoners have a weekly income of between $12 to $65 dollars a week, with seventy percent earning approximately $15 dollars a week. Approximately 2000 unemployed inmates are provided with only $13.35 per week. Money from external sources, deposited in inmate's gaol accounts by family and friends, is limited to $450 per calender month.

4.111 Each prisoner must budget for essential items, telephone calls, sports and art activities and discretionary consumer items (such as radio, television or shoes) from their earnings. It is noted that the price of such items are comparable to those in the general community, despite the reduced finances of the prisoner population.

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28. In consultation, Department of Corrective Services, 21 June 2006

4.112 Additionally, ten percent of each applicable prisoner's wage is directed towards the victims compensation levy. After all necessary expenses, "a typical savings amount out of a $20 wage is only about $1."[29]

4.113 Being deprived of a licence and work opportunities where that is linked to a capacity to drive, and facing an impossible debt burden, their natural reaction is one of hopelessness with its consequent adverse effects on rehabilitation and escape from a debt trap. Moreover, crime rates may be increased as a result of the unmanageable burden of debt that many prisoners are subject to on release. Almost forty-nine percent of prisoners researched said they committed a crime to repay debt.[30]

4.114 Options geared specifically to address the problem of prisoners with SDRO debt include the following:

- Systematic expunging debts of the mentally ill and intellectually disabled prisoners;
- Pro rata reduction of outstanding debt;
- Development of a more progressive regime for the writing-off of accumulated fines and penalties;
- Development of guidelines for debt reduction / licence reinstatement;
- Reduction or waiver of fines and surcharges for offenders who successfully complete an accredited job training, or driver education programs or other approved program and who then begin to pay off their debt; and
- Extension of three months SDRO moratorium on collection.

4.115 It is appreciated that the success of each of these initiatives would depend on the goodwill of the Departments of Corrective Service and Juvenile Justice in assuming the administrative burden of enforcing or supervising the proposals.

Systematic expunging debts of the mentally ill and intellectually disabled prisoners

4.116 It was suggested during consultation that the SDRO should consider expunging or writing-off fines and penalty notices incurred by offenders in custody with a mental illness or an intellectual disability, on the basis that these fines are unlikely to ever be recovered.

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29. In consultation, Department of Corrective Services, 21 June 2006
30. Stringer Anne, *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc 1999 Queensland

4.117 The Council understands that the debts owed by mentally ill offenders and those with intellectual disabilities can presently be written-off or waived either at the discretion of the SDRO Director or via the Hardship Review Board, if special circumstances are established.

4.118 However, this provides for an individual, case by case approach only, which makes no provision for a 'class'-based annulment procedure. The Department of Corrective Services advised that its welfare officers currently make individual applications to the SDRO requesting that prisoner debt be written off or time to pay applications entered into.

4.119 Rather than individual time consuming applications, this proposal would require that each reception gaol provide the SDRO with the names of those prisoners assessed as having a mental illness or an intellectual disability at intake, for whom the expunging or writing off of accumulated debts for penalties or fines would be appropriate.

4.120 Representatives of the Department of Corrective Services have advised that this process would not place an unduly heavy administrative burden on the Department. A similar process currently exists whereby Centrelink is notified each week of those clients who have been incarcerated, so that social security entitlements can be suspended and arrangements made for contact to be re-established with the person prior to release.

4.121 It was suggested by welfare staff that communication between DCS and SDRO can follow similar protocols of DCS cooperation with Centrelink and Department of Housing, whereby through data matching, Centrelink is notified when Centrelink clients are imprisoned, so that Centrelink can re-establish contact with the person prior to release.

Pro rata reduction of outstanding debt

4.122 It was suggested that consideration be given, in the case of offenders in custody who often have significant debt levels and limited financial capacity, to the introduction of a scheme for a pro rata reduction of their debt in exchange for partial payment of the outstanding sum. This could be done for example, on the basis of a $100 debt reduction for every $10 repaid by a prisoner; or on the basis of a sliding scale for a set-off based on the differing wage levels across the Correctional Centres and prison industries.

4.123 As people in custody can earn, at most, $65 per week, sacrificing even small amounts of money so as to repay an outstanding fine or penalty notice represents a considerable commitment to repaying a

debt that historically, the SDRO has little chance of recovering either while the person is in custody, or on their release, whereas its satisfaction through such a scheme could assist in their rehabilitation prospects.

4.124 This could be achieved through:

- Buy-up sacrifice; or
- Works Release savings where debt repayment could be routinely entered into as part of the Works Release Program.

Buy-Up sacrifice

4.125 The buy-up list is a system whereby inmates can purchase the necessities of life, including certain food items, on a weekly basis.[31]

4.126 Under this proposal, prisoners would volunteer to give up their weekly Buy Up entitlement, in exchange for a proportionate eduction in their SDRO debt.

4.127 The Department of Corrective Services has advised that there is no administrative barrier to extracting the Buy-Up component from prisoner's wages and that it could be done in a similar fashion to the deduction of Victims Compensation levies.

Works Release savings

4.128 The Works Release Program is designed to allow selected minimum-security prisoners access to employment and vocational training in the community.

4.129 The Department of Corrective Services deducts expenses from the Works Release offender's income, including a significant proportion for rent. Prisoners are required to pay for their travel and food expenses, and may be subject to an increased payment for the Victims Compensation Levy.

4.130 Under this proposal, debt repayment could be routinely entered into as part of the Works Release Program. SDRO debt write-off in exchange for part payment could reflect this additional drain on the prisoner's income.

Development of a more progressive regime for the writing off of accumulated fines and penalties

4.131 The introduction of a more progressive regime for the writing off of accumulated fines and penalties where the offender is able to show that there is no reasonable prospect of the debt being satisfied by reason of the lack of means or other special circumstances, which

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31. Butler T, Milner L. *The 2001 New South Wales Inmate Health Survey 2003*,Corrections Health Service Sydney pg 83

would bring that regime to the attention of offenders at an early stage of the enforcement process.

Development of guidelines for debt reduction / licence reinstatement

4.132 It is proposed that guidelines be developed to allow for the writing off of or reduction of such debts (in part or in full) or for the return of a licence or vehicle registration when some reasonable arrangements are made towards reducing what can be assessed as a manageable debt.

Reduction or waiver of fines and surcharges for offenders who successfully complete an accredited job training, or driver education programs or other approved program and who then begin to pay off their debt.

4.133 This proposal would serve as a rehabilitation incentive whereby if offenders do not re-offend for a period of time, or successfully completes a rehabilitation, education or training program, they may be 'rewarded' by having part or all of their outstanding fines annulled.

4.134 The reward for successfully staying out of gaol or completing a drug rehabilitation program would have a similar influence as a good behaviour bond, with the added benefit of easing the financial and other pressures on the offenders upon release from prison. [32]

Extension of three months SDRO moratorium on collection

4.135 Consultations indicated that the SDRO commonly allows offenders exiting prison a one to three month period of grace before enforcement action for unpaid debts is initiated.

4.136 A number of Correctional Centre staff strongly recommended an extension of this period in order to allow prisoners to 'get their lives back on track', which might even allow offenders the chance for review and annulment of their fines or penalties if they do not re-offend during the moratorium period.

32. Zimmerman Ken and Fishman Nancy, *Roadblock on the way to work: Driver's Licence suspension in New Jersey*, New Jersey Institute for Social Justice, 2001.

Part 5

Licence Suspension and Secondary Offending

- Use in NSW
- History of licence sanctions
- Advantages and Disadvantages of Sanctions
- Impact on marginalised sections of the community
- Effectiveness of licence sanctions imposed for fine default
- Secondary Offending
- Mandatory Disqualification Periods
- Habitual Traffic Offender Declarations
- Options for Reform

PART 5: LICENCE SUSPENSION FOR FINE DEFAULT

Use in NSW

5.1 Current NSW legislation provides for the suspension and cancellation of driver licences as part of the infringement enforcement system. This power applies both in respect of those who offend against roads and traffic legislation, and in respect of those who default on fines and penalties unrelated to driving offences.

5.2 As discussed in Part Four at para 4.13, under the *Fines Act 1996*, the RTA, when directed by the SDRO, can:

- suspend or cancel driver licences;[1]
- cancel vehicle registrations;[2] or
- suspend dealings with the fine defaulter.[3]

5.3 Similar measures exist across most other Australian states and territories.

5.4 A licence suspension remains in place until the debt is paid to the SDRO. Non-payment of the fine itself does not lead to more penalties, however driving whilst suspended or disqualified can lead to further minimum disqualification periods, a fine, and imprisonment.[4]

5.5 The SDRO will however approve of the reinstatement of a licence after six payments have been made by a defaulter under time to pay arrangements. It has also recently advised the Council that it will now give consideration to allowing a defaulter to retain a licence where special circumstances exist. However, this discretion does not seem to be widely known, nor have transparent guidelines concerning its availability been published.

History of licence sanctions

5.6 Licence and suspension measures were first introduced as 'intermediate' sanctions in response to fine default, aimed to encouraging defaulters to pay, while avoiding the more punitive and less humane aspects of incarceration for default.

5.7 Licence sanctions as a response to fine default were first introduced to Australia by NSW in the 1980's. At that time suspension was restricted to default on traffic related offences only. The first

1. Section 66 *Fines Act* 1996
2. Section 67 *Fines Act* 1996
3. Section 68 *Fines Act* 1996
4. Under sections 25 and 25A *Road Transport (Driver Licensing) Act 1998.*

extension of licence suspension to non-traffic related matters occurred in Western Australia in 1994.[5] NSW followed in 1996[6] and between 1998 and 2001 other state and territory jurisdictions generally followed suit.

5.8 In Queensland however, licence suspension is still not an automatic response to fine default. It is merely 'one of the tools' of enforcement, used with discretion and subject to strict criteria, due to Government concerns that automatic drivers licence suspensions affect the mobility and employment of both the defaulter and his or her family, create further problems of people getting into trouble due to driving unlicensed; and lead to insurance implications if accidents occur.[7]

5.9 The use of the licence 'big stick' is not confined to Australia - a number of international jurisdictions also provide for the suspension of licences as a fines enforcement mechanism. The growth in the use of licence sanctions for fine default dates roughly from the late 1980s, when shifts in US national policy toward drug enforcement and child support collection focused national attention on using suspension, previously employed primarily as a public safety measure to curb reckless drivers, to punish bad behaviour and more broadly, as a flexible enforcement mechanism.[8]

5.10 Licence suspension is provided for in numerous US states where it is used to deter a number of non-traffic related offences, particularly those committed by children, such as:

- under-age drinking, possession of illegal drugs, or possessing a firearm in a public building (Oregon);
- truancy (Kentucky);
- jay-walking (Milwaukee);
- graffiti and circulating a false public alarm (New Jersey);
- non-payment of library fines (Wisconsin); and
- non-payment of excise tax (Massachusetts).

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5. *Fines Enforcement Act* 1994 (WA)
6. *Fines Act* 1996 (NSW)
7. *State Penalties Enforcement Act* 1999 (QLD)
8. Zimmerman Ken and Fishman Nancy, *Roadblock on the way to work: Driver's Licence Suspension in New Jersey,* New Jersey Institute for Social Justice, 2001

5.11 It is also evident in other jurisdictions: under the *Highway Safety Code* in Quebec Canada, for example, the Societe de l'Assurance Automobile (SAAQ) can suspend the driving licence of an individual who has unpaid fines following a violation under the Highway Safety Code or a municipal traffic or parking bylaw.

Advantages and Disadvantages of Licence Sanctions

> "It is difficult to explain how behaviour which did not in fact cause harm, and which would be very unlikely in practical or statistical terms to cause harm should inevitably lead to a penalty (say four months' suspension) which could lead to loss of employment, loss of vehicle and even loss of family home. However, from the bureaucratic point of view, the rigid mandatory minima make the transition to, and acceptance of, routinised administrative penalties much easier."[9]

Advantages

5.12 The advantages of the sanction for fine default are said to include:

- Administrative ease;
- Relative cheapness; and
- The provision of an acceptable alternative to imprisoning fine defaulters.

5.13 The use of driver licence sanctions has also been argued to be an extremely effective measure at encouraging payment of infringement notice penalties payment of court imposed fines.[10]

Disadvantages

5.14 The majority of submissions received and consultations conducted asserted however, that the imposition of licence sanctions is an inappropriate sanction for non-driving offences, because it has a greater significance than mere debt recovery, particularly in remote areas.[11]

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9. Willis, John 'The proper role of criminal law in road safety' paper delivered to the *Criminal Justice Planning and Coordination Conference*, 19-21 April 1993, Canberra (Biles McKillop (eds.) at 196.
10. Submission 11: The Office of State Revenue
11. Submission 22: RTA. Similar points were made in Submissions 3: Senior Children's Magistrate Mitchell, NSW Children's Court; Submission 5 Salvation Army; Submission 7 Office of the Chief Magistrate; Submission 8 NSW Council of Social Services; Submission 10 UnitingCare; Submission 13 Shopfront Legal Centre; Submission 14 NRMA; Submission 16 Public

5.15 It was argued that licence sanctions also:

- Confuse the 'Road Safety' message;
- Give rise to a perception of unfairness;
- Constitute a double penalty;
- Fail to alleviate any of the causes of failure to pay;
- May actually exacerbate the cause of failing to pay;
- Can result progressively in an accelerating or excessive interaction with the criminal justice system;
- Have a wider personal and community effect; and
- Represent a potential drain on the economy;

Confusing the 'Road Safety' message

> 'Suspending a driver's license for a non-driving offense "cheapens" the value of the license. If people can have their driver's licenses suspended for offences that have nothing to do with driving, they'll soon think less of driving with a suspended license.' [12]

5.16 Concern was expressed with the way licence sanctions are imposed on non-licence related offences, including for fine default. The Council was advised that this clouds the road safety message to the public. Imposing licence sanctions for breaches of the law for non-driving related offences effectively makes people rethink their commitment and adherence to the road rules. The system therefore actually subverts the road safety message.[13]

Give rise to a perception of unfairness

5.17 Suspending licences for offences that are not related to driving could create the perception of unfairness or arbitrariness, in that the punishment does not fit the crime or the risk posed by the offender. The integrity of laws and countermeasures is better maintained when

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Interest Advocacy Centre; Submission 17 & 30 NSW Legal Aid Commission; Submission 18 South Eastern Aboriginal Legal Service (SEALS); Submission 19 Coalition of Aboriginal Legal Services (COALS); Submission 20: Youth Justice Coalition; Submission 21Combined Community Legal Centres Group (NSW) Ltd; Submission 35 NSW Law Society Criminal Justice Committee.

12. Garfinkel, Simson, 'Nobody Fucks with the DMV' *Nextworld*, 1993-2004 The Conde Nast Publications Inc, Wired Digital.
13. Faulkes, Committee Manager NSW Parliamentary StaySafe Committee, in consultation.

they are regarded as fair and evenly applied. If not perceived as such, this could lead to further non-compliance with road laws.[14]

A double penalty

5.18 It was submitted that an unjustified 'double penalty' arises because licence sanctions do not cancel a fine. Instead, the defaulter essentially receives a double penalty of licence disqualification and the original fine, as well as the additional cost of escalating enforcement costs.[15]

Fail to alleviate any of the causes of failure to pay

5.19 It was submitted that the sanction fails to address any of the causes of failure to pay, in that the fine defaulter must still pay the outstanding debt (at least in part) in order to regain his or her licence. The circumstances which gave rise to the default, such as poverty, are not addressed by the imposition of a sanction that actually serves to decrease the likelihood that an offender will be able to pay the fine, by removing the means of transport to work if not a tool of, employment.

May exacerbate the cause of failure to pay

5.20 In fact, the sanction may actually exacerbate the causes behind failure to pay the original fine, especially for those needing to drive for employment where licence remains suspended or cancelled.

5.21 Licence suspension impacts on an offenders' ability to keep his or her job, which in turn reduces the likelihood that the original fine will be paid. It also impact on people's future employability, by removing the means to gain employment in (especially) regional areas. The lack of licence itself serves as a negative signal to employers, seen as another strike against job seeker with little work history and low skills.

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14. See Cullen, *Review of Fines and Infringement Notices Enforcement in Western Australia, Ministry of Justice and Western Australian Police Service*, 1995 (unpublished); Ferrante, Anna, The *Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA* Crime Research Centre University of WA 2003; Raine & Mackie 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' *The Howard Journal of Criminal Justice* Volume 43 Page 518- 538, December 2004; Gebers, Michael and DeYoung, David *An Examination of the Characteristics and Traffic Risk of Drivers Suspended / revoked for Different Reasons*, California Department of Motor Vehicles, 2002).
15. In consultation, His Honour Judge Andrews and Acting Judge Sir Robert Wood, Dubbo 7 August 2006, and Submission 56: His Honour Sir Robert Wood. Similar arguments were advanced by the solicitors Marcelle Burns and Rebecca Simpson, Aboriginal Legal Service Lismore (12 July 2006); and staff and prisoners at John Moroney and the Mid North Coast Correctional Centres and the MRRC. See too Submission 50: 'On the Road' ACE Lismore Driver Education Program.

5.22 The CDEP in Lismore, for example, advised that although some CDEP participants are very well trained and have done all the education or training courses possible, they still are unemployed as they do not have a licence, and, because they have outstanding debt, they have no chance of obtaining one.

5.23 In contrast, if people have a licence, especially if they are Aboriginal, they can obtain employment because having a licence is rare in such communities.

5.24 This is consistent with the research findings that licence loss has a significant negative impact on employment.[16] For example, many low-income teens and adults with no record of serious traffic offences lost their driving privileges (and access to work) for failure to pay fines and forfeitures.[17]

Interaction with the criminal justice system

5.25 The imposition of licence sanctions for fine default can result progressively in an accelerating or excessive interaction with the criminal justice system with its progression through further driving offences, escalating to drive while disqualified offences, as well as offences involving take and use vehicle, and eventually to imprisonment; and mandatory disqualifications and habitual offender declarations.

Wider personal and community effect

5.26 The imposition of licence sanctions also has a wider personal and community effect in the escalation of the problem due to: the accumulation of further fines, victim compensation levies and SDRO enforcement costs ($50 each time); and the costs of acquiring or reacquiring a licence once the sanction is lifted because of existing requirements for driving tuition and supervision for an extended period.

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16. Zimmerman Ken and Fishman Nancy, *Roadblock on the way to work: Driver's Licence suspension in New Jersey*, New Jersey Institute for Social Justice, 2001; Pawasarat, *Removing Transportation Barriers to Employment: The Impact of Driver's License Suspension Policies on Milwaukee County Teens*, Employment and Training Institute, University of Wisconsin-Milwaukee, February 2000 at 2; Pawasarat and Frank Stetzer, *Removing Transportation Barriers to Employment: Assessing Driver's License and Vehicle Ownership Patterns of Low-Income Populations*, Employment and Training Institute, University of Wisconsin-Milwaukee, July 1998 at 2; Office of Port JOBS, *Working Wheels: A Guide to Overcoming Transportation Barriers to Work*, Washington State.
17. Pawasarat and Frank Stetzer, *Removing Transportation Barriers to Employment: Assessing Driver's License and Vehicle Ownership Patterns of Low-Income Populations*, Employment and Training Institute, University of Wisconsin-Milwaukee, July 1998);

Represent a potential drain on the economy

5.27 The imposition of licence sanctions may represent a hidden potential drain on the economy. In the United States, for example, significant federal transportation funds for welfare participants are being targeted to very expensive van pooling and extension of bus routes to transport workers who in many cases have had their licenses taken away for their failure to pay fines. [18]

Impact on marginalised sections of the community

5.28 Licence suspension also has a disproportionate and oppressive affect on marginalised sections of the community including:

- Those living in communities with poor public transport (as elsewhere noted in this Interim Report);
- Social security beneficiaries;
- The young;
- Prisoners; and
- Aboriginal people.

Social security beneficiaries

5.29 The Combined Community Legal Centre's Group (NSW) submitted that there is evidence to suggest that, for people living in poverty, penalties for fine defaulters that take the form of driving sanctions further entrench the cycle of socio-economic disadvantage and 'unfairly compound the social exclusion...experienced by these people.'

5.36 Similarly, The Public Interest Advocacy Centre submitted that driving sanctions can have serious consequences for socially and economically marginalised people, compounding their disadvantage.[19]

The young

5.30 While NSW law provides that licences cannot be suspended in response to a fine that was received while the fine defaulter was under the age of 18 years, and that was not a traffic offence, there is still potential for young people above this threshold to be negatively affected by the loss of their mobility. Moreover, measures applying to fine default necessarily impact young people disproportionately

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18. Pawasarat, *Removing Transportation Barriers to Employment: The Impact of Driver's License Suspension Policies on Milwaukee County Teens*, Employment and Training Institute, University of Wisconsin-Milwaukee, February 2000.
19. Submission 21: The Combined Community Legal Centre's Group (NSW); Submission 16: The Public Interest Advocacy Centre.

because they are less likely to have an income, assets or savings to pay for fines that are accumulated. [20]

Prisoners

5.31 For ex-offenders, the lack of a driver's licence itself operates against stability, obtaining a job and establishing family ties.

Aboriginal people

5.32 Virtually all submissions received by the Council noted the disproportionate impact of driving licence sanctions on Aboriginal people.[21]

5.33 A warning was given concerning the over-representation of Aboriginal people for fine default suspensions by the Aboriginal Legal Services and other social-legal commentators in Western Australia during the debate on the introduction of licence suspensions in that State.[22] However, the Government assured the Parliament that the NSW model had not led to a significant increase in the incidence of driving without a licence. Similar concerns were raised in debate in South Australia but again dismissed.[23] It does not appear as if those concerns were raised in NSW.

5.34 In 1999, amendments to the WA fines regime were introduced to allow the Sheriff or police to issue work development orders (similar to the Council's proposed Fine Option Order) for Aboriginal defaulters, if the defaulters' financial and social circumstances means licence suspension is ineffective and results in undue hardship. This could only be done if the Sheriff (or police) were satisfied that the offender had no vehicle or licence; had no property for sheriff to seize; and was unlikely to have means to pay or have property in reasonable time.

5.35 The few studies that have examined the impact of licence suspension for fine default have confirmed ongoing and disproportionate Aboriginal representation: in Western Australia, for example, the Aboriginal rate of fine suspension in 1995 was nine times

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20. Submission 3: Senior Children's Magistrate Mitchell, NSW Children's Court; Shopfront Legal Centre Submission 3; SEALS Submission 18; and Youth Justice Coalition Submission 20.
21. Submission 18: SEALS; Submission 19 COALS; see too The Royal Commission into Aboriginal Deaths in Custody *National Report* 1991; BOCSAR *The scope for reducing indigenous imprisonment rates,* 2001; Ferrante, Anna, '*The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA*' Crime Research Centre University of WA 2003.
22. Foss MP, *Fines Penalties and Infringement Notices Enforcement Bill* Second Reading Speech, Hansard Legislative Council, page 8500 6 December 1994.
23. 25 August 1998 page 1879

greater than the non-Aboriginal rate and, by 2001, this had increased to eleven times greater.[24]

Rural and Remote areas

5.36 The disproportionate impact of a drivers licence or vehicle registration suspension in regional areas as well as in some outlying metropolitan areas, was a core issue in many submissions and consultations. With poor or no public transport, people very often need to drive in order to do grocery shopping, go to work, go to school, visit health professionals and attend compulsory Job Network or Centrelink interviews.

5.37 When people reach this stage of the fine enforcement process, they are placed in the invidious position of having to choose between breaking the law and driving while unlicensed, or losing their job or Centrelink payments. As a result a large number of fine defaulters continue to drive their car. Many of them are then caught driving while their license or car registration is suspended.

5.38 As a result of such breaches, these defaulters accumulate fines totalling several thousands of dollars which compound as enforcement charges, court costs and victims compensation levies, are added. After a certain number of breaches for driving while suspended or disqualified or while unlicensed, the local court has no option but to sentence them to a term of imprisonment. Moreover they risk falling into the category of Habitual Traffic Offenders, with additional automatic periods of disqualification.

24. Ferrante, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA*, Crime Research Centre, University of Western Australia, 2003: noting that the majority of Aboriginal fine suspensions were for unpaid court fines (justice and good order offences) and railway infringements (fare evasion).

Effectiveness of Licence Sanctions Imposed for Fine Default

Limited deterrent value

5.39 The deterrent value of licence disqualification has been viewed with some scepticism. Empirical evidence suggests that certainty of punishment is important in deterring potential offenders, but that severity of punishment has very little impact on behaviour if the perceived risk of apprehension and punishment is low.[25]

5.40 There is evidence to suggest that there are differences in the effectiveness of licence disqualification in sanctioning different offences. Commentators have stated that although licence suspension/revocation is one of the most effective sanctions currently available to control problem drivers, over the years it has begun to be so broadly applied that it is in danger of losing its effectiveness.

5.41 Moreover, critics argue that the integrity of the license suspension/revocation system itself is threatened because:

- the punishment doesn't fit the crime for drivers suspended/revoked for non-driving reasons;
- non-driving suspended/revoked drivers do not pose a significant risk on the roads;
- the detection, prosecution and adjudication system is already not working well to process suspension/revocation violators, and
- there are a large number of drivers who are suspended/revoked each year, and most of them continue to drive.[26]

5.42 There has been little research addressing the effectiveness of licence suspension specifically as a fine enforcement sanction. In most studies on sanction impact, the disqualified drivers under review were either drink-drivers or serious/repeat traffic offenders or both. Doubt has been expressed at the relevance of such studies to fine defaulters.[27] For example, it is plausible that persons whose licence is

25. Willis, John 'The proper role of criminal law in road safety' paper delivered to the *Criminal Justice Planning and Coordination conference*, 19-21 April 1993, Canberra (Biles McKillop (eds.) at 196).
26. Gebers, Michael and DeYoung, David *An Examination of the Characteristics and Traffic Risk of Drivers Suspended / revoked for Different Reasons,* California Department of Motor Vehicles, 2002.
27. Ferrante, *The Disqualified Driver Study*, Crime Research Centre, September 2003 page vi.

cancelled or suspended administratively without the immediacy of an open court order may feel less bound by the prohibition.

5.43 The NSW Parliamentary StaySafe Committee advised that while in the first instance there is a reluctance to break or bend the law for most people, once they are removed from the licence regime (and particularly if they realise the chances of apprehensions are low) there is a quantum shift in attitude. In StaySafe's experience, repeat offenders are very problematic.[28]

5.44 Licence sanctions have little impact on driving where that is necessary to obtain or hold employment or to access essential services, and yet deprive unlicensed drivers of any realistic opportunity of gaining a licence. People drive regardless of licence restrictions where compliance with the restriction would cause an insurmountable burden, such as getting to a job where there is inadequate or non-existent public transport; or where it would occasion difficulties in getting children to child care and school.[29]

Licence suspensions in NSW

5.45 The RTA has advised that in the period 01/07/04 to 30/06/05, the SDRO made over 256, 500 requests to apply a *Fines Act* sanction:

- 65 percent of sanctions were applied to a licence (approximately 165,000 matters);
- 19 percent of sanctions were applied to a registration (approximately 48,000 matters);
- 16 percent resulted in a customer business restriction (approximately 40,500 matters).[30]

5.46 The Council notes the existence of a slight inconsistency between the figures supplied by the SDRO and the RTA for the period 2004-2005. In comparison with the RTA's figure of approximately 256,000 licence sanctions, the SDRO indicated that 245,500 sanctions were imposed.[31]

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28. Faulkes, Committee Manager NSW Parliamentary StaySafe Committee, in consultation.
29. (Pawasarat and Frank Stetzer, *Removing Transportation Barriers to Employment: Assessing Driver's License and Vehicle Ownership Patterns of Low-Income Populations*, Employment and Training Institute, University of Wisconsin-Milwaukee, July 1998);
30. That is, a licence would not be renewed or issued until all fines are paid to the SDRO. Advice provided by the RTA in October 2006.
31. Advice from the SDRO Fines Enforcement Branch, 22 September 2006. This includes sanctions imposed for default of both court-imposed fines and penalty notices.

5.47 The RTA has provided the Council with figures indicating the default rate and timeliness of payments made once a defaulter's licence was threatened with suspension, as follows:

- Of the approximately 165,000 matters where a licence was eligible to be suspended, 35 percent were paid within the specified time and so avoided licence suspension action.
- The remaining 65 percent of defaulters failed to pay the fine within the specified time and so incurred a licence suspension.
- Almost 7 percent of defaulters have been suspended for longer than 6 months, and their debt to the SDRO remains unpaid.

5.48 Of the 65 percent of defaulters who incurred a suspension:

- approximately 20 percent were suspended for less than 1 week;
- 12 percent were suspended from between 1 week to 1 month;
- 10 percent were suspended from between 1 month to 3 months;
- 6.5 percent were suspended from between 3 months to 6 months;
- 9 percent were suspended for more than 6 months; and
- 6.5 percent have been suspended for longer than 6 months. Their debt to the SDRO remains unpaid.

5.49 Just over 48,000 suspension notices were sent to the registered operators of vehicles during the same period. Of these:

- approximately 8 percent paid the fine within the specified time and so avoided registration suspension.
- The remaining 72 percent of defaulters failed to pay the fine within the specified time as required and so incurred a registration suspension.
- Of these, 12 percent have been suspended for longer than 6 months. Their debt to the SDRO remains unpaid.

5.50 RTA figures indicate that:

- 19 percent were suspended for less than 1 week;
- 20 percent were suspended from between 1 week to 1 month;
- 18 percent were suspended from between 1 month to 3 months;
- 12 percent were suspended from between 3 months to 6 months;
- 19 percent were suspended for more than 6 months; and

- 12 percent have been suspended for longer than 6 months. Their debt to the SDRO remains unpaid.

Secondary Offending

5.51 The Sentencing Council was specifically charged with determining whether there has been an increase in imprisonment under ss 25 and 25A *Road Transport (Driver Licensing) Act* 1998 (the Act), and as a result of the sanctions for non-payment of fines or penalties.

5.52 Sections 25 and 25A of the *Act* contains a number of driving offences of:

- Drive whilst unlicensed;
- Drive when never licensed;
- Drive whilst disqualified; and
- Drive whilst suspended.

5.53 Offences of driving an unregistered and uninsured vehicle are contained in the *Road Transport (Vehicle Registration) Act 1997* (the Regulation).

5.54 The Council notes that the NSW Parliamentary Law and Justice Committee attempted to explore the issue, but found that the relationship between fine imposition, default and licence sanctions was extremely complex. Recognising that the situation can escalate to the point where a person is faced with a term of imprisonment, whether community based or not, because of driver licence sanctions, the Committee recommended that the Government undertake a multi-agency project to examine the issues relating to fine defaults and drivers licences brought before the Committee during the Inquiry and described in its report.[32]

5.55 The Office of State Revenue has asserted that it is only aware of anecdotal evidence of a purported increase in imprisonment, and called for further research to be conducted to determine whether this is the case. [33]

5.56 However, a number of submissions argued that suspending an offender's driver's licence in response to fine default has definitely led to secondary offending – namely, the commission of the offence for drive while suspended or, in the case of repeat offenders, drive while disqualified or the commission of acquisitive offences so as to raise the money needed to pay a fine or penalty.

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32. NSW Legislative Council, Standing Committee on Law and Justice *Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations* Final Report, March 2006.
33. Submission 11: NSW Office of State Revenue.

5.57 It was submitted that fine defaulters may end up imprisoned *not* under the enforcement provisions as such, but as a consequence of continuing to drive after action has been taken under the enforcement provisions.[34]

Legislative impediment

5.58 NSW legislation currently does not distinguish between a disqualification arising out of licence sanctions imposed for fine default, and those arising through court-imposed disqualification periods for other offences. Regardless of how the sanction was incurred, the offender will be charged under section 25 *Road Transport (Driver Licensing) Act* 1998, with the result that there is no ready means in existence at this time, of identifying whether secondary offending has occurred by virtue of the default enforcement provisions of the fines regime.

5.59 A number of submissions recommended that a distinction be created in legislation, if only because it would allow for an accurate determination of whether fine default is leading to secondary offending. It would also then be possible to impose different sanctions on driving whilst disqualified, reflecting the lower culpability or threat to the community represented by those who have lost their licence through fine default, as compared to poor driving.[35]

Comparable jurisdictions

5.60 Recent Victorian legislation adopts the approach outlined above, which specifically allows fine defaulters to be distinguished from other drivers who have lost their licences as a result of driving offences.[36]

5.61 South Australia has a similar provision for separate offences in respect of unlicensed driving, distinguishing the grounds upon which a

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34. Submission 3: Senior Children's Magistrate Mitchell; Submission 5: Salvation Army; Submission 7; His Honour Judge (now Justice) Price; Submission 8: NSW Council of Social Services (NCOSS); Submission 9: UnitingCare; Submission 13: Shopfront Legal Centre; Submission 14: NRMA; Submission 15 Public Interest Advocacy Centre (PIAC); Submission 17: NSW Legal Aid Commission; Submission 18: South Eastern Aboriginal Legal Service (SEALS); Submission 19: Coalition of Aboriginal Legal Services (COALS); Submission 20: Youth Justice Coalition; Submission 21: Combined Community Legal Centres Group (NSW Ltd); Submission 22 NSW Roads and Transport Authority (RTA); Submission 35: Criminal Law Committee, NSW Law Society; Submission 50: Lismore Driver Education Project; Submission 54: Community Relations Division, NSW Attorney General's Department; and Submission 56: Acting District Court Judge Sir Robert Woods.
35. Submission 7: His Honour Judge (now Justice) Price; Submission 14: NRMA.
36. Section 185 *Victorian Infringements Act (2005)*

licence was suspended or cancelled, and constituting a clear offence of driving without a licence lost as a result of not paying a fine.[37]

5.62 According to the South Australian Courts Administration Authority, in the last six years there have been:

- 2674 prosecutions for drive while suspended;[38] and
- 22,692 prosecutions for drive while disqualified.[39]

This does not relate to enforcement suspensions.

5.63 Interestingly, the South Australian Courts Administration Authority has advised that 'there is no information to suggest that fine defaulters are being imprisoned for driving offences incurred as a consequence of the original non payment of fine'.

Aboriginal over-representation

5.64 It was submitted that Aboriginal offenders were particularly over-represented among those convicted of driving offences following licence suspension for fine default.

5.65 It was suggested that cultural obligations may have contributed to this over-representation: the Council was advised that many Aboriginal people report that they were asked to drive by others, even though they were unlicensed or disqualified, and that the 'kinship bonds' place an obligation on the person such that they cannot refuse the request.[40]

5.66 The disproportionate number of Aboriginal people imprisoned for drive while suspended, cancelled or disqualified offences (whether initially incurred through by fine default or for poor or unlicensed driving) is of concern.

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37. Section 70 E(5) of the South Australian *Criminal Law (Sentencing) Act* 1988 requires that person must not drive a motor vehicle on a road while his or her licence is suspended under section 70E, under which an authorised officer may make an order suspending a fine defaulters driver's licence for a period of 60 days. This is as opposed to prosecutions carried out under section 74 of the *Motor Vehicles Act 1959*.
38. Section 70E(5) *Criminal Law (Sentencing) Act* 1988 (SA)
39. Section 91(5) *Criminal Law (Sentencing) Act* 1988 (SA)
40. In consultation, Richard Davies Solicitor, Western Aboriginal Legal Service, Dubbo, 7 August 2006; The Richmond Valley Council (in consultation Joanne Petrovic, Community Project Officer, Lismore 12 July 2006. See too: Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) *28 Monash University Law Review 268*, 289. see too Western Australian Law Reform Commission *Discussion Paper: Aboriginal Customary Law* (2005).

5.67 Citing NSW Bureau of Crime Statistics and Research data, the Coalition of Aboriginal Legal Services (COALS), noted that 11 percent of Aboriginal people received custodial sentences for these offences, compared with under 6 percent of the total population. Only 55 per cent of Aboriginal offenders received a fine, compared with 61 per cent of the total number of people convicted.

5.68 While conceding that several factors may account for this discrepancy, including the length of particular offenders' criminal histories, COALS commented that fines "are perhaps not being considered as a sentencing option as often as they should be in relation to Aboriginal people."[41]

5.69 The Council was unable to conclusively determine whether Aboriginal people were more over-represented in secondary offending arising from fine default, as the available data did not distinguish offender characteristics (such as Aboriginality, age or gender).

Driving offences generally

5.70 In 2002, five of the top 20 most commonly sentenced matters in the Local Court involved driver license or vehicle registration offences, which accounted for nearly 15 percent of all matters in the Local Court. The table below sets forth these offences:

Table: Commonly sentenced driver licence and vehicle registration offences in the Local Court for 2002

Rank	Offence	***Legislation***	Number of matters	Percent of cases
4	Drive while disqualified	*Road Transport (Driver Licensing) Act* 1998, s 25A (1)	4,956	4.8
10	Drive while suspended	*Road Transport (Driver Licensing) Act* 1998, s 25A (2)	3,143	3.1
12	Drive without being licensed	*Road Transport (Driver Licensing) Act* 1998, s 25 (1)	2,745	2.7
14	Drive unregistered vehicle	*Road Transport (Vehicle Registration) Act* 1997, s 18 (1)	2,127	2.1
15	Drive while licence refused/cancelled	*Road Transport (Driver Licensing) Act* 1998, s 25A (3)	2,071	2.0

5.71 There has been an increase in the prevalence of section 25 and 25A offences in the local court. For example, in the year 2002, drive while disqualified was the fourth most common offence (from 10th in

41. Submission 19: Coalition of Aboriginal Legal Services (COALS)

1992) and drive while suspended was the tenth most common offence (not previously recorded in the top 20 in 1992).[42]

5.72 It is arguable that the increase is at least in part attributable to the use of licence sanctions for fine default by the SDRO. However, the link remains speculative and considerable additional research (which would be dependent on the collection of statistics in the local court) would need to be undertaken to ascertain whether this is the case or not.

RTA data on secondary offending

5.73 Data supplied by the RTA does however confirm that secondary offending *has* occurred following the imposition of licence sanctions for fine default.

5.74 Of the almost 108,000 licenses suspended for fine or penalty default in the 12 months to 30 June 2005, approximately 2.5 percent (or over 2750 people) were subsequently convicted of driving while suspended.

5.75 Of this 2.5 percent, over 10 percent (or approximately 290 people) went on to be subsequently convicted of driving while disqualified.

5.76 The available data does not, however, reveal at this stage, which proportion of these people were imprisoned for those offences.

5.77 Accordingly, further study needs to be undertaken by the Council to test whether the existence of sanctions for fine or penalty default has led to an increase in imprisonment under ss 25 and 25AA of the *Road Transport (Driver Licencing) Act*. To complete any such survey, separate statistics would have to be generated and shared with BOCSAR.

42. Keane J & Poletti P, 'Common Offences in the Local Court' (2003) 28 *Sentencing Trends and Issues*: Judicial Commission.

Referral to Driver Education Programs at point of sentence

5.78 The Council notes the widespread support and proposals for the extension of current driving education programs across the State. The Chief Magistrate, the Department of Corrective Services and Magistrate Zdenkowski, for example, submitted that there was considerable advantage to offenders being referred to driver education programs as a condition of a bond.

5.79 It was submitted that this is of practical assistance for Aboriginal offenders and those in isolated communities with poor public transport, where the involvement of professional driving instructors and support assistance has proved effective in assisting offenders to negotiate with the SDRO to repay their fines; to learn practical driving skills and eventually to gain their licence.

5.80 The Council was particularly impressed with the assistance provided to offenders by the 'On the Road' Lismore Driver Education Program, and by the Broken Hill 'Cruizin' Driver Licence Theory' Program. The Council met with representatives of both of these programs through the community consultation process undertaken as part of the Fines reference.

'On the Road" Lismore Driver Education Program

5.81 This is a comprehensive driver education program designed to reduce high levels of driver offending by Aboriginal people on the Far North Coast of NSW. It recognises a number of factors that contribute to unlicensed driving including:

- the lack of awareness of how to obtain a birth certificate;
- lack of funds to pay for driver knowledge handbooks or driving lessons;
- limited literacy and computer literacy levels; and
- the lack of access to vehicles to learn to drive and licensed drivers willing to provide 50 hours driving practice, as is required by the Graduated Licensing Scheme in NSW.

5.82 To address this disadvantage, the program provides:

- access to a computer-based driver knowledge test in local Aboriginal agencies offices;
- literacy and computer skills training;
- free driving lessons;
- licence testing in local Aboriginal community sites;

- access to supervised driving practice and
- assistance with applications to the NSW State Debt Recovery Office for "time to pay" to allow disqualified drivers to regain licences.

5.83 In 2005 the program received a Certificate of Merit in the Australian Crime and Violence Prevention Awards.

The Broken Hill Cruizin' Driver Licence Theory Program

5.84 This program was established by Magistrate Lucas of Broken Hill Court as a reaction to the high reoffending rates of Aboriginal people in the local community on driving offences.

5.85 The program, run through TAFE's Western offices, assists offenders pass the theoretical component of a drivers' licence.

5.86 To date, it has has involved approximately 108 participants, of whom only one has reoffended. The Program Coordinator advised that all payment schedules with SDRO have been maintained, and that several participants have received either full-time or part time work as a result of their participation in the program.

Mandatory Disqualification Periods

5.87 The NSW Court of Criminal Appeal has established that licence disqualification is a significant penalty which must be taken into account in the sentencing process, given its potentially devastating effect upon a person's ability to derive income and function appropriately within the community.[43]

5.88 In the course of the Fines reference, the Council received a number of submissions expressing concern regarding mandatory licence disqualification periods.

5.89 The Chief Magistrate noted that there is an inconsistency in relation to the severity of mandatory minimum periods for certain offences (such as driving while suspended for fine default compared with driving while disqualified following a court conviction for a serious traffic offence such as High Range PCA), and submitted that an element of flexibility should be incorporated into the legislation to allow different penalties according to the seriousness and circumstances of the offence.

5.90 His Honour Judge (now Justice) Price commented that someone convicted of drive while unlicensed on four separate occasions for example, will incur a total mandatory minimum disqualification period of nine years. However, if the offence were drive while suspended, the mandatory minimum period would total six years.[44]

5.91 Similarly, the NSW Law Society Criminal Law Committee noted that there is a discrepancy between the disqualification periods for unsafe offences compared to licensing offences. For example, a second high range PCA offence has an automatic disqualification of five years which can be lowered to two years, whereas a second offence for drive while unlicensed carries a three year automatic disqualification with no capacity to reduce the penalty.[45]

5.92 Submissions and consulations indicated that mandatory minimum penalties have the potential to operate very harshly and in a discriminatory way, particularly in rural and regional areas or where public transport is limited, [46] resulting in:

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43. *Application by the AG under section 37 of the CSPA for a Guideline Judgement Concerning the Offence of High Range PCA* (No. 3 of 2002) (2004) NSWCCA 303, per Howie J at p26.
44. Submission 7: Chief Magistrate.
45. Submission 35: The NSW Law Society Criminal Law Committee.
46. Submission 7: Chief Magistrate; Submission 14 NRMA; Submission 18: South Eastern Aboriginal Legal Service (SEALS); Submission 35: Criminal Law Committee, NSW Law Society; Submissions 50 and 52 'On the Road'

- loss of existing employment;
- loss of employment opportunities;
- the potential for secondary offending through continued driving;
- the imposition of Habitual Traffic Offender Declarations; and
- an adverse impact on the offender's family and the wider community.

Judicial views

> "Mandatory sentencing is always, always and in every matter unjust - sentences MUST always be formed to fit the offender and all the circumstances."[47]

5.93 Preliminary analysis of the Council's judicial survey indicates an overwhelming antipathy to mandatory disqualification periods. Sixty percent of the respondents believed that they were 'never' or 'rarely' appropriate, citing an in-principle objection to the fettering of judicial discretion and the practical hardship it occasioned for offenders and their family.

5.94 Magistrate Zdenkowski noted the social and health consequences, such as depressive illness, domestic violence and other criminal offences, which regularly flow from the imposition of mandatory minumim penalties. His Honour commented that 'the hidden economic and social cost involved canot have been in the the contemplation of those who framed the legislation.[48]

5.95 The imposition of licence sanctions may also result in the forced relocation of fine defaulters from rural areas to the city. Acting District Court Judge Sir Robert Wood commented that

> '…in cities where there is public transport it is quite possible to live and work without needing to drive…however in the country towns and rural areas where there is little or no public transport the loss of a licence becomes a double penalty because it can seriously affect a person's ability to hold down a job. When a person loses a licence in the county his or her ability to get around and lead a normal life can be

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ACE Drivers Education Program, Lismore; Submission 54: Community Relations Division, NSW Attorney General's Department; Submission 55: Magistrate George Zdenkowski, (Katoomba Local Court); Submission 56: Acting District Court Judge Sir Robert Wood.

47. Judicial Survey response 15.
48. Submission 55: Magistrate Zdenkowski.

> seriously affected and it can lead to loss of a job. This then itself creates greater hardship." [49]

5.96 Sir Robert Wood advised that depending on the special circumstances of the person before him, he endevours to keep the suspension down as low as possible to keep the person as a viable member of society in the country:

> "I do not want to force people to have to move to the city to live where they can avail themselvs of the public transport network. We should be trying to keep people in the country areas." [50]

5.97 While there may be practical problems as to enforceability, it is theoretically possible to use a range of techniques to ameliorate the consequences of the potentially harsh and inflexible regime which follows upon conviction. These techniques include:

- adjournment to undertake a Traffic Offenders Program followed by a s10 bond following successful completion[51];
- a condition of bail to surrender the licence; or
- a condition to drive only to/from work or home[52].

5.98 Judicial attempts to avoid these outcomes can lead to unjust outcomes because of excessive leniency.[53] As noted by the Court of Criminal Appeal in respect of drink driving offences, their use has the potential to undermine the credibility of section 10s.[54]

5.99 Unless other options are pursued however, there is a likelihood of inappropriately severe sentences being imposed. Moreover, if penalties are perceived as unfair, discriminatory or unduly harsh, their deterrent and moral impact risk being significantly weakened. Offenders may well feel less bound by such penalties and more prepared to disobey the prohibition on driving.[55]

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49. Submission 56: Acting District Court Judge Sir Robert Wood.
50. Submission 56: Acting District Court Judge Sir Robert Wood.
51. Section (1)(b) *Crimes (Sentencing Procedure)* Act 1999.
52. Section (1)(b) *Crimes (Sentencing Procedure)* Act 1999.
53. Submission 55: Magistrate Zdenkowski. .
54. Application by the AG under section 37 of the CSPA for a *Guideline Judgement Concerning the Offence of High Range PCA* (No. 3 of 2002) (2004) NSWCCA 303).
55. In consultation, Committee Manager, StaySafe Committee, NSW Parliament, 31 May 2006. See too Willis, John 'The proper role of criminal law in road safety' paper delivered to the Criminal Justice Planning and Coordination Conference, 19-21 April 1993, Canberra (Biles McKillop (eds.)

Remission applications

5.100 The Attorney General's Department has advised that it often receives applications for remission of the unexpired period of a driving disqualification. Remission in such cases is extremely rare, however the number of applications being received is increasing. Many of these applications reveal that, for some people, lengthy cumulative disqualification periods are trapping them in a cycle of illegal activity.[56]

56. Submission 54: NSW Attorney Generals' Department, Community Relations Division.

Habitual Traffic Offender Declarations

5.101 The Habitual Traffic Offenders scheme provides harsher penalties for drivers who repeatedly commit serious offences. Under the scheme, a person will automatically be declared a Habitual Traffic Offender once he or she has been convicted of three relevant sentences within a five-year period.[57] A relevant offence arises where is an offender:

- has committed a major offence;
- has committed a prescribed speeding offence;
- is a repeat unlicensed driver;[58] or
- is a disqualified, suspended or cancelled driver.[59]

5.102 The RTA is required to inform a person that he or she may be liable to be declared a Habitual Traffic Offender,[60] however the failure to so notify a person does not invalidate the declaration but may be taken into account by a court when considering whether a declaration should be quashed.

5.103 On declaration, the person is disqualified for an accumulated period of five years.[61]

5.104 Giving its reasons for so doing, a court can:

- impose a longer period of disqualification if it believes it appropriate (including for life);[62] or
- quash the declaration.[63]

5.105 Alternatively, the court may reduce the disqualification period on the grounds that the disqualification is a disproportionate and unjust consequence having regard to the total driving record of the person and the special circumstances of the case. The disqualification period cannot be reduced to less than two years. [64]

5.106 A Habitual Traffic Offender Declaration cannot be appealed.[65]

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57. Division Three, section 199 *Road Transport (General) Act 2005.*
58. Section 25(3) *Road Transport (Driver Licencing) Act 1998.*
59. Section 25 (A)(i)(ii) or (iii) *Road Transport (Driver Licencing) Act 1998.*
60. Section 200 *Road Transport (Driver Licencing) Act 1998.*
61. Section 201 *Road Transport (General) Act 2005.*
62. Section 201 (2) *Road Transport (General) Act 2005.*
63. Section 202 (2) *Road Transport (General) Act 2005.*
64. Section 202(1) *Road Transport (General) Act 2005.*
65. Section 202(iii) *Road Transport (General) Act 2005.*

5.107 It was submitted that it is very difficult to remove a Declaration, as the offender has to go back to the original court which imposed the driving disqualification period and argue it is unjust and unreasonable now, and was so at the time of sentence. It was said to be very difficult to succeed, partly as magistrates loathe to second guess their own sentences.[66]

5.108 The majority of submissions were opposed to the automatic imposition of Habitual Traffic Offender Declarations, questioning the severity and proportionality of the sanctions, and submitting that the imposition of a lengthy disqualification period, with no avenue by which to regain driving privileges is unfair and ineffective.[67]

5.109 It was submitted that the imposition of declarations:

- constitutes a 'double penalty' in that an offender has previously been punished for the original offences giving rise to the declaration;[68] and
- arguably contains little incentive to refrain from driving, particularly where the driving offences that give rise to the Declaration were directly attributable to the existence of outstanding fines.[69]

5.110 Submissions noted that the declarations have led to 'crushing' periods of disqualification. In consultations, the Legal Aid Commission, Aboriginal Legal Services and local lawyers provided a series of examples of clients who found themselves disqualified for periods in excess of ten years, and whose liberty and prospects of employment were severely limited as a result. The Council was told that various local courts have now disqualified people to 2024 and beyond due to the requirement to accumulate additional disqualifications.

5.111 It was also argued that declarations have had a disproportionate impact on certain marginalised groups in society, particularly on young people without qualifications, for whom the absence of a licence significantly impacts on their chances of employment.

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66. In consultation, Legal Aid Solicitor , Graham Lamond, Lismore.
67. Submission 3: Snr Children's Magistrate His Honour Scott Mitchell; Submission 13: Shopfront Legal Centre; Submission 18: SEALS: Submission 35: NSW Law Society Criminal Law Committee; Submissions 50 and 52: On the Road ACE Driver Education Program, Lismore; Submission 54: Community Relations Division, NSW Attorney General's Department; Submission 55: Magistrate George Zdenkowski; and Submission 55: Acting Judge Sir Robert Woods.
68. Fitzgerald, Lismore Driver Education Program, Submission no 50;
69. Submission 13: Shopfront Legal Centre.

5.112 The NSW Children's Court urged that the offence of 'cancelled driver' (based on fine default) be removed from the category of offences which comprise 'habitual traffic offences', at least where it applies to young people.[70]

5.113 A number of submissions recommended either that the power to disqualify a driver as a Habitual Traffic offender be removed from the RTA and made an option available only to the Local Court or that it be abandoned altogether.

Judicial views

5.114 Preliminary analysis of the Council's judicial survey reveals that eighty-five percent of respondents believed that Habitual Offender Declarations are 'never' or 'only sometimes' an appropriate penalty.

5.115 Respondents commented that 'horrendous penalties are imposed with huge repercussions'[71] with sanctions 'becoming meaningless'[72] when offenders are being disqualified well into the next decade or in excess of thirty years.[73]

RTA data

5.116 The RTA has advised that in the 12 months to 30 June 2005, 289 people were eligible for the imposition for a Habitual Traffic Offender Declaration arising out of offending committed following the imposition of a licence suspension for fine default.[74]

5.117 The demographics of these offenders is not known. It is not known how many Declarations were imposed on offenders unconnected to fine default.

5.118 The Council is of the view that an appropriate course of action, if the Habitual Traffic Offender scheme is to be retained, would be to remove its use as an automatic default option and require that a separate application be brought before the court requesting that such a declaration be imposed.

70. Submission 3: Senior Children's Magistrate His Honour Scott Mitchell.
71. Judicial Survey response 4.
72. Judicial Survey response 4.
73. Judicial Survey response 18.
74. Advice provided by the RTA, October 2006.

Options For Reform

5.119 The Council has identified a number of options geared specifically at the imposition of licence sanctions for fine default. These include the following:

- Reversing the sequence of enforcement by resorting to civil recovery options before the imposition of licence or vehicle sanctions;
- Amendment of the *Road Transport (Driver Licencing) Act* to differentiate licence suspension for fine default from suspension for traffic safety offences;
- Referral to Driver Education Programs at point of sentence;
- Sanctions other than outright suspension or cancellation of a licence in appropriate cases;
- Suspension of a licence or of vehicle registration for a period relative to the fine / penalty quantum
- Licence reinstatement programs where payments are scaled to income';
- Permitting licences to be regained without the need for six installment payments.
- Amendment of Mandatory Licence Disqualification and Habitual Traffic Offender Declarations.

Sanctions other than outright suspension or cancellation of a licence

5.120 This could be adopted in appropriate cases, and could include:

- Reducing a defaulter's licence status;
- Returning a licence after a period of good behaviour despite ongoing SDRO debt;
- Restricted licences;
- A 'grace period' before sanctions are actioned; and
- Extending a licence disqualification in exchange for a reduced or waived fine or penalty.

Reducing a defaulter's licence status

5.121 For example, a defaulter with a silver-class licence could be reduced to an ordinary licence, or placed onto a P-plate licence.

5.122 There are clear inconveniences in holding a learners or P-plate licence, and defaulters reduced to a learners licence may incur extra

costs to return to an ordinary licence. A number of consultations have also highlighted the real impact of losing one's licence status, as silver or gold class licences are only earned after maintaining long periods of safe driving records.

5.123 This enforcement option would penalise defaulters by creating significant inconvenience, but it would not take away their ability to drive, which is essential for rural and remote regions. Defaulters would be able to continue to drive to work, Centrelink interviews, and to essential services.

Returning a licence after a period of good behaviour

5.124 In appropriate circumstance (for example, after a defined period of good behaviour), an offender might be permitted the return of their licence after a period of suspension. This could apply even though payment of the SDRO debt has not been made in full.

5.125 Several jurisdictions allow an offender to seek to regain their licence once they have completed a certain part of their disqualification, subject to satisfying certain criteria.[75]

5.126 The Legal Aid Commission suggested that an offender, disqualified for over five years, could apply to the court for a licence after having at least 5 years good behaviour. The court could then grant a provisional 12 month license with return to unrestricted licence thereafter. This would be restricted to disqualification for non-aggravated traffic offences. [76]

5.127 The NSW Law Society suggested that the *Road Transport (Driver Licensing) Act 1998* be amended, to allow a Local Court Magistrate to reinstate a licence before the expiration of the disqualification period in exceptional circumstances. This would be done on the application of the driver; who would be required to establish a substantial need for a licence and evidence of rehabilitation. Applicants would have to have served at least 3 years of their disqualification and have committed no driving offence in that time.[77]

5.128 Interestingly, the CLC specified the need for applicants to have paid off all their outstanding fines before being eligible for this

75. Section 42 *Road Traffic Offenders Act 1988* (UK); and sec 78 *Road Traffic Act 1974* (WA).
76. Submission 17: The Legal Aid Commission. Submission 56: Acting Judge Sir Robert Wood, featured a similar recommendation.
77. Submission No: 35 NSW Law Society Criminal Law Committee

provision – a view not shared by the Department of Corrective Services[78] or His Honour Judge (now Justice) Price.[79].

5.129 Agencies suggested that in lieu of a full reinstatement of licence privileges, a Green P licence could be permitted, thereby enabling an offender with a realistic chance of having a full licence reinstated after a further two or three years.[80]

Restricted licences

5.130 Restricted licenses permit the issuing of a licence that allows the offender to drive for certain specified purposes, such as for work.[81]

The Council notes that the SDRO website advises that RTA sanctions may be lifted earlier if:

- a licence is required for medical or employment purposes;
- if the offender lives in a remote locality; or
- if the offender is Aboriginal , lives in a rural community and is in the process of obtaining a driver's licence through a driving school.

5.131 It is also noted however, that despite this, submissions and consultations indicted that this options is rarely granted.

5.132 Regularising through guidelines (and legislative amendment) a system which would allow the issue of restricted licenses during the sanction period, permitting the use of a vehicle for work or identified essential purposes.

A 'grace period'

5.133 Some submissions recommended that defaulters be allowed a period of grace where a licence is granted until the debt is actioned, for example when the fine defaulter reaches Green P Plates.[82]

Extended licence disqualification periods in exchange for a reduced or waived fine or penalty

5.134 The StaySafe Committee reversed the usual thinking on licence disqualification, suggesting that perhaps the offender could elect not to drive in exchange for a fine being waived. The option could be offered as an alternative to either the fine or a fine option order being

78. In consultation 21 June 2006
79. Submission 7: His Honour Judge (now Justice) Price
80. Submission 18: South Eastern Aboriginal Legal Services
81. See for example, section 76 *Road Traffic Act* 1974 (WA) (Extraordinary licence); sec 11A *Motor Traffic Act* 1936 (ACT) / Reg 48 *Road Transport (Driver Licensing) Reg* 2000 (restricted licence); sec 87 *Transport Operations (Road Use Management)* Act 1995 (QLD) (restricted licence).
82. Chief Magistrate Submission No:7; Combined Communities Legal Centre Submission No: 21.

imposed by the Court, and might be appropriate for impecunious offenders.

5.135 The formula could be equal to a penalty unit: for example, a penalty unit (currently worth $110) could be the equivalent of a ten days licence suspension.

5.136 Adoption of the scheme would require the court to order the RTA to physically remove the offenders' licence and hand it to the court (which they currently do not do now) to reinforce the severity of the penalty.

5.137 If breached, the court would be entitled to be very strict on the offender, with tough sanctions such as impoundment being imposed for a set period of one, two or three months and where the offender would be required to pay for clamping and associated enforcement costs. A breach could also give rise to reinstatement of the original financial penalty; a harsh fine; extended additional disqualification; or a community service order.

5.138 If the disqualification period was successfully served, the offender would be able to regain the licence by applying to the RTA to reissue the licence. To encourage people to apply the RTA could re-issue the licence for its original term or add an additional licence period of a few months as an incentive to a person to engage in the process.[83]

Suspension of a licence or of vehicle registration for a period relative to the fine / penalty quantum

5.139 Suspension of a licence or of vehicle registration for a period relative to the fine / penalty quantum (for example one day or one week for every $x). This would serve to reduce the double jeopardy of having both a fine or penalty which continues even though there is the additional licence or vehicle sanction in place.

Licence reinstatement programs where payments are scaled to income

5.140 Authorising licence reinstatement programs under which participants could set up realistic payment plans, scaled to income, for outstanding fines and penalty notices, and which would allow driving under a regular or job-related license during the payment period.

5.141 While NSW has time-to-pay plans, currently, when a driving licence has been suspended, sanctions remain in place until the person has paid the fines in full, or six consecutive payments have been made under a time-to-pay plan. If licence suspensions are lifted, it may minimise the impact that the sanction has on their employment

83. Faulkes, Committee Manager NSW Parliamentary StaySafe Committee.

options and personal life, and more significantly, will reduce the incidence of unlicensed driving, which results in incarceration. This option will be beneficial for individual who allowed their licence to be suspended through ignorance or inaction, rather than wilful non-payment.[84]

5.142 A similar recommendation was made by The Combined Community Legal centres' Group (NSW)[85] who suggested that the SDRO lift driving sanctions for low-income fine defaulters within four weeks of making a payment arrangement for their fines-related debt (and presumably, that make payments in accordance with that arrangement). They also propose that where an individual enters into a Centrepay or direct debit arrangement, the sanctions should immediately be lifted. This would have the effect of ensuring that licence sanctions are not seen to be punitive, but solely a fines enforcement mechanism.

Permitting licences to be regained without the need for six installment payments

5.143 Giving credit for those who engage in Driver Education Programs or who enter into part payment arrangements, so as to allow them to regain or obtain a licence without the need for the payment of six instalments, which is currently adopted in practice as a pre-requisite for licence reinstatement.

Mandatory Licence Disqualification and Habitual Traffic Offender Declarations

5.144 The Council recommends that the Government:

- Reconsider mandatory penalties and allow for a differentiation where secondary offences of driving whilst suspended or disqualified result from a fine default sanction compared with those which result from a previous serious driving offence;
- Dispense with the automatic imposition of Habitual Traffic Offender Declarations and (if they are to be retained) require that a separate application be brought before the court requesting that such a declaration be imposed; and
- Remove the offence of cancelled driver due to fine default from the category of offences which give rise to the Habitual Traffic Offender Declaration, either where special circumstances exist relative to the circumstances of marginalised members of society or where the recipient of the fine or penalty can show particular

84. Submission 17 and 30 Legal Aid Commission
85. Submission 21:The Combined Community Legal Centre's Group (NSW)

hardship due to reduced means or impact on family or employment.

Appendices

- Appendix A: Other Options for Reform
- Appendix B: Submissions
- Appendix C: Consultants
- Appendix D: Questionnaires
- Appendix E: Questionnaire: Magistrates
- Appendix F: Statutory provisions under which penalty notices are issued

Appendix A: Other Options for Reform

6.1 The Council has also considered several other options for reform which were identified in the submissions, but which are not supported at this stage. Further consideration will be paid to these options in the Council's *Final Report*.

These proposals include:

- The introduction of an amnesty for fine defaulters;
- Introduction of a Day fine / structured fine scheme;
- Permitting the cutting out of debt in prison;
- Introduction of a HECS / welfare agency loan scheme; and
- Public shaming of defaulters.

Amnesty

6.2 The introduction of some form of general amnesty allowing for a full or partial write-off of existing debts was considered.

6.3 Some precedent exists in NSW and in other jurisdictions for an amnesty when accompanied by the introduction of a new fines or penalty notice regime. For example, NSW accompanied the introduction of the new *Fines Act* with an amnesty:[1] the Northern Territory, Western Australia and Victoria have also introduced amnesties to herald the reform of their respective fines and penalties regimes.

6.4 The most recent example, the Victorian Government's 2006 amnesty, permitted the waiving of most of the additional fees and costs incurred on top of a original fine and applied to all Government-issued fines, including traffic offences, littering, and fare and toll evasion. Over 40,000 people took advantage of the waiver. One fine defaulter reportedly had more than $49,000 in fees waived and entered into a plan to pay the balance of $56,000.

6.5 The Council was of the view however, that the existing system, particularly if reformed in accordance with the options earlier identified, would seem to allow similar benefits without the need for any general amnesty.

6.6 Three further types of amnesty were proposed during the Council's consultations:

- A write–off of unpaid fines;

1. *Fines Act 1996* section 2 and Clause 2, Schedule 3.

- A discount for partial payment; and
- An amnesty on licence suspension.

A write–off of unpaid fines

6.7 Although a full write-off of unpaid fines for all community members would go too far, there are some groups of offenders for whom it could provide a way out of the fine default cycle and could allow the State to identify its outstanding and recoverable debt, while creating benefits to SDRO administration.

A discount for partial payment

6.8 This type of amnesty is conditional on the defaulters making some payment towards their debt in exchange for a portion of the debt to be wiped. Offenders would be required to make a up front payment or enter a payment plan to receive a discount for their fines. It was suggested that the SDRO could reduce the debt proportionately, based on the offender's earning capacity or financial circumstances.

An amnesty on licence suspension

6.9 This amnesty would involve the SDRO and RTA permitting a stay on the enforcement of drivers licence suspensions for fine defaulters, provided that payment plans were entered into. This would give offenders a chance to find employment (which would assist in repaying their debts) and avoid the 'double penalty' of the fine and the licence sanction.

6.10 The proposal could be used as an alternative to fines write-off, or it can be part of a general amnesty, so that defaulters can 'wipe the slate clean' as well as have the chance to return to work with a restored driver's license.

Day fine / structured fine

6.11 Several submissions and consultations submitted that fines and penalties should be made more equitable, for example, by the sentencing court imposing a fine in "day units" with a day unit equalling an offender's daily income. The day fine is perceived to be a more financial equitable sentencing option, as wealthy offenders would receive a meaningful financial penalty, while poor offenders would receive a realistic financial penalty that does not spiral into a debt and default cycle. [2]

6.12 The Council notes that the day fine system is currently used in numerous overseas jurisdictions, including Germany and Sweden. The United States Bureau of Justice Assistance conducted a pilot

2. Lismore Aboriginal Legal Service and submission no. 50, On the Road ACE Driver Education Program.

demonstration project that assessed the impact of day fines on sentencing, concluded that the day fine:

- resulted in a substantial increase in the number of fines paid in full;
- led to a substantial increase in the average amount recovered; and
- was seen as a 'fairer option' by lawyers and judicial officers.

6.13 However, it was noted that the effectiveness of day fines would be impaired by high minimum fines that are already beyond poor offenders' means, and a 'great deal' of policy and program planning is needed to make the option a successful one.

6.14 The New Zealand Criminal Justice Working Group recommended against day fines for its potential to increase the disparity between court-imposed fines and infringement notices.[3] A day fine system was introduced in England and Wales, but was abolished after less than one year after criticism that it was:

- rigidly implemented;
- interfered with the courts' discretion;
- resulted in people receiving wide variations among fines offences of the same gravity depending on their income; and
- breached the principles of proportionality and consistency in sentencing.[4]

6.15 The Council notes that both the NSW and Australian Law Reform Commissions have recommended against the introduction of the day fine in NSW on the basis that the difficulties of implementation outweighed its benefits.[5]

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3. The New Zealand Criminal Justice Working Group, *Review of Monetary Penalties in New Zealand*, 2000 at 173ff.
4. For history of the day fine in England see The Scottish Sentencing Commission, *Basis on which fines are determined* (2006) Annex A, page ii – iii. See too: Moore R 'The use of financial penalties and the amounts imposed: the need for a new approach' *Criminal Law Review* 13-17 2003; Ashworth Andrew 'English Sentencing since the Criminal Justice Act 1991' in Tonry, M. and Hatlestad, K. (ed) (1997:139) *Sentencing Reform in Overcrowded Times, A Comparative Perspective*, Oxford University Press; Moxon, David 'England Abandons Unit Fine' in Tonry, op cit; and Tonry, M (1996) *Sentencing Matters*, Oxford University Press.
5. NSW LRC, Report 79 – *Sentencing* (1996); ALRC, Report 103 – *Same Crime, Same Time: Sentencing of Federal Offenders* (2006).

6.16 Although it is on one view a more equitable sentencing alternative, its effectiveness is dependent on an easily accessible and comprehensive method of retrieving information on an offender's financial circumstances, and it is capable of being abused. It is noted that the lack of a quick and reliable way to ascertain offenders' income led the Scottish Sentencing Commission recently to recommend against the day fine system in Scotland.[6]

6.17 The Council does not at this stage support the introduction of a day fine scheme, but will give a more detailed evaluation of this sentencing option in its *Final Report*.

HECS scheme / welfare agency loan

6.18 This option would allow for the deduction of small amounts from an offender's taxable income, and is similar to the mechanism for repaying a HECS debt or a garnishee of wage. The repayments are calculated as a percentage of the person's income, and would be deducted by the ATO or another appropriate agency.[7]

6.19 This option was the subject of a study by Chapman *et al*, that recommended a HECS-style repayment scheme as relatively low cost, and proportional.[8] The study also concluded that such a scheme is more likely to achieve full repayment over the long term. Offenders would not be caught in the fine default cycle, instead they would repay their debt when they gain greater financial stability.

6.20 This option was supported by a number of prison inmates as a 'fairer system across the board'. It would also ensure that wealthy offenders do not escape liability as their income would be effectively garnisheed under this option.

6.21 The Council is of the view however, that there is no reason why the equivalent of such an arrangement could not be voluntarily achieved through a Payment Plan.

Cutting out debt in prison

6.22 Some submissions and consultations raised the possibility that offenders who are already serving a prison sentence for another offence could be permitted to work off their fines and penalties while serving their current sentence.

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6. Scottish Sentencing Commission, *Basis on which fines are determined, Foreword by the Chair* (Rt Hon Lord Macfadyen), 2006.
7. Submission 2: Dr Clive Hamilton, The Australia Institute.
8. Chapman Bruce, Freiberg Arie, Quiggin John & Tait David, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines*, Centre for Economic Policy Research Discussion Paper No 461, 2003

6.23 Another suggestion was that offenders in custody could elect to serve an additional term which would 'cut out' or cancel their debt.

6.24 The Council does not support the first option, nor does it support the alternative option of extending the existing term by an appropriate period which would be treated as operating in satisfaction of the debt, having regard, inter alia, to the fact that the costs of extending the term will exceed the debt, and in any event, imprisonment will not lead to its recovery.

6.25 A more detailed evaluation will be given in the *Final Report*.

Public shaming of defaulters

6.26 Under this action defaulters would be publicly shamed through the media, such as publishing their names.

6.27 This option could have an advantage of allowing defaulters to retain their driver's license, so that they do not lose their employment, earning capacity, and access to essential services, and it might be effective in inducing people with means to repay the debt quickly.

6.28 It is not however, an option that the Council would support, by reason of its unequal application to those without means, and by reason of the abandonment of public shaming as a sentencing option.

Appendix B: Submissions

No	Date received	Agency[9]
1	18.01.06	Roads and Traffic Authority (RTA)
2	11.01.06	Dr Clive Hamilton, The Australia Institute
3	20.01.06	Senior Children's Magistrate, His Honour Judge Mitchell
4	24.01.06	NSW Commission for Children and Young People
5	30.01.06	The Salvation Army (Australia Eastern Territory)
6	22.02.06	The Positive Justice Centre
7	22.02.06	Chief Magistrate, His Honour Judge Price
8	23.02.06	NSW Council of Social Services (NCOSS)
9	24.02.06	The Disability Council of NSW[10]
10	24.02.06	Uniting Care
11	24.02.06	NSW Office of State Revenue
12	24.02.06	NSW Young Lawyers
13	24.02.06	The Shopfront Legal Centre
14	27.02.06	NRMA
15	27.02.06	Youth Advisory Council
16	27.02.06	The Public Interest Advocacy Centre
17	28.02.06	NSW Legal Aid Commission
18	07.03.06	South Eastern Aboriginal Legal Service (SEALS)
19	10.03.06	Coalition of Aboriginal Legal services (COALS)
20	13.03.06	Youth Justice Coalition
21	14.03.06	Combined Community Legal Centres Group (NSW) Ltd
22	29.03.06	Roads and Traffic Authority (RTA): Supplementary submission
23	06.04.06	Community Relations Commission (NSW)
24	06.06.06	Anon prisoner - Mid North Coast Correctional Centre
25	28.03.06	Office of the NSW Ombudsman

9. Submissions 32; 36-39; 42-49 and 53 refer to the imposition of fines in the context of environmental offences or offences arising out of occupational health and safety breaches, which will be addressed in the Council's subsequent report.
10. Declined to make a submission

26	06.06.06	Anon prisoner - Mid North Coast Correctional Centre
27	03.04.06	Office of the Protective Commissioner / Office of the Public Guardian
28	06.04.06	NSW Sheriff's Office
29	12.04.06	Department of Ageing, Disability & Homecare (DADHC)
30	11.05.06	NSW Legal Aid Commission: supplementary submission
31	15.05.06	NSW Department of Juvenile Justice
32	18.05.06	National Research Centre for OHS Regulation
33	22.05.06	NSW Department of Community Services (DOCS)
34	23.05.06	NSW State Debt Recovery Office (SDRO)
35	25.05.06	Criminal Law Committee, NSW Law Society
36	26.05.06	NSW Department of Primary Industries
37	29.05.06	Prof. Quinlan, School of Organisation and Management UNSW
38	01.06.06	Australian Securities and Investments Commission (ASIC)
39	01.06.06	Commonwealth Department of Employment and Workplace Relations
40	02.06.06	NSW Department of Corrective Services
41	----------	----------[11]
42	06.06.06	Queensland Environmental Protection Agency
43	06.06.06	NSW Department of Environment and Conservation
44	06.06.06	Unions NSW
45	13.06.06	Environmental Protection Agency (EPA) South Australia
46	13.06.06	Environmental Protection Agency (EPA) Victoria
47	13.06.06	NSW Environmental Defenders Office
48	13.06.06	NSW Office of Fair Trading
49	19.06.06	Department of Primary Industries, Water & Environment, Tasmania
50	27.06.06	'On the Road' ACE Driver Education Program, Lismore
51	06.07.06	The Hardship Review Board
52	12.07.06	'On the Road' ACE Driver Education Program, Lismore: supplementary submission
53	13.07.06	WorkCover NSW

11. Incorrect recording – consultation not submission: South Australia Courts Administration Authority

54	10.08.06	NSW Attorney General's Department, Community Relations Division
55	22.08.06	Magistrate Zdenkowski, Katoomba Local Court
56	29.08.06	Acting Judge Sir Robert Woods

Appendix C: Consultants

Judge Andrews, District Court, Dubbo

Len Armsby, Director, Legislation Development & Review, Department of Justice, Tasmania

Michael 'Dhinawan' Baker, Dhinawan Dreaming, Byron Bay

Dean Barker, NSW Sheriff's Office, Dubbo

Roslyn Barker, Aboriginal Client Services, Dubbo Local Court

Barry Bell, Principal Adviser Family and Community Support, NSW Department of Corrective Services

Armin Benkowics, Prosecutor, NSW Police Legal Services, Lismore

David Blackman, Registrar, Broken Hill Local Court

Edward Bolt, community representative, On the Road, ACE Driver Education Program, Lismore

Shane Breen, Wesley Uniting Employment, Lismore

Robyn Boynton, Offender Programs Unit, NSW Department of Corrective Services

Stephen Brady, Manager Operations, Courts Administration Authority, South Australia

Murray Briggs, Solicitor, Paul Stubbs Legal Office, Kempsey

Mary-Lou Buck, Aboriginal Program Consultant, Roads & Traffic Authority, Kempsey

Marcelle Burns, Aboriginal Legal Service, Lismore

Michael Bushby, Director Road Safety, Licencing and Vehicle Management, Road & Traffic Authority

David Capriatis, Relieving Prosecutor, NSW Police Service, Kempsey

Geoff Clark, Many Rivers Violence Prevention Organisation, Kempsey

Ken Clark, Project Officer, Circle Sentencing Court, Dubbo

Colleen Cattermole, Project Officer, Cruizin' Driver Licencing Theory Program (Broken Hill)

Linda Codling, AOD Counsellor, Metropolitan Reception and Remand Centre

Jeff Cunningham, Director, Sentence Administration NSW Department of Corrective Services

Richard Davies, Solicitor, Western Aboriginal Legal Services (WALS), Dubbo

Victor Darcy, Circle Sentencing Coordinator, Kempsey Local Court

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Thanks also to:

- Community representatives from On the Road, ACE Driver Education Program, Lismore;
- Members of the Probation and Parole Service, NSW Department of Corrective Services, Kempsey;
- Members of the Local Highway Patrol and Crime Management Unit, NSW Police Service, Dubbo; and
- Court staff at Kempsey, Dubbo, Lismore and Broken Hill Local Courts.

Special thanks to:

- Inmate delegate representatives from
  - Broken Hill
  - John Moroney 1
  - Dillwynnia
  - Mid North Coast
  - MRRC
  - Silverwater

Annexure D: Questionnaires

1: Corrective Services

The NSW Sentencing Council would like your views on:

- The process by which people under DCS supervision who have fines are identified and time to pay or waiver applications to be made on their behalf;
- Whether, if in receipt of any income whilst in gaol, a prisoner's wages, allowance or any other monies received can be garnisheed to pay off fines;
- Whether special considerations are / should be in place for vulnerable people with fines, eg those in custody for short periods; those with an intellectual disability; non English-speaking prisoners; Aborigines and women;
- The programs provided by the Department, either to those in custody or those in the community, that relate to the management of personal monies?
- What are the State Debt Recovery Office / Centrelink etc doing right? What are they doing wrong? What more should they do?
- Whether the fine is an effective sentencing option, particularly for vulnerable people;
- The availability and appropriateness of alternative sanctions, such as Community Service Orders, in NSW;
- Whether non-custodial sentencing options could be a suitable first instance sanction for people who would otherwise receive a fine;
- The effectiveness of imposing drivers licence sanctions as a sanction for fine default;
- Whether people are being imprisoned for breaching drivers' licence sanctions originally imposed for fine default; and
- Whether outstanding fines should be able to be 'cut out' in gaol for

    i) fine defaulters; or

    ii) people already in custody who have additional unrelated fines outstanding.

For those people imprisoned for driving while suspended / disqualified offences

- Have you ever lost your licence because you hadn't paid a fine? If so, for what offence?
- What impact did not being able to drive legally have on your family or job?
- Why did you drive while you were suspended / disqualified?
- Do you think the penalty was fair? If not, why not?
- What do you think about:
    - people not being allowed to drive until an outstanding fine is paid off?
    - agreeing not to drive for a set period in exchange for having a fine cancelled;
    - being able to do community service instead of paying a fine? And
    - being able to 'cut out' your outstanding fines in gaol?

2: Regional Consultations

The NSW Sentencing Council would like your views on:

- The nature of fines in your area – most common offences; amounts; penalty notices vs court-imposed fines;
- Whether fines have a deterrent effect;
- Whether the fine amount makes any difference in deterring illegal activity;
- Who ultimately pays a fine - does this affect its' deterrence impact;
- When fines should be imposed – ie for particular offences / against particular categories of offenders eg repeat offenders; corporations; individual farmers; Aboriginal communities etc;
- How does the wider community regards fines as a penalty;
- Whether other factors have a greater impact on limiting illegal conduct eg loss of reputation / having a criminal conviction;
- The potential for greater use of alternate sentencing options, eg community service orders; imprisonment; reparations or compensation.
- The process by which people with fines can have time to pay or waiver applications made on their behalf;
- Programs provided in your area that relate to the management of personal monies?
- Whether non-custodial sentencing options could be a suitable first instance sanction for people who would otherwise receive a fine;
- The effectiveness of imposing drivers licence sanctions as a sanction for fine default;
- Whether people are being imprisoned for breaching drivers' licence sanctions originally imposed for fine default; and
- Whether outstanding fines should be able to be 'cut out' in gaol for

    i) fine defaulters; or

    ii) people already in custody who have additional unrelated fines outstanding.

3: Community Consultations

The NSW Sentencing Council wants to know what you think about fines:

- Why do people get fines?
- Does the court look at people's history and ability to pay before giving them a fine?
- Does the court explain what will happen if someone can't or won't pay a fine?
- Do you know how to:
  - arrange time to pay;
  - make an installment plan;
  - have a fine waived;
  - apply to the Hardship Review Board?
- Do fines stop people doing the wrong thing? If not, why not?
- Are fines fair? Are they too hard for people to pay? Too easy?
- Is there a better response to crime than a fine? For example, should people be able to work off their debt instead of paying a fine? (community service);
- What do you think about taking away someone's drivers licence if they don't pay a fine? Is there a better punishment for not paying fines than taking away someone's licence?
- Is it OK to drive without a licence?
- Why do you think people keep driving even though their licence has been taken away?
- Are there any situations when driving without a licence is OK – family / employment / health / no public transport?
- Are people being sent to gaol because they lost their licence because they didn't pay their fines? Is this fair?
- What do you think about:
  - people not being allowed to drive until an outstanding fine is paid off?
  - agreeing not to drive for a set period in exchange for having a fine cancelled;

- being able to do community service instead of paying a fine? and
- being able to 'cut out' outstanding fines in gaol?

Do you have any comments or questions?

Appendix E: Questionnaire: Magistrates

Please identify your region:

☐ Metropolitan area: Newcastle - Sydney – Wollongong

☐ Regional

Sentencing outcomes for all offences:

1. How do you make your decision to impose a fine? *Please number according to priority, where 1 is most important, and 6 is least important.*

   - Offender's means
   - Severity of the offence
   - Community expectations
   - No other sentencing options legislated
   - No other sentencing options appropriate or available in the community
   - Other (*please specify*)

2. In general, how much influence does the means of the offender have on the amount of the fine you impose? *Please tick one box.*

   - No influence
   - Some influence
   - Moderate influence
   - A great deal of influence

3. How often would you impose an alternative sentence rather than a fine because you understand the offender cannot afford to pay the amount that would usually be imposed? *Please tick one box.*

   - Never
   - Rarely
   - Sometimes
   - Often
   - Always

4. In cases where you would *not* impose an alternate sentence, what are the reasons for your decision? *Please tick as many as are appropriate.*

   - Every offender can always pay something
   - Legislated sentence is a fine
   - Fine is the appropriate penalty
   - No suitable options available in the community (such as CSO)
   - No suitable options for the particular offender

- Other (please comment below)

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5. How often do you impose court costs in addition to a fine? *Please tick one box.*

   - Never
   - Rarely
   - Sometimes
   - Often
   - Always

The next questions ask about amounts of fine that you consider appropriate for a particular offence. You are asked to comment on how you would usually arrive at a sentence, and consider what factors you would take into account in increasing or decreasing the sentence, or imposing an alternate sentence.

Case 1. Offensive language, court imposed fine, maximum penalty is 6 penalty points or 100 hours of community service work, Summary Offences Act NSW section 4A)

6. What penalty do you think is appropriate?

7. To what extent would the following changes in the offender's circumstances increase or decrease the amount of fine you would impose, or lead you to consider another sentence? *Please tick one box next to each statement.*

	No Change	Increase fine	Decrease fine	Alternate (please specify)
First time offence				
Offender had unrelated prior convictions				
Offender has a history of fine default				
Offender is an itinerant or is homeless				
Offender is under 25				
Offender has dependent family				
Offender is receiving unemployment benefit or pension, and/or has little disposable income				
Offender asks for an alternate sentence for				

financial or family reasons

Case 2. First time offender, drive while licence was suspended. Maximum penalty is 30 penalty units or imprisonment for 18 months or both, and mandatory 12 months disqualification (in the case of a first offence); or 50 penalty units or imprisonment for 2 years or both, and 3 years disqualification (in the case of a second or subsequent offence): Road Transport (Driver Licensing) Act 1998 (NSW), section 25 and 25A.

7. What penalty do you think is appropriate?

8. To what extent would the following changes in the offender's circumstances decrease or increase the amount of fine you would impose, or consider another sentence? *Please tick one box next to each statement.*

	No Change	Increase fine	Decrease fine	Alternate (please specify)
Offender had prior convictions for driving offences				
Offender's licence was suspended due to fine default (non-traffic related)				
Offender has a history of fine default				
Offender is an itinerant or is homeless				
Offender is under 25				
Offender has dependent family				
Offender is receiving unemployment benefit or pension, and/or has little disposable income				
Offender asks for an alternate sentence for financial or family reasons				

Case 3. Drive while disqualified. Maximum penalty is 30 penalty units or imprisonment for 18 months or both, and 12 months disqualification (in the case of a first offence) or 50 penalty units or imprisonment for 2

years or both, and 3 years disqualification (in the case of a second or subsequent offence): Road and Traffic (Driver Licensing) Act 1998 (NSW), section 25 and 25A.

8. What penalty do you think is appropriate?

9. To what extent would the following changes in the offender's circumstances decrease or increase the amount of fine you would impose, or consider another sentence? *Please tick one box next to each statement.*

	No Change	Increase fine	Decrease fine	Alternate (please specify)
Offender has prior convictions for driving offences				
Offender's licence was suspended due to fine default (non-traffic related)				
Offender has a history of fine default				
Offender is an itinerant or is homeless				
Offender is under 25				
Has dependent family				
Offender is receiving unemployment benefit or pension, and/or has little disposable income				
Offender asks for an alternate sentence for financial or family reasons				

Sentencing Procedure (To what extent are financial circumstances of the offender clearly understood, and where possible, verified?):

12. How often do defendants who attend court (or their legal representatives) make oral or written submissions on their financial circumstances?

    - Never
    - Rarely
    - Sometimes
    - Often
    - Always

13. How often do you require written proof of an offender's financial circumstances prior to sentencing?

- Never
- Rarely
- Sometimes
- Often
- Always

14. What do you routinely do to ascertain the offender's capacity to pay a fine? *Please tick as many boxes as are applicable.*

- Receive oral submissions from the offender or the legal representative?
  Require written materials such as:
  --------- Affidavit
  -------- Bank details
  --------- Statutory declaration
  --------- Letter from the offender
  --------- Purpose designed court form
- Order a pre-sentence report
- Require previous history of fines and penalty notices
- Check court records for outstanding fines

15. What is the major reason why you would not require written proof of financial circumstances when considering imposing a fine?

- Lack of court time
- Fine is too small to warrant a written statement
- Sufficient information from oral submissions
- Offender indicates they can pay a fine
- Other (please specify)

16. How do you determine the appropriate penalty when the offender is not present at sentencing?

17. How does the Court find out whether the offender has any outstanding fines? For example, prior to sentencing, do you ask offenders whether they are already paying another fine?

18. Is there any other information that would help you to decide the penalty? *Please specify*.

Explaining the consequences of non-payment:

19. How does the court emphasise the importance of paying fines? Who explains:

	From the Bench	Registrar	Other (e.g., legal representatives)	Not sure
The importance of prioritising a fine over other expenditure				
Payment options, e.g., time to pay and pay by instalments				
Default will lead to licence suspension				
Other consequences Of default (seizure of goods, garnishee orders, community service)				

20. How does the court maximise the offender's likelihood of paying a fine, for example:

	From the Bench	Registrar	Other (e.g., legal representatives)	Not sure
Referral to financial counselling, welfare agencies, driver education scheme				
Directing the offender to inform Court of change in address or other circumstances?				
Ensuring the offender knows he/she can return to the Court for assistance eg Time to Pay				
Ensuring Aboriginal offenders are aware of the Aboriginal Client Service Specialist?				

Dealing with prior fine default:

21. Do you think it would enable better sentencing outcomes if the Court had a clear picture as to the history of payment (including all penalty notices) and the reasons for default in each case?

22. Does the Court or Registry ask question as to the full circumstances and reason / excuses for non-payment of a fine?

23. Does the Court or Registry require a financial circumstances form or statement be completed? Signed (under oath)?

24. Does the Court or Registry question the defaulter as to other incomes within the family, if so, does the Court or registry discuss the possibility of settling the debt through these other incomes?

25. Does the Court or Registry provide any other support or assistance to defaulters, to minimise further default? What support or assistance is available from the Court or registry?

Other comments:

26. What do you consider to be the main advantages of fines as a sentence?

27. What do you consider to be the main disadvantages of fines as a sentence?

28. Why do you think some offenders do not pay their fines?

    - The offender cannot afford the fine
    - The offender refuses to pay the fine, i.e. wilful default
    - The offender does not prioritise the fine above other expenditure
    - Other (*please comment*)

29. Have you ever imposed a fine knowing that the offender cannot, or will not pay?

    - Never
    - Rarely
    - Sometimes
    - Often
    - Always

    Please comment:

30. How could information about the offender's circumstances be improved to assist the Court in determining a fine?

31. Should the Court be able to impose a community service order type sanction as an alternative to a fine?

32. Are mandatory disqualification periods for driving offences an appropriate penalty?

33. Are Habitual Driver Declarations an appropriate penalty?

34. Is suspending driver licences for non-payment of (non-traffic related) fines an appropriate penalty?

35. Do Courts need more discretion or sentencing options in order to impose sentences that fit the offenders' financial circumstances?

36. What additional information would help you during the sentencing process?

37. Do you have any other comments?

Thank you for your time in completing this questionnaire.

Appendix F: Statutory provisions under which penalty notices are issued

Apiaries Act 1985, section 42A

Business Names Act 2002, section 32

Casino Control Act 1992, section 168A

Centennial Park and Moore Park Trust Act 1983, section 24

Classification (Publications, Films and Computer Games) Enforcement Act 1995, section 61A

Commercial Agents and Private Inquiry Agents Act 2004, section 28

Companion Animals Act 1998, section 92

Court Security Act 2005, section 29

Crimes (Administration of Sentences) Act 1999, section 97

Criminal Procedure Act 1986, section 333

Crown Lands Act 1989, section 162

Electricity (Consumer Safety) Act 2004, section 47

Electricity Supply Act 1995, section 103A

Energy and Utilities Administration Act 1987, section 46A

Environmental Planning and Assessment Act 1979, section 127A

Exhibited Animals Protection Act 1986, section 46A

Explosives Act 2003, section 34

Fair Trading Act 1987, section 64

Fisheries Management Act 1994, section 276

Fitness Services (Pre-paid Fees) Act 2000, section 16

Food Act 2003, section 120

Forestry Act 1916, section 46A

Futures Industry (New South Wales) Code, section 149

Game and Feral Animal Control Act 2002, section 57

Gaming Machines Act 2001, section 203

Gene Technology (GM Crop Moratorium) Act 2003, section 35

Home Building Act 1989, section 138A

Impounding Act 1993, section 36

Inclosed Lands Protection Act 1901, section 10

Industrial Relations Act 1996, section 396

Jury Act 1977, section 64

Jury Act 1977, section 66

Landlord and Tenant (Rental Bonds) Act 1977, section 15A

Law Enforcement (Powers and Responsibilities) Act 2002, section 235

Liquor Act 1982, section 145A

Local Government Act 1993, section 314, 647 or 679

Lord Howe Island Act 1953, section 37B

Marine Safety Act 1998, section 126

Maritime Services Act 1935, section 30D

Meat Industry Act 1978, section 76A

Mining Act 1992, section 375A

Motor Dealers Act 1974, section 53E

Motor Vehicle Repairs Act 1980, section 87A

National Parks and Wildlife Act 1974, section 160

Native Vegetation Act 2003, section 43

Non-Indigenous Animals Act 1987, section 27A

Noxious Weeds Act 1993, section 63

Occupational Health and Safety Act 2000, section 108

Parliamentary Electorates and Elections Act 1912, section 120C

Parramatta Park Trust Act 2001, section 30

Passenger Transport Act 1990, section 59

Pawnbrokers and Second-hand Dealers Act 1996, section 26

Pesticides Act 1999, section 76

Petroleum (Onshore) Act 1991, section 137A

Photo Card Act 2005, section 34

Plant Diseases Act 1924, section 19

Plantations and Reafforestation Act 1999, section 62

Ports Corporatisation and Waterways Management Act 1995, section 100

Prevention of Cruelty to Animals Act 1979, section 33E

Property, Stock and Business Agents Act 2002, section 216

Protection of the Environment Operations Act 1997, section 224

Radiation Control Act 1990, section 25A

Rail Safety Act 2002, section 105

Redfern–Waterloo Authority Act 2004, section 47

Registered Clubs Act 1976, section 66

Registration of Interests in Goods Act 1986, section 19A

Residential Parks Act 1998, section 149

Retail Leases Act 1994, section 16P

Retirement Villages Act 1999, section 184

Road and Rail Transport (Dangerous Goods) Act 1997, section 38

Road Transport (General) Act 2005, Part 5.3

Roads Act 1993, section 243

Royal Botanic Gardens and Domain Trust Act 1980, section 22B

Rural Fires Act 1997, section 131

Rural Lands Protection Act 1998, section 206

Security Industry Act 1997, section 45A

Sporting Venues (Pitch Invasions) Act 2003, section 12

State Sports Centre Trust Act 1984, section 20B

Stock (Chemical Residues) Act 1975, section 15A

Stock Diseases Act 1923, section 20O

Stock Foods Act 1940, section 32A

Stock Medicines Act 1989, section 60A

Summary Offences Act 1988, section 29, 29A or 29B

Swimming Pools Act 1992, section 35

Sydney Cricket and Sports Ground Act 1978, section 30A

Sydney Harbour Foreshore Authority Act 1998, section 43A

Sydney Olympic Park Authority Act 2001, section 79

Sydney Water Act 1994, section 50

Tow Truck Industry Act 1998, section 89

Trade Measurement Administration Act 1989, section 23

Transport Administration Act 1988, section 117

Unlawful Gambling Act 1998, section 52

Valuers Act 2003, section 42

Veterinary Practice Act 2003, section 101

Vocational Education and Training Act 2005, section 45

Water Management Act 2000, section 365

Weapons Prohibition Act 1998, section 42

Workplace Injury Management and Workers Compensation Act 1998, section 246

Tables

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Commonwealth

Crimes Act 1914

ACT

Crimes Act 1900
Magistrates Court Act 1930
Motor Traffic Act 1936
Road Transport (Driver Licensing) Reg 2000

NSW

Children's Court Act 1987
Children and Young Persons (Care and Protection) Act 1998
Crimes Act 1900
Crimes (Local Courts Appeal and Review) Act 2001
Crimes (Sentencing Procedure) Act 1999
Criminal Procedure Act 1986
Fines Act 1996
Justices Act 1902
Road Transport (Driver Licensing) Act 1998
Road Transport (General) Act 2005
Traffic Act 1909

NT

Fines and Penalties (Recovery) Act
Sentencing Act

QLD

Penalty and Sentences Act 1992
State Penalties Enforcement Act 1999
Transport Operations (Road Use Management) Act 1995

SA

Criminal Law (Sentencing) Act 1988
Motor Vehicles Act 1959

TAS

Sentencing Act 1997

VIC

Sentencing Act 1991
Victorian Infringements Act 2005

WA

Fines Penalties and Infringement Notices Enforcement Act 1994
Road Traffic Act 1974
Sentencing Act 1995

UK

Courts Act 2003
Road Traffic Offenders Act 1988

Bibliography

ASHWORTH Andrew 'English Sentencing since the Criminal Justice Act 1991' in Tonry, M. and Hatlestad, K. (ed.) (1997:139) *Sentencing Reform in Overcrowded Times, A Comparative Perspective*, Oxford University Press;

AUDIT OFFICE OF NEW SOUTH WALES, *State Debt Recovery Office: Collecting Outstanding Fines and Penalties,* Sydney 2002

AUDIT OFFICE OF NEW SOUTH WALES, *Fare Evasion on Public Transport: Performance Audit Report,* Sydney 2000

AUSTRALIAN LAW REFORM COMMISSION / HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, Report No: 84 *Seen and heard: Priority for children in the legal process*, 1997.

AUSTRALIAN LAW REFORM COMMISSION, Report 95 (2002) *Principled Regulation: Federal Civil and Administrative Penalties in Australia*

AUSTRALIAN LAW REFORM COMMISSION, *Discussion Paper 70: Sentencing of Federal Offenders,* 2005.

BAKER Joanne, 'The Scope for reducing indigenous imprisonment rates' *Crime and Justice Bulletin No 55,* NSW Bureau of Crime Statistics and Research, 2001.

BELL, Sue *Queensland's Criminal Justice System Bulletin 2003-04,* Qld Department of Premier and Cabinet, 2005

BROWN, Douglas, *Traffic Offences and Accidents* 4th Edition, LexisNexis Butterworths Australia 2006

BUTLER, Tony and MILNER Lucas, *The 2001 NSW Inmate Health Survey,* NSW Corrections Heath, Sydney 2003

BUREAU OF CRIME STATISTICS AND RESEARCH (NSW), *New South Wales Criminal Courts Statistics*, Sydney 2005.

CHALLINGER, D. (1985) "Payment of Fines" in *Australian and New Zealand Journal of Criminology*, vol 18, pp95-108.

CHAPMAN Bruce, FREIBERG, Arie, QUIGGAN John & TAIT David, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines* Centre for Economic Policy Research Discussion Paper No 461, 2003

COLE G, 'Monetary Sanctions: The Problem of Compliance' in *Smart Sentencing – The Emergence of Intermediate Sanctions*, Byrne, Lurigio & Petersilia (eds), Sage Publications, 1992, pp 142-151.

COUMARELOS, Christine, WEI Zhigang and ZHOU Albert, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation, Sydney 2006.

CULLEN, *Review of Fines and Infringement Notices Enforcement in Western Australia*, Ministry of Justice and Western Australian Police Service, 1995 (unpublished)

FERRANTE, Anna, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA*, Crime Research Centre, University of Western Australia, 2003

FORELL, Suzie, MCCARRON Emily and SCHETZER Louis , *No Home, No Justice? The Legal Needs of Homeless People in NSW*, The NSW Law and Justice Foundation, Sydney 2005

FOX, R *Criminal Justice On the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology, Canberra, 1995.

FOX, R 'Criminal Sanctions at the Other End', paper presented at *3rd National Outlook Symposium on Crime In Australia: Mapping the Boundaries of Australia's Criminal Justice System*, Australian Institute of Criminology, Canberra, 1999 at 6-7

GARFINKEL, Simson, 'Nobody Fucks with the DMV' *Nextworld*, 1993-2004 The Conde Nast Publications Inc, Wired Digital.

GEBERS, Michael and DeYOUNG, David *An Examination of the Characteristics and Traffic Risk of Drivers Suspended / revoked for Different Reasons*, California Department of Motor Vehicles, 2002.

HALLIDAY, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, Home Office, 2001 p 41.

HAMILITON, Clive Dr. *Making Fines Fairer* The Australia Institute, Canberra, 2004.

HAWKINS, Scott, *Caught Hook Line and Sinker: Incorporating Aboriginal Fishing Rights into the Fisheries Management Act*' New South Wales Aboriginal Justice Advisory Council, Sydney, 2003

THE HOMELESS PERSON'S LEGAL SERVICE / PUBLIC INTEREST ADVOCACY CENTRE, *Not Such a Fine Thing!* 2006

HOUGHTON J, *Fine Default*, Bureau of Crime Statistics and Research (NSW), 1984.

HYSLOP, Deirdre *Doing Crime to Pay the Fine: Prisoners and Debt, a Reintegration Issue*, NSW Department of Corrective Services, 2005

JUDICIAL COLLEGE OF VICTORIA, Victorian Sentencing Manual, 2005 http://www.judicialcollege.vic.edu.au/

THE JUDICIAL COMMISSION OF NEW SOUTH WALES and the NEW SOUTH WALES ABORIGINAL JUSTICE ADVISORY COUNCIL, *Circle Sentencing in New South Wales- A Review and Evaluation,* Sydney 2003

KARRAS, M, McCARRON, GRAY & ARDASINSKI, *On the edge of justice: the legal needs of people with a mental illness in NSW*, The NSW Law and Justice Foundation, Sydney, 2006.

KEANE and POLLETTI, Common Offences in the Local Court' (2003) 28 *Sentencing Trends and Issues*: Judicial Commission of NSW.

THE LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES, *The Legal Needs of Prisoners and People Recently Released from Prison Background Paper,* Sydney 2005.

LAWIE, Rowena, *Speak Out Speak Strong: Researching the needs of Aboriginal women in custody,* The New South Wales Aboriginal Justice Advisory Council, Sydney 2002.

LEWIS, Donald E 'A Linear model of fine enforcement with application to England and Wales' *Journal of Quantitative Criminology*, Vol 4 No 1 1988

McDONNELL S and WESTBURY N 'Banking on Indigenous communities: Issues, options and Australian and international best practice' *CAEPR Working Paper No 18/2002* Indigenous Economic Policy Research Centre, ANU (www.online.anu.edu.au/caper).

MINISTRY OF JUSTICE, *Review of Monetary Penalties in New Zealand,* 2000

MOORE, R 'The use of financial penalties and the amounts imposed: the need for a new approach' *Criminal Law Review* 13-17 2003

MOXON, David 'England Abandons Unit Fine' in Tonry, M. and Hatlestad, K. (ed.) at 139 *Sentencing Reform in Overcrowded Times, A Comparative Perspective,* Oxford University Press, 1997.

THE NATIONAL COUNCIL FOR WELFARE, *Justice and the Poor*, Canada, 2000

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing: Aboriginal Offenders*, Report 96, Sydney 2000

NEW SOUTH WALES OMBUDSMAN, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police,* Sydney, 2005

NEW SOUTH WALES OFFICE OF STATE REVENUE, *2004-05 Annual Report*, 2005

NEW SOUTH WALES PARLIAMENTARY DEBATES, Hansard, Ms Lo Po' Minister for Fair Trading and Minister for Women, NSW General Assembly, Second Reading Speech, *Fines Bill*, 30 October 1996 at 5545.

NEW SOUTH WALES PARLIAMENTARY DEBATES, Hansard, Second Reading Speech, *Fines Amendment (Payment of Victims Compensation) Act* 2006, NSW Legislative Council, 9 March 2006.

NEW SOUTH WALES PARLIAMENT, Legislative Council, Standing Committee on Law and Justice, 'Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations' *Final Report* March 2006

NEW SOUTH WALES PARLIAMENT, Select Committee Inquiry into the Increase in Prisoner Population, *Final Report*, 2001

NEW SOUTH WALES SENTENCING COUNCIL, *How Best to Promote Consistency in Sentencing in the Local Court*, Sydney, 2004

NEW SOUTH WALES SENTENCING COUNCIL, *Abolishing Prison Sentences of Six Months or Less*, Sydney, 2004

OFFICE OF THE CITY AUDITOR, City of San Jose, *An Audit of The City of San Jose's Traffic Citation Collection Process Report 96-03*, 1996

OFFICE OF PORT JOBS, *Working Wheels: A Guide to Overcoming Transportation Barriers to Work*, Washington State.

PAWASARAT, *Removing Transportation Barriers to Employment: The Impact of Driver's License Suspension Policies on Milwaukee County Teens*, Employment and Training Institute, University of Wisconsin-Milwaukee, February 2000

PAWASARAT and STETZER, *Removing Transportation Barriers to Employment: Assessing Driver's License and Vehicle Ownership Patterns of Low-Income Populations*, Employment and Training Institute, University of Wisconsin-Milwaukee, July 1998

POLETTI, Patrizia *Impact of the High Range PCA Guidelines Judgment on Sentencing Drink Drivers in NSW*, Potas (ed) in Sentencing Trends & Issues, Judicial Commission of NSW, No 35 September, 2005.

PUBLIC INTEREST ADVOCACY CENTRE / PUBLIC INTEREST LAW CLEARING HOUSE *Not Such a Fine Thing*, Sydney 2006

QUEENSLAND PARLIAMENTARY DEBATES, Hansard, Queensland Legislative Assembly, page 4323, 25 November 1990

QUEENSLAND PARLIAMENTARY DEBATES, Hansard, Legislative Council, *Fines Penalties and Infringement Notices Enforcement Bill* Second Reading Speech, Foss MP, page 8500 6 December 1994.

RAINE and MACKIE, 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' *The Howard Journal of Criminal Justice* Volume 43 Page 518- 538, December 2004

RAINE et al 'Financial Penalties as a Sentence of the Court: Lessons for Policy and Practice' *Criminal Justice*; Vol 3: 181-197, 2003.

REDFERN LEGAL CENTRE AND INNER CITY LEGAL CENTRE, *Fined Out,* Sydney 2004

THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, Report into Aboriginal Deaths in Custody, *National Report,* 1991

THE SCOTTISH SENTENCING COMMISSION, *Basis on which fines are determined*, (2006)

SIEGAL, N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) *28 Monash University Law Review 268*, 289

STRINGER, Anne, *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc Queensland, 1999

STRINGER, Anne, 'Women Inside In Debt: The Prison and Debt Project' CRC Justice Support, *Women in Corrections: Staff and Clients Conference*, Australian Institute of Criminology / SA Dept of Corrective Services conference, 31 Oct-1 Nov 2000

TONRY M *Sentencing Matters*, Oxford University Press, 1996

WESTERN AUSTRALIA AUDITOR GENERAL, Report 9: *Third Public Sector Performance Report,* 2005

WESTERN AUSTRALIAN LAW REFORM COMMISSION, Discussion Paper*: Aboriginal Customary Law,* 2005.

WILLIS, John 'The proper role of criminal law in road safety' paper delivered to the *Criminal Justice Planning and Coordination Conference*, 19-21 April 1993, Canberra (Biles McKillop (eds.)

ZIMMERMAN Ken and FISHMAN Nancy, *Roadblock on the way to work: Driver's Licence Suspension in New Jersey*, New Jersey Institute for Social Justice, 2001