**FINE DEFAULT POLICY’S CONTRIBUTION TO INDIGENOUS INCARCERATION**

By Anna Lee

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**ABSTRACT**

Aboriginals and Torres Strait Islander people (Indigenous people) are significantly overrepresented in the Australian prisons being 13 times greater than the imprisonment rate for non-Indigenous Australians.[[1]](#footnote-1) In particular, fine default ultimately leading to imprisonment has a significant impact, as 43 percent of the 1,358 people who entered prison in WA for clearing fine defaults in 2013, were Indigenous Australians.[[2]](#footnote-2) This paper explores the legal policy settings for fine defaults leading to imprisonment such as warrant of commitment imposed for fine default or breach of community service order, and imprisonment being a more efficient option as fines are paid off concurrently rather than cumulatively with community service orders. These policies impact the group suffering from vulnerabilities and disadvantages, such as poverty, along with lack of knowledge and access to legal assistance. Further, Indigenous women especially are at a disadvantage. This paper agrees with the Australian Law Reform Commission’s (ALRC) Proposal 6-1 in that “State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.”[[3]](#footnote-3) It is argued that fine default should not result in the imprisonment of the defaulter, as it does not uphold the rule of law for all, being unjust, unfair and inefficient on the Indigenous people. This paper is set out in order as follows: introduction; the fine enforcement policy’s contribution to incarceration; the rule of law; and the conclusion.

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**I INTRODUCTION**

Being a volunteer at the Citizens Advice Bureau for two years, having been in three different roles there (information officer, receptionist, and mediation administrator), I am committed to helping the community, and am truly passionate about access to justice. Subsequently, I chose to study the unit ‘Social and Welfare Law’ at Murdoch University, where the assignment topic is the current ALRC’s inquiry into the high rates of incarceration of Indigenous people. The opportunity to explore this area has opened my eyes to the true disadvantages faced by the Indigenous people, in committing an offence as trivial as fine defaulting. I hope that the discussion of my paper will highlight the true need for reviewing the harsh fines policy, so that imprisonment for fine default is abolished.

**II CONTRIBUTION TO INCARCARATION RATE**

The turnover rate for fine defaulters is high, as 80% of fine defaulters in prison are held for less than a week.[[4]](#footnote-4) If provisions in fine enforcement statutes that provide for imprisonment are abolished, the high costs of imprisoning a fine defaulter can be reduced. I disagree with the Minister for Corrective Services’ argument that imprisonment for fine default is essential “to ensure that there is an endgame or else nobody would pay a parking ticket, speeding ticket...etc”.[[5]](#footnote-5) Firstly, imprisonment is not an enforcement option for failing to pay an infringement, only for unpaid court-imposed fines. Secondly, there is still “end games” being other enforcement options such as drivers licence suspension, wheel clamping, seizure of property[[6]](#footnote-6) which successfully deter people from not paying fines. Instead, the warrant of commitment and the work and development orders regime contributes to the incarceration rate, discussed below.

## Warrant of commitment

Although automatic imprisonment for fine default has now been abolished in all jurisdictions,[[7]](#footnote-7) in most State and Territory jurisdictions, imprisonment may still be imposed.[[8]](#footnote-8) There are the strict conditions that if you do not pay your court fine or fail to complete your work and development order, a warrant of commitment will be issued for your arrest and imprisonment.[[9]](#footnote-9) The stricter conditions resulted in the number of Indigenous people sent to prison for fine defaults increase from 101 to 590 persons, a growth of 480 percent.[[10]](#footnote-10) Although the direct link between fine default and imprisonment has been removed from statutes nationwide, fine enforcement regimes still provide a pathway from a fine to imprisonment. Warrants of commitment permit imprisonment without hearings or trials, and imprisonment remains automatic at a certain point in the enforcement process.[[11]](#footnote-11)

Work and Development Orders

The 2008 amendment allowed people to serve multiple sentences for fine default concurrently, effectively only serving the number of days equivalent to their largest fine.[[12]](#footnote-12) In the Australian Capital Territory, Northern Territory, Tasmania and New South Wales, the dollar value of a 7 hour day of community service work is equal to the dollar value of a day of imprisonment. [[13]](#footnote-13) In all other States, the dollar value of a day in imprisonment is still greater than the value of a day of community service work. The 2008 amendments failed to address the ways fines could be worked off by undertaking community work. The fact that community work for fines must be worked off cumulatively as opposed to serving time in prison concurrently can make imprisonment a more desirable option for a person to reduce the amount owing on their fines, therefore increasing incarceration rates of Indigenous people for this offence.

**III RULE OF LAW**

Definition

1. The government, its officials, agents, individuals and private entities are accountable under the law
2. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.[[14]](#footnote-14)

Not fully upheld for Indigenous people

*(a) Explanation*

I believe that the fines enforcement system does not uphold the Rule of Law in the context of Indigenous people, especially (3) and (4), as it operates unfairly and unjustly against the Indigenous offenders.Imprisonment for fine default has a discriminatory and disproportionate effect, leading to the over-representation of the poor and vulnerable Indigenous people, especially the women in prison.[[15]](#footnote-15) Therefore, factors such as the Indigenous people’s financial incapacity (b) combined with their lack of knowledge and legal assistance (c) prevents the rule of law applying evenly to their group.

Further this is supported through the number of parallels drawn with the findings of the Fine Defaulters Report and findings of the Royal Commission into Aboriginal Deaths in Custody. [[16]](#footnote-16) The Fine Defaulters Report questioned the fairness of incarcerating people for unpaid fines, in that people who have been fined for an offence do not deserve to be in prison for their offence, as it explicitly rules out tougher options.[[17]](#footnote-17) This is highlighted by the tragic death of Yamatji woman Ms Dhu dying two days after entering police custody in Western Australia, in which she was detained for unpaid fines amounting to $3,622.82.[[18]](#footnote-18) Other factors such as lack of medical attention was involved in her death, however, the fact that she was in prison in the first place merely because of fine default highly questions the justness of the law, and needs to be urgently addressed.

*(b) Poverty*

It is well understood that extreme levels of poverty and disadvantage faced by Aboriginal and Torres Strait Islander peoples lead to the high incarceration rates.[[19]](#footnote-19) Indigenous people are much more likely than non-Indigenous people to have low incomes and to be unemployed.[[20]](#footnote-20) Due to their impoverished circumstances, their prospect to pay fines imposed on them is low or even impossible. The matter can then easily escalate with accumulation of fines and further penalties, resulting in imprisonment. Unemployment is prevalent in the fine defaulter prison population, particularly for Aboriginal women, as 73 percent female fine defaulters are unemployed where 64 percent of these women are Aboriginal.[[21]](#footnote-21) The policy operates disproportionately on those most vulnerable, particularly Indigenous women and only exacerbates poverty and disadvantage.[[22]](#footnote-22) For example, fines can be a barrier to the reunification of families who share the financial burden of repayments.[[23]](#footnote-23)

*(c) Lack of knowledge and access to legal assistance*

While fines can be contested in court, Indigenous people almost never contest, likely due to a lack of information and difficulty in negotiating the fines enforcement system, such as fear of incurring further costs.[[24]](#footnote-24) There is overwhelming evidence about the legal needs of Indigenous peoples, which are not being met, as there are barriers to legal assistance services. [[25]](#footnote-25) Further, they are more likely to have poor literacy and numeracy skills and to have little or no English.[[26]](#footnote-26) With Indigenous people not having enough legal assistance due to reasons such as geographical barriers, low level of funding to legal services, and a lack of interpreters, essentially, it contributes to the rule of law not being upheld. Consequently, the fine enforcement provisions are inefficient to the Indigenous people because of these barriers, and alternatives to imprisonment may be inaccessible.

Alternative argument

It can be argued that the fine enforcement system does not unfairly target Indigenous people, but in fact, if there is any discrimination it tends to be in favour of Indigenous people, so the rule of law is upheld in the context of the Indigenous people. Overall, Indigenous offenders receive shorter sentences than non-Indigenous offenders for most crimes.[[27]](#footnote-27) Further, it can be argued that it is because of their lack of financial means to pay their fines, not because the courts are biased. However, I do not agree with this argument, as the fines enforcement system on its surface treats Indigenous and non-Indigenous people equally.[[28]](#footnote-28) I stand strongly by Australian Bar Association president Patrick O’Sullivan’s statement in that although there is no direct discrimination on the basis of race, the high disadvantages faced by Indigenous people causes a disproportionate impact on them.[[29]](#footnote-29) The rule of law should be upheld to consider these disadvantages faced by the Indigenous people, as the law should apply equally to all.[[30]](#footnote-30)

**IV CONCLUSION**

It is important that other measures are taken to prevent incarceration of Indigenous people for fine defaults, such as improving information efficiency like having interpreters, increasing funds for legal assistance, and efficient work and development programs. But to truly end all the imprisonment and social issues surrounding incarceration of fine default payments, State and territory governments should implement their proposal to abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines. Consequently, incarceration rates of the Indigenous people will be reduced overall, and the rule of law will be upheld in terms of fine enforcement policies. Does someone who commits an offence so minor, not causing actual harm to the community, really deserve to be in prison? No.

1. Australian Bureau of Statistics, *Prisoners in Australia,* (8 December 2016) Australian Bureau of Statistics <[http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0](http://www.abs.gov.au/ausstats/abs%40.nsf/mf/4517.0)>. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84(2017) [6.1]. [↑](#footnote-ref-3)
4. Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System: Key Findings* (20 May 2016) Office of the Inspector of Custodial Services <<http://www.oics.wa.gov.au/reports/fine-defaulters-in-thewestern-australia-prison-system/key-findings/>>. [↑](#footnote-ref-4)
5. Western Australia, Parliamentary Debates, Legislative Assembly, 16 June 2015, 4346-4358 (Mr JM Francis, Minister for Corrective Services); Aboriginal Legal Service of Western Australia briefing paper, [5]. [↑](#footnote-ref-5)
6. *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA). [↑](#footnote-ref-6)
7. Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report* (2016) 43; Commonwealth, *Reducing the unintended impacts of* fines, Paper No 2 (2011) 6. [↑](#footnote-ref-7)
8. *Sentencing Act 1995* (NT) s 39(4) and (6); *Penalties and Sentences Act 1992* (QLD) ss 123, 125, 126 and 127; *Crimes (administration of sentences) Act 1999* (NSW) s 115; *Sentencing Act 1991* (VIC) ss 83AD, 83AE, 83AF, 83AS, 63A; *Criminal Law (Sentencing) Act* 1988 (SA) s 71; *Sentencing Act 1997* (TAS) s 36; *Sentencing Act 1995* (WA) ss 132 and 113; *Crimes (Sentence Administration) Act 2005* (act) part 6a, ss 116a to 116x. [↑](#footnote-ref-8)
9. #  *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), s 53.

 [↑](#footnote-ref-9)
10. Western Australia, Legislative Assembly Tabled Papers, Parl Paper No LA1832 and LA2746 (2014); Western Australia, Parliamentary Debates, Legislative Assembly, 10 June 2009, 4833b-4834a (Christian Porter) [↑](#footnote-ref-10)
11. NITV Staff Writer, *Stop sending people to Jail for unpaid fines, says Law Reform Commission* (20 July 2017), SBS <<http://www.sbs.com.au/nitv/nitv-news/article/2017/07/20/stop-sending-people-jail-unpaid-fines-says-law-reform-commission>>. [↑](#footnote-ref-11)
12. Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report* (2016) 43. [↑](#footnote-ref-12)
13. *Crimes (Sentence Administration) Act 2005* (ACT), ss 116ZE, 116ZG; *Fines and Penalties (Recovery). Regulations* (NT), ss 14-15; *Monetary Penalties Enforcement Act 2005* (TAS), ss 27-38; *Fines Act 1996* (NSW) pt 4 div 5. [↑](#footnote-ref-13)
14. World Justice Project, *Endorsements*, (1 September 2017), World Justice Project, <<http://worldjusticeproject.org/endorsements>>. [↑](#footnote-ref-14)
15. Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System: Key Findings* (20 May 2016) Office of the Inspector of Custodial Services <<http://www.oics.wa.gov.au/reports/fine-defaulters-in-thewestern-australia-prison-system/key-findings/>>; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 [36.3.12]. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System: Key Findings* (20 May 2016) Office of the Inspector of Custodial Services <<http://www.oics.wa.gov.au/reports/fine-defaulters-in-thewestern-australia-prison-system/key-findings/>>. [↑](#footnote-ref-17)
18. Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report* (2016) 42; Commonwealth, Parliament of Australia, *Aboriginal and Torres Strait Islander experience of law enforcement and justice services* (2016) 3.2. [↑](#footnote-ref-18)
19. See National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Submission 13, p. 16; and Aboriginal Legal Service of Western Australia, Submission 10, p. 4. [↑](#footnote-ref-19)
20. Australian Bureau of Statistics, *Prisoners in Australia,* (8 December 2016) Australian Bureau of Statistics <[http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0](http://www.abs.gov.au/ausstats/abs%40.nsf/mf/4517.0)>. [↑](#footnote-ref-20)
21. Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System: Key Findings* (20 May 2016) Office of the Inspector of Custodial Services <<http://www.oics.wa.gov.au/reports/fine-defaulters-in-thewestern-australia-prison-system/key-findings/>>. [↑](#footnote-ref-21)
22. Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander experience of law enforcement and justice* services (2016) 83. [↑](#footnote-ref-22)
23. Commonwealth, *Reducing the unintended impacts of* fines, Paper No 2 (2011) 6. [↑](#footnote-ref-23)
24. Commonwealth, *Reducing the unintended impacts of* fines, Paper No 2 (2011) 2. [↑](#footnote-ref-24)
25. Commonwealth, Parliament of Australia, *Aboriginal and Torres Strait Islander experience of law enforcement and justice services* (2016) 3.2. [↑](#footnote-ref-25)
26. Ibid. [↑](#footnote-ref-26)
27. Australian Bureau of Statistics, *Prisoners in Australia,* (8 December 2016) Australian Bureau of Statistics <[http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0](http://www.abs.gov.au/ausstats/abs%40.nsf/mf/4517.0)>. [↑](#footnote-ref-27)
28. Commonwealth, *Reducing the unintended impacts of* fines, Paper No 2 (2011) 1. [↑](#footnote-ref-28)
29. Sara Hudson, *Reduce Indigenous Incarceration Rates? Not so Fast,* (13 April 2016)The Daily Telegraph <http://www.dailytelegraph.com.au/rendezview/reduce-indigenous-incarceration-rates-not-so-fast/news-story/8bd621664b1aeb471fab0e438b5dd644>. [↑](#footnote-ref-29)
30. Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System: Key Findings* (20 May 2016) Office of the Inspector of Custodial Services <<http://www.oics.wa.gov.au/reports/fine-defaulters-in-thewestern-australia-prison-system/key-findings/>>. [↑](#footnote-ref-30)