

COMMUNITY
LEGAL CENTRES
TASMANIA

20 September 2017

Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
attn: The Executive Director

via email: indigenous-incarceration@alrc.gov.au

To the Executive Director,

Re: *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the Australian Law Reform Commission's *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly support many of the proposals raised in the discussion paper but our response is limited to the court's imposition of fines and the suitability of a day fine scheme in Australia.

Sentencing Offenders to a fine

In our opinion, the imposition of fines in Australian courts often results in both inequality and unfairness. This is the outcome of laws requiring courts to impose a fine that is either a fixed-sum or mandates a minimum amount (such as for drink-driving offences) with no discretion available to reduce the amount of the fine. Almost a decade ago, the Chief Justice of Tasmania concluded that in such circumstances, the fine is 'draconian' whilst a significant number of New South Wales Supreme Court judges have similarly found that the imposition of fines could be 'disproportionately severe'.¹

¹ Tasmanian Law Reform Institute, *Sentencing – Final Report* No 11 (June 2008) para. 3.9.18. As found at http://www.utas.edu.au/_data/assets/pdf_file/0004/283810/completeA4.pdf (accessed 18 September 2017). Also see Katherine McFarlane and Patrizia Poletti, *Judicial Perceptions of fines as*

In other cases, where the court is granted discretion, the courts have adopted a 'going rate' fine for particular offences with courts able to make some adjustment downwards if the offender is unable to pay, but where no scope exists to increase a fine on the grounds of the affluence of the offender.²

The unfairness of sanctioning offenders in Australia to a fine is particularly acute for Aboriginal and Torres Strait Islander peoples (ATSI persons) who are more likely to be socially and financially disadvantaged. For example, according to data collected by the Federal Government, more than half of all ATSI persons aged between 15-64 were not employed³ and half of all ATSI persons aged 15 years or over have a disability.⁴ As the Indigenous Justice Clearinghouse has observed:⁵

The fines enforcement system, on its surface, treats Indigenous and non-Indigenous people equally. However, the disadvantage experienced by many Indigenous people results in the fines enforcement system having disproportionate impacts upon them.

Whilst some jurisdictions such as Tasmania do not imprison offenders for non-payment of fines, it is clear that secondary offences are resulting in imprisonment. The New South Wales Sentencing Council for example, has noted that whilst no one in New South Wales is imprisoned as a result of non-payment of a fine, some offenders are being imprisoned as a result of secondary offences such as driving whilst disqualified.⁶ This is confirmed in the research with estimates suggesting that one in every ten disqualified drivers who are caught driving is imprisoned, a significant figure when it is recognised that studies in the United Kingdom, the United States and Canada have demonstrated that the percentage of disqualified drivers who continue to drive lies between 30-75 per cent.⁷

a Sentencing Option: A Survey of NSW Magistrates' (Monograph 1, NSW Sentencing Council, August 2007) at 31 where just under half of the judges surveyed in New South Wales (48 per cent) noted that the fine for socially disadvantaged offenders was disproportionately severe.

² Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 2010) 99 at 329.

³ Department of Prime Minister and Cabinet, Australian Government, *Closing the Gap, Prime Minister's Report 2017* at 53. As found at <http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf> (Accessed 19 September 2017).

⁴ Australian Bureau of Statistics, *4704.0 - The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (Disability and Social Inclusion), October 2010 (February 2011). As found at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter500Oct+2010> (Accessed 20 September 2017).

⁵ Mary Williams and Robyn Gillett, *Reducing the unintended impacts of fines*, Indigenous Justice Clearinghouse (Australian Institute of Criminology: January 2011) at 1. As found at <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/initiative002.v1.pdf> (Accessed 20 September 2017).

⁶ NSW Sentencing Council, *Interim Report: The Effectiveness of Fines as a Sentencing Option: Court Imposed Fines and Penalty Options* (2007) 157.

⁷ Reported in Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualifications as an Effective Legal Sanction in Western Australia* (September 2003) Crime Research Centre 6.

99. Community Legal Centres Tasmania

In Tasmania, an application made to the Department of Justice under the *Right to Information Act 2009* (Tas) demonstrates that there has been a significant increase in the number of persons having their drivers licence suspended as a result of failing to repay a fine.

Years	No. of Persons with suspended licence
1 July 2004 – 30 June 2006	Nil*
1 July 2006 – 27 April 2008	Nil*
28 April 2008 – 30 June 2010	9,100
1 July 2010 – 30 June 2012	9,019
1 July 2012 – 30 June 2014	12,808
1 July 2014 – 30 June 2016	12,757

*Note – the ability of the Monetary Penalties Enforcement Service to impose this sanction was not available

Significantly, 30,183 of the 43,684 persons who had their drivers licence suspended between 28 April 2008 – 30 June 2016 by Tasmania’s Monetary Penalties Enforcement Service had received a court fine. In other words, 69 per cent of all persons who had had their drivers licence suspended in Tasmania had failed to repay a court fine.

Our application also sought data on the number of persons convicted of driving whilst their drivers licence was suspended.⁸ The data demonstrates that there has been a three-fold increase in the numbers of persons driving whilst their licence was suspended, from less than 300 persons in the years 2006-08 to slightly more than 1500 in 2014-16.

Years	No. of Persons convicted of driving whilst drivers licence suspended
1 July 2004 – 30 June 2006	Not available
1 July 2006 – 27 April 2008	269
28 April 2008 – 30 June 2010	839
1 July 2010 – 30 June 2012	1939
1 July 2012 – 30 June 2014	1030
1 July 2014 – 30 June 2016	1511

Again, studies point to ATSI persons being more likely to have their drivers licence suspended with the discussion paper noting that in New South Wales 12 per cent of persons charged with driving while suspended or disqualified and 31 per cent of all persons imprisoned for driving while suspended or disqualified were ATSI persons.⁹

Finally, our application sought data on the sentencing outcome for persons convicted of driving whilst their drivers licence was suspended.

⁸ Section 9(1) of the *Vehicle and Traffic Act 1999* (Tas).

⁹ Australian Law Reform Commission, *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84: July 2017) at para. 6.75.

99. Community Legal Centres Tasmania

Years	Impris/ PSS/ FSS	CSO/ Prob	Fine	Other Mon Pen	GBB	Lic Disq	Nom Pen
1 July 2006 – 27 April 2008	18	10	122	0	3	9	21
28 April 2008 – 30 June 2010	45	26	324	6	7	45	39
1 July 2010 – 30 June 2012	30	21	817	68	32	51	117
1 July 2012 – 30 June 2014	20	7	463	61	11	15	50
1 July 2014 – 30 June 2016	21	16	578	121	20	33	72

Definitions: Imprisonment/Partially suspended sentence/Fully suspended sentence; Community Service Order/probation Order; Fine; Other Monetary Penalty; Good Behaviour Bond (i.e. Undertaking/Recognizance); Licence Disqualification; Nominal Penalty.

As the data noted above demonstrates, fines were the most common penalty, followed by 'Other Monetary Penalty' which is usually court costs but can also include Victims of Crime Levy. The mean and median dollar amounts were:

Years	Fine: Mean \$	Fine: Median \$	OMP: Mean \$	OMP: Median \$
1 July 2006 – 27 April 2008	276	250	-	-
28 April 2008 – 30 June 2010	243	200	34	32
1 July 2010 – 30 June 2012	195	150	50	48
1 July 2012 – 30 June 2014	201	200	66	61
1 July 2014 – 30 June 2016	222	250	72	78

In summary, there are a significant number of offenders in Tasmania sentenced to a fine who do not pay the fine and have their drivers licence suspended. In some instances, the offender is charged with driving whilst their licence is suspended and in most cases are sentenced to another fine.

As we noted earlier, the way in which our courts impose fines is crude, resulting in inequality and unfairness. In our opinion, the unfairness of this model is demonstrated in the recognition that the socially and financially disadvantaged, including ATSI persons are punished disproportionately relative to their income. And in many cases, the failure to pay the fine results in yet another fine being imposed.

Whilst we support those proposals put forward in the discussion paper that ameliorate the harshness of the fine as a sentencing option, we do not believe that many of these proposals –such as the suspended fine- address the fundamental issue that the fine imposed should be proportionate to the crime.

The day fine

Australia's crude model of court-imposed fines can be contrasted with most of continental Europe, central and South America and some jurisdictions in the United States of America where an income-based fine, commonly referred to as the 'day

fine' has been introduced.¹⁰ Day fines are a common form of sentence for indictable offence, involving a two-step process in which the court sentences the offender to a certain number of day-fine units (for example, 10, 50, 100) according to the gravity of the offence, then the value of each unit is determined by multiplying the value of the unit by the percentage share of the offender's daily income.

The advantages of the day fine

The advantages of the day fine are set out in the article *The 'Day Fine' - Improving Equality before the Law in Australian Sentencing*¹¹ are that the principles of transparency, proportionality and equity are better served, leading to increased community support in the sentencing system.

The failure to ensure that the fine has a similar punitive bite means that the principle of equal impact is not met. When two offenders pay the same fine but one has a higher income the fine cannot have the same effect. For wealthy offenders the fine may be too easily paid and hence no real punishment or even seen as a 'licence fee' in order to continue offending.

A further advantage of the day fine system is the transparency that is achieved through the sentencing process being separated into two discernable steps. Proportionality is assured in the first step because of its focus on the gravity of the offence and the culpability of the offender. The second step, namely a consideration of the offender's personal and financial circumstances, assures that the principle of equal treatment is achieved. On the other hand, in Australia 'the extent to which the two factors, guilt and financial circumstances are reflected in the sum imposed cannot be established'.¹²

The strongest objection against the day fine arises from the difficulty of ascertaining the offender's financial circumstances. Critics point to the day fine systems of Sweden and Finland where income tax declarations are readily accessible, submitting that without such accessibility the day fine system is impaired. Although there are impediments to Australia introducing the day fine based on the Swedish and Finnish models, the difficulties are not insurmountable if the German model were adopted. Like Australia, Germany is a federation and has a similar division of power with income tax collected by the federal government and criminal law administered by the states. Nevertheless, Germany "has implemented measures in which police questionnaires, prosecution powers and court questioning ensure that the required information is obtained".¹³ First, specific details of the offender such as age, address, occupation, income, family status and number of children are generally sought in a police questionnaire. Prosecution powers then allow for more detailed

¹⁰ Benedict Bartl, *The 'Day Fine' - Improving Equality before the Law in Australian Sentencing* (2012) 16 *University of Western Sydney Law Review* 48. See also Gerhard Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* (Institute of Criminology, Occasional Papers No 9, 1982).

¹¹ Benedict Bartl, *The 'Day Fine' - Improving Equality before the Law in Australian Sentencing* (2012) 16 *University of Western Sydney Law Review* 48 at 70-75.

¹² Gerhard Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* (Institute of Criminology, Occasional Papers No 9, 1982) at 90.

¹³ Benedict Bartl, *The 'Day Fine' - Improving Equality before the Law in Australian Sentencing* (2012) 16 *University of Western Sydney Law Review* 48 at 73.

investigations and finally the judge is able to ask questions of the offender during the hearing.

In summary, Australia's system of fining offenders is not working if the Tasmanian example is any example. Socially and disadvantaged offenders including ATSI persons are being sentenced to disproportionately harsh fines that they are unable to pay. The failure to repay the fine results in them having their drivers licence suspended and if they continue to drive their car for reasons that may include work commitments or family responsibilities, they are at risk of being sentenced to a term of imprisonment or, perversely, another disproportionately harsh fine.

We strongly recommend the adoption of a day fine model and urge the Australian Law Reform Commission to undertake further research into its feasibility.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,

Benedict Bartl
Policy Officer
Community Legal Centres Tasmania
