6. Fines and Driver Licences

Contents

Summary

6.1 The Terms of Reference for this Inquiry ask the ALRC to have regard to laws that may contribute to the rate of Aboriginal and Torres Strait Islander offending, including 'driving offences and unpaid fines'—the statutory enforcement regimes of which affect Aboriginal and Torres Strait Islander peoples unduly and can result in incarceration.

6.2 In this chapter, the ALRC outlines issues related to Aboriginal and Torres Strait Islander peoples and fines. It includes an examination of the use of imprisonment to discharge fine debts, which the ALRC proposes should be abolished. Even without a direct link to imprisonment, fine default and entry into the fine enforcement system can have detrimental consequences for Aboriginal and Torres Strait Islander peoples leading to criminal justice responses.

6.3 The ALRC asks what preventative measures should be adopted to minimise the likelihood of receiving fines and infringement notices, and to minimise the impact on the person when received. It proposes placing limits on the issuing of infringement notices; expanding court imposed penalty options; and introducing the NSW Work and Development Order (WDO) scheme across states and territories.

6.4 A person with unpaid fines may have their driver licence suspended and may ultimately be imprisoned for driving while disqualified. These elements of enforcement regimes have a disproportionate impact on Aboriginal and Torres Strait Islander peoples and the ALRC asks what steps can be taken to minimise or prevent loss of

driver licences for fine default. In addition, ways to improve access to driver licences are also canvassed.

Fines and infringement notices

6.5 The term 'fines' usually encompasses both fines imposed by courts following convictions, and infringement notices, which are monetary penalties handed out at the point of infringement by issuing officers. Issuing officers include transit police, police officers and council workers.[1] The two penalty types have clear differences and non-payment can have different consequences. Nonetheless, unless otherwise stated, the term 'fines' in this chapter generally refers to monetary penalties imposed by courts and those received under infringement notices.

6.6 Where fines remain unpaid after a certain period of time, statutory fine enforcement regimes refer collection to relevant state and territory debt recovery offices. The steps for fine enforcement generally include the issuing of notices, licence or vehicle registration suspensions, civil enforcement orders, and community service orders (CSOs). There are fine mitigation options open to defaulters, such as 'time to pay' arrangements, waiver processes and, in NSW, the WDO scheme.

6.7 Fine enforcement statutes also provide for terms of imprisonment as a final enforcement step, whereby the term served in prison discharges fine debt: it 'cuts out' the fines.

6.8 Aboriginal and Torres Strait Islander peoples are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at first notice (attributed to financial capacity, itinerancy and literacy levels), and are consequently susceptible to escalating fine debt and fine enforcement measures.[2]

6.9 Stakeholders in this Inquiry have pointed to the detrimental impact of fine enforcement processes on Aboriginal and Torres Strait Islander peoples, particularly the likelihood of prison in some jurisdictions following ongoing fine default, noting that Aboriginal and Torres Strait Islander women are disproportionally affected.

Statutory enforcement frameworks

6.10 Every state and territory has a statutory enforcement regime for fine and infringement notice default. Generally, these permit the state debt recovery authority to enforce progressive sanctions. The NSW statutory framework is used in this chapter as an example.

6.11 NSW fine enforcement is legislated under the *Fines Act 1996* (NSW) (the Act) and administered by the State Debt Recovery Office (SDRO). Enforcement action is taken against fine defaulters when they have not paid a fine as required by a notice

1 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 13.

2 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [3.68].

served on the defaulter; have not paid by an extended due date granted by the SDRO; or have not paid agreed instalments (see fine mitigation below).[3]

6.12 The progressive recovery process is prescribed by the Act:

> **58 Summary of enforcement procedure**
>
> (1) The following is a summary of the enforcement procedure under this Part following the making of a fine enforcement order:
>
> (a) **Service of fine enforcement order** Notice of the fine enforcement order is served on the fine defaulter and the fine defaulter is notified that if payment is not made enforcement action will be taken (see Division 2).
>
> (b) **Driver licence or vehicle registration suspension or cancellation** If the fine is not paid within the period specified, Roads and Maritime Services suspends any driver licence, and may cancel any vehicle registration, of the fine defaulter. If the driver licence of the fine defaulter is suspended and the fine remains unpaid for 6 months, Roads and Maritime Services cancels that driver licence (see Division 3).
>
> (c) **Civil enforcement** If the fine defaulter does not have a driver licence or a registered vehicle or the fine remains unpaid 21 days after the Commissioner directs Roads and Maritime Services to take enforcement action, civil action is taken to enforce the fine, namely, a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter (see Division 4).
>
> (d) **Community service order** If civil enforcement action is not successful, a community service order is served on the fine defaulter (see Division 5).
>
> (e) **Imprisonment if failure to comply with community service order** If the fine defaulter does not comply with the community service order, a warrant of commitment is issued to a police officer for the imprisonment of the fine defaulter (except in the case of children).
>
> (f) **Fines payable by corporations** The procedures for fine enforcement (other than community service orders and imprisonment) apply to fines payable by corporations (see Division 7).
>
> (g) **Fine mitigation** A fine defaulter may seek further time to pay and the Commissioner may write off unpaid fines or make a work and development order [WDO] in respect of the fine defaulter for the purposes of satisfying all or part of the fine. Applications for review may be made to the Hardship Review Board (see Division 8).
>
> (2) This section does not affect the provisions of this Part that it summarises.

6.13 Enforcement begins with the issuing of a notice. Ordinarily, the next step is for NSW Roads and Maritime Services (RMS) to suspend the person's driver licence and/or motor vehicle registration.[4] If the fine is still not paid within a set time period, the SDRO can commence civil enforcement action to satisfy the payment of the fine. If civil enforcement is unable to commence or is unsuccessful, the SDRO may make a CSO, requiring the defaulter to perform community service work to pay off the unpaid

3 *Fines Act 1996* (NSW) s 65(1).
4 *Fines Act 1996* (NSW) s 71(1)(a).

fine amount.[5] Finally, the defaulter may serve a term of imprisonment for non-compliance with that order.[6] This is reportedly rare,[7] and stakeholders have advised the ALRC that imprisonment for non-compliance following a fine has not happened in recent practice in NSW.

Fine provisions leading to imprisonment

6.14 In each state and territory, fine enforcement statutes permit imprisonment where a person is ineligible or fails to comply with a CSO.[8] However, the process and the likelihood of incarceration differs significantly across the states and territories. There are two key pathways from a fine to imprisonment.

6.15 First, where the court imposes a CSO, and the person fails to comply or is otherwise ineligible, the court can impose a period of imprisonment by which the person 'cuts out' the fine amount owed (the ACT, SA and Victoria).[9] There are statutory safeguards,[10] and imprisonment rarely occurs in these jurisdictions.[11]

6.16 Second, where the state debt recovery agency imposes a CSO, and the person fails to comply or is otherwise ineligible, the agency can issue a warrant of commitment for the imprisonment of the person (NSW, the NT, Tasmania, Queensland, and WA).[12] The ALRC has heard that this is never used in practice in NSW. In WA, warrants of commitment can only be issued for court ordered fines and are commonly issued.

6.17 There are maximum periods that the person can spend in prison to cut out fine debt, regardless of the size of the debt.[13] In SA and WA, cutting out fines in prison can only occur for court-ordered fines.[14]

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5 *Fines Act 1996* (NSW) s 79(1): calculated at $15 per hour, maximum 100 hours (s 81).

6 *Fines Act 1996* (NSW) div 6, ss 89(1), 90(1): calculated at $120 per day with a minimum of one day and maximum of three months. The defaulter may apply for an order to serve the time under an intensive correction order in the community.

7 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012).

8 See, eg, *Crimes Sentence Administration Act 2005* (ACT) s 116ZK*; Fines and Penalties (Recovery) Act* (NT) ss 88, 90, 91; and *Infringements Act 2006* (Vic) prt 12, ss 156, 160.

9 *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK*; Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160.

10 See, eg, *Infringements Act 2006* (Vic) prt 12; *Sentencing Act 1991* (Vic) pt 3B regarding court-imposed fines.

11 See, eg, Department of Justice (Vic), *Statistical Profile of the Victorian Prison System 2006–07 to 2010–11* (2011) 66: five people in 2010/11 were received by Corrections for fine default. Between July 2006 and June 2011, however, 151 prison receptions for people serving sentences for non-payment of fines only, of which 12 (8%) were Aboriginal and Torres Strait Islander peoples.

12 *Fines and Penalties (Recovery) Act* (NT) s 86; *State Penalties Enforcement Act 1999* (Qld) s 119; *Monetary Penalties Enforcement Act 2005* (Tas) s 103; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

13 See, eg, *State Penalties Enforcement Act 1999* (Qld) s 52A(3): the maximum period of imprisonment is 2 years; *Fines, Penalties and Infringement Notices Enforcement Act* 1994 (WA) s 53: the maximum time served equivalent to the maximum term of imprisonment, if any, for the offence.

14 *Criminal Law (Sentencing) Act 1988* (SA) s 71(2); *Sentencing Act 1995* (WA) ss 58–59: when imposing a fine, courts in Western Australia can order that the person serve a sentence of imprisonment or set the period by which, if not paid, the person be imprisoned.

6.18 Imprisonment for fine default is most prevalent in WA. For example, the Western Australian Office of the Inspector of Custodial Services reported that, from July 2006 to June 2015:

- 7,462 prisoners were received into correctional centres for fine default in WA;
- there were approximately 11 people on any given day in prison for fine default;
- the average stay in prison for fine default was four days;
- Aboriginal and Torres Strait Islander men represented 38% of the fine default male prison population; and
- Aboriginal and Torres Strait Islander women made up 64% of the female fine defaulter prison population—and constituted the fastest growing fine default population.[15]

6.19 The particular impact of short term imprisonment on Aboriginal and Torres Strait Islander women is discussed in Chapter 9.

6.20 Imprisonment to cut out fines in WA can also be served in police lock up.[16] This is reported to be a common practice, and is not recorded in the custodial statistics.[17]

Imprisonment terms that 'cut out' fine debt

Proposal 6–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

6.21 Fines are penalties imposed for what are usually minor infractions—conduct that the legislature or the courts has determined does not warrant a term of imprisonment.[18] Imprisonment for fine default results in punishment disproportionate to the offending conduct, and contradicts the principle of imprisonment 'as a last resort'.[19]

6.22 In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended that all governments ensure that sentences of imprisonment were not automatically imposed for the default of payment of a fine.[20] While the direct link

15 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v.

16 *Prisons Act 1981* (WA) s 16(7).

17 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 152–5.

18 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 15; NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012).

19 See, eg, , Amanda Porter, 'Reflections on the Coronial Inquest of Ms Dhu' (2016) 25 *Human Rights Defender* 8; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016).

20 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 117.

between fine default and imprisonment has been removed from statutes nationwide, and fine mitigating options have been introduced, fine enforcement regimes still provide a pathway from a fine to imprisonment. Further, regimes that use warrants of commitment permit imprisonment without hearings or trials. Imprisonment remains automatic at a certain point in the enforcement process.

6.23 In 2012, the NSW Law Reform Commission (NSWLRC) recommended the abolition of imprisonment for non-compliance with a CSO in that state, describing the process as contrary to the principles of natural justice and procedural fairness.[21]

6.24 In 2016, the Coroner's Court of Western Australia questioned whether incarcerating fine defaulters provided any benefit to the community and recommended the abolition of warrants of commitment in WA.[22] At the very least, the Coroner's Court recommended that imprisonment must be subject to a hearing in the Magistrates Court and determined by a Magistrate who is authorised to make orders other than imprisonment (such as a CSO or other alternatives) where appropriate.[23] This reflects enforcement regimes in the ACT, SA and Victoria, and was supported in 2016 by the Law Society of WA.[24]

6.25 The Western Australian system has been identified as particularly arduous for Aboriginal and Torres Strait Islander women. In 2013, it was reported that one in every three women who entered prison in West Australia did so for fine default.[25] More recent statistics show that 73% of female fine defaulters in WA were unemployed when imprisoned. About 64% of women imprisoned for fine default were Aboriginal and Torres Strait Islander women.[26]

6.26 The UN Special Rapporteur on Violence against Women urged the Western Australian government to review the policy of incarceration for unpaid fines, noting the 'disproportionate effect on the rates of incarceration of Aboriginal women because of the economic and social disadvantage that they face'.[27] The 2017 report by the Human Rights Law Centre on the over-representation of Aboriginal and Torres Strait Islander women in prison identified fine default statutes as laws that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, and recommended the abolition of all laws that lead to the imprisonment of people who cannot pay fines.[28]

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21 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 8.4.

22 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 147.

23 Ibid 151.

24 The Law Society of Western Australia, *Imprisonment of Defaulters* (Briefing Paper, 2016).

25 Western Australia Labor, *Locking in Poverty: How Western Australia Drives the Poor, Women and Aboriginal People to Prison*, (Discussion Paper, 2014) 2.

26 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v: only 10% of men were unemployed at entry for fine default.

27 United Nations Special Rapporteur on Violence against Women, *End of Mission Statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences, on Her Visit to Australia from 13 to 27 February 2017* (2017).

28 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) rec 3.

6.27 This concern has been further highlighted by Australian legal advocates. In 2016, the Law Society of NSW submitted to the national *Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services* that the WA scheme 'operates disproportionately on those most vulnerable, particularly Indigenous women and only exacerbates poverty and disadvantage. It furthermore fails to deter fine defaulting or gather fine revenue'.[29]

6.28 The Aboriginal Legal Service of WA has stated that the

> complex underlying problems that exist for vulnerable fine defaulters (such as mental illness, cognitive impairment, homelessness, poverty, substance abuse, family violence and unemployment) will never be addressed by the current blunt fines enforcement system in Western Australia.[30]

6.29 The Law Council of Australia has indicated support for the national abolition of fine default imprisonment schemes.[31]

6.30 The ALRC is alert to the argument that to remove the option for prison is to remove a 'short and sharp' option for people without the means to discharge their fine debt to become debt-free. There may be more equitable means by which to minimise the impact of fines and to clear fine debt. These are discussed below and include:

- limiting the number of infringement notices able to be issued in one transaction and placing limits on the monetary penalty of infringement notices;
- expanding sentencing options for low-level offending; and
- introducing the NSW WDO scheme in each state and territory.

The impact of infringement notices

Question 6–1 Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

Question 6–2 Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

Question 6–3 Should the number of infringement notices able to be issued in one transaction be limited?

6.31 Infringement notices are the most common penalty issued by criminal justice systems in Australia.[32] In 2009, the NSW Ombudsman reported that the NSW Police Force, as an 'issuing agency', had issued more than 500,000 infringement notices to

29 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [6.2].
30 Aboriginal Legal Service of WA, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper* (2016) 2.
31 The Law Society of Western Australia, *Imprisonment of Defaulters* (Briefing Paper, 2016).
32 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.26]–[1.28].

adults in the previous year.[33] At the same, over 8,000 criminal infringement notices (discussed below) were also issued. In Victoria up to five million infringement notices were issued across all issuing agencies in 2015–16.[34]

6.32 Infringement notices generally refer to regulatory penalties in areas such as traffic infringements (such as for parking or speeding) as well as in areas such as health and safety, national parks and wildlife, passenger transport, and rail safety.[35] In 2012, the NSWLRC observed in their report on *Penalty Notices* that

> [m]any penalty notice offences involve conduct that is not generally thought of as highly culpable. For instance, few people are likely to think of themselves as engaging in criminal activity when they park illegally, or smoke a cigarette on a railway platform.[36]

6.33 The penalty received under an infringement notice is fixed in price and cannot be tailored to the circumstances of the recipient. While infringement notices can be challenged in court, this is reportedly rare, especially when the accused is vulnerable or an Aboriginal and Torres Strait Islander person.[37]

Impact on Aboriginal and Torres Strait Islander peoples

6.34 The imposition of monetary penalties, especially the sometimes high fixed amounts under infringement notices, has been widely criticised for having a disproportionate impact on: people with low incomes (including young people); people in prison;[38] homeless or transient people with complex needs; and people with mental health issues or cognitive impairments.[39] Aboriginal and Torres Strait Islander peoples are over-represented in these groups.[40]

6.35 There are other issues related to infringement notice enforcement regimes that are particular to Aboriginal and Torres Strait Islander peoples. For example, a high proportion of Aboriginal and Torres Strait Islander people live in regional or remote communities and may not routinely receive mail. This may mean that enforcement notices are not received and can lead to a greater risk of accruing fine related debt, enforcement costs and enforcement measures.[41]

6.36 Penalties received under single or multiple infringement notices can be disproportionate to the offending conduct. The ALRC has heard examples of the

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33 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) foreword.

34 Infringement Management and Enforcement Services, *Annual Report on the Infringements System 2015–16* (2016) 25.

35 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.3], [1.7].

36 Ibid [1.32].

37 See, eg, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 102.

38 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [17.1], [17.3], [17.67].

39 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 14.

40 See ch 11.

41 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [16.9].

potential for escalation, such as that of a young Aboriginal girl (Ms X) with a dysfunctional family who skipped school and rode the trains. Ms X was asked for a ticket by a transit officer, who Ms X told to 'fuck off'. Ms X was then given an infringement notice for fare evasion and offensive language.[42] For which Ms X said, 'you got to be fucking kidding', for which Ms X received another notice for offensive language, amounting to well over $1,000 in fines.

6.37 The ALRC has also heard about an Aboriginal boy (Mr X) who was given an infringement notice on his way to and from school every day for not wearing a bicycle helmet. As a young adult, Mr X was paralysed by fine debt, and ended up in prison.

Ways to lower the monetary penalty

6.38 Punishment should be proportionate to the crime. In 2014, the Sentencing Advisory Council of Victoria (SACV) observed that the principle of proportionality requires that infringement penalty dollar amounts be proportionate to the seriousness of the offence and that the penalty be lower than a person would expect to receive if the matter was to go to court.[43] The SACV reported that some infringement penalties in Victoria amounted to 50% of the maximum penalty available to the court. It also noted the discrepancy between the high penalty attached to public order offences and the lower, but more dangerous, traffic offences, such as speeding. The SACV recommended a review of infringement penalty amounts to ensure the proportionality of the amount.[44] In its report on penalty notices, the NSWLRC adopted a formula to recommend that infringement notice amounts should not exceed 25% of the maximum court fine for that offence.[45]

6.39 Concession infringement notices have been raised as another way to ensure the efficacy and fairness of infringement notices. This was recommended by the SACV, which supported a fixed reduction model of 50% for people experiencing financial hardship (using the same eligibility as that for automatic entitlement to a payment plan). Eligible infringement recipients under this scheme would be able to apply for a reduced infringement penalty to the enforcement agency as soon as the person has received the penalty. This recommendation sought to provide the person with an early exit from the infringement enforcement system.[46] The NSWLRC considered that the administration of this option could be overly burdensome, citing the added complexity to the infringement notice system, preferring instead to expand the WDO scheme and 'time to pay' systems.[47]

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42 See, eg, *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a), 12(1)(b), sch 1 pt 3.

43 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report* (2014) [8.3.4].

44 Ibid [8.3.19], [8.3.26], rec 38.

45 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 4.5.

46 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria—Report* (2014) [8.4.49]–[8.4.53] rec 39.

47 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [11.25]–[11.27].

Ways to minimise the issuing of infringement notices

6.40 There may be ways to minimise the issuing of infringement notices in the first instance. The NSWLRC recommended that:

- there be greater use of the discretion to caution and that cautions be written, so that data could be collected; [48] and
- issuing officers be required to consider whether the issuing of multiple penalty notices in response to a single set of circumstances would unfairly or disproportionately punish a person in a way that does not reflect the totality, seriousness or circumstances of the offending behaviour, and that where this is found, the issuing agency must withdraw one or more notices.[49]

6.41 The ALRC asks whether issuing officers should be restricted to one infringement notice in the same category per interaction. This means that, for example, where a person swears multiple times, they would only receive one infringement notice and one penalty, not multiple penalties for each infraction within the same altercation. For example, the girl on the train in the example given above would only receive one infringement notice for using offensive language, and one for fare evasion.

6.42 There may be an option to issue a written caution instead of an infringement notice. For example, in 2017, South Australian police introduced an adult cautioning scheme for some summary offences that would have previously resulted in the person going before the court.[50]

6.43 The ALRC notes the availability of fine mitigation options following the imposition of a fine. These include time-to-pay options in all jurisdictions and the availability of *Centrepay*—the ability to have fines deducted weekly from Centrelink payments to pay off outstanding fines. There are also bodies that consider the special circumstances of the person. These include the Hardship Review Board in NSW and the Enforcement Review Program (a special circumstances court) in Victoria for persons with a diagnosed mental illness or cognitive impairment, an addiction to drugs, or for people experiencing homelessness.

6.44 The ALRC welcomes submissions on options to minimise the impact of infringement notices on Aboriginal and Torres Strait Islander peoples.

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48 Ibid rec 5.1, 5.4.

49 Ibid rec 6.5.

50 South Australia Police, *SA Police Introduce Adult Cautioning* <https://www.police.sa.gov.au/sa-police-news-assets/front-page-news/sa-police-introduce-adult-cautioning>. SA does not have a Criminal Infringement Notice system.

Infringement notices for offensive language/conduct

Question 6–4 Should offensive language remain a criminal offence? If so, in what circumstances?

Question 6–5 Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?

6.45 Infringement notices that are able to be issued by police for minor summary offences are called 'criminal infringement notices' (CINs). These can generally be issued for public order offences and some low level larceny or obtaining goods offences. Prior to the introduction of CINs, a person charged for these types of offences would be charged and required to go before the court. CINs are a relatively new form of infringement notice. For example, NSW introduced CINs in 2004, and WA introduced them in 2016.

6.46 Police can issue CINs for offensive language in all states and territories except SA, Tasmania and the ACT.[51] The maximum fines available (for offences that go before the court) and the CIN amounts are itemised in the table below.

51 *Criminal Procedure Regulation 2010* (NSW) reg 106, sch 3; *Criminal Procedure Act 1986* (NSW) ss 333–7; *Summary Offences Regulations* (NT) regs 3–4A; *Police Powers and Responsibilities Act 2000* (Qld) s 394; *Penalties and Sentences Act 1992* (Qld) s 5; *State Penalties Enforcement Act 1999* (Qld) sch 2; *Police Offences Act 1935* (Tas) s 61; *Monetary Penalties Enforcement Act 2005* (Tas) s 14; *Summary Offences Act 1966* (Vic) ss 60AA, 60AB(2); *Criminal Code* (WA) ss 730–3; *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1.

Table 1: Offensive language provisions with maximum penalties per state and territory (source: Elyse Methven, Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes (PhD Thesis, Faculty of Law, University of Technology Sydney, 2017) table 4.1.

State or territory	Legislation	Conduct	Location	Maximum Fine (ex prison)	CIN
NSW	*Summary Offences Act 1988* (NSW) s 4A(1)[52]	Offensive language	In or near, or within hearing from, a public place or a school	$660	$500
Vic	*Summary Offences Act 1966* (Vic) ss 17, 60AA, 60AB	Profane, indecent or obscene language; or threatening, abusive or insulting words	In or near a public place or within the view or hearing of any person being or passing therein or thereon	25 penalty units	$295.22
Qld	*Summary Offences Act 2005* (Qld) s 6; *State Penalties Enforcement Act* 1999 (Qld)	Offensive, obscene, indecent or abusive language	The person's behaviour must interfere, or be likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public	$1,100	$110
WA	*Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; *Criminal Procedure Act 2004* (WA) ss 8 and 9; *Criminal Code* (WA) ss 74A, 720–3	Insulting, offensive or threatening language	In a public place; or in the sight or hearing of any person in a public place; or in a police station or lock up	$6,000	$500

52 Instead of imposing a fine, a court may make an order directing the person to perform community service work (up to 100 hours), s 4A(3)–(6); there are also specific provisions that prohibit offensive language in more specific places, and provide different penalties. See, eg, *Parramatta Park Trust Regulation 2007* (NSW) reg 49, sch 3 pt 2; *Rail Safety (Offences) Regulation 2008* (NSW) reg 12(1), sch 1 pt 3.

State or territory	Legislation	Conduct	Location	Maximum Fine (ex prison)	CIN
SA	*Summary Offences Act 1953* (SA) ss 7, 22	Offensive, threatening, abusive or insulting, indecent or profane language	In a public place or a police station (profane or indecent words are punishable if audible from such a place, which is audible from a public place or neighbouring or adjoining occupied premises, or the person intends to offend or insult any person)	$1,250 $250 (indecent or profane language)	NA
Tas	*Police Offences Act 1935* (Tas) s 12	Profane, indecent, obscene, offensive, or blasphemous language; or threatening, abusive, or insulting words	In any public place, or within the hearing of any person in that place	3 penalty units	NA
NT	*Summary Offences Act* (NT) ss 47, 53; *Summary Offences Regulations 1994* (NT) reg 4A	Profane, indecent, obscene, threatening, abusive or objectionable words, offending, or causing substantial annoyance to a person	In or within the hearing or view of any person in any road, street, thoroughfare or public place	$2 ,000 (profane, indecent or obscene words)	$144 $288 $432[53]
ACT	*Crimes Act 1900* (ACT) s 392	Riotous, indecent, offensive or insulting behaviour	In, near, or within the view or hearing of a person in, a public place	$1,000	**NA**

Impact on Aboriginal and Torres Strait Islander peoples

6.47 Aboriginal and Torres Strait Islander peoples are over-represented as recipients of offensive language CINs. For example, the NSW Ombudsman found that 11% of CINs for offensive language in 2008 were issued to Aboriginal and Torres Strait Islander people.[54] More recently, it was reported that the proportion had risen to 17%.[55]

53 *Summary Offences Act* (NT) ss 47, 53; *Summary Offences Regulations 1994* (NT) reg 4A. Note that the location depends on the words used, for example, indecent, obscene or profane language is punishable in a public place, or within the view or hearing of any person passing therein.

54 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 59.

This can have a significant impact. According to the NSW Ombudsman, 89% of Aboriginal and Torres Strait Islander people issued with a CIN failed to pay on time and were referred to SDRO for enforcement. By comparison, 48% of all CIN penalty notices were referred for enforcement.[56]

6.48 The issues regarding offensive language provisions and how they are applied to Aboriginal and Torres Strait Islander peoples have been well ventilated. Primarily, these arguments are that most offensive language CINs are issued for language directed at police; and, if tested in court, may not meet the legal definition of 'offensive'.[57]

Should offensive language provisions be removed from CIN regimes?

6.49 The ALRC has heard from stakeholders that Aboriginal and Torres Strait Islander peoples can be targeted by issuing officers. This may result in many more Aboriginal and Torres Strait Islander peoples entering the fine enforcement system. It has been suggested that offensive language provisions be removed from CIN offences—as the prospect of offensive language charges going before the court may discourage issuing officers from charging trivial infractions.

6.50 The ALRC has also heard that CIN regimes provide an appropriate diversionary option, which results in less contact for Aboriginal and Torres Strait Islander peoples with the criminal justice system—the person is not arrested and need not attend the police station, making it less likely that the person will be charged with further offences, such as resist arrest or assault officer. This addresses a key concern of the RCIADIC.[58] With regard to the diversionary value of the CIN regime, however, the NSW Ombudsman noted:

> Of the Aboriginal people contributing to this review ... all voiced concerns that any benefits arising from diverting minor offenders in this way were likely to be eclipsed by the much more pervasive problems associated with fine default, especially with respect to the high number of Aboriginal people who are ineligible to drive or register a vehicle because of sanctions imposed as part of measures to enforce unpaid fines.[59]

6.51 The ALRC invites submissions on whether offensive language provisions remain an issue related to the incarceration of Aboriginal and Torres Strait Islander peoples. If so, the ALRC asks for comments on whether these provisions should be abolished, or whether they should be removed from CIN regimes.

6.52 There are other options. For example, the NSWLRC recommended that if offensive language provisions were retained, the issuing of a CIN for these offences should be subject to mandatory review by a senior police officer.[60] South Australian

55 Elyse Methven, *Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes* (PhD Thesis, Faculty of Law, University of Technology Sydney, 2017) 5.

56 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) iv–v.

57 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [10.47]; NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009).

58 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 22.

59 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 49.

60 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) recs 10.2–10.3.

police are able to issue a caution to adults for offensive language offending, and provide an example of swearing at police resulting in the issuing of an adult caution on their website.[61]

6.53 The ALRC also welcomes submissions on any other CIN offence that affects Aboriginal and Torres Strait Islander criminalisation and incarceration rates. For example, in 2014, the NSW Ombudsman noted that Aboriginal and Torres Strait Islander peoples were particularly affected by the issuing of CINs for the offence of 'continuation of intoxicated and disorderly behaviour following move on direction'.[62] The Ombudsman reported that, of the 484 fines or charges issued for this offence during the review period, 31% (150) were issued to Aboriginal people.[63]

Alternatives to court imposed fines

Question 6–6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

6.54 Generally, fines are the lowest penalty a court can impose, and a court imposed fine need not equate to a large amount. Courts can use discretion when imposing a fine, and are directed by statute to consider the means of the offender when imposing a fine amount.[64] There are also statutory maximums. Nonetheless, the courts can still impose relatively large fines, especially where fines are imposed *ex parte* (in the absence of the accused).

6.55 This section asks whether there is a requirement for other court sanctions to be introduced to prevent people without means from entering the fine enforcement regime. The ALRC outlines options including the potential introduction of suspended fines; day fines; and WDOs, but welcomes submissions on other possible alternatives.

Suspended fines

6.56 WA introduced legislation to provide for suspended fines in 2016.[65] Suspended fines would operate in the same way as suspended sentences of imprisonment, only to be enforced where further offending occurs within a certain period of time. The provisions are yet to commence.

6.57 The option of a suspended fine would allow a court, in sentencing an offender to a fine, to order that the fine be suspended for a period set by the court of up to 24 months. A suspended fine could not be imposed unless a fine equal to the suspended

61 South Australia Police, above n 50.
62 *Summary Offences Act* (NSW) s 9.
63 NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988* (2014) 3.
64 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 14; *Fines Act 1996* (NSW) s 6; *Sentencing Act* (NT) s 17; *Penalties and Sentences Act 1992* (Qld) s 48; *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1991* (Vic) s 52(1); *Sentencing Act 1995* (WA) s 53.
65 *Sentencing Legislation Amendment Act 2016* (WA) pt 4 div 3.

amount would be appropriate in all the circumstances. The effect of suspending a fine would be that the offender would not need to pay the fine unless they committed an offence during the suspension period and the court makes an order requiring the person to pay, or part pay, the fine.[66]

6.58 The introduction of suspended fines has been criticised as operating as a postponing device which still criminalises people who are likely to recommit low level offences. This includes vulnerable people who are without means to pay a court imposed fine, such as people experiencing: homelessness; drug and alcohol addiction; and mental health issues. A suspended fine without the provision of support services is argued to be unlikely to address the issues that lead to conviction and default.[67]

6.59 As part of the findings in the inquest into the death of Ms Dhu, the Western Australian Coroner's Court suggested that the question of whether the person has the means to pay the fine if they reoffend could be addressed in the legislation, as the court would have the power to re-fine 'unless it decides that it would be unjust to do so in view of all the circumstances that have arisen, or have become known, since the suspended fine was imposed'. If the court decides that ordering payment would be unjust, it must provide written reasons. The Coroner's Court stated:

> One of the obvious merits is that in the case of a suspended fine, the re-offender is brought back before the court for decision, rather than having the fine enforced through a subsequent executive act. This will mandate the consideration, by a judicial officer, of the re-offender's means to pay the fine at the relevant time, amongst other factors that must be taken into account.[68]

Day fines

6.60 Day fines refer to fining systems that respond to a person's capacity to pay. Day fines rely on a formula where the seriousness of the offence is indexed to the offender's average daily income or the surplus remaining after daily expenses. Fines are then expressed according to the number of days it would take that particular offender to pay the fine off. This type of approach has been taken in some European jurisdictions.[69]

6.61 While there are advocates for day fines in Australia,[70] the ALRC considers it unlikely that Australian jurisdictions would adopt such an approach. It is complex to apply, would rely on state and Commonwealth information sharing, and could result in distorted fine and penalty amounts for people on middle to high incomes. In its 2015 report on federal offenders, the ALRC contended that:

> a day fine scheme should not be introduced for federal offenders. Day fine schemes do not operate in any state or territory, and submissions and consultations revealed

66 Ibid s 52.
67 Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 2016, 28028c–8067a (John Quigley).
68 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 150.
69 Such as Germany, Austria, Denmark and Finland.
70 Adam Fletcher and André Dao, 'Alternatives to Imprisonment for Vulnerable Offenders International Standards and Best Practice—Report for Australian Government Attorney-General's Department' (July 2012) rec 3; Tasmanian Law Reform Institute, *Sentencing* Final Report No 11 (2008) 150–52.

> limited support for such a scheme. A day fine scheme would be time consuming and complex to administer in practice. In addition, the ALRC is not convinced that a day fine scheme would ensure that fines operated more equitably for all offenders. For example, an offender with little or no income may have substantial assets, a significant future earning capacity, or the capacity to acquire money from other sources.[71]

6.62 The ALRC welcomes submissions on the suitability of this type of system in Australia.

Court ordered work and development order schemes

6.63 Currently, most courts can order some form of community service at first instance or in lieu of a fine debt. Breaches of such orders, however, may result in a prison sentence. The NSW WDO scheme is currently only available *following* the imposition of a court-ordered fine (or receipt of an infringement notice). It has been suggested that courts should be able to impose a WDO, as understood in NSW, at first instance.

6.64 Courts are already able to issue CSOs or non-conviction orders.[72] The ALRC is interested in current practice and procedure, and whether there is any need to introduce a WDO sentencing option for courts.

NSW Work and Development Orders

Proposal 6–2 Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

- community work;
- program attendance;
- medical treatment;
- counselling; or
- education, including driving lessons.

State and territory governments should introduce work and development orders based on this model.

6.65 WDOs were introduced in NSW in 2009 to provide meaningful and achievable ways of discharging fine debt where a person cannot pay.[73] WDOs enable a person

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71 Australian Law Reform Commission, *Sentencing of Federal Offenders* Discussion Paper No 70 (2005) 110–11.

72 Such as s 10 orders under the *Crimes (Sentencing Procedure) Act 1999* (NSW).

73 WDOs in NSW represent a scheme particular to that jurisdiction. WA has a WDO option, but this represents mandatory community service ordered by the state debt recovery agency. It is the NSW WDO program the ALRC is referring to when citing WDOs in this section.

who cannot pay their fines due to hardship, illness, addiction, or homelessness to discharge their debt through community work; program attendance; medical treatment; counselling; or education, including driving lessons. Once on a WDO, any related licence suspension (see below) is lifted.

Legislative framework

6.66 The WDO program is set out in the *Fines Act 1996* (NSW). A WDO can be made by the SDRO when a fine enforcement notice has been made, and the defaulter meets the criteria.[74] An applicant for a WDO must be supported by an 'approved person' who is to supervise their compliance.[75]

6.67 A WDO can—to satisfy all or part of a fine—require the defaulter to:

- undertake unpaid work (for an approved organisation);
- undergo medical or mental health treatment;
- undertake an educational, vocational or life skills course (including driver licence training);
- undergo financial or other counselling;
- undergo drug or alcohol treatment; or
- undertake a mentoring program (where under 25 years old).[76]

6.68 The applicant must submit the grounds for making an order, outline the proposed activities to be carried out under the order, and propose a time for completion of the activities to the SDRO.[77] There are some restrictions. For example, where the applicant has an addiction and does not satisfy any other criteria, the person must be required to carry out counselling and/or drug and alcohol treatment.[78] The rate at which fines are discharged depends on the activity, and is set out in in the WDO guidelines.[79]

Outcomes

6.69 The WDO program was independently evaluated in 2015. The evaluation concluded that the WDO scheme was 'achieving its objective of enabling vulnerable people to resolve their outstanding NSW fines by undertaking activities that benefit them and the community'.[80]

6.70 The NSW Department of Justice stated that, as of December 2016, almost 2,000 service locations provided WDOs, and that nearly $74 million in fine debt had been

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74 *Fines Act 1996* (NSW) s 99B(1).
75 Ibid ss 99A (meaning an approved organisation or health practitioner); 99B(2)(b).
76 Ibid s 99A.
77 Ibid s 99B(2)(c).
78 Ibid s 99B(2A).
79 Department of Attorney-General and Justice (NSW), *Work and Development Order Guidelines 2012* (2012) 18.
80 Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, 2015) 2.

cleared since the program commenced in 2009.[81] In October 2016, the Senate Finance and Public Administration References Committee reported that $9 million of the $44 million that had been waived through the WDO scheme had been in 'Aboriginal communities'.[82]

Obstacles

6.71 There are some obstacles to nationwide implementation. Regional and remote areas may lack the infrastructure required to implement the programs and provide employment opportunities, excluding some Aboriginal and Torres Strait Islander communities from participating. Nonetheless, there is momentum to introduce WDOs in this form in other jurisdictions. The Sentencing Advisory Council of Victoria (SACV) recommended that Victoria introduce the NSW WDO scheme in 2014.[83] The Queensland Parliament passed legislation to introduce a WDO scheme in May 2017.[84]

6.72 The ALRC notes the strong support for WDOs shown in all states and territories during consultation, and seeks further comments on this proposal.

Driver licence related issues

6.73 A person that drives without a valid driver licence commits a criminal offence. Penalties include: court imposed fines; licence suspension and disqualification; and imprisonment, with penalties increasing with each related infraction. Aboriginal and Torres Strait Islander people are susceptible to licence suspension due to fine default, or may never gain a valid driver licence.

Impact on Aboriginal and Torres Strait Islander peoples

6.74 Where public transport is limited or not available—which is particularly relevant for remote communities—Aboriginal and Torres Strait Islander peoples without a valid driver licence or under a licence suspension may still be required to drive in order to maintain employment, fulfil cultural and family obligations, or drive to obtain medical assistance or necessities such as food.

6.75 Driver licence related offences affect Aboriginal and Torres Strait Islander communities, particularly where regionally or remotely located. For example, the NSW Aboriginal Legal Service reported that, in 2010 in NSW, 12% of people charged with driving while suspended or disqualified were Aboriginal and Torres Strait Islander peoples. Of those charged with driving unlicensed, 21% were Aboriginal and Torres Strait Islander peoples.[85] The NSW Bureau of Crime Statistics and Research data

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81 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

82 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [6.10].

83 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report* (2014) rec 13.

84 State Penalties Enforcement Registry, *New Legislation to Streamline SPER Operations* (10 May 2017) <www.sper.qld.gov.au/news-and-announcements/legislation-changes.php>.

85 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [3.39].

shows that in 2016, Aboriginal and Torres Strait Islander peoples constituted 31% of all people imprisoned for driving while suspended or disqualified.[86] This is similar in other states and territories, and is particularly high in the NT.[87]

6.76 Nationally, 3% (270) of the total Aboriginal and Torres Strait Islander prison population in 2016 were imprisoned for traffic and vehicle regulatory offences. This proportion was similar in the non-Indigenous prison population, at 2% (556).[88]

Loss of licence through fine default

Question 6–7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

Question 6–8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

(a) recovery agencies be given discretion to skip the driver licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

6.77 Loss of licence through fine default is common. For example, in WA up to 308,400 licence suspensions were imposed by the Fines Enforcement Registry in 2014–15. 270,843 suspensions were lifted during the same period (for fines paid or for people entering a time-to-pay arrangement).[89] Up to 67% of licence suspensions in NSW are the result of fine enforcement measures, as shown in the table below.

Table 2: The source of NSW driver licence cancellations and disqualifications at March 2016 [90]

Court cancellations	Court disqualifications	Demerit point suspensions	Fine default suspensions	Police suspensions
1,876	1,714	4,575	26,463	1,220

86 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (2017) tables 5, 14.

87 Thalia Anthony and Harry Blagg, 'Addressing the "Crime Problem" of the Northern Territory Intervention: Alternate Paths to Regulating Minor Driving Offences in Remote Indigenous Communities' (Report, Criminology Research Advisory Council, June 2012).

88 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 1.

89 Department of Attorney General (WA), *Report on the Fines Enforcement Registry 2010/11 to 2014/15* (2015).

90 Roads and Maritime Services (NSW), *Monthly Trend in Licence Suspensions and Cancellations by All Licence Holders (Suspensions and Cancellations Commencing during Month)* (2016) table 3.1.1.

Prison for driving while disqualified

6.78 A person cannot go directly to prison for driver licence suspension due to fine default. The person must be consequently convicted of driving while suspended and then be disqualified. Continuing to drive while disqualified can result in a sentence of imprisonment. This is generally rare, but can be pronounced in some regions. For example, the NSW ALS observed that 50% of their clients in the Dubbo region who were charged for driving while disqualified received a sentence of imprisonment. They were generally sentenced to imprisonment on their second to fourth offence.[91]

6.79 Driver licence disqualification periods, which are imposed when a person is caught driving while suspended, are mandatory in some jurisdictions. In the ACT, NSW, and Queensland, courts do not have a discretion whether or not to apply a statutory disqualification period.[92] Where there is more than one disqualification period, the periods can be required to be served consecutively—which can result in extremely long periods of disqualification.

Impact on Aboriginal and Torres Strait Islander peoples

6.80 Driver licences can be suspended as a result of fine default—even where the originating fine was unrelated to the defaulter's driving ability. The ALRC has heard, for example, of Aboriginal and Torres Strait Islander people caught *fishing* without a permit, which resulted in driver licence suspension.

6.81 The ALRC has been told that some Aboriginal and Torres Strait Islander peoples face particular difficulties relevant to remoteness and transiency that can make them highly susceptible to licence suspension for fine default. The NSW Ombudsman reported that

> Aboriginal people are far less likely than non-Aboriginal people to pay their fines by the due date and there is a high likelihood that they will remain in the fines enforcement system for up to several years after they have committed the offence(s) for which one or more penalty notices were issued.[93]

6.82 This means that Aboriginal and Torres Strait Islander people are likely to be over-represented in licence suspension due to fine default. For example, in 2013, the NSW Auditor-General reported that Aboriginal and Torres Strait Islander peoples were suspended for fine default in NSW at over three times the rate of non-Indigenous people.[94]

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91 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [7.12].

92 *Road Transport (Driver Licensing) Act 1999* (ACT) ss 31A, 32; *Road Transport Act 2013* (NSW) ss 53, 54, 115, 205; *Transport Operations (Road Use Management) Act 1995* (Qld) ss 78(3), 79D.

93 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [3.68].

94 Audit Office of New South Wales, *New South Wales Auditor-General's Report: Performance Audit—Improving Legal and Safe Driving among Aboriginal People* (2013) 3.

Whether state debt recovery agencies should skip licence suspension step

6.83 Where a person has funds but is refusing to pay an unpaid fine, licence suspension (or the threat of) can be effective in encouraging payment.[95] However, where a person is not paying an unpaid fine because they simply do not have the funds, licence suspension can have grievous consequences for people, especially Aboriginal and Torres Strait Islander peoples. There have been calls to reconsider the fine enforcement step of licence suspension. For example, a report to the then Roads and Traffic Authority (NSW) noted that, if licence suspension was to continue to be one consequence of fine debt, the SDRO needed to work more closely with the community to minimise adverse or unintended consequences.[96] The ALRC goes further to ask whether—considering the option for civil orders—the step is really necessary.

6.84 In 2017, NSW introduced a statutory discretion allowing the SDRO to skip licence suspension where the person in fine default is deemed to be 'vulnerable'. Instead, the SDRO can use discretion to skip the RMS step, and recover fines earlier via civil enforcement action with 'less negative impact on vulnerable members of the community'.[97] The SDRO may decide that civil enforcement action is preferable in the absence of and without giving notice to, or making inquiries of, the fine defaulter.[98]

Whether disqualification periods should be discretionary

6.85 The ALRC notes that in certain jurisdictions, the court has little discretion as to the disqualification period.[99] In NSW, for example, if the court wants to impose a lesser penalty than one prescribed, it only has limited discretion to make a non-conviction order.[100] It has been suggested that expanding the discretion of the courts is a better solution than introducing a process to apply to have the disqualification quashed after a period of good behaviour,[101] although that option already exists in some jurisdictions.[102] There may be an option for discretionary disqualification periods to apply only to licence suspensions due to fine default.

6.86 The ALRC seeks input on the best way to minimise the impact of licence suspension on Aboriginal and Torres Strait Islander peoples who have defaulted on fine payments, and welcomes submissions on these questions as well as any other relevant material.

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95 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 14.

96 Roads and Traffic Authority of NSW, *Research Report: An Investigation of Aboriginal Driver Licencing Issues* (2008) rec 2.

97 Fines Amendment Bill 2017 (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2017, 47 (Victor Dominello, Minister for Finance, Services and Property).

98 Fines Amendment Bill 2017 (NSW) sch 1 cl 5.

99 See, eg, *Road Transport (Driver Licensing) Act 1999* (ACT) ss 31A, 32; *Transport Operations (Road Use Management) Act 1995* (Qld) ss 78, 79D.

100 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

101 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [4.22].

102 *Transport Operations (Road Use Management) Act 1995* (Qld); *Road Traffic (Authorisation to Drive) Act 2008* (WA).

Access to driver licences

Question 6–9 Is there a need for regional driver permit schemes? If so, how should they operate?

Question 6–10 How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

6.87 Some Aboriginal and Torres Strait Islander people can face particular obstacles in getting a driver licence. These include: limited access to registered vehicles and licensed drivers to supervise learners; the number of learner hours required to become licensed; difficulty in obtaining identity documentation (such as birth certificates); and any literacy issues and corresponding difficulty passing written tests.[103]

6.88 In 2013, the NSW Auditor-General reported that fewer than half of eligible Aboriginal and Torres Strait Islander peoples held a driver licence, compared with 70% of the non-Indigenous population, and observed that 'meeting the Graduated Licensing Scheme requirements is difficult if your literacy is poor, you cannot access a vehicle or there is not a licensed driver to supervise you'.[104] Being in fine default can also prevent a person from applying for a driver licence.

Whether to introduce a regional driver permit scheme

6.89 In preliminary consultations in this Inquiry, the ALRC has been told that there should be a driver permit scheme for Aboriginal and Torres Strait Islander peoples living in some regional and remote areas. This has been raised previously in other inquiries. For example, in 2010, the Standing Committee on Aboriginal and Torres Strait Islander Affairs recommended the introduction of 'special remote area' driver licences.[105] The recommendation was supported in a 2012 report to the NT Government, which suggested that the reform be 'carefully studied' as a way to increase employment opportunities for young Aboriginal and Torres Strait Islander peoples.[106]

6.90 In 2009, the North Australian Aboriginal Justice Agency suggested that community members in the NT should be able to drive unlicensed or in unregistered

103 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) [6.119]–[6.123]; Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) viii, [3.43]–[3.44].

104 Audit Office of New South Wales, above n 94, 2, 21.

105 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 103, rec 21.

106 Anthony and Blagg, above n 87, rec 13.

cars within communities and on Aboriginal land on bush tracks, especially for hunting purposes.[107]

6.91 The ALRC envisages that, in order to address the current obstacles preventing Aboriginal and Torres Strait Islander peoples from accessing driver licences, a regional driver permit is likely to require fewer identity documents and cost less to access. The driving requirements prior to receiving the permit would likely be less arduous. It would need to be limited to use in certain areas, and should not qualify as equivalent personal identification to a standard driver licence for the purposes of confirming identity.

Whether it is better to focus on the obstacles to becoming licensed

6.92 The ALRC has also heard that regional driver permit schemes would only provide 'band aid' solutions, and be difficult to implement and administer. Instead what needs to be addressed are the obstacles to receiving a driver licence in the first place. This is not a new issue: the RCIADIC recommended that, in jurisdictions where motor vehicle offences are a significant cause of Aboriginal imprisonment, these causal factors should be identified, and, in conjunction with Aboriginal community organisations, programs should be designed to reduce the incidence of offending.[108]

6.93 There are some driver licence schemes already operating, such as the Aboriginal Justice Project in WA, which provides travelling services to assist Aboriginal and Torres Strait Islander peoples to pay fines, access birth certificates and apply for or reinstitute their driver licence. To this end, representatives from the Department of Transport, Centrelink, Registry of Births, Deaths and Marriages, Fine Enforcement Registry, and the Aboriginal Justice Program attend 'open days' in identified priority locations.

6.94 In 2015–16 the Aboriginal Justice Project reported that it had:

- conducted 73 open days, which 2,751 people attended;
- converted over $300,000 worth of fines to time to pay schemes or stayed;
- provided for 33 people to enter time to pay schemes;
- lifted 684 licence suspensions caused by fine default;
- enabled 900 people to apply for a birth certificate; and
- conducted 146 practical driving assessments and over 200 theory tests.

6.95 The Royalty for Regions program in WA also provided enhanced driver training and education in regional and remote communities.[109]

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107 North Australian Aboriginal Justice Agency, *Aboriginal Communities and the Police's Taskforce Themis: Case Studies in Remote Aboriginal Community Policing in the Northern Territory* (2009).

108 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 95.

109 Advice Correspondence, Stephen Cannon (15 May 2017).

6.96 There are similar driver licence programs in NSW, including *Driving Change*; the *Balunda-a* program (for offenders); and *Birrang Enterprises*, which provides literacy and training to adult Aboriginal and Torres Strait Islander peoples. Driver training is also a key element of the Maranguka Justice Reinvestment Program in Bourke. The ALRC has also heard about driving programs developed for Aboriginal and Torres Strait Islander peoples in Queensland and the NT.

6.97 The NSW Auditor-General's 2013 report on *Improving Legal and Safe Driving among Aboriginal People*, outlined the characteristics of successful programs, including using and building on community capacity; having program champions; and involving Aboriginal and Torres Strait Islander peoples in program development and delivery.[110]

6.98 Driving programs are necessarily limited by resources and geography. Other issues include the small scale and short lifespan of most programs; the practical constraints of insurance cover; volunteer driver reimbursements; and lack of ownership, funding and evaluations.[111] Driver licence programs require coordination between different government departments, such as Births, Deaths and Marriages, Attorneys-General, and Roads and Maritime Services. This happens under the Aboriginal Justice Program in WA, but lack of coordination can be a problem in other states and territories. The NSW Auditor-General identified coordination as a key gap in the steady provision of driving programs to Aboriginal and Torres Strait Islander peoples in NSW.[112]

6.99 Considering the suite of current driver programs, and identification of best practice for the successful delivery of driver programs for Aboriginal and Torres Strait Islander peoples, the ALRC welcomes submissions on whether a limited driver permit scheme is necessary, or whether the focus should remain on expanding and enhancing the current service provision.

6.100 The ALRC also welcomes submissions on the best way to deliver driver licence programs to regional Aboriginal and Torres Strait Islander communities. For example, it has been suggested to the ALRC in consultations that, where Aboriginal and Torres Strait Islander young people are likely to complete high school education and unlikely to face other identified obstacles (such as access to birth certificates), driver licence programs could constitute an elective in the school curriculum. It has also been suggested that state and territory governments enhance and commit to current government driver education programs, so as to extend the geographic reach of the program and the consistency of service in certain areas.

110 Audit Office of New South Wales, above n 94, 4.
111 Ibid.
112 Ibid 4, 55.