12. Fines and Driver Licences

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Summary

12.1 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 people unduly and can result in incarceration.

12.2 The ALRC considers that fine enforcement regimes should not, directly or indirectly, allow for imprisonment, and recommends that legalisation should be amended to this effect. Imprisonment is a disproportionate response to fine default, and impacts especially on Aboriginal and Torres Strait Islander women.

12.3 The imposition of fines and fine enforcement regimes affect Aboriginal and Torres Strait Islander people disproportionately. Fine enforcement regimes can aggravate criminogenic factors and operate to further entrench disadvantage, especially when the penalty for default or secondary offending includes further fines, driver licence suspension or disqualification, and imprisonment.

12.4 The ALRC makes recommendations to increase the efficacy and decrease the harm caused to Aboriginal and Torres Strait Islander people by the imposition of fines. These include decreasing the size of fines, limiting the issue of infringement notices, the nationwide adoption of Work and Development Orders (WDOs) based on the New

South Wales (NSW) model, and the provision of a discretion to skip driver licence suspension where the person in fine default is vulnerable, supported by statutory guidelines for state debt recovery agencies. These are not standalone recommendations and, together with the abolition of imprisonment, seek to make fine systems and fine enforcement regimes fairer and more responsive to the circumstances of Aboriginal and Torres Strait Islander people, especially in regional or remote locations.

12.5 This chapter further discusses two key pathways for Aboriginal and Torres Strait Islander people into fine enforcement, namely offensive language provisions and driving without a licence.

Fines and infringement notices

12.6 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 both to monetary penalties imposed by courts and those received under infringement notices.

Statutory enforcement frameworks

12.7 Every state and territory has a statutory enforcement regime for fine and infringement notice default.[2] Generally, these permit the state debt recovery authority to enforce progressive sanctions against a person in default. The NSW statutory framework is used in this chapter as an example.

12.8 NSW fine enforcement is legislated under the *Fines Act 1996* (NSW) (the Act) and administered by State Debt Recovery (SDR)[3]—now called 'Revenue NSW'. Enforcement action is taken against fine defaulters when they have not paid a fine by a notice served on the defaulter; have not paid by an extended due date granted by SDR; or have not paid agreed instalments (see fine mitigation below).[4]

12.9 The progressive recovery process is summarised in s 58 of the Act:[5]

> 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:

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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 *Crimes (Sentencing Administration) Act 2005* (ACT) ch 6A; *Fines Act 1996* (NSW) pt 4; *Fines and Penalties (Recovery) Act* (NT) pt 5; *State Penalties Enforcement Act 1999* (Qld) pts 4–6; *Criminal Law (Sentencing) Act 1988* (SA) pt 9 div 3; *Expiation of Offences Act 1996* (SA) s 14B; *Monetary Penalties Enforcement Act 2005* (Tas); *Infringements Act 2006* (Vic); *Sentencing Act 1991* (Vic) pt 3B; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).

3 *Fines Act 1996* (NSW) s 115.

4 Ibid s 65(1).

5 See also ibid pt 4.

(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.

12.10 Enforcement begins with the issuing of a notice. Ordinarily, the next step is for NSW Roads and Maritime Services (RMS) to suspend a person's driver licence and/or motor vehicle registration.[6] If the fine is still not paid within a set time period, SDR can commence civil enforcement action to satisfy the payment of the fine. If civil enforcement is unable to commence or is unsuccessful, SDR may make a Community Service Order (CSO), requiring the defaulter to perform community service work to pay off the unpaid fine amount.[7] Finally, the defaulter may serve a term of imprisonment calculated in reference to the amount in default for non-compliance with that order.[8]

12.11 Some states and territories also provide for the details of defaulters to be published on a government website.[9]

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6 Ibid s 71(1)(a).

7 Ibid ss 79(1), 81 calculated at $15 per hour, maximum 100 hours.

8 Ibid 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.

9 See, eg, *Fines and Penalties (Recovery) Act* (NT) s 66M.

Fine provisions leading to imprisonment

12.12 Fine default imprisonment can be broken down into three broad categories:[10]

- imprisonment on the basis of continued fine default that is not necessarily dependant on breach of a CSO; [11]
- imprisonment following failure to comply with a CSO, imposed following fine default;[12] and
- imprisonment for a secondary offence, such as driving while licence disqualified when the driver licence was suspended or cancelled as part of the fine default enforcement regime (see further below).[13]

12.13 In each state and territory, fine enforcement statutes permit imprisonment when a person is ineligible or fails to comply with a CSO.[14] However, the process and the likelihood of incarceration differ significantly across the states and territories.

12.14 There are two key pathways from a fine to imprisonment. First, where the court imposes a CSO, and a defaulter fails to comply or is otherwise ineligible, the court can impose a period of imprisonment by which a defaulter pays off, or 'cuts out', the fine amount owed (the Australian Capital Territory (ACT), South Australia (SA) and Victoria).[15] While there are statutory safeguards, such as the Hardship Review Board,[16] and it has been reported that imprisonment occurs only rarely in these jurisdictions,[17] it does not mean the provisions are never used. The Sentencing Advisory Council of Victoria reported in 2014 that 338 people entered prison for fine default between 2001 and 2013 in Victoria.[18] National Aboriginal and Torres Strait Islander Legal Services (NATSILS) advised this Inquiry that imprisonment in SA for breach of a CSO imposed for fine default does not show up in statistics as imprisonment for fine default. Instead,

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10 The Law Council of Australia, *Submission 108*.

11 See, eg, *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

12 See, eg *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) div 6; *Fines and Penalties (Recovery) Act* (NT) ss 88, 90–91; *State Penalties Enforcement Act 1999* (Qld) pt 6; *Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160.

13 See, eg, *Road Transport Act 2013* (NSW) s 54; The Law Council of Australia, *Submission 108*.

14 See, eg, *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) div 6; *Fines and Penalties (Recovery) Act* (NT) ss 88, 90–91; *State Penalties Enforcement Act 1999* (Qld) pt 6; *Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

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

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

17 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.

18 Sentencing Advisory Council (Vic), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria—Report* (2014) figure 26. See also Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

it is recorded as a justice procedure offence, and NATSILS 'sees this occurring in South Australia quite regularly'.[19]

12.15 Secondly, where the state debt recovery agency imposes a CSO, and a person fails to comply or is otherwise ineligible, the state debt recovery agency can issue a warrant of commitment for the imprisonment of the person (NSW, the Northern Territory (NT), Tasmania, Queensland, and Western Australia (WA)).[20] With the exception of WA, which need not rely on a breach or ineligibility for a CSO to issue a warrant, imprisonment for fine default in these jurisdictions is reportedly rare.[21] For example, the NT Government advised that in 2016 only one warrant was issued against a fine defaulter in the NT.[22] The NSW Government advised that SDR had not issued a warrant of commitment since 1998, and that SDR was exploring options to repeal provisions in the *Fines Act 1996* (NSW) that permit imprisonment via a warrant of commitment for fine default. The NSW Government submitted they were considering replacing warrants of commitment with a prison sanction that could only be imposed by a court.[23]

12.16 Some jurisdictions distinguish between the types of fines that can result in imprisonment. In Victoria, for example, imprisonment can only be imposed for default on an infringement notice.[24] In SA, imprisonment can only be imposed by the court for default on court-ordered fines.[25] In WA, warrants of commitment can only be issued by the state debt recovery agency for court-ordered fines.[26]

12.17 There are maximum periods that a defaulter can spend in prison to 'cut out' fine debt, regardless of the size of the debt.[27]

12.18 Imprisonment for fine default is most prevalent in WA. For example, the WA Office of the Inspector of Custodial Services reported that in WA between July 2006 and June 2015:

- 7,462 prisoners were received into correctional centres for fine default;
- 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;

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19 NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*. For justice procedure offending see ch 7.

20 *Fines Act 1996* (NSW) s 87; *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.

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

22 Northern Territory Government, *Submission 118*.

23 NSW Government, *Submission 85*; *Fines Act 1996* (NSW) pt 4 div 6.

24 *Infringements Act 2006* (Vic) s 160AB.

25 *Criminal Law (Sentencing) Act 1988* (SA) s 71(2).

26 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 29.

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

- 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.[28]

12.19 Imprisonment to cut out fines in WA can also be served in police lock up.[29] In the coronial inquest into the death of Ms Dhu—an Aboriginal woman held in custody on a warrant of commitment—the coroner was advised that cutting out fines in police lock up was common place in WA, and was not recorded in the custodial statistics.[30]

12.20 Regimes that use warrants of commitment that are issued by state debt recovery agencies result in imprisonment without hearings or trials. Imprisonment is automatic at a certain point in the enforcement process. In 2012, the NSW Law Reform Commission (NSWLRC) recommended the abolition of imprisonment for non-compliance with a CSO in NSW, describing the process of warrants of commitment issued by SDR as contrary to the principles of natural justice and procedural fairness.[31] Legal Aid NSW submitted to this Inquiry that the system in NSW was entirely inconsistent with Recommendation 117 of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which had called for the intervention of a judge or magistrate to determine whether a term of imprisonment should be ordered.[32] The NSW Government advised the ALRC that the relevant NSW provisions are under review.[33]

12.21 In 2016, the Coroner's Court of WA questioned whether incarcerating fine defaulters provided any benefit to the community and recommended the abolition of warrants of commitment in WA.[34] 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 CSOs or other alternatives) where appropriate.[35] This approach was supported in 2016 by the Law Society of WA.[36]

12.22 The ALRC understands that the WA Government may introduce reforms to address imprisonment for fine default in that state, including introducing lesser penalties and expanding the use of CSOs.[37]

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28 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v.
29 *Prisons Act 1981* (WA) s 16(7).
30 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 152–5.
31 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 8.4.
32 Legal Aid NSW, *Submission 101*.
33 NSW Government, *Submission 85*.
34 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 147.
35 Ibid 151.
36 The Law Society of Western Australia, 'Imprisonment of Defaulters' (Briefing Paper, 2016).
37 Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 September 2017, 188–207 (John Quigley); The Law Council of Australia, *Submission 108*.

The impact on Aboriginal and Torres Strait Islander peoples

12.23 Aboriginal and Torres Strait Islander people are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at the time of issue of the initial notice (attributed to financial capacity, itinerancy and literacy levels). Aboriginal and Torres Strait Islander people are consequently susceptible to escalating fine debt and fine enforcement measures.[38] Adjunct Professor Russell Hogg and Associate Professor Julia Quilter submitted:

> We do know from research and official inquiries that fines have disproportionate and serious adverse impacts on disadvantaged sections of the community: Indigenous Australians, the young, homeless, the welfare dependent, mentally ill, people with intellectual disabilities and prisoners. These groups are more vulnerable to being fined in the first place and to accruing multiple fines. They are less likely to be able to pay fines or to negotiate the processes available to contest them or otherwise mitigate their impact. Literacy and numeracy problems, language difficulties, housing insecurity and residential transience ensure that many will fall foul of inflexible administrative systems that are insensitive to the circumstances of the poor and marginal.[39]

12.24 The WA system has been identified as particularly arduous for Aboriginal and Torres Strait Islander peoples, especially women. In 2013, it was reported that one in every three women who entered prison in WA did so for fine default.[40] Between 2006 and 2015, nearly three-quarters (73%) of female fine defaulters in WA were unemployed when imprisoned, and about 64% of women imprisoned for fine default were Aboriginal and Torres Strait Islander women.[41]

12.25 The United Nations Special Rapporteur on Violence against Women urged the WA 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'.[42] This call was reiterated by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, who expressed concern about the growing number of Aboriginal women imprisoned for fine default, and noted that the 'laws on fine default are an example of legislation having a disproportionate impact on Aboriginal women'.[43] A 2017 report by the Human Rights Law Centre on the over-representation of Aboriginal and Torres Strait Islander women in prison also identified fine default statutes as laws that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, and

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38 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].

39 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

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

41 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.

42 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).

43 United Nations Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/HRC/36/46 (15 September 2017) 72.

recommended the abolition of all laws that lead to the imprisonment of people who cannot pay fines.[44]

12.26 Such concerns have also been highlighted by Australian legal advocates. In 2016, the Law Society of NSW submitted to the Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services that the WA fine default 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'.[45] This observation was reiterated by stakeholders to this Inquiry.[46]

12.27 The Aboriginal Legal Service of WA (ALSWA) has previously 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.[47]

12.28 The potential 'bluntness' of the enforcement regime in WA was illustrated in a case study provided by Kimberly Community Legal Services:

> Client G resides in an Aboriginal Community near Fitzroy Crossing. He receives his post c/- the Post Office as do many Aboriginal people who reside in communities in the Kimberley where there is no postal delivery to residences. Client G had fines in excess of $20,000 incurred over a long time. He had entered into a repayment agreement and set up Centrepay deductions from his Centrelink benefit. At the time the Centrepay deductions were set up Client G's Centrelink payments were subject to Income Management. Client G was subsequently taken off Income Management and was receiving a Disability Support Pension (DSP). At the time the transfer was made, all Client G's Centrepay deductions were cancelled. Client G does not believe he was ever notified of this and to the best of his knowledge he was still making regular payments towards his fines.
>
> Client G came to see KCLS to find out how much his fines were. KCLS made inquiries with the local Sheriff and was advised that, at the time of the inquiry, Client G's fines were approximately $17,000 and there was no current repayment agreement in place. The Sheriff also advised that given the quantum of the fines, unless a repayment agreement was implemented immediately, it was likely a warrant would be issued for Client G's arrest. Client G was understandably distressed at this information. KCLS assisted Client G to reinstate his Centrepay deductions which avoided the warrant being issued.
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> The suspension of the repayments was a result of an administrative process internal to Centrelink that was not communicated to Client G, or not communicated appropriately having regard to his literacy and general comprehension of English

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44 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.

45 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].

46 See, eg, Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Legal Aid WA, *Submission 33*.

47 Aboriginal Legal Service of WA, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper* (2016) 2.

> language, or the issues related to receiving post by checking at the Post Office. Had Client G not contacted KCLS when he did, a warrant for his arrest would have been issued and Client G would have been incarcerated.[48]

12.29 This case study clearly identifies the interrelated issues that Aboriginal and Torres Strait Islander people who live in regional or remote communities and who may not routinely receive mail may face in relation to fine enforcement. Issues of remoteness coupled with unreliable postal services can mean that enforcement notices may not be received, leading to greater risk of fine debt escalating, enforcement costs accruing and enforcement measures being implemented.[49]

Imprisonment terms that 'cut out' or result from fine debt

Recommendation 12–1 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, or as a result of, unpaid fines.

12.30 The ALRC recommends that statutory provisions permitting imprisonment resulting from unpaid fines should be repealed. Fines are penalties imposed in response to usually minor infractions—conduct that the legislature and the courts have determined not to warrant a term of imprisonment.[50] Imprisonment for fine default results in punishment disproportionate to the offending conduct, and contradicts the principle of imprisonment 'as a last resort'.[51]

12.31 Fine enforcement provisions provide for stepped enforcement actions. It is the view of the ALRC that when a fine defaulter is unable to pay a fine or infringement notice; has not applied for time to pay or other payment options; has no income or property to be the subject of civil orders; and is unable to complete a CSO, that person requires assistance, not prison.

12.32 The RCIADIC recommended that all governments ensure that sentences of imprisonment were not automatically imposed for the default of payment of a fine.[52] While the direct link between fine default and imprisonment has been removed from

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48 Kimberley Community Legal Services, *Submission 80*.

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

50 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). See also S McLean Cullen, *Submission 64*.

51 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).

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

statutes nationwide, and fine payment options have been introduced, fine enforcement regimes still provide pathways from fines to imprisonment.

12.33 The NSW Government did not support abolition of a court's ability to order imprisonment for fine default altogether, as it considered that the 'principle of imprisonment as a last resort protects against imprisonment for fine default unless necessary'.[53] The vast majority of stakeholders to this Inquiry, however, supported the abolition of statutory provisions that provide for imprisonment in lieu of, or as a result of, unpaid fines.[54] Many pointed out the absurdity of imprisonment for such a 'crime'. Legal Aid WA observed that imprisonment for fine default 'normalises imprisonment, undermining the effectiveness of the deterrence element of the sentence of a term of imprisonment and detracting from the policy position that a sentence of imprisonment should be a last resort'.[55] The NSW Bar Association strongly supported any reforms that

> prevent incarceration, directly or indirectly, solely as a result of the non-payment of fines. Deprivation of liberty for this reason is not compatible with a modern, civilised society and has had a manifestly disproportionate impact upon Aboriginal and Torres Strait Islander people. Fines are a debt and should only be enforced as such.[56]

12.34 The Law Society of NSW Young Lawyers Criminal Law Committee (YLCLC) suggested that imprisonment as a result of fine default 'offends both principle and pragmatism'.[57]

12.35 The Infringement Working Group in Victoria is a joint working group of the Victorian Federation of Community Legal Centres and Financial and Consumer Rights Council. Its joint submission with the Victorian Aboriginal Legal Service to this Inquiry (VALS/IWG) expressed 'strong' support for the proposal to abolish the possibility of a person being imprisoned for unpaid fines.[58]

12.36 VALS/IWG advised that, in Victoria, the most common way infringements can lead to imprisonment is when a 'person does not pay their fine, is arrested and brought before the Magistrate's Court for a penalty enforcement warrant (PEW) hearing and is

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53 NSW Government, *Submission 85*.

54 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; Kimberley Community Legal Services, *Submission 80*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Victoria Legal Aid, *Submission 56*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Kingsford Legal Centre, *Submission 19*; Legal Services Commission of South Australia, *Submission 17*; Commissioner for Children and Young People Western Australia, *Submission 16*.

55 Legal Aid WA, *Submission 33*.

56 NSW Bar Association, *Submission 88*.

57 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

58 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

then placed on an "imprisonment in lieu of payment" order (IIL order)'. This means that any default in payment leads to the automatic issuing of an imprisonment warrant which enables the person to be taken directly to prison without further court oversight. They advised that people can be on an IIL order for years, with one lasting as long as 40 years. VALS/IWG reported there to be 8,000 imprisonment warrants in existence in Victoria. So, although the court does impose imprisonment in Victoria, imprisonment is then contingent upon actions of the defaulter and the matter does not go back before the court when a person has not paid. It is not known how many warrants issued are for Aboriginal and Torres Strait Islander people. VALS/IWG observed that, as Aboriginal and Torres Strait Islander people 'disproportionately experience factors making IIL order default more likely, including financial hardship, insecure housing, poor health including mental health and cognitive impairment, involvement with Chid Protection and problematic substance misuse', it was 'likely that Aboriginal and Torres Strait Islander people are over-represented amongst this group'.[59]

12.37 VALS/IWG reported that up to 272 people in Victoria were received into custody for fine default only between 2010 and 2016.[60] The median time in prison was 24 days, whereas the longest was 345 days.[61]

12.38 Some states and territories are considering reform to their fine default regimes. WA is reviewing their fine enforcement system while, in NSW, the Commissioner of Fines Administration has established a steering committee to review the impact of the penalty notice system on Aboriginal and Torres Strait Islander people in NSW.[62] The NT Government also advised that it is 'currently considering alternative options to infringements'.[63] Many jurisdictions are also adopting the WDO scheme from NSW (discussed below).

12.39 VALS/IWG outlined the approach taken by the Department of Economic Development, Jobs, Transport and Resources in Victoria, which has included increasing the training of decision makers at the frontline to help guide the exercise of discretion. This training aims to ensure that people who make mistakes or who are experiencing disadvantage are not penalised. Further, a person who receives a fine is given an opportunity to provide evidence of their special circumstances to avoid the enforcement of a fine.[64] VALS/IWG suggested this approach as a model for reform.

12.40 The ALRC is cognisant that removing prison as an option removes both a final incentive to pay and a 'short and sharp' option for people without the means to discharge their fine debt to become debt-free. The Public Interest Advocacy Centre (PIAC) submitted to this Inquiry that, accordingly, there is the need for better

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59 Ibid. The VALS/IWG suggested an expansion of the Koori Court to sit in relation to PEW and special circumstances matters

60 Without any other conviction.

61 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

62 NSW Government, *Submission 85*.

63 Northern Territory Government, *Submission 118*.

64 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

alternatives to be in place before the final option of prison is removed in some jurisdictions.[65]

Increase the efficacy of fine regimes

Recommendation 12–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop options that:

- reduce the imposition of fines and infringement notices;
- limit the penalty amounts of infringement notices;
- avoid suspension of driver licences for fine default; and
- provide alternative ways of paying fines and infringement notices.

12.41 Fines are of little benefit when the person fined cannot pay and the state expends resources to enforce a debt that cannot be discharged. Seeking to enforce an unrecoverable debt is costly for governments. The NSW Bar Association noted that in many cases the 'cost of enforcement exceeds the amount successfully recovered', and enforcement has both tangible and intangible costs for a vulnerable person in default.[66]

12.42 The sheer cost, and sometimes number, of penalties can appear insurmountable, where even partial payment may further impoverish a person. Fine default results in loss of driver licences, which can exacerbate disadvantage for Aboriginal and Torres Strait Islander people in regional areas, and affect the likelihood of employment. Loss of a licence may also decrease accessibility to health services and family, kin and community, and result in offences for driving while unlicensed (discussed below). Fine default can also lead to enormous stress and the fear of—or actual—incarceration. As noted by Hogg and Quilter, fine enforcement involves a form of 'sentence creep', in which a 'supposedly lenient penalty for a minor offence gives way to harsh sanctions for those who cannot pay but is also criminogenic in its effects'.[67]

12.43 The ALRC believes that there are more equitable ways to increase the effect of fines and fine enforcement while minimising the harm. The ALRC recommends that state and territories work with relevant Aboriginal and Torres Strait Islander organisations to introduce a suite of options aimed at reducing the likelihood of fines being imposed, mitigating negative outcomes when fines are imposed, and using innovative approaches to 'pay' the fine that benefit the person and the community. Stakeholders strongly supported these approaches and provided various models and options, which are outlined throughout this chapter.

12.44 The ALRC encourages states and territories to:

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65 Public Interest Advocacy Centre, *Submission 25*.
66 NSW Bar Association, *Submission 88*.
67 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

- introduce or clarify the use of written cautions (supported by training) issued in lieu of infringement notices for minor or first time offending;
- provide concessional infringement penalty amounts for those receiving government benefits;
- cap the total penalty amount able to be received in one incident;
- consider introducing suspended court-ordered fines;
- skip the enforcement step of driver licence suspension for Aboriginal and Torres Strait Islander people living in regional and remote communities; and
- introduce the NSW model of voluntary WDOs.

12.45 These options are discussed below.

Reduce the imposition of fines and infringement notices

12.46 Infringement notices are the most common penalty issued by criminal justice systems in Australia.[68] In 2009, the NSW Ombudsman reported that the NSW Police Force, as an 'issuing agency', had issued more than 500,000 infringement notices to adults in 2008,[69] and over 8,000 criminal infringement notices (discussed below). In Victoria up to five million infringement notices were issued across all issuing agencies in 2015–16.[70]

12.47 Infringement notices generally refer to regulatory penalties covering areas such as traffic infringements (such as for parking or speeding) as well as areas such as health and safety, national parks and wildlife, passenger transport, and rail safety.[71] In 2012, the NSWLRC observed in its 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.[72]

12.48 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.[73]

12.49 The imposition of monetary penalties, particularly the significant high fixed amounts under infringement notices, has been widely criticised for having a

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68 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.26]–[1.28].
69 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) foreword.
70 Infringement Management and Enforcement Services (Vic), *Annual Report on the Infringements System 2015–16* (2016) 25.
71 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.3], [1.7].
72 Ibid [1.32].
73 See, eg, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 102.

disproportionate impact on: people with low incomes (including young people); people in prison;[74] homeless or transient people with complex needs; and people with mental health issues or cognitive impairments.[75] Aboriginal and Torres Strait Islander people are over-represented in these groups.[76]

12.50 Paying a fine can be especially problematic for people living remotely with little means. A submission from the Torres Strait noted that: 'I have met offenders with SPER fines in the $4,000 and $6,000. In comparison to a mainland working class this equates to a mortgage for these people. They do not have a hope of making full payment.'[77]

12.51 Penalties received under single or multiple infringement notices can be disproportionate to the offending conduct. In consultations, the ALRC heard examples of the potential for escalation, such as that of a young Aboriginal girl (Ms X) with a dysfunctional family who skipped school and rode the trains without a ticket. Ms X was asked to present her ticket for inspection by a transit officer. Ms X told the transit officer to 'fuck off'. Ms X was then issued an infringement notice for fare evasion and offensive language.[78] Ms X responded to the transit officer: 'you got to be fucking kidding'. Ms X received a further infringement notice for offensive language. In one short incident Ms X was issued with fines well in excess of $1,000.

12.52 Fine mitigation options following the imposition of a fine are available. 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 regarding fine debt. 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. Legal Aid NSW observed that, while

> time to pay, the Work and Development Order scheme and the write-off of fine debt are important mitigation measures, they cannot and should not serve as a substitute for proper 'front end' regulation of the system. Front end changes are needed to ensure that infringement notices are only issued in appropriate circumstances, and for appropriate amounts, so as to reduce their disproportionate impact on Aboriginal and Torres Strait Islander people.[79]

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

75 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.

76 See ch 10.

77 S McLean Cullen, *Submission 64*.

78 *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a)–(b), sch 1 pt 3.

79 Legal Aid NSW, *Submission 101*.

Greater use of cautions in lieu of infringement notices

12.53 Issuing officers may use their discretion to informally warn a person rather than to issue an infringement notice in some circumstances. Some jurisdictions also provide for written cautions.[80] The NSWLRC noted:

> The use of both warnings and cautions allows issuing officers to encourage compliance by using the least restrictive measure called for in the circumstances of a particular case. A warning or a caution may be particularly appropriate, for example, where the offence is at the very minor end of a scale of offending, or where the person has a vulnerability, such as homelessness or mental illness, that impairs the ability to comply with or understand the relevant regulations or legislation.[81]

12.54 In 2017, SA Police introduced an adult cautioning scheme for some summary offences that would have previously resulted in the person going before the court.[82] The SA scheme does not have a statutory basis. NT Police can also issue written or verbal cautions, although the issuing of a caution is not recorded.[83]

12.55 Issuing officers in NSW are empowered by statute to issue an official caution.[84] For all issuing officers, other than police officers, directions regarding the imposition of official cautions are provided in guidelines issued by the Attorney General (NSW) (the Guidelines).[85] The Guidelines 'assist officers in exercising their discretion, they do not create any right or obligation to give a caution'.[86]

12.56 The Guidelines set out the matters to be taken into account when deciding whether to issue a caution, including: the characteristics of the offence; whether the person is homeless, has a mental illness or intellectual impairment, or is a child; whether the offending was inadvertent; whether the person was cooperative; and whether it was otherwise reasonable to issue a caution.[87] A caution must only be given in circumstances where an infringement notice could have been issued.[88] Under the Guidelines, the giving of a caution should be recorded 'where practical' to do so, including the date, the name of the offender and the issuing officer, and the offence for which the caution was given. Agencies should ensure that all issuing officers have a good understanding of the offences, are aware of the guidelines, and receive 'regular and appropriate training'.[89]

12.57 In 2012, the NSWLRC found that the cautioning system, while new at that time, could be strengthened, as issuing officers had difficulty identifying vulnerable people.

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80 See, eg, *Fines Act 1996* (NSW) s 19A.
81 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [5.7].
82 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.
83 Northern Territory Government, *Submission 118*.
84 *Fines Act 1996* (NSW) s 19A.
85 *Caution Guidelines under the Fines Act 1996* (NSW).
86 Ibid 1.
87 Ibid.
88 Ibid 6.
89 Ibid 7, 8.

It noted compliance with the Guidelines by issuing officers was 'uneven'.[90] The NSWLRC recommended that:

- the *Fines Act 1996* (NSW) direct issuing officers to consider whether it is appropriate to issue an official caution instead of a penalty notice;
- all guidelines on the issuing of cautions be publicly available;
- unless police develop their own consistent guidelines, legislation prescribe that the Attorney General Guidelines apply to police; and
- the Guidelines contain a 'statement of principle' regarding the need to reduce the involvement of vulnerable people in the infringement notice system.[91]

12.58 The NSWLRC also found that it was difficult to ascertain the incidence of cautions, and recommended that all cautions be written, recorded and reported on, and that issuing officers be accountable to an oversight body.[92]

12.59 Stakeholders to this Inquiry supported the introduction of formalised adult cautioning schemes across the jurisdictions.[93] ALSWA agreed with the use of cautions when people were clearly vulnerable, noting that it was 'important to bear in mind that vulnerable and disadvantaged people are not likely to pay the infringement amount in any event'.[94] Instead of attempting to have fines that are issued to disadvantaged people removed after the fact, the Law Council of Australia advocated for wider use of cautions, suggesting that written cautions should be issued in the first instance for most offences. Training and guidelines should be strengthened to include cautioning and referrals to services rather than infringements where cautioning has not been successful.[95] VALS/IWG also expressed strong support for the wider use of cautions and official warnings, stating that low level and first time offending should be routinely dealt with by official warning or written caution.[96]

12.60 Associate Professor Tamara Walsh advised that written cautions are used as an effective diversionary mechanism in the UK, and suggested that they should be further trialled in Australia.[97]

12.61 Official cautioning schemes have the potential to divert minor offenders away from fine enforcement systems. The NSW approach of a statutory scheme with supporting guidelines provides a good model. The requirement for cautions to be

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90 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [5.23].

91 Ibid rec 5.1, 5.3, 5.5. See also Legal Aid NSW, *Submission 101*.

92 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 5.3, 5.4.

93 See, eg, Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Associate Professor T Walsh, *Submission 51*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

94 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

95 The Law Council of Australia, *Submission 108*.

96 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

97 Associate Professor T Walsh, *Submission 51*.

issued only where an infringement notice usually would be issued minimises the potential for 'net widening'.[98] The ALRC suggests that guidelines apply to all issuing agencies, and that the recommendations of the NSWLRC be considered when adult cautioning systems are adopted in other states and territories.

Suspended court fines

12.62 Generally, fines are the lowest penalty a court can impose (excluding no sentence or conditional release orders). Up to 40% of offenders sentenced in Australian criminal courts receive a fine as their principal penalty.[99] Fines are commonly imposed in courts of summary jurisdictions for assaults, thefts, drug offences, property damage and public order offences.

12.63 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.[100] 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). The median fine amount given in courts of summary jurisdiction in 2015–2016 was $669.[101]

12.64 Unpaid court fines are generally subjected to the same fine enforcement regime as infringement notices, although in WA and SA imprisonment is only permitted for default of court-ordered fines.

12.65 PIAC considered there to be an 'urgent need' for state and territory governments to provide alternative penalties to court-ordered fines.[102] The Criminal Lawyers Association of NT (CLANT) submitted that alternatives should be an option when it is apparent that a person has no capacity to pay the fines.[103] YLCLC noted that generally there needed to be a more 'nuanced and diverse set of tools at the disposal of decision makers within the criminal system. Broader discretion enhances the ability of courts to provide individualised justice'.[104]

12.66 WA introduced legislation to provide for suspended fines in 2017.[105] Suspended fines 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 option of suspended fines allows courts, in sentencing offenders to fines, to order that the fine be suspended for a period set by the court of up to 24 months. A suspended fine cannot be

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98 PIAC raised concern about net-widening: 'we are concerned about the potential for these lower level penalties to be used by police in a wider range of circumstances, rather than as an alternative to a 'higher level' penalty (such as an infringement notice)': Public Interest Advocacy Centre, *Submission 25*.

99 Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2016) table 9. See also Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*. See ch 3.

100 See, eg, *Crimes (Sentencing Administration) Act 2005* (ACT) s 14; *Fines Act 1996* (NSW) s 6; *Sentencing Act* (NT) s 17; *Penalties and Sentencing Act 1992* (Qld) s 48; *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1991* (Vic) s 52(1); *Sentencing Act 1995* (WA) s 53.

101 Australian Bureau of Statistics, above n 99, table 50.

102 Public Interest Advocacy Centre, *Submission 25*.

103 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*.

104 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

105 *Sentencing Legislation Amendment Act 2016* (WA) pt 4 div 3.

imposed unless a fine equal to the suspended amount would be appropriate in all the circumstances. The effect of suspending a fine is that the offender does not need to pay the fine unless they commit an offence during the suspension period and the court makes an order requiring the person to pay, or part pay, the fine.[106]

12.67 The introduction of suspended fines in WA has been criticised as operating simply 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 unlikely to address the issues that lead to conviction and default.[107]

12.68 In its submission to this Inquiry, VALS/IWG raised these concerns, considering the likelihood of breach by disadvantaged people to be high:

> Any intended deterrent function is unlikely to be effective when the offending conduct is compelled by a person's circumstances—including mental illness, substance dependence, family violence or homelessness. Having said this, suspended fines are preferable to the use of traditional fines.[108]

12.69 As part of the findings in the inquest into the death of Ms Dhu, the WA Coroner's Court suggested that the question of whether the person has the means to pay the fine if they reoffend is addressed in the WA legislation. The court has 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.[109]

12.70 In 2013, the NSWLRC recommended the introduction of suspended fines in NSW to operate in conjunction with s 10 bonds under the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 10 bonds permit a sentencing court to order the dismissal of charges without proceeding to a conviction. The order can be made with or without conditions.[110] Under the NSWLRC approach, payment of the fine would be required on breach and revocation of the bond,[111] with the court retaining discretion to

106 Ibid s 52.
107 Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 2016, 28028c–8067a (John Quigley).
108 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
109 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 150.
110 Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [5–000].
111 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) rec 14.3.

cancel the fine and resentence where the offender's capacity to pay had changed from the time of the order.[112]

12.71 Legal Aid NSW supported the introduction of suspended fines so long as the conditions were not too onerous and that the scheme was unable to result in prison term.[113] The NSW Bar Association supported suspended fines as long as they were voluntarily entered into.[114] ALSWA supported the introduction of suspended fines, but submitted that the imposition of a suspended fine without the provision of support services is unlikely to address the underlying issues. ALSWA preferred the proposed amended Conditional Release Orders (CROs) that are yet to commence in WA. CROs would permit the court to require the offender to participate in an approved educational, vocational or personal development program, or unpaid work. ALSWA acknowledged, however, that the proposed amended CROs would not be available to people likely to reoffend (those with previous convictions), and that these are the people who would benefit most from this type of program and who are accumulating massive fine debt, ultimately resulting in short prison terms.[115] A court-ordered WDO was not supported by other stakeholders, who noted that the voluntariness of the NSW program was a 'key factor of the program's success'.[116]

12.72 Other stakeholders preferred the introduction day fines.[117] 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 off the fine. This type of approach has been taken in some European jurisdictions.[118]

12.73 Kingsford Legal Centre considered that fixed penalty amounts (extending to infringement notices) hurt the most vulnerable, and preferred a system that proportionally adjusted the fine relative to an individual's income.[119] The NSW Bar Association submitted that the 'quantum of fines should be strictly limited, both for infringement notices and in court, for people who are at the lowest level of income'.[120]

12.74 The ALRC considers it to be unlikely that Australian jurisdictions would adopt day fines. In a 2005 Inquiry into the sentencing of federal offenders, the ALRC did not support day fines. It suggested that day fines would be 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:

> 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

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112 Ibid [14.44].
113 Legal Aid NSW, *Submission 101*.
114 NSW Bar Association, *Submission 88*.
115 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
116 See, eg, Legal Aid NSW, *Submission 101*.
117 See, eg, Community Legal Centres Tasmania, *Submission 99*; Kingsford Legal Centre, *Submission 19*.
118 Such as Germany, Austria, Denmark and Finland.
119 Kingsford Legal Centre, *Submission 19*.
120 NSW Bar Association, *Submission 88*.

> 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.[121]

Limit the penalty amounts of infringement notices

Concession penalty notices for people in receipt of government benefits

12.75 The monetary penalties attached to infringement notices are fixed and can be high. For example, in NSW offensive language provisions attract a $500 penalty.[122]

12.76 There have been proposals and recommendations regarding the best way to lessen penalty amounts for vulnerable people, including Aboriginal and Torres Strait Islander people. In 2014, the Sentencing Advisory Council of Victoria (SACV) observed that the principle of proportionality required 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.[123] The SACV reported that some infringement penalties in Victoria amounted to 50% of the maximum penalty available to the court. It also noted disparity 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.[124]

12.77 In its report on penalty notices, the NSWLRC adopted a formula recommending infringement notice amounts should not exceed 25% of the maximum court fine for that offence.[125] Adopting this recommendation would mean that offensive language infringement penalties in NSW would be capped at $165. This approach was supported by stakeholders to this Inquiry, including PIAC and Legal Aid NSW.[126]

12.78 Concessional infringement notices have been suggested as another way to ensure the efficacy and fairness of infringement notices. This was also recommended by the SACV, who 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 such a scheme would be able to apply for a reduced infringement penalty to the enforcement agency following the person receiving the penalty. The SACV model aimed to provide the person fined with an early exit from the infringement enforcement system.[127] This approach was

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

122 *Summary Offences Act 1988* (NSW) s 4A; *Criminal Procedure Regulation 2017* (NSW) sch 4.

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

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

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

126 Legal Aid NSW, *Submission 101*; Public Interest Advocacy Centre, *Submission 25*.

127 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.

supported by VALS/IWG in their submission to this Inquiry, noting that a $229 infringement notice issued for failing to produce a valid train ticket amounts to 85% of the weekly earnings for a person relying on the Newstart Allowance. VALS/IWG recommended that fines for eligible concession card holders be substantially reduced, reflecting such a person's actual capacity to pay, and that the SACV recommendation for fixed reduction be implemented.[128]

12.79 A decrease in penalty amounts was not supported by CLANT, who submitted that general deterrence may be affected if fines are decreased.[129]

12.80 The NSWLRC Report considered that the administration of a concessional infringement notice system could be overly burdensome, citing the added complexity to the infringement notice system. It preferred instead to expand the WDO scheme and 'time-to-pay' systems.[130] VALS/IWG stressed the need for a variety of options. It observed that, regardless of special circumstances and WDOs, 'some people may want to resolve their infringements through payment, and for this to be a possibility, the system needs to acknowledge that people on very low incomes cannot, and in fairness should not, pay the same amount as people on average to high incomes'.[131]

12.81 Kimberly Community Legal Services put forward a simpler option: the provision of a standard discount rate for low income earners, welfare recipients and any person who would qualify for a WDO.[132] Similarly, Legal Aid NSW suggested that one rate should be developed for people on Centrelink benefits.[133] It may be less burdensome to develop two penalty streams, with a concession penalty able to be administered at the point of infringement.

12.82 Concession rates are not a standalone solution. As noted by Hogg and Quilter, while concessions are a worthwhile approach, the effect would still be limited for the 'most vulnerable who typically confront major obstacles in negotiating abstruse administrative processes'.[134] For some people, even a small penalty can be unworkable and lead them into the fines enforcement system. Cautions (above) need to be implemented as well.

Limiting the total penalty amount

12.83 The ALRC has heard that, in some instances, multiple infringement notices may be issued in one transaction. This can be unhelpful and result in insurmountable debt. VALS/IWG observed that the 'deterrent effect of infringements is not commensurate with the number of infringements issued', contending that the opposite was true. The

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128 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

129 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*.

130 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [11.25]–[11.27]. See also Northern Territory Government, *Submission 118*.

131 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

132 Kimberley Community Legal Services, *Submission 80*.

133 The Law Council of Australia, *Submission 108*. See also Legal Aid NSW, *Submission 101*; Legal Aid WA, *Submission 33*.

134 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

more fines received, the more overwhelming and unmanageable they become, and the less effective they are. VALS/IWG reported that their experience had shown that payment and compliance is more likely where fewer fines are issued to a person.[135]

12.84 Multiple issuing of fines could be limited by statute in three ways. Issuing officers could be restricted to issuing one infringement notice in the same offence category per interaction. In practice, this would mean that 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. This approach was not supported by NT Police, because, as outlined in the NT Government submission, 'police currently consider a person's capacity to pay and whether the fine is creating further hardship',[136] but was otherwise 'strongly supported' by stakeholders who suggested that this could be achieved through guidelines or statutory reform.[137]

12.85 Stakeholders to this Inquiry further suggested that a cap should be placed on the total financial penalty able to be imposed in a single transaction.[138]

12.86 A third approach was outlined by the NSWLRC in its inquiry into penalty notices. It recommended that 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.[139] This approach was supported by the Commissioner for Children and Young People in WA in their submission to this Inquiry.[140]

12.87 Limiting the number of infringement notices per transaction or placing a cap on the financial penalty serves to minimise the difficulty large fines can place on vulnerable people, including Aboriginal and Torres Strait Islander peoples. The greatest effect on minimising hardship to Aboriginal and Torres Strait Islander people from fine regimes would occur if the limitation on imposing multiple infringement notices also operated in a system where cautions are prioritised, and infringement notices for people in receipt of government benefits are reduced.

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135 The Law Council of Australia, *Submission 108*.

136 Northern Territory Government, *Submission 118*.

137 See, eg, Legal Aid NSW, *Submission 101*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*.

138 See, eg, The Law Council of Australia, *Submission 108*; The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

139 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 6.5.

140 Commissioner for Children and Young People Western Australia, *Submission 16*.

Discretion regarding driver licence suspension

12.88 When a person does not pay a fine debt, after a certain period of time, the relevant state debt recovery agency can direct the roads and traffic authority to suspend a person's driver licence. The original fine need not be for traffic-related offences.

12.89 A person who drives without a valid driver licence commits a criminal offence. Penalties for that offence include: court imposed fines; licence suspension and disqualification; and possible imprisonment, with penalties increasing with each related infraction.

12.90 Licence suspension can lead to 'secondary offending', when a fine defaulter commits another offence related to the enforcement action taken to recover the original outstanding fine.[141] As noted by Legal Aid WA:

> The fine suspension system is complex. Mail may not be received; fine suspension, demerit suspension and court suspension are all administered separately, making inquiries difficult... Fine suspension can lead to a vicious cycle of a person being under fine suspension initially, who then drives under that fine suspension and then is charged with that offence and then may drive under court suspension and ultimately may be imprisoned for driving under court suspension.[142]

12.91 A person convicted of driving while suspended is most likely to receive a court imposed fine, and have their licence disqualified. It is unlikely that a first time offender for driving while suspended would or could receive a sentence of imprisonment. However, where the person drives while under the court imposed disqualification, this can result in serious penalties, including prison.

12.92 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. During the same period, 270,843 suspensions were lifted (for fines paid or for people entering a time-to-pay arrangement).[143] In smaller jurisdictions like Tasmania, up to 12,000 people had their licence suspended over a two-year period.[144]

12.93 Up to 67% of licence suspensions in NSW were the result of fine enforcement measures, as shown in the table below.

Table 12.1: NSW driver licence cancellations and disqualifications (March 2016)

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

Source: 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.

141 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.
142 Legal Aid WA, *Submission 33*. See also Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.
143 Department of Attorney General (WA), *Report on the Fines Enforcement Registry 2010/11 to 2014/15* (2015).
144 Community Legal Centres Tasmania, *Submission 99*.

Impact on Aboriginal and Torres Strait Islander people

12.94 Aboriginal and Torres Strait Islander people are susceptible to licence suspension due to fine default, and are over-represented in this regard.[145] For example, in 2013, the NSW Auditor-General reported that Aboriginal and Torres Strait Islander people were suspended for fine default in NSW at over three times the rate of non-Indigenous people.[146]

12.95 Licence suspension can make life more difficult in regional and remote areas, affecting employment options and family obligations. The need to drive can lead to secondary offending, and ultimately to imprisonment for driving while disqualified. A 2017 study into the barriers to driver licences for Aboriginal and Torres Strait Islander peoples in NSW and SA observed that reduced transport options for regional and remote communities were 'implicated in the over-representation of Aboriginal people incarcerated for transport offences'.[147] The study attributed over-representation to a 'cycle of unauthorised driving following the suspension of a driver licence due to fine defaults, leading to court imposed licence disqualification, further fine defaults and—potentially—imprisonment'.[148]

12.96 The impact of fine default licence suspension in the criminal justice system has undergone evaluation. In 2003, a study of WA licence disqualifications found that, in 2001, over 80% of licence disqualifications had originated in fine default. For Aboriginal and Torres Strait Islander people, over 60% of licence disqualifications for fine default related to non-traffic offending, such as court fines for justice and good order offending, and infringement notices for parking and fare evasion.[149] Fare evasion constituted 24% of all fine suspensions.[150]

12.97 The same study found that Aboriginal and Torres Strait Islander people were more likely to receive a custodial sentence once convicted of driving without a valid licence (which may or may not be the result of fine default), with 17.5% of Aboriginal and Torres Strait Islander offenders imprisoned for disqualified driving, compared with 8.6% of non-Indigenous offenders.[151]

12.98 The link between licence suspension due to fine default and imprisonment for driving while disqualified can be difficult to identify. NSW has an offence of driving while licence suspended or cancelled due to fine default.[152] For this reason the NSW Bureau of Crime Statistics and Research (BOCSAR) was able to provide data to the

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145 Alice Barter, 'Indigenous Driving Issues in the Pilbara Region' in Melissa Castan and Paula Gerber (eds), *Proof of Birth* (Future Leaders, 2015) 62, 64.

146 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.

147 Kathleen Clapham et al, 'Addressing the Barriers to Driver Licensing for Aboriginal People in New South Wales and South Australia' (2017) 41(3) *Australian and New Zealand Journal of Public Health* 280, 280.

148 Ibid.

149 Anna Ferrante, 'The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia' (Crime Research Centre, 2003).

150 Ibid vii.

151 Ibid 36.

152 *Road Transport Act 2013* (NSW) ss 54(5)(a)–(b).

ALRC that traced the history of people imprisoned for driving while disqualified when the licence was originally lost due to fine default.

12.99 The BOCSAR data showed that 5% (89) of defendants who received a sentence of imprisonment for driving while disqualified from January 2016 to March 2017 had a proven prior offence of driving while licence suspended/cancelled due to fine default where they had received a penalty of licence disqualification. Of these, 17% (15) were Aboriginal and Torres Strait Islander people (76% were non-Indigenous and in 7% of cases the Indigenous status was unknown). The median prison sentence for Aboriginal and Torres Strait Islander offenders who had lost their licence due to fine default was four months.[153]

12.100 The data confirms that people can end up in prison due to secondary offending directly related to fine default in NSW. This problem is not confined to Aboriginal and Torres Strait Islander people. Nonetheless, 15 Aboriginal and Torres Strait Islander people were imprisoned in NSW over a 14-month period for driving while disqualified who had initially lost their driver licences through fine default. It may be that the fine they had received and the subsequent licence suspension was entirely unrelated to traffic offending.

Provide ways to skip licence suspension as an enforcement measure

12.101 Where a person has sufficient funds with which to pay a fine, but initially refuses or neglects to do so, licence suspension (or the threat of) can be effective in encouraging payment.[154] However, where a person is not paying a fine because they have insufficient funds to do so, licence suspension can have grievous consequences for that person. This is especially the case for many Aboriginal and Torres Strait Islander people.

12.102 Some Aboriginal and Torres Strait Islander people face particular difficulties relevant to remoteness and transiency that can make them highly susceptible to licence suspension for fine default. Licence suspension can further entrench disadvantage. VALS/IWG considered licence suspension to be an 'overly blunt tool that penalises whole families and communities and unfairly interferes with people's employment, education, access to healthcare and other services, and other opportunities'.[155] The Kingsford Legal Centre noted that the 'link between fine recovery and loss of licence provides a barrier to employment, particularly in remote areas where public transport is unavailable or inadequate', and recommended the removal of the licence suspension step for fine default enforcement regimes.[156] Removal of this step was supported by

153 NSW Bureau of Crime Statistics and Research, *Sentences of Imprisonment for Driving While Disqualified (S54(1)(a) of the Road Transport Act 2013), NSW Reoffending Database January 2016 to March 2017, Ref No 17–15537* (2017).

154 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.

155 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

156 Kingsford Legal Centre, *Submission 19*. See also Sisters Inside, *Submission 119*.

other stakeholders,[157] including the NSW Bar Association who submitted that this type of enforcement had a 'disproportionate impact on marginalised communities ... and leads to secondary offending and imprisonment'.[158]

12.103 NATSILS suggested that driver licence suspension had 'exacerbated effects' on people living regionally and remotely, stating that unless licence suspension was removed for 'vulnerable and disadvantaged persons, a pathway to prison for fine default will remain through driving offences in areas or roles where driving is required'.[159] The NT Government acknowledged the problems for defaulters who lived regionally and remotely, but suggested licence suspension for default of fines to be a 'reasonable action for the majority of people living in urban settings'.[160] Hogg and Quilter noted the importance of driving to many facets of daily life, and echoed NATSILS and the NSW Bar Association when observing that licence suspension for Aboriginal and Torres Strait Islander communities was 'highly punitive and may also be criminogenic in certain respects'.[161]

12.104 The NSW Government did not support removal of this step altogether, noting that 'suspension or cancellation of a person's licence is one of the most effective enforcement actions to recover debts'.[162] Other stakeholders also saw the benefit of retaining the licence suspension step on the condition that greater awareness is made of repayment options and that access to WDOs is increased.[163] Some stakeholders called for the abolition of licence suspension for all non-traffic-related fines, retaining it only where the person defaults on a fine received for traffic offending.[164]

12.105 In 2017, NSW introduced a statutory discretion allowing SDR to skip licence suspension where the person in fine default is deemed to be 'vulnerable'. Instead, SDR can recover fines earlier via civil enforcement action with 'less negative impact on vulnerable members of the community'.[165] SDR may decide that civil enforcement action is preferable in the 'absence of and without giving notice to, or making inquiries of, the fine defaulter'.[166] Many stakeholders supported this approach.[167] There was some concern, however, regarding the practical effects of this provision and how to

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157 See, eg, NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; Kimberley Community Legal Services, *Submission 80*; Public Interest Advocacy Centre, *Submission 25*.

158 NSW Bar Association, *Submission 88*.

159 NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

160 Northern Territory Government, *Submission 118*.

161 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87* attachment 1.

162 NSW Government, *Submission 85*.

163 Northern Territory Government, *Submission 118*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

164 The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Kimberley Community Legal Services, *Submission 80*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

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

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

167 See, eg, Change the Record Coalition, *Submission 84*; Kimberley Community Legal Services, *Submission 80*; Legal Aid WA, *Submission 33*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

assess vulnerability with limited information.[168] Hogg and Quilter noted a lack of legislative guidance in NSW on how SDR will be 'satisfied that civil enforcement action is preferable or how a potential offender is able to agitate for this discretion to be used'.[169]

12.106 Kimberly Community Legal Services recommended the development of statutory principles to help guide the discretion of a decision maker. It suggested that the principles should support the presumption that a driver licence suspension is unsuitable where the original fine did not result from a driving offence; and the person who defaulted on the fine is Aboriginal or Torres Strait Islander, or lives in a remote area, or is unable to pay the original fine, or can otherwise demonstrate that they are reliant on their driver licence.[170]

12.107 Others considered that the relevant state debt recovery agency should exercise its discretion not to suspend when driver licence suspension is likely to have a significant flow-on effect, such as limiting employment, access to health services or where needed to support children.[171]

12.108 In WA, the Fines Enforcement Registrar may impose driver licence suspension orders for unpaid infringement notices and fines.[172] The registrar has discretion not to make a licence suspension order, or to cancel one in certain cases of hardship.[173] These include when a driver licence is needed for urgent medical treatment, to facilitate income or where the licence suspension order would hinder the person performing family or personal responsibilities, or for 'good reason'.[174] The Registrar can also directly issue a CSO (called 'work and development order') and skip or revoke a licence disqualification when licence suspension would be ineffective and would not result in payment of the fine.[175]

12.109 The ALSWA recommended that the discretion in the WA regime should be expanded to cover the same category of person that NSW WDOs currently do, that is: a person experiencing mental illness, mental health or cognitive impairment; homelessness; acute economic hardship; and having substance addiction, where the person can demonstrate a genuine need to drive.[176]

12.110 There is little doubt that licence suspension due to fine default entrenches disadvantage and can result in further penalties, including further fines or even imprisonment, for Aboriginal and Torres Strait Islander people. In Recommendation 12–2, the ALRC supports the introduction of a statutory discretion for state debt

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168 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

169 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

170 Kimberley Community Legal Services, *Submission 80*.

171 Change the Record Coalition, *Submission 84*.

172 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 19, 43.

173 Ibid ss 27A, 55A.

174 Ibid ss 20, 27A(1), 44.

175 Ibid s 47A. See also Explanatory Notes, Acts Amendment (Fines Enforcement) Bill 1999 (WA) 1–3.

176 Aboriginal Legal Service of Western Australia Limited, *Submission 74*. The ALSWA also suggested including family violence, although not currently part of the NSW WDO criteria.

recovery agencies to skip the licence suspension step where the person is vulnerable. There is a clear need for this to be underscored by statutory principles to help guide the decision maker in the use of this discretion. These principles should be developed by state and territory governments with relevant Aboriginal and Torres Strait Islander bodies in all jurisdictions.

Alternative ways of paying fines and infringement notices

NSW Work and Development Order scheme

12.111 Work and Development Orders (WDOs) were introduced in NSW in 2009 to provide meaningful and achievable ways of discharging fine debt.[177] WDOs enable a person who cannot pay their fines due to acute economic hardship, mental illness, serious addiction, or homelessness to discharge their debt through: community work; program attendance; medical treatment; counselling; or education, including driving lessons.[178] Once on a WDO, any related driver licence suspension is lifted.

12.112 The WDO program is set out in the *Fines Act 1996* (NSW). A WDO can be made by SDR when a fine enforcement notice has been made, and the defaulter meets the criteria.[179] An applicant for a WDO must be supported by an 'approved person' who is to supervise their compliance.[180]

12.113 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).[181]

12.114 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 SDR.[182] 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.[183] The rate at

177 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.
178 *Fines Act 1996* (NSW) s 99A.
179 Ibid s 99B(1).
180 Ibid ss 99A (meaning an approved organisation or health practitioner); 99B(2)(b).
181 Ibid s 99A.
182 Ibid s 99B(2)(c).
183 Ibid s 99B(2A).

which fines are discharged depends on the activity, and is set out in the WDO guidelines.[184]

12.115 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'.[185] The NSW Department of Justice has reported that, as of December 2016, almost 2,000 service locations provided WDOs, and that nearly $74 million in fine debt had been cleared since the program commenced in 2009.[186] 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'.[187]

12.116 The NSW Government submission to this Inquiry advised that in 2016–17, 4,875 WDOs were approved for Aboriginal and Torres Strait Islander participants, which represented 21% of all WDOs during that time. The average debt was $3,281 per Aboriginal and Torres Strait Islander participant, which was about 7% higher than the average debt for non-Indigenous participants. The majority of Aboriginal and Torres Strait Islander participants were eligible due to acute economic hardship (50%), addiction (34%) and mental illness (18%).[188]

12.117 There is momentum to introduce WDOs in other states and territories:

- the ACT has introduced WDOs for traffic infringements;[189]
- the Queensland Parliament passed legislation to introduce a WDO scheme in May 2017;[190]
- a WDO scheme came into force in Victoria in July 2017, applying only to infringement notice penalties;[191]
- the Legal Services Commission of SA[192] advised the ALRC that legislation before SA Parliament contains a financial hardship provision, allowing debts to be offset by attending treatment programs and community service;[193] and

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184 Department of Attorney General and Justice (NSW), *Work and Development Order Guidelines 2012* (2012) 18.

185 Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, 2015) 2.

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

187 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].

188 NSW Government, *Submission 85*.

189 ACT Government, *Infringement Notice Management Plans and Work and Development Programs* (6 December 2017). <https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2140/~/infringement-notice-management-plans-and-work-and-development-programs#!tabs-2>.

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

191 Fines Reform and Infringements Acts Amendment Bill 2016 (Vic); *Infringements Act 2006* (Vic) s 27A.

192 Legal Services Commission of South Australia, *Submission 17*.

193 Fines Enforcement and Recovery Bill 2017 (SA).

- the NT Government has advised that it is considering options for payment of fines, including WDOs, although it noted that its implementation may be hampered by the required service provision throughout that Territory.[194]

12.118 The vast majority of stakeholders to this Inquiry supported the introduction of WDOs across jurisdictions.[195] WDOs were generally considered to be an innovative yet sensible solution to both fine debt and disadvantage. The Australian Red Cross—a WDO 'sponsor' providing a driver mentor program in Wagga Wagga, NSW—considered that 'wide implementation' of WDOs would provide an important diversionary option for 'vulnerable people struggling to pay existing fines'. It submitted:

> Not only do Work and Development Orders provide an opportunity to divert people from the system, but they also provide a unique opportunity to gain work place experience through volunteering and community work that can be conducted as part of the scheme. It is important that such a measure is sufficiently funded in order to maximise participation in the scheme.[196]

12.119 The Commissioner for Children and Young People (WA) supported WDOs because an order 'recognises the individual circumstances and capacity of a juvenile offender as well as providing for further rehabilitation, rather than taking a purely punitive approach'.[197] Kingsford Legal Centre offered a similar observation, and stated that the 'WDO program directly reduces incarceration of highly vulnerable ATSI peoples by offering a non-financial method of repaying fines, whilst simultaneously incentivising participation in educational and counselling services'.[198]

12.120 The redirection of resources away from punishing individuals for fine default and into addressing the issues which saw the individual incur the fine was described by Victorian Legal Aid as 'justice reinvestment in action'.[199]

12.121 Some improvements to the existing scheme were proposed. The need to further include Aboriginal and Torres Strait Islander people in the scheme was key. PIAC, for example, stated:

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194 Northern Territory Government, *Submission 118*.

195 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Kimberley Community Legal Services, *Submission 80*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Kingsford Legal Centre, *Submission 19* 19; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

196 Australian Red Cross, *Submission 15*.

197 Commissioner for Children and Young People Western Australia, *Submission 16*. See also Kingsford Legal Centre, *Submission 19*.

198 Kingsford Legal Centre, *Submission 19*.

199 Victoria Legal Aid, *Submission 56*. Justice reinvestment is explained in ch 4.

> The Work and Development Order (WDO) scheme has proven to be an effective mechanism for helping individuals manage and reduce their debts. For many clients of PIAC's Homeless Persons' Legal Service, access to the WDO scheme has allowed them to resolve their fines debt while engaging in meaningful activities that promote positive outcomes, such as volunteer work or health treatment.
>
> However, the WDO scheme is not suited to all individuals as paying off a substantial debt would require a regular commitment over an extended period of time. Consideration should be given to the additional barriers to participation that are faced by Aboriginal and Torres Strait Islander people who may have family and cultural commitments that require them to spend their time across two or more locations.
>
> Two key strategies could be adopted that would help make the scheme more accessible on a wider scale:
>
> To ensure that culturally appropriate options are available to participants, Aboriginal and Torres Strait Islander community controlled organisations should be supported to become participants in the WDO scheme in New South Wales, and in other jurisdictions where the scheme is adopted. Additional resources may be required to allow those organisations to provide appropriate support to participants, and to meet the ongoing administrative and reporting requirements of their own participation in the scheme.
>
> The process for temporarily suspending and then reinstating a WDO should be streamlined. This would make it easier for individuals with complex life circumstances to take part, and to continue with their participation following a break (which may be due to a health condition, family commitment, unstable housing, etc).[200]

12.122 VALS/IWG strongly supported the introduction of 'WDO-style schemes' across Australia, but noted the need to resource the scheme for Aboriginal and Torres Strait Islander fine defaulters. It observed that, in Victoria, almost all of the sponsor organisations were mainstream organisations.[201] The ALS NSW/ACT also noted the lack of sponsor sites in regional and remote areas of NSW and the ACT, and recommended that an 'incentive scheme' be considered to encourage regional and remote locations to sponsor WDO placements.[202] This observation was echoed by Kimberly Community Legal Services, who supported implementation of the NSW model, but expressed 'significant concern' about how WDOs could be made available across WA.[203] The Commissioner for Children and Young People (WA) emphasised the need for governments to work with local Aboriginal communities and organisations to provide WDOs in regional and remote areas.[204]

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200 Public Interest Advocacy Centre, *Submission 25*.

201 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*. See also ACT Government, *Submission 110*; Victoria Legal Aid, *Submission 56*.

202 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*. See also NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

203 Kimberley Community Legal Services, *Submission 80*.

204 Commissioner for Children and Young People Western Australia, *Submission 16*.

12.123 Other suggested improvements to help facilitate use of WDOs by Aboriginal and Torres Strait Islander people included:

- creating greater awareness of the program by having a certain level of fine debt trigger recovery agencies to assist with solutions, such as directing the person to contacts for undergoing a WDO;[205] and
- expanding the definition of 'acute economic hardship' to include those on Abstudy; and victims of family violence. Consideration should also be given as to whether to include gambling addicts.[206]

12.124 Sisters Inside supported the introduction of the WDO program in Queensland, but noted that it remains 'practically impossible' for large debts to be discharged solely through WDOs.[207] Legal Aid NSW supported the implementation of WDOs in other states and territories, but stressed the importance that it not be the only option, and that frontend solutions need be found.[208]

12.125 The ALRC encourages state and territory governments to adopt the options outlined above to limit the imposition of fines, and decrease the negative effects of fine enforcement, as well as providing for WDOs or other innovative payment solutions.

'Cutting out' a fine when already in prison

12.126 There is a clear difference between imprisoning people for fine default and enabling people already in prison to 'cut out' their fines concurrently while serving a sentence of imprisonment. Those who exit prison with outstanding fines often face further barriers to reintegration, especially where fines prevent them from driving, or act as a disincentive to employment where there is a garnishee order in place.[209] Fine debt can prevent Aboriginal and Torres Strait Islander peoples from accessing housing, and impact on the likelihood of recidivism.[210] Legal Aid NSW told this Inquiry that they had provided advice to some 153 Aboriginal women leaving prison in the previous year, and of those women close to 100% had a fine debt.[211]

12.127 Victorian statute provides for prisoners to request that unpaid fines are 'cut out' and converted to days spent in custody under sentence for another offence.[212] In NSW, Corrective Services are a sponsor of the WDO scheme, and prisoners who complete voluntary programs in prison can have this count towards their fine debt.[213]

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205 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.
206 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.
207 Sisters Inside, *Submission 119*.
208 Legal Aid NSW, *Submission 101*.
209 Kingsford Legal Centre, *Submission 19*.
210 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
211 Legal Aid NSW, *Submission 101*.
212 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*. See *Infringements Act 2006* (Vic) s 161A .
213 Corrective Services NSW, *Policy for Supporting Offenders to Manage Fine-Related Debts through Work and Development Orders* (2017).

The ALRC recognises the negative impact that a fine debt can have on a person exiting prison and supports these initiatives.

12.128 The NSW Government submission also provided information on the Driver Knowledge Test, available to prisoners in NSW, which aims to support a reduction in recidivism for licensing offences and to increase the number of Aboriginal and Torres Strait Islander peoples with a driver licence. It also provided information on the Aboriginal Inmate Birth Certificate Program run by Corrective Services which provides financial assistance to eligible Aboriginal prisoners who wish to obtain a birth certificate for the purposes of obtaining 'qualifications, completing vocational training or accessing services'. In 2016–17, the program provided 800 birth certificates to inmates across the state'.[214]

12.129 The *Prison to Work* Report noted that, in the NT, the Department of Corrective Services can work through licensing issues with prisoners, and can 'support prisoners to pay outstanding fines, enabling suspended licences to be reinstated'. It further noted that, depending upon the security classification of a prisoner, such prisoner may be able to 'qualify for a learner's permit or probationary licence while in prison, although many are released without a licence'.[215] A similar program exists in the ACT, where prisoners can complete 'Road Ready' driver theory training while in prison, however 'practical driver instruction is not available due to the need for prisoners to be contained inside the prison'.[216]

Driving when unlicensed

Recommendation 12–3 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to identify areas without services relevant to driver licensing and to provide those services, particularly in regional and remote communities.

12.130 A person who is convicted of driving when unlicensed is likely to enter the fine enforcement system and may also have their licence disqualified, preventing them from becoming licensed in the near future. Persistent driving while unlicensed can result in a term of imprisonment.

12.131 Some Aboriginal and Torres Strait Islander people can face particular obstacles to 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);[217] financial constraints; and language or literacy issues and

214 NSW Government, *Submission 85*.
215 Council of Australian Governments, *Prison to Work Report* (2016) 127.
216 Ibid 135.
217 Alice Barter, above n 147, 64; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) 406.

corresponding difficulty passing written tests.[218] The circumstances of some Aboriginal and Torres Strait Islander people have been said to equate to an 'endemic lack of licensing access for Aboriginal people'.[219]

12.132 The ACT Government submitted:

> Aboriginal and Torres Strait Islander people experience significant barriers to obtaining and sustaining a licence relating to low level literacy, low income, challenges navigating a mainstream system and limited access to both licensed drivers and registered vehicles for supervised practice. What starts as a social justice issue often becomes a criminal justice issue.[220]

12.133 Aboriginal and Torres Strait Islander people who live in regional and remote areas are likely to experience 'transport disadvantage',[221] that is, to live remotely without access to public transport. Austroads submitted that 87% of people in regional and remote areas travelled to work in a privately owned car.[222] In 2013, fewer than half of all eligible Aboriginal and Torres Strait Islander people held a driver licence compared with 70% of the non-Indigenous population.[223] As observed by ALSWA:[224]

> The nature of living in a remote area means that people have a very real need to drive. It is impossible to compare driving in the city or a large town to driving in the regional and remote parts of Western Australia; the vast distances, harsh environment and lack of public transport means people must drive whether or not they hold a valid licence.[225]

12.134 ALSWA also noted that cultural requirements for law business, funerals, hunting and visiting family, as well as being obliged to follow Elders, can also result in unlicensed driving.[226]

12.135 The NSW Bar Association noted that driving offences that affect Aboriginal and Torres Strait Islander people living remotely 'demonstrate how metropolitan laws may operate unjustly in remote areas. Often Aboriginal or Torres Strait Islander communities have longer distances to travel, minimal access to public transport and face administrative and financial obstacles to obtaining a driving licence'.[227]

12.136 Driving unlicensed can have dire consequences. The NSW Council of Social Service observed:

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218 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].

219 Patricia Cullen et al, 'Challenges to Driver Licensing Participation for Aboriginal People in Australia: A Systematic Review of the Literature' 15(1) *International Journal for Equity in Health* 134, 134.

220 ACT Government, *Submission 110*.

221 Patricia Cullen et al, '"The Program Was the Solution to the Problem": Process Evaluation of a Multi-Site Driver Licensing Program in Remote Communities' (2017) 4 *Journal of Transport & Health* 81, 81; Austroads, *Submission 13*.

222 Austroads, *Submission 13*.

223 Audit Office of New South Wales, above n 148, 2, 21.

224 See also Alice Barter, above n 147, 66–67.

225 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

226 Ibid.

227 NSW Bar Association, *Submission 88*.

> The consequences of driving without a licence can be serious and significant for Aboriginal people and the communities in which they live. Not being able to drive can mean not being able to access vital services, such as receiving medical treatment. Being caught driving without a licence can exacerbate financial hardship and result in loss of employment and potential imprisonment.[228]

Impact on Aboriginal and Torres Strait Islander peoples

12.137 The NSW Aboriginal Legal Services reported that, in 2010, of people charged with driving unlicensed in NSW, 21% were Aboriginal and Torres Strait Islander people.[229] BOCSAR data shows that in 2016, Aboriginal and Torres Strait Islander people constituted 31% of all people imprisoned for driving while suspended or disqualified.[230] This is similar in other states and territories, and is particularly high in the NT.[231]

12.138 Nationally, 3% (270) of the total Aboriginal and Torres Strait Islander prison population in 2016 were imprisoned for traffic and vehicle regulatory offences (TVRO). This proportion was similar in the non-Indigenous prison population, at 2% (556).[232] However, Aboriginal and Torres Strait Islander peoples are over-represented in this prison population, constituting 33% of all prisoners imprisoned with traffic and vehicle regulatory offences nationally—and 100% in the NT.[233]

Table 12.2: Number and percentage of Aboriginal and Torres Strait Islander prisoners convicted of traffic and vehicle regulatory offences (TVRO) by state and territory (Dec 2016)

Jurisdiction	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Number of prisoners convicted of TVRO	3	96	70	17	13	10	6	58
Percentage of all prisoners convicted of TVRO who are Aboriginal and Torres Strait Islander peoples	18%	29%	**100%**	20%	20%	22%	7%	48%
Percentage of Aboriginal and Torres Strait Islander prisoners convicted of TVRO	3%	3%	5%	0.7%	2%	11%	1%	2%

Source: Australian Bureau of Statistics, *Prisoners in Australia 2016, Cat No 4517.0* (2016) table 15.

228 NSW Council of Social Service (NCOSS), *Submission 45*.
229 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].
230 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (2017) tables 5, 14.
231 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).
232 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 1.
233 Ibid.

12.139 TVRO include: driver licence offences; vehicle registration and roadworthiness offences; regulatory driving offences (such as speeding and parking offences); and pedestrian offences. They exclude: dangerous or negligent driving (including driving under the influence of alcohol or drugs and culpable driving); actually or potentially causing an injury; motor vehicle theft; and fraud related to motor vehicles.[234]

12.140 'Driver licence offences' include 'drive while licence suspended or disqualified', 'drive without licence' (where licence expired or unlicensed driving), and other driver licence offences including 'drive contrary to conditions of a restricted licence' and 'fail to produce licence on demand'.[235]

12.141 Stock prisoner figures are taken from census data. These data may hide the actual number of people—especially Aboriginal and Torres Strait Islander people—that driver licence offending affects. As discussed in Chapter 3, Prisoner census data limits our understanding of flow—the number of people imprisoned on short sentences which flow through the system over the period of a month, or six months or a year.[236] Austroads noted:

> Traffic related offences, including the direct and indirect impact of imprisonment for unpaid fines, are often identified as a small component of the cause of Aboriginal and Torres Strait Islander incarceration. This is a contested issue in the literature ... Nonetheless, the broader consequences of the disconnection and inequality resulting from reduced mobility are significant contributors to the underlying drivers of Aboriginal and Torres Strait Islander imprisonment rates.[237]

The provision of driver licence programs and services

12.142 Most jurisdictions require that for a person to attain a provisional driver licence, they must: complete a computer based testing procedure to attain a learner driver licence; complete minimum time period on that licence whereby the person completes a minimum number of supervised driving hours; and pass a driving test. These requirements have been described as 'frequently insurmountable'[238] that 'inadvertently disadvantage' vulnerable groups in accessing a licence.[239]

12.143 Driving in the bush is often viewed differently to driving in urban areas. In some communities, bush driving without a driver licence is intergenerational and normalised.[240] In 2009, the North Australian Aboriginal Justice Agency (NAAJA) suggested that community members in the NT should be able to drive unlicensed or in

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234 Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification, Cat No 1234.0* (2011) div 14.

235 Ibid sub-div 141.

236 Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 2; Alex Avery and Stuart Kinner, 'A Robust Estimate of the Number and Characteristics of Persons Released from Prison in Australia' (2015) 39(4) *Australian and New Zealand Journal of Public Health* 315, 315–317.

237 Austroads, *Submission 13*.

238 Patricia Cullen et al, 'Challenges to Driver Licensing Participation for Aboriginal People in Australia: A Systematic Review of the Literature', above n 221, 142.

239 Ibid 135.

240 Alice Barter, above n 147, 66.

unregistered cars within communities and on Aboriginal land on bush tracks, especially for hunting purposes.[241]

12.144 There has been support for the introduction of driver permit schemes for Aboriginal and Torres Strait Islander people living in some regional and remote areas. For example, in 2010, the Standing Committee on Aboriginal and Torres Strait Islander Affairs recommended the introduction of 'special remote area' driver licences.[242] 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 people.[243]

12.145 Some stakeholders to this Inquiry supported the introduction of regional driver permits for Aboriginal and Torres Strait Islander people in remote communities.[244] The ALSWA, for example, submitted that a reduced driver permit should provide for a reduced number of hours and learner and probationary periods. It should require fewer identity documents, with drivers having to undergo a modified test more relevant to country driving. Low income earners should access it on a reduced fee basis. ALSWA also submitted that a regional driver permit could relate to a person's community, relevant native title determination or regional boundaries, with an option to expand the permit after a certain period without any traffic convictions.[245]

12.146 Kimberly Community Legal Services did not support the design and implementation of a regional driver licence scheme, advising that it would 'create a more confusing and elaborate process of licensing than already exists'. It suggested instead that further consideration needs to be given to decreasing costs associated with licensing.[246] The Legal Services Commission of SA advocated a 'return to the previous model of a single, practical driving test conducted by local police' for Aboriginal people living remotely.[247]

12.147 The NSW Government submission advised the ALRC of the Restricted Provisional P1 Licence (RP1), available in certain regional and remote areas. The RP1 requires fewer hours of on-road driving experience (50 compared with 120 hours). The licence permits drivers to drive for work, education or medical purposes only. Take up of the RP1 has been low, and research has suggested that system barriers such as literacy; access to proof of identity documents, vehicles, petrol, and supervised drivers; and unpaid fines are still preventing young people in these regional areas from achieving 50 hours of supervised driving. While the RP1 is still available in NSW, [248]

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241 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).

242 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 220, rec 21.

243 Anthony and Blagg, above n 233, rec 13.

244 The Law Society of Western Australia, *Submission 111*; The Law Council of Australia, *Submission 108*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Legal Aid WA, *Submission 33*.

245 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

246 Kimberley Community Legal Services, *Submission 80*.

247 Legal Services Commission of South Australia, *Submission 17*.

248 NSW Bar Association, *Submission 88* supported this type of measure.

focus has relocated to addressing barriers through the Driver Licensing Access Program and Safer Driver Court Disadvantaged Learner Initiative (see below).[249]

Driver licence programs and services

12.148 The ALRC is not opposed to these and the other options discussed above. There is value in local solutions developed with Aboriginal and Torres Strait Islander communities. Nonetheless, the ALRC recommends that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations to identify gaps in servicing to remove the obstacles to Aboriginal and Torres Strait Islander peoples getting fully licensed. VALS/IWG stated that, in regards to driver licences, the 'priority should be investing in significant additional resources to ensure that Aboriginal and Torres Strait Islander people living in regional locations have better opportunities from a young age to obtain and keep a full drivers licence as opposed to a limited regional driver permit'.[250]

12.149 This is not a new proposal. 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.[251]

12.150 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.

12.151 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 the fine;
- 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.

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249 NSW Government, *Submission 85*.

250 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*. See also Northern Territory Government, *Submission 118*.

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

12.152 WA also has the Royalty for Regions program, which provides enhanced driver training and education in regional and remote communities;[252] the Remote Areas Licensing Program run by Department of Transport; and a community owned driving school in Roebourne (the Red Dirt Driving Academy*)*, which also provides assistance with getting identification. There are also other community-led[253] and NGO programs available throughout WA, such as those provided in the Kimberley by Life without Barriers.[254]

12.153 The NT Government developed DriveSafe NT Remote, which provides free licensing services to Aboriginal clients in remote NT communities. It uses

> verbal assessment methodology and unique educational resources to recognise the environmental and cultural attributes of Aboriginal learning styles and linguistically diverse population groups, many with low levels of English literacy with online versions available in English and three Aboriginal languages (Warlpiri, Yolgnu Matha and Kriol). In addition, driver education and licensing services are delivered in remote high schools and correctional institutions (prisons and work camps) through the Departments of Educational and Correctional Services.[255]

12.154 The program has provided for an increase in driver licensing rates for Aboriginal and Torres Strait Islander people living in the NT.[256] The NT Government submitted that, since the program's inception in 2012, it has delivered 4,671 learner licences, 1,713 provisional licences, and issued over 1,500 birth certificates, describing the program as a 'sustainable solution to the complex, multi-causal and interdependent barriers to getting a driver licence for clients who reside in remote and regional areas of the NT'.[257] A program evaluation published in 2017 concluded that the program offered flexible delivery and community engagement and had filled a need within communities.[258]

12.155 There are similar driver licence programs in NSW, including Driving Change; and the Balunda-a program (for offenders). Birrang Enterprises provides community-led literacy and training to adult Aboriginal and Torres Strait Islander people.[259] Programs also facilitate payment of fine default. An evaluation of the initial three pilot sites[260] for Driving Change was published in 2016.[261] This evaluation found that the program increased access to driver licences for young Aboriginal people and delivered a 'sufficiently flexible' program that was able to respond to 'community and

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252 Advice Correspondence, Stephen Cannon (15 May 2017).
253 Alice Barter, above n 147, 68.
254 See, *Life without Barriers, David's Dream* <http://www.lwb.org.au/about-us/news-and-events/davids-dream/>.
255 Northern Territory Government, *Submission 118*.
256 Patricia Cullen et al, '"The Program Was the Solution to the Problem": Process Evaluation of a Multi-Site Driver Licensing Program in Remote Communities', above n 223, 81.
257 Northern Territory Government, *Submission 118*.
258 Patricia Cullen et al, '"The Program Was the Solution to the Problem": Process Evaluation of a Multi-Site Driver Licensing Program in Remote Communities', above n 223, 84, 88.
259 See also Transport for NSW, 'NSW Aboriginal Road Safety Action Plan 2014–2017' (December 2014).
260 Redfern, Griffith and Shellharbour.
261 Patricia Cullen et al, 'Implementation of a Driver Licensing Support Program in Three Aboriginal Communities: A Brief Report from a Pilot Program' (2016) 27(2) *Health Promotion Journal of Australia* 167.

client identified need'. It reported that 22% of people who participated in the program sought help for fine and debt management, and 22% had sanctions lifted.[262] The program is to expand into a further nine communities in NSW.[263]

12.156 Driver training is also a key element of the Maranguka Justice Reinvestment Program in Bourke, NSW. In 2013, Bourke was identified to have the highest number of driver licences offences in the state. In response, the Maranguka Justice Reinvestment Project developed the driver licensing program, which commenced in late 2015. Under the project, a person can either volunteer, or be referred by police (as a diversion strategy) to take part in the program. The program provides:

- access to registered cars, driver mentors and associated costs;
- removal of barriers to identity documents;
- case management of the services required by the individual; and
- the opportunity to obtain a Certificate 1 in Automotive Mechanics.

12.157 From December 2015–September 2016, 58 licences were obtained; two people required assistance gaining documentation; and 53 required assistance with SDR, WDOs or Centrepay. Four people had secured employment due to having a driver licence. Similar statistics were provided by Just Reinvest NSW from October 2016 to June 2017.[264]

12.158 The NSW Government submission also outlined the Driver Licensing Access Program, which provides culturally appropriate support services including literacy, numeracy and computer skills, access to roadworthy vehicles, debt negotiation and management and learner driver mentoring and supervision.[265] The NSW Government submission further informed the ALRC of the Driving and Licences Offences Project, which provides support to Aboriginal and Torres Strait Islander peoples appearing in court for driving or licensing offences in some regional and remote local courts. Through this project, driving offenders can be referred to services such as Births Deaths and Marriages for identification, SDR to put in place time-to-pay plans or referrals to WDOs to reduce fines and retain or regain licences.[266]

12.159 Similar programs are run in other jurisdictions. The Queensland Department of Transport and Mains Road Indigenous Driver Licensing Unit operate the Indigenous Driver Licensing Program, which provides licensing services to some Aboriginal and Torres Strait Islander communities in Far North Queensland.[267] Victoria has a Learner to Permit program, which is reportedly used by Aboriginal and Torres Strait Islander

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262 Ibid table 2.
263 Ibid abstract.
264 Just Reinvest NSW, *Submission 82*.
265 See also, *Driver Licences, Freedom and opportunity*, <http://roadsafety.transport.nsw.gov.au/aboutthecentre/aboriginalprojects/licensing.html>
266 NSW Government, *Submission 85*.
267 See, *Indigenous Driver Licensing Program*, <https://www.tmr.qld.gov.au/Community-and-environment/Indigenous-programs/Indigenous-driver-licensing-program.aspx>

young people.[268] The SA Government runs the 'On the Right Track Remote' driver licensing service. Under this program, some clients can be exempted from some aspects of the Graduated Licensing Scheme, specifically the number of hours of supervised driving and the length of time required on a learner permit.[269] A program for a driver licensing pilot for Aboriginal and Torres Strait Islander people in the ACT is under development.[270] These types of programs were supported by stakeholders.[271]

12.160 The NSW Auditor-General's 2013 report, *Improving Legal and Safe Driving among Aboriginal People*, outlined characteristics of successful driver licence programs. These included using and building on community capacity; having program champions; and involving Aboriginal and Torres Strait Islander peoples in program development and delivery.[272] In their submission to this Inquiry, Austroads advised the ALRC of its project, 'Improving Driver Licensing Programs for Indigenous Road Users and Transitioning Learnings to Other User Groups'. The project aims to provide national policy principles to guide further Aboriginal and Torres Strait Islander program development; provide service-level solutions to licence barriers; and better link data sources and information sharing. The project is scheduled for completion in August 2018.[273]

12.161 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.[274] Driver licence programs require coordination between different government departments, such as Births, Deaths and Marriages, Attorneys-General, and Roads and Maritime Services. This happened 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.[275]

12.162 ALSWA suggested that, to improve the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities, an increase in the frequency and geographic scope of current programs in WA was needed. It also suggested that school driver licence programs be run in all regional schools; that regional and remote communities receive reduced fees for all government resources and services related to driving tests for Aboriginal and Torres Strait Islander people, and that the services produce culturally appropriate material; and that government

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268 Mission Australia, *Submission 53*.
269 See, *On the Right Track, Aboriginal Road Safety and Driver Licensing Program*, <http://www.dpti.sa.gov.au/ontherighttrack>.
270 ACT Government, *Submission 110*.
271 See, eg, NSW Council of Social Service (NCOSS), *Submission 45*; ACT Law Society, *Submission 40*. For a summary of available programs nationwide see Austroads, *Submission 13*.
272 Audit Office of New South Wales, above n 148, 4.
273 Austroads, *Submission 13*.
274 Audit Office of New South Wales, above n 148, 4.
275 Ibid 4, 55.

uncouple the Department of Transport offices from law enforcement facilities, and employ Aboriginal and Torres Strait Islander people. [276]

12.163 Incorporating driver programs into the school curriculum was supported. Mission Australia advised that, in Victoria, this was provided by Changing Gears and Ignition programs in remote area schools.[277] In WA, the Department of Transport had partnered with schools to implement programs to assist students to obtain their learner permit and progress to a provisional driver licence.[278]

12.164 It was also suggested that school-age children receive information on getting a licence, and the consequences of driving without one.[279]

12.165 Other suggestions have included:

- the expansion and better use of WDOs and legal solutions, such as court diversion programs to attain a driver licence;[280] and
- requiring people who are detected driving while unlicensed to undergo training (including through alternative methods of testing competency which may not rely on literacy) for a licence rather than facing mandatory disqualification from becoming licensed.[281]

12.166 Under-licensing can result in serious consequences for Aboriginal and Torres Strait Islander people who choose, or need, to drive unlicensed. While work has been done to improve access to driver licences, there remains an imperative for state and territory governments to work with Aboriginal and Torres Strait Islander communities to enhance and commit to current and new government driver education programs.[282]

Infringement notices for offensive language

12.167 Stakeholders to this Inquiry have advised that offensive language provisions and subsequent infringement notices for such conduct continue to be an issue for Aboriginal and Torres Strait Islander peoples.

276 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
277 Mission Australia, *Submission 53*.
278 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
279 The Law Society of Western Australia, *Submission 111*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
280 Kathleen Clapham et al, above n 149, 281.
281 NSW Bar Association, *Submission 88*.
282 Kathleen Clapham et al, above n 149, 281.

Recommendation 12–4 State and territory governments should review the effect on Aboriginal and Torres Strait Islander peoples of statutory provisions that criminalise offensive language with a view to:

- repealing the provisions; or
- narrowing the application of those provisions to language that is abusive or threatening.

Statutory frameworks

12.168 All states and territories have provisions that criminalise the use of offensive language in a public place.[283] A person may receive an infringement notice for using offensive language from various issuing officers,[284] including police—where the infringement notice is generally referred to as a Criminal Infringement Notice (CIN). Police can issue CINs for offensive language in all states and territories except SA, Tasmania and the ACT, where the matter must go before the court.[285] In the jurisdictions with CINs, there remains an option for police to arrest or issue a court attendance notice for the matter to go before the court.

12.169 CINs are a relatively new form of infringement notice. For example, NSW introduced CINs in 2004, and WA introduced CINs in 2016.[286]

12.170 The penalty amount for offensive language CINs ranges from $110 in Queensland to $500 in NSW and WA.[287] When appearing in court, the maximum fine ranges from $660 in NSW to $6,000 in WA, with the majority of jurisdictions having maximum fines of approximately $1,000. A sentence of imprisonment can also be imposed in all jurisdictions except NSW and WA.[288]

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283 *Crimes Act 1900* (NSW) s 392; *Summary Offences Act* (NT) ss 47, 53; *Summary Offences Regulations 1994* (NT) reg 4A; *Summary Offences Act 1988* (NSW) s 4A(1); *Summary Offences Act 2005* (Qld) s 6; *State Penalties Enforcement Act 1999* (Qld); *Summary Offences Act 1953* (SA) ss 7, 22; *Police Offences Act 1935* (Tas) s 12; *Summary Offences Act 1966* (Vic) ss 17, 60A–60AB; *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; *Criminal Procedure Act 2004* (WA) ss 8–9; *Criminal Code 1913* (WA) ss 74A, 720–3.

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

285 *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.

286 *Criminal Code Amendment (Infringement Notices) Act 2011* (WA).

287 In 2014, NSW increased the penalty amount for offensive conduct and language from $200 to $500: *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW); *Criminal Procedure Regulation 2017*, sch 4.

288 *Summary Offences Act* (NT) ss 47, 53; *Summary Offences Act 2005* (Qld) s 6(3); *Summary Offences Act 1953* (SA) ss 7, 22; *Police Offences Act 1935* (Tas) s 12; *Summary Offences Act 1966* (Vic) ss 17, 60AA–

The impact on Aboriginal and Torres Strait Islander peoples

12.171 Aboriginal and Torres Strait Islander people remain over-represented as recipients of offensive language CINs.[289] For example, the NSW Ombudsman found that 11% of CINs for offensive language in 2008 were issued to Aboriginal and Torres Strait Islander people.[290] More recently, it was reported that the proportion had risen to 17%.[291] 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 SDR for enforcement. By comparison, 48% of all CIN penalty notices were referred for enforcement.[292]

12.172 Professor Tamara Walsh submitted that Aboriginal people in Queensland are up to 12 times more likely to be charged with or receive infringement notices for public nuisance than non-Indigenous people. In most cases, offensive language was directed at police officers. Where these matters were dealt with in the court, Aboriginal and Torres Strait Islander people were more likely to receive a custodial sentence.[293]

12.173 The issues regarding offensive language provisions and how they are applied to Aboriginal and Torres Strait Islander people have been well ventilated. Primarily: most offensive language CINs are issued for language directed at police;[294] and, if tested in court, may not meet the legal definition of 'offensive'.[295] Instead, under CINs, police are the 'victim, enforcer and judge' of the law, which provides strong foundation for conflict and misuse.[296]

12.174 The RCIADIC recognised the role of offensive language provisions in incarcerating Aboriginal and Torres Strait Islander people, and recommended that offensive language provisions be monitored.[297]

12.175 The high incidence of Aboriginal and Torres Strait Islander offensive language offending has been ascribed to the likelihood of Aboriginal and Torres Strait Islander people being out in public, amounting to an increased likelihood of police interaction.[298] Aboriginal and Torres Strait Islander people are likely to be over-represented in areas of social disadvantage, including homelessness, mental health

60AB; 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. See also Northern Territory Government, *Submission 118*; Dr Elyse Methven, *Submission 114*.

289 Dr Elyse Methven, *Submission 114*.

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

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

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

293 Associate Professor T Walsh, *Submission 51*.

294 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012); Dr Elyse Methven, *Submission 114*.

295 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).

296 Dr Elyse Methven, *Submission 114*.

297 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 rec 86.

298 The Law Council of Australia, *Submission 108*.

issues and lower education; and are more likely to be reliant on public services.[299] This visibility means that there is a high likelihood of interaction with police, which can easily escalate.[300]

12.176 It has also been reported that there is an acceptance of swear words in the vernacular of some Aboriginal and Torres Strait Islander communities.[301] The use of swear words when interacting with police may be an expression of resistance to police but also may represent cultural differences in attitudes to swearing, where it may be more 'routine' in some Aboriginal communities.[302] This may not always be the case. The NT Government suggested to this Inquiry that some Aboriginal communities welcome the criminalisation of offensive language:

> A person's right to feel safe in the community should not be compromised, and the lessening of community value standards through abolition of such offences could contribute to decreased social amenity. A recurring theme in Aboriginal communities as part of the NT Police community safety management process is the importance of a safe community, free from offensive language and disorderly behaviours. Community members often pose sanction options that should apply if people engage in offensive behaviour and the use of offensive language as Aboriginal communities state it is detrimental to the values they wish to uphold in their communities.[303]

Offensive language provisions should be reviewed

12.177 Offensive language provisions have a particular history associated with Aboriginal and Torres Strait Islander peoples, and have wide application. There may be value in, if not abolishing relevant offensive language provisions, then narrowing their application.

12.178 Abolition may result in unintended consequences—it may leave police without a tool to manage some situations, and may even result in more serious charges being laid. It may therefore be most appropriate for states and territories to narrow the application of relevant provisions to language voiced in public which is threatening or abusive. This would remove the option for a person to be fined for telling police something was 'none of their fucking business', for example, but retain the option for police to issue CINs when threatened or abused. It may be, however, that certain threatening or abusive conduct is already proscribed by the criminal law in some states and territories, and that police can use move-on powers, intoxication, assault or inciting provisions when needed.[304]

12.179 The ALRC suggests that states and territories evaluate their relevant offensive language provisions.

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299 See ch 2.

300 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Dr Elyse Methven, *Submission 114*.

301 Dr Elyse Methven, *Submission 114*.

302 Ibid.

303 Northern Territory Government, *Submission 118*.

304 See, eg, *Summary Offences Act 1988* (NSW) s 9; *Crimes Act 1900* (NSW) 1900 s 60; Dr Elyse Methven, *Submission 114*. It is noted that not many of these provisions come under CIN regimes.

Options for reform

12.180 Stakeholders in this Inquiry expressed strong support for the abolition of all offensive language provisions.[305] Stakeholders submitted that these provisions were disproportionately used and had a disproportionate effect on Aboriginal and Torres Strait Islander people.[306]

12.181 Redfern Legal Centre supported abolition of the offence of offensive language, noting that 'though ostensibly less serious than criminal proceedings, the consequences of receiving a CIN can be significant'.[307] It argued that Aboriginal and Torres Strait Islander people are unlikely to request a review or elect to have a CIN dealt with by the court, even where it is likely that the offensive language will not satisfy the legal test. As a result, the 'overwhelming majority' of CINs issued to Aboriginal and Torres Strait Islander people for offensive language were not scrutinised by a court. In Redfern Legal Centre's view, the CIN scheme had not met its stated aims of diverting people away from the criminal justice system: it instead involved them further through fine default and involved more people through net widening.[308]

12.182 The ALSWA noted that, for many Aboriginal and Torres Strait Islander people, the penalty amount of $500 in WA would be 'impossible to pay'.[309] Kimberly Community Legal Services argued that for 'Aboriginal people, the homeless and other disadvantaged groups the imposition of such a fine is tantamount to a prison sentence in WA'.[310]

12.183 Some stakeholders considered offensive language provisions to be outmoded.[311] The NSW Bar Association asserted that, not only are these types of provisions no longer needed, but that their continuing use 'brings the law into disrepute':

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305 See, eg, Sisters Inside, *Submission 119*; Dr Elyse Methven, *Submission 114*; The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; Kimberley Community Legal Services, *Submission 80*; Redfern Legal Centre, *Submission 79*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; S McLean Cullen, *Submission 64*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Caxton Legal Centre, *Submission 47*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Associate Professor L Bartels, *Submission 21*; Commissioner for Children and Young People Western Australia, *Submission 16*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

306 See, eg, NSW Bar Association, *Submission 88*; Redfern Legal Centre, *Submission 79*; Caxton Legal Centre, *Submission 47*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

307 Redfern Legal Centre, *Submission 79*.

308 Ibid.

309 Aboriginal Legal Service of Western Australia Limited, *Submission 74*. Also see Legal Aid NSW, *Submission 101*.

310 Kimberley Community Legal Services, *Submission 80*.

311 Dr Elyse Methven, *Submission 114*.

> Historically, the offence has been used disproportionately against Aboriginal and Torres Strait Islander people, and it is likely to continue to be so used. There is no justification for its retention. Other existing laws provide protection from verbal threats and intimidation.[312]

12.184 Short of abolition, there are other options by which to reduce the use of offensive language provisions. For example, the NSWLRC has previously 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.[313] This approach garnered some support from stakeholders to this Inquiry. Redfern Legal Centre supported this with an additional requirement to examine and monitor usage on Aboriginal and Torres Strait Islander peoples.[314] VALS/IWG suggested, however, that police oversight without any other mechanism may not be an effective measure to prevent the imposition of fines, especially multiple fines.[315]

12.185 The YLCLC suggested that the NSW provision should also include a requirement that offensive language is used at a 'time or in circumstances at which it was likely to be heard by a reasonable member of the public and it caused offence or was done in a manner likely to cause offence to a reasonable member of the public'.[316] Professor Tamara Walsh suggested that, if retained, the threshold of 'offensiveness' set by the High Court in *Coleman v Power* (2004)[317] should be spelt out within the relevant provisions—that is that offensive behaviour provisions were meant to protect the public from harms including disorder, violence, intimidation and serious affront.[318]

12.186 The Law Society of WA suggested that offensive language should only be capable of criminal sanction where it forms part of a more serious set of circumstances giving rise to a breach of the peace.[319] The Law Council of Australia suggested that only language that is so 'grossly offensive as to amount to vilification or intimation' ought to be criminalised.[320]

The reforms of this chapter

12.187 Offensive language CINs provide an example of how fine systems can operate in a way that disproportionately affects Aboriginal and Torres Strait Islander people. The ALRC has heard of people receiving multiple infringement notices for swearing more than once in the same transaction. Swearing need not be abusive or threatening, and can be a consequence of everyday vernacular. The large penalty amounts render offensive language CINs difficult to pay, and are likely to result in the

312 NSW Bar Association, *Submission 88*.
313 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) recs 10.2–10.3.
314 Redfern Legal Centre, *Submission 79*.
315 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
316 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.
317 *Coleman v Power* (2004) 220 CLR 1.
318 Associate Professor T Walsh, *Submission 51*.
319 The Law Society of Western Australia, *Submission 111*.
320 The Law Council of Australia, *Submission 108*. See also Dr Elyse Methven, *Submission 114*.

offender entering the fine enforcement regime. It some jurisdictions it can result in prison.

12.188 The recommendations in this chapter aim to circumscribe the effects of such provisions. Under these, the issuing officer would be directed to recognise circumstances when the imposition of a formal caution is more appropriate. Police in SA can issue a caution to adults for offensive language offending, including for swearing at police.[321] Cautioning is particularly appropriate to offensive language offending, which is more often than not a 'victimless crime'.[322]

12.189 When cautioning is not appropriate, or has not been effective, the recommendations of this chapter would provide that the monetary penalty attached to a fine for offensive language be decreased to a more manageable amount. Offensive language CINs carry high penalties. As noted above, an imposition of a $500 fine on many Aboriginal and Torres Strait Islander people is insurmountable, and is likely to cause a person to enter the fine enforcement regime.

12.190 Under the recommendations in this chapter, when unable to pay the decreased amount, the offender could opt to pay the fine via a WDO.

12.191 This mitigation would apply to other types of offending that lead to the issuing of infringement notices or CINs. 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'.[323] 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.[324] Stakeholders to this Inquiry also pointed to alcohol, begging offences, and move-on powers as problematic provisions for Aboriginal and Torres Strait Islander peoples.[325]

12.192 Nonetheless, as offensive language provisions particularly affect Aboriginal and Torres Strait Islander people, the ALRC recommends state and territory governments review the relevant statutes with a view to repealing or narrowing the application of the provisions.

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321 South Australia Police, above n 82.
322 Queensland Advocacy Incorporated, *Submission 60*. See also Redfern Legal Centre, *Submission 79*.
323 *Summary Offences Act 1988* (NSW) s 9.
324 NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988* (2014) 3.
325 Redfern Legal Centre, *Submission 79*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Victorian Aboriginal Legal Service, *Submission 39*.