

The Hon. A. R. Abadee RFD QC
Chairperson
New South Wales Sentencing Council
GPO Box 6
Sydney NSW 2001

23 February 2006

Re: Submission to NSW Sentencing Council on Court Imposed Fines and their Enforcement

Dear Mr Abadee,

Thank you for your invitation to contribute to your consideration of court imposed fines and their enforcement.

UnitingCare NSW.ACT is concerned that procedures around fines and implications for fine defaulting remain flexible and clearly distinguish between those who refuse to pay and those who cannot afford to pay fines. The driving principle must be that prison remains a punishment of last resort.

We recommend that the consequences for those who do not pay fines be altered, so that:

1. There is a distinction between those who cannot afford their fines, and those who refuse to pay their fines;
2. More flexibility is available to the former group, through measures such as
 - a. returning the power to grant time extensions from the court registrar to the Magistrate; and
 - b. use of the fine option, so that people can choose to pay a fine through community service before licence disqualification;
3. The suspension, cancellation or disqualification of a driver's licence is done through a process in which individual circumstances are taken into account from the beginning, rather than through an automated process which may then be appealed; and
4. More care is taken to ensure that people are notified when their licence is suspended, cancelled or disqualified.

Yours sincerely,



Harry Herbert
Executive Director

About UnitingCare NSW.ACT

UnitingCare NSW.ACT is the peak body for all community services, chaplaincy and the social justice and advocacy activities of the Uniting Church in the New South Wales Synod. Its work is inspired and guided by the biblical principles of justice and compassion, by insights of social, political and economic analysis, and by the experience of those who are poor and marginalised in Australian society.

Our reflections on the question of court imposed fines are guided by a central concern for the dignity of every human being, and desire for social cohesion and communities in which all people are able to live life to the full. In consideration of the effects of detention on individuals and communities, Australian churches have together emphasised the critical importance of prison remaining a last resort in sentencing matters.¹

1. The effectiveness of fines as a sentencing option

Fines are presently used as a sentencing option for relatively non-serious offences, and for this reason accounted for 50.2 per cent of sentence types in NSW local courts in 2002. This represents a drop from 62.6 per cent in 1992, with one of the primary reasons for this being an increase in suspended sentences.²

The aims of sentencing embedded in the common law are retribution, deterrence, denunciation, rehabilitation and incapacitation.³ Sentencing must be in line with the principles of human rights and with the ultimate goal of restoring the relationship between people and communities.⁴ That is, an effective sentencing option is one which assists the offender and the community to live together in the long run and which respects the fundamental human dignity of each person. The least effective sentencing options – those least likely to lower rates of recidivism – include sentencing options which rely on a “short, sharp shock” or are primarily punitive.⁵ The approach of serving out “just desserts” is “contrary to the goal of rehabilitation”.⁶

From this perspective fines are an appropriate option for dealing with minor offences. Given that offenders who have already been in custody are 1.59 to 2.84 times more likely to re-offend than those who have no prior custodial history, fines may be effective in reducing recidivism if they are seen as an alternative to prison.⁷

However if fines are used as a sentencing option it is essential that they be fair. Minimum or mandatory sentencing as well as standard (non-variable) fines are problematic in this regard, as people on low

¹ Church Agencies. 1988. *Prison – The Last Resort*. Collins Dove, Blackburn

² Keane J, Poletti P. 2003. “Common offences in the local court”, *Sentencing Trends & Issues*. Judicial Commission of New South Wales. 28 (September).

³ Law Reform Commission NSW. 1996. pp.331-332, cited in Select Committee on the Increase in Prison Population. 2001. *Final Report*. Sydney. p.4

⁴ Church Agencies. 1988. *Prison – The Last Resort*. Collins Dove, Blackburn. p.33

⁵ Chen, S et al. 2005. “The transition from juvenile to adult criminal careers”, *Crime and Justice Bulletin*. NSW Bureau of Crime Statistics and Research. 86. pp.10-11

⁶ Church Agencies. 1988. *Prison – The Last Resort*. p.17

⁷ Jones C, et al. 2006. “Risk of re-offending among parolees”, *Crime and justice bulletin*. NSW Bureau of Crime Statistics and Research. Sydney. 91. p.6; Beyond Bars 2004. *Alternatives to Custody*, Beyond Bars Fact Sheet no.7. p.1

incomes are more severely affected.⁸ Fines which are not adjusted according to the person's ability to pay can be so great a proportion of weekly income for certain people that the penalty becomes out of balance with the offence.⁹ This negates any possible benefits of fines, in particular that they reflect the status of an offence as relatively minor.

At present there is a degree of flexibility in the setting of some fines, particularly Court-imposed fines. A Court can adjust the amount of the fine according to the offender's income, and an extension of time to pay is available on application to the registrar. The present flexibility must be maintained and strengthened, if fines are to be effective and in proportion to the severity of the offence.

This flexibility requires the protection of judicial discretion, and ensuring that decisions made by bureaucratic means are transparent and equitable. Previously the Magistrate, rather than the registrar, was able to determine time to pay at the moment when the fine was issued. Under the present system there is no right to appeal a registrar's decision, and it is the offender's responsibility to lodge a request for a time extension. Returning this power to the Magistrate would make the system more responsive to the needs of the poor.¹⁰

Furthermore, under the present system community service orders are issued only after an offender has made a default in payment and had other non-custodial sanctions enacted, including suspension of driver's licence. Fine option orders could be used to allow some offenders to apply to pay off the fine immediately by opting to undertake community service work if they would find it difficult to pay the fine.¹¹

2. *Consequences for those who do not pay fines, paying particular regard to increases in imprisonment for offences against sections 25 and 25A of the Road Transport (Driver Licensing) Act 1998*

Under the Fines Act 1996, an enforcement order is issued when a fine has not been paid, and if the fine is still not paid by the date given in the enforcement order, that person's driver's license is suspended and then cancelled six months later if the fine is still unpaid. This is the case whether or not the fine is related to a traffic offence.¹² For certain groups of people, such as those without access to alternative means of transportation or those who need a driver's licence for employment or job-seeking, such a penalty may be particularly damaging and impinge on their ability to repay their fine.¹³

The relevant offences for which people may be imprisoned are found in section 25 of the Road Transport (Driver Licensing) Act 1998 which states that a driver must be licensed, and section 25A which relates to offences committed by disqualified drivers or drivers whose licences are suspended or cancelled. Offences against these sections of the Act accounted for four of the top 20 offences sentenced by NSW Local Courts in 2002. With the exception of the offence of drive while disqualified, fines were the main penalty and there was frequent use of licence disqualification. Twenty-nine

8 Hamilton C. 2004. *Making fines fairer*. Australia Institute. Sydney. pp.1-2

9 Hamilton C. 2004. *Making fines fairer*. p.1; Church Agencies. 1988. *Prison – The Last Resort*. p.33

10 Law Reform Commission NSW. 1996. *Report 79 – Sentencing*. Section 3.

11 *Ibid*.

12 *Ibid*.

13 Law and Justice Foundation of NSW. 2003. *Access to Justice Roundtable: Proceedings of a workshop, July 2002*. Sydney. Accessible at <http://www.lawfoundation.net.au/publications/reports/ajr/ajr.pdf> p.137

per cent of those found to drive without being licensed were disqualified from having a licence, as were 76.4 per cent of those who drove while suspended, 87.2 per cent of those who drove while licence refused/cancelled and 95.7 per cent of those who drove while already disqualified. For those offenders who were not fined, there appears to be generally growing use of alternatives to prison and non-custodial sentences, including good behaviour bonds, suspended sentences, and community service orders. However in the case of driving while disqualified, there was a jump in sentences of imprisonment, with 18.8 per cent sentenced to prison.¹⁴

The rate of imprisonment for those found to drive while disqualified raises a concern that this may reflect a system where prison is not used as a last resort. Therefore it is important that licences are only disqualified when necessary, and not as a means of punishment for people who have been unable to pay fines.

People who do not pay fines are likely to have their driver's licence suspended or cancelled. However in some cases people who have their licence suspended or cancelled continue to drive, and if caught, their licence is more likely to be disqualified and they may eventually be imprisoned. There is insufficient research into the reasons why people drive while their licence is suspended or cancelled, but it may be because they have little choice but to drive. It may be that a person requires a driver's licence for employment or because they do not live near public transport. Homeless people are likely to struggle to pay any accrued fines, yet may not be aware that they have lost their licence as they are difficult to contact, having no fixed address.

Indigenous people are particularly likely to be gaoled for driving without a licence, and often are unable to obtain a licence both before and after prison because of extensive debts. This is of special concern because the inability to obtain a licence may be an obstacle to rehabilitation, and because keeping indigenous people out of prison was identified as essential by the Royal Commission into Aboriginal Deaths in Custody.¹⁵ Despite its recommendations, Indigenous Australians remain grossly overrepresented in the prison system in Australia.

It is of concern that people in these groups, particularly those who have difficulty paying fines, may end up having their licences disqualified unnecessarily – and potentially face imprisonment if they continue to drive. It is important that punitive measures such as loss of licence be applied only to those who wilfully default on fine payments, rather than to those who face real economic difficulties.

Attention is required to ensure the conditions for reinstating licences as well as the grounds on which time to pay may be granted are fair and sufficient. At present, people who do not pay their fines have their licences suspended or cancelled automatically, and have no option to work off the fine through community service without first having made a fine default and had sanctions such as loss of licence applied. If care is not taken to provide sufficient information about available options and make sure that those options are accessible, then this can lead to people who are unable to pay fines being more likely to be sentenced under sections 25 and 25A of the Road Transport (Driver Licensing) Act, which may ultimately lead to imprisonment for driving while disqualified.

14 Keane J, Poletti P. "Common offences in the local court". 2003.

15 Jones A, Hyslop D. 2001. *'Can't wait to get out and drive past the cops. This time I'll have a licence': Pre-release programs in NSW correctional centres – driver education at Mannus*. Australian Institute of Criminology. Accessible at <http://www.aic.gov.au/conferences/indigenous2/hyslop.pdf> pp.3-4

As a result, it is likely that people on low incomes, homeless people, and Aboriginal people are more severely affected by the use of fines as a sentencing option, and may be more likely to be imprisoned as they become caught up in the criminal justice system. This is particularly problematic as the median and mode sentence for driving while disqualified was relatively short, at only six months.¹⁶ People sentenced to less than six months imprisonment are unable to access rehabilitation and training services, are generally not covered by the Probation and Parole Service's post-release supervision programs, and are exposed to criminals serving time for more serious offences.¹⁷

For these reasons, steps must be taken to ensure that prison is genuinely a last resort. In particular, where fines are used as a sentencing option, the penalties for fine default must be carefully applied so as to avoid unnecessary imprisonment for those who struggle to pay.

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16 Keane J, Poletti P. "Common offences in the local court". 2003.

17 Beyond Bars. 2004. *Alternatives to Custody*. p.3