NSW Sentencing Council

Judicial perceptions of fines as a sentencing option

A survey of NSW magistrates

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Contents

Table of cases

Table of statutes

Children (Criminal Proceeding) Act 1987

Crimes Act 1900

Crimes and Courts Legislation Amendment Act 2006

Crimes (Sentencing Procedure) Act 1999

Fines Act 1996

Inclosed Lands Protection Act 1901

Justices Act 1902

Penalty and Sentences Act 1992 (QLD)

Road Transport (Driver Licencing) Act 1998

Road Transport (Safety and Traffic Management) Act 1999

Road Transport (General) Act 1999

Road Transport (General) Act 2005

State Penalties Enforcement Act 1999 (QLD)

Summary Offences Act 1988

Traffic Act 1909

List of tables and figures

Tables

Figures

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INTRODUCTION

In November 2006, the New South Wales Sentencing Council approached the Judicial Commission of New South Wales to provide assistance with the data analysis of a survey of magistrates. The survey forms part of a wider evaluation of the Sentencing Council's review of effectiveness of fines as a sentencing option.

Given that fines are the most common penalty handed down by magistrates in the Local Court (accounting for 54.4% of all first-instance sentencing cases in 2005),[1] the Judicial Commission was enthusiastic to participate in this study.

1.1 Background

The NSW Sentencing Council fines reference

On 16 November 2005, the Sentencing Council received a reference from the then Attorney General, the Hon Bob Debus, inter alia in the following terms:

> "Pursuant to section 100J(1)(d) of the *Crimes (Sentencing Procedure) Act* 1999 I refer the following issues to the Sentencing Council for consideration and report:
>
> (a) Fines
>
> (i) The effectiveness of fines as a sentencing option;
>
> (ii) 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 Licencing) Act* 1998."

Scope of terms

The terms of reference specified that the Sentencing Council was to consider fines as a *sentencing* option. Accordingly, the Sentencing Council originally limited its investigation to the true sentencing issues related to court-imposed fines, excluding consideration of the imposition of penalty notices or "on the spot fines".[2]

[1] This figure is based on the Judicial Information Research System (JIRS) data maintained by the Judicial Commission (75,543 out of 138,974 cases). According to the NSW Bureau of Crime Statistics and Research (BOCSAR), *New South Wales Criminal Courts Statistics*, 2005, the most frequently imposed principal penalty in 2005 was a fine (56,528 out of 113,291; or 49.9%). The different figures in the two sources may be explained by the exclusion of most cases, from the BOCSAR report, involving offences contained in Regulations – which are more likely to receive fines than offences under Acts (69.9% compared with 50.3%). In 2005, regulatory offences accounted for 20.6% of all principal offences in the Local Court. On the other hand, JIRS data excludes cases involving some breaches of justice orders such as, good behaviour bonds and community service orders – which have a lower than average rate of fines imposed (9.6%). JIRS excludes these cases on the basis that they are a "call-up" for a failure to comply with a judicial order, rather than an "offence" in the strict sense of the word. In 2005, such breaches accounted for 1.5% of all principal offences in the Local Court.

[2] Imposed for offences such as illegal parking, speeding, driving trough a red light, catching public transport without a ticket, having a dog that is not under effective control, or not voting in a government election.

In August 2006, following discussions with the Attorney General and by reason of the common issues that arise, the Sentencing Council agreed to widen its terms to include the imposition and judicial review of penalty notices.

The interim report on fines

The Sentencing Council's interim report on fines and penalty notices, was provided to the Attorney General in October 2006.[3] The report includes an assessment of the fines regime in all Australian jurisdictions, based on a review of national and international literature on fines, and analysis of submissions and statistical data.

The Sentencing Council engaged in an extensive consultation process, meeting with approximately 150 people in 50 face to face meetings held across the State. Magistrates, Local Court staff, legal representatives, police, prosecutors, local councils, community agencies and Indigenous representatives from four regional communities (Lismore, Kempsey, Dubbo and Broken Hill) were consulted. Meetings were also held with District Court judges on circuit in Dubbo and Broken Hill.

Interviews with staff and inmate delegate representatives were conducted in six correctional centres. Male prisoners were interviewed at the Metropolitan Reception and Remand Centre (MRRC); Silverwater; John Moroney 1; Broken Hill and the Mid North Coast correctional centres. Female prisoners were consulted at the Mid North Coast and Dilwynnia correctional centres.

The Sentencing Council also met with representatives of the State Debt Recovery Office (SDRO) and the Roads and Traffic Authority (RTA) to discuss relevant issues.

Written submissions were invited from government and community agencies: 56 submissions were received.

As part of its investigation, the Sentencing Council also surveyed NSW magistrates regarding their views on fines. A preliminary analysis (conducted by the Sentencing Council) of a quarter of the responses received was incorporated into the *Interim Report on Fines*.

1.2 Aim of the survey

The judicial survey was designed to examine how court-imposed fines are being imposed. Specifically, the survey aimed to identify the factors taken into consideration when a magistrate is determining firstly, whether a fine ought to be imposed, and secondly, its quantum. The survey also examined judicial perceptions of the advantages and disadvantages of the fine, and its effectiveness as a sentencing option.

Court and registry processes implemented in response to default were also examined. Specifically, the survey explored judicial views of administrative procedures imposed

[3] NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court Imposed Fines and Penalty Notices – Interim Report*, (forthcoming).

in response to fine default, such as mandatory licence suspension, and of accumulated sanctions in the form of habitual driver declarations.

This study presents the findings of the survey and discusses the issues identified by the survey respondents. The report will be disseminated to all magistrates in NSW.

Methodology

In order to gauge judicial views and assess current practices in the imposition of fines, the Sentencing Council developed a survey that drew on a 2003 New Zealand precedent from the Ministry of Justice[4] and reflected recent developments in courtroom practice in the United Kingdom and the United States. A copy of the questionnaire is contained in the Appendix.

The survey consisted of 37 questions and broadly covered the following areas:

- Sentencing outcomes for all offences (Questions 1 to 11)
- Sentencing procedure, such as to what extent are financial circumstances of the offender clearly understood, and where possible, verified (Questions 12 to 17)
- Explaining the consequences of non-payment (Questions 19 to 20)
- Dealing with prior fine default (Questions 21 to 25)
- Other comments, including: the perceived advantages and disadvantages of fines as a sentencing option; how information about the offender's circumstances could be improved to assist the Court in determining a fine; the appropriateness of suspending driver licences for non-payment of fines; and the appropriateness of mandatory disqualification periods and habitual driver declarations (Questions 26 to 37).

Case studies were presented in the survey to gauge magistrates' views and practices in determining firstly, whether a fine was an appropriate response to the offence, and secondly, if so, how the quantum of the monetary penalty was to be assessed. Two of the case studies – drive while licence suspended and drive while licence disqualified – were chosen because the offences commonly incur a fine as the primary sentencing sanction. The remaining case study – that of offensive language – was selected as being more likely to attract an alternate sentence or a relatively minor fine amount, and so was considered an appropriate offence to canvass respondents' attitudes toward non-monetary penalties.

Questions on the survey required respondents to tick boxes; there was one rank order question and several "open-ended" questions. Returned surveys were marked with a unique identifier and their responses recorded in an Excel spreadsheet. The statistical analysis was undertaken using SPSS®.[5]

2.1 Survey response rate

The survey was distributed to NSW magistrates at the Judicial Commission's 2006 Local Court Annual Conference.[6] Approximately 130 surveys were distributed. Seventy-nine responses were received, giving a response rate of 61%.

[4] W Searle, *Court-imposed fines: A survey of Judges*, 2003, Ministry of Justice, New Zealand.
[5] SPSS is a statistical computing program. SPSS® is a registered trademark of SPSS Inc., Chicago, IL.
[6] Held on 2-4 August 2006.

2.2 Characteristics of survey respondents

No attempt was made to distinguish between respondents in terms of, background, or socio-demographics such as age and gender. Nor were distinctions drawn regarding experience on the bench: for example, surveys were returned both from respondents experienced in criminal matters, and those from the licensing court. Neither was seniority (length of time served on the bench) considered.

Region of respondents

Not all respondents identified their region on the questionnaire – 11 respondents (or 14%) did not. Consequently, any statistical analysis by this factor will exclude these respondents.[7]

Seven in 10 respondents (47 or 69%) preside in courts located in the "metropolitan" area. The remaining 21 respondents (31%) preside over "regional" courts.[8] Area differences will be described where it was found to be statistically significant.

However, caution should be exercised when comparing regional with metropolitan responses. Differences may not always be evident because of the reliance on self-identification as to location. It is also possible that metropolitan magistrates may have empathised with regional magistrates in their responses (for example, some may have previously presided over regional courts). Furthermore, the number of respondents, particularly for regional NSW was often too small to provide any meaningful results.

[7] As for the remainder of the survey, the results are based on the number of respondents who answered the particular question.

[8] Metropolitan area includes courts located in Sydney, Newcastle and Wollongong. All other courts were classified as regional. The magistrate who identified as metropolitan and also on circuit in regional NSW has been counted as metropolitan.

Analysis and findings

The following results are presented in the same section and question order as in the survey instrument (see the Appendix).

A note on the interpretation of the results

Some of the questions in the survey were "open-ended" – that is, there was no specific or implicit set of answers.[9] In answering this type of question it is possible for a respondent to mention only the issues which are most important or to overlook certain responses.

It is important to realise that not every respondent considered particular issues. If a list of issues was presented (as a "close-ended" question), the number of respondents reporting a particular issue would most likely be different. In this regard, it is important to look at the range of issues being presented rather than the number, or proportion of respondents, mentioning each issue.

3.1 Sentencing outcomes for all offences

Important factors in deciding to impose a fine – Question 1

Respondents were asked to rank the importance of certain factors when making a decision to impose a fine. The *severity of the offence* was clearly regarded as the most important of these factors. Over half of the respondents (57%) ranked it the most important factor and a further 23% of respondents ranked it as the second most important factor.

Having *no other sentencing options legislated* was considered the second most important factor. Almost half of respondents (44%) ranked it the most important factor and a further 13% of respondents ranked it the second most important factor.

The third most important factor was the *offender's means* or capacity to pay a fine. Almost eight in ten respondents ranked it either the second most important factor (30%), the third most important factor (23%) or the fourth most important factor (26%). Around 7% of respondents ranked it the most important factor. However, 14% ranked the least important of the five factors presented.

The other two factors, *no other sentencing options appropriate or available in the community* and *community expectations*, received similar rankings and were the least important of the factors.

Figure 1 displays the mean rank score for each factor and includes a breakdown by region. The higher the score the more important is the factor. Some area differences

[9] Questions 16, 17, 18, 26, 27, 30, 36 and 37 are examples of "open-ended" questions.

were observed with respondents from regional areas ranking the *offender's means* more important than having *no other sentencing options legislated*. They also thought that *community expectations* were more important than *no other sentencing options appropriate or available in the community*. Nevertheless, when deciding to impose a fine, the *severity of the offence* was the most important factor in both areas.

Figure 1 The importance of certain factors when deciding to impose a fine

Refer to Figure 1 in the attachment.

Eight respondents nominated other factors that they considered important (a few which were considered by the respondent to be more important than any of the five factors mentioned above). These included:

- "non-appearance and not appropriate to issue a warrant"
- "appropriate to degree of criminality and record of accused"
- "prior similar offences, residing in same household of victim, i.e. amounts to penalty on victim (DV)"
- "appropriateness of fines relative to alternative penalties"
- "no need for ongoing supervision or the controls of a bond"
- "to complement other options, e.g., section 9 bond or disqualification"
- "in some cases, a fine has more impact on offender than bond, CSO"
- "absence of ability to write off offences on basis of other penalties, e.g. if person sent to gaol, it is appropriate for them to be fined on other offences, or if the fine is only penalty what can you do?"

Degree to which the offender's means influences the amount of fine imposed – Question 2

Generally speaking, all respondents believe that the means of the offender has an influence, to varying degrees, on the amount of the fine they would impose. Approximately half of the respondents (51%) think it has *a great deal of influence*, 30% think it has a *moderate influence* and 19% believe it has *some influence*.

Frequency of imposing an alternate sentence due to the offender's incapacity to pay a fine – Question 3

When faced with an offender who could not afford to pay the amount of a fine that would usually be imposed for an offence, more than half of the respondents (53%) would *sometimes* impose an alternative sentence rather than a fine. Around a quarter

of the respondents would do so less often (17% *rarely* and 6% *never*) and around a quarter of the respondents would do so more often (20% *often* and 4% *always*).

Reasons for imposing a fine rather than an alternate sentence – Question 4

That a *fine is the appropriate penalty* was the main reason given by respondents for not imposing an alternative sentence (83%). That the *legislated sentence is a fine* was another important reason, indicated by 68% of respondents. Having *no suitable options for the particular offender* or *no suitable options available in the community (such as CSO)* were other, less common, reasons for deciding to impose a fine (44% and 33% respectively). Less than one in five respondents (17%) would not impose an alternative sentence because of their belief that *every offender can always pay something*.

Three respondents provided commentary on other reasons influencing their decision to persist with a fine:

- "CSO heavier penalty than fine. Difficult to say to someone should do CSO ie work, because of inability to take easier option of a fine."
- "Alternate sentence (e.g. bond) more severe."
- "Not appropriate to give CSO just because accused lacks means. It sends the wrong message to next magistrate who looks at his record, e.g. 'that must have been serious!'"

Frequency of imposing court costs in addition to a fine – Question 5

Eight in 10 respondents stated that they *always* or *often* impose court costs in addition to a fine (35% and 45% respectively). Only 4% of respondents acknowledged that they *never* impose court costs with a fine, while other respondents only *rarely* or *sometimes* impose them (8% and 9% respectively).

Appropriateness of fines and other penalties for given offences and offender circumstances – Questions 6-11

Questions 6, 8 and 10 asked the respondents: *What penalty do you think is appropriate*? for the three offences selected below. For these three questions the respondents were informed of the maximum penalty. Further objective or subjective features were not provided. Given the manner questions 6, 8 and 10 were framed the answers supplied as to what is an appropriate penalty are at best preliminary. Put another way the answers were inchoate or not fully formed. The questions also did not specifically ask respondents to indicate a fine amount where that sentencing option was considered to be the "appropriate" penalty. Consequently, where respondents selected a fine they expressed this in a mixture of ways. Some respondents volunteered a specific fine quantum, some a range of fine amounts and some did not supply any amount. It was not possible to draw firm conclusions about

the differences between the respondent's answers on the issue of the appropriate quantum of fines.

Respondents were then asked to consider a list of offender circumstances and record against each whether they would decrease, increase or leave the amount of the fine unchanged. Respondents were also given the option of considering an alternate sentence.

Three different offences (cases) were presented:

Case 1 offensive language pursuant to s 4A of the *Summary Offences Act* 1988: maximum penalty is 6 penalty units or 100 hours of community service.

Case 2 First time offender, drive while licence was suspended pursuant to s 25A(2)(a) of the *Road Transport (Driver Licensing) Act* 1988: maximum penalty is 30 penalty units or imprisonment for 18 months or both, and mandatory 12 months disqualification (in the case of a first offence); or 50 penalty units or imprisonment for 2 years or both, and 3 years disqualification (in the case of a second or subsequent offence).

Case 3 Drive while disqualified pursuant to s 25A(1)(a) of the *Road Transport (Driver Licensing) Act* 1988: maximum penalty is 30 penalty units or imprisonment for 18 months or both, and mandatory 12 months disqualification (in the case of a first offence); or 50 penalty units or imprisonment for 2 years or both, and 3 years disqualification (in the case of a second or subsequent offence).

Responses to Case 1 can be found in questions 6 and 7. Questions 8 and 9 are associated with responses to Case 2, and questions 10 and 11 are associated with responses to Case 3.

Many respondents wanted to put qualifiers on their responses to these questions. These respondents stressed the importance of taking into consideration a range of factors other than the offence itself in determining the appropriate penalty. These factors included: the circumstances surrounding the offence and the seriousness of the offence; the offender's prior record; age; plea and their capacity to pay a fine.

Appropriateness of fines and other penalties for offensive language – Question 6

The vast majority of respondents (86%) thought that a fine was the appropriate penalty for an offence of offensive language. The only other sentencing option considered appropriate by 14% of respondents was a s 10 non-conviction order. Most of these respondents, however, also pointed out that they would fine an offender for offensive language depending on the circumstances of the offence and the offender. Seven respondents gave their views on whether or not a CSO is an appropriate penalty for this kind of offence. Four said that they would consider a CSO if the offender had several priors for example, and three would never consider a CSO for an offensive language offence.

The respondents were not directly requested to provide a fine amount. However thirty respondents gave an indication of the amount of fine that they thought would be an appropriate penalty for offensive language. Sixteen respondents indicated a range of fines.

Effect of a change in offenders' circumstances on the amount of fine or type of penalty for offensive language – Question 7

Question 7 was premised on the assumption that the sentencer had already decided to impose a fine taking into account all the circumstances of the case. Figure 2 shows the extent to which changes in the offender's circumstances effects the amount of the fine respondents would impose for offensive language. The majority of respondents would ***decrease*** the amount of fine they would impose if the *offender is receiving unemployment benefit or pension and/or has little disposable income* (80%), the *offender is an itinerant or is homeless* (77%) or it is a *first time offence* (73%). Almost half of the respondents would decrease the fine if the offender has dependant family (49%) or if the offender asks for an alternative penalty for financial or family reasons (46%). Approximately one in five respondents (18%) would ***increase*** the fine if the *offender had unrelated prior convictions*.

Figure 2 The extent to which changes in the offender's circumstances effects the amount of fine imposed for offensive language

Refer to Figure 2 in the attachment.

Respondents were more likely to consider an alternative penalty to a fine if it is a *first time offence* (46%), if the *offender asks for an alternate sentence for financial or family reasons* (25%) or if the *offender is an itinerant or is homeless* (22%) than they were of other changes in the offender's circumstances. As Table 1 shows, these respondents would most likely impose a s 10 order instead of a fine. However, if the *offender asks for an alternate sentence for financial or family reasons* a greater number of respondents would consider a CSO as an alternative.

Table 1 Alternative penalties for offensive language

Refer to Table 1 in the attachment.

Appropriateness of fines and other penalties for drive while licence suspended – Question 8

Many respondents answered that the "appropriate penalty" for the offence of drive while licence suspended would depend on the circumstances of the suspension. An important consideration was whether the suspension was due to non-payment of fines (fine default) or was the consequence of points accumulation (demerit points). In cases of the first kind, the matter was likely to be adjourned to give the offender time to pay outstanding fines or enter into an instalment plan with the State Debt Recovery Office (SDRO). The respondents indicated that if the Court received evidence that the

licence had been re-instated, the offender would be given a s 10 order.[10] In cases of the second kind, the offender was unlikely to receive a s 10 order.

The vast majority of respondents (87%) thought that a fine was the appropriate penalty for an offence of drive while licence was suspended. A few respondents considered more serious sentencing options appropriate, such as a fine in addition to a s 9 bond (3%) or a CSO (1%). A s 10 non-conviction order was considered appropriate by 9% of respondents.[11]

Twenty- nine respondents gave an indication of the amount of fine they would impose for drive while licence was suspended. Fifteen respondents indicated a range rather than a specific amount.

Forty-seven respondents indicated that they would also impose a period of licence disqualification for drive while licence was suspended.[12] Of these, 27 respondents said that they would impose the mandatory minimum disqualification period of 12 months, one respondent specified a period of six months and one respondent specified the automatic disqualification period of three years. The remaining 18 respondents did not specify a period.

Effect of a change in offenders' circumstances on the amount of fine or type of penalty for drive while licence suspended – Question 9

As with question 7 question 9 was premised on the assumption that the sentencer had already decided to impose a fine taking into account all the circumstances of the case. Figure 3 shows the extent to which changes in the offender's circumstances effects the amount of fine that would be imposed by respondents for the offence of drive while licence was suspended. The majority of respondents would ***decrease*** the amount of fine they would impose if the *offender is receiving unemployment benefit or pension and/or has little disposable income* (71%), or the *offender is an itinerant or is homeless* (65%). Half of the respondents (50%) would decrease the fine if the offender has dependant family. Decreasing the amount of fine would be an option for over a third of respondents (38%) if the offender asks for an alternative for financial or family reasons. Three-quarters of the respondents (75%) would ***increase*** the fine if the *offender had prior convictions for driving offences*.

Figure 3 The extent to which changes in the offender's circumstances effects the amount of fine imposed for drive while licence was suspended

Refer to Figure 3 in the attachment.

[10] These responses have been included in Question 9. See n 10.

[11] After taking into consideration the kinds of traffic offences that led to the suspension, one respondent said that he/she would impose a s 10 order following attendance at a Traffic Offender's Program (TOP).

[12] Licence disqualification is mandatory when certain types of penalties are imposed. Consequently, the number of respondents who would impose licence disqualification would actually be higher. As mentioned earlier, only 9% of respondents would consider a 10 non-conviction order thereby avoiding the imposition of mandatory licence disqualification.

As Table 2 shows, a third of the respondents (33%) would consider sentencing options other than a fine if the *licence was suspended due to fine default (non-traffic related).* As mentioned above, the circumstances of the suspension was an important consideration in sentencing for this offence. These respondents would most likely impose a s 10 order instead of a fine.

Approximately one-quarter of the respondents would consider alternative penalties for this offence, if the *offender asks for an alternate sentence for financial or family reasons* (27%) or if the *offender had prior convictions for driving offences* (25%). As Table 2 shows, these respondents would most likely impose a s 9 good behaviour bond or a CSO. In the latter case, a few respondents indicated that they would impose harsher penalties depending on the number of prior convictions for driving offences there were and whether they included any convictions for a "major offence".[13]

Few respondents would consider an alternative penalty to a fine because the *offender is under 25* years (1%) or because the *offender has dependant family* (4%).

Table 2 Alternative penalties for drive while licence was suspended

Refer to Table 2 in the attachment.

Appropriateness of fines and other penalties for drive while disqualified – Question 10

The majority of respondents (81%) thought that a fine was the appropriate penalty for an offence of drive while disqualified. Around one-fifth of the respondents considered more serious sentencing options appropriate, such as a s 9 bond (7%), a s 9 bond and a fine (4%), a CSO (4%) or a s 12 suspended sentence (2%). Only one respondent considered a s 10 non-conviction order was appropriate.

Twenty five respondents gave an indication of the amount of fine they would impose for drive while disqualified. Thirteen respondents indicated a range rather than a specific amount.

Forty-one respondents indicated that they would also impose a period of licence disqualification for drive while disqualified.[14] Of these, 22 respondents would impose the mandatory minimum disqualification period of 12 months and one respondent

[13] The *Road Transport (Safety and Traffic Management) Act* 1999 distinguishes between the statutory maximum penalties applicable to a "first offence" and a "second or subsequent offence". Clause 2 of the dictionary defines first offences and second or subsequent offences. A second or subsequent offence includes offences where a person has been convicted of a major offence within a period of 5 years of the present offence. The definition of a major offence has the same meaning as it has in the *Road Transport (General) Act* 2005, that is:

"**'major offence'** means:

(a) a crime or offence referred to in the definition of **'convicted person'** in section 188 (1), or

(b) any other crime or offence that, at the time it was committed, was a major offence under this Act, the *Road Transport (General) Act* 1999 or the *Traffic Act* 1909."

[14] Licence disqualification is mandatory when certain types of penalties are imposed. Consequently, the number of respondents who would impose licence disqualification would actually be higher. As mentioned earlier, only one respondent would consider a 10 non-conviction order thereby avoiding the imposition of mandatory licence disqualification.

indicated a range between 12 months and three years. The remaining 18 respondents did not specify a period.

Effect of a change in offenders' circumstances on the amount of fine or type of penalty for drive while disqualified – Question 11

As with questions 7 and 9, question 11 was premised on the assumption that the sentencer had already decided to impose a fine. Figure 4 shows the extent to which changes in the offender's circumstances effects the amount of fine that would be imposed by respondents for drive while disqualified. The majority of respondents would ***decrease*** the amount of fine they would impose if the *offender is receiving unemployment benefit or pension and/or has little disposable income* (73%), or the *offender is an itinerant or is homeless* (66%). Around half of the respondents (52%) would decrease the fine if the offender has dependant family. Decreasing the amount of fine would be an option for four in 10 respondents (40%) if the offender asks for an alternative penalty for financial or family reasons. Just over two-thirds of the respondents (68%) would ***increase*** the fine if the *offender had prior convictions for driving offences.*

Figure 4 The extent to which changes in the offender's circumstances effects the amount of fine imposed for drive while disqualified

Refer to Figure 4 in the attachment.

As Table 3 shows, almost half of the respondents (44%) would consider sentencing options that are more severe than a fine if the *offender had prior convictions for driving offences*. These respondents would most likely impose a CSO or a s 9 good behaviour bond, although imprisonment and alternatives to imprisonment, such as periodic detention and s 12 suspended sentences would also be considered. Many respondents indicated that the severity of the penalty would escalate depending on the number of prior convictions and whether any were for similar offences. The reasons for disqualification were also important considerations at sentencing.

Around a third of the respondents (34%) would consider sentencing options other than a fine if the *offender asks for an alternate sentence for financial or family reasons* (34%). As Table 3 shows, these respondents would most likely impose a s 9 good behaviour bond or a CSO.

Few respondents would consider an alternative penalty to a fine just because the *offender is under 25* years (5%).

Table 3 Alternative penalties for drive while disqualified

Refer to Table 3 in the attachment.

Summary

For each given offence described in 6, 8 and 10, a fine was clearly considered the most appropriate penalty. The amount of the appropriate fine indicated, however, varied depending on the type of offence and the circumstances it was committed.

A notable difference was that drive while disqualified was seen by respondents as more serious than drive while licence was suspended. Where a fine was not considered the appropriate penalty, respondents suggested penalties that were more severe. Conversely, fewer respondents would consider a s 10 non-conviction order.

Offensive language offences, on the other hand, warranted much smaller fine amounts. The only other appropriate sentencing option was a s 10 non-conviction order. Even though a CSO can be imposed instead of a fine for this offence, four respondents remarked that they would only consider a CSO if the offender had several priors, while three respondents stated that they would never consider a CSO for this offence.

Respondents were more ***likely to decrease*** the amount of fine they would impose if the *offender is receiving unemployment benefit or pension and/or has little disposable income*, or the *offender is an itinerant or is homeless*, or to a lesser extent, if the *offender has dependant family*. Respondents were ***unlikely to change*** the amount of fine they would impose if the *offender has a history of fine default* or the *offender is under 25* years. Respondents were more ***likely to increase*** the amount of fine they would impose if the *offender had prior convictions for driving offences*.

For each given offence, an alternate sentence was likely to be considered by a significant proportion of respondents if the *offender asks for an alternate sentence for financial or family reasons* (between 25% and 34% depending on the type of offence). In the case of drive while licence was suspended, one-third of respondents (33%) would consider sentencing options other than a fine if the *licence was suspended due to fine default (non-traffic related)*. In the case of an offensive language offence, 46% of respondents were likely to consider an alternative penalty, such as a s 10 order, if it is a *first time offence*.

3.2 Sentencing Procedure (To what extent are financial circumstances of the offender clearly understood, and where possible, verified?)

Frequency of oral or written submissions made by defendants (or their legal representatives) – Question 12

Defendants or their legal representatives frequently make oral or written submissions on their financial circumstances (56% *often* and 19% *always*). One in five respondents (20%) stated that submissions are made *sometimes*. A few respondents reported that they are *rarely* (4%) or *never* made (1%).

Frequency of requiring written proof of an offender's financial circumstances – Question 13

Nine in 10 respondents *never* (47%) or *rarely* (43%) require written proof of an offender's financial circumstances prior to sentencing. Most of the remaining respondents (9%) *sometimes* need written proof while only one respondent stated that he/she *always* requires this type of evidence.

Methods of ascertaining the offender's capacity to pay a fine – Question 14

In order to ascertain the offender's capacity to pay a fine, every respondent (100%) stated that they routinely *receive oral submissions from the offender or the legal representative*.

As Figure 5 shows, other methods of determining the offender's capacity to pay a fine are uncommon, although, one in five respondents (19%) routinely order a pre-sentence report. Written materials, of any kind, are seldom required.

Figure 5 What is routinely done to ascertain the offender's capacity to pay a fine

Refer to Figure 5 in the attachment.

Reasons for not requiring written proof of financial circumstances – Question 15

Lack of court time (72%) and having *sufficient information from oral submissions* (65%) were clearly the main reasons why respondents would not require written proof of financial circumstances when considering imposing a fine. That the *offender indicates they can pay a fine* (41%) or that the *fine is too small to warrant a written statement* (35%) were other, albeit less common, reasons.

Four respondents further remarked that written proof of financial circumstances is unnecessary when the offender is represented by legal aid because this means that the offender's financial circumstances have been checked already.

Determining the appropriate penalty for absent offenders – Question 16

Broadly speaking, respondents *determine the appropriate penalty when the offender is not present at sentencing* in the following ways:

- according to the nature, facts and circumstances of the offence
- having regard to the offender's prior record
- having regard to the fixed or legislated penalty
- personal tariff
- having regard to the offender's financial circumstances and employment.

Two respondents stated that they "take into account the usual sentencing principles" or rely on "intuitive synthesis" to determine the appropriate sentence for absent defendants.

Facts and offender's record

The majority of respondents (65%) primarily or solely refer to the facts on file and the offender's prior record, where one is available. Forty-seven respondents (59%) refer to the facts and circumstances of the offence and 39 respondents (49%) refer to the offender's record, to determine a sentence. Some of the respondents only rely on facts and records, while others seek to have an understanding of the surrounding circumstances of the offence as well (13%). Sixteen respondents (20%) highlighted the need to consider the seriousness of the offence when imposing a penalty. Seven respondents (9%) remarked that the nature of the offence is also important. It may be assumed that a main source of information about the nature, seriousness and circumstances of the offence is from the facts before the magistrate.

One respondent acknowledged that he/she would sometimes consider a s10 order where the offence is very minor and the defendant has no prior record.

Personal tariff versus fixed or legislated penalty[15]

A number of respondents specifically refer to a form of fixed penalty. These include the maximum penalty in the legislation and the "ticketed" amount for traffic offences. Other respondents stated that they would usually impose a tariff or fine. Altogether, 46 respondents (58%) said they would impose a legislated fine or a tariff on absent offenders.

Twenty-four respondents (30%) stated that they impose a tariff/fine that has been personally determined. For example: eight of these respondents apply the usual fine they would impose for an offender with capacity to pay; four respondents rely on past experience on the bench; and four respondents apply a tariff/fine that is based on the average or "normal" range of fines for the offence.

Twenty-eight respondents (35%) stated that they would impose a fine having regard to the legislated maximum fine for the offence.

The above responses show that fines are commonly imposed where the defendant is absent from court. There are clear overlaps where respondents refer to facts and record, as well as the maximum penalties for each offence, to determine a sentence.

Reference to financial circumstances of offender

Twenty respondents (25%) would refer to the defendants' financial circumstances in some way, including from written pleas of guilty and other written material submitted by the defendant. Where possible, a number of respondents rely on other material on the court file, such as antecedents or the charge sheet to disclose information, for example, on employment status and financial circumstances. A few respondents would look at the offender's age to make an assessment of their capacity to pay.

[15] Several respondents are included in both categories.

A further four respondents highlighted the difficulty of sentencing in the absence of adequate information about defendants' financial circumstances. Given the likelihood that information concerning financial circumstances is not available for absent defendants, these answers may also indicate the magistrates cannot tailor the sentence to fit the absent offender, and may result in inappropriate penalties being imposed.

Other comments

Two respondents pointed out that the first issue to decide, when the offender is not present at sentencing, is whether the matter will be dealt with in their absence or whether a warrant should be issued instead.

Another respondent will give "no discount because no plea of guilty."

Lastly, one respondent simply stated that he/she "frequently" determines the appropriate penalty for absent offenders.

Ascertaining whether the offender has outstanding fines – Question 17

As noted by 10 respondents, *information on whether the offender has outstanding fines* is generally not known. Thirty-nine respondents (49%) indicated that they never *ask offenders whether they are already paying another fine*.[16] Six of these respondents remarked that they were not interested in knowing this information or that it is of no relevance to them if fines remain unpaid.

Forty respondents (51%) stated that they ask offenders about outstanding fines or financial obligations[17]: 24% regularly or usually; 17% sometimes or occasionally; and 10% rarely. Eight of these respondents said they ask for this information especially where the offence is suspension due to fine default (4) or stated generally that it would depend on the type of offence (4).

At least 21 respondents (27%) noted that they are given this information from the bar table (or from the offender directly), even if the respondent does not always ask for the information. Another respondent is "starting a program whereby LAC solicitors will ask accused person to give them authority to contact the SDRO to get a record of all outstanding fines – the 'invisible' record the court never sees."

Sixteen respondents (20%) stated that they sometimes find out about previous fines and existing fines from documents before the court, usually the court record (2) or the defendant's traffic or penalty record (13). One respondent occasionally asks the Registrar of the court for this information. Another respondent noted that "in the UK the Registry provides a print out of all outstanding fines and the Court deals with default and can adjust the amount of fines payable. A printout of outstanding fines would be useful."

[16] Includes six respondents who did not state clearly whether they ask offenders about outstanding fines, however, comments made by these respondents give the impression that they don't ask.

[17] Several respondents ask general questions about financial obligations rather than whether fines are outstanding, such as: whether they are working or not; whether they are paying rent or mortgage; whether they have any dependants; and so on.

Several respondents stated that they can usually tell whether an offender has outstanding fines because fine default has led to licence suspension (3); or they seek an adjournment to pay fines (1); or in the majority of cases, most have outstanding fines anyway (1).

Two respondents remarked that trying to ascertain this sort of information can be time consuming.

Other helpful information in deciding the appropriate penalty – Question 18

The majority of respondents (70%) did not specify *any other information that would help them to decide the penalty*. One respondent stated that "in a busy court, there is little time to contemplate at length where the offence is not particularly serious."

Most of the respondents who did comment referred to having information important to sentencing generally, such as information on the usual sentencing principles[18] (3); prior record[19] (6); facts (4); type of offence (2); circumstances of the offence (2); plea (2); and prevalence of the offence (1). Six respondents mentioned having information on the offender's subjective circumstances, including: homelessness; mental health and intellectual disability; drug/alcohol addiction; and future prospects. Two respondents identified pre-sentence reports and psychiatric/psychological reports which address the subjective features of an offender.

Eleven respondents remarked that having information on the financial circumstances and the offender's capacity to pay a fine would help to decide the penalty. Information relating to debts (including from SDRO), living expenses (including rent/mortgage, food, dependants, and so on) and source of income, would be useful. This type of information could come from submissions (3), references (1) or written notice attached to a notice of plea (1).

3.3 Explaining the consequences of non-payment

Emphasising the importance of paying fines – Question 19

Respondents were asked whether the court explains to the offender the importance of paying fines, and who in particular provides this explanation. Four explanations were presented. The findings are presented in Table 4.

Table 4 How does the court emphasise the importance of paying fines

Refer to Table 4 in the attachment.

[18] Including mitigating and aggravating factors under s 21A of the *Crimes (Sentencing Procedure) Act* 1999.

[19] One respondent would like to know whether the defendant has previously attended a Traffic Offenders Program (TOP).

As Table 4 shows, the Bench is the person most likely to explain *payment options, e.g., time to pay and pay by instalments* (69%), although the Registrar (39%) is also responsible. Almost a quarter of respondents (22%) indicated that other people, such as legal representatives, explain payment options. Only a small proportion of respondents (5%) were unsure who, if anyone explains payment options.

The Bench (40%) was more likely than the Registrar (25%) or other person (21%) to explain that *default will lead to licence suspension*. A third of respondents (33%) were unsure who, if anyone explains this consequence of fine default.
The majority of respondents were unsure who, if anyone explains *other consequences of default (seizure of goods, garnishee orders, community service)* or *the importance of prioritising a fine over other expenditure* (60% and 52% respectively). Where it is known: the Bench (11%) is less likely than the Registrar or other person (both 19%) to explain other consequences of fine default; and approximately one in five respondents indicated that the Bench (23%), the Registrar (19%) or some other person (20%) explains *the importance of prioritising a fine over other expenditure*.

Maximising the offender's likelihood of paying a fine – Question 20

Respondents were asked how the court helps in maximising the offender's likelihood of paying a fine. Four methods were presented. The findings are presented in Table 5.

Table 5 How does the court maximise the offender's likelihood of paying a fine

Refer to Table 5 in the attachment.

As Table 5 shows, almost three-quarters of respondents (72%) indicated that the Bench is responsible for *ensuring the offender knows he/she can return to the Court for assistance* with payment, such as time to pay. Just over a quarter of respondents (27%) indicated that the Registrar informs offenders of this ability and approximately one in 10 respondents (9%) indicated that other people, such as legal representatives, inform offenders. The remaining 15% of respondents were unsure who, if anyone informs the offender.

The bench is unlikely to *refer the offender to financial counselling, welfare agencies,* or *driver education scheme* (13%); or *direct the offender to inform* the *Court of change in address or other circumstances* (16%); or *ensure that Aboriginal offenders are aware of the Aboriginal Client Service Specialist* (19%). In fact, many of the respondents were unsure who, if anyone did these things (60%, 47% and 56% respectively).

Where it is known: the Registrar (36%) rather than the Bench (16%) or other person (14%) is more likely to *direct the offender to inform the Court of change in address or other circumstances*; and some person other than the Registrar or the Bench is more likely to *refer the offender to financial counselling, welfare agencies,* or *driver education scheme* (26% compared with 17% and 13% respectively). The Bench

(19%), Registrar (19%) and other person (22%) similarly share the responsibility for *ensuring Aboriginal offenders are aware of the Aboriginal Client Service Specialist.*

3.4 Dealing with prior fine default

Knowing the offender's payment history and reasons for default – Question 21

Respondents were divided on whether there are benefits in knowing the payment history of offenders in great detail. Just over half of the respondents thought that it would (45%) or possibly would (10%) *enable better sentencing outcomes if the Court had a clear picture as to the history of payment (including all penalty notices) and the reasons for default in each case*. Just under half of the respondents did not (40%) or did not really (5%) believe it would assist.

Thirteen respondents (17%) raised concerns about the practicality of assembling such information, the resources that would be required and/or the amount of time that would be needed to consider such information. Six respondents (8%) criticised the lack of sentencing options available by highlighting the fact that often there is no realistic alternative to imposing a fine. Eight respondents (10%) remarked that it isn't the court's "role" or "business" to be concerned with debt collection and enforcement. A couple of respondents suggested that it would be convenient if such information was set out on antecedents (1) or in short summary form (1).

Asking questions as to the full circumstances and reasons for non-payment – Question 22

Just over a third of respondents (35%) indicated that *the Court or Registry ask questions as to the full circumstances and reason/excuses for non-payment of a fine*.[20] However, many of these respondents added that they only ask in certain circumstances, for example, where the matter relates to drive while licence suspended for non-payment of fines. Another respondent only asks whether "arrangements have been made with SDRO to pay fines". Two respondents do not necessarily ask about the "full" circumstances but seek "brief" explanations for non-payment.

The other two-thirds of respondents indicated that neither the Court nor Registry ask about non-payment of fines (40%) or were unaware whether the Registry asks such questions (25%).

Requiring a form or statement of financial circumstances – Question 23

Eight respondents (10%) indicated that *the Court or Registry require a financial circumstances form or statement be completed*. Four respondents pointed out that the Registry require confirmation of financial circumstances where the offender is

[20] Only three respondents were aware that the Registry asks about non-payment of fines.

applying for time to pay arrangements and one respondent stated that sometimes a financial statement is required in civil or family law matters.

However, the vast majority of respondents (94%) indicated that a financial statement is not required by the Court.[21] Most of these respondents did not believe a financial statement is required by the Registry or they couldn't say one way or the other.

Asking questions as to other family income – Question 24

Approximately one in five respondents (21%) indicated that *the Court or Registry question the defaulter as to other incomes within the family*. However, the majority of respondents (83%) indicated that the Court does not ask about the incomes of other family members.[22] Most of these respondents did not believe that the Registry asks or they couldn't say one way or the other.

It was difficult to ascertain from the responses whether *the Court or registry discuss the possibility of settling the debt through these other incomes*.

Providing support or assistance to minimise further default – Question 25

Sixteen respondents (21%) indicated that *the Court or Registry provides other support or assistance to defaulters, to minimise further default*. The kind of support or assistance provided include: advice about time to pay arrangements (6); referral to community agencies and services (3); and provision of an information sheet which also informs defendants about the consequences of default (2). Five respondents did not comment on the type of support or assistance that is provided.

However, the majority of respondents (83%) indicated that the Court does not provide other support or assistance.[23] Most of these respondents did not believe that other support and assistance is provided by the Registry or they couldn't say one way or the other.

[21] Includes three respondents (4%) who said that a financial statement was required by the Registry, but not by the Court.
[22] Includes three respondents (4%) who said the Registry asks about the incomes of other family members but the Court doesn't.
[23] Includes three respondents (4%) who said other support and assistance is provided by the Registry, but not by the Court.

3.5 Other comments

Main advantages of fines – Question 26

The *main advantages of fines as a sentence* can be broadly grouped as follows:

- Achieves the goals of sentencing, such as punishment and deterrence
- Universally applicable; easy to apply; immediate and fast
- Only option
- Reflects the seriousness of the offence; consistency
- Moderate penalty; appropriate for minor offences
- Good for property and dishonesty offences.

A number of respondents, however, also qualified their statements, noting that fines are not appropriate or an effective sentencing option for everyone.

Achieves the goals of sentencing, such as punishment and deterrence

Overall, 40 respondents (51%) referred to the various goals of sentencing that are achieved when fines are imposed, including: deterrence, general and/or specific (24); punishment and retribution (11); and denouncement (1). Fourteen respondents described the "pain" and "hurt" suffered by offenders from the imposition of a fine.[24]

Eight respondents, however, noted that fines are advantageous only if the offender has the means or capacity to pay; and one respondent saw little advantage if fines are so severe that they impact adversely on the family.

Two respondents said the benefits of fines are that they are "universally understood" by the community; and another respondent commented that the community "accepts" fines as a penalty.

Universally applicable; easy to apply; immediate and fast

Another advantage of fines, mentioned by 17 respondents (22%), is that they are universally applicable (3); easy to apply (6); and immediate and fast (12).

Three respondents acknowledged that fines are a "cheaper" or a "good" option for the community; and one respondent stated that for "people who can afford it", fines help collect revenue for the government.

Only option

Four respondents pointed out that a fine is the only available, or suitable, penalty in many cases. Three respondents said that an advantage of fines is that they can be imposed on absent offenders.

[24] Four of these respondents also hoped that the financial hurt would deter further offending and two of these respondents also indicated that fines punish the offender.

Reflects the seriousness of the offence; consistency

Another advantage of fines, noted by 10 respondents (13%), is that they reflect "the objective seriousness of the offence" and the "appropriate" penalty for the "nature of the offence".

Three respondents said that fines have the benefit of achieving consistency in sentencing.

Moderate penalty; appropriate for minor offences

Nineteen respondents (24%) believe that fines are a "moderate" penalty (8); which are appropriate for minor offences (8); and the "least intrusive" (3). Two respondents made the point that fines avoid the negative consequences of breaching more serious sanctions.

Good for property and dishonesty offences

One respondent mentioned that fines are "particularly effective for dishonesty offences committed for greed, e.g., social security fraud, larceny as servant, etc, etc…" Another respondent stated that fines are "most useful in property crime to remove ill-gotten gains…" One respondent indicated that fines are "very appropriate sentencing outcomes for industrial and environmental offences…"

Other advantages of fines

Finally, four respondents expressed a view that fines are a better option than going to prison.

Main disadvantages of fines – Question 27

The *main disadvantages of fines as a sentence* can be broadly grouped as follows:

- Adverse consequences of fines (if unpaid), including
  - Licence suspension/disqualification issues
  - Leading to further offences
  - Gaol
  - Adverse consequences for family or dependents
- Unequal impact on certain offenders
- Inability to enforce fines
- Problems with SDRO and RTA
- Other comments.

Adverse consequences of fines (if unpaid)

Thirty-five respondents (44%) broadly drew attention to the "extreme" adverse consequences of fines for offenders who fail to pay them. One particular consequence, highlighted by 30 respondents, is licence suspension for fine default. These respondents pointed out that suspending licences leads people to commit further offences of drive while suspended and drive while disqualified (19); where disqualification periods can "mount up" (3). Seven respondents mentioned the prospect of defaulters going to gaol as a result of secondary traffic offences. Six

respondents remarked that the consequences of non-payment (loss of licence) can often be "disproportionate to the original offence", which is often unrelated to traffic offences.

Six respondents also noted adverse consequences for the offender's family and dependents.

Unequal impact on certain offenders

Thirty-eight respondents (48%) noted that fines are disproportionately harsh on certain types of offenders, especially those without means to pay (31), for example the homeless or itinerant. Issues caused by the differentials between the rich and poor were emphasised by 12 respondents. The mentally ill (2); country people (1); juveniles (1); and the "unorganised" (3) were other groups of offenders where fines were seen to be a disadvantage.

Inability to enforce fines

Another disadvantage of fines, mentioned by 31 respondents (39%), relates to the inability to enforce fines. Many of these respondents pointed out that fines are "meaningless", or "ineffective as a deterrent", where an offender is unable to pay or chooses not to pay (5).

Problems with SDRO and RTA

Six respondents generally noted problems with the SDRO, RTA and enforcement hierarchy.

Other comments

Two respondents commented that the legislated fine penalty is often "inconsistent [with] court's view of seriousness of offence."

One respondent recommended community service as an alternative to fines and/or fine default.

One respondent noted that fines are ineffective for repeat offenders.

One respondent stated that the "Court [is] not properly informed of defendant's actual income – not verified."

One respondent stated that fines are the "only option especially where defendant has been in custody on more serious but related matters. Court not able to impose wholly/partly concurrent penalty or rising of the court."

Reasons why offenders do not pay fines – Question 28

That *the offender does not prioritise the fine above other expenditure* (80%) or that *the offender cannot afford the fine* (79%) were the most common reasons cited by respondents to explain why some offenders do not pay their fines. Almost two-thirds of respondents (63%) believe that some offenders *refuse to pay the fine, i.e. wilful default*.

It is worth noting, however, that several respondents commented that different defendants have different reasons for not paying fines and that some types of defendants are more common than others. For example, three respondents expressed a view that "wilful default" is rare and certainly not as common as other reasons. Nevertheless, two respondents pointed out that some offenders may not pay fines because they do not require a licence and so have nothing to lose. Another two respondents found it difficult to generalise.

Fourteen respondents (18%) mentioned that some offenders have difficulty managing their financial affairs. This could often result from: accumulating significant debt levels (6); having to deal with the complexity of correspondence or just overwhelmed by it (5), especially if they are illiterate or suffer poor mental health; or are otherwise dysfunctional (1) or lead chaotic lives (2). Consequently, many forget or ignore the situation "until forced to by external forces" (5).

Frequency of imposing a fine knowing that the offender cannot, or will not pay – Question 29

Eight in 10 respondents *have imposed a fine knowing that the offender cannot or will not pay*: *often* (16%); *sometimes* (38%) or *rarely* (26%). One in five respondents (21%) have *never* done so knowingly.

The most common explanation put forward by 30 respondents for imposing a fine knowing that it won't be paid, is that a fine is the only penalty option "available" to them or the only penalty that is "appropriate". For example: where there is no statutory alternative other than to impose a fine (8);[25] or where the defendant is convicted in their absence and the matter must be disposed of (3).[26]

Another situation where it might occur is where the defendant is in custody for a lengthy period (1) or where the defendant also receives a gaol term for a different offence (1).

Five respondents pointed out that some sections of the community have difficulty paying fines, for example, the homeless, disadvantaged or drug and alcohol addicted. Ten respondents mentioned that they would reduce the amount of fines to take into account an offender's capacity to pay. Two respondents raised the issue of consistency in sentencing and the difficulty that arises from taking into account capacity to pay.

Nine respondents made the point that an offender's refusal to pay a fine should not mean that the Court should not impose that sentence. And finally, two respondents stated that they are aware of the provision in the *Fines Act* 1996 to convert the fine to a CSO where an offender is unable to pay or chooses not to pay.

[25] Several respondents cited, as an example, trespassing offences under the *Inclosed Lands Protection Act* 1901 (3), fare evasion (1) and not wear bicycle helmet (1).
[26] That is, where the offence is not sufficiently serious to issue an arrest warrant.

Improving information about the offender's circumstances – Question 30

A range of ideas and suggestions emerged from respondents' answers to *how information about the offender's circumstances could be improved to assist the Court in determining a fine*. Eighteen respondents (23%) did not proffer any ideas or suggestions.

The most popular recommendation is a standardised form or information to set out the financial circumstances. Thirty respondents (38%) put forward some variation of this idea. Although many more respondents believe that the offender should complete the pro forma, one respondent suggested that the welfare officer in each court [could] complete statements of financial circumstances for all applicants and give them counselling at the same time…" Four respondents suggested that this information could be included with court attendance notices (CANs), criminal histories and/or police antecedents. Another respondent suggested that "specific questions about means" could be included with a written plea.

Thirteen respondents (17%) emphasised the need to have independently verified or verifiable information. Others would be content with "affidavit evidence" as to means (6) and/or statements that are supported by documentation (2), for example previous tax returns. Two respondents suggested providing RTA or SDRO records.

Thirteen respondents (17%) suggested better oral submissions from defendants or their lawyers. Three respondents had reserve about the accuracy of information provided from the defence side.

Other suggestions include: judicial (and lawyer) education (1); increase legal aid (1); increased court attendance by defendants (1); make sure the defendants understand their sentence before they leave the court room (1); ask the defendant to enter a payment schedule before they leave court (1); and the need for alternative penalties that would be appropriate (1).

Three respondents said more information would be "helpful" but did not offer concrete suggestions.

Eight respondents were more doubtful as to whether more information would be helpful. In particular, these respondents highlighted the impracticality and cost of acquiring more information in most circumstances; and the amount of time that would be required to consider the information.

Finally, four respondents noted that information currently received is sufficient (3) and that no more forms are required (1).

Imposing a community service order type sanction as an alternative to a fine – Question 31

The overwhelming majority of respondents (96%) believe that *the Court should be able to impose a community service order type sanction as an alternative to a fine*.[27] Many of these respondents were, however, cautious of the problems that may arise as a result, and the need to put in place some safeguards.

For example, 12 respondents pointed out that on a scale of severity, a CSO is considered to be a more serious penalty than a fine. Furthermore, in most instances, a CSO is imposed as an alternative to imprisonment. Consequently, a CSO is intentionally reserved for more serious offences. Because of this perception, six respondents remarked that they would prefer to have a different type of penalty to the current CSO that was "more on a par" with a fine, and two respondents stated that its use in this way should be legislated for by Parliament.

Two respondents were concerned how a CSO that was imposed simply as an alternative to a fine is to be recorded on someone's record. These two respondents suggested that the record should differentiate between a CSO issued in this way and a CSO imposed as an alternative to imprisonment.

Two respondents were concerned about net-widening. That is, "widening the original parameters for which CSOs were intended".

Four respondents suggested that the penalty imposed should be a fine; however the offender should have the option to either pay or undertake community service.[28] To achieve consistency, conversion rates should apply. Conversion rates of $10 or $20 per hour were suggested as examples by two respondents.

Twelve respondents made the point that in order to work, a CSO type sanction needs to be adequately resourced, practical and/or made available statewide. Two respondents also mentioned that more assessments to determine the offender's suitability to perform community service would be required in order to reduce the incidence of non-compliance, which otherwise might increase if permitted to impose a CSO as an alternative to a fine.

In addition, there were concerns about enforcement and the consequences for non-compliance. Two respondents were concerned that a term of imprisonment would have to be imposed if the offender breached a CSO type sanction. On the other hand, two respondents stated that this would make it clear to, or would remind, the offender the importance of complying.

[27] Only three respondents did not think that a Court should be able to impose a CSO type sanction as an alternative to a fine. One responded noted that s 78 of the *Fines Act* 1996 already provides for a CSO order to be made against a fine defaulter. Another respondent stated that "community service should be used only as an alternative to prison." This respondent also acknowledged that "there is not enough work nor staff available to supervise, if community service is used as an alternative to fines." The other respondent did not provide a reason.

[28] There was one respondent who did not believe that the offender should be able to elect.

Five respondents recommended that the number of hours of community service work should be short to reflect the seriousness of the offence and to safeguard against operating as a more serious type of sentence. One respondent remarked that "long periods of CSO can be onerous."

Finally, a number of respondents could see some benefits both to the community and to the offender of allowing a CSO type sanction to be imposed as an alternative to a fine (2). Four respondents believe this type of penalty may be useful in some cases depending on the nature of the offence or the offender's antecedents. For example, one respondent suggested that it may be appropriate for offences of malicious damage or graffiti. One respondent stated that sometimes it may be "more appropriate where the offender lacks the mean or mental capacity to pay a fine". However, another respondent believes it has limited effect for particular offenders, such as the intellectually disabled, mentally ill, or drug and alcohol addicted, as these offenders are probably ineligible or unsuitable to perform CSO work. One respondent also commented that "if [they] won't pay fine what makes one think they would obey CSO."

Appropriateness of mandatory disqualification periods – Question 32

Seven in 10 respondents (70%) believe that mandatory disqualification periods for driving offences are never, or almost never, an appropriate penalty.[29] A further 23% believe that they are only appropriate for certain categories of offences. Only six respondents (8%) acknowledged the appropriateness of mandatory disqualification for sentencing driving offenders.

Sixteen respondents maintained that magistrates should have the discretion at sentencing to take into account the relevant circumstances of the offence and the offender. Sixteen respondents also pointed out that mandatory disqualification can and do result in considerable injustice and can operate too harshly, particularly for people in rural areas where there is no public transport (7). This can often lead to further offending (3) and consequently, more serious charges and penalties (1) and disqualification periods for ridiculously long periods (3). Four respondents remarked that they could have a punishing impact on their family and dependants.

Six respondents said they have no difficulty with mandatory disqualification for offences involving prescribed concentrations of alcohol (PCA) or for dangerous driving or dangerous speeding offences. One respondent mentioned that they are appropriate for repeat offenders. Seven respondents stated that disqualification should not be mandatory in cases of drive while suspended due to fine default.

Five respondents suggested that mandatory disqualification periods should be lowered and that magistrates should have the discretion to increase the period if need be. Three respondents remarked that it encourages the inappropriate use of s 10 non-conviction orders.

[29] Although statistically insignificant, a substantially greater proportion of respondents from regional areas indicated that mandatory disqualification periods are inappropriate (81% compared with 62% of respondents from metropolitan areas).

Three respondents noted that mandatory disqualification can be effective in achieving consistency in sentencing and two respondents noted that there must be some mandatory disqualification so as to "form a deterrent". Two respondents acknowledged that disqualification is necessary for the protection and safety of the public.

Finally, one respondent suggested that "if mandatory minimum is desirable, that it be done by way of guideline judgment rather than legislation."

Appropriateness of Habitual Driver Declarations – Question 33

The vast majority of respondents (86%) do not believe that Habitual Driver Declarations are, or usually are, an appropriate penalty. Only two respondents (3%) believe they are appropriate and nine respondents (12%) believe they are appropriate in some circumstances, for example, where the "source offence is a traffic offence" (1), or where the offender has a record for traffic offences (1).

Twenty-one respondents remarked that Habitual Driver Declarations do result in lengthy and severe penalties that are "way over the top". Eleven respondents noted that the cumulative effect of a declaration disqualification by the RTA added to a court disqualification is disproportionate to the offence. This often leads to a sense of "hopelessness" (6) and there is "no incentive not to re-offend" (9). One respondent stated that it "punishes people for an unknown future pattern of offending".

Eight respondents mentioned that they impact heavily on many offenders, for example, the young (2), or those in rural areas (2), or un-represented defendants (1). Four respondents remarked that they can and do invariably quash or reduce the order upon application. Eight respondents stated that it should be left up to the courts, and not the RTA, to decide whether a longer period of disqualification is called for.

Four respondents suggested that after a determinate period without offending, a person should be able to apply for a review and the declaration could be quashed or reduced. One respondent thought that "compulsory driving programs and/or financial counselling would be better" than Habitual Driver Declarations.

Appropriateness of suspending driver licences for non-payment of (non-traffic related) fines – Question 34

Approximately one in five respondents (18%) agreed that *suspending driver licences for non-payment of (non-traffic related) fines is an appropriate penalty*.[30] A further 15% of respondents believe that it is appropriate in certain circumstances. However, the majority of respondents (67%) never, or almost never, believe that this type of scheme is appropriate.[31]

[30] Two respondents pointed out that it is not really a penalty.

[31] Although statistically insignificant, a greater proportion of respondents from regional areas indicated that suspending driver licences for non-payment of (non-traffic related) fines is inappropriate (81% compared with 62% of respondents from metropolitan areas).

Sixteen respondents described it as a "blunt instrument" that causes considerable hardship to disadvantaged people, such as the young, the unemployed, and people from rural or regional areas where there is no public transport. Nine respondents remarked that it leads people to commit further offences, such as drive while suspended and drive while disqualified, with penalties escalating to the point they end up in gaol. Two respondents stated that the penalty is out of proportion to the crime. One respondent stated that "it devalues offences, such as disqualified driving, and driving suspended following points accumulation." One respondent stated that it "blurs causation between offending behaviour and punishment."

Five respondents remarked that suspending driver licences is better than sending fine defaulters to gaol. However, three respondents argued that it isn't working and that "it is wrong to take their driving privileges away". Two respondents contended that suspending driver licences is appropriate, however, it is inappropriate to have "multiple disqualification periods", for example, "where a conviction is recorded and the mandatory disqualification periods are triggered."

Eight respondents maintained that it should be reserved for driving offences and it should not be used in relation to non-payment of any fine. Three respondents pointed out that many defaulters have no idea that this can happen.

Nine respondents acknowledged that suspending driver licences is a useful tool designed to compel payment of fines. One respondent remarked that "otherwise they will never be paid, and fines will have no punishment or deterrent effect." Three respondents noted that it has the benefit of "administrative efficiency". However, one respondent suggested that it "needs to be streamlined to make it more user friendly" and one respondent asked "why not garnishee wages or Centrelink payments?"

Six respondents believe that there ought to be another way to deal with fine defaulters that does not involve money to get the suspension lifted. Two of these respondents suggested that community service would be more appropriate. One respondent stated that the defaulter should be "given the option to resolve their default". One respondent suggested that "it may be that a fine not paid could be referred back to the court like any other breach of a court order."

Requiring more discretion or sentencing options to fit the offender's financial circumstances – Question 35

The majority of respondents (84%) believe that the *Courts need more discretion or sentencing options in order to impose sentences that fit the offenders' financial circumstances.*[32] Most of the remaining respondents (15%) do not believe this is necessary and one respondent (1%) is unsure.

[32] Although statistically insignificant, a greater proportion of respondents from regional areas indicated that more discretion or sentencing options are needed (95% compared with 81% of respondents from metropolitan areas).

Ten respondents commented that they would like the option to impose penalties other than a fine. For example, eight respondents suggested that CSO and one respondent recommended that s 9 bonds could be used as alternatives to fines (especially for offences that carry only a fine as a penalty). One respondent would like community aid panels (CAP) to be reconsidered. Two respondents differed on who should be able to elect to have the matter dealt with by CSO – one respondent believes that the defendant should be "able to ask for a CSO in lieu of a fine but on the basis that if they don't do the CSO a custodial sentence should result", while another respondent stated that "it should not be a matter of election" and that the Court should impose the CSO as an alternative penalty.

Seven respondents expressed views about disqualification periods. These respondents would like more discretion in relation to the length of disqualification periods imposed (1); accumulating disqualification periods (1); and imposing a fine, or other penalty, without mandatory disqualification (5). One respondent stated that "a useful power would be (as in Victoria) disqualification until further order of the Court, with conditions to be fulfilled before the Court will entertain application for such an order."

Two respondents mentioned that they would like the discretion, or power, to order time to pay periods (instead of the statutory period of 28 days) and the amounts to be paid.

Several respondents raised concerns about some of the difficulties that would need to be overcome in order to provide sentences to fit the offenders' financial circumstances, including the need for financial circumstances to be independently assessed and verified (3); the difficulty "creating time to match additional options to individuals in different situations, e.g. a traffic, RTA, or State Rail list" (1); and the "…expense in administering it" (1). One respondent remarked that there needs to be "wider setup of CSO placement - no Local [Government] Councils participate or offer placements (as far as I know) - which is scandalous - yet roadsides are public rubbish tips, aged people and aged accommodation etc suffer neglect, etc, etc".

Alternatively, six respondents expressed views why the Courts do not need more discretion or sentencing options. Three respondents believe that present options are sufficient (especially if you are only considering quantum of fines). One respondent stated that "the Fines Act appears to do this quite well, i.e., if a fine cannot be paid there are alternatives provided by the Act to enable an offender to finalise the amount owing." Another respondent could see "no practical alternative" and lastly, one respondent remarked that magistrates "need to be much more aware and understanding of capacity to pay and not just impose huge fines without proper consideration of capacity."

Additional information that would be useful in the sentencing process – Question 36

Forty-nine respondents (62%)[33] provided a number of suggestions about *additional information that would help during the sentencing process*. Their suggestions focus on procedural aspects of information provision, ways to take into account offenders' financial circumstances, as well as substantive suggestions about the types of information that could be provided. Thirty respondents (38%) did not offer any suggestions for additional information.

The different types of information that would be helpful cover a range of factors. The predominant information, cited by 24 respondents, relates to the offender's financial circumstances, including a printout of their fine payments history (5). Other types of useful information include: mental health assessments (3), drug and alcohol assessments (2) and "details of previous courses completed", for example, TOP (1) or "proof of compliance with previous 'chances' given by the courts…[for] example, abstention from drug taking" (1). Several respondents suggested that additional information could be prepared by defence representatives (4) or Probation and Parole (5).

The need to reflect the offender's financial circumstances in the sentencing process was apparent from the responses to this question. Ten respondents favoured the idea of a simple form, setting out the offender's assets and liabilities, incomes and expenditure, as this would give the Court an easy overview of the offender's financial circumstances without undue extra demands on the Court's time. Nine respondents also highlighted the need for verifiable information.

Lack of time was the main constraint emphasised by five respondents. One respondent noted that "assessing a fine" is a difficult process and another respondent remarked that "[a]ll relevant information is useful, but it really depends on the gravity of the offence as to extent of information needed. There is a real need in the Local Court to balance the needs of all parties before the court in a list situation."

Three respondents emphasised the need for more sentencing options. Their comments reflect comments to earlier questions that call for greater flexibility in sentencing, particularly with respect to sentencing options and mandatory disqualifications. One respondent remarked that all options should be available in rural areas. Another respondent would like information on what services are available in the community.

Seven respondents did not believe more information would necessarily be helpful and seven respondents remarked that they will ask for any additional information they require.

[33] Many of these respondents restated views expressed in question 30.

Other comments – Question 37

The comments provided in answer to this question were varied.[34] A large number of respondents re-emphasised their opposition to the current licence suspension and mandatory disqualification system. Other comments focused on the types of information that may help the Court in sentencing, to other changes needed to make the fine imposition and collection process more logical and efficient, as well as the burden of fines on individuals and their family.

Twenty-three respondents expressed concerns about the licence suspension system (16), the mandatory disqualification system (14) and/or habitual traffic offender declarations (4). Eight respondents remarked that these systems are "seriously flawed" and "counter-productive" and that they are "creating a class of criminals" who continue to drive whilst suspended or disqualified. These respondents believe there is a need to change the licence suspension system, and change the mandatory disqualifications laws – either by abolishing licence suspension for fine default for non-traffic matters (1); or inserting a mechanism that allows people to re-apply for a licence after a few years without re-offending (3); or lowering the currently excessive mandatory disqualification periods (2); or allowing judicial discretion in this area (3).

Fifteen respondents also highlighted the need for more lateral thinking regarding sentencing, including: other sentencing options (10), such as CSO (3) and restricted licences (1); or permitting alternative methods of fine collection (5), such as automatic deductions (3) and payment of fines by instalments (1). One respondent suggested that "[f]ines should be remitted after a certain amount."

Five respondents were particularly concerned about the burden imposed by fines. Others were concerned about its impact on people from country/remote areas (5) and Aboriginals (1). Others were concerned about its impact on family and other people (3).

Other suggestions critical of the current system were:

- Concern about unrepresented defendants, especially guilty pleas from unrepresented defendants (2)
- Concerns about infringement notices (3)
- Concerns that statutory penalties for some offences are disproportionate to more serious offences (4)
- Need a well considered package (1)
- Need for proof of circumstances (3)
- Sentencing attitude needs to change (1)
- Fines cannot deal with repeat offenders (1)
- Lack of enforcement is a source of concern (2)
- Problems with SDRO (1)
- Need more help from legal representatives (1)
- Interest in Victorian legislation (1).

[34] Forty-six respondents (58%) provided comments.

Some respondents were cautious about proposals for change. The main reason for caution is the lack of time in the court room (7), and the perception that more information will increase the complexity of the sentencing process (2). Two respondents stated that there is a need to maintain the symbolic weight of penalties or have regard to community expectations.

Discussion

4.1 Advantages and disadvantages of fines

Respondents clearly accepted that fines have several advantages as a sentencing option. They reported that they believed that fines:

- Achieve the goals of sentencing
- Are flexible - universally applicable / easy to apply / immediate and fast
- Useful for property or greed crimes
- Enable consistency while reflecting the seriousness of an offence
- Are the least intrusive and moderate option for minor offences
- Act as both a personal and general deterrent.

A fine was generally seen as an effective sentencing option where a person is convicted of a fairly trivial offence for which a court does not consider any other sentencing option to be appropriate. In such cases, the imposition of a fine satisfies sentencing theory and permits the sentencer to dispose of the matter in a relatively short period of time and without any curtailment of the offender's liberty.

However, some respondents qualified their statements, noting that a fine is advantageous only if an offender has the capacity to pay. Others noted that a fine may be the only option available or suitable, especially for absent defendants, or noted that it was "better than gaol" and an advantage for that reason alone.

Respondents also identified a number of disadvantages of a fine as a sentencing option, including:

- The adverse impact on family or dependents
- The unevenness of a financial burden caused by the differential between the rich and poor offenders
- The impact of a relatively inflexible penalty regime when imposed on those with special disabilities, such as a mental illness
- Problems with the SDRO and RTA inflexible procedures
- Practical difficulties in contesting fines and in obtaining time to pay.

A number of respondents drew attention to the fact that fines have the potential to have extremely adverse effects if unpaid, noting that the ramifications of default are not always understood either by the offender or by the Bench.

Licence suspension issues in particular proved a concern, with almost half of respondents raising it as a concern. Respondents specifically cited the risk that further offences will arise when suspended drivers find it necessary to drive by reason of work or family emergencies. The catastrophic consequences, such as the commission of driving offences unrelated to the fine offence, and the potential escalation towards imprisonment, were commonly noted.

The inability to enforce fines, due to defaulters' limited resources or unwillingness to pay was also seen as a negative aspect of the sanction. Magistrates are often faced with the choice of reducing the fine to the extent that it fails to reflect the offence or community attitudes and thus brings the sentencing system into disrepute. Alternatively, fines of such severity can be imposed that family and dependents are harshly penalised, leading to subsequent breaches, even prison. It was generally agreed that fines imposed on an offender with no capacity to pay are absolutely useless as a penalty.

4.2 Appropriate penalty for three offences

The respondents were given three summary offences and each corresponding maximum penalty (questions 6, 8 and 10). They were asked *What penalty do you think is appropriate*? Since no further objective or subjective features were added to these questions, the answers given as to what penalty is "appropriate" were preliminary only. Many respondents understandably wanted to put qualifiers on their responses to these questions and stressed the importance of taking into consideration a range of factors other than the elements of the offence and the maximum.

Notwithstanding these constraints the respondents indicated that for the offences selected a fine was the most appropriate penalty: offensive language (86%), drive while licence was suspended (87%) and drive while disqualified (81%).

4.3 Cost orders

It also appears that there are inconsistencies in the practice of magistrates in making cost orders. Eighty percent of respondents indicated that they always or often order court costs in addition to a fine. In comparison, 20% of respondents acknowledged that they never, only rarely or sometimes impose court costs.

It is not known whether those respondents who impose court costs reduce or adjust downward the amount of the fine in light of the costs order. If respondents do not take the increased cost to the offender into account when determining the fine amount, this discrepancy is likely to lead to inconsistent sentencing outcomes and inconsistent pecuniary burdens, particularly for low-income offenders who are convicted of more than one offence. As well as the inherent disadvantage this implies, it is important as fees and levies set at a level that the offender cannot pay, or cannot pay within a reasonable time, are "much less likely to be paid".[35]

Interestingly, the issue of court costs being imposed on impecunious offenders is currently a matter of judicial unease in the United Kingdom. Magistrates have criticised a recent government requirement that a fifteen pound surcharge be levied in addition to fines imposed in court. The money is designed to allay costs of victims of crime and witnesses, but has been met with stiff opposition from the judiciary, who have argued that the costs threaten judicial independence and effectively render them tax agents for the government. Rather than submit to the edict, magistrates have

[35] D Challinger, "Payment of Fines", *Australian and New Zealand Journal of Criminology*, Vol 18, pp 95-108, 1985.

threatened to impose alternate sentences such as conditional discharges, which do not attract the levy, in lieu of fines. Magistrates have been warned that wilful refusal to impose the court costs cannot be reconciled with fitness to hold judicial office, and may lead to referrals to the Office of Judicial Complaints for disciplinary action.[36]

4.4 Capacity to pay

It is well established at common law that a fine should not be imposed where an offender is unable to pay. In 1989 the NSW Court of Criminal Appeal (per Finlay J with Smart and Studdert JJ agreeing) held that:[37]

> "It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment."

If the offender is not able to pay the proposed fine, the Court should consider adjusting the amount of the fine or consider using an alternative sentencing option.

Legislative constraints requiring the Court to consider an offender's circumstances before imposing a sentence have existed in NSW since 1985.[38] Section 6 of the *Fines Act* 1996 requires the court to take into account the offender's financial circumstances before sentencing, but only where the information is reasonably and practicably available to the court for consideration. Although s 33(1) of the *Children (Criminal Proceeding) Act* 1987 places a limit on the court insofar as it can only impose a fine up to but not exceeding 10 penalty units, it does not specify the factors to be taken into consideration when fixing the amount of the fine.

Generally speaking, all respondents believed that the means of the offender has an influence, to varying degrees, on the amount of the fine they would impose. Approximately half of respondents (51%) believe that it has a great deal of influence. While acknowledging the importance of appreciating an offender's capacity to pay however, respondents ranked this as only the third most important factor in determining whether to impose a fine, behind considerations of the severity of the offence and whether there was any other sentencing option legislated.

4.5 Decreasing the fine imposed

This is of interest given that a majority of respondents stated that they would decrease a fine if details of offender circumstances or offending history were known. Respondents indicated that they would decrease the fine amount imposed if the offender was receiving unemployment benefits or was on a pension and/or has little disposable income, or if the offender was an itinerant or homeless. Respondents were

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[36] "JPs unhappy over victims' surcharge", *New Law Journal*, p 531, 20 April 2007.
[37] *R v Rahme* (1989) 43 A Crim R 81 at [86].
[38] Section 80A of the *Justices Act* 1902 was inserted in 1985. Section 440AB of the *Crimes Act* 1900 was inserted in 1989. Both sections were in similar terms to s 6 of the *Fines Act* 1996, and both were repealed when the *Fines Act* 1996 commenced.

unlikely to change the amount of fine they would impose if the offender has a history of fine default or the offender is under 25 years. Evidence of prior convictions, even if for unrelated offences, would result in an increased fine being imposed.

However, despite acknowledging the importance of ascertaining an offender's capacity to pay a fine, it appears that consistent information on whether an offender has outstanding fines is generally not known nor sought. While just over half of respondents (51%) stated that they ask offenders about outstanding fines or financial obligations, almost as many respondents (49%) indicated that they never ask offenders whether they are already paying another fine. Whether this information is requested seems to depend upon the nature of the offence, and (for driving offences) whether licence suspension arose from fine default or problematic driving.

How the courts satisfy themselves as to the offender's circumstances also appears inconsistent. While all respondents initially stated that they routinely receive oral submissions as to capacity from the offender or the legal representative, one in five respondents (20%) subsequently declared that oral submissions are made only sometimes and a few respondents reported that they are rarely (4%) or never made (1%). Reliance on other methods of determining an offender's capacity to pay a fine is uncommon, with written materials, of any kind, being seldom required. Only one in five respondents (19%) routinely order a pre-sentence report before imposing a sentence.

4.6 Imposing an alternate sentence

Faced with an offender who could not afford to pay a fine that would usually be imposed for an offence, more than half of the respondents (53%) indicated that they would sometimes impose an alternative sentence.

Interestingly however, almost a quarter of respondents stated that they would rarely or never impose an alternative sentence, notwithstanding the offender's inability to pay. A refusal to substitute an alternative sentence was generally attributed to the fine being considered "an appropriate penalty" (83%), and that "the legislated sentence is a fine" (68%).

If an alternate sentence was to be considered, the form of the sentence was heavily reliant upon the circumstances of the offence. In both driving scenarios for example, one-third of respondents indicated that an alternate sentence, such as dismissing the charge notwithstanding that offence was proven (a s 10 order),[39] would be considered where the licence suspension had been incurred due to fine default (non-traffic related) rather than problematic driving.

An alternate sentence was also likely to be considered by a significant proportion of respondents if the offender requested it for family or financial reasons. While a s 10 was the most likely alternative for an offensive language offence, the alternate sentence was likely to increase in severity, that is, be at the higher end of sentencing hierarchy, for a driving offence, which was regarded as a considerably more serious

[39] *Crimes (Sentencing Procedure)* Act 1999: s10

offence. Accordingly, a s 9 good behaviour bond[40] or a community service order[41] were the most likely penalties to be considered, when an alternate sentence to a fine was requested for family reasons.

A number of respondents indicated that they imposed a fine only because of the lack of sentencing alternatives. There was a strong element of judicial unease regarding the restricted availability of sentencing options, especially in rural and remote areas. The majority of respondents (84%) stated that the courts need more discretion or sentencing options in order to impose sentences that are tailored to the offenders' financial circumstances. These responses suggest that magistrates are imposing fines in cases where they believe a fine is not the appropriate penalty. Indeed, eight in 10 respondents stated that they have imposed a fine knowing that the offender cannot or will not pay: often (16%); sometimes (38%) or rarely (26%).

The overwhelming majority of respondents (96%) believe that the Court should be able to impose a community service order type sanction as an alternative to a fine, provided adequate supervision and safeguards are realistically available. The practical challenges to be overcome if a community service type order was to be introduced in NSW include: the limited availability of suitable community service in the area; the need for assessment of the offender's suitability for community service; need to cater for specific disadvantaged groups, such as those with intellectual disabilities; the need to ensure compliance and program completion; and the need to provide transport for some offenders to the work sites.

It is noted that Fine Options Orders (FOOs) are currently available in Queensland for both court-imposed fines and penalty notices,[42] have been operating in Canada since 1975[43] and were recently endorsed by the Sentencing Commission of Scotland.[44] FOOs allow an impecunious offender to apply to the court, at the time of the imposition of a fine or thereafter, for an order that he or she be allowed to work off the fine by way of community service.

It is important that the courts do not impose sentences that cannot be enforced. If magistrates are compelled to impose fines because no other options are available, even in cases where they know the fine is unlikely to be paid, this is likely to undermine community respect for the law and the court system.

Judicial attempts to avoid potentially unjust outcomes brought about by undue severity, can in turn, lead to unjust outcomes because of excessive leniency, such as an over-reliance on s 10 orders resulting either in outright dismissal, or a conditional discharge that avoids the usual consequences of a recorded conviction and sentence.

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[40] *Crimes (Sentencing Procedure)* Act 1999: s 9
[41] *Crimes (Sentencing Procedure)* Act 1999: s 8
[42] Division 2, Part 4, *Penalty and Sentences Act* 1992 (QLD), and s 43 of the *State Penalties Enforcement Act* 1999 (QLD).
[43] National Council of Welfare, *Justice and the Poor*, No 111, NCW, Canada, 2000. Available at <http://www.ncwcnbes.net/en/home.html>, accessed 12/09/06.
[44] The Sentencing Commission for Scotland, *Basis on which Fines are Determined*, 2006. Available at <http://www.scottishsentencingcommission.gov.uk/>,accessed 14/04/06.

Concern about systemic leniency in sentencing has previously prompted the Attorney General to request that the Court of Criminal Appeal deliver a guideline judgment for high range drink-driving.[45] In its analysis of the impact of the guideline judgment, the Judicial Commission found a strong relationship between the location of the sentencing court and the use of s 10 non-conviction orders for high-range PCA offences. Generally speaking, the use of s 10 orders was higher for courts outside Sydney, due perhaps to the absence of viable transport in many NSW country and regional areas. [46]

The NSW Parliament recently moved amendments designed to address "an anomaly in the sentencing regime",[47] whereby courts were able to impose lenient and arguably tokenistic sentences, as low as 50 cents, on some offenders. The Government argued that "imposing very small nominal fines costs the courts and the State Debt Recovery Office more to administer and recover than the value of the fine",[48] and moved to permit the court to dispose of proceedings without imposing any other penalty[49] in circumstances where a s 10 is inappropriate because an offence is not trivial and it is inconvenient to impose any further penalty.[50]

4.7 Information to assist in the sentencing process

Asked what additional information would assist respondents in the sentencing process, several mentioned having information on the offender's subjective circumstances, including: homelessness; mental health and intellectual disability; drug/alcohol addiction; and future prospects. Pre-sentence reports and psychiatric/psychological reports which address the subjective features of an offender were cited by two respondents.

Eleven respondents commented that having information on the financial circumstances and the offender's capacity to pay a fine would help to decide the penalty. Information relating to debts (including from SDRO), living expenses (including rent/mortgage, food, dependants, and so on) and source of income, would be useful.

Generally, the idea of a standardised form or information that sets out the offender's financial circumstances at sentencing was popular with respondents, with 38% advocating some variation of this proposal. Suggestions combining assistance from the court's welfare officer to complete statements of financial circumstances and the provision of financial counselling was also canvassed.

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[45] *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) (2004)* 61 NSWLR 305.

[46] See P Poletti, "Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW", *Sentencing Trends & Issues*, No 35, Judicial Commission of New South Wales, Sydney, 2005.

[47] The Hon Neville Newell, *Crimes and Courts Legislation Amendment Bill* 2006, Hansard, pp 3663-3666, 27/10/06.

[48] Ibid.

[49] Section 10A of the *Crimes (Sentencing Procedure) Act* 1999 commenced on 29 November 2006.

[50] Judicial Commission of New South Wales, *Sentencing Bench Book*, at [5-300], pp 3555-3556, 2006.

4.8 Advising the offender

Asked whether the court explains to the offender the importance of paying fines, and who in particular provides this explanation, respondents indicated that the bench is most likely to advise defendants of the payment options, such as time to pay and pay by instalments (69%). Likewise, the bench was more likely than the registrar or other person to explain that default will lead to licence suspension, although a third of respondents were unsure who, if anyone, explains this consequence of fine default.

The majority of respondents were unsure who, if anyone explains the other consequences of fine default (such as seizure of goods, garnishee orders, community service) or the importance of prioritising a fine over other expenditure (60% and 52% respectively). The bench is unlikely to refer the offender to financial counselling, welfare agencies, or driver education scheme (13%); direct the offender to inform the court of change in address or other circumstances (16%); or ensure that Aboriginal offenders are aware of the Aboriginal Client Service Specialist (19%). In fact, many of the respondents were unsure who, if anyone, did these things (60%, 47% and 56% respectively).

The apparent lack of proactive action taken by respondents is concerning, given research has established that the likelihood that fines will be paid promptly and in full is likely to be improved if such advice is provided consistently and implemented routinely into Local Court practice.[51]

4.9 Absent defendants

Several respondents highlighted the difficulty of sentencing absent defendants, given the likelihood that information concerning financial circumstances is not generally available in these circumstances. This suggests that magistrates are struggling to tailor a sentence to fit the absent offender, which may result in inappropriate penalties being imposed.

Consistent with international research,[52] data obtained from the Bureau of Crime Statistics and Research (BOCSAR) has indicted that defendants convicted in their absence receive harsher financial penalties than those imposed on defendants who are present for sentencing. In 2005 the median fine imposed on defendants physically in Court was $350. For absent defendants, the median fine was $400.[53]

[51] J Raine, E Dunstan and A Mackie, "Financial Penalties: Who Pays, Who Doesn't and Why Not?", *Howard Journal of Criminal Justice*, Vol 43, No 5, pp 518-538, 2004; G F Cole, "Monetary sanctions: The problem of compliance", in J M Byrne, A J Lurigio and J Petersilia (eds), *Smart sentencing: The emergence of intermediate sanctions*, pp 142-151, Sage Publications, Newbury Park, CA, 1992.

[52] J Raine, E Dunstan and A Mackie, "Financial Penalties as a Sentence of the Court: Lessons for policy and practice from research in the magistrates' courts of England and Wales", *Criminal Justice*; Vol 3, No 2, pp 181-197, 2003.

[53] Data analysis provided by BOCSAR on 29 September 2006.

4.10 Licence suspension

The majority of respondents (67%) never, or almost never, believe that suspending driver licences for non-payment of (non-traffic related) fines is appropriate. Respondents noted that licence sanctions fail to deter, fail to alleviate any of the causes of failure to pay and may actually exacerbate the cause of failing to pay and can result progressively in an accelerating or excessive interaction with the criminal justice system through secondary offending. The "blunt instrument" of sanctions was seen as causing considerable hardship to disadvantaged people, such as the young, the unemployed, and people from rural or regional areas where there is no public transport.

There was an overwhelming antipathy to mandatory licence disqualification periods. Ninety-three percent of respondents believed that mandatory disqualification was never or rarely appropriate, citing an in-principle objection to the fettering of judicial discretion and the practical hardship it occasioned for offenders and their family. Only six respondents (8%) acknowledged the appropriateness of mandatory disqualification for sentencing driving offenders.

Likewise, the vast majority of respondents (86%) believe that Habitual Offender Declarations are never or only sometimes an appropriate penalty. Respondents commented that "horrendous penalties are imposed with huge repercussions"[54] with sanctions "becoming meaningless"[55] when offenders are being disqualified well into the next decade or in excess of thirty years.[56]

[54] Judicial Survey response 4.
[55] Judicial Survey response 4.
[56] Judicial Survey response 18.

Conclusion

This is the first study undertaken in New South Wales to examine magistrate's views and practices regarding the imposition of fines. Approximately 130 surveys were distributed at a magistrates' conference, with 79 responses being received: giving a response rate of 61%.

The survey was undertaken as part of a research project examining the effectiveness of court-imposed fines and penalty notices. It was designed to examine how court-imposed fines are imposed. Specifically, the survey aimed to identify the factors taken into consideration when a magistrate is determining whether a fine ought to be imposed, as well as its quantum, and to ascertain judicial perceptions of the advantages and disadvantages of the fine, including judicial views of related administrative procedures imposed in response to fine default, such as mandatory licence suspension, and of accumulated sanctions in the form of habitual driver declarations.

The fine remains by far the most common sentencing option imposed in the Local Court in New South Wales. In 2005, the fine was the principal penalty imposed on more than one half of all Local Court offenders. Although the use of fines has declined over the past ten years, the monetary amount imposed has increased, with 56.7% of fines being between $200 and $500. The most common fine amount imposed is $500 (levied on 13.8% of fined offenders).[57]

There appeared to be a misapprehension between what respondents believe they need to know about an offender before imposing a fine, and the practical ability to determine those factors. Given the importance respondents placed on obtaining information about the specific circumstances of an offender, it is concerning that the major reason given by respondents for their failure to inquire further into the offender's circumstances is a "lack of court time" (72%). Moreover, it is of concern that 80% of respondents said that, even if only rarely, they have imposed a fine while being fully aware that the offender cannot or will not pay, notwithstanding that a refusal to substitute an alternative sentence was generally attributed to the fine being considered 'an appropriate penalty' or the legislated sentence that should be imposed.

Respondents also made reference to the extent to which legislation fettered their judicial discretion, with licence suspension for fine default, the imposition of mandatory licence disqualifications and Habitual Traffic Offender Declarations the subject of some criticism.

[57] J Keane and P Poletti, "Common Offences in the Local Court", *Sentencing Trends and Issues*, No 28, Judicial Commission of New South Wales, Sydney, 2003. This study was conducted using JIRS sentencing data for the 2002 calendar year. It should be noted that 2002 data did not include most regulatory offences as these were not collected by BOCSAR until 2003 (see n 1). In 2005, the median fine amount imposed was $350 with 53.4% of fines being between $200 and $500 and 64.5% being between $150 and $600. The most common fine amount was $500 (imposed on 12.9% of offenders), although fine amounts of $200 (imposed on 10.5% of offenders), $300 (imposed on 9.3% of offenders), and $400 (imposed on 9.2% of offenders) were also common.

Respondents generally seemed to take the effectiveness of the fine as a given, with just over half of respondents referring to the deterrent role played by the fine.[58] Nor did respondents factor into their determination of the appropriate fine quantum for a particular offence, whether the amount imposed would have a specific deterrent effect on the offender before them. This assumption however, sits uneasily with recent research that has established, at least for driving offences, that substantial increases in fines and licence disqualifications has limited potential in deterring recidivist offenders.[59]

Results of the survey indicate that magistrates consider a fine to be an integral weapon in the sentencing arsenal. While concerns were expressed about the impact on the impecunious offender and the escalating consequences of fine default, no respondents advocated their abolition. Essentially, fines are seen as a flexible, easy to administer and an appropriate penalty for relatively minor offences.

[58] As per responses to question 26.

[59] S Moffatt and S Poynton, "The deterrent effect of higher fines on recidivism: driving offences", *Crime and Justice Bulletin*, No 106, NSW Bureau of Crime Statistics and Research, Sydney, 2007.

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Appendix

Questionnaire – Magistrates

Please identify your region:

☐ Metropolitan area: Newcastle - Sydney – Wollongong
☐ Regional

Name:
(optional)

Sentencing outcomes for all offences:

1. How do you make your decision to impose a fine? *Please number according to priority, where 1 is most important, and 6 is least important.*

   ☐ Offender's means
   ☐ Severity of the offence
   ☐ Community expectations
   ☐ No other sentencing options legislated
   ☐ No other sentencing options appropriate or available in the community
   ☐ Other (*please specify*)

   _____

   _____

2. In general, how much influence does the means of the offender have on the amount of the fine you impose? *Please tick one box.*

   ☐ No influence
   ☐ Some influence
   ☐ Moderate influence
   ☐ A great deal of influence

3. How often would you impose an alternative sentence rather than a fine because you understand the offender cannot afford to pay the amount that would usually be imposed? *Please tick one box.*

   ☐ Never
   ☐ Rarely
   ☐ Sometimes
   ☐ Often
   ☐ Always

4. In cases where you would *not* impose an alternate sentence, what are the reasons for your decision? *Please tick as many as are appropriate*.

   ☐ Every offender can always pay something
   ☐ Legislated sentence is a fine
   ☐ Fine is the appropriate penalty
   ☐ No suitable options available in the community (such as CSO)
   ☐ No suitable options for the particular offender
   ☐ Other (please comment below)

5. How often do you impose court costs in addition to a fine? *Please tick one box*.

☐ Never
☐ Rarely
☐ Sometimes
☐ Often
☐ Always

The next questions ask about amounts of fine that you consider appropriate for a particular offence. You are asked to comment on how you would usually arrive at a sentence, and consider what factors you would take into account in increasing or decreasing the sentence, or imposing an alternate sentence.

Case 1. Offensive language, court imposed fine, maximum penalty is 6 penalty points or 100 hours of community service work, Summary Offences Act NSW section 4A)

6. What penalty do you think is appropriate?

_____

_____

7. To what extent would the following changes in the offender's circumstances increase or decrease the amount of fine you would impose, or lead you to consider another sentence? *Please tick one box next to each statement*.

	No Change	Increase fine	Decrease fine	Alternate (please specify)
First time offence	☐	☐	☐	☐ _____
Offender had unrelated prior convictions	☐	☐	☐	☐ _____
Offender has a history of fine default	☐	☐	☐	☐ _____
Offender is an itinerant or is homeless	☐	☐	☐	☐ _____
Offender is under 25	☐	☐	☐	☐ _____
Offender has dependent family	☐	☐	☐	☐ _____
Offender is receiving unemployment benefit or pension, and/or has little disposable income	☐	☐	☐	☐ _____
Offender asks for an alternate sentence for financial or family reasons	☐	☐	☐	☐ _____

Case 2. First time offender, drive while licence was suspended. Maximum penalty is 30 penalty units or imprisonment for 18 months or both, and mandatory 12 months disqualification (in the case of a first offence); or 50 penalty units or imprisonment for 2 years or both, and 3 years disqualification (in the case of a second or subsequent offence): Road Transport (Driver Licensing) Act 1998 (NSW), section 25 and 25A.

8. What penalty do you think is appropriate?

_____

_____

9. To what extent would the following changes in the offender's circumstances decrease or increase the amount of fine you would impose, or consider another sentence? *Please tick one box next to each statement.*

	No Change	Increase fine	Decrease fine	Alternate (please specify)
Offender had prior convictions for driving offences	☐	☐	☐	☐ _____
Offender's licence was suspended due to fine default (non-traffic related)	☐	☐	☐	☐ _____
Offender has a history of fine default	☐	☐	☐	☐ _____
Offender is an itinerant or is homeless	☐	☐	☐	☐ _____
Offender is under 25	☐	☐	☐	☐ _____
Offender has dependent family	☐	☐	☐	☐ _____
Offender is receiving unemployment benefit or pension, and/or has little disposable income	☐	☐	☐	☐ _____
Offender asks for an alternate sentence for financial or family reasons	☐	☐	☐	☐ _____

Case 3. Drive while disqualified. Maximum penalty is 30 penalty units or imprisonment for 18 months or both, and 12 months disqualification (in the case of a first offence) or 50 penalty units or imprisonment for 2 years or both, and 3 years disqualification (in the case of a second or subsequent offence): Road and Traffic (Driver Licensing) Act 1998 (NSW), section 25 and 25A.

10. What penalty do you think is appropriate?

_____

_____

11. To what extent would the following changes in the offender's circumstances decrease or increase the amount of fine you would impose, or consider another sentence? *Please tick one box next to each statement.*

	No Change	Increase fine	Decrease fine	Alternate (please specify)
Offender has prior convictions for driving offences	☐	☐	☐	☐ _____
Offender's licence was suspended due to fine default (non-traffic related)	☐	☐	☐	☐ _____
Offender has a history of fine default	☐	☐	☐	☐ _____
Offender is an itinerant or is homeless	☐	☐	☐	☐ _____
Offender is under 25	☐	☐	☐	☐ _____
Has dependent family	☐	☐	☐	☐ _____
Offender is receiving unemployment benefit or pension, and/or has little disposable income	☐	☐	☐	☐ _____
Offender asks for an alternate sentence for financial or family reasons	☐	☐	☐	☐ _____

Sentencing Procedure (To what extent are financial circumstances of the offender clearly understood, and where possible, verified?):

12. How often do defendants who attend court (or their legal representatives) make oral or written submissions on their financial circumstances?

- ☐ Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ Always

13. How often do you require written proof of an offender's financial circumstances prior to sentencing?

- ☐ Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ Always

14. What do you routinely do to ascertain the offender's capacity to pay a fine? *Please tick as many boxes as are applicable*.

- ☐ Receive oral submissions from the offender or the legal representative?

Require written materials such as:

- ☐ --------- Affidavit
- ☐ --------- Bank details
- ☐ --------- Statutory declaration
- ☐ --------- Letter from the offender
- ☐ --------- Purpose designed court form

- ☐ Order a pre-sentence report
- ☐ Require previous history of fines and penalty notices
- ☐ Check court records for outstanding fines

15. What is the major reason why you would not require written proof of financial circumstances when considering imposing a fine?

- ☐ Lack of court time
- ☐ Fine is too small to warrant a written statement
- ☐ Sufficient information from oral submissions
- ☐ Offender indicates they can pay a fine
- ☐ Other (please specify)

_____

_____

16. How do you determine the appropriate penalty when the offender is not present at sentencing?

_____

_____

_____

_____

17. How does the Court find out whether the offender has any outstanding fines? For example, prior to sentencing, do you ask offenders whether they are already paying another fine?

_____

_____

_____

18. Is there any other information that would help you to decide the penalty? *Please specify*.

_____

_____

_____

Explaining the consequences of non-payment:

19. How does the court emphasise the importance of paying fines? Who explains:

	From the sure Bench	Registrar	Other (e.g., legal representatives)	Not
The importance of prioritising a fine over other expenditure	☐	☐	☐	☐
Payment options, e.g., time to pay and pay by instalments	☐	☐	☐	☐
Default will lead to licence suspension	☐	☐	☐	☐
Other consequences Of default (seizure of goods, garnishee orders, community service)	☐	☐	☐	☐

20. How does the court maximise the offender's likelihood of paying a fine, for example:

	From the sure Bench	Registrar	Other (e.g., legal representatives)	Not
Referral to financial counselling, welfare agencies, driver education scheme	☐	☐	☐	☐
Directing the offender to inform Court of change in address or other circumstances?	☐	☐	☐	☐
Ensuring the offender knows he/she can return to the Court for assistance eg Time to Pay	☐	☐	☐	☐
Ensuring Aboriginal offenders are aware of the Aboriginal Client Service Specialist?	☐	☐	☐	☐

Dealing with prior fine default:

21. Do you think it would enable better sentencing outcomes if the Court had a clear picture as to the history of payment (including all penalty notices) and the reasons for default in each case?

    _____

    _____

22. Does the Court or Registry ask question as to the full circumstances and reason / excuses for non-payment of a fine?

    _____

    _____

23. Does the Court or Registry require a financial circumstances form or statement be completed? Signed (under oath)?

    _____

    _____

24. Does the Court or Registry question the defaulter as to other incomes within the family, if so, does the Court or registry discuss the possibility of settling the debt through these other incomes?

_____

_____

25. Does the Court or Registry provide any other support or assistance to defaulters, to minimise further default? What support or assistance is available from the Court or registry?

_____

_____

Other comments:

26. What do you consider to be the main advantages of fines as a sentence?

_____

_____

_____

_____

_____

27. What do you consider to be the main disadvantages of fines as a sentence?

_____

_____

_____

_____

_____

_____

28. Why do you think some offenders do not pay their fines?

☐ The offender cannot afford the fine
☐ The offender refuses to pay the fine, i.e. wilful default
☐ The offender does not prioritise the fine above other expenditure
☐ Other (*please comment*)

_____

_____

_____

29. Have you ever imposed a fine knowing that the offender cannot, or will not pay?

- ☐ Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ Always

Please comment:

_____

_____

_____

_____

_____

30. How could information about the offender's circumstances be improved to assist the Court in determining a fine?

_____

_____

_____

_____

_____

31. Should the Court be able to impose a community service order type sanction as an alternative to a fine?

_____

_____

_____

_____

_____

_____

32. Are mandatory disqualification periods for driving offences an appropriate penalty?

_____

_____

_____

_____

_____

33. Are Habitual Driver Declarations an appropriate penalty?

_____

_____

_____

_____

_____

34. Is suspending driver licences for non-payment of (non-traffic related) fines an appropriate penalty?

_____

_____

_____

_____

_____

_____

35. Do Courts need more discretion or sentencing options in order to impose sentences that fit the offenders' financial circumstances?

_____

_____

_____

_____

_____

36. What additional information would help you during the sentencing process?

_____

_____

_____

_____

_____

_____

37. Do you have any other comments?

_____

_____

_____

_____

_____

_____
_____
_____
_____
_____
_____

Thank you for your time in completing this questionnaire.

Factor	Metropolitan	Regional	Overall
severity of the offence	3.28	3.58	3.27
no other sentencing options legislated	2.83	2.37	2.69
offender's means	1.54	2.45	1.88
no other sentencing options appropriate or available	1.37	1.47	1.42
community expectations	1.33	1.87	1.40

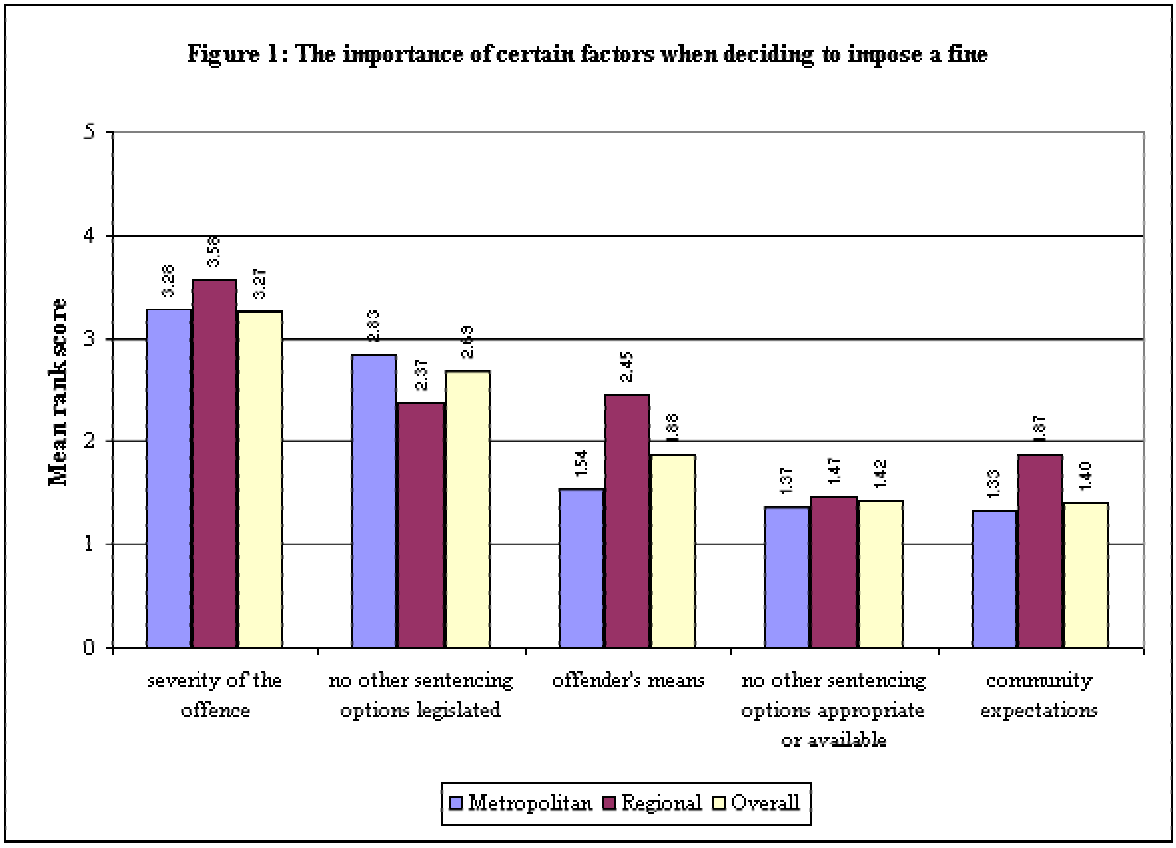
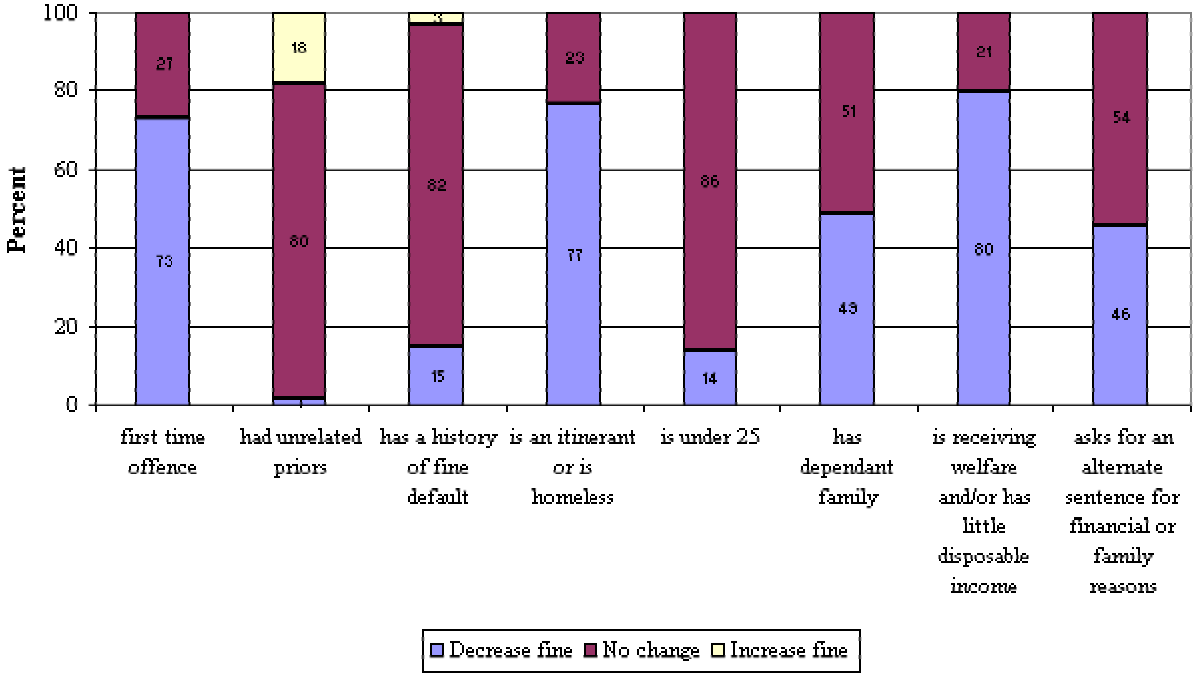
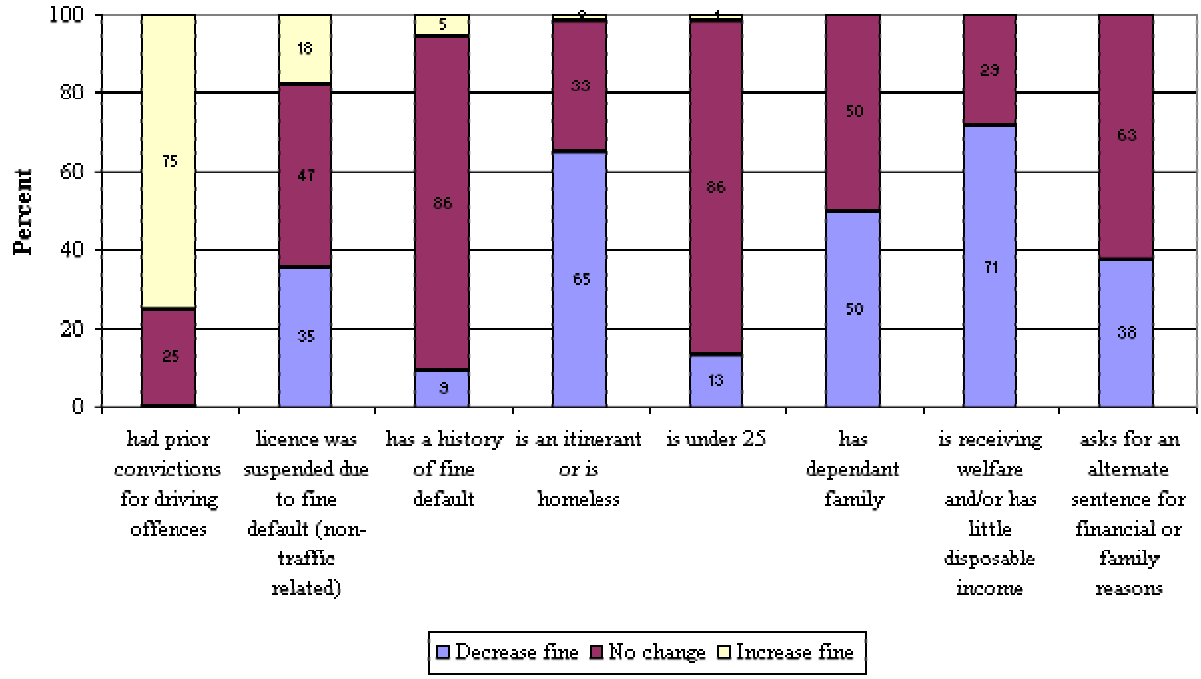


Figure 2: The extent to which changes in the offender's circumstances effects the amount of fine imposed for offensive language



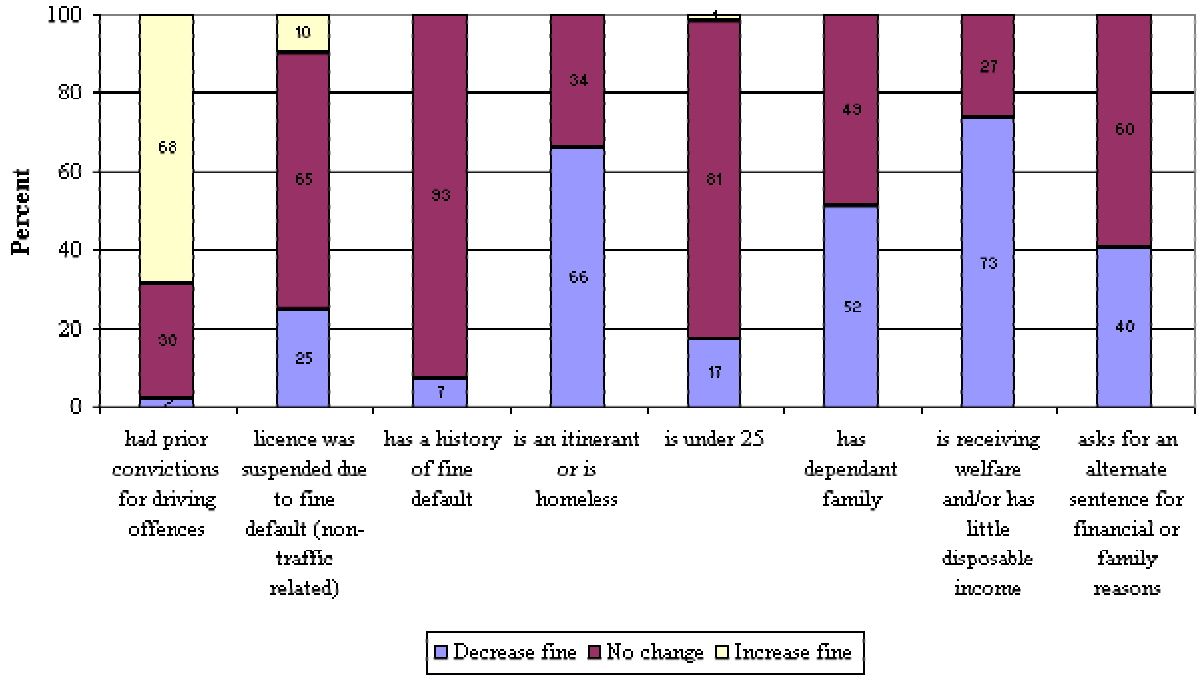
Offender Circumstance	Decrease fine	No change	Increase fine
had prior convictions for driving offences		25.0	75.0
licence was suspended due to fine default (non-traffic related)	35.3	47.1	17.6
has a history of fine default	8.9	85.7	5.4
is an itinerant or is homeless	65.1	33.3	1.6
is under 25	13.0	85.5	1.4
has dependant family	50.0	50.0	
is receiving welfare and/or has little disposable income	71.4	28.6	
asks for an alternate sentence for financial or family reasons	37.5	62.5	

Figure 3: The extent to which changes in the offender's circumstances effects the amount of fine imposed for drive while licence was suspended



Offender Circumstance	Decrease fine	No change	Increase fine
had prior convictions for driving offences	1.8	29.8	68.4
licence was suspended due to fine default (non-traffic related)	25.0	65.4	9.6
has a history of fine default	7.3	92.7	
is an itinerant or is homeless	66.1	33.9	
is under 25	17.4	81.2	1.4
has dependant family	51.5	48.5	
is receiving welfare and/or has little disposable income	73.4	26.6	
asks for an alternate sentence for financial or family reasons	40.4	59.6	

Figure 4: The extent to which changes in the offender's circumstances effects the amount of fine imposed for drive while disqualified



	%
receive oral submissions	100.0
require affidavit	2.5
require bank statements	5.1
require statutory declaration	3.8
require letter from the offender	1.3
require purpose designed court form	1.3
order a pre-sentence report	19.0
require previous history of fines and penalty notices	11.4
check court records for outstanding fines	6.3

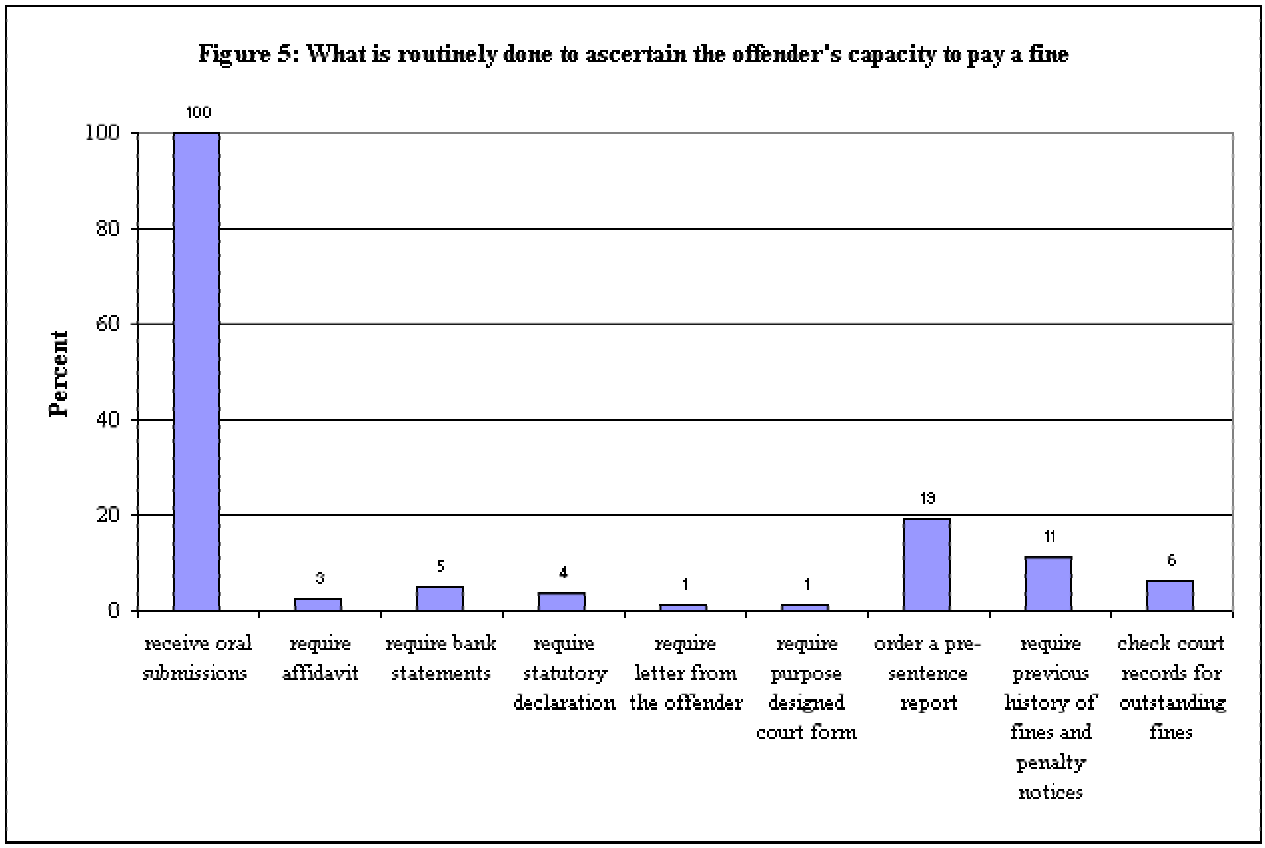


Table 1: Alternative penalties for offensive lanuguage

Offender Circumstance	Would impose an alternative		
	n	%	alternate penalty
first time offence	36	46	s 10 order (32), CAP (1), Depends (3)
had unrelated priors	1	1	s 10 order (1)
has a history of fine default	7	9	s 10 bond (1), s 9 bond (1), CSO (3), Depends (2)
is an itinerant or is homeless	17	22	s 10 order (9), CSO (1), No penalty (1), Depends (6)
is under 25	6	8	s 10 order (3), CSO (1), Depends (2)
has dependant family	6	8	s 10 order (2), CSO (1), Depends (3)
is receiving welfare and/or has little disposable income	6	8	s 10 order (2), CSO (1), Depends (3)
asks for an alternate sentence for financial or family reasons	20	25	s 10 order (5), s 9 bond (1), CSO (7), Depends (7)

Table 2: Alternative penalties for drive while licence was suspended

Offender Circumstance	Would impose an alternative		
	n	%	alternate penalty[(a)]
had prior convictions for driving offences [(a)]	20	25	s 9 bond (9), s 9 bond + fine (3), CSO (1) Depends (7)
licence was suspended due to fine default (non-traffic related)	26	33	s 10 order (22), s 9 bond (2), CSO (1), Depends (1)
has a history of fine default	10	13	s 10 order (1), s 9 bond (5), CSO (1), Depends (3)
is an itinerant or is homeless	11	14	s 10 order (3), s 9 bond (5), Depends (3)
is under 25	1	1	s 9 bond or CSO (1)
has dependant family	3	4	s 10 bond (1), s 9 bond or CSO (1), s 9 bond + small fine (1)
is receiving welfare and/or has little disposable income	6	8	s 9 bond (3), s 9 bond + small fine (1), CSO (1), Depends (1)
asks for an alternate sentence for financial or family reasons	21	27	s 9 bond (11), s 9 bond + small fine (1), CSO (4), Depends (5)

[(a)] Several respondents specified more severe penalty types as well - depending on the number of priors, type of priors, and reasons for suspension.

Table 3: Alternative penalties for drive while disqualified

Offender Circumstance	Would impose an alternative		
	n	% alternate penalty[a]	
had prior convictions for driving offences [a]	35	44	s 9 bond (8), CSO (12), imp alternatives (3), s12 (1), PD (2), prison (3), Depends (6)
licence was suspended due to fine default (non-traffic related) [b]	11	14	s 10 order (3), s 9 bond (3), CSO (2), Depends (3)
has a history of fine default [c]	10	13	s 10 order (1), s 9 bond (5), CSO (2), Depends (2)
is an itinerant or is homeless	14	18	s 10 order (1), s 9 bond (8), CSO (1), Depends (4)
is under 25	4	5	s 9 bond (2), CSO (2)
has dependant family	6	8	s 9 bond (2), CSO (4)
is receiving welfare and/or has little disposable income	11	14	s 9 bond (6), CSO (3), Depends (2)
asks for an alternate sentence for financial or family reasons	27	34	s 10 order (1), s 9 bond (13), CSO (6), Depends (7)

[a] Several respondents specified more severe penalty types as well - depending on the number of priors, type of priors (i.e., similar), and reasons for disqualification.

[b] Twelve respondents did not answer this question because this was drive while disqualified (DWD) and not a drive while suspended (DWS) offence.

[c] Seven respondents stated that they would not know this information

Table 4: How does the court emphasise the importance of paying fines

By explaining	Who explains [a]				
	Bench %	Registrar %	Other %	Not sure %	No-one [b] %
the importance of prioritising a fine over other expenditure	23	19	20	48	4
payment options, e.g., time to pay and pay by instalments	69	39	22	5	0
default will lead to licence suspension	40	25	21	30	3
other consequences of default (seizure of goods, garnishee orders, community service)	11	19	19	57	3

[a] Percentages do not total 100 as more than one person may explain the importance of paying fines.

[b] In some cases, respondents wrote that "no-one" explains. It may be that some of the respondents who ticked the box "not sure" were also of the view that "no-one" necessarily explains.

Table 5: How does the court maximise the offender's likelihood of paying a fine

By	Who [a]			
	Bench %	Registrar %	Other %	Not sure %
referral to financial counselling, welfare agencies, driver education scheme	13	17	26	60
directing the offender to inform Court of change in address or other circumstances	16	36	14	47
ensuring the offender knows he/she can return to the Court for assistance, e.g., time to pay	72	27	9	15
ensuring Aboriginal offenders are aware of the Aboriginal Client Service Specialist	19	19	22	56

[a] Percentages do not total 100 as more than one person may be responsible for maximising the likelihood of paying a fine.