
LOW-END PENALTY, BIG-TIME IMPACT: THE EFFECT OF FINES ON INDIGENOUS PEOPLE

by Melanie Schwartz

INTRODUCTION

For many, fines are an annoying but essentially amoral penalty—something to be treated as a cost of living than rather than a vehicle for condemnation.¹ However, this discounts the significant impact of fines on the disadvantaged, who are more likely to be vulnerable to fines in the first place. Like many other areas of the criminal justice system, the punitive reach of a fine can go well beyond merely the financial penalty.

The fine is now the most common penalty in the Australian criminal justice system: in 2014 and 2015, 60 per cent of offenders received a fine as their principal sentence.² In addition to court-imposed fines, a growing number of infractions result in on-the-spot fines or infringement notices delivered ‘in the field’ by police or other agencies. In Victoria alone, almost six million infringement notices were issued between 2012 and 2013.³ Given the great upswing in the use of fines, some attention has been given to the particular impact of monetary penalties on poor, vulnerable and Indigenous peoples.⁴ The punitive impact of fines is most obvious in WA, where non-payment can result in a term of imprisonment: a defaulter pays down their fine at a rate of \$250 per day of incarceration. Aboriginal women were the most likely cohort to be in prison in WA due to fine default, comprising 22 per cent of fine default receptions overall, and 64 per cent of female fine defaulters.⁵

Another important criticism is the potential for fines to act as a circuitous route to further criminalisation and incarceration. Many jurisdictions allow a defaulter’s driver’s licence to be cancelled, introducing a risk of drive-while-disqualified offences. During the NT Intervention, the practice was particularly heavy-handed due to a dramatic increase in law-enforcement presence alongside pressure on police to meet targets for driving offence charges.⁶ In an environment where police ‘drive around as their main activity, booking people for unregistered cars and issuing fines’,⁷ the likelihood of apprehension for additional offences is greatly increased.

Another way that fine stress can lead to further contact with the criminal justice system occurs where an inability to meet a fine leads to acquisitive crime aimed at obtaining the funds to meet the debt.⁸ These examples of secondary offending illustrate the importance of understanding the legal knock-on effects of fines.

While secondary offending provides a clear and visible example of the ramifications that fines can have, the lived experience of people dealing with high levels of unpaid fines offer another layer of significant, though often more hidden, impact. As recognised by the NSW Sentencing Council,

The imposition of a large fine on an already disadvantaged person simply opens the door to excessive interaction with the criminal justice system, with consequent negative impacts for family life, employment, individual morale and often, the wider community.⁹

The Indigenous Legal Needs Project travelled to 40 Indigenous communities across five Australian jurisdictions talking to Aboriginal and Torres Strait Islander people about their experience of legal issues. It found that debt levels among Indigenous people are high, and typically involve a combination of government agency debt (including unpaid fines), rental arrears and consumer debt to goods/service providers.¹⁰ This multiplicity complicates prospects of repayment and may cause debt to snowball: a QLD study points out that for those who rely on social security benefits for their livelihood, fine payments of \$50 a fortnight are impossible to sustain.¹¹ An Indigenous community organisation worker interviewed as part of the Indigenous Legal Needs Project points out ‘the complexity of the legal need in this area’:

[My clients have] been fined for disruptive behaviour. There’s a lot of that. Or driving without a licence or driving under the influence. All that sort of thing. So a lot of my clients have a lot of debt built up before they even start on anything else.¹²

Indeed, even in WA where non-payment of fines results in imprisonment, it is incorrect to think of a stint in jail as the only

ramification of that framework, as alluded to by this staff member in an Indigenous Legal Service in WA:

I think it's a complete failure of justice for a system to allow people to serve prison time when they have family to look after ... The flow-on effects go to everything. It goes to people's health issues. Then that's a burden on the health system. It's a further burden on the health system. It pushes people to substance abuse. That's, again, a burden on the health system. It's also a burden on law and order, because then it requires the police. It also requires vigilance in the community. Obviously, private citizens then get concerned. All of these things are kind of quite cyclical.¹³

This article explores some of the punitive effects of fines on Indigenous people that are felt in day-to-day experience, which may impact in much more subtle ways on the degree of contact with the legal system.

ATTRIBUTION OF FINES TO VULNERABLE PERSONS

An underlying policy assumption around the increased use of fines is that they are not excessively disruptive to the recipient. Fines can be paid by any willing third party on the offender's behalf, or be formally transferred to another person if appropriate. However, this openness of fines to transferability is problematic where there is coercion or violence in a relationship. Fines can become a tool for financial abuse where vulnerable people are coerced into taking on debt. Driving and parking infringements are particularly easy to sign over to a person under duress or threat, as discussed by an Indigenous Legal Service staff member in Victoria:

Infringements are ... one of the major components of debt. So, the common driving fines, parking fines ... have been inherited from the perpetrator (of family violence, by victims of that violence) (and) because of the fear, have never been transferred, have never been dealt with... We do quite a lot of these. I think currently we probably do about five to ten per cent (of our work) in that broad civil area.¹⁴

Outside a family violence context, but rather purely through the willingness of family members to help each other, people accrue fines

for a vehicle they have never driven, they have never had a licence, but the vehicle is registered in their name, and so they'll have this raft of fines that they could not possibly have incurred, but they have never responded, never sent in the documents saying I wasn't the driver.¹⁵

Where literacy is an issue, the risk of wrongful attribution of fines is increased even further. Here, one of the most attractive characteristics of fines for lawmakers—their administrative nature and the absence of need for oversight of their method of discharge—masks the potential for exploitation of vulnerable people.

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OUTSTANDING FINES KNOCK UP AGAINST OTHER AREAS OF LAW

Debts, including via non-payment of fines, can create or exacerbate other legal matters in criminal, civil and family law. For ex-prisoners, leaving jail with debt is a risk factor for recidivism.¹⁶ In 2000, 37 per cent of inmates surveyed had a debt to a government agency.¹⁷ Carrying a lot of debt entrenches levels of poverty and inequality that are themselves associated with increased likelihood of contact with the criminal justice system. As a legal practitioner in Redfern states,

If I get a parking fine, I pay it—that's the cost of parking in the city ... it hurts, I don't want to do it, but hey, it's not going to cause me to not eat this week. On the other hand, if this group of clients get a fine, it *would* mean not eating, it *would* mean not being able to get medication, so the degree of penalty is so much harsher.¹⁸

The knock-on effect of fines in civil or family law can be just as great. Outstanding debts lead to problems with credit reference ratings, which then impinge on people's capacity to access finance, credit and goods or services. It may also compromise their ability to gain tenancies in the private housing market. When housing is compromised, this may then become a risk factor in the child protection arena, since unstable accommodation is a primary justification for the removal of children.

On this analysis, unpaid fines take their place in a complex picture of legal need. Far from being discrete, low-impact penalties, they should be understood as interacting in complicated and sometimes escalating ways with housing, consumer, child protection and a raft of other non-criminal legal issues.

FINES AND ACCESS TO JUSTICE

For people who have trouble paying their fines in a lump sum, payment schemes offered by state debt recovery offices can be helpful in rendering a debt manageable. However, this assumes both knowledge of the possibility of implementing a payment plan, and a capacity to initiate and negotiate its terms. In this way, fines — and people's ability to pay them — become an access to justice issue. The availability of help to deal with fines can mean the difference between a payment plan or waiver of fines through arguments about special circumstances or hardship, and escalation to the point where warrants are issued.¹⁹

Clearly then, there is a high level of need for both community legal education and active support around repayment of fines. In the Northern Territory, for example, Aboriginal Legal Services make a point of delivering advice and support on fines as part of their bush court circuit, to try and stem the escalation of debt: 'It's such a big issue, but the fact that people are so disempowered by the process means they continue to accrue fines; they have no means of actually getting their fines sorted out.'²⁰

Where there is no help in this area, outstanding fines can be very likely to go into peoples' 'too hard basket'. Indigenous people often have complex legal, health and other needs, and so where fines are not presenting an immediate crisis, they are often not prioritised. This raises broader issues of social and economic inclusion in addition to access to justice concerns.

It can also be argued that the increased use of fines compounds Indigenous resignation around interactions with the law and contributes to an unwillingness to engage with the legal system (for example, to assert rights as a citizen or consumer) except under compulsion (usually at the hands of the criminal justice system).

The flow-on consequences of fines can push Indigenous people further to the margins, exacerbating financial and social exclusion and creating new reasons for justice system fatigue.

A LOW-LEVEL PENALTY WITH HIGH-LEVEL RAMIFICATIONS

The spectre of unpaid fines creates risks for net-widening into the criminal justice system, which undermines the idea of the fine as an unintrusive, relatively painless penalty. However, attention must also be given to the lived experience of people with mounting fines, and the way that flow-on effects of fines can compound or entrench more broad experiences of social, financial and legal exclusion. Throwing a raft of fines on top of Indigenous peoples' already complex circumstances can have a powerful impact on an individual's ability to thrive. This is illustrated by an example given by a government (statutory authority) staff member in Victoria:

[There was a] Koori woman that I had [as a client] who was on [a community supervision order]. So pretty much she had to report to us four days a week. So, you know, for her it was nearly impossible. Like, she had housing issues. There was a lot of domestic violence

going on. And people knew and would ring DHS (Department of Human Services) as soon as there was a fight. You know, 'We need them out!' Her children were in and out of foster care and there was a lot of contact that way. And there were a lot of financial issues. She had lost her licence. She had unpaid fines. You know, there were all these other civil matters that were going on... It is hard when there is so much ... I was exhausted. And she was living it!²¹

More recognition is required that for many Indigenous people, the flow-on consequences of fines are often debilitating. Work and development orders are a good example of an initiative that provides an alternative to the accumulation of fine debt. The NSW scheme provides that people suffering acute economic hardship (or a range of other circumstances) can undertake unpaid work for approved organisations to pay down their debt at the rate of \$30 per hour, to a maximum of \$1000 each month.²²

Ultimately, however, imposing a fine on person who does not have the means to pay demonstrates neither just punishment nor fairness. The NSW *Equality Before the Law Bench Book* instructs judges that principles of equity must be front of mind when considering monetary penalties for Aboriginal and Torres Strait Islander people, including that 'a specific level of fine for them will often mean considerably more than the same level of fine for others.'²³ The extent to which judicial officers heed these principles in practice varies a great deal from court to court.²⁴ Adherence to this principle by police officers, for example, by choosing to caution rather than fine, is similarly patchy.

The flow-on consequences of fines can push Indigenous people further to the margins, exacerbating financial and social exclusion and creating new reasons for justice system fatigue. The more seriously the lived effects of fines are taken, the more likely they are to be considered in discussions of reform of the existing system. It might lend more weight, for example, to arguments for adopting a day fine system,²⁵ where the amount fined is pegged to the income of the offender. Through better understanding the way that fine debt interacts with other legal and non-legal issues in people's lives, the idea of a fine as a small time penalty cannot be sustained.

Melanie is a Senior Lecturer in the Faculty of Law at the University of New South Wales, with expertise in criminal law, legal issues affecting Indigenous people, prisons and human rights. The author was one of three chief investigators (CIs) on the Indigenous Legal Needs Project, an Australian Research Council funded Linkage grant (LP100200455). The other CIs are Professors Chris Cunneen and Larissa Behrendt. Fiona Allison was the Senior Research Associate to the project.

- 1 Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge-Cavendish, 2009).
- 2 Australian Bureau of Statistics, 'Criminal Courts, Australia, 2014–15' (2 March 2017).
- 3 The Sentencing Advisory Council, 'Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria' (Report, The Sentencing Advisory Council, 30 May 2014) 2. In 2009–10 in NSW, 2.8 million penalty notices were issued to the value of more than \$491 million. See, NSW Law Reform Commission, *Penalty Notice Offences*, Report No 132 (2012) [1.8].
- 4 See, eg, Bruce Barbour, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (Report, NSW Ombudsman, August 2009); Ellena Galton and Emma Golledge, 'Not such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW' (Report, Homeless Person's Legal Service and Public Interest Advocacy Centre, April 2006).
- 5 Office of the Inspector of Custodial Services, *Fine defaulters in the Western Australian prison system*, Government of WA, April 2016, v. See also Nini Loh and Anna Ferrante 2001 'Aboriginal Involvement in the Western Australia Criminal Justice System: A Statistical Review' (Report, Aboriginal Justice Council, Crime Research Centre, The University Of Western Australia, 2001).
- 6 Thalia Anthony and Harry Blagg, 'Addressing the "crime problem" of the Northern Territory Intervention: alternate paths to regulating minor driving offences in remote Indigenous communities' (Report, Criminology Research Advisory Council, June 2012) 38.
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- 8 NSW Sentencing Council Members et al, 'The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices' (Interim Report, NSW Sentencing Council, October 2006) viii.
- 9 *Ibid*, [2.5] (citing the submission of the South Eastern Aboriginal Legal Service).
- 10 See the reports of the Indigenous Legal Needs Project, available at www.jcu.edu.au/ilnp.
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- 12 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Western Australia' (Report No 5, Australian Indigenous Legal Needs Project, James Cook University, 2014) 46.
- 13 *Ibid*, 244.
- 14 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Victoria' (Report No 3, Australian Indigenous Legal Needs Project, James Cook University, 2013) 130.
- 15 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in New South Wales' (Report No 1, Australian Indigenous Legal Needs Project, James Cook University, 2008) 90.
- 16 See Melanie Schwartz and Chris Cunneen 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) 7(15) *Indigenous Law Bulletin* 18.
- 17 Anne Stringer, 'Women inside in debt: the prison and debt project' (Paper presented at The Women in Corrections: Staff and Clients Conference, Adelaide, 31 October 2000) 4.
- 18 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in New South Wales' (Report No 1, Australian Indigenous Legal Needs Project, James Cook University, 2008), 92.

- 19 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Victoria' (Report No 3, Australian Indigenous Legal Needs Project, James Cook University, 2013), 205.
- 20 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Northern Territory' (Report No 2, Australian Indigenous Legal Needs Project, James Cook University, 2012), 113.
- 21 Fiona Allison, Melanie Schwartz and Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Victoria' (Report No 3, Australian Indigenous Legal Needs Project, James Cook University, 2013), 202.
- 22 NSW Government, 'Work and Development Order' (Factsheet, Office of State Revenue, November 2012).
- 23 Judicial Commission of NSW, 'Equality Before the Law' (Bench book, Anthea Lowe and Associates under the guidance of an Advisory Committee of the Judicial Commission of NSW, 10 July 2016) [2.3.6].
- 24 See, eg, Tamara Walsh, 'Won't pay or can't pay? Exploring the use of fines as a sentencing alternative for public nuisance type offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217.
- 25 Countries that have adopted the day fine include Finland, Sweden, Denmark, Croatia, Germany, Switzerland and Macao.

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