



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 55 – Part III

**Enforcement of Orders under
The Justices Act 1902**

REPORT

APRIL 1994

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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To: **HON C L EDUARDES MLA**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the enforcement of orders under the *Justices Act 1902*.

C J McLURE, Chairman

19 APRIL 1994

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APPENDIX 4 - SYSTEM RECOMMENDED BY COMMISSION FOR ENFORCING PAYMENT OF FINES IMPOSED BY INFRINGEMENT NOTICES

Table of Abbreviations

ABS Statistics	Australian Bureau of Statistics <i>Court Statistics: Courts of Petty Sessions Western Australia 1988-89</i> (1991).
Corrective Services Report	<i>Annual Report of the Western Australian Department of Corrective Services</i> (1993).
Corrective Services Statistical Report	<i>Statistical Report of the Western Australian Department of Corrective Services July 1 1991 to June 30 1992</i> (1992).
Cullen Report	Ministry of Justice and Police Fines Policy Development <i>Infringement Notice & Fines Management System Western Australia</i> (1993).
Dixon Report	<i>Report of the Committee of Inquiry into the Rate of Imprisonment</i> (1981).
WALRC Report	Law Reform Commission of Western Australia <i>Report on Courts of Petty Sessions: Constitution, Powers and Procedure</i> Project No 55 Part II (1986).

The pronouns and adjectives "he", "him" and "his", as used in this Report, are not intended to convey the masculine gender alone, but include also the female equivalents "she", "her" and "hers".

Chapter 1

INTRODUCTION AND BACKGROUND

1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the *Justices Act 1902*.

2. STAGES OF THE PROJECT

1.2 The *Justices Act 1902* regulates a number of matters relating to justices of the peace and Courts of Petty Sessions. The Commission has already reported on a number of other aspects of the *Justices Act 1902*, namely appeals from decisions of Courts of Petty Sessions and justices, bail, the retention of court records and the constitution, powers and procedures of Courts of Petty Sessions.¹ This Report, which deals with the enforcement of orders of Courts of Petty Sessions represents the final part of the Project. It is primarily concerned with the enforcement of fines imposed by infringement notices and by Courts of Petty Sessions.²

1.3 This matter was deferred to enable the Commission to take into account decisions by the Government on the recommendations as to the enforcement of orders contained in section VI of the Dixon Report which was published in 1981.³ Section VI of the Report dealt with fines and infringement notices and set out a number of recommendations relating to fines which it concluded might have some effect in reducing what it saw as an unacceptably high rate of imprisonment in Western Australia. Recently the Government has published the Cullen Report which contains recommendations for changes to the procedures for enforcing

¹ *Review of the Justices Act 1902: Part I - Appeals (1979); Bail (1979); Retention of Court Records (1980); Courts of Petty Sessions: Constitution, Powers and Procedure (1986).*

² Approximately 450,000 infringement notices were issued by police and local authority officers in 1992/1993 and 98,548 fines were imposed by Courts of Petty Sessions in that year: Cullen Report 20.

³ The Dixon Report is the short name given to the report of a committee of inquiry appointed by the Western Australian Cabinet in January 1979 "to determine what legislative and/or administrative action is necessary to reduce the use of imprisonment as a sanction in Western Australia": Dixon Report 1. The Chairman of the Committee was Mr Oliver Dixon, Parliamentary Commissioner for Administrative Investigations when appointed. Its members included senior executives of the Crown Law, Community Welfare, Corrections and Police Departments. As its second term of reference, this Committee was required "To consider whether it is possible to reduce the use of imprisonment, particularly for non-indictable offences, and whether other forms of punishment may be suitable in such cases": id 2

pecuniary penalties imposed by infringement notices and by Courts of Petty Sessions. The major recommendations of the Cullen Report are set out in Chapter 5 and discussed in Chapter 6.

3. CONSULTATIONS

1.4 In April and June 1992 the Commission wrote to a number of organisations and individuals asking for their preliminary submissions to help it identify issues for consideration in this part of the reference. The preparation of this Report has been assisted by those who replied and the Commission expresses its thanks to those concerned.

Chapter 2

THE EXISTING POSITION

1. THE EXISTING LAW AND PRACTICE

(a) Introduction

2.1 As fines are by far the most frequently used penalty by Courts of Petty Sessions,¹ the enforcement of orders of Courts of Petty Sessions is generally a question of the collection of fines² and the consequences of default in their payment. The existing law, following the implementation of some of the recommendations in the Dixon Report, is discussed below.

2.2 Approximately 34% of all receivals into prison (excluding police lockups) for the year ending 30 June 1993 consisted of persons detained solely for default of payment of a fine.³ Due to the short length of sentences served for these defaults such prisoners are a small proportion of the prison population at any one point in time and thus comprised only six per cent of the prison muster on the night of 30 June 1993.⁴ Aboriginal persons counted for 50% of the receivals into prison for the year ending 30 June 1993 solely for default of payment of a fine.

2.3 Defaulters can be analysed as falling into one of four distinct categories: principled, calculating, negligent and indigent.⁵ If such an analysis is accepted then enforcement policy

¹ The Australian Bureau of Statistics found that 71% (129,405 orders) of all penalties imposed in Western Australian Courts of Petty Sessions in the year 1988-1989 (182,453) were fines: ABS *Statistics* Table 3. The ABS *Statistics* appear to have excluded from these figures charges laid by infringement notices which are disposed of by payment of fines without being brought to court.

² The payment of other sums, such as costs and compensation, may also be ordered by Courts of Petty Sessions. Unless the context otherwise indicates, a reference to a fine includes any other sum that a court has ordered be paid.

³ In some years the proportion of fine defaulters amongst all receivals has been lower. In 1991-1992, for example, it was 28.5% (1,656 receivals out of a total of 5,819).

⁴ Corrective Services Report 18.

⁵ R Morgan and R Bowles *Fines: The Case for Review* [1981] Crim LR 203, 212.

The *principled* are those who, because of a matter of conscience or hostility, wilfully refuse to pay while being able to do so. The *calculating* are those who wilfully refuse to pay while being able to do so because they prefer to serve the sentence or undertake a work and development order rather than pay the fine. The *negligent* are those who can afford to pay but simply make no effort to do so. The *indigent* are those who are simply unable to pay in the time allowed.

must encompass carefully applied sentencing and enforcement practices which allow the court to adjust its response appropriately to deal with these diverse groups.

2.4 The available evidence seems to support the conclusion that the majority of fine defaulters lack the means to pay the penalties to which they are sentenced, although there also appears to be a significant number who are capable of paying, but refuse to do so for various reasons.⁶ It is inequitable and ineffective to treat those offenders who can't pay and those who won't pay in the same way.

(b) Fines, costs or other sums of money ordered to be paid by a court order

(i) Methods of enforcement

2.5 Where a fine is imposed on a defendant by a Court of Petty Sessions or a person is ordered to pay costs or any other sum of money by a court,⁷ the payment of that sum of money can be enforced by one of two methods. First, a judgment or order made by any court pursuant to the Criminal Code for the payment of a sum of money⁸ may, without prejudice to any other method of enforcement, be entered as a judgment of the Supreme Court or the order of a judge and is enforceable accordingly.⁹ Part VII of the *Supreme Court Act 1935* provides that judgments of the Supreme Court may be enforced by writs of fi fa, attachment of debts, charging orders on stocks and shares, equitable execution by appointment of a receiver or by a charging order or commitment under the *Debtors Act 1871*. In addition, where the time for payment is limited, the judgment may be enforced by writ of sequestration or by attachment.¹⁰ The Commission understands that this first method is not used in practice.

2.6 Secondly, the *Justices Act 1902* itself provides that when a person is ordered to pay a sum of money, the conviction or order must, at the same time, direct that it shall be recoverable, in the event of default, by execution against the goods and chattels of the person liable, and if he does not have sufficient goods and chattels, that he be imprisoned in

⁶ J M Houghton *Fine Default: A Survey of Persons Imprisoned in NSW for the NonPayment of Fines* NSW Bureau of Crime Statistics and Research (1985) 40-41.

⁷ Eg on the enforcement of a recognisance under s 154A(1) of the *Justices Act 1902*.

⁸ That is, a fine, costs or some other sum of money.

⁹ Criminal Code s 682.

¹⁰ *Supreme Court Act 1935* s 117(1).

accordance with a scale prescribed in section 167 of the Act.¹¹ The court may, however, in lieu of directing that the fine may be recovered by execution, direct that in default of payment the person be imprisoned.¹²

2.7 The court also has power to do all or any of the following -¹³

- (a) allow time to pay;¹⁴
- (b) direct payment by instalments;¹⁵
- (c) direct that the defendant be at liberty to give security for payment of the sum adjudged to be paid.¹⁶

Where a person defaults in paying any sum of money ordered to be paid, any justice may issue a warrant of execution¹⁷ or commitment¹⁸ as the case may be.¹⁹ A warrant of execution or commitment cannot be issued more than twelve months after the determination of the case (except for the enforcement of an order for the making of periodic payments) without the leave of a stipendiary magistrate.²⁰ In 1992-1993 the police were required to deal with 55,000 warrants of commitment or execution emanating from fines imposed by Courts of Petty Sessions.²¹

2.8 The *Justices Act 1902* contains no guidelines for the exercise of the court's discretion to allow time to pay.²² However, in 1988 the Act was amended to require justices to record in

¹¹ *Justices Act 1902* s 155(1).

This procedure can also be used for the recovery of fines, costs or other sums of money ordered to be paid by the District Court or Supreme Court: *Criminal Code* s 682A. s 67 of the *Interpretation Act 1984* also provides that where an Act makes a fine recoverable but says nothing about how it is to be recovered, that Act is deemed to provide for recovery under the provisions of the *Justices Act 1902*.

¹² *Justices Act 1902* s 155(1). The period of imprisonment may be ordered to be cumulative on that served in respect of any other default: id s 167(6)(b).

¹³ If the court does none of these things, the fine is payable immediately, and if it is not so paid, the defendant may be imprisoned immediately if the court has ordered that he be imprisoned in default of payment: *R v Brook* [1949] 1 All ER 787, 789.

¹⁴ Some courts have a standard time to pay and all offenders are given the same time, say one month, irrespective of the offender's means or the amount of the fine.

¹⁵ It is not common for courts to order periodic payments.

¹⁶ *Justices Act 1902* s 144(1). This option is rarely, if ever, used.

¹⁷ A warrant of execution authorises the seizure and sale of the offender's goods to satisfy the outstanding sum.

¹⁸ A warrant of commitment authorises the arrest and detention of the offender for a specific period unless the sum outstanding is sooner paid.

¹⁹ *Justices Act 1902* ss 155(3) and 27(1).

²⁰ Id s 27(2).

²¹ Cullen Report 21. Most warrants are warrants of commitment.

²² Given by s 144 of the *Justices Act 1902*.

writing their reasons for refusing time to pay, payment by instalments or the giving of security for payment.²³

2.9 Although the *Justices Act 1902* appears to make seizure and sale of property of the offender a primary enforcement mechanism for payment of a fine,²⁴ it is a power which is little used except in cases where a corporation is fined where of course no other method of enforcement is available. Legislation has been passed to amend section 158 of the *Justices Act 1902* to allow the court to order execution against property rather than imprisonment of a fine defaulter on the application of the offender or a clerk of petty sessions.²⁵ However, the relevant section of the amending Act has not yet been proclaimed.²⁶

(ii) *Warrant of commitment*

2.10 If a conviction or order does not direct that a sum of money may be recovered by execution, but directs that in default of payment the defaulter shall be imprisoned any justice may issue a warrant of commitment of the person in default to gaol to be imprisoned in accordance with the scale in section 167 of the *Justice Act 1902*²⁷ unless the sum is sooner paid.²⁸ Credit must be given in the warrant for any portion of the sum of money paid before the warrant was issued.²⁹ A person who has been imprisoned under such a warrant may pay the sum ordered to be paid (together with any costs and charges mentioned in the warrant for issuing or executing the warrant and taking him to prison) to the keeper of the prison. The keeper is required to receive the same and, if the person is not in custody for any other reason, discharge him and pay the money received to the clerk of petty sessions.³⁰ If a part of the sum ordered to be paid is paid, the person's term of imprisonment may be reduced proportionately.³¹

²³ *Justices Amendment Act 1988* s 5, amending s 144 of the *Justices Act 1902*. This change implements a recommendation in the Dixon Report at 159.

²⁴ S 155(1).

²⁵ *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* s 19.

²⁶ See Proclamation, 19 January 1993, *Government Gazette* 26 January 1993 823.

²⁷ Para 2.11 below.

²⁸ *Justice Act 1902* s 158.

²⁹ *Ibid.*

³⁰ Id s 160. There is no provision like s 168 of the *Justice Act 1902*, which provides for how the proceeds of a warrant of execution are to be disposed of, directing the clerk as to how to dispose of this money.

³¹ *Justices Act 1902* s 167(4).

(iii) Scale of imprisonment for non-payment of money

2.11 The scale for calculating the term of imprisonment for default of payment is contained in section 167 of the *Justices Act 1902* (one day for every \$25 or part thereof),³² but the court may reduce any period so calculated to whatever shorter period it thinks is just.³³ When the rate was altered to \$25 per day in 1988 it was made subject to being varied subsequently by regulation rather than statutory amendment,³⁴ a method which facilitates more frequent alteration of the rate.³⁵

(iv) Enforcement of warrants of execution

2.12 If a warrant of execution is issued, and not a warrant of commitment, it is executed by the seizure and sale of the goods and chattels of the person against whom it is issued. A warrant may be executed in any part of the State³⁶ by or under the direction of a police officer.³⁷ The following goods may not be seized -

1. the person's or his wife's wearing apparel to the value of \$100;
2. his family's wearing apparel to the value of \$50;
3. household furniture and effects to a value not exceeding \$300;
4. tools and implements of trade;
5. beds and bedding; and
6. family portraits and photographs.³⁸

2.13 The goods and chattels which have been seized must be sold at public auction, unless they are perishable, not less than forty-eight hours after they were seized. The person against whom the execution was issued may consent to them being sold by some other means.³⁹ Unless some other period is fixed in the warrant, the goods and chattels must be sold within fourteen days of the date they were seized. The sale of the goods can be prevented if the sum

³² The term of imprisonment cannot exceed one month where only costs are ordered to be paid: *Justices Act 1902* s 167(3).

³³ Id s 167(5).

³⁴ *Justices Amendment Act 1988* s 9, further amending s 167 of the *Justice Act 1902*.

³⁵ This is consistent with a recommendation in the Dixon Report at 163 that the rate at which default is calculated be reviewed frequently to maintain consistency with current monetary values.

³⁶ *Justices Act 1902* s 162.

³⁷ Id s 163(1).

³⁸ Id s 163(2).

³⁹ Id s 163(3).

for which the warrant was issued, and the charges of executing it, are paid. The money can be paid to the police officer charged with executing the warrant⁴⁰ or the clerk of petty sessions,⁴¹ in which case the officer cannot execute the warrant if the person produces a receipt for the sum mentioned in the warrant.⁴² If the money is paid to any person other than the clerk of petty sessions, that person is obliged to pay it to the clerk.⁴³

2.14 The proceeds of the sale are applied in paying the sum for which the warrant was issued and all costs and charges incurred in effecting the sale.⁴⁴ Any funds remaining after the proceeds of the sale are so distributed must be paid to the owner of the goods seized.⁴⁵

2.15 The money received by the clerk of petty sessions as a result of a warrant of execution must be paid in accordance with any direction of the Act under which the complaint was made. If that Act contains no such direction, the clerk is required to pay the money into the Consolidated Revenue Fund.⁴⁶ If a fine or penalty imposed (or part thereof) is payable to any person other than the Crown, the clerk is required to retain the same for a period of seven days before paying it to him. Once the fine or penalty has been paid to that person, it cannot be recovered from the Crown, notwithstanding that the conviction is subsequently set aside.⁴⁷

2.16 If on the execution of a warrant of execution the police officer cannot find goods or chattels or sufficient goods or chattels to satisfy the sum mentioned in the warrant and the costs of executing the warrant, a justice may issue a warrant committing the person against whom the warrant was issued to prison.⁴⁸ He must be imprisoned in accordance with the scale contained in section 167 of the *Justices Act 1902*.⁴⁹ In calculating the term of imprisonment, credit must be given for any portion of the sum directed to be recovered which has been recovered or paid. When issuing the warrant the justice may direct that the term of

⁴⁰ Id s 164.

⁴¹ Id s 161.

⁴² Id s 164.

⁴³ Id s 161.

⁴⁴ The police officer charged with executing the warrant must give a written account of the costs and charges so incurred to the clerk of petty sessions. The person against whom the warrant was issued may inspect and take a copy of the account at any reasonable time within one month of the date the goods were seized: id s 163(6).

⁴⁵ Id s 163(5).

⁴⁶ Id s 168.

⁴⁷ Id s 171.

⁴⁸ Id s 157.

⁴⁹ Para 2.11 above.

imprisonment under the warrant commence from the expiry of any term of imprisonment that the person is then serving.⁵⁰

(v) *Work and development orders*

2.17 A major recommendation of the Dixon Committee was that the Government should institute a detailed study to permit the introduction of a Fine Option Programme.⁵¹ The fine option program envisaged in the Report was modelled on one which was introduced in the Canadian Province of Saskatchewan in 1975. That program allows an offender to perform authorised unpaid work of community service in lieu of payment of all or a portion of a fine or of suffering a period of imprisonment for default. Such a scheme was incorporated in the *Justices Act 1902* in 1988 under the name of Work and Development Orders.⁵²

2.18 Where a warrant of commitment may be issued in respect of an offender who is in default of payment, the person must report to a community corrections officer.⁵³ If the supervisor of a community corrections centre is satisfied that the payment in default is one to which Part VIAA of the *Justices Act 1902* applies he is required to issue a work and development order to the offender.

2.19 Where a warrant of commitment has been issued in respect of an offender who is in default of a payment, the offender may, whether or not the warrant has been executed, by notice in writing given to the Chief Executive Officer of the Ministry of Justice, advise him of the issue of the warrant.⁵⁴ If the Chief Executive Officer is satisfied that the payment in default is a payment to which Part VIAA applies, he must -

- (a) issue a work and development order to the offender; and
- (b) if the offender is in custody by reason only of the warrant of commitment, cause the offender to be released forthwith from custody.⁵⁵

⁵⁰ *Justices Act 1902* s 167(7).

⁵¹ Dixon Report 173.

⁵² Part VIAA, ss 171AA - 171AI; added by the *Acts Amendment (Community Corrections Centres) Act 1988* s 8.

⁵³ *Justices Act 1902* s 171AA(1). A pamphlet published by the Department of Corrective Services, *Work and Development Orders For Fine Defaulters*, advises those who have not paid their fine to report to a community corrections officer.

⁵⁴ *Justices Act 1902* s 171AB(1).

⁵⁵ Id s 171AB(2).

2.20 An offender who completes the performance of his obligations under a work and development order is regarded as having served the period of imprisonment that might have been provided for in a warrant of commitment in respect of the payment in default.⁵⁶ A work and development order is cancelled if the offender pays the sum mentioned in the order as the amount of the payment in default.⁵⁷ Part payment of that amount leads to a reduction in the period the offender is required to participate in a community corrections programme under the order.⁵⁸

2.21 When a fine or other obligation is imposed, the court may order that a work and development order must not be issued if payment should be in default,⁵⁹ but the courts rarely exclude the option of work and development orders. As a result, work and development orders are available even to those who have -

- * the means to pay but refuse to do so;
- * a history of wilful non-payment; or
- * breached previous work and development orders.

(c) Court orders relating to eighth schedule matters

2.22 Where a proceeding before a Court of Petty Sessions involves one of the matters referred to in the Eighth Schedule⁶⁰ to the *Justices Act 1902* money ordered to be paid by the justices cannot be recovered by means of a warrant of execution or commitment under the Act. The sum ordered to be paid (including any costs relating to the enforcement of the order) may however be recovered in the same manner as a judgment of a Local Court.⁶¹ The party entitled to recover the sum can recover the money this way by registering a certified copy of the record of the court's order in the Local Court nearest to the place where the order was made.⁶²

⁵⁶ Id s 171AE.

⁵⁷ Id s 171AF(1).

⁵⁸ Id s 171AF(2).

⁵⁹ Id s 171AI(2).

⁶⁰ Matters in the Eighth Schedule relate to the recovery of sums such as fees, damages, charges, rates and expenses of repairs.

⁶¹ *Justices Act 1902* s 155(6)(a).

⁶² Id s 155(6)(b) and (c).

2.23 This procedure for recovering outstanding sums of money was provided because the matters referred to in the Eighth Schedule, although dealt with in a criminal court, were considered to be in the nature of a civil debt.⁶³ Judgments of the Local Court may be enforced in the following ways -

- (i) execution against land;
- (ii) execution against goods;
- (iii) attachment of debts;
- (iv) execution against the person.⁶⁴

In the fourth case any magistrate may commit the person owing the money to prison if he defaults in payment of the sum for a term not exceeding six weeks (or until the sum is paid).⁶⁵ A person's debt is not satisfied by such imprisonment and execution may still take place against his land or goods.⁶⁶

(d) Other cases

2.24 An order of a Court of Petty Sessions may not be for the payment of money. A Court of Petty Sessions may make an order not for the payment of money but that the defendant do some act, and in the case of default, that he be imprisoned. In such a case, if the defendant neglects or refuses to do the act, any justice may commit the defendant to prison for such time as he directs.⁶⁷

(e) Interstate enforcement of fines

2.25 The enforcement of an order to pay a fine is not prevented merely because the individual who has been ordered to pay a fine is out of the State. The enforcement of such an order in another State or in a Territory can be carried out under Part 7 of the *Commonwealth Service and Execution of Process Act 1992*. There is also provision in the *Justices Act 1902* for the enforcement of an order against a body corporate to pay a fine where that corporation

⁶³ Western Australia Parliamentary Debates (1932) Vol 88 923.

⁶⁴ Ss 122, 126, 144 and 130 of the *Local Courts Act 1904*, respectively.

⁶⁵ *Local Courts Act 1904* s 130(1).

⁶⁶ Id s 130(4).

⁶⁷ *Justices Act 1902* s 159.

has property in another State or Territory which has agreed to provide a reciprocal scheme for the enforcement of such an order.⁶⁸

(f) Enforcement of fines imposed by infringement notices

2.26 Provisions governing the use of infringement notices and their enforcement were introduced into the *Justices Act 1902* in 1988 by the addition of Part VIBA (sections 171BA-171BM).⁶⁹ The first offences prescribed for inclusion in the infringement notice system under the Act were violations of the *Road Traffic Act 1974* and parking offences under the *Local Government Act 1960*. However, the scope of this procedure has now been widened to encompass offences under a number of other Acts such as the *Bush Fires Act 1954*, *Dog Act 1976*, and *Litter Act 1979*, but to date no offences under either the *Police Act 1892* or the *Criminal Code* have been prescribed.⁷⁰

2.27 Where a fine imposed by an infringement notice issued under an enactment prescribed for the purposes of section 171BD of the *Justices Act 1902* has not been paid, a courtesy letter may be served on the alleged offender identifying the infringement notice to which it relates and stating that -

- (a) If the alleged offender does not wish to have the matter heard and determined by a court the outstanding amount should be paid within the time specified in the letter.
- (b) If the person wishes to have the matter dealt with by a court, notice to that effect must be given within the time specified in the letter.
- (c) If neither the payment is made nor the notice given, payment of the amount specified in the letter will be enforceable under Part VIBA of the *Justices Act 1902*.⁷¹

⁶⁸ See Part VIA (ss 171A-171D) of the *Justices Act 1902*. The following jurisdictions are participating at present: Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania and Victoria.

⁶⁹ Added by *Justices Amendment Act 1988* s 10.

⁷⁰ See *Justices (INREP) Regulations 1989*.

⁷¹ *Justices Act 1902* s 171BD(1) and (2).

The courtesy letter must set out the sum outstanding, including the costs connected with sending the letter, the time within which payment must be made (it must not be less than 28 days) and the person to whom payment must be made.⁷²

2.28 If the time specified in the courtesy letter has elapsed and the alleged offender has not paid the sum outstanding or given notice that he wishes to have the matter dealt with by a court, a prescribed person may lodge an enforcement certificate⁷³ with the Registrar of the appropriate Court of Petty Sessions (known as an "INREP court"⁷⁴).⁷⁵ The certificate is registered in a register kept for the purpose by the Registrar.⁷⁶

2.29 Once the certificate is lodged with the Court it is required to order that the alleged offender pay to the Registrar the amount for the time being outstanding within a period of not less than seven days.⁷⁷ The Court is also required to order that in default of such payment -

- (a) where the alleged offender is an adult, a warrant be issued for his imprisonment under section 171BI;
- (b) where the alleged offender is a juvenile, the failure to make payment be referred to the Children's Court; and
- (c) where the alleged offender is not a natural person, a warrant of execution be issued.⁷⁸

The alleged offender must be given notice of the making of the enforcement order.⁷⁹ The alleged offender can apply to Court for time to pay and the Court can grant time to pay or make an order for payment by instalments.⁸⁰ In default of payment the Registrar shall issue a warrant of commitment⁸¹ or execution, as the case may be.⁸² An adult offender may apply for

⁷² Id s 171BD(3).

⁷³ The certificate must contain certain information: id s 171BE(3).

⁷⁴ A Court of Petty Sessions declared to be the court for the purpose of the registration and enforcement of infringement notices: id s 171BC.

⁷⁵ Id s 171BE(1).

⁷⁶ Id s 171BE(6).

⁷⁷ Id s 171BF(1) and (2).

⁷⁸ Id s 171BF(1).

⁷⁹ Id s 171BG(1).

⁸⁰ Id s 171BH(1).

⁸¹ The period of imprisonment to be inserted in the warrant must be calculated in accordance with ss 158 and 167 of the *Justices Act 1902*: id s 171BI(2).

⁸² Id s 171BI(1).

the issue of a work and development order under Part VIAA of the *Justices Act 1902*⁸³ either after the issue of the enforcement order or after the issue of the warrant of commitment but before it is executed.⁸⁴

2. THE DIXON REPORT

(a) Notice of penalty

2.30 Four issues dealt with in section VI of the Dixon Report remain outstanding. One recommendation made by the Dixon Committee was that:

"... a notice of penalty be handed to every defendant who appears or should be posted where the matter is heard ex parte.

The notice should specify:

- (a) The name and address of offender.
- (b) The court reference.
- (c) The amount of fine.
- (d) The time allowed for payment.
- (e) The default provisions.
- (f) Any other court order.
- (g) Advice as to the action to be taken if the offender is unable to pay within the prescribed period.⁸⁵

2.31 The Dixon Committee stated in reference to written notices being sent to all convicted persons "It is understood administrative action has been taken but legislation may be necessary to implement this recommendation."⁸⁶ Following the recommendation of the Dixon Report, the administrative practice of sending such notice to offenders who were absent from court when sentenced was extended to all convicted persons, whether present or not at sentencing.⁸⁷ It is worth noting, however, that the form used may omit "[a]dvice as to the action to be taken if the offender is unable to pay within the prescribed period" as

⁸³ See paras 2.17-2.21 above.

⁸⁴ *Justice Act 1902* s 171BG(1)(c)(i).

⁸⁵ Dixon Report 157.

⁸⁶ Id 157-158.

⁸⁷ WALRC Report para 7.4.

recommended by the Dixon Committee. In its Report on Courts of Petty Sessions, the Commission recommended that the administrative practice of allowing an offender to apply to the clerk of petty sessions for an extension of the time to pay a fine be also brought to the notice of the convicted person in this way and that provision for written notice encompassing all of these matters be statutorily confirmed.⁸⁸ To date the *Justices Act 1902* has not been amended to implement these recommendations.

(b) Execution against goods

2.32 The Dixon Committee recommended that courts should make more inquiries to ascertain whether execution against goods might not be a more effective means of enforcing payment of fines.⁸⁹ Although this recommendation has not been adopted, an unproclaimed section of the *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992*⁹⁰ provides that where a conviction or order directs imprisonment in default of payment of a fine, any justice, if requested to do so by the complainant or a clerk of petty sessions, may issue a warrant of execution.

(c) Means inquiry

2.33 The Dixon Committee also recommended giving defendants whose default term of imprisonment or aggregate terms exceed 21 days the right to elect to be brought before a court for an inquiry into their means to pay. Where the court is satisfied the defendant cannot pay the fine it recommended that the court be given the power to extend the time for payment or, where the law permits, to impose an alternative penalty.⁹¹ Once again, although this recommendation has not been adopted, an unproclaimed section of the *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992*⁹² provides for means testing by the Chief Executive Officer of the Ministry of Justice as part of an administrative scheme for granting offenders time to pay fines.

⁸⁸ Ibid.

⁸⁹ Dixon Report 160.

⁹⁰ S 19.

⁹¹ Dixon Report 164.

⁹² S 21.

(d) Extension of the infringement notice system

2.34 Finally, the Dixon Committee recommended an extension of the system of infringement notices in appropriate areas.⁹³ Although a wide range of offences can now be dealt with by infringement notices,⁹⁴ to date no offences under either the *Police Act 1892* or the *Criminal Code* have been prescribed.⁹⁵

3. ACTS AMENDMENT (JURISDICTION AND CRIMINAL PROCEDURE) ACT 1992

2.35 Apart from the changes referred to above made by the *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992*, another unproclaimed section⁹⁶ makes changes to the use of work and development orders as a means of discharging fines. The purpose of the changes brought about by this section is to limit the use of work and development orders as a means of discharging fines. It does this by requiring a person liable to pay a fine to apply to the Chief Executive Officer of the Ministry of Justice for written approval for the issue of a work and development order. The Chief Executive Officer is required to issue a work and development order only if satisfied that -

- * the applicant has insufficient means to pay the fine, or if the applicant were to pay it, the applicant or his family would suffer economic hardship;
- * an application for a warrant of execution is not appropriate; and
- * any warrant of execution issued in respect of the sum the applicant is liable to pay is unexecuted.

2.36 Proclamation of the sections of the *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* referred to above has been delayed pending the completion of the review of the enforcement of fines in the Cullen Report.

⁹³ Dixon Report 176.

⁹⁴ Para 2.26 above.

⁹⁵ See *Justices (INREP) Regulations 1989*.

⁹⁶ s 22.

4. THE CULLEN REPORT

2.37 In June 1993 a Ministry of Justice and Police Fines Policy Development Project was established to recommend means of strengthening the integrity of fines as a sentencing option and increase the proportion of fines paid without enforcement, minimise enforcement actions and ensure that fine defaulters do not go to prison. It was established because it was believed that the various enforcement mechanisms developed over the past decade, including work and development orders, were not serving the community of Western Australia well. According to its report only 40% of fines imposed by Courts of Petty Sessions are paid without enforcement action. A further 20% are paid after some form of action. Of the rest, 20% are discharged by work and development orders and the other 20% are discharged by imprisonment.⁹⁷

2.38 The Cullen Report recommends that a new system be developed which will increase the number of fines paid without any enforcement action and place considerably less emphasis on the use of work and development orders and imprisonment to discharge outstanding fines. Its major recommendations are set out in Chapter 5 and discussed in Chapter 6.

⁹⁷ Cullen Report 24.

Chapter 3

MAJOR ISSUES RELATING TO THE ENFORCEMENT OF ORDERS UNDER THE JUSTICES ACT 1902

1. INTRODUCTION

3.1 Apart from dealing with the problems with the current system highlighted by the Cullen Report¹ there are two major issues relating to the enforcement of orders under the *Justices Act 1902* which should be borne in mind in developing a new system for the enforcement of these orders. These issues are discussed below.

2. IMPRISONMENT FOR DEFAULT IN PAYMENT OF PECUNIARY ORDERS IS UNDESIRABLE

3.2 The question whether offenders ordered to pay money (whether as a fine, compensation or costs) should be imprisoned at all for default in payment has been raised from a variety of perspectives. From both a criminological and common sense point of view many observers have concluded that it is inappropriate to impose at the enforcement stage a penalty which was not deemed fitting in the first instance.² For instance, the Dixon Report remarked:

"To repeat what has been said elsewhere in this report if a fine is imposed it means either the legislature considers such a penalty adequate or the court imposing the penalty considers imprisonment is not required in the circumstances of the particular case. It follows therefore imprisonment by way of default should only be used in the limited type of case where a defendant is able but not willing to meet the prescribed payment."³

¹ See para 5.1 below.

² S T Hillsman *The Growing Challenge of Fine Administration to Court Managers* (1988) 13 Justice System Journal 5, 9, 10 (references omitted) emphasises that fine administration policy should be based on recognition of two basic features of the fine:

"First, the choice of a fine sentence is a policy decision to punish and deter by means of financial deprivation. . . . Second, the choice of a financial penalty is a policy decision to punish and deter without imprisonment."

³ Dixon Report 160.

Even earlier, an author looking at sentencing in Western Australia was equally forceful in her conclusions:

"If imprisonment be used as a default penalty, fines that are unrelated to the defendants' means tend to inflate the prison population by the incarceration of the poor and the unemployed. A vicious circle is then too easily established. Employment is harder to obtain after incarceration, families may be less cohesive and new and undesirable associations are set up within the prison. Further imprisonment no longer seems to the defendant unthinkable."⁴

3.3 A leading criminological researcher has recently pointed out that the official penal policy of this State as set out in Criminal Code section 19A prescribes imprisonment only as a last resort: the court "shall not imprison the offender unless it considers that no other form of punishment or disposition available to the court is appropriate."⁵ The same author states that imprisonment has not been seen either here or elsewhere to have helped to reduce crime rates or reoffending.⁶ A similar view was quoted in the report of the Dixon Committee:

"A noticeable trend has been a readiness to justify non-custodial or semi-custodial sentences in preference to imprisonment or incarceration, on the grounds that they cost very much less to implement, and decrease at the same time the risk of psychological and practical harm to the offender. As 'softer' sentences have apparently no worse effect on recidivism and still offer the chance of less tangible if as yet unknown advantages, they are seen as preferable by all schools of thought except perhaps the retributivist."⁷

3.4 Imprisoning fine defaulters is also very costly. For instance the New South Wales Department of Corrective Services reported that during 1991-92 the custodial costs per inmate per day in minimum security were \$95.90.⁸ The logic in incurring such expense in order notionally to extract payment from a fine defaulter at the rate of \$25 per day is lacking and the public's attention has been drawn to this apparent waste of tax dollars.⁹

⁴ M W Daunton-Fear *Sentencing in Western Australia* (1977) 140.

⁵ R W Harding *The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solutions* (1992) 22 UWAL Rev 72, 75.

⁶ Id 84.

⁷ *The Effectiveness of Sentencing* (Home Office Research Study No 35 1975) 37, as quoted in the Dixon Report 105.

⁸ In Western Australia in 1992-1993 the custodial costs of *all* prisoners was \$51,188 per prisoner or \$140 per prisoner per day: Corrective Services Report 21.

⁹ See for instance "Making jail a last resort" editorial *The West Australian* 8.11.1993 p10.

3.5 It is therefore reasonable to conclude that, as a matter of principle, the role of imprisonment as an element in the procedure for enforcement of pecuniary orders of Courts of Petty Sessions under the provisions of the *Justices Act 1902* should be minimal.

3. SENTENCING AND ENFORCEMENT PRACTICES OF COURTS OF PETTY SESSIONS

3.6 Research elsewhere indicates that the rate of default in payment of pecuniary orders will depend to a significant degree on the ability of offenders to meet these obligations, and that fines which are set without due regard for the means of the convicted person may be more likely to result in default.¹⁰ This was recognised by the Dixon Committee in connection with their consideration of "day fine" systems whereby the pecuniary penalty for an offence is statutorily adjusted to reflect the means of the offender. The Dixon Report concluded:

". . . like the English Committee [Sub-committee of the Advisory Council on the Penal System] we have also reached the conclusion the day fine could not be adapted to our present system at this time. The theory of equating the amount of a fine with the means of a defendant to pay is excellent but we have neither the resources of trained manpower nor the access to accurate information on incomes to make the scheme workable within the confines of our present judicial system."¹¹

3.7 A number of Western Australian cases have emphasised the need for the sentencing court to have due regard for the circumstances of the offender when imposing a fine. For instance, in the case of *Pearson v Lee* Brinsden J remarked:

"The court also has spoken on numerous occasions about the inadvisability of imposing a fine where the fine will inevitably mean that a term of imprisonment for non-payment of the fine will occur. In other words, the fining process should not be used as an indirect means of imprisonment. A person's capacity to pay a fine is always relevant".¹²

3.8 Nevertheless, substantial numbers of persons fined in Western Australia continue to be imprisoned each year. Although there appears to be no available evidence concerning the financial circumstances of the Western Australian prison population, a study in New South

¹⁰ According to S T Hillsman *The Growing Challenge of Fine Administration to Court Managers* (1988) 13 Justice System Journal 5, 11 (references omitted):

"Research in the United States, England, and Western Europe demonstrates that when fine amounts reflect the offenders' financial circumstances as well as the severity of their offences, the majority of fined offenders will be able to meet their obligations, at least if fine administrators design and implement an effective collection and enforcement strategy."

¹¹ Dixon Report 169.

¹² (unreported) Supreme Court of Western Australia Appeal No 412 of 1986 5.

Wales found high rates of unemployment among fine defaulters prior to incarceration.¹³ Further, research into the causes of default as reported by prisoners has revealed that inability to pay is a leading explanation for their predicament.¹⁴ If the situation of fine defaulters in this State is similar, courts may not be sufficiently taking into account means to pay when sentencing offenders to pay fines or when deciding to imprison them for default. There should be closer scrutiny of the offender's ability to pay a fine both at the time a fine is imposed and when the means of enforcing payment or discharging the fine is selected.

3.9 The Royal Commission into Aboriginal Deaths in Custody stated in its final report:

"It is to be noted that at the less serious end of the scale, there are proportionately more Aboriginal than non-Aboriginal prisoners held for traffic, good order offences, property offences and for the group of offences known as 'justice procedures', which includes breaches of orders and fine default."¹⁵

This finding is borne out by the figures of the Western Australia Department of Corrective Services which show that aboriginal persons constituted almost 45% (829 out of 1,845 receivals) of prisoners received for fine default during the year ended June 30, 1992,¹⁶ a figure out of all proportion to their relative numbers in Western Australia and to the proportion who are fined in Courts of Petty Sessions.¹⁷ As regards lockups the disproportion is even greater: over 72% (2,812 of a total of 3,885) of all receivals for the same period of time were aboriginal persons.¹⁸ If, as the Dixon Report stated, a considerable proportion of default sentences are served in lockups then the enforcement procedures of Courts of Petty Sessions are a major contributor to this state of affairs.

¹³ Para 4.4 below.

¹⁴ Ibid.

¹⁵ Commissioner Elliot Johnston, Royal Commission into Aboriginal Deaths in Custody *Final Report* Vol 1 (1991) 208 as quoted in C Cunneen *Aboriginal Imprisonment During and Since the Royal Commission Into Aboriginal Deaths in Custody* (1992) 3 Current Issues in Criminal Justice 351, 354.

¹⁶ Corrective Services Statistical Report Table 7.

¹⁷ For example, in the first six months of 1992, only 1,882 (19.96%) of the 9,429 people who were fined in Courts of Petty Sessions were Aborigines: *Crime Research Centre Crime and Justice Statistics for Western Australia: Interim Report January-June 1992* (1993) Table 3.7.

¹⁸ Corrective Services Statistical Report Table 3

Chapter 4

THE LAW ELSEWHERE

1. INTRODUCTION

4.1 The Commission has looked at the practice of imposing and enforcing the payment of fines in a number of other jurisdictions for the purpose of gaining added insight into the problems faced here and possibly discovering approaches worth emulating.

4.2 The Commission is well aware of the danger in comparing systems of law without due regard for the importance of unique demographic factors and other complex social phenomena. Nevertheless, it is felt that the jurisdictions surveyed below are for the most part sufficiently similar to Western Australia for some instructive comparisons and contrasts to be drawn.

2. NEW SOUTH WALES

(a) Introduction

4.3 New South Wales has experienced most of the same problems encountered in Western Australia with regard to enforcement of pecuniary orders including high rates of receivals into prison for default and high proportions of Aboriginal people amongst receivals. In 1984-85 for instance 50% of all receivals into prison were fine defaulters.¹ This percentage dropped to a very low point in 1988-89 (3.6%) before rising again in subsequent years and reaching 30.6% in 1991-92.

4.4 Several important initiatives have been taken in response to problems with fining and enforcement in New South Wales. In 1985 an influential survey of fine defaulters in New South Wales prisons reported these significant findings among others -

¹ Department of Corrective Services, New South Wales *Annual Report 1991/92: Statistical and Information Supplement* (1992) Table 8.1.

- * The highest rates of detention in police station lockups were in remote country areas with large Aboriginal populations.
- * The main reason for default given by defaulters was lack of money to pay (71.2%) and the majority (56.5%) were unemployed when fined and remained so until imprisoned.
- * Over two thirds (67.2%) of those imprisoned were in default of fines imposed for driving and traffic offences; the majority of these (62.4%) from traffic infringement notices.
- * Almost one half (45.4%) of those imprisoned were in default of offences for which imprisonment was not a penalty.²

Since this survey³ major amendments have been made to the procedure for the enforcement of fines in New South Wales. The existing law resulting from these developments is discussed in the following paragraphs.

(b) Means inquiry and court orders

4.5 Where a defendant is convicted of an offence, the court in exercising its discretion to fix a fine or monetary penalty is under a duty to consider such information regarding the means of the defendant as is reasonably and practicably available to the court for consideration and such other matters as are relevant to the fixing of the amount.⁴ The court is required to allow time for the payment of the amount unless -

² J M Houghton *Fine Default: A Survey of Persons Imprisoned in NSW for the Non-Payment of Fines* NSW Bureau of Crime Statistics and Research (1985) 1.

³ This survey recommended a number of changes to New South Wales law among which were -

- * Statutory provision requiring that the ability of an offender to pay a fine be determined prior to sentencing and that an offender's means be taken into account when setting the amount of a fine and the time allowed for payment.
- * The discretionary power of Clerks of the Court in respect of the payment of fines should be clarified and extended.
- * The reminder notice system used for overdue payments on traffic fines should be extended to all fines and should be sent out automatically after default and before a warrant is issued.
- * The use of special fines enforcement officers attached to the courts should be investigated through a pilot scheme.
- * A work order scheme for defaulters should be established as an alternative to imprisonment for default: id 3-4.

⁴ *Justices Act 1902* (NSW) s 80A.

- (a) it is satisfied that the offender has sufficient means to pay the whole amount immediately;
- (b) the offender requests that no time be allowed for payment; or
- (c) there are special reasons for not allowing any time for payment and the court has stated those reasons.⁵

The court also has the option to order payment by instalments.⁶ The period of time allowed for payment, whether or not by instalments, must not be less than 21 days unless the offender requests a shorter period or the court considers that there are special reasons for a shorter period and those reasons have been stated by the court.⁷ The requirement that the court take financial circumstances into account and the presumption of a minimum of 21 days to pay were introduced in 1985.

(c) Warrant of commitment for non-payment

4.6 Where an offender defaults in payment of a fine imposed by a court, an authorised justice may, by warrant, commit the person to prison for a specified period unless the sum is sooner paid.⁸ The conversion rate was increased from \$25 to \$50 per day in 1985⁹ and this is the current figure.¹⁰ A warrant of commitment may not be issued with respect to an offence under the *Traffic Act* or a prescribed offence under that Act or any other Act unless the authorised justice has been otherwise notified in accordance with the regulations or in prescribed circumstances.¹¹ The result of this provision is that a warrant of commitment may not be issued in respect of traffic, parking and other prescribed offences until an authorised justice is notified that action will not be taken against the offender's licence.¹²

⁵ Id s 83(1).

⁶ Id s 83(1A).

⁷ Id s 83(1B).

⁸ Id s 87(1).

⁹ See *Justices (Penalties and Procedure) Amendment Act 1985*(NSW).

¹⁰ That the changes made in 1985 had an impact on the imprisonment rate for default is perhaps reflected in the declining proportion of fine defaulters amongst all prison receivals: from 43.5% in 1985-86 to 19.9% in 1987-88: Department of Corrective Services, New South Wales *Annual Report 1991/92: Statistical and Information Supplement* (1992) Table 8.1.

¹¹ *Justices Act 1902* (NSW) s 87(4).

¹² See para 4.10 below.

4.7 If an offender is committed to prison for two or more terms of imprisonment by two or more warrants, the terms must be served consecutively, not concurrently.¹³ This provision was added in 1987. The reform was initially introduced in 1985 to deter the accumulation of large numbers of fines and to encourage prompt payment.

4.8 One of the major changes made in 1989 was the provision that a warrant of commitment cannot be executed unless the offender is given oral notice that if, within 7 days of the notice being given, he -

- (a) pays the amount due under the warrant;
- (b) applies to an authorised justice to allow further time for the payment of the whole or any part of that amount; or
- (c) applies to an authorised justice for a community service order,¹⁴

the warrant will not be executed. A warrant is revoked if the offender pays the sum due within seven days of the notice or if, on his application, further time to pay is granted or a community service order is made. A further warrant may be issued if the offender fails to pay the amount payable within any additional time allowed to pay.¹⁵ If payment or an application is not made within seven days the warrant may be executed and the fine defaulter imprisoned. So far as the use of community orders is concerned, this marked a retreat from a reform made in 1987. That legislation provided that offenders fined in court (rather than through the infringement notice procedure) who subsequently defaulted were automatically issued an order to do community service instead of being imprisoned.

4.9 This automatic order had an immediate effect on the New South Wales Probation and Parole Service, which was called upon to deal with a large increase in the number of offenders required to do community service. The impression given by the available reports of this step¹⁶ is that inadequate resources were provided to deal with the influx and that the fine defaulters as a group were found difficult to integrate into the existing community service order system. Some of the reported comments by those responsible for administering these

¹³ *Justices Act 1902* (NSW) s 91A(1).

¹⁴ Id s 89B(1) and (2).

¹⁵ Id s 89C(3).

¹⁶ See K Miller and A Gorta *Monitoring the Operation of the N.S.W. Fine Default Scheme 1988-89*, New South Wales Department of Corrective Services Research Publication No 24 1990; and Judicial Commission of New South Wales *Community Service Orders: Views of Organisers* in NSW (Monograph Series No 2 1991).

orders were that lack of assessment of defaulters for inclusion in the scheme posed a danger to the community and therefore the integrity of the community service system, and that there was increased personal pressure on organisers, lowered morale and a drain on resources.¹⁷ Another study concluded that fine defaulters were also defaulting on registering for the community service they had been ordered to do, and even when they did they were often unreliable workers, although there were recognisable benefits for some offenders and the community.¹⁸ This study made several recommendations to improve the community services order system as it applied to fine defaulters -

- * Increased communication to offenders regarding the initial fine, due dates, extensions and instalments to increase the rate of payment.
- * Improved information to be supplied to offenders concerning defaults and responsibilities to fulfil community service orders.
- * Enforcement of imprisonment for failure to commence or complete community service work.
- * Use of a default letter from the court to advise the offender to pay, apply to do community service,¹⁹ or face imprisonment.
- * Community service organisers be given the authority to assess offenders for suitability for the scheme and refer those rejected back to the court for an extension of time to pay.
- * Probation and Parole officers should be fairly credited with fine defaulters as part of their caseload.

¹⁷ See Judicial Commission of New South Wales *Community Service Orders: Views of Organisers* in NSW (Monograph Series No 2 1991).

¹⁸ See K Miller and A Gorta *Monitoring the Operation of the N.S.W. Fine Default Scheme* 1988-89, New South Wales Department of Corrective Services Research Publication No 24 1990 47-49.

¹⁹ By the *Fine Enforcement Legislation (Amendment) Act 1989* (NSW) which commenced in February 1990 community service orders were no longer to be issued automatically on default. Rather a warrant was issued for personal service by the police who are to give seven days' notice to the offender to pay or apply to the court for a fine default order or be imprisoned. It is to be noted that this procedure requires two attendances by the police.

- * A wider range of agencies where defaulters serve their community service might be provided.²⁰

(d) Enforcement of various fines by suspension of motor vehicle driver's licence or motor vehicle registration

4.10 After the highly publicised prison beating of a fine defaulter, in 1987 a group of statutes was passed²¹ which made cancellation of driver's licences or motor vehicle registration the penalty for default of payment of traffic and parking fines.²² In 1992-1993, 2.2 million infringement notices were issued for traffic and parking offences. 83% of these were paid without an enforcement action. One and one half per cent (33,000) resulted in licence cancellation for failure to pay the fine.²³ 13% were referred to the Road Traffic Authority for a warning letter before the licence was cancelled. Three per cent were withdrawn or written-off and one per cent elected a court hearing. By contrast fines imposed by New South Wales Courts of Petty Sessions, which cannot be enforced by licence or registration suspension, have low payment rates, low completion rate for fine default community service and an increasing rate of imprisonment for fine default.

4.11 That the introduction of automatic community service orders and the cancellation of motor vehicle driver's licence and motor vehicle registration had a dramatic impact on default imprisonment may be seen by the fact that the number of receivals into prison for fine default as a percentage of total receivals dropped from 19.9% in 1987-88 to 3.6% in the following year.

²⁰ K Miller and A Gorta *Monitoring the Operation of the N.S.W. Fine Default Scheme* 1988-89, New South Wales Department of Corrective Services Research Publication No 24 1990 57-59.

²¹ *Justices (Penalty Defaults) Amendment Act 1987* (NSW); *Motor Traffic (Penalty Defaults) Amendment Act 1987* (NSW); *Transport (Penalty Defaults) Amendment Act 1987* (NSW); *Community Service Orders (Fine Default) Amendment Act 1987* (NSW); *Miscellaneous Acts (Fine Default) Amendment Act 1987* (NSW), and *Children (Community Service Orders) (Fine Default) Amendment Act 1987* (NSW).

²² This system of enforcement has since been extended to offences under a number of other different acts: (for example, the *Clean Air Act 1961*, *Tow Truck Act 1989* and *Local Government Act 1919*) see *Motor Traffic Regulations 1935* (NSW)cl 130A. Suspension of a driving licence or motor vehicle registration is also used as a method of enforcing the payment of traffic and parking fines in the Australian Capital Territory: *Magistrates Court Act 1930* (ACT) ss 147A and 150A.

²³ There is no provision for an extraordinary licence whilst under default suspension. Nor is there any provision for extending the period for payment.

4.12 Since community service orders ceased to be automatically issued on default of payment in February 1990 the proportion of fine defaulters amongst all prison receivals has risen from 7.9% in 1989-90 to 30.6% in 1991-92.

(e) Execution against corporations

4.13 When a corporate body is ordered to pay a fine or other sum of money, the order is deemed to be a judgment given by a Local Court on a civil claim and is a judgment for a debt due to the Crown by the corporate body.²⁴

(f) Execution against goods

4.14 Except in the case of a conviction or order made against a corporate body, a fine or other sum of money cannot be levied by distress.²⁵

(g) Enforcement of amounts payable to "private payees"

4.15 A person or body that is entitled to receive payment or the proceeds of a fine, penalty, costs or other amount by virtue of a judgment or conviction or order may enforce it as though the amount payable were a civil judgment.²⁶ Such action cannot be taken if a warrant of commitment has been issued. If action is taken to enforce the amount payable as a civil judgment, the person or body taking the action may not use the other fine default procedures to recover the amount payable and any outstanding warrant is revoked.²⁷

3. VICTORIA

(a) Introduction

4.16 Victorian approaches to enforcing the payment of fines have also undergone changes over the last several decades. In 1971 that State's Statute Law Revision Committee recommended the abolition of execution against property and greater use of imprisonment to

²⁴ *Justices Act 1902* (NSW) s 82(2A) and (2B).

²⁵ *Id* s 82(1).

²⁶ *Id* s 89D.

²⁷ *Ibid*.

recover fines imposed in the lower courts.²⁸ It did so because it was claimed that the courts and police were overburdened by the time consuming requirements involved in issuing and executing distress warrants, many of which were returned *nulla bona*, that is, that no goods have been found that can be seized. Legislation in 1975 subordinated this remedy against property to other forms of enforcement, but did not abolish it.²⁹ In 1979 the Sentencing Alternatives Committee recommended allowing fined offenders without means to do community service work rather than be imprisoned.³⁰ This was subsequently adopted so as to allow courts to order defaulters to undertake this alternative³¹ and defaulters who have been imprisoned may also be allowed to undertake such work with administrative approval by what are known as attendance centre permits.³²

4.17 Victoria's statutory framework for fining and enforcement of pecuniary orders has remained the same since 1985 when the *Penalties and Sentences Act 1985* was passed, although the present law is embodied in the *Sentencing Act 1991*. That framework is set out below. A major administrative change was made in 1990 when responsibility for the enforcement of fines was transferred from the police to the Sheriff's Office.

(b) Means inquiry and court order

4.18 If a court decides to fine an offender it must in determining the amount and method of payment "take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose" although a court is not prevented from fining if unable to determine these circumstances.³³ The court may make a fine payable by instalments, or give time to pay, and the offender may apply to an officer of the court for such orders or their variation or for an order requiring him to perform unpaid community work for a prescribed number of hours.³⁴ The offender, a prescribed person or the Director of Public Prosecutions may apply to vary a time to pay or instalment order by reason that the

²⁸ *Report of the Statute Law Revision Committee Upon Recovery of Civil Debts, Venue and Enforcement of Fines in Magistrates' Courts* (1971) paras 69-81, see R G Fox & A Freiberg *Sentencing: State and Federal Law in Victoria* (1986) para 4.308.

²⁹ *Magistrates (Summary Proceedings) Act 1975* (Vic).

³⁰ Victorian Sentencing Alternatives Committee *Sentencing Alternatives Involving Community Service* (1979) paras 55-78, as reported in R G Fox & A Freiberg *Sentencing: State and Federal Law in Victoria* (1986) para 4.311.

³¹ *Penalties and Sentences Act 1981* (Vic) ss 13L and 13M.

³² *Community Welfare Services Act 1970* (Vic) s 125A.

³³ *Sentencing Act 1991*(Vic) s 50(1),(2).

³⁴ *Id* ss 53, 54, 55.

circumstances of the offender have materially altered, were misstated or not accurately presented to the court.³⁵

(c) Default in payment of fine

4.19 If payment of a fine is in default for more than a month the court may issue a warrant to arrest a person. This order may be executed by the Sheriff of the Supreme Court. The order further requires that the offender be personally given written notice to obtain an instalment or time to pay order or to consent to a community-based order involving unpaid community work within seven days.³⁶

4.20 If the offender does nothing after having been given such notice, the warrant for arrest may be executed and the offender brought before the court which may choose from a range of alternatives: an order for community work, imprisonment, execution against property, variation of an instalment order, or an adjournment of the hearing for up to 6 months on terms.³⁷ The court is prohibited from ordering imprisonment if the offender satisfies it that he "did not have the capacity to pay the fine or the instalment or had another reasonable excuse for the non-payment".³⁸ The court is further directed not to impose imprisonment unless it is satisfied that no other order open to it is appropriate in all the circumstances of the case.³⁹ If an order for execution of property is unsuccessful the offender may be again brought before the court which may then order imprisonment or community work.⁴⁰

4.21 In practice about 75% of fine defaulters who are located by officers of the Sheriff pay the outstanding sum in cash.⁴¹ In these cases, the threat of imprisonment or the suspension of a driver's licence⁴² is sufficient to ensure payment of the sum outstanding. In most other cases arrangements are made for time to pay or payment by instalments and those concerned are

³⁵ Id s 61.

³⁶ Id s 62(1)-(9).

³⁷ Id s 62(10).

³⁸ Id s 62(11).

³⁹ Id s 62(12).

⁴⁰ Id s 64.

⁴¹ However, only about 50% of defaulters are located by the Sheriff's office. There are two reasons for this. First, the system for maintaining records of driver's licences is poor. Secondly, the period of delay in forwarding warrants to the Sheriff's Office and the general mobility of the population means that it is difficult to trace defaulters.

⁴² Although there is no express provision relating to the suspension of a driver's licence for non-payment of traffic and parking fines as there is in New South Wales and South Australia, the threat of the use of the power under the *Road Safety Act 1986* (Vic) and its regulations to suspend a licence is used to obtain payments for traffic related offences.

monitored to ensure that they comply with the arrangements. As a result very few fine defaulters are imprisoned in Victoria. Most of those who discharge their fine by imprisonment are already serving a period of imprisonment for some other offence. Community based orders are also used to discharge the fines of more serious offenders.

(d) Scale of imprisonment or community work for non-payment of money

4.22 Fines are converted into terms of imprisonment at the rate of \$100 per day and by way of community work at the rate of \$20 per hour (minimum eight and maximum 500 hours).⁴³ Where a person is in default of more than one fine or instalment, the minimum and maximum number of hours apply to the aggregate number of hours for which he may be required to perform unpaid community work in respect of the amounts then remaining unpaid of all the fines or instalments for which he is then in default.⁴⁴

(e) Corporate body

4.23 Subject to being allowed to exculpate themselves, directors of corporations may be made jointly and severally liable for payment of a fine which is uncollectable from a corporate body in circumstances where there were reasonable grounds to expect that the corporation would not be able to meet its liabilities before the commission of the offence.⁴⁵

(f) Enforcement of fines imposed by infringement notices

4.24 There is a separate process for enforcement of infringement notices known as the PERIN procedure.⁴⁶ Defaults in payment of infringement penalties attract the sanction of imprisonment at the conversion rate of \$50 per day subject to the court's power to order time to pay or instalment payments if applied for within seven days of being notified of the issue of a warrant for arrest.

⁴³ *Sentencing Act 1991* (Vic) s 63.

⁴⁴ Id s 63(3).

⁴⁵ Id s 50(6),(7).

⁴⁶ *Magistrates Court Act 1989* (Vic) s 99 and Schedule 7.

(g) Comments

4.25 The system in Victoria performs very well compared to Western Australia in that few fine defaulters are imprisoned. However, it does have areas where it is inefficient or ineffective. The poor record keeping system for driver's licences means that it is difficult to trace some defaulters, particularly the more mobile members of the community. As a result only 50% of defaulters are located by the Sheriff's office. Further, the requirement for defaulters to be brought to court involves considerable expenditure of time and money.

4.26 As in Western Australia, there are difficulties in enforcing the payment of fines by corporations. It is proposed to deal with this problem by making provision for property, particularly motor vehicles, to be seized to enforce the payment of fines. Corporate avoidance will also be addressed by making company directors liable for infringements incurred by drivers of company cars. Another particular problem in Victoria is that there is a large number of unregistered vehicles, which when transferred continue to be unregistered. It is proposed to provide for fines incurred by the drivers of these vehicles to be enforced by providing for the vehicle to be seized unless the owner at the time of the seizure can establish that he did not own it at the time the offence for which the fine was incurred was committed.

4. SOUTH AUSTRALIA**(a) Imposition of fine**

4.27 Where a court imposes a fine it may specify a period within which the fine must be paid or direct that the fine be paid in instalments.⁴⁷ In determining the time to pay the court must have regard to the effect of the fine on the welfare of the defendant's dependants and on the defendant's ability to satisfy any order or direction for compensation made.⁴⁸ The court is not required to inform itself as to these matters but it should consider any evidence on those matters that the defendant or prosecutor has placed before it.⁴⁹ A defendant upon whom a fine has been imposed by a court may apply to the court for an order varying the time or manner of payment of the fine and the court may make such order as it thinks fit.⁵⁰

⁴⁷ *Criminal Law (Sentencing) Act 1988* (SA) s 33(1).

⁴⁸ *Id* s 33(2).

⁴⁹ *Id* s 33(3).

⁵⁰ *Id* s 35.

(b) Imprisonment or warrants for sale of land or goods for default in payment

4.28 Where a defendant is in default of payment of a pecuniary sum for 14 days, a court officer may send a reminder notice by post to the person.⁵¹ If the defendant is in default of payment for one month,⁵² the court may issue a warrant of commitment for the term of imprisonment appropriate to the amount outstanding under the order.⁵³ The term of imprisonment is cumulative on any other term of imprisonment that the person is liable to serve by virtue of any other such warrant.⁵⁴

4.29 Where a person is in default of payment of a pecuniary sum for more than one month, the court may order the sale of land or goods owned by the person and issue a warrant authorizing the seizure and sale of that land or those goods if -

- * to do so would supply, or substantially reduce, the amount outstanding; and
- * the amount outstanding is \$10,000 or more (or some other prescribed amount).⁵⁵

The goods that may be seized are those that could be taken in bankruptcy proceedings.

(c) Working off pecuniary sum by community service

4.30 If the payment of a pecuniary penalty would cause severe hardship, the person liable to pay the sum may apply to the court for permission to work off the sum, or the balance outstanding, by community service.⁵⁶ A written application must include a statement of the applicant's assets and liabilities, income and recurrent expenditure and any prescribed information.⁵⁷ A pecuniary penalty cannot be worked off by community service where the amount outstanding exceeds \$2,000 or some other prescribed amount.

⁵¹ Id s 60a(1).

⁵² A warrant may be issued sooner if the court is satisfied that there are reasonable grounds for suspecting that the person will abscond without making payment or the person in default is already serving some other term of imprisonment: id s 61(4).

⁵³ Id s 61(3).

⁵⁴ Id s 61(5).

⁵⁵ Id s 62(1)-(2).

⁵⁶ Id s 67(1).

⁵⁷ Id s 67(2).

4.31 If the application is granted the person must then enter into a written undertaking to do community service work under the supervision of officers in the Department of Corrective Services who may reject an applicant. One member of that Department has noted certain problems which have been encountered as follows -

- * Offenders have looked on the period of community service as an extended time to pay and are not motivated to work. The legislation provides that the community service must be performed over a period not exceeding 18 months. Many offenders use this as a means of delaying the issue of a warrant.
- * A complicated means test which deterred some applicants (this has since been simplified).
- * It is likely that under the old system many participants in the scheme would have paid their fines. Frequent offenders on the other hand may more easily dispose of numerous fines upon serving a term of imprisonment since it is the duty of the authorities to "call in" all existing warrants while a prisoner is in custody. These are satisfied concurrently and deemed to have been satisfied if not in fact "called in".
- * Lack of use of the scheme by Aboriginal people.⁵⁸ In 1985 one study reported that over a one month period fine defaulters accounted for 72% of receivals into institutions and that Aboriginal persons and the unemployed were over-represented amongst these prisoners.⁵⁹ After interviewing some of these defaulters the researcher found that most non-Aboriginal offenders favoured community service orders as an alternative while Aboriginal respondents were less likely to prefer such an option.

⁵⁸ A Fletcher *Fine Options - Some Problems in Keeping People Out Of Prison* Proceedings of a Conference Held 27-29 March 1990, ed S McKillop Australian Institute of Criminology (1991) 281-287.

⁵⁹ L Weber *Fine Default in South Australia* Review of Criminological Research: Papers From a Seminar 19-22 February 1985 117-118.

(d) Driver's licence disqualification for default

4.32 Where a person is in default of payment of a pecuniary sum imposed in relation to an offence committed by him, being an offence arising out of the use of a motor vehicle, the court may, instead of issuing a warrant of commitment, disqualify the person from holding or obtaining a driver's licence until the sum has been fully satisfied.⁶⁰ Notice of the disqualification must be given to the person in default and the disqualification takes effect 14 days after the notice is given unless the sum in default is paid before that time.⁶¹ On the application of the person in default, the court may revoke the disqualification if it is satisfied that the sum in default has been reduced and that continued disqualification would result in undue hardship to the person.⁶² The disqualification must be revoked by the court if the person enters into an undertaking to work off the sum in default by community service.⁶³

(e) Suspension of motor vehicle registration for default by a body corporate

4.33 Where a body corporate is in default payment of a pecuniary sum imposed on it for an offence arising out of the use of a motor vehicle of which it was the registered owner at the time the offence was committed and the default has endured for one month, the court may instead of initiating any other enforcement proceedings, suspend the registration of all motor vehicles of which the company is the registered owner until the sum has been fully satisfied.⁶⁴ Notice of the suspension must be given to the company in default and the suspension takes effect 28 days after the notice is given unless the sum in default is paid before that time.⁶⁵ On application of the company in default, the court may revoke the order for suspension if it is satisfied that the sum in default has been reduced and that continued suspension of registration would result in undue hardship to the company.⁶⁶

⁶⁰ *Criminal Law (Sentencing) Act 1988* (SA) s 61a(1).

⁶¹ Id s 61a(2)-(3).

⁶² Id s 61a(4)(a).

⁶³ Id s 61a(4)(b).

⁶⁴ Id s 61b(1).

⁶⁵ Id s 61b(2)-(3).

⁶⁶ Id s 61b(6).

(f) Remission of pecuniary sum

4.34 A person liable to pay a pecuniary sum may apply to the court to remit the sum outstanding and the court may remit it if satisfied that, in all the circumstances of the case, no other order for the enforcement of the payment of the sum would be appropriate.⁶⁷

5. COMMONWEALTH OF AUSTRALIA

4.35 By section 15A of the Commonwealth *Crimes Act 1914* State laws respecting the enforcement of fines, including those relating to imprisonment in default, allowance of time, instalment payments and security for payment, are made applicable (so far as they are not inconsistent with Commonwealth law) to offenders against federal law according to the place in which they are convicted.

4.36 In 1990 Part 1B was added to the *Crimes Act 1914* dealing with sentencing, imprisonment and release of federal offenders. Section 16A deals with general sentencing principles to be followed as regards federal offenders; it includes requirements for the court to have regard to the means of an offender and the probable effect a sentence would have on the person's family or dependants. Fines are specifically governed by section 16C which requires that before imposing a fine for a federal offence a court must take into account the financial circumstances of the person although a fine is not prohibited if these circumstances cannot be ascertained.

4.37 This legislation arises in part out of the work of the Australian Law Reform Commission which had been given a reference on sentencing a decade earlier. In 1979 it published a research paper which concluded:

"Research has clearly shown that . . . persons languishing in gaol for failure to pay fines are rarely recalcitrant men-of-means; more often they are indigents whom incarceration will not and cannot force to pay a debt which is outside any realistic (possibility) to pay . . .".⁶⁸

⁶⁷ Id s 68.

⁶⁸ J A Scutt *Alternatives to Imprisonment: The Fine as a Sentencing Measure* Sentencing Research Paper No 3: Australian Law Reform Commission (1979) 13.

4.38 In 1982 the *Crimes Act 1914* was amended to implement a number of recommendations in the Commission's interim report issued in 1980. They were: prohibition on imposing a prison term (where not mandatory) unless the court is satisfied that in all the circumstances no other penalty is appropriate, requiring it to give written reasons why no other sentence is appropriate,⁶⁹ and provisions extending alternatives to imprisonment available in the States to federal offenders.⁷⁰

4.39 The final report of the Australian Law Reform Commission on sentencing in 1988 recommended two techniques for reducing the emphasis on imprisonment which are relevant to the issues with which this report is concerned. They were: the abolition of imprisonment as an automatic consequence of fine default and the creation of a new substantive offence of wilful and substantial default of a non-custodial sentence with a penalty of up to two years imprisonment.⁷¹ This report also suggested that an informal means inquiry be held to determine whether a fine or community based order would be more appropriate than a custodial sentence.⁷²

6. ENGLAND

(a) Introduction

4.40 Although fine default has been described as "a serious problem" in England and Wales⁷³ it appears that the proportion of fine defaulters amongst all prison receivals is less than experienced in Western Australia. That percentage was 20% in 1986⁷⁴ and 21% in 1988.⁷⁵ Researchers have calculated that receptions of fine-defaulters was 72% higher in Australia than in England and Wales.⁷⁶ According to one writer they represent "only a trivial 1.4 per cent of the total sentenced prison population."⁷⁷ Even taking into account the caution

⁶⁹ *Crimes Act 1914* (Cth) s 17A.

⁷⁰ Id s 20AB.

⁷¹ Australian Law Reform Commission *Sentencing* (Report No 44 1988) xx-xxi.

⁷² Id xx.

⁷³ Justice *Sentencing: A Way Ahead* (1989) 21.

⁷⁴ Ibid.

⁷⁵ Home Office *Prison Statistics, 1988* (1989) as quoted in A Morris and L Gelsthorpe *Not Paying for Crime: Issues in Fine Enforcement* [1990] Crim LR 839.

⁷⁶ J Walker, P Collier & R Tarling *Why Are Prison Rates in England and Wales Higher Than in Australia?* (1990) 30 *British Journal of Criminology* 24, 32.

⁷⁷ S Shaw *Monetary Penalties and Imprisonment: The Realistic Alternatives in Paying for Crime* (1989) 29, 30.

which must accompany such statistical comparisons, it seems that there may be a significantly lower imprisonment rate of fine defaulters in the English jurisdiction.⁷⁸

4.41 There are also some significant differences between the statutory provisions governing fining and enforcement of pecuniary orders in England and Wales and those in the *Justices Act 1902*. Those portions of the English legislation of most relevance to the issues dealt with in this Report are described below.

(b) Unit fine system

4.42 By far the most significant recent development in England relating to fining was the introduction of the "unit fine" system for adjusting the amount of the penalty to the means of the offender.⁷⁹ After trials in four magistrates courts commenced in 1989, this scheme received a favourable evaluation by the government⁸⁰ and was introduced generally by legislation in 1991.⁸¹ It provided that the amount of the fine should be the *product* of the number of units which is determined by the court to be commensurate with the seriousness of the offence⁸² and the value to be given to each of those units.⁸³

4.43 Some of the findings from analysis of the trial project were that all courts reported fewer cases in which more than one enforcement action had to be taken; three courts reported

⁷⁸ According to R Shaw *Monetary Penalties and Imprisonment: The Realistic Alternatives in Paying For Crime* (1989) 29, 33 and 36 there are a number of factors which may contribute to this situation -

1. Some of those arrested and held overnight before appearing in court the next day may be fined a sum which they can meet from money found on the offender. Alternatively, a term of imprisonment of one day may be imposed but the person is released immediately because the night spent in a police cell is regarded as the equivalent of a day's imprisonment.

2. A means inquiry is held before a person is imprisoned for default.

3. Rather than exhaust enforcement means, a fine may be written off.

⁷⁹ Day fine systems have been introduced in a number of jurisdictions. As one response to the need to tailor fines to offenders, the "day fine" system of adjusting financial penalties to the means of the offender was put on trial in a New York court in 1988: S T Hillsman and J A Greene *Tailoring Criminal Fines to the Financial Means of the Offender* (1988) 72 *Judicature* 38, 41-45. Under the system adopted there which borrowed from both Swedish and German models, a day-fine unit is based on the offender's net daily income adjusted for personal and family responsibilities in much the same way as child support payments are set. This unit is then multiplied by a number representing the judge's assessment of the severity of the offence (having regard to "benchmarks" for each offence) to yield a financial penalty calculated as a single or multiple personal day-fine unit.

⁸⁰ Home Office Research and Planning *Unit Paper 59 Unit Fines: Experiments in Four Courts*.

⁸¹ *Criminal Justice Act 1991* (UK), relevant sections in force 1 October 1992.

⁸² For example 2 units for a level 1 offence, that is a summary offence which is punishable by a fine not exceeding level 1 on a standard scale and 50 units for a level 5 offence: *Criminal Justice Act 1991* s 18(4).

⁸³ That is, the amount which is determined by the court in accordance with rules made by the Lord Chancellor to be the offender's disposable weekly income: id s 18(2)(b). The sum could not be less than 4 nor more than 100.

that the time taken for fines to be paid decreased by about 25%; and, finally, there was a reduction of between 15-25% in the number of defaulters imprisoned.⁸⁴ One researcher concluded "The reduction in the numbers imprisoned for default, which followed the introduction of unit fines, reinforces the view that poor offenders have in the past been fined more than they can afford to pay, and that the new system could make an effective contribution to tackling this problem."⁸⁵ The unit fines system was repealed in September 1993.⁸⁶ Its repeal has been criticised as being "short-sighted - a prime example of throwing the baby out with the bathwater."⁸⁷

(c) Fixing of fines

4.44 Before fixing the amount of any fine, the court must inquire into the financial circumstances of the offender. In fixing the amount of any fine, the court must take into account the circumstances of the case including, "among other things, the financial circumstances of the offender so far as they are known, or appear, to the court".⁸⁸ Although some have commented that in practice it appears this duty has often been perfunctorily performed,⁸⁹ it may be that it has contributed to some extent in limiting the numbers of fine defaulters. When fixing the fine the court may both allow time for payment and order payment by instalments.⁹⁰

(d) Default in payment

4.45 Before ordering imprisonment for default the court must be satisfied that all other methods of enforcing payment have been tried or considered and either have proved unsuccessful or are likely to do so.⁹¹ These other methods are execution against property,⁹²

⁸⁴ D Moxon *Developments in fines and fine enforcement* (1991) 30 Research Bulletin 30, 32

⁸⁵ Id 34.

⁸⁶ *Criminal Justice Act 1993* (UK). According to an Editorial in the New Law Journal it was "largely discredited": [1993] NLJ 1321. The Editorial cited one case in which a man was fined 500 for failing to return two library books.

⁸⁷ A Ashworth *The Criminal Justice Act 1993* [1994] Crim LR 106.

⁸⁸ *Criminal Justice Act 1991* (UK) s 18(1)-(3) (as substituted by s 65 of the *Criminal Justice Act 1993* (UK)). Until the unit fine system was introduced by the *Criminal Justice Act 1991* (UK) there was a similar duty in s 35 of the *Magistrates Courts' Act 1980* (UK).

⁸⁹ R Morgan and R Bowles *Fines: Where Does Sentencing End and Enforcement Begin?* [1983] Crim LR 78, 84.

⁹⁰ *Magistrates Courts' Act 1980* (UK) s 75(1).

⁹¹ *Administration of Justice Act 1970* (UK) s 41(9).

⁹² *Magistrates Courts' Act 1980* (UK) s 76.

attachment of a portion of wages earned⁹³ or government income support benefits received⁹⁴ and a community service order.⁹⁵ The court may postpone ordering execution against property or imprisonment on conditions imposed on the offender.⁹⁶

4.46 No term of imprisonment for default may be set at the time of conviction except in certain cases and the court must inquire into the means of the offender before imprisonment is ordered at a hearing of which the offender has been given notice. Further, after the inquiry has been held, the court is prohibited from ordering imprisonment unless it is satisfied that the default is due to the offender's wilful refusal or culpable neglect and it has considered or tried all other methods of enforcing payment and it appears that they are inappropriate or unsuccessful.⁹⁷ The court has power to order an offender to supply a statement of means and to punish for failure to do so, or for false statements.⁹⁸

(e) Supervision

4.47 Defaulting offenders may be placed under supervision (normally by a probation officer) until the fine is paid; this order is mandatory for those under 21 years of age before they may be imprisoned.⁹⁹

(f) Remission of fine

4.48 The court may reduce or nullify a fine at any time where it thinks it is just having regard to a change in circumstances.¹⁰⁰

⁹³ *Attachment of Earnings Act 1971* (UK) s 3(4).

⁹⁴ *Criminal Justice Act 1991* (UK) s 24.

⁹⁵ *Criminal Justice Act 1972* (UK) s 49(1) (not in force).

⁹⁶ *Magistrates Courts' Act 1980* (UK) s 77.

⁹⁷ *Id* s 82(4).

⁹⁸ *Id* s 84.

⁹⁹ *Id* s 88.

¹⁰⁰ *Id* s 85.

Chapter 5

THE CULLEN REPORT

1. PROBLEMS WITH THE EXISTING SYSTEM

5.1 The Cullen Report identified the following problems with the existing system of enforcement of fines imposed by infringement notices and by Courts of Petty Sessions in Western Australia -¹

- * The number of warrants issued to enforce the payment of fines has increased significantly in the past four years. In 1992/1993 100,000 warrants of commitment or execution and 13,800 work and development orders were issued or made. This volume was said to consume a disproportionate amount of Government resources. In particular, the cost of administering the work and development order programme is very high. Work and development orders are an expensive alternative to the payment of a fine.
- * There is a growing lack of confidence in the enforcement of fines imposed by infringement notices and by Courts of Petty Sessions.
- * The current system was being abused due to the concurrence of warrants of commitment. A number of fines can be discharged at the same time by serving a term of imprisonment based on the default rate for the largest fine, thus avoiding all but the largest fine.²
- * Work and development orders are available to defaulters regardless of their suitability to the scheme or ability to pay.³

¹ *Cullen Report* 21-26.

² A person with a number of small fines also has an advantage over a person with one large fine. A person with ten fines of \$50 is liable to imprisonment for two days because the ten fines can be discharged concurrently, but a person with one fine of \$500 is liable to imprisonment for 20 days.

³ According to R W Harding *The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solutions* (1992) 22 UWAL Rev 72, 87 in 1991 approximately 5,600 work and development orders were made and about 2,400 offenders were received into prison for failure to complete the order.

- * The conversion formula for work and development orders is inequitable: with concurrency, a person with several small fines has an advantage over a person with one larger fine of amount equal to the smaller fines.⁴
- * All those who fail to pay a fine may discharge the fine in prison without consideration of the circumstances of the case. The Cullen Report estimated that some 800-900 people⁵ are imprisoned for fine default each year, even though in many cases the fine would have been imposed as an alternative to imprisonment by the court.
- * The current system gives no incentive to offenders to pay their fines and allows offenders to avoid payment and prolong the enforcement process. One reason for this is that time to pay and instalment payments are not closely monitored and some defaulters have become aware that it is possible to miss periodic payments or make payment below the set rate. Defaulters are also aware that if no payment is made, they are unlikely to be detected for a long time.
- * Enforcement options for use against corporations are lacking. Approximately 90% of all warrants against corporations are not executed because the company has either ceased trading, the assets are encumbered or no assets are available to be seized and sold.
- * Defaulters are not fully informed when the fine is imposed of their liability to discharge the fine.

2. FINES IMPOSED BY COURTS OF PETTY SESSIONS⁶

5.2 The Cullen Report recommends that the role of the court should be merely to impose the penalty where a person is convicted and not to grant time to pay or determine how a

In 1991-1992, 12,163 work and development orders were terminated. 9,192 (75.6%) were terminated by compliance, but 2,560 (21%) were cancelled for non-compliance. The rest were terminated by re-offending, payment of the fine, unconditional discharge and death: Corrective Services Statistical Report Table 32.

⁴ For example, a person with five fines of \$100 is liable to imprisonment for four days in default or a work and development order for 14 hours. However, a person fined \$500 for one offence is liable to 20 days' imprisonment or a work and development order for 42 hours.

⁵ Cullen Report 23.

⁶ Appendix 1 contains a chart showing the procedure recommended by the Cullen Report.

default in payment of a pecuniary penalty should be enforced. Once convicted the offender would be required to report to the Managing Registrar who would determine time to pay arrangements based on an examination of the offender's ability to pay and available assets.⁷

5.3 If an offender breached a time to pay arrangement he would be sent a notice of intention to suspend a motor vehicle driver's licence or motor vehicle registration. The licence or registration would be suspended automatically unless the sum outstanding was paid within 28 days. The offender would not have the opportunity to apply for a work and development order, discharge the sum by imprisonment or apply for an extraordinary driver's licence. If offenders attempted to accumulate fines and avoid payment after the suspension of a licence or registration, the Registrar could issue a warrant of execution.

5.4 Where a defaulter does not have a motor vehicle driver's licence or motor vehicle registration,⁸ the Cullen Report recommends that a warrant of execution be issued to satisfy the fine and costs and that the Sheriff take over from the police the role of executing these warrants. The Sheriff could also receive payments of sums owing under the warrant. The Report also recommends that the Sheriff be given power to issue a work and development order.⁹

5.5 If a defaulter did not report to a Community Corrections Centre or conform with the order, a Community Corrections Centre Manager could issue a warrant of commitment. The threat of imprisonment was considered to be necessary to enforce compliance with a work and development order. The Report also recommends that work and development orders be modified to deal with the inequitable conversion formula for work and development orders.¹⁰

3. FINES IMPOSED BY INFRINGEMENT NOTICES¹¹

5.6 The Cullen Report also recommends the introduction of the suspension of a motor vehicle driver's licence or motor vehicle registration as the means of enforcing the payment of fines imposed by infringement notices.

⁷ If a person is convicted at an ex parte hearing an order for payment would be sent to the offender by normal post and he could make arrangements for payments by instalments with the Managing Registrar.

⁸ Estimated to be 13% of the adult population of the State: Cullen Report 12.

⁹ During the course of a work and development order the defaulter would still have the opportunity to pay the fine in full.

¹⁰ Cullen Report 14.

¹¹ Appendix 2 contains a chart showing the procedure recommended in the Cullen Report.

5.7 So far as the issue of infringement notices is concerned it recommends that a standard period (of 28 days) for payment should be introduced. Unless payment is made within that period or the alleged offender gives notice that he requires that the matter be dealt with by a court, a courtesy letter would be sent him requiring that the sum outstanding be paid within 28 days. There would be no option to extend the time for payment.

5.8 If the alleged offender did not pay the sum outstanding in that time, the matter could be referred to an INREP court which would issue an enforcement order giving the alleged offender a further 28 days to pay. If payment was not made within that period notice would be given to the alleged offender that his motor vehicle driver's licence or motor vehicle registration will be suspended automatically unless the sum outstanding is paid within 28 days. If payment is not made and the alleged offender does not have a motor vehicle driver's licence or motor vehicle registration the default would be recorded and until the fine was paid the person could not obtain or transfer a licence or registration or obtain an extraordinary driver's licence. The Committee recommended that imprisonment and work and development orders should not be available as a means of enforcing the payment of fines imposed by infringement notices.

Chapter 6

RECOMMENDATIONS

1. INTRODUCTION

6.1 As the Cullen Report shows,¹ the present system for enforcement of the payment of fines is functioning poorly. Notwithstanding the introduction in 1988 of work and development orders the percentage of those received into prison solely for default of payment of a fine is still high.² The Cullen Report recommends the introduction of a new system to increase the number of fines paid without any enforcement action and to place considerably less emphasis on the use of work and development orders and imprisonment to discharge outstanding fines. The following paragraphs discuss the recommendations made in the Cullen Report and the Commission's recommendations on those proposals. These paragraphs also contain recommendations on other matters not addressed in the Cullen Report.

6.2 The Commission agrees with the Cullen Report that there is a need to develop a new system for the enforcement of the payment of fines for the following reasons -

- * The number of persons imprisoned for default in payment of a fine is too high.
- * Work and development orders have been of limited value in reducing the level of imprisonment and, in any case, there are anomalies with their operation.
- * The value of fines as a sentencing option may fall into disrepute if offenders believe that they can ignore the sanction with impunity or manipulate the use of imprisonment or work and development orders to discharge fines.
- * The present system is cumbersome and costly to administer because the onus is on the government to pursue defaulters.

¹ Para 5.1 above.

² In 1992-1993 the rate was 34% and fine defaulters comprised 6% of the prison muster: para 2.2 above.

6.3 The Commission generally agrees with the recommendations of the Cullen Report. However the Commission believes that the Cullen Report's recommendations give insufficient consideration to the position of indigent defaulters both at the time the fine is imposed and when payment arrangements are settled and enforced. The Commission's recommendations made below are designed to ensure that the indigent are not inequitably affected by the proposals.

2. FINES IMPOSED BY COURTS OF PETTY SESSIONS

(a) Assessing means when imposing fines

6.4 At present a court should give consideration to an offender's means to pay when it decides the amount of the fine.³ The court also determines whether the offender should be given time to pay or allowed to pay by instalments.⁴ The Cullen Report recommends that the role of the court should be merely to impose the fine where a person is convicted and not to grant time to pay or determine how a default in payment of the fine should be enforced. Under the Cullen proposal, once convicted by a court, the offender would be required to report to the Managing Registrar immediately and he would determine time to pay arrangements based on an examination of the offender's ability to pay and available assets.⁵

6.5 Fines which are set without due regard for the means of the convicted person are more likely to result in default.⁶ While a person's capacity to pay a fine is always relevant to the amount of the fine imposed,⁷ it seems that many fine defaulters who are imprisoned are unable to pay the fine imposed.⁸ It may be that courts are not sufficiently taking into account means to pay when imposing a fine.

6.6 One means of fixing a fine according to the offender's means is the day fine system. Under the day fine system the fine for an offence is statutorily adjusted to reflect the means of

³ See *Pearson v Lee* (unreported) Supreme Court of Western Australia Appeal No 412 of 1986.

⁴ Para 2.7 above. The Dixon Committee recommended that provision should be made for a means inquiry in certain circumstances: para 2.33 above.

⁵ Cullen Report 10. More court resources would be required to perform this function, particularly at the Central Law Courts where up to 200 defendants appear each day. Resources would be saved by a reduction of the number of warrants of execution or commitment issued.

A person convicted at an ex parte hearing would be sent an order for payment and he could make arrangements for payments by instalments with the Managing Registrar: Cullen Report 10.

⁶ Para 3.6 above.

⁷ Para 3.7 above.

⁸ Para 3.8 above.

the offender. The Dixon Report considered the day fine system but concluded that, at the time, the system could not be adapted to our criminal justice system because of a lack of resources to assess incomes to make the scheme workable. It stated, however, that the "...theory of equating the amount of a fine with the means of a defendant to pay is excellent".⁹

6.7 In 1988 the Australian Law Reform Commission also considered whether day fines should be introduced for those who commit Commonwealth offences. It concluded that the practical difficulties involved in the courts having to determine accurately an offender's ability to pay were too great and recommended that day fines should not be introduced:

"Not only would the time involved be excessive, especially in magistrates courts, but possibly the only method of obtaining the necessary data with complete accuracy would involve access to the offender's taxation records. This would raise privacy problems. The existence of artificial taxation schemes might lead to white collar offenders being able to conceal their financial position from the courts."¹⁰

6.8 The Commission's terms of reference do not allow it to consider whether or not a day fine or unit fine system should be introduced in Western Australia. The comments of the Dixon Report, the Australian Law Reform Commission and the experience in England¹¹ suggest that it may be impracticable to introduce a day fine or unit fine system in Western Australia. However, the Commission considers that courts should continue to take into account the means of an offender in determining the amount of the fine because fines which are set without due regard for the offender's means are more likely to result in default.¹² Consideration could be given to requiring statutorily that the court in determining the amount of the fine take into account the financial circumstances of the offender, as occurs in other States and England.¹³

(b) Determining a fine payment programme

6.9 The Commission considered whether the court imposing the fine should also determine the payment method on the basis of its own means enquiry. However, the Commission **endorses** the recommendation of the Cullen Report that the method of payment

⁹ Para 3.6 above.

¹⁰ Australian Law Reform Commission *Sentencing* (Report No 44 1988) para 114.

¹¹ Paras 4.42 and 4.43 above.

¹² Para 3.6 above.

¹³ Paras 4.5, 4.18, 4.27 and 4.44 above.

should be determined by the Managing Registrar. In many cases the determination of this matter will require detailed means testing. It would be time consuming and administratively inconvenient for this function to be performed by a judicial officer. On the basis of information obtained from the offender,¹⁴ the Managing Registrar should be able to order that the fine be paid within 28 days of the date it was imposed,¹⁵ that the offender be given further time to pay or be allowed to pay by instalments. Only those with the means to pay within 28 days should be required to do so. Others should be given further time to pay or ordered to pay by instalments after due consideration of their means.¹⁶ In allowing for payment by instalments, it should be possible for the Managing Registrar to arrange for an offender to sign an authority for the automatic deduction of the sum due from the offender's bank or other account. The Commission considers that it is an important role of the Managing Registrar to ensure that a payment programme is developed which can be met within the offender's means. To assist offenders to make submissions to the Managing Registrar about a payment programme and to organise their financial affairs so as to meet such a programme, the Commission **recommends** that consideration be given to providing financial counsellors in the Court registry or to ensuring that Court officers refer offenders and defaulters to private counsellors for financial advice. The Cullen Report proposes that the Managing Registrar should provide an offender with a notice setting out the methods of payment and the consequences of enforcement.¹⁷ The Commission endorses this recommendation.¹⁸ The Cullen Report also recommends, as a pilot scheme, that Aboriginal Fines Officers be attached to the Roebourne and Kununurra Courts of Petty Sessions to explain the obligations to the defaulter and make suitable arrangements to pay.¹⁹ The Commission **endorses** this recommendation.

6.10 The Cullen Report recommends that an offender should be required to report to the Managing Registrar immediately after the fine is imposed by a Court of Petty Sessions. The Commission considers that it would be administratively more convenient to give all offenders 28 days to pay the fine with the option of reporting to the Managing Registrar immediately or within that period to arrange a fine payment programme if that is necessary. It **recommends**

¹⁴ To facilitate the provision of this information the defendant could be supplied with a means inquiry form when he is served with a summons and advised to complete it before attending the court for a hearing.

¹⁵ Para 6.10 below.

¹⁶ As is the case at present with the court (see para 2.8 above), the Managing Registrar should be required to give written reasons for refusal of time to pay or refusal to allow payment by instalments.

¹⁷ Cullen Report 10.

¹⁸ There is a similar requirement in New Zealand: *Summary Proceedings Act 1957* (NZ) ss 84 and 85.

¹⁹ Cullen Report 18.

accordingly. At the time the fine is imposed, offenders should be given a notice by the Managing Registrar setting out the fine and any other sum payable and advising them that -

- * the sum outstanding is payable within 28 days;
- * if they cannot pay the fine within that period, that they should arrange a payment programme with the Managing Registrar either immediately or within 28 days; and
- * if they default in payment, payment may be enforced by suspension of a motor vehicle driver's licence or motor vehicle registration, warrant of execution or ultimately a work and development order.

Where a payment programme has been set, the Commission **recommends** that the Managing Registrar should have power on his own motion or on the application of the offender to vary the programme if the offender's means to pay have changed, for example, a previously unemployed person may have obtained employment.

6.11 If the court sets an appropriate fine and the Managing Registrar settles an appropriate payment programme based on an offender's means, default is less likely to be due to inability to pay the fine. The means of enforcing payment of the fine can therefore be directed to strengthening the incentive to pay the fine, such as by suspension of a driver's licence or a motor vehicle registration.

(c) Breach of order to pay pecuniary sums by those with a motor vehicle driver's licence or motor vehicle registration

6.12 The Cullen Report proposes that if an offender defaults in payment of a fine he would be sent a notice of intention to suspend a motor vehicle driver's licence or motor vehicle registration. The licence or registration would be suspended automatically unless the total sum outstanding was paid within 28 days. The licence or registration would only be reinstated on payment of the fine. The offender would not have the opportunity to apply for a work and development order, discharge the sum by imprisonment or apply for an extraordinary driver's licence. If an offender attempted to accumulate fines and avoid payment after the suspension of a licence or registration, the Registrar could issue a warrant of execution against his goods.

6.13 The introduction of suspension of a motor vehicle driver's licence or motor vehicle registration as a method of enforcement was recommended in the Cullen Report because it has proved an effective enforcement mechanism elsewhere for fines imposed for traffic and parking offences.²⁰ Suspension of motor vehicle registration is necessary in addition to suspension of a motor vehicle driver's licence to allow for the recovery of fines imposed on corporations which have a motor vehicle. In 1987 the cancellation of a driver's licence or motor vehicle registration was introduced in New South Wales as the penalty for default in payment of traffic and parking fines.²¹ This innovation, together with the introduction of the automatic issue of an order to do community service instead of being imprisoned, led to an increase in the payment of fines and a fall in receivals for default imprisonment.²²

6.14 The Cullen Report recommends that the suspension of driver's licence or motor vehicle registration be extended to the enforcement of all fines (not just traffic and parking fines as in New South Wales, Victoria and South Australia) imposed by infringement notices and by Courts of Petty Sessions. It does so to provide "a universal effective approach" to the enforcement of monetary penalties.²³ This is most likely to be the case because "for most people a drivers/vehicle licence is vital to mobility and, in some cases, to earning a living" and is accordingly accorded the status of a privilege that must be protected.²⁴ In the view of the Commission, the loss of a licence is likely to provide sufficient incentive to those who have both a licence and the means to pay. However, its use is predicated upon provision for a means inquiry by the Managing Registrar and the development of a payment programme for all offenders who lack the means to pay the fine within the 28 day period. A person's driving licence should not be suspended if he does not have the means to pay. The Commission agrees that the suspension of a driver's licence or motor vehicle registration as an enforcement procedure should be introduced in respect of all fines but this agreement is subject to the recommendations in the following paragraphs. It **recommends** accordingly.

²⁰ Id 4. Based on the New South Wales experience, the Cullen Report estimated an improvement in the collection rate from 60% to 96% in fines imposed by infringement notices and from 40% to 98% for court imposed fines: id 17.

²¹ It is also a means of enforcing the payment of this type of fine in the Australian Capital Territory, Victoria and South Australia.

²² Para 4.11 above. Once community service orders ceased to be automatically issued in February 1990 to those fined by a court who subsequently defaulted, receivals of fine defaulters in prison increased to 30.6% in 1991-1992: para 4.12 above.

²³ Cullen Report 4.

²⁴ Ibid.

6.15 The system operating in New South Wales and recommended for adoption by the Cullen Report provides that the licence or registration is suspended until payment of the fine.²⁵ One possible consequence of the use of the suspension of a motor vehicle driver's licence or motor vehicle registration as an enforcement procedure may simply be to increase the number of unlicensed drivers²⁶ and unregistered vehicles on the road. Hardship would be caused to those whose property is damaged in accidents caused by unlicensed offenders without insurance cover unless their own insurance covered the damage.²⁷ The Commission **recommends** that the suspension of motor driver's licences or motor vehicle registration be monitored by the Ministry of Justice to see the extent to which this is a problem. A further result could be hardship on those who require a driver's licence to earn a livelihood or for some other compelling reason. It is illogical to deprive a person of a driver's licence needed to earn a livelihood if the person thereby loses the means to pay a fine. To deal with cases of hardship, the Commission **recommends** that the provisions for obtaining an extraordinary driver's licence be extended to licences suspended under the enforcement procedure.²⁸ A person who obtained an extraordinary licence would have to comply with its limitations and conditions²⁹ until the fine was paid. Apart from the matters referred to in the *Road Traffic Act 1974*³⁰ the court considering an application for an extraordinary licence should also have regard to the means of the defaulter.³¹ It is not intended that such a licence should be available to a defaulter who has the means to pay the fine.

6.16 An offender sent a notice of intention to suspend a licence or registration if the sum outstanding is not paid within 28 days or whose licence or registration has been suspended should be able to apply to the Managing Registrar for a variation of his payment programme or for a payment programme if he has not previously arranged one. The Commission **recommends** that the licence or registration should be suspended, or not reinstated, unless and until the Registrar decides to vary the order or to arrange a payment programme on the

²⁵ Id 8, 11.

²⁶ According to the Cullen Report 19 there is no evidence in New South Wales of an increase in the number of persons driving whilst under disqualification.

²⁷ Personal injuries would however be compensated under the provisions of the *Motor Vehicle (Third Party Insurance) Act 1943* ss 7, 8.

²⁸ The Cullen Report recommends that extraordinary licences not be available: para 6.12 above.

²⁹ S 76(5)(a)(ii) of the *Road Traffic Act 1974* provides that the limitations and conditions may be as to the: ". . . locality in which and roads on which the applicant is entitled to drive, the purposes for which the applicant is entitled to drive, the hours during which the applicant is entitled to drive, and the vehicle or class of vehicle that may be driven under the authority of the licence."

³⁰ S 76(3).

³¹ Other matters which the court may have regard to include the circumstances of the case or the degree of hardship and inconvenience which would otherwise result to the applicant and his family if the licence was not issued: *ibid*.

ground that the default in payment was due to a change in financial circumstance since the fine was imposed or an earlier payment programme made.

(d) Breach of order to pay pecuniary sums by those who do not have a motor vehicle driver's licence or motor vehicle registration

6.17 Where a defaulter does not have a motor vehicle driver's licence or motor vehicle registration,³² the Cullen Report recommends that a warrant of execution be issued to satisfy the fine and costs and that the Sheriff take over from the police the role of executing these warrants. The Sheriff could also receive payments of sums owing under the warrant. The Report also recommends that the Sheriff be given power to issue a work and development order if a fine has not been discharged by the execution of the warrant.³³ The Commission **endorses** these recommendations.

(e) Warrants of execution against property

6.18 As stated above,³⁴ the Cullen Report recommends that warrants of execution should be available where a person whose licence or registration is suspended for default begins to accumulate fines. The Commission **recommends** that warrants of execution should also be available where a fine is not paid within a reasonable period of the suspension of a licence or registration even if fines are not being accumulated by the defaulter. Otherwise some offenders may believe that they can flout the system simply by not paying the fine and continuing to drive without a licence. The Sheriff should also be given power to issue a work and development order if the execution of a warrant does not discharge the fine. The Commission **recommends** accordingly.

(f) Work and development orders

6.19 As stated above, the Cullen Report recommends that work and development orders be retained but only as an adjunct to warrants of execution. While the Commission agrees, it **recommends** that the system should be improved to respond to the circumstances of Aboriginal offenders. If rejection and hostility on the part of white members of the

³² Estimated to be 13% of the adult population of the State: Cullen Report 12.

³³ Id 13. During the course of a work and development order the defaulter would still have the opportunity to pay the fine in full.

³⁴ Para 6.12 above.

community are factors causing feelings of alienation which lead to some crime by Aboriginal people, it is not surprising that Aboriginal offenders may not be well served by schemes which require them to work in trusting work relationships in that same community. On the other hand, if such alternative schemes are designed and operated by Aboriginal agencies with a large degree of autonomy then the community service experience may become the mutually beneficial one which it was intended to be.³⁵ Adequate resources must be provided to administer such alternatives to imprisonment. As a pilot scheme, the Cullen Report recommends that a supervisor be attached to the Maddington Community Corrections Centre to follow up Aborigines who risked breaching their work and development order.³⁶ The Commission **endorses** this recommendation.

6.20 The Cullen Report points out that work and development orders are open to abuse because "there is an inequitable conversion formula for work and development orders whereby with concurrency a person with several small fines is advantaged over a person with one larger fine of equal amount."³⁷ To overcome this, the Report recommends that all fines be discharged cumulatively (whereas presently most fines are discharged concurrently).³⁸ The Commission **endorses** this recommendation.

6.21 The Cullen Report recommends that imprisonment³⁹ for fine defaulters be retained for fines imposed by Courts of Petty Sessions but only for those who fail to comply with a work and development order.⁴⁰ It did so because the work and development order scheme "would not be enforceable if imprisonment is not available to threaten the defaulter with loss of

³⁵ The criticisms of programs which have been tried to date ought to be kept in mind in pursuing this alternative: see M Wilkie *Aboriginal Justice Programs in Western Australia* Crime Research Centre (Research Report No 5 1991).

³⁶ Cullen Report 18.

³⁷ Id 22.

³⁸ Id 14.

³⁹ As to the default period, the Cullen Report at 14 recommends that:

"The conversion rate for a work and development order would be 6 hours for every \$100 or part thereof (6 hours would form the minimum work unit)

For periods in excess of 12 hours the minimum weekly hours to be performed will be 12

The default rate for breach of a work and development order would be 1 day [imprisonment] for every 3 hours

This would effectively increase the default rate for breach of a work and development order to \$50 per day."

⁴⁰ Cullen Report 14. It recommends that an administrative officer, the Community Corrections Centre Manager, be given power to issue a warrant of commitment if a defaulter did not report to a Centre or failed to comply with a work and development order: *ibid.*

liberty."⁴¹ The integrity of fines as a sentencing option would be threatened if offenders perceived that ultimately fines could not be enforced.⁴²

6.22 The Commission agrees that imprisonment of fine defaulters should be limited to those who fail to comply with a work and development order. There are a number of reasons for considering imprisonment to be an unsatisfactory method of enforcement and for making its use a last resort -

- * It is inappropriate to impose at the enforcement stage a penalty which was not deemed fitting at the sentencing stage.⁴³
- * If imprisonment can be imposed as a sentence only as a last resort,⁴⁴ it is incongruous to use it more readily as a means of enforcement.
- * Imprisoning fine defaulters is costly⁴⁵ though alternatives such as work and development orders may also be costly to administer.⁴⁶
- * It disproportionately affects Aboriginal people in Western Australia.⁴⁷

6.23 This is not to say that all those who breach a work and development order should necessarily be imprisoned. It is more appropriate to deal with them on a case by case basis as are those who breach a community service order⁴⁸ by making it an offence to fail to comply with any requirement of the order. On conviction, a Court of Petty Sessions, having considered the extent of the failure to comply with the order and the defaulter's attitude to discharging the fine, should sentence the person to a period of imprisonment not exceeding say six months or order that the number of hours required to be served under the order be increased. The Commission **recommends** accordingly.

⁴¹ Id 15.

⁴² Id 5.

⁴³ Para 3.2 above.

⁴⁴ Para 3.3 above.

⁴⁵ Para 3.4 above.

⁴⁶ In 1992-1993 it cost \$1,921 per community based offender: Corrective Services Report 16.

⁴⁷ Para 3.9 above.

⁴⁸ See *Offenders Community Corrections Act 1963* s 20H.

3. FINES IMPOSED BY INFRINGEMENT NOTICES

6.24 The Cullen Report recommends the introduction of the suspension of a motor vehicle driver's licence or motor vehicle registration as the only means of enforcing the payment of fines imposed by infringement notices.⁴⁹ Subject to the recommendations made below, the Commission **endorses** the use of the suspension of a licence or registration as an enforcement mechanism for fines imposed by infringement notices.

6.25 Under the system proposed by the Cullen Report, suspension of a motor vehicle driver's licence or motor vehicle registration or preventing a person from obtaining a licence or registration would be the sole means of enforcing fines imposed by infringement notices. If payment is not made and the alleged offender does not have a motor vehicle driver's licence or motor vehicle registration the default would be recorded and until the fine was paid the person could not obtain or transfer a licence or registration or obtain an extraordinary driver's licence. Unlike the position with fines imposed by Courts of Petty Sessions,⁵⁰ no further action would be taken if an offender did not have a licence or registration or began to accumulate fines. The Commission does not agree that such a distinction should be made and recommends that warrants of execution should be used where a person does not have a licence or vehicle registration or where a person whose licence or registration has been suspended for failure to pay a fine imposed by an infringement notice begins to accumulate fines or does not pay the fine within a reasonable period of time. As with fines imposed by Courts of Petty Sessions, the Sheriff should be given power to issue a work and development order if the execution of a warrant does not enable the fine to be discharged.

6.26 At present the INREPs enforcement system provides a standard enforcement procedure for most fines imposed by infringement notices.⁵¹ Existing legislation relating to the issue of infringement notices is not consistent, particularly with regard to time to pay the fine. In the interest of promoting common knowledge and reducing uncertainty the

⁴⁹ Paras 5.6-5.8 above.

⁵⁰ Paras 6.12 and 6.17 above.

⁵¹ It applies to infringement notices under the following Acts: *Bush Fires Act 1954*; *City of Perth Parking Facilities Act 1956*; *Control of Vehicles (Off-Road Areas) Act 1978*; *Curtin University of Technology Act 1966*; *Dog Act 1976*; *Edith Cowan University Act 1984*; *Litter Act 1979*; *Local Government Act 1960*; *Metropolitan Market Act 1926*; *Murdoch University Act 1973*; *Road Traffic Act 1974*; *University of Western Australia Act 1911*; *Western Australian Marine Act 1982*.

However there are some infringement notice fines which are not within the system (for example those under *Parks and Reserves Act 1895* s 14 and the *Secret Harbour Management Trust Act 1984* s 30 (to be proclaimed)) and they should be included in it.

Commission **recommends** that a standard time of 28 days, equivalent to that applying in the case of fines imposed by Courts of Petty Sessions, be introduced.

6.27 The scheme proposed by the Cullen Report does not make any provision for those who lack the means to pay a fine imposed by an infringement notice. To avoid causing hardship to these people, the Commission **recommends** that the same procedure as that recommended for fines imposed by Courts of Petty Sessions apply to fines imposed by infringement notices. This means that those who receive an infringement notice should be able to apply within 28 days of the issue of the notice to a Managing Registrar for an order for time to pay or for payment by instalments, as is the case with fines imposed by Courts of Petty Sessions. They should be advised of this option in the infringement notice and also that if they default in payment, payment may be enforced by suspension of a motor vehicle driver's licence or motor vehicle registration, a warrant of execution or ultimately by a work and development order. As with fines imposed by Courts of Petty Sessions, the Managing Registrar should have power to vary a payment programme⁵² or to reinstate a suspended licence or registration if the defaulter satisfies the Managing Registrar that the default in payment was due to a change in financial circumstances since the fine was imposed or an earlier payment programme made.⁵³

4. MISCELLANEOUS MATTERS

(a) Enforcement officers

6.28 Implementation of the recommendations referred to above would reduce the number of warrants of execution issued, do away with warrants of commitment as an enforcement mechanism and consequently reduce the role of police in the enforcement process. The Cullen Report describes some of the difficulties experienced by police in assisting Courts of Petty Sessions in enforcing pecuniary orders -

* The volume of directions issued by the court to detain persons or to execute against property arising out of default in payment of pecuniary orders has become enormous

⁵² Paras 6.10 and 6.16 above.

⁵³ Para 6.16 above.

and unmanageable - in excess of 100,000 warrants to undertake these procedures being current in 1992-1993.⁵⁴

- * Execution against property calls for resources which the police, in the main, do not have.⁵⁵

The Cullen Report recommends that responsibility for enforcing warrants of execution be conferred primarily on the Sheriff with police still playing a role in some country areas or where the Sheriff required their assistance.⁵⁶ The Commission **endorses** this recommendation. As the Cullen Report states, the Sheriff has the knowledge, skills and infrastructure to execute these warrants. Bailiffs of the Local Courts and private collection agencies could be used where appropriate to assist the Sheriff. However, the use of private collection agencies could result in the use of unacceptable harassment and standover tactics. Public officers are more susceptible to controls.

6.29 The Cullen Report recommends, and the Commission has endorsed the recommendation, that the Managing Registrar assess an offender's ability to pay as well as arrange and manage an individually suited payment programme.⁵⁷ The use of computerised transactions, such as the issue of courtesy letters, to enforce payment would free resources to deal with individuals who still did not pay.⁵⁸ The Commission also considers that it is important for there to be enforcement officers in the court registry and **recommends** that officers of the court be appointed enforcement officers. They should be responsible for monitoring the payment of fines and compliance with arrangements for time to pay and payment by instalments. They should be quick to respond to non-payment by contacting the offender to alert them to the non-payment.⁵⁹ Where a fine is not paid within a reasonable time after the suspension of a licence or registration or the offender is accumulating fines the

⁵⁴ Cullen Report 21.

⁵⁵ Id 12.

⁵⁶ Id 5.

⁵⁷ Para 6.9 above.

⁵⁸ Cullen Report 6.

⁵⁹ According to one study in the United States of America:

"The evidence shows that `supervision' works in collecting fines. The court must continually signal its watchfulness over the offender's payment progress through a monitoring system that reminds offenders when their payments are due and is quick to respond to non-payment": S T Hillsman and B Mahoney *Collecting and Enforcing Criminal Fines: A Review of Court Processes, Practices, and Problems* (1988) 13 *The Justice System Journal* 17, 34-35.

officer should refer the matter to the Managing Registrar so that a warrant of execution could be issued.⁶⁰

(b) Corporations

6.30 At present the main means of enforcing orders for the payment of fines imposed on corporations is by means of warrants of execution.⁶¹ According to the Cullen Report approximately 90% of all warrants issued against corporations cannot be executed and the sums outstanding are written off. There are a number of reasons for this lack of success. The corporation may have ceased trading, its assets may be encumbered or it may lack assets that can be seized and sold.⁶² Even if a corporation has ongoing operations its officers may claim that it has no assets upon which execution can be levied or that its assets, such as vehicles, are under hire purchase. In the case of a corporation which is being wound up because of insolvency, a fine or penalty is not a provable debt and the fine or penalty must be written off.⁶³

6.31 In other cases, the payment of fines by corporations will no doubt rise if enforcement by means of the suspension of motor vehicle registration is introduced. Nevertheless other means of enforcement should be considered.

6.32 At present, an order made by any court pursuant to the Criminal Code for the payment of a sum of money may, without prejudice to any other method of enforcement, be entered as a judgment of the Supreme Court or the order of a judge and is enforceable accordingly.⁶⁴ One advantage of the enforcement of orders in the Supreme Court is that an order may be

⁶⁰ Paras 6.12 and 6.17 above.

⁶¹ Orders made pursuant to the Criminal Code can also be entered as a judgment of the Supreme Court and be enforced accordingly: para 2.5 above.

There is also provision for the reciprocal enforcement of orders against a body corporate which has property in another State or Territory: para 2.25 above.

⁶² Cullen Report 24.

⁶³ Where a corporation is being wound up, the Corporation Law provides that in the winding up of an insolvent company the rules in force under the Commonwealth *Bankruptcy Act 1966* relating to the rights of secured and unsecured creditors and debts provable in relation to the estates of bankrupt persons are applicable to the winding up: *Corporations Act 1989* (Cth) s 553. The *Bankruptcy Act 1966* provides that penalties or fines imposed by a court (except a pecuniary penalty order or an interstate pecuniary penalty order under the *Proceeds of Crime Act 1987* (Cth)) are not provable in bankruptcy: *Bankruptcy Act 1966* (Cth) s 82(3).

⁶⁴ Para 2.5 above.

made for the examination of a judgment debtor or, if the debtor is a body corporate, one of its officers. The debtor or officer examined before a judge may be asked whether any debts are owing to the debtor and whether the debtor has any other property or means of satisfying the judgment.⁶⁵ There is a similar power to examine debtors in the Local Court.⁶⁶ In order to deal with problems in enforcing fines imposed on a corporation, the Commission **recommends** that the Managing Registrar should have an express power to examine an officer of the corporation as to any debts that are owing to the corporation and whether it has any other property or means of satisfying the fine.

6.33 Another means of addressing problems caused by corporations is that adopted in Victoria where the court may declare that any person who was a director of a body corporate at the time of the commission of the offence is jointly and severally liable for the payment of the fine if the court is satisfied that -

- (a) the body will not be able to pay an appropriate fine; and
- (b) that immediately before the commission of the offence there were reasonable grounds to expect that the body would not be able to meet any liabilities that it incurred at that time.⁶⁷

This method of enforcement also provides a means of enforcing the payment of fines against corporations which are being wound up, particularly where the principals use the legal entity of a corporation to flout the orders of the court. The Commission recommends that a similar provision be introduced in this State, but that if the body corporate cannot pay the fine, the directors should be jointly and severally liable unless they can satisfy the court that at the time of the commission of the offence there were reasonable grounds to expect that the body would be able to meet any liabilities that it incurred at that time.

⁶⁵ Rules of the Supreme Court 1971 O 48 r 1.

⁶⁶ Local Court Rules 1961 O 27 r 13.

⁶⁷ *Sentencing Act 1991* (Vic) s 50(6). The court must not make the declaration in respect of a director who satisfies it that at the time of the commission of the offence he had reasonable grounds for believing and did believe that the body corporate would be able to meet its liabilities and he had taken all reasonable steps in carrying on its business to ensure that it would be able to meet its liabilities as and when they became due: id s 50(7).

(c) Compensation orders

6.34 A Court of Petty Sessions has power to order an offender to pay compensation for any injury, loss, damage or expense suffered or incurred as a result of the commission of the offence for which the offender was convicted.⁶⁸ The recovery of compensation may be enforced in the same way as a fine.⁶⁹ According to the Cullen Report, it is not the general practice for the courts to notify a victim of an offence of any compensation awarded in his favour or that he must seek enforcement of the order. On the other hand, awards of compensation to State Government Departments are automatically enforced by the courts in the same way as a fine.⁷⁰ The Commission considers that such a distinction is unjustified and **recommends** that all orders for compensation to victims of offences be enforced automatically in the same way as the payment of fines, unless the victim indicates that he wishes to use civil remedies.

(d) Implementation

6.35 The Commission believes that all statutory provisions relating to the procedure of Courts of Petty Sessions should, so far as practicable, be retained in one Act, the *Justices Act 1902*. It therefore **recommends** that the provisions relating to enforcement be retained in that Act. In drafting these provisions emphasis should be given to the enforcement policy as regards pecuniary orders which is based upon tailoring the enforcement process to the circumstances of the offender and avoiding imprisonment except in cases analogous to contempt of court where a person has failed to comply with a work and development order.

(e) Immobilising or towing away a vehicle

6.36 In New Zealand any bailiff executing a warrant to seize property may, instead of seizing any motor vehicle belonging to a fine defaulter, immobilise the vehicle by attaching to the vehicle any device designed for the purpose until the fine is paid.⁷¹ A vehicle cannot be immobilised unless it is on private property or, if it is in a public place, the bailiff is satisfied that immobilising it will not cause undue inconvenience to other persons.⁷² Immobilisation

⁶⁸ Criminal Code s 719.

⁶⁹ Paras 2.5 and 2.6 above.

⁷⁰ Cullen Report 25.

⁷¹ *Summary Proceeding Act 1957* (NZ) s 94B(1).

⁷² Id s 94B(2).

does not prevent the vehicle being later seized in satisfaction of the warrant. The Commission suggests that consideration be given to the introduction of a similar power in Western Australia.

6.37 The Commission suggests that alternative sanctions for some offences should be investigated. With regard to parking offences for instance it may be found to have more of a deterrent effect to permit any vehicle parked illegally to be towed away. The offender would be required to pay any fine and the towing charges before regaining possession of the vehicle.

5. SUMMARY OF RECOMMENDATIONS

6.38 The Commission recommends that -

Means inquiry

1. Offenders should be given 28 days to pay a fine imposed by a Court of Petty Sessions with the option of reporting to the Managing Registrar immediately or within that period to arrange a fine payment programme if that is necessary. At the time the fine is imposed, offenders should be given a notice by the Managing Registrar setting out the fine and any other sum payable and advising them that -

- * the sum outstanding is payable within 28 days;
- * if they cannot pay the fine within that period, that they should arrange a payment programme with the Managing Registrar either immediately or within 28 days; and
- * if they default in payment, payment may be enforced by suspension of a motor vehicle driver's licence or motor vehicle registration, warrant of execution or ultimately a work and development order.

Paragraph 6.10

2. The Managing Registrar should conduct an inquiry into the means of an offender before determining the method of payment of the fine. The Managing Registrar should be able to order that the fine be paid within the 28 day period, that the offender be given further time to pay or be allowed to pay by instalments. Only those with the means to pay within 28

days should be required to do so. Others should be given further time to pay or ordered to pay by instalments after due consideration of their means. In allowing for payment by instalments, it should be possible for the Managing Registrar to arrange for an offender to sign an authority for the automatic deduction of the sum due from the offender's bank or other account.

Paragraph 6.9

3. Where a payment programme has been set, the Managing Registrar should have power on his own motion or on the application of the offender to vary the programme if the offender's means to pay have changed.

Paragraph 6.10

Financial counselling

4. Consideration should be given to providing financial counsellors in the Court registry or to ensuring that Court officers refer offenders and defaulters to private counsellors for financial advice.

Paragraph 6.9

5. A pilot scheme of Aboriginal Fines Officers should be undertaken.

Paragraph 6.9

Suspension of driver's licence or motor vehicle registration

6. Suspension of a motor vehicle driver's licence or motor vehicle registration as a means of enforcing the payment of pecuniary orders of Courts of Petty Sessions and fines imposed by infringement notices should be introduced.

Paragraphs 6.12-6.14, and 6.24

7. Provisions for obtaining an extraordinary driver's licence should be extended to licences suspended under the enforcement procedure. A person who obtained an extraordinary licence should be required to comply with its conditions until the fine was paid.

Paragraph 6.15

8. Where a notice of suspension of a licence or registration is served on the offender, he should be able to apply to the Managing Registrar for a variation of his payment programme or for a payment programme if he has not previously arranged one. The licence or registration should be suspended unless and until the Registrar decides to vary the order or arrange a payment programme on the ground that the default in payment was due to a change in financial circumstances since the fine was imposed or an earlier payment programme made.

Paragraph 6.16

9. A defaulter whose licence or registration has been suspended should be able to obtain a reinstatement of the licence or registration if the Managing Registrar decides to vary a payment programme or to arrange a payment programme on the ground that the default was due to a change in financial circumstances since the fine was imposed or an earlier payment programme made.

Paragraph 6.16

10. The use of the suspension of a motor driver's licence or motor vehicle registration should be monitored by the Ministry of Justice to see the extent to which hardship is caused to those whose property is damaged in accidents involving unlicensed offenders without insurance cover.

Paragraph 6.15

Warrants of execution against property

11. Execution against property owned by a defaulter should be available where a fine is not paid within a reasonable period of the suspension of a licence or registration, a defaulter begins to accumulate fines or where a defaulter does not have a motor vehicle driver's licence or motor vehicle registration.

Paragraphs 6.17 and 6.18

Work and development orders

12. Work and Development Orders should be retained as an adjunct to warrants of execution and should be improved to respond to the circumstances of Aboriginal offenders.

Paragraphs 6.17, 6.18 and 6.19

13. As a pilot scheme, a supervisor should be attached to a Community Corrections Centre to follow up Aborigines who risk breaching their work and development order.

Paragraph 6.19

14. All fines discharged by work and development orders should be discharged cumulatively.

Paragraph 6.20

15. It should be an offence to fail to comply with any requirement of a work and development order. The penalty should be imprisonment for a period not exceeding six months or an increase in the number of hours to be served under the order.

Paragraph 6.23

Infringement notices

16. Where an offender does not have a licence or motor vehicle registration or where a person whose licence or registration has been suspended for failure to pay a fine imposed by an infringement notice begins to accumulate fines or does not pay the fine within a reasonable period of time a warrant of execution should be available to enforce payment of the fine. As with fines imposed by Courts of Petty Sessions, the Sheriff should be given power to issue a work and development order if the execution of a warrant does not enable the fine to be discharged.

Paragraph 6.25

17. A standard time for payment of fines imposed by infringement notices of 28 days should be introduced.

Paragraph 6.26

18. The same enforcement procedure as that recommended for the enforcement of fines imposed by Courts of Petty Sessions should apply to fines imposed by infringement notices. That is, those who receive an infringement notice should be able to apply within 28 days of the issue of the notice to a Managing Registrar for an order for time to pay or for payment by instalments, as is the case with fines imposed by Courts of Petty Sessions. They should be

advised of this option in the infringement notice and also that if they default in payment, payment may be enforced by suspension of a motor vehicle driver's licence or motor vehicle registration, a warrant of commitment or ultimately by a work and development order. As with fines imposed by Courts of Petty Sessions, the Managing Registrar should have power to vary a payment programme or to reinstate a suspended licence or registration if the defaulter satisfies the Managing Registrar that the default in payment was due to a change in financial circumstances since the fine was imposed or an earlier payment programme made.

Paragraph 6.27

Notice to offender

19. The Managing Registrar should provide an offender with a notice setting out the methods of payment and the consequences of enforcement.

Paragraph 6.9

Enforcement officers

20. Responsibility for enforcing warrants of execution should be conferred primarily on the Sheriff with police still playing a role in some country areas or where the Sheriff required their assistance.

Paragraph 6.28

21. Officers of the court should be appointed enforcement officers.

Paragraph 6.29

Corporations

22. The Managing Registrar should have an express power to examine an officer of a corporation as to any debts that are owing to it and whether it has any other property or means of satisfying the fine.

Paragraph 6.32

23. A court should be empowered to declare that any person who was a director of a body corporate at the time of the commission of the offence is jointly and severally liable for the

payment of the fine unless he can satisfy the court that at the time of the commission of the offence there were reasonable grounds to expect that the body would be able to meet any liabilities that it incurred at that time.

Paragraph 6.33

Compensation orders

24. Orders for compensation to victims of offences should be enforced in the same way as the payment of fines, unless the victim indicates that he wishes to use civil remedies.

Paragraph 6.34

Implementation

25. The provisions relating to enforcement should be retained in the *Justices Act 1902*.

Paragraph 6.35

Immobilising or towing away a vehicle

26. Consideration should be given to empowering the Sheriff in executing a warrant, instead of seizing any motor vehicle, to immobilise it until the fine is paid. Immobilisation should not prevent the later seizure of the vehicle.

Paragraph 6.36

27. Consideration should be given to introducing alternative sanctions for some offences, for example, with regard to parking offences to permit any vehicle parked illegally to be towed away for which the offender must pay any fine and the towing charges before regaining possession.

Paragraph 6.37

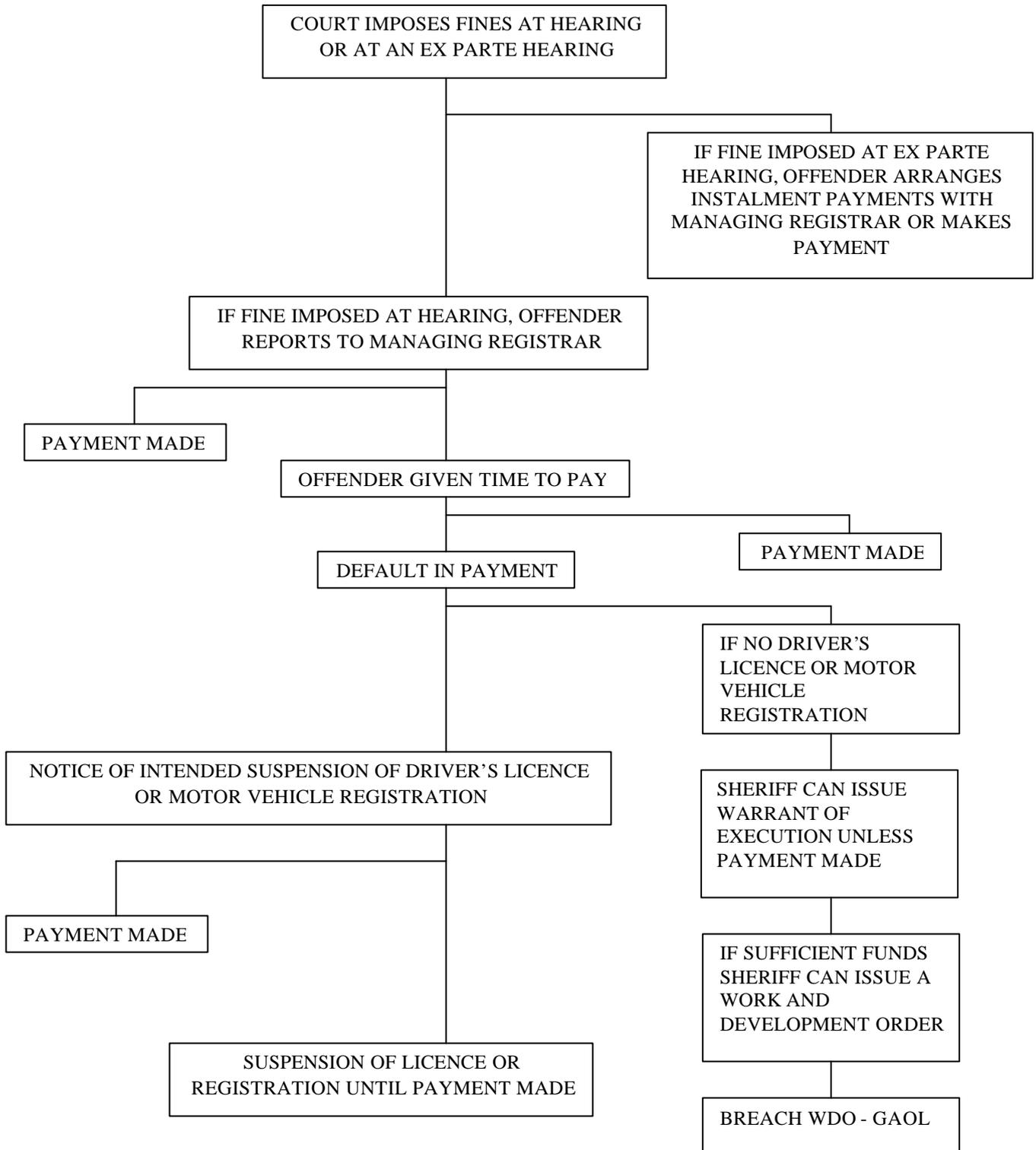
C J McLURE
Chairman

P G CREIGHTON

P R HANDFORD

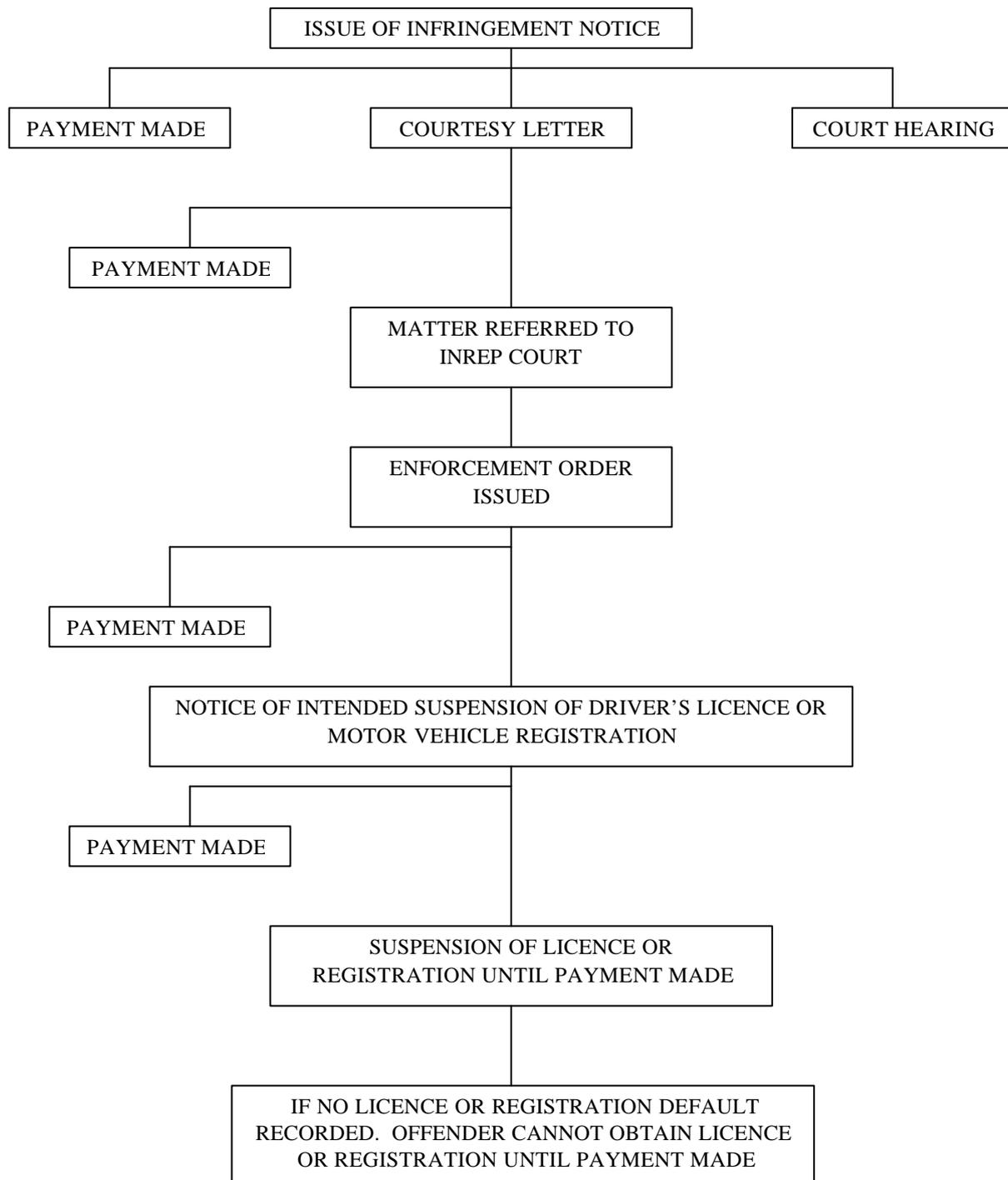
Appendix 1

SYSTEM RECOMMENDED BY CULLEN REPORT FOR ENFORCING PAYMENT OF FINES IMPOSED BY COURTS OF PETTY SESSIONS



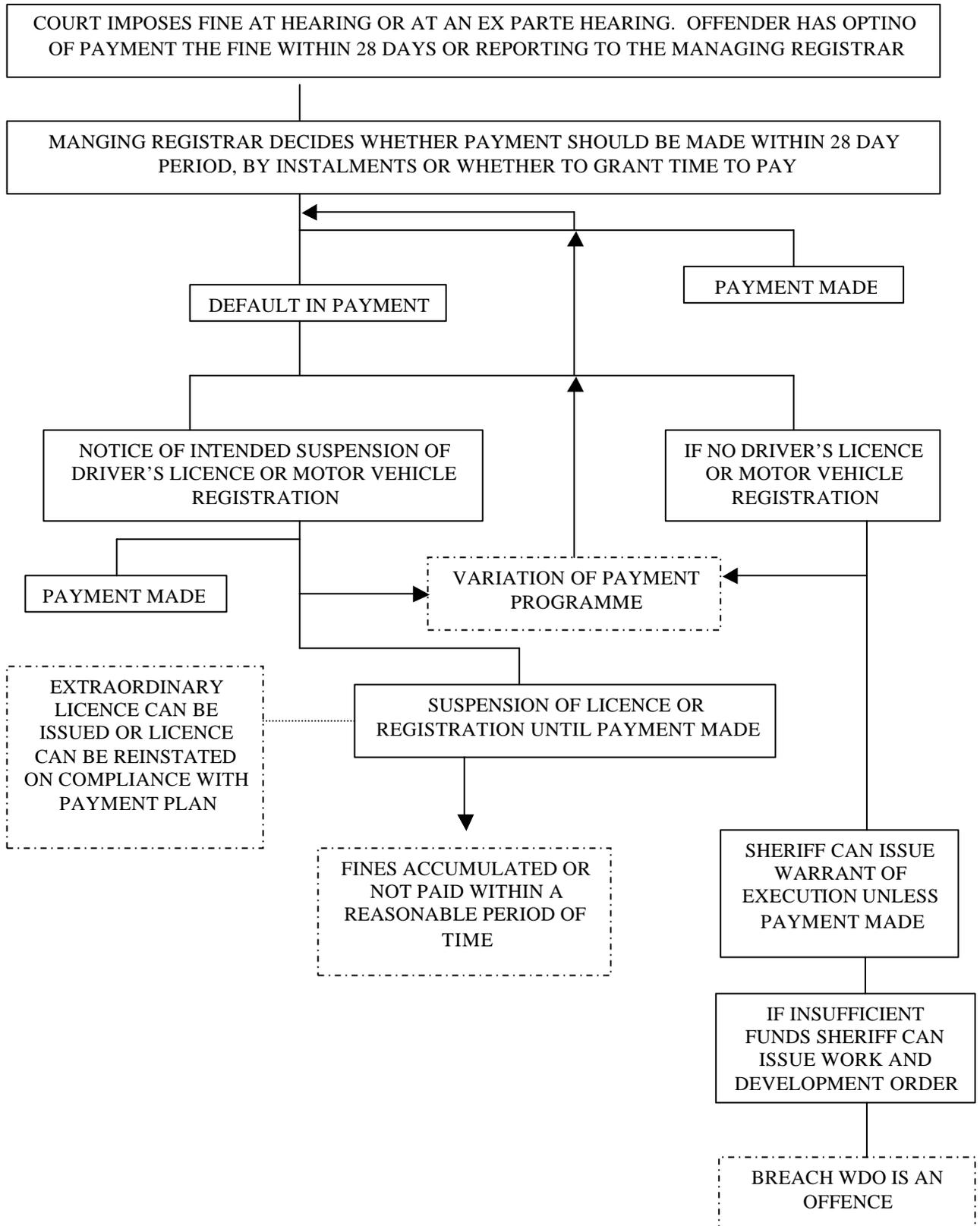
Appendix 2

SYSTEM RECOMMENDED BY CULLEN REPORT FOR ENFORCING PAYMENT OF FINES IMPOSED BY INFRINGEMENT NOTICE



Appendix 3

SYSTEM RECOMMENDATIONS BY COMMISSION FOR ENFORCING PAYMENT OF FINES IMPOSED BY COURTS OF PETTY SESSIONS



Appendix 4

SYSTEM RECOMMENDATIONS BY COMMISSION FOR ENFORCING PAYMENT OF FINES IMPOSED BY INFRINGEMENT NOTICES

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