

Aboriginal Legal Service of Western Australia (Inc)



Addressing fine default by vulnerable and disadvantaged persons: Briefing paper

August 2016

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA ('ALSWA')

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

INTRODUCTION

Purpose of this Briefing Paper

The purpose of this briefing paper is to inform the current policy debate about the appropriateness of continuing to imprison fine defaulters in Western Australia. ALSWA is primarily concerned with vulnerable and disadvantaged fine defaulters who may not have the capacity to pay off their fines and/or the ability to understand the fines enforcement system. The complex underlying problems that exist for these fine defaulters (such as mental illness, cognitive impairment, homelessness, poverty, substance abuse, family violence and unemployment) will never be addressed by the current blunt fines enforcement system in Western Australia. ALSWA advocates for a fairer and smarter approach whereby vulnerable and disadvantaged fine defaulters are encouraged to engage in appropriate treatment, education or training to address the causes of offending and the reasons why they are unable to pay off their fines.

Background

Imprisonment for fine default has received significant public attention over the past two years following the tragic death of Ms Dhu in police custody in August 2014 – she had been taken into custody for failing to pay fines and costs totalling \$3,622.34.¹

In November 2014 the WA Labor Party produced an informative Discussion Paper, *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison*. The Discussion Paper provided very important data in relation to the unacceptable level of imprisonment for fine default in Western Australia:

- Since 2010, over 1,100 people have been sent to Western Australian prisons each year exclusively for fine default.² ALSWA highlights that in comparison, for example, in Victoria during 2012/2013 there were only 45 prison receptions for fine default (both court fines and infringement penalties).³ Furthermore, in New South Wales no one has been imprisoned as a consequence of fine default since 1996.⁴
- Unpaid fines are ‘cut out’⁵ in prison at a rate of \$250 per day; however; the daily cost of imprisoning a fine defaulter was stated to be \$345.⁶ In contrast, the funding allocated to supervising a fine defaulter on a community work order is \$43 per day.⁷
- In 2013, one in every three women who entered prison did so for fine default. Furthermore, since 2008 the number of Aboriginal women jailed for fine default has increased by 576%.⁸
- The number of Aboriginal people imprisoned for fine default has increased by 480% between 2008 and 2013.⁹
- The average term of imprisonment for fine default is 4.24 days.¹⁰
- Fine defaulters cost the prison system \$2.4 million in 2013.¹¹
- The total amount of unpaid fines owed by those fine defaulters who are imprisoned has ‘never exceeded 5.5 per cent of the overall outstanding debt’.¹²

1 Ms Dhu was required to spend four days in custody to pay off the largest fine of \$1,000.00: Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) 2.

2 WA Labor Party, *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison* (November 2014) 2.

3 Victorian Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria*, Report (May 2014) 180.

4 New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012) 243. Under the *Fines Act 1996* (NSW) a person can be imprisoned for failure to comply with a community service order imposed in relation to fine default. However, since 2003 only 1,027 community service orders have been made. Further, there have been no community service orders issued since 2010 (which is when the work and development order scheme, discussed further below, was first introduced (238)).

5 The term ‘cut-out’ is used to refer to the process whereby a fine defaulter is taken to prison under a warrant of commitment pursuant to s 53 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) for the specified period of days required to satisfy the unpaid fine debt.

6 This does not include the costs of transporting fine defaulters to prison or the impact of additional prison receptions on prison administration: WA Labor Party, *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison* (November 2014) 2 & 3.

7 Ibid 4.

8 Ibid 2.

9 Ibid 2.

10 Ibid 6.

11 Ibid 6.

Since the publication of the Discussion Paper, it has been suggested that the daily cost of imprisoning a fine defaulter may have been underestimated. In the Auditor General's 2015 report on bail it is stated that:

Holding people in prison for short periods has a very high daily cost due to the assessments and additional supports needed when defendants are first received in prison.¹³

Corrective Services estimates that keeping defendants in prison for less than a week can cost up to \$770 a day which is around double the cost for longer term prisoners.¹⁴

Therefore, as stated by the Shadow Minister for Corrective Services, the total cost of imprisoning fine defaulters in 2013 'would have been \$4 million'.¹⁵

Recently, the Office of the Inspector of Custodial Services has published a review of fine defaulters in the prison system. This review found that:

- Between July 2006 and June 2015 there were 7462 prison receptions solely for fine default.¹⁶ This figure does not include the 'undisclosed number of people who are held in police lock ups for "paying off" fines and do not enter the Department's custody'.¹⁷
- Before legislative amendments in 2008 (which had the effect that a number of unpaid fines could be 'cut out' at the same time) the average stay in prison for a fine defaulter was 40 days. Since that time the average prison stay has been 4.5 days.¹⁸
- The total cost of imprisonment for fine default over the period July 2006 to June 2015 was \$42 million (and this does not include the cost to police, courts and transportation to prison).¹⁹
- Aboriginal women are drastically overrepresented as fine defaulters – Aboriginal women comprised 64% of all female fine defaulters who were sent to prison (in contrast, Aboriginal men comprised 38% of all male fine defaulter sent to prison).²⁰
- 73% of imprisoned female fine defaulters were unemployed in contrast to 10% of imprisoned male fine defaulters.²¹
- 54% of the offences for which fine defaulters were imprisoned were traffic related offences including drink driving and driving without a licence.²²

12 Ibid 7.

13 When a person is first taken into prison, the intake process involves an interview, a risk assessment, a photograph being taken, medical screening, access to phone a relative, a strip-search, a shower and provision of prison uniform and forms: Auditor General Western Australia, *Management of Adults on Bail*, Report No 10 (June 2015) 15.

14 Auditor General Western Australia, *Management of Adults on Bail*, Report No 10 (June 2015) 14. See also Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) iv.

15 Western Australia, Parliamentary Debates, Legislative Assembly, 23 June 2015, 4756-4779 (Mr P Papalia).

16 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) iv.

17 Ibid 4.

18 Ibid iv.

19 Ibid.

20 Ibid.

21 Ibid v.

22 Ibid iv.

- In November 2015 it was calculated on the available data that on average there were 11 fine defaulters in prison on any given day.²³

While it appears that the total number of prison receptions for fine default alone decreased in 2014–2015, Aboriginal women remain grossly overrepresented – 62% of all female fine defaulters in this period were Aboriginal women.²⁴

Should fine defaulters be liable to imprisonment?

In ALSWA's view, the critical issue with the current fines enforcement system in Western Australia is that vulnerable and disadvantaged persons are liable to imprisonment for failing to pay their fines. One of the major arguments for providing imprisonment as an option for fine default is that there must be tangible consequences for those who fail or refuse to pay their fines. For example, it has been argued by the Minister for Corrective Services that imprisonment for fine default is essential to ensure that there is an 'endgame or else nobody would pay a parking ticket, nobody would pay a speeding ticket, and nobody would pay a driving without a licence ticket'.²⁵ This argument is flawed for two reasons. First, imprisonment is not an enforcement option for failing to pay an infringement (ie, a parking ticket or a speeding ticket). Imprisonment for fine default is only available for unpaid court-imposed fines. Thus, those who currently pay infringements do so without any threat of imprisonment. Second, if imprisonment for fine default was removed as an option there would still be an 'endgame', albeit a different one. The other enforcement options under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), such as drivers licence suspension, vehicle immobilisation and seizure of property are designed to deter people from not paying their fines (and currently also apply to infringements).

It was further argued that those who are imprisoned for fine default are in prison 'because of their refusal to pay their fines or to make amends for their penalties somehow through the justice system'.²⁶ ALSWA acknowledges that there are some fine defaulters who refuse to pay and simply ignore their obligations. The major debtors lists on the Department of the Attorney General's website on 20 August 2015, shows that of the nine fine defaulters with fines debt in excess of \$100,000 there were seven corporations. However, for many vulnerable and disadvantaged people, failure to pay fines is not a deliberate strategy but rather a consequence of impoverished and complex circumstances. In this regard it has been observed that for homeless and other vulnerable people, the accumulation of 'massive fine debt adds to the problems of finding food and shelter, dealing with a mental illness or navigating the world with a cognitive impairment. It is all but impossible for those surviving on a Centrelink benefit (and sometimes on no benefit at all), to pay off their [fine] debts'.²⁷

23 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) iv.

24 It was stated in Parliament that there were 603 people imprisoned for fine default alone in 2014–2015 (40% were Aboriginal). There were 151 women imprisoned for fine default (62% were Aboriginal): Western Australia, Parliamentary Debates, Legislative Assembly, 10 May 2016, 2577 (Mr JM Francis, Minister for Corrective Services).

25 Western Australia, Parliamentary Debates, Legislative Assembly, 16 June 2015, 4356–4358 (Mr JM Francis, Minister for Corrective Services).

26 Western Australia, Parliamentary Debates, Legislative Assembly, 16 June 2015, 4356–4358 (Mr JM Francis, Minister for Corrective Services).

27 Santow E, 'The NSW Work and Development Scheme: A therapeutic response to an infringement system that oppresses people experiencing homelessness' (2014) 51 available at <http://www.piac.asn.au/publication/2014/11/nsw-work-and-development-order-scheme>.

The Office of the Inspector of Custodial Services (OICS) has recently observed that there is 'little doubt that imprisonment needs to remain as the ultimate deterrent for people who wilfully refuse to pay or to engage in other measures to work off fines'.²⁸ Nonetheless, it was also emphasised that more information is required in relation to how many fine defaulters are truly wilful (ie, those who can pay their fines but choose not to do so).²⁹ As highlighted in the OICS report, unemployed Aboriginal women are the most likely group to be imprisoned for fine default in Western Australia and ALSWA is strongly of the view that the overwhelming majority (if not all) of these women are not 'wilful' fine defaulters.

The low numbers of fine defaulters in prison on any one day has also been relied on as a justification for the continuation of the current regime. The Minister for Corrective Services stated in Parliament on 16 June 2015 that 'less than 0.04 percent of the population in prison today are there for fine defaults alone'.³⁰ In response, the Shadow Minister highlighted that:

On average they stay in prison for 4.21 days, so if on any one day a snapshot of the entire prison muster is made and the number of fine defaulters is counted, there will not be very many because they only stay for a short time. However, that does not mean that that is inconsequential and it does not mean that it is not important to look at the fact that if money is trying to be saved, if efficiencies are sought...³¹

Similarly, the OICS concluded that despite the fact that there are few people in prison for fine default at any given time (because fine defaulters usually serve short periods in custody), 'having people "churning" in and out of custody for short periods for fine default is financially costly (several million dollars each year), socially undesirable, and risky and disruptive for prisons'.³²

ALSWA agrees that the personal, social and economic cost of imprisoning fine defaulters should not be underestimated simply because the duration of their prison stay is relatively short. The tragic death of Ms Dhu is a stark and confronting example. There are other significant risks associated with imprisonment including physical and mental health problems and, for people entering the prison system for the first time, the negative impact of associating with more serious offenders. Further, there are risks to the health, safety and wellbeing of people who are transported long distances in custody from regional and remote areas to prison. Additionally, there are negative impacts on family such as disruption to children and the possibility of removal by welfare; the possibility that children are unsupervised and that some children may be at risk of abuse in the absence of the parent who is imprisoned. Moreover, as outlined above, imprisonment for unpaid fines is expensive. Even if it could be shown that there are some fine defaulters who would rather spend time in prison than pay a fine, the system does nothing to encourage rehabilitation or deter offenders from breaking the law.

More recently, it has been suggested that enforcing fines via compulsory payments from social security payments may be the best way forward to reduce the number of prison receptions for fine default. ALSWA does not agree with this approach for vulnerable and disadvantaged people and instead favours a therapeutic approach that addresses the underlying causes of offending

28 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) vi (emphasis added).

29 Ibid vi.

30 Western Australia, Parliamentary Debates, Legislative Assembly, 16 June 2015, 4356-4358 (Mr JM Francis, Minister for Corrective Services).

31 Western Australia, Parliamentary Debates, Legislative Assembly, 23 June 2015, 4756-4779 (Mr P Papalia).

32 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) ii.

behaviour and addresses the various vulnerabilities and disadvantages (such as mental illness, physical or cognitive disability, substance misuse, homelessness, family violence and poverty) that make it impossible for some people to pay off their accumulated fine debt.

AN ALTERNATIVE APPROACH: THE NEW SOUTH WALES WORK AND DEVELOPMENT ORDER SCHEME

Introduction

In August 2015, ALSWA consulted with various stakeholders who are closely involved in the New South Wales Work and Development Order Scheme ('WDO Scheme'). ALSWA is grateful to all who generously provided their time and assistance including the provision of relevant documentation and data. The overview of the WDO Scheme below (which has been informed by these consultations as well as by research undertaken by ALSWA) provides information about the legislative and policy requirements of the scheme and how it works in practice. It also includes suggestions for improvements or modifications to assist policy makers in developing an enhanced scheme for Western Australia. ALSWA hopes that this detailed overview provides a useful blueprint for reform in Western Australia.

The WDO Scheme was developed by the New South Wales Department of Justice and the State Debt Recovery Office ('SDRO') with support from various non-government organisations.³³ A monitoring committee was established and the project commenced as a two-year pilot on 10 July 2009. The current WDO Scheme is a collaborative arrangement between the Department of Justice, SDRO, Legal Aid NSW and ALS (NSW/ACT). ALSWA was advised that the scheme has had and continues to have bi-partisan support.³⁴

The scheme applies to fine debts arising from unpaid court-imposed fines as well as unpaid penalty notices. Further, it is available to both adults and children and to persons with unpaid New South Wales fine debt who are living interstate.³⁵ During consultations, ALSWA was advised that there were approximately 530,000 fine defaulters in New South Wales and 6,000 of these were children.³⁶ A person may apply for a Work and Development Order ('WDO') in respect to part of their total outstanding fine debt and, at the same time, apply for time to pay or a write-off for the remaining fine debt.³⁷

The legislative scheme

The *Fines Act 1996* (NSW) ('*Fines Act*') provides for various fines enforcement options including drivers licence or vehicle registration suspensions; orders to seize property; orders to garnish wages or salary;³⁸ and community service orders. Imprisonment for failing to comply with a

³³ Consultation with Tania Matruglio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

³⁴ Consultation with Tania Matruglio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

³⁵ Work and Development Order Guidelines 2012, 3-4.

³⁶ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

³⁷ Work and Development Order Guidelines 2012, 6.

³⁸ It was explained to ALSWA that SDRO can place a garnishee order on a fine defaulter's bank account; however, the SDRO doesn't know whether the fine defaulter is a Centrelink recipient and this causes problems. What usually occurs is the fine defaulter contacts SDRO after they discover their social security payments have been withheld: Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

community service order imposed for unpaid fines remains an option under the legislation although ALSWA was advised that no one has been imprisoned for fine default in New South Wales since the late 1990s.

Alternative processes for fine mitigation are set out in Division 8 of the *Fines Act*. These include the WDO scheme,³⁹ time to pay arrangements⁴⁰ and write offs.⁴¹ Certain decisions⁴² of the Commissioner of Fines Administration (referred to as 'State Debt Recovery'⁴³) in relation to these fine mitigation options are reviewable by a Hardship Review Board.⁴⁴ The Hardship Review Board is comprised of the Director-General of the Department of Finance and Service, the Secretary of the Treasury and the Director-General of the Department of the Attorney General and Justice.

Section 99A of the *Fines Act* stipulates that a WDO means an order requiring a person to do any one or more of the following activities in order to satisfy all or part of a fine:

- unpaid work for or on behalf of an approved organisation;⁴⁵
- undergo medical or mental health treatment in accordance with a health practitioner's⁴⁶ treatment plan;
- undertake an educational, vocational or life skills course;
- undergo financial or other counselling;
- undergo drug or alcohol treatment;
- if the person is under 25 years, undertake a mentoring program.

A person is only eligible for a work and development order if:

- a fine enforcement order has been made in relation to the unpaid fine;
- the person
 - has a mental illness;
 - has an intellectual disability or cognitive impairment;
 - is homeless;
 - is experiencing acute economic hardship; or
 - has a serious addiction to drugs, alcohol or volatile substance;
- a community service order is not in force already in relation to the unpaid fine;⁴⁷ and

39 *Fines Act 1996* (NSW) Division 8, Subdivision 1.

40 *Fines Act 1996* (NSW) Division 8, Subdivision 2.

41 *Fines Act 1996* (NSW) Division 8, Subdivision 2. SDRO does not usually combine write-offs with WDOs; however, on occasion they will write-off small outstanding amounts at the end of the order (eg, if the WDO participant has cut out \$3,000 worth of unpaid fines over a three-month period and there is \$80 owing, SDRO may write-off this amount: Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

42 A decision in relation to the making of, or failure to make or vary or revoke a WDO, the making of, or failure to make a time to pay order, and the writing off or failure to write off the whole or part of an unpaid fine.

43 *Fines Act 1996* (NSW) ss 113 & 115.

44 *Fines Act 1996* (NSW) Division 8, Subdivision 3.

45 An approved organisation means an organisation or body that is approved by the Director-General of the Department of the Attorney General and Justice: *Fines Act 1996* (NSW) s 99A.

46 A health practitioner means a registered medical practitioner, registered psychologist or a nurse: *Fines Act 1996* (NSW) s 99A.

47 ALSWA was advised that since the WDO Scheme commenced, community service orders are no longer used. None have been issued for the past four to five years and it was further noted that the cut-out rate for community service orders is only \$15: Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

- an application is made in accordance with the legislation.

Applications to SDRO must be supported by an approved organisation or approved health practitioner who will sponsor the applicant and specify the grounds for making the order and the proposed activities to be carried out under the order.⁴⁸ If the sole ground for eligibility is a 'serious addiction to drugs, alcohol or volatile substances' then the only activities permitted under the scheme are counselling and drug or alcohol treatment.

The *Fines Act* provides that guidelines may be issued in relation to the scheme and sets out the matters that the guidelines can address. The current *Work and Development Order Guidelines* (2012) ('the Guidelines') provide comprehensive rules about the administration and operation of the scheme. The requirements under the Guidelines are discussed below along with information obtained from ALSWA during consultations.

Operation

Criteria for eligibility

As noted above, in order to be eligible for a WDO, the person must have one of the specified disadvantages or vulnerabilities (namely, mental illness; intellectual disability or cognitive impairment; homelessness; serious addiction to drugs, alcohol or volatile substances; or acute economic hardship). Further, the person's application must be supported by an approved organisation or health practitioner.

It is not necessary for the applicant to demonstrate that the relevant vulnerability or disadvantage contributed to incurring the fine; however, it is necessary for the supporting organisation or health practitioner to indicate in the application that the vulnerability or disadvantage contributed to or is contributing to the person's inability to pay the fine or that because of the person's condition it is more appropriate for the person to undertake the work or activities than to pay the fine.⁴⁹

Further, a work and development order cannot be made unless there is an enforcement order against the person⁵⁰ and only as long as there is no community service order in force.

Mental illness

Mental illness is defined under the Guidelines as a 'condition that seriously impairs, either temporarily or permanently, the mental functioning of a person' and examples provided include schizophrenia, psychosis, bipolar disorder, serious depression or anxiety, and a personality disorder.⁵¹ The required documentary proof of a mental illness is a letter or other documentation from the applicant's treating doctor, psychiatrist, registered psychologist, mental health nurse; a government agency or non-government organisation with professionals qualified to make mental health assessments; or from Centrelink if the applicant is in receipt of

48 *Fines Act 1996* (NSW) s 99B(2).

49 Work and Development Order Guidelines 2012, 4.

50 A person can apply for an enforcement order to be issued in order to access the WDO Scheme and there are no enforcement order fees applied in these circumstances.

51 Work and Development Order Guidelines 2012, 7.

a full or partial disability pension.⁵² This documentation should be no older than six months from the date of the application.

Intellectual disability or cognitive impairment

Likewise, intellectual disability and cognitive impairment are defined under the Guidelines and specific examples mentioned are a developmental disorder (such as autistic spectrum disorder and cerebral palsy), neurological disorder, dementia, brain injury (including from trauma or as a result of substance abuse or Alzheimer's disease).⁵³ The documentary proof requirements are also set out under the Guidelines and are reasonably broad encompassing a letter or other documentation from the applicant's general practitioner, school teacher or Principal, or officer in the Department of Education and Communities; or from a government agency or non-government organisation with experience working with people with intellectual disabilities or cognitive impairments 'clearly describing the person's disability or impairment'.

Homelessness

A person is homeless if they are:

- without conventional accommodation (eg, sleeping in parks or on the street);
- moving from one form of temporary accommodation to another (eg, refuges, staying with family/friends);
- living in temporary accommodation due to domestic violence, unsafe living conditions or inability to afford other housing;
- living in a caravan park due to inability to access other accommodation; or
- living in boarding houses on a medium to long-term basis.

The supporting documentation for homelessness must be no longer than three months old from the date of the application and can include a letter from the applicant's lawyer, specialist service provider or case worker, a government agency or non-government organisation with experience working with homeless persons.⁵⁴

Serious addiction to drugs, alcohol or volatile substances

A detailed definition of a serious addiction to drugs, alcohol or volatile substances is contained in the Guidelines. Supporting documentation (no older than six months from the date of the application) from the applicant's treating doctor, psychiatrist, registered psychologist, nurse working the field of drug and alcohol addiction or social worker; drug and alcohol caseworker or counsellor; youth service case worker or counsellor; residential rehabilitation service provider; or other government agency or non-government organisation with expertise in working with people with serious addictions to drugs, alcohol or volatile substances showing 'the nature, severity and effects of the addiction and how long the applicant has had the addiction'.⁵⁵

Acute economic hardship

52 Work and Development Order Guidelines 2012, 7.

53 Work and Development Order Guidelines 2012, 8.

54 Work and Development Order Guidelines 2012, 9–10.

55 Work and Development Order Guidelines 2012, 13.

There are two categories of acute economic hardship: persons receiving Centrelink benefits and persons with an income below the specified thresholds. The stipulated Centrelink benefits are:

- Newstart Allowance;
- Youth Allowance;
- Parenting Payment;
- Disability Pension;
- Carer's Payment;
- Sickness Allowance;
- Age Pension; or
- Department of Veterans Affairs benefits.⁵⁶

Applicants who are not in receipt of the above benefits will be deemed to be experiencing acute economic hardship if their incomes are below the thresholds set out in the Guidelines. Legal Aid suggested that Austudy and Abstudy should be added to the above list.⁵⁷

There is an exception in the Guidelines to accommodate people whose income is above the thresholds. If the applicant is considered by the supporting organisation to be experiencing acute economic hardship because of significant and unavoidable medical expenses or because of a lack of access to the household income, a special application can be made.⁵⁸ This application requires a full statement of financial circumstances together with supporting documentation and details of the extenuating circumstances or hardship suffered.⁵⁹ Legal Aid noted that these requirements can be particularly onerous, especially for victims of family and domestic violence who may not be in a position to provide details and proof of the household income (including their partner's income).⁶⁰

The documentary requirements are included in the Guidelines. For people in receipt of Centrelink benefits, the evidence must be no older than four weeks before the date of the application. For non-Centrelink recipients, details of income must be no older than three months before the date of the application. Legal Aid NSW advised that the current income thresholds under the Guidelines are currently being reviewed.⁶¹ The Guidelines state that if the relevant supporting documentation is not available an application to SDRO to waive the requirements can be made.

Consultations with various stakeholders explained that the majority of WDO applicants rely on acute economic hardship (even where their primary condition is different such as mental illness or homelessness) because proof of a Centrelink benefit is the most straightforward way of establishing eligibility. It was also commented that this creates an issue for data collection because the eligibility criteria relied on (ie, acute economic hardship) may not be the primary condition and may not be related to actual activity undertaken by the fine defaulter.⁶²

56 Work and Development Order Guidelines 2012, 10.

57 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

58 Work and Development Order Guidelines 2012, 10-11.

59 Work and Development Order Guidelines 2012, 11.

60 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

61 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

62 Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

A 2013 report into the infringement system in Victoria recommended that domestic violence should be included within the eligibility criteria for a different scheme in that state for vulnerable and disadvantaged persons.⁶³ Legal Aid also stated that family and domestic violence should be included as a ground for eligibility under the NSW scheme and consideration should also be given to including gambling (which is now recognised as a mental illness under the DSM).⁶⁴

Approved activities

If the eligibility criteria are satisfied the person can undertake any of the specified approved activities subject to two restrictions:

1. If the person is eligible on the basis of a serious addiction to drugs, alcohol or volatile substances, the person is only permitted to undertake drug or alcohol treatment and/or counselling; and
2. The option of mentoring is only available if the person is under 25 years.

It is the responsibility of the supporting organisation or health professional to ensure that the proposed activities are suitable and appropriate for the client.⁶⁵

Unpaid work

Unpaid work may be undertaken with or on behalf of the approved organisation (eg, gardening, cooking, property maintenance, cleaning and administrative duties).

Medical or mental health treatment

Medical or mental health treatment must be undertaken in accordance with a health practitioner's treatment plan (such a plan may include pharmacotherapy and sessions with a psychiatrist or psychologist).⁶⁶ Medical treatment is not defined in the Guidelines or legislation and Legal Aid NSW advised that this causes some confusion in practice.⁶⁷

An educational, vocational or life skills course

Educational courses include courses at university, TAFE or other educational institutions. Vocational courses can include activities with job service providers such as computer skills and life skills courses covering personal, social and practical skills such as cooking, driving, anger management and parenting courses.⁶⁸

Financial or other counselling

Counselling may include counselling for mental health issues, family counselling or domestic violence group sessions. Financial counselling is specifically designed to provide advice and support in relation to debt issues and budgeting strategies. Attendance at case management meetings with a social worker or other case worker may be counted as counselling for the

⁶³ Saunders B et al, *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System* (Monash University, 2013) 12.

⁶⁴ Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

⁶⁵ Work and Development Order Guidelines 2012, 14.

⁶⁶ Work and Development Order Guidelines 2012, 14.

⁶⁷ Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

⁶⁸ Work and Development Order Guidelines 2012, 15.

purpose of a WDO.⁶⁹ Legal Aid suggested that financial counselling and other forms of counselling along with case management should be separated under the Guidelines.⁷⁰

Drug and alcohol treatment

Drug and alcohol treatment may include detoxification, medication or pharmacotherapy, counselling, behaviour therapy, group therapy and 12-step programs.⁷¹ The SDRO advised that approximately 30% of activities undertaken are drug and alcohol treatment (although not all of these people rely on the ground of serious addiction to drugs or alcohol, rather relying on acute economic hardship because it is easier to prove).⁷²

A mentoring program

The definition of mentoring referred to in the Guidelines is a 'mutually beneficial relationship that involves a more experienced person helping a less experienced person to achieve their goals'.⁷³ It is further stated that a 'mentoring program establishes this relationship in a semi-formal, structured way'.⁷⁴ During consultations it was revealed that 'mentoring' is the activity least frequently undertaken by participants and that this appears to be a result of the vague definition of mentoring under the Guidelines.⁷⁵ It was also suggested that mentoring should not be restricted to those under the age of 25 years.⁷⁶ ALSWA agrees that the current definition is not ideal and does not clearly reflect the nature of mentoring in a social justice framework. Instead, it more accurately reflects a mentoring relationship in an employment or professional context. For example, 'youth mentoring' has been defined as 'a structured and trusting relationship that brings young people together with caring individuals who offer guidance, support and encouragement'.⁷⁷ For the purpose of the WDO Scheme, mentoring would be more appropriately defined if it incorporated concepts such as support, guidance and encouragement.

Prohibited activities

Certain activities cannot be counted towards a WDO:

- court ordered activities;
- mutual obligation activities for Centrelink benefits;
- compulsory school attendance; and
- activities required under a traineeship or apprenticeship.

69 Work and Development Order Guidelines 2012, 15.

70 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

71 Work and Development Order Guidelines 2012, 15.

72 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

73 Work and Development Order Guidelines 2012, 16.

74 Work and Development Order Guidelines 2012, 15.

75 Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015); Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015); Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

76 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

77 See

http://www.dtwd.wa.gov.au/employeesandstudents/aboriginalworkforcedevelopmentcentre/resources/factsheets/Documents/guide_mentoring_young_aboriginal_people.pdf 4.

The activities are excluded on the basis that counting them towards cutting out unpaid fines would amount to 'double-dipping'.⁷⁸ However, in exceptional circumstances, SDRO may authorise these activities to be counted (eg, if an applicant suffers particular hardship and permission to count the activity is likely to ensure compliance with the activity or significant benefits are likely to flow to the applicant by granting permission).

However, participation in *voluntary* court, custody or community based supervision activities may be counted (eg, MERIT program, CREDIT program or voluntary activities as part of the drug court program). ALSWA was advised that compliance with community treatment orders (orders under civil mental health legislation) are soon to be included in the Guidelines as an activity that can count towards a WDO.⁷⁹

Approved organisations and health practitioners

The Department of Justice is responsible for approving organisations and health practitioners as sponsors for the scheme. In order for a health practitioner to be approved they must:

- provide documentary evidence of their registration as a health practitioner; and
- agree to the conditions of the program (eg, provide monthly reports to SDRO, report non-compliance; and have a complaints handling procedure).

To be an approved organisation, the organisation must:

- be a non-profit organisation with an ABN, a government agency or a statutory body representing the Crown;
- have relevant public liability and/or professional indemnity insurance;
- have appropriately trained or accredited staff;
- have established OH&S procedures;
- if previously government funded, have complied with funding and any performance agreements.⁸⁰

The evaluation of the pilot WDO scheme found that sponsors did not consider the application process 'too onerous'.⁸¹ ALSWA notes that the current application forms are relatively straightforward. For health practitioners the form is two pages with the only required supporting documentation being a copy of the practitioner's current registration certificate.⁸² For non-profit organisations, the three-page application form requires various details of the organisation (including an ABN); the eligible client groups that the organisation can assist; the WDO activities that the organisation will provide directly and those that it will refer to other agencies; the job title and relevant qualifications of staff that will provide the services; and a referee. The documentation that must be provided includes all certificates of currency for insurance policies (worker's compensation, public liability, professional indemnity and volunteers insurance) as well as a copy of the organisational structure.⁸³ The form for

78 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

79 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

80 Work and Development Order Guidelines 2012, 21.

81 New South Wales Attorney General & Justice, *A Fairer Fine System for Disadvantaged People: An evaluation of time to pay, cautions, internal review and the work and development order scheme* (May 2011) 45.

82 Health Practitioner Application Form.

83 Application to be an Approved Organisation Not for Profit Organisation Form.

government agencies is essentially the same without the need for documentation in relation to insurances.⁸⁴

Sponsors can elect not to be publicly listed, and according to Legal Aid NSW, only about 25% of sponsors agree to have their name published on the website.⁸⁵

As at August 2015 there were approximately 1400 registered sponsors⁸⁶ with about 600 of these being active sponsors.⁸⁷ Legal Aid explained that many sponsors register in the scheme in order to support a particular client and when that client has completed the order they are not willing to provide an ongoing role to other people. Other organisations become 'dormant' when the initial 'champion' for the scheme moves to a new role elsewhere.⁸⁸ It was noted by various stakeholders that although there are government sponsors, the number are insufficient and ideally government agencies should automatically be included within the scheme unless they opt-out.⁸⁹ Legal Aid also advised that there are Aboriginal organisations registered under the scheme such as land councils and Aboriginal health agencies although not all Aboriginal medical services are currently on board.⁹⁰ One issue for attracting and retaining sponsors is the lack of funding support – sponsors do not receive any funding to be part of the scheme and for some organisations and health practitioners this is a disincentive because (although not overly burdensome) there remains compliance and reporting requirements. Legal Aid cautioned that in the current climate of reduced funding for non-government organisations, this lack of funding may cause additional problems in the future.⁹¹

A further issue raised in relation to sponsors is that the Guidelines do not enable private organisations to apply and this leaves gaps in relevant activities in some locations. For example, many job search agencies are private (although government funded) and could appropriately be included within the scheme.⁹² Additionally, it was mentioned that social workers are currently unable to apply to act as a sponsor in the same way as a health practitioner and that if social workers have a Medicare provider number this should be sufficient to enable registration.⁹³

Correctional centres are currently registered sponsors and support prisoners with voluntary activities undertaken in prison. The Department of Justice observed that one issue for prisoners is that if they are released and the WDO has not been completed they cannot continue with their current activity and are required to find a new sponsor. Further, programs are not available for prisoners who are sentenced to six months (or less) or for remand prisoners so this cohort is

84 Application to be an Approved Organisation Government Agency.

85 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

86 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

87 Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

88 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

89 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015); Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

90 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

91 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

92 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

93 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

unable to participate in the WDO scheme.⁹⁴ SDRO also commented that there is inconsistency in approaches between different correctional centres; however, New South Wales Corrective Services are developing their own guidelines and this should improve the situation.⁹⁵

More generally, there is an issue in terms of continuity and ease of transferring a WDO (eg, when a client moves to a different location). It was suggested during consultations that there needs to be a process whereby the order can simply be transferred rather than requiring a new sponsor to submit a new application.⁹⁶

Another issue raised during consultations in relation to sponsors is the issue of potential conflicts of interest where service providers are related to the person undertaking the WDO. It was suggested that the Guidelines should specify the procedures in this situation and, ideally, should allow for the disclosure of any potential conflict of interest but not necessarily preclude activities being supervised by a family member or an agency where a family member is employed.⁹⁷

Application process

An application for a WDO is made by the supporting organisation or health practitioner and is submitted to SDRO online via the scheme's portal. The self-service portal commenced in 2012 and there is a comprehensive user guide available online.⁹⁸ Applications for WDOs, variations to existing WDOs and reporting of client activity hours can be submitted via the portal. As commented during consultations, the scheme is largely self-governing. Nonetheless, observations in regard to the recent evaluation indicated that sponsors appear to be complying with the requirements because they are genuine in their motivation to do the best for their clients.⁹⁹

The matters that must be included in the application are set out in the Guidelines.¹⁰⁰ They include the grounds for requesting the order; the proposed activities; proof of identity and details of the applicant; details of the relevant fines and penalty notices; and how the proposed activities will benefit the applicant. As stipulated in the Guidelines, whether the person satisfies the abovementioned eligibility criteria is determined by the supporting organisation or health practitioner. However, the organisation or health practitioner must keep documentary proof to support their determination that the person is eligible (and this documentation may be audited).

⁹⁴ Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

⁹⁵ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

⁹⁶ Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

⁹⁷ Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

⁹⁸ State Debt Recovery Office, Work and Development Order Self-Service Portal User Guide (2013) see http://www.sdrc.nsw.gov.au/lib/docs/misc/wdo_006.pdf. Originally, during the pilot, applications were paper based but this was an administrative burden: Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

⁹⁹ Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

¹⁰⁰ Work and Development Guidelines 2012, 5.

Cut out rate

There is a degree of flexibility in terms of the cut out rate for activities undertaken as part of a WDO. Sponsors can tailor the activities to suit the needs of the applicant; however, the maximum amount of fine debt that can be claimed through a WDO each month is \$1,000.¹⁰¹

Activity	Cut out rate
Unpaid work	\$30 per hour
Educational, vocational or life skills courses	\$50 per hour or \$350 per full (7 hour) day to a maximum of \$1,000 per month
Financial or other counselling	\$50 per hour or \$350 per full (7 hour) day to a maximum of \$1,000 per month
Drug or alcohol treatment	\$1,000 per month for full compliance
Medical or mental health treatment	\$1,000 per month for full compliance
Mentoring	\$1,000 per month for full compliance

It was observed during consultations that the cut out rates arguably have the potential to operate unfairly or inconsistently; however, overall, the view was expressed that the flexibility associated with the cut-out rate structure enables sponsors to appropriately tailor the WDO to best meet the needs and circumstances of clients. For example, in some regional locations the availability of psychologists for drug counselling is limited and it would be unfair to penalise the client for not attending more frequent counselling sessions given that the availability of sessions is beyond their control. Also, for example, the flexibility of the scheme enables a drug treatment provider to stipulate to its client that complying with methadone treatment alone is insufficient and that in order for them to agree to act as a sponsor the client must agree to undertake counselling as well.¹⁰² SDRO expressed the view that it is important for sponsors to be able to reduce the \$1000 cap in particular circumstances (eg, if the client is only undertaking methadone treatment it may not be viewed as appropriate for the client to obtain the full cut out rate).¹⁰³

Variation and revocation of work and development orders

The supporting organisation or health practitioner can notify SDRO of a proposed variation or addition to the specific activities to be undertaken under a WDO (so long as the organisation or health practitioner has approval to provide or supervise that kind of activity) and the variation or addition will be deemed approved by SDRO unless they hear to the contrary within the stipulated timeframe.¹⁰⁴

Non-compliance with a WDO will eventually result in a revocation of the order. However, there is no penalty for non-compliance – the fine debt simply remains unpaid and normal enforcement processes will be reactivated. During consultations it was explained that the approach to non-compliance is necessarily flexible. There is no set duration for a WDO; however, sponsors are required to report the activity undertaken by each client on a monthly

¹⁰¹ Work and Development Order Guidelines 2012, 18.

¹⁰² Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

¹⁰³ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

¹⁰⁴ Work and Development Order Guidelines 2012, 16.

basis and if there has been a period of nil activity the SDRO will make inquiries with the sponsor about the reason for non-compliance. It was suggested that a more consistent approach could be built into the system by having a red flag on the online portal if there has been a two-month period with nil activity.¹⁰⁵

Effect of a work and development order

While a work and development order is in force, no enforcement action is taken against the person and any drivers licence or vehicle licence suspension order is lifted for the duration of the work and development order.¹⁰⁶ Stakeholders consistently agreed that this is a positive outcome enabling participants to lawfully drive for the purpose of employment, training and other relevant activities.

Record keeping

An approved organisation or health practitioner must keep records of the following information:

- documentation to support assessment of client eligibility;
- copies of all WDO applications;
- copy of the WDO and any correspondence from SDRO declining the order; and
- documentation showing level of compliance with the WDO.

Approved organisations and health practitioners are required to report to SDRO on a monthly basis in relation to each active order.¹⁰⁷ The Guidelines state that documentation and records required to be kept by approved organisations and health practitioners may be audited for the purpose of ensuring compliance.¹⁰⁸ The first such audit was undertaken in October 2014 and a report completed in April 2015.¹⁰⁹ As far as ALSWA is aware, this report is not publicly available.

Legal Aid NSW explained that sponsors are required to keep documentation in relation to why the existence of the relevant condition prevented the person from paying their fines as well as documentation to prove the existence of the condition. It was suggested that this can be onerous and arguably unnecessary.¹¹⁰

Agencies involved in administering the WDO Scheme

The role of Legal Aid (NSW) and ALS (NSW/ACT)

Legal Aid NSW and the ALS (NSW/ACT) operate the Work and Development Order Service ('WDO Service') to assist fine defaulters to obtain a WDO and to assist organisations and health practitioners to become sponsors.¹¹¹ ALSWA consulted with the senior project officer for WDO

105 Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

106 Work and Development Order Guidelines 2012, 19.

107 Work and Development Order Guidelines 2012, 23-24.

108 Work and Development Order Guidelines 2012, 5.

109 Consultation with Tania Matruggio, Director Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, New South Wales Department of Justice (6 August 2015).

110 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

111 <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/work-and-development-order-service>.

Service at Legal Aid NSW along with various other lawyers and staff from the service from both Legal Aid NSW and ALS (NSW/ACT). The service commenced in 2012 and SDRO observed that the role of this service is critical to the success of the scheme because they recruit and assist sponsors and match clients to the appropriate sponsor.¹¹² The WDO Service and SDRO work closely together, conducting field visits along with other agencies. ALSWA was informed that the collaborative relationship between the WDO Service and the SDRO enables effective outcomes.

The WDO Service has five small teams each comprised of one lawyer and one paralegal and they are supported by two ALS field officers. The team undertakes strategic work, outreach, training and continuing legal education. The senior project officer and other team members explained that they identify gaps in the pool of sponsors in particular locations; target agencies and encourage them to apply to act as sponsors; assist sponsors to understand the record keeping requirements under the scheme including training in regard to the self-service portal; hold fines clinics in various locations; build capacity with agencies to apply for and maintain sponsor status; and work with Legal Aid's new Civil Law Service for Aboriginal clients which holds clinics such as 'Money Worries Days'. The Civil Law Service and the WDO Service work to ensure that Aboriginal communities with high fine debts are appropriately targeted and serviced to enable community members to access the WDO Scheme and other assistance in relation to unpaid fines. The SDRO provides information to Legal Aid NSW in relation to the level of fine debt and enforcement action by postcode.

It was also noted that in Redfern, Legal Aid NSW work with the Redlink Outreach Service which operates in the housing commission area to provide onsite services (eg. mental health services, Family and Children's Services, drug and alcohol services) to public housing residents. Further, in some areas clinics are held outside the courthouse to enable people who have received fines to obtain immediate advice and assistance.¹¹³

SDRO

In the initial establishment phase, SDRO received \$450,000 for system development and a further \$450,000 for staffing to support the scheme and this funding has subsequently been 'absorbed into [its] existing budget'.¹¹⁴ The SDRO has two separate teams dealing with WDOs: the Advocacy Team which manages WDO applications and the Quality and Administrative Compliance Team which deals with compliance issues regarding sponsors and applications.¹¹⁵ At the time of consultations, ALSWA was advised that between these two teams there are the following dedicated work and development order staff:¹¹⁶

- 6 x grade 3/4 FTE serving the work and development order hotline and email services;
- 3 x grade 3/4 FTE dealing with compliance issues and risk mitigation;
- 1.25 x grade 3/4 FTE dealing with back-end processing (exceptions);
- 1.5 x grade 5/6 FTE team leader;
- 1 x grade 7/8 FTE business specialist;¹¹⁷ and

112 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

113 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service (7 August 2015).

114 Email correspondence, Mathew Baker, State Debt Recovery Office (11 August 2015).

115 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

116 Email correspondence from Mathew Baker, Fines Enforcement Branch, State Debt Recovery (7 August 2015).

117 This person has a role with other programs but the major role is with the WDO Scheme.

- 1 x grade 9/10 FTE manager.¹¹⁸

The Advocacy Team responds to calls from agencies who are advocating on behalf of fine defaulters (including but not limited to Legal Aid NSW and ALS (NSW/ACT). Agencies can register with SDRO and this enables the agency to contact SDRO to seek details of outstanding fines for a particular client.¹¹⁹

SDRO advised that one resourcing issue it faces is that for each application, the supporting organisation or health practitioner must contact SDRO to determine the Fine Number and other relevant details of the applicant fine defaulter, and this is very time consuming. If sponsors could access this information via a central database, time and resources would be saved.¹²⁰ In this regard, it was noted that SDRO receives approximately 1,000 applications per month with a recent high of 1,300 applications. Applications are seldom refused because of the nature of the application process (ie, applications are made online directly by the sponsor who vouches for the fine defaulter's eligibility for the scheme). In practice, applications are only checked by SDRO when the content of the application appears to be out of the ordinary.¹²¹

SDRO has four telephone hotlines as part of the scheme: WDO sponsor and client hotline; advocacy hotline; Review Board hotline; and inmate hotline.¹²² These telephone hotlines enable efficient and prompt access by various agencies and clients to facilitate the work and development order scheme.

Department of Justice

The New South Wales Department of Justice does not receive an additional budget for administering aspects of the WDO scheme. One FTE Level 3/4 manages the approval process for organisations and health practitioners and a ½ FTE Level 9 undertakes the role of project manager along with support and oversight from the Director of Crime Prevention Programs.¹²³

As demonstrated from the above discussion, there are four agencies working together to operate the WDO scheme. Each agency has its own website link for the scheme and it was suggested during consultations that one area for improvement would be to establish a central website for the scheme, rather than the four different websites operating currently.¹²⁴ This would enable participants and sponsors to obtain all of the relevant information from one site rather than switching between the four current websites.

Fines Hardship Review Board

The Fines Hardship Review Board ('the Board'), which is comprised of representatives from the Department of Justice, Treasury and the Office of State Revenue, reviews decisions made by

¹¹⁸ This person is also responsible for other programs.

¹¹⁹ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

¹²⁰ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

¹²¹ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

¹²² Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

¹²³ Consultation with Tania Matruglio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

¹²⁴ Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

SDRO to refuse an application for a WDO. The Board also reviews decisions to decline an application for time to pay and to decline a write-off application. An application is made to the Board outlining the grievance with the decision and supporting documentation is provided. SDRO provides its reasons for the decision and the Board then considers the case on the papers. Because the SDRO rarely refuses an application for a WDO, the Board had only received its first application to review a refusal of an application for a WDO in mid 2015.¹²⁵

Effectiveness

The pilot WDO scheme commenced in July 2009. The evaluation of the pilot scheme found that from the inception of the scheme in July 2009 until 14 April 2011, WDOs had been issued to 657 people. At the same time there were 143 organisations and 77 health practitioners participating in the scheme. As can be seen from the statistics mentioned earlier, the number of WDO participants and sponsors has substantially increased in recent years. The evaluation also found that there was overwhelming support for the scheme with 96% of sponsor survey respondents indicating that the scheme should be made permanent. In addition, 90% of respondents stated that the pilot scheme was of 'great benefit or some benefit' to their clients.¹²⁶ Other findings from the evaluation of the pilot included that:

- As at February 2011, 82.5% of WDO clients had not received another fine or penalty notice enforcement order since having their WDO approved.¹²⁷ Nonetheless, it was noted that the outcomes in terms of reoffending need to be monitored over a longer period of time.
- The scheme was a useful tool for engagement for clients in treatment and activities (in particular, mental health, drug and alcohol treatment).¹²⁸
- There were mental health benefits for participants in the scheme because unpaid fine debts cause stress, anxiety and hopelessness.¹²⁹
- Participation in the scheme assists in building 'self-esteem, agency and self-efficacy' and it was observed that:

As a WDO is not a write-off, participants make a commitment and actively address their debt through their activities, and thereby gain a sense of control and agency in their lives.¹³⁰

- Undertaking a WDO can assist in increasing participants' skills and employment opportunities. In addition, the lifting of driver licence suspensions assisted with employment opportunities.¹³¹
- The scheme is likely to reduce costs for the government. It was found that as at April 2011 the average cost of recovering \$100 of unpaid fines was \$12.49 (and the cost would be higher for impecunious offenders). It was noted that there are costs incurred

¹²⁵ Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

¹²⁶ New South Wales Attorney General & Justice, *A Fairer Fine System for Disadvantaged People: An evaluation of time to pay, cautions, internal review and the work and development order scheme* (May 2011) 40.

¹²⁷ Ibid.

¹²⁸ Ibid 41-42.

¹²⁹ Ibid 43.

¹³⁰ Ibid 45.

¹³¹ Ibid 46.

by other agencies such as legal services and community services in assisting fine defaulters. Further, cost benefits are likely to result from reduced reoffending, reduced secondary offending as a consequence of licence suspensions, improved engagement and compliance with mental health treatment, and increased employability.¹³²

The evaluation recommended that the scheme be made permanent (which occurred in 2012).¹³³

Information provided to ALSWA from SDRO shows the following demographics for WDO applicants from 2012 onwards:

- approximately 21% of the WDO applicants were Aboriginal and Torres Strait Islander people;
- almost 70% of applicants were in receipt of Centrelink; and
- the most common grounds for eligibility in order were acute economic hardship (27%), mental illness (26%), serious addiction to drugs/alcohol/volatile substances (23%), homelessness (14%), and intellectual disability/cognitive impairment (8%).¹³⁴

For the same period, the data demonstrates that only 16% of WDOs were closed due to non-compliance and over half of the orders were closed because of completion. Other reasons for closure included that there were changes in client circumstances, sponsors were deregistered or the programme ended.¹³⁵

During consultations, SDRO advised ALSWA that there has been no evidence of fraudulent behaviour within the scheme although there is some degree of confusion and administrative errors do occur from time to time.¹³⁶ Legal Aid NSW noted that from April 2012 to the end of June 2015 the scheme resulted in \$41 million of fine debt being cleared. However, there has to date been no economic evaluation of the cost benefits of other outcomes such as health treatment, voluntary work and courses.¹³⁷ It was also observed that there is, currently, no cap on the number of WDOs that can be issued in relation to one person. It was suggested that this is viewed unfavourably by some people because it may be seen as a disincentive to paying fines.¹³⁸

A further external qualitative evaluation has been published. The results of this evaluation are broadly consistent with the 2011 evaluation of the pilot scheme. In particular, the evaluation found that 94% of sponsors agreed that the scheme is achieving its objective of 'enabling vulnerable people to resolve their outstanding NSW fines by undertaking activities that benefit them and the community' and 87% of sponsors said that the scheme enabled clients to address factors that make it difficult for them to pay or manage their debts in the first place. Furthermore, the majority of participants did not incur any further fines while they participated in the scheme.¹³⁹ ALSWA understands that the quantitative component of the recent evaluation will be made publicly available later in 2016.

132 Ibid 47-48.

133 Ibid 48.

134 Email correspondence from Mathew Baker, Fines Enforcement Branch, State Debt Recovery (7 August 2015).

135 Email correspondence from Mathew Baker, Fines Enforcement Branch, State Debt Recovery (7 August 2015).

136 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

137 Consultation with Meredith Osborne, Senior Project Officer, Work and Development Order Service & Work and Development Order Service Team (7 August 2015).

138 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

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

OTHER JURISDICTIONS

The Australian Capital Territory operates a similar scheme in respect to road traffic infringements.¹⁴⁰ A person can apply to enter into an arrangement for an infringement notice management plan and can either discharge the fine debt by paying the amount in instalments or by participating in a community work or a social development program. Eligibility for this scheme is also based upon the existence of a condition such as mental or intellectual disability; physical disability or illness; alcohol or drug addiction; being subject to domestic violence; or homelessness. Similar activities may be undertaken as in New South Wales and the applicant must seek support from the service provider.¹⁴¹

During consultations with stakeholders, ALSWA was advised that Victoria is soon to implement a similar scheme and representatives from that jurisdiction have consulted with those involved with the WDO scheme in New South Wales to inform the development of their system. Similarly, South Australia is considering adopting a similar scheme.¹⁴² Stakeholders in New South Wales noted that it appears that South Australia are planning to separate acute economic hardship from other forms of disadvantage so that those fine defaulters who are experiencing acute economic hardship without any other condition will only be permitted to undertake voluntary work. Those with other conditions and disadvantages will undertake treatment and courses.¹⁴³ It was suggested by the Manager of the Legal Aid WDO Service that it would be unlikely that there would be a significant number of fine defaulters experiencing acute economic hardship without also experiencing another form of disadvantage.¹⁴⁴ The *Fines Reform Act 2014* (Vic) has been passed but has not yet commenced operation.

CONCLUSION AND RECOMMENDATIONS

As observed by the Royal Commission into Aboriginal Deaths in Custody:

Governments and correctional administrators have long recognised that there are compelling social and economic reasons to provide an alternative way to address fine default other than to imprison the defaulters.¹⁴⁵

Poverty should not determine that a person is at risk of imprisonment where a person of greater means would pay a similar fine without such possibility arising.¹⁴⁶

Unfortunately, almost 25 years later, Western Australia still fails to acknowledge the inherent unfairness in the fine system for vulnerable and disadvantaged persons. ALSWA is acutely aware of the difficulties for many Aboriginal people in paying fines and the detrimental consequences that follow from fine default. Many vulnerable and disadvantaged persons are simply unable or incapable of paying their fines or making arrangements to pay fines by instalments in a timely manner. In this regard, it has been observed that:

140 See <http://www.rego.act.gov.au/infringements/infringement-notice-management-plans/inmp-work-and-development-programs>.

141 Australian Capital Territory Government, Community Work and Social Development Program Overview (2013).

142 Consultation with Tania Matruggio, Director, Crime Prevention Programs, Crime Prevention and Community Programs Division & Aleksandra Alavanja, Senior Policy and Projects Officer, Justice Strategy and Policy, Crime Policy, Department of Justice (6 August 2015).

143 Consultation with Mathew Baker, Business Specialist, Fines Enforcement Branch, State Debt Recovery Office; Nicole Stack and Lauren Judge, Fines Enforcement Branch, State Debt Recovery Office (6 August 2015).

144 Consultation with Meredith Osborne, Legal Aid NSW (7 August 2015).

145 RCIADIC, National Report Vol 3 [22.5.84].

146 RCIADIC, National Report Vol 3 [22.5.89].

Factors that contribute to the accrual of fines that some people may never be in a position to pay include: no fixed address to receive fines, mental health issues, substance abuse issues, intellectual disability, low literacy levels, financial hardship, social isolation, and exposure to domestic violence.¹⁴⁷

People who are burdened with insurmountable debts often experience a significant amount of anxiety and depression, resulting in a state of denial, which in turn leads to the accrual of late fees and escalating debts.¹⁴⁸

Many Aboriginal fine defaulters are experiencing, in addition to the abovementioned circumstances, cultural and language barriers that impact on their capacity to successfully navigate the fines enforcement system. As just one example, if an Aboriginal person speaks English as their second or third language it is highly unlikely that, in the absence of an Aboriginal interpreter, they will properly understand what has been said in court in relation to the fine or the documentation that is subsequently provided through the Fines Enforcement Registry.

ALSWA considers that people who have the financial means and capacity to pay their fines or make appropriate arrangements in a timely manner should be distinguished from those who are socially and economically disadvantaged or vulnerable. It is also emphasised that bearing in mind the estimated annual cost of imprisoning fine defaulters (\$4 million in 2013) the case for reform is indisputable. For these reasons, ALSWA strongly urges the Western Australian Government to implement a similar scheme as exists in New South Wales. Although ALSWA considers that the merits of this approach are beyond question, it may be worth considering establishing a pilot program in a particular locality or localities with high levels of fine default in order to enable the permanent establishment of the scheme (including necessary legislative amendments) to be fully informed by practical operational issues that occur in Western Australia and to enable any necessary divergence from the New South Wales model to reflect particular Western Australian circumstances.

Recommendations

1. The Western Australian government introduce a work and development order scheme for vulnerable and disadvantaged persons based upon the New South Wales WDO scheme.
 - a. Eligibility for the scheme should be based on the existence of the following conditions/circumstances:
 - i. mental illness;
 - ii. intellectual disability or cognitive impairment;
 - iii. homelessness;
 - iv. acute economic hardship;
 - v. serious addiction to drugs, alcohol or volatile substance; or
 - vi. victim of family and domestic violence.
 - b. Activities that can be undertaken to cut-out unpaid fines include:
 - i. unpaid work;
 - ii. medical or mental health treatment;
 - iii. educational, vocational or life skills courses;

¹⁴⁷ Saunders B et al, *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System* (Monash University, 2013) 17.

¹⁴⁸ Ibid 71.

- iv. counselling;
 - v. financial counselling;
 - vi. case management;
 - vii. drug or alcohol treatment; and
 - viii. mentoring.
- c. Relevant agencies, organisations and individuals that can apply for registration as sponsors include:
- i. Government departments such as the Department of the Attorney General, the Department of Corrective Services, the Department for Child Protection and Family Support, the Department of Health, the Department of Sport and Recreation, the Department of Education, the Department of Local Government and Communities;
 - ii. Local councils;
 - iii. Non-government agencies; and
 - iv. Health practitioners including doctors, nurses, mental health workers, social workers, psychologists, psychiatrists, counsellors.
- d. The scheme should be a collaborative partnership between the Department of the Attorney General, the Fines Enforcement Registry, the Department of Corrective Services, ALSWA and Legal Aid WA.
- i. Funding should be provided to ALSWA and Legal Aid WA to establish a service similar to the WDO Service in New South Wales that supports government, non-government agencies and individuals to apply for registration as a sponsor and provides assistance and training in regard to ongoing requirements under the scheme. Additionally, the funding should be sufficient to enable ALSWA and Legal Aid WA to provide a comprehensive fine default service across the state including fines clinics, educational strategies and legal assistance to clients to access the scheme and link up with appropriate sponsors.
2. The Western Australian government investigate the option of also enabling the scheme to be accessible prior to fine default in order to ensure that persons who are fined or receive infringements can apply to participate in the scheme at the earliest opportunity and before enforcement action commences. In order to access the scheme prior to default, the applicant would need to demonstrate the existence of the same conditions outlined above and, that as a consequence of their particular vulnerability or disadvantage, the applicant is unlikely to be in a position to pay the fine within a reasonable period.



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