

16 March 2012

The Secretary  
Select Committee on the Cost of Living  
Parliament of Tasmania  
Parliament House  
Hobart TAS 7000

Dear Mr Shane Donnelly,

**Re: Select Committee on the Cost of Living**

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I am writing to the Select Committee on the Cost of Living to provide a submission on the following term of reference:

(c) the impact of legislation such as the *Monetary Penalties Enforcement Act 2005*;

In particular, I wish to draw to the Committee's attention the unfairness and inequality associated with sanctioning Tasmanian offenders to a fine and the flow-on effect this has with the *Monetary Penalties Enforcement Act 2005* (Tas).

The unfairness and inequality of sanctioning an offender to a fine in Tasmania is caused because in many instances, the courts are required to impose a fine that is either a fixed-sum or mandates a minimum amount (such as for drink-driving offences) with no discretion available to the court to reduce the amount of the fine. Several years ago the Chief Justice of Tasmania concluded that in such circumstances the fine is 'draconian'.<sup>1</sup> In other cases, where the court is granted discretion, the courts have adopted a 'going rate' fine for particular offences with courts able to make some adjustment downwards if the offender is unable to pay, but where no scope exists to increase a fine on the grounds of the affluence of the offender.

This can be contrasted with most of continental Europe, central and South America and some jurisdictions in the United States of America where an income-based fine, commonly referred to as the 'day fine' has been introduced. Day fines are a common form of sentence for indictable offences, involving a two-step process in which the court sentences the offender to a certain number of day-fine units (for example 10, 50, 100) according to the gravity of the offence;

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<sup>1</sup> Tasmanian Law Reform Institute, Sentencing – Final Report No 11 (June 2008) para. 3.9.18. As found at <http://www.law.utas.edu.au/reform/documents/completeA4.pdf> (Accessed 15 March 2012).

then the value of each unit is determined by multiplying the value of the unit by the percentage share of the offender's daily income.

### **The advantages of the day fine**

The advantages of the day fine are that the principles of transparency, proportionality and equity are better served, leading to increased community support in the sentencing system.

The failure to ensure that the fine has a similar punitive bite means that the **principle of equal impact** is not met. When two offenders pay the same fine but one has a higher income the fine cannot have the same effect. For wealthy offenders the fine may be too easily paid and hence no real punishment or even seen as payment of a 'license fee' in order to continue offending. Whilst, as Professor David Adams recently noted in his report, *A Cost of Living Strategy for Tasmania* the imposition of a fine on financially disadvantaged offenders may mean that they 'forego essentials to make even instalment payments and many of these fines can never be paid'.<sup>2</sup> Both of these outcomes result in a number of important aims of sentencing including retribution, deterrence and rehabilitation not being met.

A further advantage of the day fine system is the **transparency** that is achieved through the sentencing process being separated into two discernable steps. **Proportionality** is assured in the first-step because of its focus on the gravity of the offence and the culpability of the offender. The second-step, namely a consideration of the offender's personal and financial circumstances, assures that the principle of **equal treatment** is achieved. On the other hand, in Australia 'the extent to which the two factors, guilt and financial circumstances are reflected in the sum imposed cannot be established'.<sup>3</sup> The day fine system therefore avoids the perceived arbitrariness of judicial discretion, ensuring a better understanding of the sentencing process and trust in the sentencing system.

The day fine system also improves the perceived legitimacy of the fine as a sentencing option. In other words, the fine is not just considered a mild punishment but is available for more serious offences such as property crime, fraud and assault. The broader use of the fine should in turn lead to the **reduced use of the custodial sentence** (and custodial costs), and 'consequently, day fines help concentrate criminal justice resources on the small group of most serious offenders'.<sup>4</sup> For example, in West Germany, the introduction of the day fine saw a sharp drop in the number of offenders imprisoned, from 110,000 short-term custodial sanctions (defined as six months or less) shortly before the

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<sup>2</sup> David Adams, *A Cost of Living Strategy for Tasmania* (October 2011) 63.

<sup>3</sup> Gerhardt Grebing, *The Fine in Comparative Law: A Survey of 21 Countries*, Institute of Criminology Occasional Papers No. 9 (University of Cambridge: 1982) 90.

<sup>4</sup> Hans-Jörg Albrecht, 'Post-Adjudication Dispositions in Comparative Perspective'. Found in Michael Tonry & Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (New York: 2001) 293, 308.

introduction of the day fine in the mid 1970s, to 10,000 persons in 1976.<sup>5</sup> In contrast, the imposition of the short-term custodial sentence remains firmly entrenched in Australia.<sup>6</sup> In the Magistrates Court of Tasmania for example between 2001-2006, 67 per cent of custodial sentences were for three months or less, and 89 per cent for six months or less whilst in the Supreme Court of Tasmania, 18 per cent of sentences for imprisonment were for three months or less, and 47 per cent for six months or less.<sup>7</sup>

### **Objections to the day fine**

The strongest objection against the day fine system arises from the difficulty of ascertaining the offender's financial circumstances. Critics point to the day fine systems of Sweden and Finland where income tax declarations are readily accessible,<sup>8</sup> submitting that without such accessibility the day fine system is impaired. Although there are impediments to Australia introducing the day fine based on the Swedish or Finnish models, the difficulties are not insurmountable. For example, in order to resolve the problem of tax declaration secrecy, Germany introduced a system in which the police, prosecution and the courts are able to work together in order to obtain the information required to estimate the offender's income. First, specific details of the offender such as age, address, occupation, income, family status and number of children are generally sought in a police questionnaire. Prosecution powers then allow for more detailed investigations and finally the judge is able to ask questions of the offender during the hearing.<sup>9</sup> Alternatively, provisions could be introduced in Australia in which offenders are requested to fill in a financial circumstances questionnaire prior to the hearing.<sup>10</sup> New Zealand courts for example may request a financial statement from the offender, although admittedly only in cases in which the Court is unsure as to whether the offender has the means to pay the fine.<sup>11</sup>

### **The Monetary Penalties Enforcement Act 2005**

According to Professor David Adams' report, *A Cost of Living Strategy for Tasmania* there is approximately \$68 million in unpaid fines.<sup>12</sup> In circumstances

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<sup>5</sup> Robert Gillespie, *Fines as an Alternative to Incarceration: The German Experience* (1980) 44(4) *Federal Probation* 20, 20-21; These statistics have remained steady. In 2001 for example 11.1 percent of offenders were sentenced to short-term custodial sentences. Found in Bernd-Dieter Meier, *Alternatives to Imprisonment in the German Criminal Justice System* (2003-2004) 16(3) *Federal Sentencing Report* 222, 227.

<sup>6</sup> According to one Report 6.8 percent of prisoners in NSW, 11.4 percent in Victoria and 7.2 percent in Queensland have been sentenced to short-term prison terms: Don Weatherburn, *The Effect of Prison on Adult re-offending* (August 2010) 143 *Crime and Justice Bulletin*, New South Wales Bureau of Crime Statistics and Research.

<sup>7</sup> Kate Warner, *Sentencing* (June 2008) Tasmanian Law Reform Institute, Final Report No 11, para. 3.2.6.

<sup>8</sup> Hans Thornstedt, *Skandinavische Erfahrungen mit dem Tagesbußensystem* (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* 595, 600; Rod Morgan & Roger Bowles, *Fines: The Case for Review* (1981) *Criminal Law Review* 203, 213.

<sup>9</sup> Wolfgang Fleischer, *Die Strafzumessung bei Geldstrafen* (Gießen 1983) 105-116; 124-131.

<sup>10</sup> This questionnaire could declare that it is an offence to provide false or misleading information, and to encourage completion, it could note that income details may otherwise be obtained from the employer: Gerhard Grebing, *Probleme der Tagessatz-Geldstrafe* (1976) 88(4) *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1049, 1102.

<sup>11</sup> Sections 40-43 of the *Sentencing Act 2002* (NZ).

<sup>12</sup> David Adams, *A Cost of Living Strategy for Tasmania* (October 2011) 63.



in which the fine is not paid the Director of the Monetary Penalties Enforcement Service has the power to impose a number of sanctions against the debtor including suspension of drivers licence as well as to make an application to the court for imprisonment.<sup>13</sup>

Whilst it is not clear how many Tasmanians are imprisoned due to non-payment of fines, it is clear that some offenders are being imprisoned for secondary offences such as driving whilst disqualified. The New South Wales Sentencing Council for example noting that whilst no one in NSW is imprisoned as a result of non-payment of a fine, some offenders are being imprisoned as a result of secondary offences such as driving whilst disqualified.<sup>14</sup> This is confirmed in the research with estimates suggesting that one in every ten disqualified driver who is caught driving is imprisoned,<sup>15</sup> a significant figure when it is recognized that studies in the United Kingdom, the United States and Canada have demonstrated that the percentage of disqualified drivers who continue to drive lies between 30-75 per cent.<sup>16</sup>

### **Is there community support for the day fine?**

The Tasmanian Police, the Legal Aid Commission of Tasmania and Community Corrections have all recommended the introduction of the day fine in Tasmania.<sup>17</sup>

The Tasmanian Council of Social Services has recommended 'further investigation' of the day fine<sup>18</sup> and the Tasmanian Social Inclusion Commissioner has recommended the 'potential introduction of progressive... fines in Tasmania'.<sup>19</sup>

More recently the Tasmanian Law Reform Institute has recommended the investigation of day fines through the preparation of a feasibility study:<sup>20</sup>

### **Recommendation 44**

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<sup>13</sup> Parts 6-8 of the *Monetary Penalties Enforcement Act 2005* (Tas).

<sup>14</sup> New South Wales Sentencing Council, Interim Report: The Effectiveness of Fines as a Sentencing Option: Court Imposed Fines and Penalty Options (2007) 157.

<sup>15</sup> Anna Ferrante, The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualifications as an Effective Legal Sanction in Western Australia (September 2003) Crime Research Centre, 66.

<sup>16</sup> Reported in Anna Ferrante, The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualifications as an Effective Legal Sanction in Western Australia (September 2003) Crime Research Centre, 6. See also Franz Streng, *Modernes Sanktionsrecht* (1999) 111(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* 827, 855.

<sup>17</sup> Tasmanian Law Reform Institute, Sentencing – Final Report No 11 (June 2008) para. 3.9.17. As found at <http://www.law.utas.edu.au/reform/documents/completeA4.pdf> (Accessed 15 March 2012).

<sup>18</sup> 'Discussion Paper towards the development of formal TasCOSS policy in relation to Income based monetary penalties' (July 2006). As found at: <http://www.tascoss.org.au/Portals/0/Publications/Income-based%20fines.pdf> (Accessed 15 March 2012).

<sup>19</sup> David Adams, A Cost of Living Strategy for Tasmania (October 2011) 62.

<sup>20</sup> Tasmanian Law Reform Institute, Sentencing – Final Report No 11 (June 2008). As found at <http://www.law.utas.edu.au/reform/documents/completeA4.pdf> (Accessed 15 March 2012).

The Institute recommends that the government establish a feasibility study to investigate how a day fine scheme could be introduced into Tasmania.

**Recommendation**

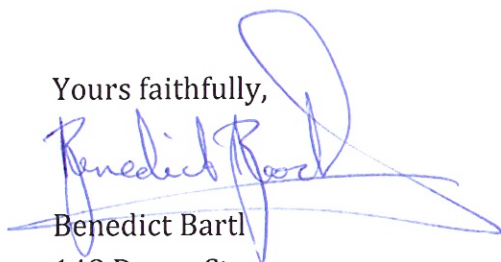
It is recommended that the Select Committee on the Cost of Living:

- (a) note their support for the introduction of the day fine; and
- (b) call on the Government to establish a feasibility study investigating how a day fine system would operate in Tasmania

For more detailed information about the day fine please find enclosed a draft of an article that will be submitted to a law journal in the near future.

If I can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,



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enc: Journal Article draft