

# The Sentencing Commission for Scotland

Basis on which Fines are  
Determined

Report – 2006

## **CHAIRMAN'S FOREWORD**

I have pleasure in presenting the report of the Sentencing Commission for Scotland on the basis on which fines are determined in Scotland. This is our third report.

The fine is the most frequently used penalty in our criminal courts, though its use has declined in recent times as the number of sanctions for criminal behaviour has increased. Despite what is reported from time to time, a very high proportion of fines are paid. Sometimes, the effort to recover them is arguably disproportionate to the value of the fine but that, of course, is only one aspect of the equation. A more significant part, in our view, is that the execution of any sanction imposed by the courts in response to criminality must be enforced so as to maintain proper respect for the law. The need to maintain proper respect for the law by the enforcement of any sanction imposed by the courts in response to criminality is, in our view, more significant.

We are aware of the steps that are being proposed by the Scottish Executive to improve fine enforcement in the Criminal Proceedings etc. (Reform) (Scotland) Bill and we have taken these into account in our recommendations.

We do not consider that there is at present a compelling case to change the existing system governing the imposition of fines in this country. While a number of other European jurisdictions operate a system of unit or day fines, we do not consider that a simple, reliable and cost-effective method of obtaining information on offenders' income currently exists in Scotland. The availability of such a method is vital to the success of any such system.

We do consider, however, that changes should be made to the handling of cases where an offender defaults on a fine and to cases where it is apparent that an offender has very little or no means to pay a financial penalty. We have made a number of recommendations in these respects, the most significant of which is a recommendation that imprisonment as a first alternative for default on fines up to £5,000 should be abolished. In all such cases we consider that the offender should have imposed on him a Supervised Attendance Order (SAO), and only if he or she breaches such an Order should imprisonment be an option for the court. We further consider that the sanction for breach of an SAO needs to be stiffer than at present and we have recommended up to 3 months' imprisonment.

So far as those offenders who have very little or no income are concerned, we recommend that they should not be fined and that the courts should impose an alternative sanction, such as a SAO or a Community Reparation Order. Imposing a financial penalty in such cases is in our view simply setting-up the offender to fail.

I am grateful to my colleagues on the Commission, and to our Secretariat, for their work in producing this report. I hope that the Scottish Executive, those operating within the criminal justice system and the general public find our recommendations well balanced and helpful.

**Rt Hon Lord Macfadyen**  
**Chairman**  
**May 2006**



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## **PART ONE: INTRODUCTION**

1.1 The Sentencing Commission for Scotland (“the Commission”) is an independent, judicially led body set up by the Scottish Executive under its policy statement “A Partnership for a Better Scotland.” The members of the Sentencing Commission, appointed by the Scottish Ministers, are:

**The Rt Hon Lord Macfadyen** (Chair): High Court Judge  
**The Rt Hon The Lord Mackay of Drumadoon**: High Court Judge  
**Sheriff Charles Stoddart**: Sheriff of Lothian and Borders  
**Sheriff Rita Rae QC**: Sheriff of Glasgow and Strathkelvin  
**Sheriff Bill Gilchrist**: Sheriff of Tayside, Central and Fife  
**Chief Constable David Strang**: Chief Constable of Dumfries and Galloway Police  
**Mr Alex Prentice**: Advocate Depute (formerly of McCourts Solicitors)  
**Ms Valerie Stacey QC**: Vice-Dean of the Faculty of Advocates  
**Mr Jim Dickie**: Director of Social Work at North Lanarkshire Council  
**Councillor Eric Jackson**: Chair of the Social Work Committee of East Ayrshire Council  
**Ms Bernadette Monaghan**: Director of Apex Scotland  
**Ms Kaliani Lyle**: Chief Executive of Citizens Advice Scotland  
**Mr David McKenna**: Chief Executive of Victim Support Scotland  
**Professor Neil Hutton**: Dean of the Faculty of Law, Arts and Social Sciences at the University of Strathclyde  
**Professor Chris Gane**: Chair of Scots Law at Aberdeen University  
**Mrs Sue Brookes**: Governor at HMI Cornton Vale  
**Professor David McCrone**: Department of Sociology at Edinburgh University (until April 2005).

1.2 The Commission has a secretariat of five: Mr Alan Quinn (Secretary), Mrs Kay McCorquodale (Solicitor), Mrs Diane Machin (Principal Researcher), Mrs Rona Tatler (Assistant Secretary) and Ms Taryn Forrest (Office Manager).

1.3 The Commission was launched in November 2003 with a remit to review and make recommendations to the Scottish Executive on:

- the use of bail and remand<sup>1</sup>;
- the arrangements for early release from prison and the supervision of short-term prisoners on their release<sup>2</sup>;
- the basis on which fines are determined;
- the effectiveness of sentences in reducing re-offending;
- the scope to improve consistency of sentencing.

1.4 Subsequently, the Executive provided the Commission with a more detailed remit as a result of which the Commission agreed that its consideration of fines would focus on the use of the fine as a penalty, the differential impact of fines on offenders of different means, the

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<sup>1</sup> The Commission reported on this in April 2005. See The Sentencing Commission for Scotland (2005) - Report on The Use of Bail and Remand. At:

<http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf>

<sup>2</sup> The Commission reported on this in January 2006. See The Sentencing Commission for Scotland (2006) – Report on Early Release from Prison and Supervision of Prisoners on their Release. At:

<http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf>

place of fines versus compensation orders, fines enforcement, alternatives to the fine and imprisonment in default. This report is concerned with that aspect of the Commission's remit. The Executive also subsequently explained that the purpose of inviting the Commission to review this matter was to obtain advice that would:

- re-enforce the importance of the fine as a very significant penalty (its use having declined from 71% of disposals in 1999 to 64% in 2003); and
- assist in constructing future policy in a way that seeks to avoid the use of imprisonment for fine default (over 6,000 fine defaulters are jailed per annum (some 7% of those fined in 2003), mostly for short periods of time).

1.5 Perhaps most importantly, on the basis that fines may have little impact upon the pockets of the more affluent but a disproportionate impact on the poor, the Executive wished the Commission to consider whether the introduction of a unit or day fine system would result in a fairer system of financial penalties.

1.6 In our review we have considered the balance between the burdens of introducing any new procedures or measures to avoid imprisonment in default and the scale of the problem which such procedures would be designed to solve. We have taken into account the findings and recommendations made by Sheriff Principal McInnes' Committee on Summary Justice<sup>3</sup> in this context.

1.7 After careful consideration the Commission decided to proceed straight to a report to the Scottish Executive on this matter without carrying out a public consultation. The reasons for this are threefold. Firstly, the topic is a narrow one, given that it is primarily about the pros and cons of unit or day fines versus the existing arrangements; secondly, Sheriff Principal McInnes' Committee on Summary Justice recently carried out a comprehensive review, part of which was a wide-ranging consultation, on the summary criminal justice system, including detailed consideration of fine enforcement and alternatives to prosecution which the Executive is taking forward through various provisions contained in the Criminal Proceedings etc. (Reform) (Scotland) Bill; and thirdly, our consultations on the use of bail and remand, and the law governing the early release of prisoners and their supervision on release drew low levels of response. For these reasons, in this instance, we decided to rely on the fact that Commission members were able to bring knowledge and experience both of imposing fines and of the operation, impact and enforcement of fines to the debate.

1.8 The latest figures that we have used in this report relate, for the most part, to 2003 which is the most recent year for which *comprehensive* figures are available. Statistics on criminal proceedings in Scottish courts in 2004-05 did become available shortly before this report went to print but because our report was substantially completed we decided not to use these as they did not differ significantly from the figures for 2003 and moreover cost figures for 2004-05 were not available.

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<sup>3</sup> The Summary Justice Review Committee (2004) – Report to Ministers. Astron.

## Summary of Conclusions and Recommendations

- Fines are an effective penalty, statistics showing that the vast majority are paid in full, albeit that a substantial number require enforcement action to be taken. (Paragraph 2.4)
- We **recommend** that fines should not be imposed on offenders who can demonstrate, by way of verified information, that their financial situation indicates that they have an extremely low level of income and on whom the imposition of a fine would create an unreasonable burden. (Paragraph 7.2)
- We **recommend** that in such cases an alternative sanction should be imposed. This might be a Supervised Attendance Order (SAO) and we therefore **recommend** that the use of SAOs as a first instance disposal should be rolled out as soon as practicable so that they may be imposed particularly in the case of individuals for whom evidence of their financial situation indicates that they have an extremely low level of income and on whom the imposition of a fine would create an unreasonable burden. (Paragraph 7.3)
- We **recommend** that Fines Supervision Orders should be re-invigorated and investment made in the provision of supervising officers until such a time as the proposed fines enforcement officers (who are to have support and advice roles as well as one of enforcement) are operational in all sheriff and district courts. (Paragraph 7.6)
- We **recommend** that greater use should be made by the courts of compensation orders. For this to happen better information needs to be made available to the courts on the cost of the damage or harm caused by the offender. (Paragraph 7.7)
- We **recommend** that a SAO should be imposed as an alternative to prison for those who have defaulted on payment of a fine (or the outstanding balance of a fine) where the amount does not exceed Level 5 on the standard scale (currently £5,000) and that accordingly imprisonment, in such cases, should only take place where there has been a breach of a SAO. (Paragraph 7.8)
- We consider that default in payment of a compensation order should be treated in the same way as a fine and therefore **recommend** that a SAO should be imposed as an alternative to prison for those who have defaulted on payment of a compensation order (or the outstanding balance of such an order) where the outstanding amount does not exceed £5,000 and that accordingly imprisonment should, in such cases, only take place where there has been a breach of a SAO. (Paragraph 7.9)
- For breach of a SAO imposed as a sanction for non-payment of a fine (or the outstanding balance of a fine) where the amount does not exceed Level 5 on the standard scale we **recommend** that where the court considers that imprisonment is the proportionate sanction then it should be empowered to order a period of imprisonment of up to three months. (Paragraph 7.10)
- In the event of our recommendation in paragraph 7.10 being accepted we **recommend** that the maximum terms of imprisonment which may be imposed for non-payment of

a fine (or the outstanding balance of a fine) up to Level 5 on the standard scale (at present £5,000), prescribed by section 219(2) of the Criminal Procedure (Scotland) Act 1995, should be repealed. (Paragraph 7.11)

- For breach of a SAO imposed as a sanction for non-payment of a compensation order (or the outstanding balance of such an order) where the outstanding amount does not exceed £5,000 we **recommend** that where the court considers that imprisonment is the proportionate sanction then it should be empowered to order a period of imprisonment of up to three months. (Paragraph 7.12)
- Where a SAO has been imposed as a first instance disposal and has been breached by the offender we **recommend** that where the court considers that imprisonment is the proportionate sanction then it should be empowered to order that a period of imprisonment of up to three months should be imposed. (Paragraph 7.13)
- Where an offender is convicted of a number of offences either on the same or multiple complaints (or indictments) and in respect of one or more of those offences he or she is sentenced to a term or terms of imprisonment and on another or others he or she is fined or ordered to pay compensation, if the offender is unable to pay the financial penalty or penalties immediately then we **recommend** that he or she should be allowed time to pay it or them after being released from prison. (Paragraph 7.14)
- Where an offender is serving a custodial sentence and during the currency of the sentence requires to have an outstanding fine(s) considered by the court, the immediate sanction (currently available) of imprisonment in default, to be served either concurrently or consecutively to the existing sentence, should not be available. Instead, assuming the court decides not to remit the financial penalty that is outstanding, we **recommend** that the court should order that the offender is brought before it again prior to his or her release from prison so that the court may review the situation with regard to the outstanding financial penalty. (Paragraph 7.15)
- There is a limited amount of written guidance available to sentencers in Scotland to assist them in determining the appropriate fine to impose in a particular set of circumstances. The Commission is of the view that guidelines would, in some cases, be of use to sentencers in deciding whether or not to impose a fine and, if so, what fine to impose. (Paragraphs 7.16 and 7.18)
- The Commission is not opposed to the idea of unit fines in principle. However, as we could find no simple, reliable and cost effective method of securing accurate and verifiable information on an offender's means, on which the success of any unit fine scheme depends, we cannot support their introduction at the present time. We believe, therefore, that the Scottish Executive should take no steps for the time being to change the current system for the imposition of fines in Scotland and **recommend** that it should invest in research – which in the time available we have been unable to undertake – to help in identifying a suitable, cost effective mechanism by which reliable information on all offenders' means might be obtained. (Paragraph 7.26).

## **PART TWO: FINANCIAL PENALTIES IN SCOTLAND**

2.1 The law of Scotland allows a range of different financial penalties to be imposed on those who have been convicted of an offence, or in the case of diversion from prosecution schemes, those believed to have committed an offence. These are:

- Fine – a financial penalty imposed by way of sentence, following conviction for an offence, which punishes the offender by depriving him or her of financial resources.
- Compensation Order – an order imposed by the court, following conviction for an offence, requiring the offender to compensate the victim for any losses arising from the offence.
- Fixed Penalty Notice – a conditional offer of a fixed penalty made by a procurator fiscal or a police constable to people alleged to have committed minor road traffic offences, and low level anti-social and nuisance offences, as an alternative to prosecution.
- Fiscal Fine – a conditional offer of a fixed penalty made by a procurator fiscal for any offence for which the alleged offender could be prosecuted in the district court, as an alternative to prosecution.

### **The Fine**

2.2 The fine is the most commonly used penalty for criminal offences in Scotland and is largely effective (see paragraphs 2.3 to 2.5). In 2003 a total of 83,631 fines were imposed as the main penalty on persons convicted in the Scottish courts. This represents 64% of all penalties.<sup>4</sup> Of this total 44,057 fines were imposed by sheriff summary courts, representing 56% of sentences in these courts; 39,407 were imposed by the stipendiary magistrates and district courts, representing 84% of sentences in these courts; and the remainder (167) were imposed by sheriff solemn courts and the High Court of Justiciary. The average amount of fine imposed by the sheriff summary courts in 2003 was £294 and in the stipendiary magistrates and district courts £124.<sup>5</sup>

2.3 The use of the fine as a main penalty has remained stable in Scotland's courts in recent years, fluctuating from 62% of all disposals in 2002 to 64% in 2003. Over the 10 years from 1994 to 2003, however, use of the fine has declined from 71% of all disposals to 64%. This has been matched by an increase of the same amount in the use of custody (from 10% to 13% of all disposals) and community sentences (from 7% to 11% of all disposals). During the same time period, the range of offences that fall within the conditional offer of fixed penalty schemes (i.e. fixed penalty notices and fiscal fines described at paragraphs 2.19 and 2.24 respectively) has been widened considerably and many cases that would previously have been prosecuted in the summary courts and resulted in a fine are now diverted from prosecution. Both the crime rate, with the exception of some crimes of violence and drug crimes, and the overall number of persons proceeded against in the Scottish courts have also declined over the last decade. In a UK context, use of the fine is slightly less prevalent in Scotland than it is in England and Wales where 69% of offenders sentenced in 2003 were

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<sup>4</sup> Scottish Executive (2005a) – Criminal Proceedings in Scottish Courts, 2003. Statistical Bulletin Criminal Justice Series CrJ/2005/4. Astron.

<sup>5</sup> Scottish Executive (2005b) – Costs, Sentencing Profiles and the Scottish Criminal Justice System, 2003. CP(S)A Section 306. Astron.

fined. Use of the fine has also been declining in England and Wales, however, with its use in the magistrates court amounting to 73% of all disposals in 2003, down from 80% in 1993.<sup>6</sup>

2.4 Over half (55%) of the fines imposed by Scottish courts in 2003 were for sums of between £50 and £200, while 29% were for sums of between £200 and £500. The majority of fines imposed by the sheriff summary courts in 2003 (90%) were for sums of between £50 and £500. In the district courts the majority of fines (87%) were for amounts up to £200, while in the sheriff solemn courts, the majority of fines (80%) were for sums of between £200 and £2,500.<sup>7</sup> Under section 211(7) of the Criminal Procedure (Scotland) Act 1995 in determining the amount of any fine to be imposed the courts are obliged to take into account, amongst other things, the means of the offender so far as known to the court. There is, however, no statutory obligation on an offender to disclose his or her financial circumstances. In practice, the courts, more often than not, have to proceed with the disposal of a case without having access to accurate, verifiable financial information. Where a fine is not paid at the bar of the court, the court must normally allow the offender to pay by instalments or give him or her time to pay. Fewer than half of the fines imposed in the sheriff court are paid in full in the time allowed and around half of those outstanding generally require the offender to appear before a means enquiry court. However, by the end of the year 2002-03 approximately 82% of all court fines were reported as having been paid in full. A further 7% were fully or partially remitted, 3% resulted in a Supervised Attendance Order (see paragraph 3.5) and 9% resulted in imprisonment for default.

2.5 In terms of the fine's effectiveness as a sanction, 29% of those given a monetary penalty in 1999 were reconvicted within 12 months and 50% were reconvicted within 4 years. By comparison, 30% of those given community service and 46% of those discharged from custody in 1997 were reconvicted within 12 months, while 52% and 71% respectively were reconvicted within 4 years. Fourteen percent of those given a monetary penalty in 1999 had received a custodial sentence within 4 years, compared to 18% of those given community service, 32% of those given probation and 51% of those released from custody.<sup>8</sup> This does not necessarily mean that monetary penalties can be regarded as being more effective than other types of sentences in reducing reconviction. It must be remembered that the differences are less marked once age, sex and number of previous convictions are taken into account and also that those who are fined will normally have committed less serious offences and will tend to be less persistent offenders than those who receive other types of penalty.

2.6 Where an offender has been allowed time for payment of a fine section 217 of the Criminal Procedure (Scotland) Act 1995 enables the court to place the offender under the supervision of a 'supervising officer' appointed by the court 'for the purpose of assisting and advising the offender in regard to payment of the fine.' Section 217(4) prevents the court from ordering the detention of an offender under 21 years of age who has been given time to pay and who has defaulted on payment of the fine unless

- (a) he has been placed under supervision in respect of the fine; or
- (b) the court is satisfied that it is impracticable to place him under supervision.

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<sup>6</sup> Home Office (2005) – Sentencing Statistics 2003, England and Wales. Home Office Statistical Bulletin 05/05 RDS NOMS. At : <http://www.homeoffice.gov.uk/rds/pdfs05/hosb0505.pdf>

<sup>7</sup> Scottish Executive (2005b) *Op. cit.*

<sup>8</sup> Scottish Executive (2005c) – Reconvictions of Offenders Discharged From Custody or Given non-custodial Sentences in 1999, Scotland. Statistical Bulletin Criminal Justice Series CrJ/2005/7. At: <http://www.scotland.gov.uk/Publications/2005/06/20134117/41268>

2.7 Figures on the use made by the courts of fines supervision orders (FSOs) are not collected centrally, however, they are used by both the sheriff and district courts. Local Authorities are responsible for providing supervising officers. We have been informed by the Association of Directors of Social Work (ADSW) that it is normal practice to write to an offender confirming that he or she is subject to a FSO, emphasising the importance of making payments and offering some form of service. However, we are further informed by ADSW that the take up of offers of advice, guidance and assistance offered through FSOs is relatively low and very few offenders are actively supervised. ADSW express the view that FSOs could be an important way of intervening at the start of an offending career but in reality this is unlikely to happen, particularly given the need to focus resources on more serious offenders.

### **Compensation Orders**

2.8 Compensation Orders were introduced by Part IV of the Criminal Justice (Scotland) Act 1980 and came into use the following year. The relevant provisions are now contained in sections 249 to 253 of the Criminal Procedure (Scotland) Act 1995. Section 249 provides that, subject to the exceptions set out below, where a person is convicted of an offence the court, instead of or in addition to dealing with the offender in any other way, may make a compensation order requiring the offender to pay compensation for any personal injury, loss or damage caused, directly or indirectly, by the acts which constituted the offence. A compensation order cannot be made where:

- the court orders an absolute discharge of the offender;
- the court makes a probation order;
- the court defers sentence;
- the loss is suffered as a result of the death of a person;
- the injury, loss or damage is due to a road accident, except for damage to (but not loss of) a dishonestly taken vehicle.

The victim does not require to lodge a formal claim and the courts are not required to give reasons where they do not make a compensation order.

2.9 The purpose of making a compensation order is to compensate the victim for his or her losses. Although monetary penalties (fines and compensation orders) remain by far the most common disposal used in the criminal justice system, and in the summary courts in particular, compensation orders are used much less frequently than fines. Research into the use of compensation orders in Scotland has suggested that this might be because it has never been made explicit whether compensation orders are intended primarily to benefit the victim (and therefore are essentially civil in nature) or to penalise the offender (and therefore are essentially penal in nature). This may be an area on which judicial guidance from the Appeal Court of the High Court of Justiciary would be helpful to sentencers. Sentencers also indicated that a) they often have insufficient information before them on which to base the decision on whether to make an order and, if so, for what amount and b) they have difficulty reconciling the requirement to take into account both the victim's loss and the offender's means and it is unclear to which priority should be attached.<sup>9</sup>

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<sup>9</sup> Hamilton, J. and Wisniewski, M. (1996) – The use of the Compensation Order in Scotland. The Scottish Office Central Research Unit. HMSO: Edinburgh.

2.10 In England and Wales, the Criminal Justice Act 1988 required sentencers to give reasons for not awarding compensation in cases involving any personal injury, loss or damage. Research undertaken to assess the impact of the requirement revealed that in the 12 months following implementation, compensation orders were used for 39% of offences within the relevant categories in the magistrates' courts and 17% in the Crown Court. Guidelines for levels of compensation to award in injury cases were provided to magistrates and found to be extremely helpful, although levels awarded for more serious injuries were generally well below those recommended. The research revealed wide variations between courts in the use of compensation orders and showed that magistrates viewed compensation as appropriate primarily in straightforward cases where the extent of damage, loss or injury was clear-cut. In theft cases where the value of the loss was primarily sentimental and in physical injury cases sentencers found it very difficult to assess appropriate levels of compensation.<sup>10</sup>

2.11 In 2003, 56% of sheriff summary cases (n=44,057) and 84% of district court cases, including stipendiary magistrate court cases, (n=39,407) resulted in a fine being imposed as the main penalty. By comparison compensation orders were imposed as the main or secondary penalty in only 4% of sheriff summary cases (n=3,170) and 13% of district court cases (n=5,870). The average amount of a fine imposed in the sheriff summary courts in 2003 was £294 and in the stipendiary magistrates and lay district courts £124. The average amount of a compensation order awarded in 2003 was £427 in the sheriff summary courts and £129 in the district courts. The use of compensation orders in the sheriff summary courts has remained unchanged over the last five years, at 4% of cases, although the average amount of compensation has increased from £309 to £427. Their use in the district courts, however, has increased from 4% of cases in 1999 to 13% of cases in 2003. In absolute terms, the number of compensation orders imposed in the district courts has increased from 2,281 in 1999 to 5,870 in 2003.<sup>11</sup> Information on why compensation orders are more popular in the district courts than they are in the sheriff courts is not available. Data from the district courts indicate that in 2003-04 83% of compensation orders were paid in full, 3% were remitted in full, 3% were partly remitted and 10% (approximately 193 cases) resulted in imprisonment being imposed for default.<sup>12</sup> Data for the sheriff courts indicate that of all compensation orders concluded in 2003-04 (n=4,283), 77% were paid, 17% were remitted and 6% resulted in imprisonment being imposed for default.<sup>13</sup>

2.12 The scope for compensation is wide as the amount that is required to be paid can include compensation for any personal injury, loss or damage caused, directly or indirectly, by the acts which constituted the offence.<sup>14</sup> The damage need not be capable of precise valuation and does not require to be proved by corroborated evidence although where the

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Maher, G. and Docherty, C. (1988) – Compensation Orders in the Scottish Criminal Courts. The Scottish Office Central Research Unit. HMSO: Edinburgh.

<sup>10</sup> Moxon, D.; Corkery, J.M. and Hedderman, C. (1992) – Developments in the use of Compensation Orders in Magistrates' Courts Since October 1988. Home Office Research Study No. 126. London: HMSO.

<sup>11</sup> Scottish Executive (2005b) – *Op. Cit.*

<sup>12</sup> Source – district courts workload data collected by Scottish Executive, Justice Department, Analytical Services Division. It should be noted, however, that data were not available for the district courts in Glasgow, Dumfries and Galloway, Eilean Siar and Stirling.

<sup>13</sup> Source – personal communication from Scottish Court Service, Operations and Policy Unit. 12 October 2005.

<sup>14</sup> See proposals to extend the scope of compensation orders contained in the Criminal Proceedings etc. (Reform) (Scotland) Bill outlined in paragraph 4.12 of this report.

accused disputes the amount stated by the Crown the case should be continued to allow evidence to be led. A compensation order is not rendered invalid by the death of the victim.

2.13 When an accused is convicted on indictment there is no limit on the amount that may be awarded under a compensation order. In summary proceedings the limit is the prescribed sum (currently £5,000) and in the district court the limit is level 4 on the standard scale (currently £2,500). These maximum sums apply to each offence.

2.14 In making a compensation order the court has regard to the means of the offender and the degree of injury, loss or damage sustained by the victim whether directly or indirectly. Consideration should also be given to whether the offender is serving or about to serve a custodial sentence as it may not take account of earnings contingent on the offender obtaining employment after his or her release. In practice this means that if an offender is given a custodial sentence then it is unlikely that the court will also make a compensation order unless the offender has financial resources available with which to pay immediately or on release.

2.15 Compensation orders are treated very much like fines payable through the clerk of court to the victim. They are, however, preferred to fines in that where a court considers that it would be appropriate to impose both a fine and a compensation order and the offender has insufficient means to pay both, the compensation should be the preferred disposal. Where both are imposed, payments by the offender are applied first in satisfaction of the compensation order. A victim has no right to enforce a compensation order. Instead the clerk of court is obliged to account to the victim for any amount paid under the order. Compensation orders should be payable over a reasonable period, normally not more than two years. Since a victim is entitled to his or her compensation the fact that the offender can afford to pay only by such small instalments that it will take a long time to pay the full sum need not prevent the court from making a compensation order. Where a compensation order is payable in instalments, the instalments are collected by the clerk of court and remitted to the entitled party on a monthly basis. Thus, if the offender is ordered to pay £200 compensation at a rate of £5 per week, the entitled party should receive the compensation at the rate of £20 per month over 10 months.

2.16 Where a victim brings a successful civil action for damages against the offender the amount of damages awarded will be reduced by the amount paid by an offender under a compensation order. This prevents double compensation. The same applies when the victim receives a payment under the Criminal Injuries Compensation Scheme.

2.17 Compensation orders are enforced in the same way as fines with the exception that when the court makes a compensation order, it may not impose imprisonment for non-payment at the same time and can only do so at a subsequent means enquiry court. It is competent to impose imprisonment in respect of a fine and not in respect of a compensation order imposed for the same offence, but not vice versa, and where imprisonment is imposed on both, the amounts are aggregated for the purpose of calculating the period of imprisonment. Where the accused is imprisoned for default, his or her liability to pay the order is extinguished although the victim's civil remedies will remain.

2.18 Apart from a compensation order, which is a sentence in its own right, it is also possible for a court to make it a requirement to pay compensation as a condition of a probation order under section 229(6) of the Criminal Procedure (Scotland) Act 1995. In that

event, failure to comply with such a condition may lead to a breach of probation and the order being varied or recalled. This can result in the offender being sentenced for the offence for which the order was originally made; any of the requirements of the probation order being varied; or a community service order being imposed on the offender (section 232(2) of the 1995 Act). This can be contrasted with the consequences of non-payment of a compensation order which are the same as those for non-payment of a fine and which can ultimately result in imprisonment (see paragraphs 3.1 and 3.2).

### **Fixed Penalty Notices**

2.19 Fixed penalty notices are, in effect, an administrative alternative to prosecution, which, if accepted and payment made of the first instalment, mean that the accused cannot be prosecuted and no conviction is recorded. Under section 75(3) of the Road Traffic Offenders Act 1988 (as inserted by section 34 of the Road Traffic Act 1991) procurators fiscal may send, and police constables may issue, conditional offers of fixed penalties, 'fixed penalty notices' (FPNs), in respect of a range of road traffic offences. This gives persons who have allegedly committed certain minor road traffic offences an opportunity to pay a fixed penalty as an alternative to prosecution. The police conditional offer scheme became operational on 1 January 1993. The police can issue FPNs for a large number of offences including moving vehicle offences such as speeding. The current penalty levels are £30 for a non-endorsable offence and £60, £100 or £200 for endorsable offences, depending on the specific offence. FPNs are payable in full within 28 days of issue. Non-payment results in the case being referred to the procurator fiscal for consideration of prosecution, and if convicted the accused will be liable for the full penalty provided by statute and not merely the restricted fixed penalty.

2.20 Under a different fixed penalty system for certain types of parking offences, a police constable or a traffic warden may give a FPN to a person on the spot or attach one to a motor vehicle. If the offender fails to pay the fixed penalty to the clerk of the court, he or she may be reported to the procurator fiscal for prosecution in the normal way and, if convicted, will be liable for the full statutory penalty.

2.21 The use of FPNs in Scotland has recently been extended by the Antisocial Behaviour (Scotland) Act 2004 which introduced FPNs for a range of low level anti-social and nuisance offences committed by people aged 16 years and over. The ten offences for which FPNs can be issued, as listed in section 128, are:

- Riotous behaviour while drunk in licensed premises
- Refusing to leave licensed premises on being requested to do so
- Urinating or defecating in circumstances causing annoyance to others
- Being drunk and incapable in a public place
- Being drunk in a public place in charge of child
- Persisting to annoyance of others, in playing musical instruments, singing, playing radios etc. on being required to stop
- Vandalism
- Consuming alcoholic liquor in a public place
- Breach of the peace
- Malicious mischief

2.22 The level of the FPN for these offences has been set at £40 and their use is being piloted in Tayside. Offenders have 28 days in which to pay in full or to challenge the FPN. If they do not pay and do not challenge the FPN in this time the level of the FPN increases by 50% to £60. Final data from the evaluation of the pilot indicates that in the 12 months from April 2005 to March 2006 police in Tayside issued 3,321 FPNs for anti-social behaviour. Of these, 2,030 (61%) have been paid, 984 (30%) have become registered fines, 182 remain unpaid and four individuals have challenged the FPN and requested a court hearing. In the remaining 121 cases the matter has been dealt with in some other way.<sup>15</sup>

2.23 Power to give FPNs has also been extended by the Smoking, Health and Social Care (Scotland) Act 2005 which permits authorised council officers to give FPNs for certain offences committed under that Act, such as smoking or permitting others to smoke on no-smoking premises, and in connection with the display of warning notices in and on no-smoking premises. FPNs can also be imposed under different legislation for a variety of other anti-social offences such as littering and dog fouling.

### **Fiscal Fines**

2.24 Fiscal Fines were first introduced by the Criminal Justice Act (Scotland) 1987 and are now permitted under section 302 of the Criminal Procedure (Scotland) Act 1995. That section enables a procurator fiscal to make a conditional offer of a fixed penalty (known colloquially as a ‘fiscal fine’) for any offence (other than those directed by the Lord Advocate as being unsuitable and road traffic offences already covered by the fixed penalty schemes) in respect of which the offender could be competently tried in a district court. Provided the procurator fiscal considers that he or she has sufficient evidence to justify instituting proceedings the procurator fiscal may exercise his or her discretion and send a conditional offer to the accused giving the accused an opportunity to pay the penalty instead of being prosecuted in the district court. If the accused pays the penalty, or the first instalment of it, timeously he or she cannot be prosecuted for the offence thereafter and the acceptance of the offer cannot be recorded as a previous conviction. If the offer is not accepted and no payment is made the accused may be prosecuted in the normal manner and, if convicted, will be liable for the full range of penalties applicable to the offence.

2.25 Once an offer of a fiscal fine has been accepted, by payment of the first instalment, enforcement of subsequent non-payment is difficult. At present payment of the balance has to be enforced by civil diligence, the cost of which may be prohibitive. Experience amongst members of the Commission indicates that some offenders pay the first instalment of the penalty only, thus avoiding prosecution and conviction, and then deliberately default on payment of the remainder in the knowledge that they are extremely unlikely to be pursued and the balance will be written off.<sup>16</sup>

2.26 The levels of fiscal fine are set by an order of the Scottish Ministers and cannot exceed level 1 on the standard scale, currently £200. The current levels are £25, £50, £75 and £100. The level of fiscal fine offered is determined solely by the nature of the offence – the procurator fiscal rarely has access to information on the offender’s means, and information on criminal history and/or previous fiscal fines is often not considered. The offender’s ability to

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<sup>15</sup> Personal communication from the Scottish Executive Anti-social Behaviour Unit. 27 April 2006.

<sup>16</sup> However, the proposals on enforcement of various financial penalties contained in the Criminal Proceedings etc. (Reform) (Scotland) Bill aim to make collection and enforcement of these penalties easier through the employment of Fines Enforcement Officers. (See paragraphs 4.16-4.19 of this report.)

pay is not taken into account in the decision to offer a fiscal fine, therefore accused persons who have committed similar offences will be offered the same level of fiscal fine irrespective of their means.

2.27 The number of fiscal fines being offered and accepted has increased year on year since their introduction. They are now considered to be a valuable and effective alternative to prosecution in less serious cases, for a wide range of offences, that would otherwise result in prosecution in the district court. In the financial year 2002-03, the most recent year for which reasonably comprehensive data are available, 34,697 fiscal fines are known to have been issued, 53% of which were at the £25 level. Of those offered, 17,648 (51%) were accepted by the accused and of those accepted, 13,985 (79%) were paid in full.<sup>17</sup> Data published by Crown Office indicate that in financial year 2003-04 a total of 30,029 fiscal fines were accepted by the accused.<sup>18</sup>

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<sup>17</sup> Source: annual statistical returns from district courts to Scottish Executive Justice Department Statistics Unit. For the year 2002-03 data are not available for Eilean Siar, Stirling and West Lothian.

<sup>18</sup> Crown Office and Procurator Fiscal Service (2004) – 2003-04 Final Figures. At: [http://www.crownoffice.gov.uk/publications/2003\\_04\\_final\\_figures.xls](http://www.crownoffice.gov.uk/publications/2003_04_final_figures.xls)

The annual statistical returns from the district courts for 2003-04 on the number of fiscal fines accepted and the number paid in full were not available from Dumfries and Galloway, Eilean Siar, Fife, Glasgow City and Stirling. As such, the available data cannot be regarded as being sufficiently reliable for use.

## PART THREE: SANCTIONS FOR DEFAULT IN PAYMENT OF A FINE

3.1 A person is in default in payment of a fine if he or she fails to pay any instalment timeously or fails to pay the whole fine within the time allowed. The sanction for default is imprisonment for adult offenders, detention in a young offenders institution for young offenders, or imposition of a Supervised Attendance Order (SAO).

### Imprisonment/Detention for Fine Default

3.2 The maximum terms of imprisonment which may be imposed for non-payment of a fine are prescribed by the Criminal Procedure (Scotland) Act 1995 section 219(2) and are as follows:-

Amount of Fine	Period of Imprisonment
Not exceeding £200	7 days
Exceeding £200 but not exceeding £500	14 days
Exceeding £500 but not exceeding £1,000	28 days
Exceeding £1,000 but not exceeding £2,500	45 days
Exceeding £2,500 but not exceeding £5,000	3 months
Exceeding £5,000 but not exceeding £10,000	6 months
Exceeding £10,000 but not exceeding £20,000	12 months
Exceeding £20,000 but not exceeding £50,000	18 months
Exceeding £50,000 but not exceeding £100,000	2 years
Exceeding £100,000 but not exceeding £250,000	3 years
Exceeding £250,000 but not exceeding £1 million	5 years
Exceeding £1 million	10 years

3.3 It is apparent, however, that fines in excess of £1,000 are uncommon. In 2003 a total of 463 fines in excess of £1,000 were imposed by the courts in Scotland, representing just 0.55% of all fines imposed.<sup>19</sup> More detailed analysis of the data reveals that it is extremely rare for fines of £10,000 or more to be imposed. In the four years from 2000 to 2003 a total of 74 fines of £10,000 or more were imposed by the Scottish courts. Sixty three of these fines were imposed on companies, with the maximum fine imposed in any of these years being £750,000. The remaining 11 fines in excess of £10,000 were imposed on individuals, with the maximum fine imposed being £20,100.<sup>20</sup> Accordingly, as far as sentencing for default on payment of fines is concerned, many of the prescribed periods of imprisonment are of little practical application. In the five years from 2000-01 to 2004-05 a total of 16 people were imprisoned for defaulting on payment of fines of £5,000 or more. However, four of these individuals were already in prison at the time when they were imprisoned for fine default and just 12 were received into prison solely as a result of their fine default.<sup>21</sup>

3.4 The number of receptions of people into prison in Scotland for defaulting on payment of a fine in 2004-05 was 6,098. It should be noted, however, that this figure includes offenders who have had sentences of imprisonment imposed for other offences at the same time as a fine and offenders who are already serving sentences of imprisonment for other offences on the date on which a fine is imposed for a separate offence. It is understood that

<sup>19</sup> Scottish Executive (2005b) – *Op cit*

<sup>20</sup> Source – personal communication from Scottish Executive Criminal Justice Statistics Unit. 14 March 2006.

<sup>21</sup> Source – personal communication from Scottish Prison Service Statistics. 6 April 2006.

the number of annual receptions purely for fine default is around half of the published figure. The figure of 6,098 represents 16% of all receptions into custody and 33% of sentenced receptions. However, fine default receptions in 2004-05 decreased by 11% from 6,888 in the previous year. Although they represent only a very small proportion of the average daily prison population as they spend only short periods of time in custody, fine defaulters make up more than a third of prison receptions. In 2004-05 the average daily population of fine defaulters in Scotland's prisons was 61. The majority of imprisoned fine defaulters (57%) have outstanding fines in excess of £200. However, over a quarter (29%) are imprisoned for defaulting on amounts of between £100 and £200. The average fine outstanding for imprisoned adult defaulters in 2004-05 was £289 and the average length of fine default sentence imposed was 11 days.<sup>22</sup> As a result of the current early release law this means that the average sentence actually served in prison for fine default is around five and a half days. The daily cost of a prisoner place in Scotland is about £110. The considerable staff and financial resources expended by the Scottish Prison Service on fine defaulters can therefore be contrasted with the short time spent by them in custody in order to discharge an unpaid fine. The following example illustrates how a significant fine can be substantially discharged by serving only a very short period of time in custody:

***Example***

*Sentenced to 28 days in default of fine of £1,000. Part payment offered on 3<sup>rd</sup> day in custody which is a Friday before Christmas weekend when Monday and Tuesday are public holidays.*

*2 days served + 4 days for weekend and holidays = 6 days served*

*6 days × 2 = 12 days deemed expiated*

*28-12= 16 days remaining to be served*

*Payment due = 16/28 × £1,000 = £571.43*

**Supervised Attendance Orders**

3.5 A SAO is an order made by the court which provides a community-based alternative, substituting for the unpaid portion of a fine a period of constructive activity designated by the local authority. Local authorities may provide and manage activities themselves or contract with other agencies, such as Apex, to do so.<sup>23</sup> Undertaking activities places stringent demands on offenders to sacrifice their time and to meet high standards of behaviour and participation. The punitive element in the SAO is contained in the time which offenders must devote to supervised attendance activity, in the essential disciplines of regular attendance, prompt time-keeping and satisfactory performance and in the prompt application of enforcement procedures for non-compliance. The activities may be categorised under three headings: activities of an educational nature, broadly relevant to the offender's personal and social circumstances; activities designed to stimulate interest and encourage the constructive use of time; and activities involving unpaid work in the community. Since most offenders

<sup>22</sup> Scottish Executive (2005d) – Prison Statistics Scotland, 2004/05. Statistical Bulletin Criminal Justice Series CrJ/2005/8. Astron.

<sup>23</sup> For example, Apex Scotland currently provides a number of SAO schemes in various locations across the country.

undertaking SAOs have defaulted on or been unable to pay fines all those who are undertaking a SAO for the first time should be offered a core induction module which should include a component on debt awareness/financial management. Other components should focus on life and work skills.<sup>24</sup>

3.6 In the event of non-compliance with a SAO, the court can:

- vary the number of hours on the SAO
- extend the period of the SAO
- revoke the SAO
- revoke the SAO and impose a custodial sentence currently up to 20 days (district court) or 30 days (sheriff court).

3.7 In 2004-05 a total of 3,360 SAOs were imposed by the courts in Scotland on 2,965 individual offenders. In the same year 1,203 SAO breach applications were made to the courts. While it is difficult to calculate precise completion and breach rates because of the time lag between an order being imposed and its final resolution, the available data suggest that around one in three SAOs result in a breach application. Of the 1,203 breach applications made in 2004-05 7.5%, or 90 SAOs were revoked and a custodial sentence imposed. This is a decrease from 17.5% of orders in 2001-02. A quarter of orders (22%) were continued, the warrant was outstanding in 9% of cases and the outcome was not yet known in 41% of cases (i.e. 492 breach applications), a proportion of which will eventually have resulted in revocation and custody.<sup>25</sup>

3.8 An evaluation of SAOs, published in July 2001, found that they had become a credible alternative to imprisonment for fine default.<sup>26</sup> Offenders who completed their orders were less likely to be convicted in the 12 months following the order than in the previous 12 months. Custodial receptions for fine default have declined following the roll-out of SAOs, which can be attributed in part to the introduction of the Order.<sup>27</sup> Two pilots are currently underway to explore an extension to the use of SAOs following changes to the legislation made by the Criminal Justice (Scotland) Act 2003. On 17 May 2004 in Ayr Sheriff Court and on 21 June 2004 in Glasgow District Court and Stipendiary Magistrate Court a pilot began where the option of custody as a punishment for fine default was removed from sentencers. Instead SAOs must be used for fine default up to Level 2 on the standard scale (currently £500). Custody remains competent for breach of the SAO. The pilots are undergoing independent evaluation in order to monitor the effect that mandatory SAOs have on courts and offenders. The evaluation is scheduled to be completed in mid-2006, however, interim data suggest that in the 13 months between the start of the pilots and the end of June 2005, in excess of 800 SAOs were imposed in place of custody for fine default. On the basis of progress to date the data suggest that the breach rate might be expected to be in the region of 30-40% of the SAOs imposed. Some of the personnel involved in administering them are

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<sup>24</sup> The National Objectives and Standards for the Provision of Social Work Services in the Criminal Justice System set out the minimum requirements for the provision of SAOs.

<sup>25</sup> Scottish Executive (2006) – Criminal Justice Social Work Statistics, 2004-05. Statistical Bulletin CrJ/2006/01. Astron.

<sup>26</sup> Levy, E. and McIvor, G. (2001) – National Evaluation of the Operation and Impact of Supervised Attendance Orders. Scottish Executive Central Research Unit. Astron. At: <http://www.scotland.gov.uk/cru/kd01/green/sao-00.asp>

<sup>27</sup> Scottish Executive (2004) - Alternatives to Custody - Supervised Attendance Orders. At: <http://www.scotland.gov.uk/Topics/Justice/criminal/16906/6824>

of the view that the SAO is gaining a ‘tough’ reputation compared to the minimal period offenders with relatively small fines would otherwise spend in prison.<sup>28</sup> Experience within the Commission supports this view.

3.9 The Scottish Executive has made clear that it is committed to further reducing the number of fine defaulters sent to prison. Existing legislation has been used to create a further pilot scheme in Renfrewshire and West Dunbartonshire (in Paisley and Dumbarton Sheriff Courts and Giffnock, Dumbarton and Clydebank District Courts) where, since 1 June 2005, SAOs may be used as a first instance disposal in cases where the court considers the individual would be unable to pay the appropriate fine within 28 days, or such additional period that the court considers appropriate. For the duration of the pilot decisions on whether or not an offender is likely to be able to pay a fine should be based on ‘locally known criteria’ such as whether the person is known to be unemployed or is known to the court as a regular fine defaulter. This pilot scheme is scheduled to run for two years.

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<sup>28</sup> Henderson, B. (unpublished) – Mandatory Supervised Attendance Orders. Second Interim Report. Report to Scottish Executive Research Advisory Group, September 2005.

## **PART FOUR: THE SUMMARY JUSTICE REVIEW COMMITTEE**

4.1 The Summary Justice Review Committee, under the Chairmanship of Sheriff Principal McInnes, considered the question of fine enforcement in detail. The Committee recognised the importance of maintaining the fine as a credible and enforceable penalty in the summary justice system and suggested that, given the current focus on reduction of re-offending, making fines more effective and more workable would repay the effort made.

4.2 The McInnes Committee recommended a different approach to the enforcement of financial penalties that is:

- consistent and flexible across Scotland;
- applies equally to compensation orders, court imposed fines, fiscal fines, fixed penalty notices and other sanctions for breaches of the criminal law;
- makes it easy to pay for those who are willing to pay;
- minimises or eliminates the involvement of courts and the police once the financial penalty has been imposed;
- enables all an offender's outstanding financial penalties to be dealt with by a single enforcement process;
- eliminates direct imprisonment for fine default;
- provides clear and graduated sanctions for non-payment; and
- reduces or eliminates the cost to public funds of the enforcement process.

4.3 In order to achieve these aims the McInnes Committee recommended that:

1. The Executive should take responsibility for fine enforcement away from individual courts and bring it together within a single delivery organisation.
2. Wherever practicable, financial penalties which carry an ultimate criminal sanction, should be collected and enforced by the new agency, which would have a variety of new powers.
3. The Executive should explore, with the Department of Work and Pensions, the options for making the deduction from benefits scheme operate more effectively in Scotland.
4. The Executive should consider how arrestment of earnings orders might be better used as a means of fine enforcement.
5. A thorough examination of the unit fines system should be undertaken in the context of the revised approach to Summary Justice proposed in Scotland.

4.4 In its response to the McInnes Committee the Scottish Executive<sup>29</sup> rejected the idea of a separate fine enforcement agency, opting instead to transfer responsibility for the collection and enforcement of all court fines, fiscal fines and registered fines to the Scottish Court Service. It undertook to develop enhanced administrative arrangements to ensure fines are effectively enforced and to investigate improvements to the fine enforcement regime and roll-out nationally improvements that prove to be beneficial.

4.5 The McInnes Committee also considered fixed penalty notices (FPNs), fiscal fines and compensation orders. The Committee concluded that FPNs are an appropriate means of

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<sup>29</sup> Scottish Executive (2005f) – Smarter Justice, Safer Communities. Summary Justice Reform, Next Steps. Astron.

dealing with low level offending and as such, the numbers and types of offence in which FPNs can be issued is likely to continue to increase. The Committee identified a number of difficulties with the administration of the FPN scheme but concluded that the advantages of increasing the scope of FPNs outweighed the disadvantages. The Committee recommended that:

- Consideration be given to increasing the scope of FPNs to a number of non-road traffic offences.
- Information on FPNs imposed for similar offences committed by the accused should be available to the court in a subsequent prosecution for a similar offence.
- An accused should be required to ‘opt-out’ of a FPN if he or she does not wish to accept it – inaction should be deemed to indicate that the accused accepts the FPN and if it is not paid within 28 days the FPN should become a registered fine.
- All unpaid FPNs which become registered fines should be increased by 50% of the value of the FPN.

4.6 In its response to these recommendations the Scottish Executive noted that it remains committed in principle to a further extension of the use of FPNs, with appropriate guidelines and safeguards in place. However, it suggested that the McInnes Committee’s recommendations had been addressed in a large part by the provisions of the new Antisocial Behaviour (Scotland) Act 2004 and undertook to monitor the outcome of the Tayside pilot before making a final decision on how best to further extend the use of FPNs.

4.7 In its consideration of fiscal fines the McInnes Committee concluded that they are a very valuable sanction that should remain in place but suggested a number of ways in which their use could be strengthened. In particular, they recommended that:

- Information on an accused person’s history of accepting and rejecting fiscal fines should be disclosed to any court in connection with any current or subsequent prosecution for a period of up to five years after the offer of a fiscal fine is made.
- Information on fiscal fines accepted should be available to the police and procurator fiscal to inform the decision on what action to take when a person re-offends.
- Difficulties relating to the enforcement of payment of fiscal fines should be addressed.
- Offenders should be required to actively ‘opt-out’ of a fiscal fine offer if they do not wish to accept it so that inaction will result in the fine being regarded as having been accepted.
- If an accused does not pay a fiscal fine it will become a registered fine, payment of which will be enforceable through the courts.
- Unpaid fiscal fines which are registered should be subject to a 50% increase.
- The upper level of fiscal fines should be increased from £100 to either £200 or £500, increasing the range of cases in which they can be used and bringing their level closer to that of court fines.

4.8 The McInnes Committee’s consideration of compensation orders focused primarily on the concept of fiscal compensation orders. The Committee recommended that:

- a procurator fiscal should be able, in conjunction with or separate from a fiscal fine, to impose a compensation order on an alleged offender. The procurator fiscal should

prefer a compensation order where an offender's means appear to be insufficient to pay both a fiscal fine and a fiscal compensation order.

- Guidelines on the use of compensation orders should be produced and should, as far as possible, be publicly available.
- Both the courts and the procurator fiscal should be given power to make a compensation order where the victim of the offending behaviour has been subjected to behaviour which is frightening, distressing, annoying or has caused nuisance or anxiety.
- Fiscal compensation orders should have no prescribed upper limit.
- The arrangements for enforcement of fiscal compensation orders should be the same as for fiscal fines/FPNs.

### **Criminal Proceedings etc. (Reform) (Scotland) Bill**

4.9 The Executive's response to the McInnes Committee's recommendations is now embodied in the provisions contained in Part 3 of the Criminal Proceedings etc. (Reform) (Scotland) Bill ("the Bill") introduced in the Scottish Parliament on 27 February 2006. In the context of financial penalties, provision is made in two main areas to:

- (1) Extend the range of alternatives to prosecution that can be offered to an alleged offender and the manner in which those alternatives can be enforced and disclosed; and
- (2) Reform the way in which fines and other financial penalties imposed in respect of a criminal offence can be collected and enforced.

4.10 The main changes in relation to the extension of the alternatives to prosecution and their enforcement and disclosure are:

- An increase in the maximum level of fiscal fine that may be offered, coupled with changes in the enforcement regime for outstanding fiscal fines and the manner in which their acceptance can be disclosed in subsequent proceedings involving the same accused; and
- The introduction of two new forms of alternative to prosecution – the fiscal compensation offer and the work order.

4.11 In particular, provision is made in the Bill for:

- An increase in the limit of fiscal fines to £500.
- A move to an 'opt-out' system in which the accused has to notify the procurator fiscal if he or she does not wish to accept the fiscal fine – inaction will be deemed as an acceptance. Safeguards will be introduced to ensure that those who fail to take action to reject the offer, for good reason, are able to have the fine recalled.
- Failure to pay a fiscal fine to result in the outstanding amount being treated, for enforcement purposes, as if it were a fine imposed by the court.
- The prosecutor being able to include in any notice of previous convictions details of an alternative to prosecution which has been accepted by the accused in the two years preceding the date of the new offence under consideration.
- The period while a fiscal fine offer is outstanding to be disregarded for the purposes of reckoning whether a case is time-barred.

4.12 The Bill also introduces a fiscal compensation order in summary cases up to £5,000 to be offered instead of or in combination with a fiscal fine and provides for it to operate in the same way. Prosecutors are to have the option of offering a fiscal compensation order in any circumstance where a case could competently be tried summarily and the court might impose a compensation order on conviction. On payment the money will be remitted to the victim of the offence. The range of offences for which a fiscal compensation order may be imposed will include both cases where quantifiable loss has been established and cases where the victim has suffered alarm and distress caused directly by the actions complained of. That extension is also to be made in relation to compensation orders imposed by the court.

4.13 Provision is also made in the Bill to introduce another new form of alternative to prosecution – the work order. This enables the prosecutor to offer an alleged offender a period of community-based reparatory work as an alternative to prosecution. Completion of the order will discharge the right to prosecute the alleged offender for the offence and no conviction will be recorded against them. This will give the prosecutor the power to offer an alternative to prosecution where a court hearing does not appear to be necessary in respect of the alleged offence and where the nature of the alleged offence makes the imposition of a financial penalty inappropriate.

4.14 As the introduction of the work order represents a new addition to the powers of the prosecutor, it is understood that it is intended to pilot its operation in one or more areas and evaluate that pilot fully in advance of any decision being taken to roll-out the use of work orders on a wider basis.

4.15 The provisions in relation to disclosure of the acceptance of an alternative to prosecution in subsequent proceedings against an individual and the suspension of the period of time-bar in relation to statutory offences whilst the offer of an alternative is outstanding, as described in paragraph 4.11 in relation to fiscal fines, will also apply to fiscal compensation offers and work orders.

4.16 With regard to fine collection and enforcement the Bill makes provision for the creation of a new officer known as a fines enforcement officer (FEO) who will have specified powers in respect of relevant penalties such as court-imposed fines and compensation orders, as well as fiscal fines, fiscal compensation orders and other fixed penalties which are enforced by the court. The Scottish Court Service will determine the number of such officers required depending on the workload of a particular court and the FEO will be an officer of the Scottish Court Service.

4.17 The principal role of the FEO will be to collect and enforce fines through active management of outstanding fines, considering the full circumstances of both the offender and the fine in question. They will support those who want to pay or are struggling to pay, providing information and advice to offenders as regards payment of relevant penalties, but will have statutory powers to enforce payment against those who could pay but choose not to.

4.18 When a court grants time to pay for a fine in an area where FEOs have been appointed, it will also make an ‘enforcement order’ in respect of that fine, transferring responsibility for collection of the fine to the FEO. While an enforcement order is in effect the court will not be able to imprison an offender for fine default. Through communication with the offender and regular updates as to outstanding balances and the level of payment due, the FEO will seek payment of the fine without using any further powers. He or she will

have the power, at the request of the offender, to increase the time to pay in respect of a fine or to lower the level of regular instalments to be paid.

4.19 Where an offender is persistently uncooperative the FEO will be entitled to exercise one or more of the following enforcement powers:

- make a request to the court which imposed the fine for a deduction to be made from the offender's benefits;
- arrest earnings where the offender is employed or arrest monies from the offender's bank or building society account;
- seize a vehicle belonging to the offender, which could ultimately be sold to discharge the outstanding fine; or
- refer the case back to the court, with a report as to the circumstances of the case. The court will take account of the FEOs recommendations but is not obliged to follow them. The court will be able to take whatever action it sees fit – including imposing a SAO or imprisonment in default of the fine.

The offender will be able to seek a review of the actions of the FEO by the court if such actions are deemed to be unreasonable.



## PART FIVE: CALCULATION OF FINES

5.1 Once an accused has been convicted by the court the sentencer must decide the most appropriate sentence to impose. The first consideration is whether the nature of the offence of which the person has been convicted brings the case within the range of cases that would attract a fine as an appropriate means of disposal. This is almost entirely a matter to be decided by the sentencer, though in certain instances a fine is the only disposal available to the court apart from an admonition or an absolute discharge. Consideration is also given by the court to the offender's previous record, if any, and any aggravating and/or mitigating circumstances. If, on the basis of this information, the sentencer determines that a fine would be the most appropriate disposal, consideration is given to the offender's means so far as known to the court<sup>30</sup>, together with relevant local knowledge (such as whether there is a current spate of a particular type of crime in the local area or whether there has been a recent change in the economic climate of the local area), and the sentencer determines the appropriate fine to impose. Formal tariffs or 'going rates' for different types of offences do not exist, although sentencers are generally aware of current fining practice within their own court. Although sentencers are required to take an offender's means into account in determining the amount of fine to impose, this is only to the extent that information is known to the court. Evidence of means, such as benefits statements, wage slips and bank statements, together with vouched evidence of outgoings, is rarely available to the sentencer. The sentencer must base his or her judgment on the information that is before the court without having the opportunity to have it verified. In the day to day reality of sentencing, therefore, sentencers give what consideration they can to the income of individual offenders when they first appear in court for sentence but the information that is available in this regard is, more often than not, limited and unverified.

5.2 Research undertaken by Young in the late 1980s "Punishment, Money and a Sense of Justice" entailed interviews with sheriffs in three cities in central Scotland and focused on sheriffs' perceptions of the fine as a punishment, the factors involved in determining the actual sum fined for a variety of crimes and offences, and sheriffs' views on the common methods of paying fines (i.e. time to pay and instalment payments).<sup>31</sup> The research revealed that all of the sheriffs interviewed regarded fines as being a definite punishment, with a primary objective of retribution, requiring that the seriousness of the offence be reflected in the amount fined. Sheriffs also regarded the fine as a flexible penalty in that it can fulfil other objectives of sentencing such as individual and general deterrence and denunciation, and can be used in a wide range of different situations. In determining the amount of the fine the research revealed that sheriffs generally put offence related criteria – consideration of the seriousness of the offence – first.

"Consideration of income, for most sheriffs, takes second or third place. The order in which the factors are considered can be described in this way: (1) offence; (2) record of offender; and (3) income and family circumstances. Different sheriffs may substitute between (2) and (3), but nearly all of them placed offence related criteria first. Those sheriffs who differ do not necessarily place income first. Rather, they claim to treat all factors simultaneously."

(Young, 1989, pp. 55)

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<sup>30</sup> As required by Section 211(7) of the Criminal Procedure (Scotland) Act 1995.

<sup>31</sup> Young, P. (1989) – Punishment, Money and a Sense of Justice. In Carlen, P. and Cook, D. (Eds.) – Paying for Crime. Open University Press.

5.3 Sheriffs did, however, indicate that the actual amount of money fined also reflects what they know to be the ‘going rate’. This was regarded as being both the amount of money that it is conventional to fine for a particular offence or crime and convention on how much a particular offender that appears before them can reasonably be expected to afford, regardless of the seriousness of the offence. The going rate is not determined by reference to the income of individual offenders, or even types of offenders, but by the general economic climate. Young suggests that the ‘going rate’ sets a very real limit on how far the fine can reflect seriousness of the offence since sheriffs recognise that going beyond the ‘going rate’ increases the likelihood of the offender defaulting on payment and eventually being imprisoned and sheriffs are reluctant to see that happen. As a result, consideration of offence related criteria takes place within a wider consideration of income related criteria in determining the amount of the fine. However, the influence of an individual offender’s income on the level of fine is also limited – sheriffs regard the ‘going rate’ as resulting in low fines anyway and are reluctant to reduce levels further on the basis of individual income, while any increases in level on the basis of income tend to be limited by considerations of equality of impact between offenders. Young concludes that:

“...it seems the criteria used to determine the size of the fine are centred on income-related criteria. Although sheriffs place offence-related criteria first, the practical realities of constructing the fine force sheriffs to resort to income-related criteria.”

(Young, 1989, pp. 57)

5.4 Young also suggests that the fine is a unique penalty in that the decision, not on *whether* to fine, but occasionally on how much to fine and often on the rate at which the fine will be paid, is the result of a process of negotiation between the sheriff and the defence. The sheriff may ask the offender how much he or she can afford to pay on a weekly basis before determining the level of instalments, or the defence may indicate to the sheriff that the offender cannot afford to pay at the rate that the sheriff has selected and suggest a different payment rate. Most sheriffs interviewed were of the view that a period of 12 months was sufficient for fines to be paid.

5.5 More recently research by Tombs “A Unique Punishment: Sentencing and the Prison Population in Scotland” explored sentencers’ decision making processes in determining what sentence to impose on an offender.<sup>32</sup> Sentencers varied widely in their views of whether the decision-making process is primarily structured or more intuitive and based on experience. Those who felt that the process is structured tended to describe a process with a series of stages that typically involve considering the charge and the circumstances of the offence, the offender’s previous convictions, other similar cases and aggravating and mitigating circumstances. Sentencers who felt that the process is not particularly structured and is based more on intuition and experience, however, also tended to describe a process by which the same factors are taken into consideration but the weight and importance attached to each factor is regarded as being largely intuitive. Other sentencers regarded the sentencing process as being entirely intuitive and recognised that local factors such as the ‘feel of the courtroom’ play a part in the process and could result in the way in which they sentence one day or in one court being different from how they would sentence on a different day or in a different court.

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<sup>32</sup> Tombs, J (2004) – A Unique Punishment. Sentencing and the Prison Population in Scotland. Scottish Consortium on Crime and Criminal Justice.

5.6 Although Young's research, in particular, is now rather dated, we have seen no evidence to suggest that sentencers' decision making processes in respect of whether to impose a fine and if so, how much to fine, are any different now to those described by the sentencers interviewed by Young almost 20 years ago. The findings remain pertinent, therefore, and experience among those members of the Commission who are sentencers accords with the processes described by both researchers. Furthermore, those said members of the Commission who are sentencers consider that their own sentencing practice is broadly consistent and that the difficulty lies chiefly with the lack of consistency which exists between different sentencers.

5.7 While plentiful statistics exist on the use of and amount of fines imposed by the courts in Scotland, the Commission was concerned about the lack of research evidence on the basis on which decisions to fine people are made. It was felt that the existence of more up-to-date research information on this subject (as opposed to fines enforcement) would have made the Commission's task in considering this topic easier. It was also suggested that the provision of regular research and statistical information to the courts would make the task of determining whether to, and how much, to fine offenders an easier one for sentencers. In the context of statistics we would observe that there appears to be inordinate delay with the publication of figures pertaining to the business of the criminal courts, which in this era of electronic record keeping should be readily available. More rapid and more co-ordinated dissemination of such information would enable, amongst other things, quicker, evidence-based reforms to be made where these are urgently needed.



## PART SIX: UNIT FINES

6.1 In order to ensure equality of treatment of offenders and promote the interests of justice, offenders who have committed similar offences ought to be dealt with in such a way that renders them liable to the same *quality* of punishment. Thus penalties for similar offences should as far as possible be designed to have an equal impact on offenders. Therefore if two offenders are to be fined in respect of broadly similar offences and one has a disposable income of £500 per week with no dependants and the second has a disposable income of £100 per week with four dependants, this would suggest that the former should receive a higher fine. This is the approach inherent in systems imposing unitary or day fines.

6.2 The approach of treating offenders who have committed broadly similar offences equally by imposing fines of differing amounts to reflect their differing financial circumstances was approved by the High Court in the case of Scott v Lowe 1990 S.C.C.R 15. In that case, where several offenders on the same complaint were found to be equally blameworthy, the sheriff imposed fines representing in each case five weeks' income. Consequently, the offenders suffered an equivalent, though not identical, deprivation of resources.

6.3 In systems imposing unit fines, fines are expressed not as total sums of money but as a multiple of, on the one hand, a number which reflects the gravity of the particular offence and the offender's degree of culpability and, on the other hand a unit representing the amount which a given offender can reasonably contribute to a fine on a daily or weekly basis. In practice the first step is for the sentencer to determine the number of units to be imposed according to the seriousness of the offence. The second is to decide the financial amount to be accorded to each fine unit, calculated according to the offender's disposable income. The two figures are multiplied to give the amount of the fine.

6.4 Any scheme based on units of seriousness can potentially give rise to very small and very large fines being imposed and acceptance of these outcomes requires a shift in culture in seeing seriousness reflected in terms of the number of units, or the proportion of disposable income, rather than the amount payable.

6.5 A number of arguments, which are not mutually exclusive, have been put forward both in favour of and against unit fines. These are usefully summarised by Albrecht (2001).<sup>33</sup> The arguments in favour of unit fines are:

- day fines, unlike fixed sum fines, satisfy the need for both equal and proportionate punishment as day fines, at least in theory, can be adjusted to the individual circumstances of the offender.
- day fines can provide public evidence that differences in each offender's means and assets are taken into account. As a result the acceptance of fines can be increased by making the process of assessing fines more visible.
- day fines are congruent with the current shift in sentencing away from rehabilitation and treatment and towards proportionality. Since the seriousness of the offence is the basic determinant of the number of day fines, day fines can serve as a common

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<sup>33</sup> Albrecht, H.J. (2001) – Post-adjudication Dispositions in Comparative Perspective. In Tony, M. and Frase, R.S. (Eds.) – Sentencing and Sanctions in Western Countries. Oxford University Press.

denominator for different types of penalties and the deprivation or pain associated with each.

- day fines lead to greater rationality in sentencing because the judge must first decide the number of day fines in proportion to the seriousness of the offence, the harm caused and the culpability of the offender and then must adjust the level of the day fine to the financial circumstances of the offender. In theory inequities are less likely to occur than with fixed sum fines and unlimited discretion and the decision making process is more transparent.
- the day fine system provides a clear method of converting fines into default imprisonment – irrespective of the offender’s level of income, failure to pay should result in a similar number of days of imprisonment for offences of equal seriousness.

6.6 The main arguments against unit fines are that:

- the approach places too much emphasis on the financial circumstances of the offender, while other factors affecting proportionate punishment are under-valued.
- almost all of the advantages attributed to the unit fine system depend on reliable and valid information about an offender’s financial and income status. If this cannot be obtained the feasibility of the unit fines approach becomes questionable.

### **The use of unit fines in other jurisdictions**

6.7 Unit fine systems are common in many jurisdictions around the world. Finland introduced the first day fine system in 1921, followed by Sweden in 1931 and Denmark in 1939 and they now also operate in Austria, France, Portugal, Germany, Hungary, Poland and parts of the United States where they are known as structured fines. Details of the regimes operating in overseas jurisdictions are contained in Annex A.

### **The position in Scotland**

6.8 The Scottish Home and Health Department issued a Consultation Paper “Fines and Fines Enforcement” in October 1988. Chapter V sought views on the desirability of setting up an experiment to assess the implications of introducing a day or unitary fine system in Scotland. The advantages and disadvantages of a unitary fine system, as perceived in 1988, are set out in paragraphs 5.12 and 5.13 of the Consultation Paper. In summary these are:-

#### Advantages

- setting of more realistic fines leading to lower levels of default and reduction in prison population
- fairness in that they can have equal impact on offenders who have committed similar offences by depriving them of equal proportions of their income
- transparency in the sentencing process
- consistency in sentencing.

#### Disadvantages

- unreliability and/or absence of financial information

- unfairness in that persons committing the same offence receive different financial penalties
- no account taken of capital assets
- need to set up new administrative procedures.

6.9 Following consideration of the responses to the Consultation Paper, which ranged from enthusiasm to hostility, provision was made in the Bill that became the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 to empower the Secretary of State to authorise an experimental scheme on the use of unitary fines in a number of selected courts in Scotland. That provision was, however, dropped during the Bill's passage through Parliament. It has been suggested that the reasons for this were that there was a need to assess the impact of other initiatives in relation to fines and fine default first, as well as a concern about resource implications and the fact that the issue of unit fines was controversial among the judiciary, some of whom saw them as inflexible. Instead it was decided to review the matter in the light of experience of the introduction of unit fines in England and Wales. The history of the introduction of the unit fine system in England and Wales, together with details of the current position, is described in Annex B.



## **PART SEVEN: CONCLUSIONS AND RECOMMENDATIONS**

### **Financial Penalties in Scotland**

7.1 Given that the fine is currently used in two thirds of all cases and that fiscal fines are in the process of being extended and fiscal compensation and work orders introduced, which will divert from prosecution, primarily, cases that would otherwise result in a fine, it is difficult to see how the importance of the fine as a significant penalty can be reinforced to any great extent. That is, unless there is a substantial shift in the pattern of sentences imposed by judges and more offenders are fined in place of other disposals.

7.2 The Commission **recommends** that fines should not be imposed on offenders who can demonstrate, by way of verified information, that their financial situation indicates that they have an extremely low level of income and on whom the imposition of a fine would create an unreasonable burden. We appreciate that we have not defined what we mean by “extremely low” level nor “unreasonable burden.” This is because we understand that there is no precise figure designated as the minimum sum required by an adult person to live on in the UK and we are therefore unable to point to a precise figure that constitutes a level of income on which it is reasonable to expect a person to subsist. We therefore anticipate that sentencers will use their own judgment in determining what constitutes an “extremely low” level of income, and an “unreasonable burden”, in cases that come before them.

7.3 We **recommend** that in such cases, in order to avoid those concerned being “set up to fail”, an alternative sanction should be imposed. One such alternative would be a SAOs. Indeed, we endorse the view of the McInnes Committee which expressed its support for ‘the existing and proposed future uses of SAOs both as an alternative to prison for those who have defaulted and as a first disposal’. We **recommend**, therefore, that the use of SAOs as a first instance disposal should be rolled out as soon as practicable so that they may be imposed particularly in the case of individuals for whom evidence of their financial situation indicates that they have an extremely low level of income and on whom the imposition of a fine would create an unreasonable burden.

7.4 Another alternative sanction which may be imposed is the recently introduced Community Reparation Order. These were brought into effect by the Antisocial Behaviour etc. (Scotland) Act 2004 to deal with cases of relatively low level anti-social crimes heard in the summary courts. The orders focus specifically on anti-social behaviour and getting offenders to make reparation to their local community in the form of 10 to 100 hours of appropriate unpaid work. They are currently being piloted in courts in Inverclyde, Inverness and Dundee. Anecdotal evidence suggests that very few such orders have been imposed.

7.5 We note the provisions introduced by the Criminal Proceedings Etc. (Reform) (Scotland) Bill. To a degree these circumscribe what we are able to say about financial penalties because a good deal is being done especially in the field of enforcement. We would wish to record, however, that we have misgivings about the proposal to include details of any alternatives to prosecution that have previously been accepted by an accused person in any notice of previous convictions in the two years preceding the date of any new offence under consideration. This seems to us to be inconsistent with the principle of fiscal fines, one of the incentives of which is that they allow accused persons to avoid acquiring a criminal record.

7.6 We **recommend** that Fines Supervision Orders should be re-invigorated. Strengthening these orders may assist those offenders who are willing to pay their fines but are unable to manage their finances sufficiently well without support. The presence of an effective fines supervision officer may reduce the effort expended on enforcement through the usual methods and ultimately may reduce the number of offenders imprisoned for default. It may be that once fines enforcement officers, who will be introduced by the Criminal Proceedings etc. (Reform) (Scotland) Bill, are operational and have bedded-in across all sheriff and district courts that these orders can be abolished, but until that time comes we consider that it would be helpful for some investment to be made in these orders so as to assist in fines collection.

7.7 In our view greater use should be made by the courts of compensation orders and we so **recommend**. They should be made wherever possible on the basis of the best information possible. However, it is vital that a method is found to enable better information on the cost of the damage or harm caused by the offender to be made available to the court otherwise nothing will change. We consider that it should be within the resources of the police and the Crown to seek to obtain better financial information to assist the court in exercising its powers to impose such orders. We endorse the current position which stipulates that, in terms of enforcement, compensation orders should be given priority over fines.

### **Sanctions for Default in Payment of a Fine**

7.8 The Commission considers a court should *never* proceed straight to imprison anyone for non-payment of a fine, even if the offender seeks no time to pay. We consider that imprisonment should, however, be retained as a *final* sanction when all other means of securing payment and sentencing disposals have been exhausted. But, in our view, given that almost half of all people imprisoned for fine default are in default on amounts of less than £200, imprisonment does not represent a sensible nor an efficient use of criminal justice resources. We are also of the view that imprisoning fine defaulters for an average period of 11 days (five and a half days in practice) is a questionable use of public money when the current cost of a prisoner place in Scotland is about £110 per day. Having said that, those who commit crime and are fined for doing so cannot be permitted to abuse and disregard the law. We therefore **recommend** that a SAO should be imposed as an alternative to imprisonment for all those who have defaulted on payment of a fine (or the outstanding balance of a fine) where the amount does not exceed Level 5 on the standard scale (currently £5,000) and that accordingly imprisonment, in such cases, should only take place where there has been a breach of a SAO. Given that very few offenders are fined beyond this level, this would mean that imprisonment as the first alternative for non-payment of a fine would virtually disappear and the “churn” in the prison system arising from the imprisonment of over 3,000 fine defaulters a year would be removed.

7.9 We consider that default in payment of a compensation order should be treated in the same way and therefore **recommend** that a SAO should be imposed as an alternative to prison for those who have defaulted on payment of a compensation order (or the outstanding balance of such an order) where the outstanding amount does not exceed £5,000 and that accordingly imprisonment, in such cases, should only take place where there has been a breach of a SAO.

7.10 It has to be recognised, however, that even if SAOs were to become the mandatory sanction for most of the fine default across Scotland, there will continue to be a proportion of

offenders who will continue to refuse to discharge their debt to society and will default on their SAO, and any other sanction imposed on them, and will ultimately end up in prison. The powers of enforcement available to a fines enforcement officer under the provisions of the Criminal Proceedings Etc. (Reform) (Scotland) Bill allow the officer to refer the case back to the court which will be able to take what action it sees fit, including imposing a SAO or imprisonment in default of a fine. We consider that in those circumstances imprisonment should still be the final sanction, imposed only once a SAO has been breached. Accordingly for breach of a SAO imposed as a sanction for non-payment of a fine (or the outstanding balance of a fine) where the amount does not exceed Level 5 on the standard scale we **recommend** that unless the offender is able to demonstrate to the court that he or she has a reasonable excuse for breaching the SAO then where the court considers that imprisonment is the proportionate sanction then it should be empowered to order that a period of imprisonment of up to three months should be served so as to reflect public condemnation of the offender's lack of respect for the law.

7.11 If the recommendation in paragraph 7.10 above is accepted the maximum terms of imprisonment which may be imposed for non-payment of a fine (or the outstanding balance of a fine) up to Level 5, prescribed by the Criminal Procedure (Scotland) Act 1995 section 219(2), should be repealed and we so **recommend**.

7.12 We further **recommend** that where a SAO has been imposed as a sanction for non-payment of a compensation order (or the outstanding balance of such an order) where the outstanding amount does not exceed £5,000 and has not been complied with then where the court considers that imprisonment is the proportionate sanction then it should have the same powers for the same purpose as referred to in paragraph 7.10 above.

7.13 Where a SAO has been imposed as a first instance disposal and has been breached by the offender we **recommend** that where the court considers that imprisonment is the proportionate sanction then it should be empowered to order that a period of up to three months imprisonment should be imposed. We consider that to suggest an alternative lesser custodial penalty for a breach in such cases would be confusing and more importantly would lead to unfairness towards those in respect of whom a fine was the original disposal.

7.14 There are two particular scenarios on which we consider some extra commentary is necessary. The first is where an offender is convicted of a number of offences either on the same or multiple complaints (or indictments) and in respect of one or more of those offences he or she is sentenced to a term or terms of imprisonment and on another or others he or she is fined or ordered to pay compensation. If the offender is unable to pay the financial penalty or penalties immediately then we **recommend** that he or she should be allowed time to pay it or them after being released from prison. Default on any such penalty or penalties would then be dealt with in accordance with the recommendations contained in the paragraphs immediately above.

7.15 Secondly, where an offender is serving a custodial sentence and during the currency of the sentence requires to have an outstanding fine(s) considered by the court, the immediate sanction (currently available) of imprisonment in default, to be served either concurrently or consecutively to the existing sentence, should not be available. Instead, assuming the court decides not to remit the financial penalty that is outstanding, we **recommend** that the court should order that the offender is brought before it again prior to his or her release from custody so that the court may review the situation with regard to the outstanding financial

penalty. At that time, the court may decide to remit the fine in whole or in part, require the person to appear again at a later date, or order that the fine should be paid after the person is released from custody.

## **Guidelines**

7.16 Sentencers in Scotland have a limited amount of written guidance available to them to assist them in determining the appropriate fine to impose in a particular set of circumstances. Moreover, lawyers acting for accused persons also have to cope with the fact that the guidance about the imposition of fines, which is available in the law reports and textbooks, is not extensive. The High Court of Justiciary has the statutory power, when dealing with an appeal against sentence in both solemn and summary cases, to pronounce an opinion on the sentence or other disposal or order which would be appropriate in any similar case (see sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995). Furthermore, section 197 of the 1995 Act provides that, without prejudice to any rule of law, a court in passing sentence shall have regard to any relevant opinion pronounced under those sections. In the event, very few ‘guideline’ opinions have been delivered by the High Court of Justiciary. The High Court has tended to confine itself to dealing with the facts and circumstances of the particular case under appeal, rather than making wider pronouncements. Of those ‘guideline opinions’ that have been delivered, none has dealt with the issues of determining whether a fine should be imposed, in preference to other forms of disposal available to the court, or the approach that should be taken to the calculation of the amount of any fine being imposed.

7.17 We have considered whether the introduction of guidelines would be of assistance to sentencers who are considering whether or not to impose a fine. In the recent cases of Purvis and Pryde v MacDonald 2006 SCCR 47, the High Court made it clear that it is not against the aim of promoting consistency in sentencing. That case concerned an appeal against fines imposed by a district court in the Borders where the justices based their sentences on guidelines devised and issued by the justices committee for the whole area of the Borders. These guidelines had been devised in private and had not been published. It had not been known by the accused that it was likely that the guidelines would be taken into account in dealing with their case. Whilst holding that the manner in which each fine was arrived at in each case was not in accordance with natural justice their Lordships said:

*“We do not doubt that the aim of promoting consistency in sentencing is a worthy one, and that there is much to be said for an appropriate body deliberating on, and arriving at, recommendations or suggestions as to the range within which sentences of a certain type would generally fall. Such recommendations or suggestions might in due course be endorsed by the High Court by reference to sections 118(7) and 189(7) of the 1995 Act. However, such an endorsement would depend on a number of considerations, such as whether they were preceded by consultation, whether they had been publicised and whether in themselves they appeared to be satisfactory.”*

7.18 We believe that guidelines would, in some cases, be of use to sentencers in deciding whether or not to impose a fine and, if so, what fine to impose. We recognise that in some quarters there is perceived to be inconsistency in the size of fines imposed for apparently similar offences and imposed on persons of relatively similar circumstances. The perception is of such inconsistency between different courts at different levels and in different locations around Scotland. However, a lack of research on this subject in Scotland means that

empirical evidence for this perception is hard to find. It should also be borne in mind that each case is different, in gravity and circumstance; the criminal record (if any) of offenders will be different, as may the mitigating circumstances and the level of discount to be given for a plea of guilty. For these reasons, the apparent variations in sentence may be relatively easy to understand, once the full facts of different cases are known, a luxury not enjoyed by those who keep statistics or write headlines. Moreover, the amount of a fine is not a matter upon which many offenders appeal to the High Court; the available statistics suggest a relatively small proportion of appeals against sentence - 13%, or 225 cases in 2003 - are directed towards this matter.

7.19 All of that having been said, we think there are classes of case in which sentencing guidelines might be useful. For example, at present, when Parliament creates a new statutory offence, it usually prescribes any competent financial penalty either by reference to the various levels set out in the standard scale provided for under section 225 of the Criminal Procedure (Scotland) Act 1995 or by reference to the prescribed sum. The prescribed sum is currently £5,000 but is to be increased to £10,000 under the provisions of the Criminal Proceedings etc. (Reform) (Scotland) Bill. When adopting the former approach, such references are usually to “a fine not exceeding Level X on the standard scale”; in other words a fine not exceeding a set maximum amount. The Commission regards this formula as being of little assistance to the sentencer, especially in relation to the many regulatory offences with which the courts have to deal. By definition the maximum competent fine ought to be reserved for the worst possible case of its kind. In practice most cases do not reach this high threshold, whatever the circumstances. What would be of much greater assistance to the sentencers, to those acting for accused persons and to the wider public, including the media, would be some indication from an authoritative source about the approach to be taken by sentencers in determining the imposition of fines below the maximum threshold.

7.20 Health and Safety offences and environmental crime present themselves as two particular areas where guidelines might be helpful. In such areas the sentencer (at present) will find precious little of assistance in previously decided cases, such as they are; accordingly the risks of inconsistency are much greater. Guidelines might ameliorate the problems for the sentencer, if, for example, a base figure were prescribed for all cases, with various mitigating and aggravating factors also set out. Guidelines would also have to make it clear that the final figure was, in some way, related to the means of the offender, bearing in mind the different resources available to corporations of different sizes. Much the same would apply to individual offenders who commit environmental crime, such as wholesale pollution, the theft of rare birds eggs or other wildlife offences.

7.21 As an example of what might be done in this area we found the work of the Sentencing Advisory Panel in England and Wales instructive. The Sentencing Advisory Panel proposed to the Court of Appeal in 1999 that the Court should frame a sentencing guideline on environmental offences. The Panel’s advice to the Court specified that the fine should be the starting point for the sentencing of both persons and companies for environmental offences and identified a series of aggravating and mitigating factors. The level of the fine should reflect how far below the relevant statutory environmental standard the defendant’s behaviour actually fell. The assessment of seriousness requires consideration of the culpability of the defendant in bringing about, or risking, the relevant environmental harm, which must be balanced against the extent of the damage that has actually occurred or been risked. The fine which is imposed should also reflect the means of the individual or

company concerned.<sup>34</sup> With regard to Health and Safety offences, in its Case Compendium, the Sentencing Guidelines Council identifies those Court of Appeal rulings that contain guidance on the sentencing of such offences. These rulings outline the relevant factors that should be taken into account in determining the level of fine, including aggravating and mitigating factors and, while steering away from the laying down of a tariff, specify that:

- Fines should reflect the gravity of the offence and means of the offender; this applies just as much to corporate offenders as to any other.
- Fines need to be large enough to bring home the message that the object of prosecution is to achieve a safe environment for workers and members of the public.
- The court must look at the whole sum (fine plus costs) that it was minded to order and consider the impact upon the offender.
- Any fine must be balanced against the length of any suspended sentence passed at the same time.<sup>35</sup>

7.22 If the case is made out for guidelines to be prescribed in relation to the level of fine to be imposed for certain cases or classes of case, then the question arises as to how these guidelines are to be formulated and by whom. The Commission is presently carrying out detailed work on another part of our remit – the scope to improve consistency in sentencing - in the context of which this question is being addressed. A report on this matter will be published in due course.

### **Unit fines**

7.23 We have considered the research and other information on unit fines available from a number of jurisdictions around the world. A number of aspects inherent in a unit fine system are attractive. Any system that has an equal impact on offenders of different means is commendable and the available evidence suggests that since unit fines tend to be more closely tailored to an offender's ability to pay, default rates tend to be lower. However, unit fines systems also have a number of drawbacks, in particular, their over-emphasis on the financial circumstances of the offender at the expense of the consideration of the seriousness of the offence and other relevant circumstances, and the need for accurate and verifiable information on means. It is also difficult to see how a unit fine system fits within a coherent system of financial penalties when other penalties, such as fiscal fines and fixed penalty notices, can be imposed without consideration of an offender's means.

7.24 It is clear from those jurisdictions that operate unit fine systems and from the work undertaken by those that have piloted them, as well as those that have considered but rejected them, that the success of a unit fine system depends on access to accurate, verifiable information on an offender's means. In Finland, for example, where day fines have operated for many years, the courts have free and unrestricted access to information known to the tax authorities on offenders' means. In Scotland, a sentencer is required by law to take the means of the offender into account in determining the amount of fine to impose. In doing so the court is, for the most part, reliant on information provided by the offender, or his agent. Provision has been made in England and Wales under which an offender commits a criminal

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<sup>34</sup> A copy of the Panel's advice to the Court of Appeal can be accessed at <http://www.sentencing-guidelines.gov.uk/docs/environment.pdf>

<sup>35</sup> Sentencing Guidelines Council (2005) – Guideline Judgements Case Compendium. At: [http://www.sentencing-guidelines.gov.uk/docs/complete\\_compendium.pdf](http://www.sentencing-guidelines.gov.uk/docs/complete_compendium.pdf)

offence when knowingly failing to disclose any material fact to a fines officer when providing a statement of his or her financial circumstances<sup>36</sup> although that provision has not been brought into force. We do not recommend the introduction of a similar provision in Scotland. We are uncomfortable with the notion of asking an accused to provide financial information prior to conviction and requiring that information to be available in a verifiable form immediately after conviction to enable sentence to be passed at that time without the necessity of a further court appearance. Given this position, requiring verifiable financial information would mean an offender would always need to return to court post-conviction to have a fine imposed. That process would add considerably to delays in court procedures and because the most likely penalty for failing to supply financial information, or indeed providing false information, is itself a fine, the introduction of any such arrangements seems to us impractical.

7.25 Technological advances in the future may allow the development of a system whereby the courts have automatic access to centrally held information enabling them to verify the financial status of an offender, for example via information held by HM Revenue and Customs or the Department of Work and Pensions. This would, however, necessitate a significant investment in technology and may well prove to be cost prohibitive. We have considered whether information on means could be accessed via legal aid applications but believe there are sufficient difficulties inherent in this approach to render it unrealistic. In particular, many offenders who are fined are unrepresented, including those who plead guilty by letter without using the services of a solicitor or ever appearing in court.

7.26 We do not oppose the idea of unit fines in principle but their introduction requires a simple, reliable, speedy and cost effective method of securing accurate and verifiable information on an offender's means. In the absence of such a method we do not support the introduction of a unit fines system in Scotland at present. Given that fines are already used as the main disposal in 64% of cases we do not consider that there is any good reason to suppose that such a change would result in the fine being used more as a disposal. Nor do we believe it would result in an improvement in fine collection rates to such an extent that it would reduce the rate of imprisonment for default, given that around 82% of all fines are eventually paid in full. Arguably, it could mean a fairer imposition of financial penalties but, as we have pointed out, the courts are currently obliged to have regard to an offender's means in determining the level of fine to impose. There is, however, a risk that it could result in disproportionate penalties for minor offences committed by those with higher incomes. The bureaucracy involved in collecting the necessary information would be substantial and the ability of the courts to complete much of its summary criminal business quickly would be seriously hampered by the need to delay proceedings to await the receipt of such information. We believe, therefore, that the Scottish Executive should take no steps for the time being to change the current system for the imposition of fines in Scotland and **recommend** that it should invest in research – which in the time available we have been unable to undertake – to help in identifying a suitable, cost effective mechanism by which reliable information on all offenders' means might be obtained.

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<sup>36</sup> Schedule 5 Part 10 paragraph 48 to the Courts Act 2003.



## UNIT FINES IN OVERSEAS JURISDICTIONS

1. In Finland, day fines are the principal punishment for criminal offences with the number of day fines determined on the basis of the seriousness of the offence while the amount of a day fine depends on the financial situation of the offender. In 2002 a total of 36,584 day fines were imposed by the courts in Finland and in the same year a daily average of 190 offenders were in prison for fine default. Rates of imprisonment for default have almost doubled in recent years, increasing from 102 offenders in 1999 to 198 in 2003. This is believed to be due, in large part, to an increase in the number of foreign, particularly Eastern European, people being convicted in Finland.<sup>37</sup> Legislation in the 1960s resulted in a significant reduction in the number of people imprisoned for fine default – decriminalisation of the offence of public drunkenness reduced the daily average number of imprisoned fine defaulters from 800 to less than 100, while a reduction in the number of days for which people could be fined together with an increase in the amount of each day’s fine, resulted in shorter sentences for default being served.<sup>38</sup>

2. In Germany, day fines are regarded as a direct alternative to periods of imprisonment and are designed to be punitive. Offenders can be fined from 5 to 360 days (or up to 720 days in the case of exceptional and serious offences). In each case the value of the day fine is taken to be equivalent to the daily net income that the offender would have forfeited had he or she been imprisoned instead (with no allowances made for family maintenance). The penalty for fine default in Germany is imprisonment, with each day’s fine being equated to a day of imprisonment, or community service with each day’s fine equating to 6 hours.<sup>39</sup>

3. Australia and New Zealand have implemented ‘penalty unit’ systems which differ somewhat from the unit fines model described in this paper. These are systems where the penalty for an offence is expressed in terms of numbers of penalty units and the value of the penalty unit is set down in statute and is the same for every offender. The number of penalty units to which an offender is sentenced is multiplied by the prescribed value of the unit to establish the amount the person is fined. For example, in New South Wales the value of a penalty unit is specified in statute as being A\$110 so a person sentenced to 10 penalty units will be fined A\$1,100. In Northern Territory the penalty unit is valued at A\$100 and in Queensland it is either A\$75 or A\$100 depending on the Act under which a person is prosecuted. The number of units an offender is fined can vary from person to person according to individual circumstances but the value of each unit remains fixed. In each of these jurisdictions the court is required to take into account a) the financial circumstances of the offender and b) the nature of the burden that payment of the financial penalty will impose on

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<sup>37</sup> The National Research Institute of Legal Policy (2003) – Crime and Criminal Justice in Finland 2003. At <http://www.om.fi/optula/uploads/cqfi3usm2zbtb.pdf>

<sup>38</sup> Eley, S; McIvor, G.; Malloch, M. and Munro, B. (2004) – A Comparative Review of Alternatives to Custody: Lessons From Finland, Sweden and Western Australia. Final Report Commissioned by the Scottish Parliament Information Centre for the Justice 1 Committee. At: <http://www.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-custody-04.htm>

<sup>39</sup> Ministry of Justice Criminal Justice Policy Group (2000) – *Review of Monetary Penalties in New Zealand*. At: [http://www.justice.govt.nz/pubs/reports/2000/review\\_money/chapter\\_4.html#Germany](http://www.justice.govt.nz/pubs/reports/2000/review_money/chapter_4.html#Germany)

the offender but the court is not precluded from fining the offender if information on these matters is not available to it. In New South Wales rates of fine default are high and there was a steady increase in the number of offenders imprisoned for fine default in the first half of the 1990s. The Fines Act 1996 (NSW) introduced new enforcement procedures aimed at reducing the incidence of non-payment. The State Debt Recovery Registry (SDRR) was created and made responsible for the enforcement of both court-imposed fines and infringement notices. The SDRR was empowered to take the following steps in cases of default: 1) issue enforcement orders; 2) suspend or cancel a driver's licence or vehicle registration, which can be applied to fines for both traffic and non-traffic offences; 3) institute a civil action, including property seizure and arrestment of wages; 4) impose a community service order; and 5) impose a period of imprisonment. Imprisonment is intended to be used only as a final sanction for fine default.<sup>40</sup>

4. In 1996, in its *Report on Sentencing*, the New South Wales Law Reform Commission considered the introduction of a day fine system in order to 'provide a more effective means of tailoring the fine to fit the individual offender's income'. Following a consultation exercise in which the day fine received only limited support, and concerns were expressed about the practical difficulties of verifying individual's income or financial status, the Commission concluded that such a system should not be introduced in New South Wales because

“The day-fine places too great a restriction on the discretion of the sentencing court to impose the sentence which is most appropriate given all the circumstances of an individual case. It may also prove too complex and consequently unworkable in practice, as the experience of other jurisdictions suggests. Moreover, it may be too time consuming for courts to make an accurate assessment of the offender's financial means. (NSWLRC 1996 para. 3.14)<sup>41</sup>

5. In 1994, the New Zealand government agreed to pilot a scheme of time fines (based on a unit fines system) and the Department of Justice developed a scheme under which the court, having reached the decision that a fine was the appropriate sentence, would:

- Consider the number of weeks during which it would be appropriate to deny the offender a portion of his or her 'income' having regard to the seriousness of the offence;
- Consider the amount the offender could afford to pay per week (with maximum and minimum amounts specified in regulations); and
- Calculate the amount of the fine to be imposed by multiplying the number of weeks by the dollar amount determined under the above calculations.

6. This scheme was intended to avoid the shortcomings of the unit fines scheme introduced in England and Wales in 1991 by retaining flexibility for the courts and avoiding the rigid application of a formula that in England and Wales led to wide

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<sup>40</sup> New South Wales Law Reform Commission (1996) – *Report on Sentencing* (NSWLRC 79-1996) At: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R79CHP3>

<sup>41</sup> *Ibid.* para. 3.14

variation among fines for offences of the same gravity depending on the income of the offender (see Annex B). The scheme was regarded as having the capacity to increase the use of fines in preference to more costly community based sentences. However, the Judiciary and the New Zealand Law Commission expressed reservations about the proposed scheme which centred around how it would relate to the existing scheme of infringement fees and whether the time fine scheme would exacerbate existing inconsistencies between fines and infringement fees.<sup>42</sup> In 1995 the Government decided not to continue with the time fine scheme and the Criminal Justice Policy Group set out the following arguments against the adoption of a time/unit fines system:

- It is inconsistent with just deserts/proportionality whereby the degree of punishment should be determined chiefly by reference to the seriousness of the offence.
- There are simpler, speedier and more effective methods of increasing the imposition of fines.
- Introducing a two-step process for imposing a fine will make the imposition of a fine as complex as, or even more complex than, other sentences. This is not ideal given that the fine is the most commonly used sentence. Accordingly, unit fines are likely to encourage rather than discourage the use of more serious dispositions.
- The likely public perception that, because of the assessment of their means, certain individuals will end up being disproportionately punished for minor offences.
- The current mechanisms in place to assess the defendant's ability to pay fines are already sufficient to avoid inequity and undue harshness for offenders of low income who receive a fine as a penalty.
- The scheme is of no value to infringement offences in respect of which a key factor is that the amount of the fine is fixed in advance.
- The difficulties in applying the scheme consistently across the country so that there were no sentencing disparities. It would in any event introduce greater inconsistencies than at present with the infringement fee scheme and the minor offence scheme.
- There would need to be a review of all the maximum fine penalties.
- It requires accurate information on the financial circumstances of the offender (difficulties in this area have resulted in such systems failing in overseas jurisdictions).
- A person with capital assets but little disposable income may get off relatively lightly unless a complicated scheme exists for the discovery and valuation of assets.

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<sup>42</sup> Infringement fees are broadly similar to Scotland's system of fiscal fines. They are issued for a range of low level offences such as vehicle offences, littering, underage drinking etc. and if accepted do not result in a criminal conviction. If a person issued with an infringement ticket does not pay before the due date the fee becomes a Court Fine and automatically has a fee of \$30 added to it. If the fine is not paid within 21 days enforcement action is taken and a further fee of \$100 is added to the fine. Source: Fines on-Line: A Step by Step Guide. At: [http://www.fines.govt.nz/flowchart\\_text.html](http://www.fines.govt.nz/flowchart_text.html)

7. The Criminal Justice Policy Group concluded that before a unit or time fine system can be successfully introduced a number of issues have to be addressed and resolved. These were identified as being:

- The interface between unit fines and other fines and reparation;
- Which offences to include in the system;
- How and when courts should obtain and check information on means;
- What the means assessment should include;
- A means of ensuring that information supplied is reliable;
- Resource implications for the court;
- The full extent of legislative changes required for a unit fines system, including maximum penalties; and
- The attitude of other participants in the criminal justice system to unit fines.

8. Problems to avoid in establishing a unit fines system were identified as being: any drastic increase in fines for offenders of moderate and high income for relatively trivial offences, unreliable means of obtaining accurate information on offenders' finances, and too much complexity or rigidity in calculating the appropriate fines.<sup>43</sup>

9. Very little research into the operation and effectiveness of unit/day/structured fines systems appears to have been carried out. In the United States the Bureau of Justice Assistance developed a Structured Fines Demonstration Project in four jurisdictions in the late 1980s. Data from the Iowa project showed that in moving from a tariff system to a structured fines system the percentage of offenders paying in full increased from 32% to 72% and while the average amount of a fine decreased from \$509 to \$469, the average amount of fines collected increased from \$197 to \$360.<sup>44</sup> The Maricopa County (Arizona) FARE project showed that structured fines provided a credible alternative to routine probation and that almost all FARE offenders (96%) paid something towards their fine in the 12 month follow-up compared to 77% of control offenders. For each quarter of the year a 'significantly greater' proportion of FARE offenders paid their fine in full.<sup>45</sup>

10. A U.S. Department of Justice report summarised the main findings from the Demonstration Projects as being:

1. while not much can be said about the outcome effectiveness of the day fines program, these programs have demonstrated that they can be effective operationally;
2. for a day fine program to demonstrate any effectiveness, a well designed collection system must be implemented;
3. practitioners who have used day fines (judges, prosecutors and defence lawyers) like the basic concept and generally agree that structured fines are fairer than tariff fines;

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<sup>43</sup> Ministry of Justice Criminal Justice Policy Group (2000) - *Op. cit.* At: [http://www.justice.govt.nz/pubs/reports/2000/review\\_money/chapter\\_7.html](http://www.justice.govt.nz/pubs/reports/2000/review_money/chapter_7.html)

<sup>44</sup> Pennsylvania Department of Corrections (2003) – DAY FINES: Structured Fines (Day Fines) as a Sentencing Alternative. At: [http://www.cor.state.pa.us/stats/lib/stats/Day\\_Fines.pdf](http://www.cor.state.pa.us/stats/lib/stats/Day_Fines.pdf)

<sup>45</sup> Turner, S. and Greene, J. (1999) – The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County. *The Justice System Journal*, Vol. 21 (1) pp.1-21.

4. the potential effectiveness of day fines as a sentencing option is significantly impaired by laws establishing mandatory fines or fees. When the minimum mandatory payment (fine floor) is high, it is difficult to develop a system in which fines can be collected from relatively poor offenders. At the other end of the monetary scale, a low maximum fine amount (fine ceiling) makes it difficult to develop a system that results in meaningful economic impacts on relatively affluent offenders; and
5. to make a day fine program work, a great deal of up-front policy formulation and program planning is necessary.<sup>46</sup>

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<sup>46</sup> Bureau of Justice Assistance (1996) – How to Use Structured Fines (Day Fines) as an Intermediate Sanction. At: [http://www.vera.org/publication\\_pdf/96\\_64.pdf](http://www.vera.org/publication_pdf/96_64.pdf)



## UNIT FINES IN ENGLAND AND WALES

1. A unit fine system was introduced in England and Wales, after a six month trial in four magistrates' courts, under the Criminal Justice Act 1991. The provisions came into force on 1 October 1992. The scheme applied only to fines imposed in a magistrate's court and specified that the number of units imposed on an offender could not exceed:

- 2 units in the case of a level 1 offence;
- 5 units in the case of a level 2 offence;
- 10 units in the case of a level 3 offence;
- 25 units in the case of a level 4 offence; and
- 50 units in the case of a level 5 offence or a statutory maximum offence (s.18 (4)).

2. The value of each unit was specified as being 'no less than 1/50<sup>th</sup> of level 1 on the standard scale' (£4 at the commencement of the Act) and 'no more than 1/50<sup>th</sup> of level 5 on that scale' (£100 at the commencement of the Act). As such, an offender sentenced to two units for a level 1 offence could be fined between £8 and £200 depending on his or her means, while an offender sentenced to eight units for a level 3 offence could be fined between £32 and £800.

3. The provisions were, however, repealed some 6 months later in 1993 by the Criminal Justice Act 1993 following a media campaign which focused on offenders receiving widely differing fines for the same offence after their income had been taken into account. In one notable case an individual was fined £1200 for dropping a crisp packet in the street although this was reduced to £48 on appeal. The Minister of State for the Home Office offered the following explanation:

“[T]here was widespread dissatisfaction with its operation among sentencers and the general public. We are concerned about the anomalous results that have been produced in several cases.... With the benefit of experience of the scheme's operation, we believe it to have been over-mechanistic and over-complicated. It interfered unnecessarily with the magistrates' discretion to impose appropriate fines in individual cases.”

4. One problem identified with the 1991 Act scheme was the fact that a relatively few number of units were available, and these were multiplied by weekly income. This consequently gave rise to inflexibility. In addition there was a lack of availability of means information which led to magistrates exercising their discretion and imposing the maximum possible fine.

5. In January 2005 The Management of Offenders and Sentencing Bill was introduced in the House of Lords but fell when Parliament was dissolved prior to the General Election. The Bill contained provisions to introduce a unit or day fine system. The proposed provisions were intended to implement the recommendation of The Carter Review “Managing Offenders, Reducing Crime” to introduce a day fine system as part of the measures to rebuild fines as a credible punishment. In England

and Wales the number of fines imposed by the courts fell by a fifth between 1992 and 2002. The intention was to focus services on more serious persistent offenders by diverting low risk offenders from community sentences to fines. By introducing a statutory methodology for calculating the amount of each fine, it was anticipated that day fines would bear more equally on people of differing means and there would be less fine default.

6. Fines in England and Wales are currently calculated by reference to the seriousness of the offence and the offender's ability to pay. It is thought that a day fine scheme would follow the same principles but introduce an explicit methodology for calculating the amount of each fine. The first step would be to decide the number of "day fine units" to be imposed according to the seriousness of the offence. Sentencing guidelines could be drawn up by the Sentencing Guidelines Council suggesting ranges of days for each type of offence. It would then be for the court to decide in each particular case the actual number of days to allocate. The second step would be to decide the financial amount to be accorded to each day fine unit, calculated according to the offender's disposable income. It is thought that the scheme would be limited to adult offenders sentenced in the magistrates' courts.

7. Since one of the problems with the scheme under the Criminal Justice Act 1991 was the lack of availability of means information, implementation of a new scheme could be linked to the new standard national means form already introduced in England and Wales. This would require the support of an appropriate IT support system. The scheme would also require a much higher number of units than the scheme under the 1991 Act, so to enable greater flexibility, with daily income rather than weekly income as the basis of the multiplier. The new standard means form together with the provision of help in the court to complete the form, the use of IT, better enforcement processes and Sentencing Guidelines Council support should allow any system introduced in the future to operate effectively. The intention to legislate to introduce day fines by 2009 was reaffirmed by the UK Government in February 2006 in its White Paper "A Five Year Strategy for Protecting the Public and Reducing Re-offending."<sup>47</sup>

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<sup>47</sup> Home Office (2006) – A Five Year Strategy for Protecting the Public and Reducing Reoffending. Cm.6717 Feb 9 2006. At: <http://www.probation.homeoffice.gov.uk/output/Page318.asp>

