



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

REPORT

ON

THE INDEXATION OF FINES:

A REVIEW OF DEVELOPMENTS

(LRC 65 – 2002)

IRELAND

The Law Reform Commission

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An Taoiseach Bertie Ahern, TD
Office of the Taoiseach
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Dublin 2

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Dear Taoiseach,

I enclose a copy of the Commission's Report on *The Indexation of Fines: A Review of Developments*, which will be published in the near future.

Yours sincerely,

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INTRODUCTION

A. Background to the Report

1. In 1991, the Law Reform Commission published a *Report on the Indexation of Fines*¹ (“the 1991 Report”), wherein it concluded that there was a pressing need for action to combat the erosion by inflation of the value of criminal fine maxima.² The Commission articulated three core objectives of any reforming legislation in this area. First, it should ensure the imposition of equal fines for offences of equal gravity. Secondly, it should take account of the past and future effect of inflation on the real value of fines. Thirdly, it should be flexible enough to adjust for the differing means of those upon whom fines are imposed.

2. Having surveyed the laws of several jurisdictions,³ the Commission proposed and analysed two possible reform options. The first option was to adopt by legislation a standard fine system, whereby fine values would be maintained by reference to a price index. In explaining the nature of a standard fine system involving the use of categories, the Commission stated:

“Existing fine levels are first brought up to date. Then categories of fine maxima are prescribed, in one of which a place can be found for every monetary fine maximum, *e.g.* in categories of up to £100, up to £500, up to £1,000 and so on. Thereafter, reference is only made to the category; and the monetary maxima which attach to each category can be

¹ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991).

² *Ibid.* at 2 and 67.

³ The laws in the following jurisdictions were surveyed: the United Kingdom, Australia, the Netherlands, Belgium, Germany, Sweden and the United States of America.

amended from time to time in a process which is both simple and comprehensive.”⁴

3. The second option was to adopt by legislation a variable fine system,⁵ whereby fines would be calculable in a particular case by reference to the gravity of the offence and the means of the offender. In explaining the nature of a variable fine system, the Commission stated:

“A convict may be fined 100 units, for example, for an infraction of a certain gravity. Each unit will be a prescribed fraction of his income (*e.g.* 1/1000). There is no need for indexation in such a system, as it adjusts automatically to differing levels of income over time, as well as between different persons.”⁶

4. The Commission concluded its analysis of variable fines in Chapter Four of the 1991 Report as follows:

“Most criticisms of day fine systems can be answered. However, because of what one might consider to be the peculiar circumstances of this jurisdiction, two difficulties of more stubborn mien present themselves. One is practical, relating to the ascertainment of the means of offenders; the other is constitutional, being the problem of the relationship of a day fine system with the regime of summary trial and trial on indictment.

In its favour, it has an inherent capacity to accommodate fluctuations in the value of money, as well as setting out to be absolutely fair in terms of the weight of punishment imposed on each fine. The alternative of a standard fine system, no matter how well designed, must inevitably entail either unnecessary hardship for poorer offenders, or meaningless

⁴ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 20.

⁵ A variable fine system is also referred to as a “unit fine” system or a “day fine” system.

⁶ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 11.

finer for the more wealthy. Day fines allow the penal impact of fines to be maintained not only over time, but also over socio-economic class. Also, they tend to promote clarity in the sentencing process, and consistency in fining offenders. They allow the extension of fines to more serious offences.

While it is thought that the social and economic advantages of a day fine system would be considerable, the obstacles to its introduction could be unlimited in duration and effect (including the possibility of being found repugnant to the Constitution). The idea was met by considerable reservations on the part of those to whom the earlier Discussion Paper was circulated. Many were of opinion that the practical difficulties posed by the adoption of a variable fine system could be even greater than we surmised. In the light of such responses from professionals working in all parts of the criminal justice system, and of the system's potential practical and constitutional infirmity, we feel unable positively to recommend a variable fine system for this jurisdiction at this stage. We remain confident of its potential merits, however, and suggest that the question be considered again, after a standard fine scheme has been introduced, and in the light, in particular, of British experience.”⁷

5. Ultimately, for reasons of practicality, clarity and doubts as to the constitutional validity of a variable fine scheme, the Commission recommended the adoption of a standard fine scheme. The Commission summarised its recommendation thus:

“Adopting either the standard or unit fine system would transform the present situation for the better. Ultimately, it is thought that a variable fine scheme could be superior to a standard fine system. However, we are inclined to the view that a variable fine scheme would be difficult and complicated to operate, particularly because of the difficulty in ascertaining readily the means of convicted persons. Its constitutional validity, moreover, cannot be regarded as being beyond doubt. Our conclusion therefore is that, as an initial step, priority

⁷ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 65 – 66.

should be given to the immediate introduction of a standard fine system. This would not, however, preclude the introduction of a variable fine system at some stage in the future.”⁸

6. Accordingly, the Commission recommended the adoption of a category system involving the selection of three to five categories which would extend retrospectively to embrace equivalent bands of fine values for earlier periods.⁹ The Commission explained its recommendation thus:

“First, one would have only a limited number of possible maximum fines. For example, it might be decided that three levels was adequate. These could be fixed in present day values at (a) not more than, say, £100 (for relatively trivial offences), (b) £500 (more serious offences) and (c) £1,500 (the most serious). These one would call categories A, B, and C. The sums fixed would not, of course, stand for all time but a mechanism to update the values of each category would be fixed.

The next step is to decide to which category to assign each existing maximum fine so as to arrive at the appropriate level of fine. Again, mathematical exactitude is not required and it is probably not necessary to deal individually with each Act. From looking at the tables we see that roughly speaking the value of money has halved since 1980, decreased four times since 1975, decreased ten times since 1964, decreased twenty times since 1942, and decreased fifty times since 1914. A maximum fine of £100 today therefore equates to a maximum fine of £50 in 1980, £25 in 1975, £10 in 1964, £5 in 1942 and £2 in 1914. In the century before 1914 prices were very stable.

Using this logic we can construct a table which enables us to assign any maximum fine in any piece of legislation to its appropriate category, as in the following example:

⁸ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 68.

⁹ *Ibid.* at 28 – 31.

	Category A (Present maximum: £100)	Category B (Present maximum: £500)	Category C (Present maximum: £1,500)
1980 –	£100 or less	£100 – £500	Over £500
1975 – 1979	£50 or less	£50 – £250	Over £250
1965 – 1974	£25 or less	£25 – £125	Over £125
1945 – 1964	£10 or less	£10 – £50	Over £50
1915 – 1944	£5 or less	£5 – £25	Over £25
– 1914	£2 or less	£2 – £10	Over £10

The appropriate category is fixed by reading the level of fine opposite the date of the Act in which it is contained and seeing into which category it falls.”¹⁰

B. Overview of the Report

7. As noted above, the Commission recommended in its 1991 Report that priority should be given to the immediate introduction of a standard fine system involving the use of categories. That recommendation was underpinned by significant policy considerations with constitutional force. Legislation giving effect to the recommendation has not yet been passed. The Commission also reserved for future consideration (and, in particular, in the light of the British experience) the question of whether a variable fine system

¹⁰ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 29 – 30.

should be introduced. Against this background, the Commission decided that it was appropriate to review developments in relation to the indexation of fines since the publication of the 1991 Report. The objectives of this review were to:

- (a) supplement the research undertaken for the 1991 Report;
- (b) highlight significant developments in relation to the indexation of fines in Ireland and other jurisdictions;
- (c) consider questions which were left open by the Commission in its 1991 Report; and
- (d) make recommendations to the Government in the light of the foregoing.

C. Outline of the Report

8. Chapter One of this Report highlights significant developments in Ireland in relation to the indexation of fines since 1991. Chapter Two highlights significant developments in this area in other jurisdictions. Specifically, the laws of the following jurisdictions have been surveyed and the relevant provisions thereof will be outlined: the United Kingdom, the Commonwealth of Australia, the Australian Capital Territory, New South Wales, the Northern Territory of Australia, Queensland, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Canada, Hong Kong and the United States of America. Chapter Three presents the conclusions and recommendations of the Commission.

CHAPTER ONE: A REVIEW OF DEVELOPMENTS IN IRELAND SINCE 1991

A. Introduction

1.01 The recommendations of the Law Reform Commission in its 1991 Report have yet to be implemented by legislation. There have, however, been some piecemeal legislative developments which should be noted. In this regard, the legislative provisions which establish an indexation scheme for “on-the-spot” litter fines will be outlined. Although levies are beyond the scope of this Report, the legislative provisions concerning environmental levies and landfill levies will also be outlined since they too provide for indexation schemes and are, therefore, relevant to an assessment of the central issues addressed in this Report. This Chapter will also highlight legislative and judicial developments regarding the assessment of fines.

B. Developments Since 1991

(a) *Litter Pollution Fines*

1.02 Section 28(1)(b) of the *Litter Pollution Act, 1997*, as amended by the *Litter Pollution Regulations, 1999*,¹¹ empowers a litter warden or member of the Garda Síochána who has reasonable grounds for believing that a person is committing or has committed a prescribed offence under the Act to give the person a notice stating, *inter alia*, that he is alleged to have committed the offence in question and that he can within a specified time period¹² make a payment of £50,¹³

¹¹ S.I. No. 359 of 1999. The Regulations were confirmed by s.14(2) of the *Waste Management (Amendment) Act, 2001*.

¹² The period specified is 21 days beginning on the date of the notice.

accompanied by the notice, to the local authority specified therein. Such a notice must also state that a prosecution in respect of the alleged offence will not be instituted during the period specified in the notice and that, if the payment specified in the notice is made during that period, no prosecution in respect of the alleged offence will be instituted.¹⁴

1.03 Section 14(3) of the *Waste Management (Amendment) Act, 2001* amended section 28(1)(b) of the *Litter Pollution Act, 1997*, with effect from 1 January 2002, by the substitution of “€125” for “£50”. In addition, section 14(4) of the 2001 Act empowers the Minister for the Environment, having regard to certain specified factors, to make an order amending section 28(1)(b) of the *Litter Pollution Act, 1997* by substituting for the amount specified therein for the time being an amount that is greater than that amount. The specified factors are:

- (a) changes in the value of money generally in the State since the passing of the Act or the last previous exercise of the power under section 14(4); and
- (b) the need to ensure the continued effectiveness of the procedures contained in section 28 of the *Litter Pollution Act, 1997* with respect to the enforcement of the provisions of that Act.¹⁵

¹³ Section 28(1)(b) originally provided for a payment of £25. This amount was increased to £50 by the *Litter Pollution Regulations, 1999* and, most recently, to €125 by the *Waste Management (Amendment) Act, 2001*. In relation to the latter, see para.1.03 below.

¹⁴ Section 28(1)(b) also empowers a dog warden (within the meaning of the *Control of Dogs Act, 1986*) or a member of the Garda Síochána to give such a notice to a person where he has reasonable grounds for believing that the person is committing or has committed a dog related offence under s.22 of the *Litter Pollution Act, 1997*.

¹⁵ The indexation scheme provided for by s.14(4) of the *Waste Management (Amendment) Act, 2001* replaced the indexation scheme provided for by s.28(4) of the *Litter Pollution Act, 1997*. Section 28(4) of the latter Act provided that:

“Where the Minister was satisfied that the monetary amount for the time being standing specified -

- (a) in s.28(1)(b), or
- (b) in respect of s.28(1)(b), by virtue of a regulation made under s.28,

1.04 Pursuant to section 14(5) of the 2001 Act, the Minister is empowered to amend or revoke an order under section 14(4) of that Act. Section 14(6) of the 2001 Act provides that the power under section 14(4) and (5) shall not be exercised in such a manner as will result in the amount standing specified in section 28(1)(b) of the *Litter Pollution Act, 1997* on any date in any relevant period¹⁶ being greater by 25 per cent than the amount that stood so specified on any other date in that period.

(b) The Environmental Levy

1.05 The power to impose a levy in respect of, *inter alia*, the supply to customers of plastic bags is conferred by section 72 of the *Waste Management Act, 1996*, as inserted by section 9 of the *Waste Management (Amendment) Act, 2001*. Pursuant to section 72(2), the Minister for the Environment can, with the consent of the Government, make regulations providing that an “environmental levy” shall be chargeable, leviable and payable in respect of the supply to customers of plastic bags, at the point of sale to them of the goods or products to be placed in the bags or otherwise, in or at a specified class or classes of supermarket, service station or other sales outlet.¹⁷ Pursuant to section 72(3), the Minister is required to specify

should, having regard to the changes in the value of money generally in the State since the monetary amount was so specified, be varied, the Minister may by regulation specify an amount that the Minister considers appropriate, and in such case s.28(1)(b) shall, in relation to any offence referred to in s.28(1) committed while the regulation is in effect, have effect as if the amount specified in the regulation was set out in s.28(1)(b).”

¹⁶ “Relevant period” is defined in s.14(1) of the *Waste Management (Amendment) Act, 2001* as:

- (a) the period of 3 years beginning on the date of the first exercise of the power under s.14(4), and
- (b) each period of 3 years after the expiration of the period mentioned in para.(a).

¹⁷ The Minister is also empowered to make a provisional order extending the application of s.72 to such other types of article as he or she considers appropriate: *Waste Management Act, 1996*, s.72(12), as inserted by the *Waste Management (Amendment) Act, 2001*, s.9. See para.1.06 below.

the amount of the levy in such regulations but the levy cannot exceed 19 cent for each plastic bag supplied to a customer.¹⁸ Section 72(7) empowers the Minister to make an order once, and once only, in each financial year¹⁹ amending section 72(3) by substituting for the amount standing specified in that subsection for the time being an amount equal to the amount obtained by multiplying 19 cent by the figure specified in section 72(8).²⁰ The latter figure is the quotient, rounded up to 3 decimal places, obtained by dividing the consumer price index number²¹ relevant to the financial year in which the order concerned is made by the consumer price index number relevant to the 2001 financial year.²²

1.06 Section 72(12) of the *Waste Management Act, 1996*, as inserted by section 9 of the *Waste Management (Amendment) Act, 2001*, empowers the Minister to make a provisional order²³ extending the application of section 72 to such other types of article as he or she considers appropriate by:

- (i) substituting for references to plastic bags in section 72 references to articles specified in the order (and the articles so specified include plastic bags), and

¹⁸ *Waste Management Act, 1996*, s.72(3), as inserted by the *Waste Management (Amendment) Act, 2001*, s.9.

¹⁹ Beginning with the financial year following the financial year in which the *Waste Management (Amendment) Act, 2001* was passed.

²⁰ If the amount so obtained is not a whole number of cent and the Minister considers it appropriate to do so and specifies in the order that the amount has been so rounded, rounding (up or down as he or she thinks fit) the amount to the nearest whole number of cent.

²¹ The “consumer price index number” means the All Items Consumer Price Index Number compiled by the Central Statistics Office and references to the consumer price index number relevant to any financial year are references to the consumer price index number at such date in that year as is determined by the Minister with the consent of the Minister for Finance: s.72(1) of the *Waste Management Act, 1996*, as inserted by s.9 of the *Waste Management (Amendment) Act, 2001*.

²² *Waste Management Act, 1996*, s.72(8), as inserted by the *Waste Management (Amendment) Act, 2001*, s.9.

²³ A provisional order does not have effect unless or until it is confirmed by an Act of the Oireachtas: *Waste Management Act, 1996*, s.72(8), as inserted by the *Waste Management (Amendment) Act, 2001*, s.9.

- (ii) making such consequential amendments of section 72²⁴ as he or she considers necessary or appropriate, and such amendments may include a provision:
 - (I) specifying that section 72(3) shall, in relation to a particular article or articles referred to in the order, apply as if, for the amount standing specified in that subsection for the time being, there were substituted an amount specified in the order (in clause (II) of this sub-paragraph referred to as the ‘altered amount’), and
 - (II) in consequence of that specification, specifying that:
 - (A) s.72(7) shall, in relation to the said article(s) apply as if, for the reference in that subsection to 19 cent, there were substituted a reference to the altered amount, and
 - (B) s.72(8) shall, in relation to the said article(s), apply as if, for the reference in that subsection to the consumer price index number relevant to the financial year 2001, there were substituted a reference to the consumer price index number relevant to a financial year specified in the order.

(c) *The Landfill Levy*

1.07 The power to impose a landfill levy is conferred by section 73 of the *Waste Management Act, 1996*, as inserted by section 11 of the *Waste Management (Amendment) Act, 2001*. Pursuant to section 73(1), the Minister can, after consultation with any Minister of the Government concerned, make regulations providing that there shall be chargeable, leviable and payable a “landfill levy” in respect of certain waste disposal activities therein specified.²⁵ Pursuant to

²⁴ Other than s.72(12) and (13).

²⁵ The following are the specified waste disposal activities:

- (a) the carrying on of a specified class or classes of waste disposal activity (being an activity referred to in para.1 or 5 of the Third

section 73(3), the Minister is required to specify the amount of the levy in such regulations but the levy cannot exceed €19 for each tonne of waste disposed of.²⁶ Section 73(8) empowers the Minister to make an order once, and once only, in each financial year,²⁷ amending section 73(3) by substituting for the amount standing specified in that subsection for the time being a greater amount, not being an amount that is greater than that amount by €5.

(d) Determining the Amount of a Fine

1.08 Order 23, Rule 4 of the *District Court Rules, 1997*²⁸ provides that where the District Court imposes a penalty it must, in fixing the amount of the penalty, take into consideration amongst other things the means of the accused so far as they are known to it at the time. This reflects section 43(2) of the *Criminal Justice Administration Act, 1914* which provides that “[a] court of summary jurisdiction, in fixing the amount of any fine to be imposed on an offender, shall take into consideration, amongst other things, the means of the offender so far as they appear or are known to the court.”

1.09 Pursuant to section 109 of the *Children Act, 2001*, a court is required, in determining the amount of a fine to be imposed on a child²⁹ and, also, in determining whether to award costs against a

Schedule); or

- (b) the disposal by means of a waste disposal activity referred to in para.1 or 5 of the Third Schedule, or a specified class or classes of such activity, of a specified class or classes of waste; or
- (c) subject to subs.(2), both the carrying on of an activity referred to in para.(a) and an activity referred to in para.(b).

²⁶ Subject to s.73(3), the regulations can specify as respects the amount of the levy payable under them, different such amounts by reference to different activities referred to in any of paragraphs (a), (b) and (c) of s.73(1) in respect of which the levy is so payable: *Waste Management Act, 1996*, s.73(4), as inserted by the *Waste Management (Amendment) Act, 2001*, s.9.

²⁷ Beginning with the financial year following the financial year in which the *Waste Management (Amendment) Act, 2001* was passed.

²⁸ S.I. No. 93 of 1997.

²⁹ The power of the court to determine the amount of a fine to be imposed on a child is subject to s.108 of the Act which provides that where a court is

child and the amount of any such costs, to have regard to, among other considerations, the child's present and future means in so far as they appear or are known to the court. For that purpose, the court can require the child to give evidence as to those means and his or her financial commitments.

1.10 The nature and extent of the duty to have regard to the means of an offender when a court is imposing a fine was considered by the Court of Criminal Appeal in *The Director of Public Prosecutions v. Redmond*³⁰ in the context of an appeal by the Director of Public Prosecutions for a review of a fine pursuant to section 2 of the *Criminal Justice Act, 1993*. The respondent had pleaded guilty to 10 charges which related to a failure to make tax returns in respect of a number of specified years.³¹ The trial judge had imposed a fine of £500 in respect of each of the first five charges and £1,000 in respect of each of the next five and, thus, a total fine of £7,500. The Court of Criminal Appeal noted that the appellant had confined his application for review to the proposition that the fines were too small in amount and did not submit that a sentence of imprisonment was appropriate. In this light, it considered that it was "important to state the principle on which fines are assessed" and, citing O'Malley on *Sentencing Law and Practice*,³² stated that "regard must be had to the means of the offender when a fine is being imposed".³³ The Court continued:

satisfied of the guilt of a child whom it has dealt with summarily for any offence and it is of opinion that the appropriate penalty is or includes a fine, the fine shall not exceed half the amount which the District Court could impose on a person of full age and capacity on summary conviction for such offence.

³⁰ Court of Criminal Appeal, 21 December 2000.

³¹ The ten charges were virtually identical. The first alleged:

"That [the accused] within the State, being a chargeable person knowingly or willfully failed to deliver a return in the prescribed form of [his] income, profits or gains, or of the sources of [his] income, profits or gains, to the appropriate Inspector of Taxes for the year of assessment 1989/90 on or before the specified return date for that chargeable period, that is to say 31 December 1989, as was required by s.10 of the *Finance Act, 1988*, contrary to s.94(2)(e)(i) of the *Finance Act, 1983*, as amended."

³² Thomas O'Malley, *Sentencing Law and Practice* (Round Hall Press, 2000).

³³ *The Director of Public Prosecutions v. Redmond* Court of Criminal Appeal, 21 December 2000, 25.

“In this respect, a fine imposed by a criminal court differs from a revenue financial penalty. Unless there is specific provision to the contrary ... a Court must indeed proportion the fine to the means of the offender.³⁴ A revenue penalty, however, is generally of fixed amount (whether provided by statute or arrived at as a result of computation) and is payable in that sum without regard to the means of the offender subject only to such statutory mitigation as may be possible. For example, a Court would rarely impose a fine which would have the consequence that the Defendant would have to sell his or her house because to do so might be regarded as an extraordinary punitive measure. A revenue penalty, on the contrary, arises in a specified amount without regard to the means of the offender or what steps he will have to take to pay it. And there is generally only a limited amount of mitigation available, and that at the discretion of the revenue.”³⁵

1.11 The Court observed that a fine of £7,500 is neither lenient nor harsh in itself, but only in terms of the circumstances of the person who must pay it:

“Is he dependent on a public service pension or has he other resources? Has he paid many hundreds of thousands or nothing at all in prior penalties? Was he effectively ruined by the Revenue settlement or has he remaining assets?”³⁶

1.12 The Court noted that there was no evidence on any of these points. It stated that since the appellant’s specific contention was that the fines were inadequate, to the point of representing divergence from principle, it was “a grave difficulty for the Appellant’s case that there was no evidence whatsoever of the Respondent’s means”.³⁷

³⁴ In this context, see also, *The People (DPP) v. Sheedy* [2000] 2 IR 184 where the Court of Criminal Appeal held that sentences should be proportionate to the crime and also to the personal circumstances of the applicant (citing *The People (Attorney General) v. O’Driscoll* [1972] 1 Frewen 351, 359).

³⁵ *The Director of Public Prosecutions v. Redmond* Court of Criminal Appeal, 21 December 2000, 25 – 26.

³⁶ *Ibid.* at 29.

³⁷ *Ibid.*

The Court added that “[h]aving regard to the obligation of the Court imposing a fine to take these means into account, it seems difficult to criticize a particular level of fine without this evidence.”³⁸

1.13 In the circumstances of the case and having regard to the onus of proof on the application, the Court concluded that the matters stated by the trial judge to have been taken into consideration were correctly so considered:

“The fines imposed are the result of a logical process whereby the trial judge, working with the limited and sometimes contradictory information before him, tried to balance the gravity of the offences, the other penal consequences to the offender, and the personal circumstances. There is no evidence that he erred in principle.”³⁹

C. Conclusions

1.14 The recommendations of the Commission in its 1991 Report in relation to a standard fine system have not yet been implemented by legislation. However, there have been a number of legislative developments primarily in the field of environmental law which are rooted in the same policy considerations as those underlying the recommendations of the Commission. Any lingering doubts about the force of those policy considerations are quickly removed by reference to the survey of legislative developments in other jurisdictions in Chapter Two of this Report. Most of those jurisdictions have enacted laws aimed at combating the erosion by inflation of criminal fine maxima, thus achieving the central objective that the Commission argued should underpin any reforming legislation in this jurisdiction.

1.15 The enactment of legislative provisions such as those contained in the *Litter Pollution Act, 1997* and the *Waste Management (Amendment) Act, 2001* is welcome to the extent that it provides a means of updating certain fines and levies in accordance

³⁸ *The Director of Public Prosecutions v. Redmond* Court of Criminal Appeal, 21 December 2000, 29.

³⁹ *Ibid.* at 31.

with, *inter alia*, the value of money and thus, achieves, at least in part, the central objective of reforming legislation articulated by the Commission in 1991. However, the Commission believes that a systematic approach to the indexation of fines is required and that it is undesirable and unnecessarily complicated to attempt indexation on a piece-meal legislative basis. Rather, the Commission favours the enactment of legislation establishing a standard fines system based on the categories model outlined in its 1991 Report. Such a system would apply to fines for summary offences across the full spectrum of legislation, thus obviating the need to target laws on an individual basis while enhancing accessibility to and the clarity of the relevant provisions of such laws.

1.16 If legislation based on the categories model favoured by the Commission is to be enacted, it will be necessary to make provision for the existing scheme for the indexation of litter fines outlined above. One option would be specifically to exclude the monetary amounts encompassed by that scheme from the general indexation of fines framework. Another option would be to repeal this indexation scheme, thus allowing the monetary amounts covered by it to be updated in accordance with the general indexation of fines framework. For reasons of clarity, consistency and practicality, the Commission favours the latter approach.

CHAPTER TWO: A REVIEW OF DEVELOPMENTS IN OTHER JURISDICTIONS SINCE 1991

A. Introduction

2.01 This Chapter provides an overview of significant developments in other jurisdictions since the publication by the Commission of its 1991 Report.

B. Developments in Other Jurisdictions

(a) *United Kingdom*

(i) *Standard Fine Scale*

2.02 As outlined in the 1991 Report, section 37 of the *Criminal Justice Act, 1982* introduced a standard scale of fines for summary offences in England and Wales.⁴⁰ The terms of the standard scale were set out as follows by section 37(2):

<i>Level on the Scale</i>	<i>Amount of fine</i>
1	£50
2	£100
3	£400
4	£1,000
5	£2,000

⁴⁰ *Criminal Justice Act, 1982*, s.37(1).

2.03 Section 37(2) of the *Criminal Justice Act, 1982* and section 289G of the *Criminal Procedure (Scotland) Act, 1975* (the corresponding statutory provision in Scotland) were substituted by section 17(1) of the *Criminal Justice Act, 1991*⁴¹ as follows:

“The standard scale is shown below:

<i>Level on the Scale</i>	<i>Amount of Fine</i>
1	£200
2	£500
3	£1,000
4	£2,500
5	£5,000”

2.04 An enactment (whether contained in an Act passed before or after the 1982 Act) which provides that a person convicted of a summary offence shall be liable on conviction to a fine or a maximum fine by reference to a specified level on the standard scale is construed as referring to the standard scale for which section 37 provides, as that standard scale has effect from time to time by virtue of section 37 or an order made under section 143 of the *Magistrates' Courts Act, 1980*.⁴² An enactment which confers power by subordinate instrument to make a person liable on conviction of a summary offence (whether or not created by the instrument) to a fine

⁴¹ Chapter 53 of 1991. It should be noted that Appendix VII of the 1991 Report which is headed “U.K. *Criminal Justice Act, 1991* (relevant extracts)” in fact contains extracts from the *Criminal Justice Bill*, presumably because it had not been enacted before the Report was printed. There are a number of significant differences between the text of the said Bill and the *Criminal Justice Act, 1991*.

⁴² *Criminal Justice Act, 1982*, s.37(1).

or maximum fine by reference to a specified level on the standard scale is construed likewise.⁴³

2.05 By way of example, section 96(11A) of the *Transport Act, 1968*,⁴⁴ as amended, provides that “[w]here in the case of a driver of a motor vehicle, there is in Great Britain a contravention of any requirement of the applicable [European] Community rules as to periods of driving, or distance driven, or periods on or off duty, then the offender and any other person (being the offender’s employer or a person to whose orders the offender was subject) who caused or permitted the contravention shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.” This section was considered by the House of Lords in *Vehicle Inspectorate v. Nuttall*.⁴⁵

(ii) *Unit Fines System*

2.06 As noted above, the Commission stated in its 1991 Report that it was confident of the potential merits of a variable fine system and it suggested “that the question be considered again, after a standard fine system has been introduced, and *in the light, in particular, of British experience*.”⁴⁶ The British experience in relation to a variable fine system since the publication of the 1991 Report is particularly instructive. Pursuant to sections 18 and 19 of the *Criminal Justice Act, 1991* (which came into force on 1 October 1992), England and Wales adopted a unit fines scheme.⁴⁷ However, these sections were repealed in 1993 by section 65 of the *Criminal Justice Act, 1993*. Having regard to the views expressed by the Commission in its 1991 Report, it is appropriate to outline the provisions of sections 18 and 19 of the *Criminal Justice Act, 1991* and to explore the reasons for their demise.

⁴³ *Criminal Justice Act, 1982*, s.37(1).

⁴⁴ Chapter 73.

⁴⁵ [1999] 1 WLR 629; [1999] 3 All ER 833.

⁴⁶ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 65 – 66 (emphasis added).

⁴⁷ The unit fines system was provided for by ss.18 and 19 of the *Criminal Justice Act, 1991* but it only came into force on 1 October 1992. See Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2000) at 273.

2.07 Section 18 of the *Criminal Justice Act, 1991* introduced a unit fines system which applied where a magistrates' court imposed a fine on an individual: (a) for a summary offence which was punishable by a fine not exceeding a level on the standard scale; or (b) for a statutory maximum offence (that is, an offence which was triable either way and which, on summary conviction, was punishable by a fine not exceeding the statutory maximum).⁴⁸ The amount of such a fine was stated to be the product of:

- (a) the number of units which was determined by the court to be commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it;⁴⁹ and
- (b) the value to be given to each of those units (that is, the amount which, at the same or any later time, was determined by the court in accordance with rules made by the Lord Chancellor to be the offender's disposable weekly income).⁵⁰

⁴⁸ *Criminal Justice Act, 1991*, s.18(1).

⁴⁹ *Criminal Justice Act, 1991*, s.18(2). In making such a determination, a court was required to take into account all such information about the circumstances of the offence (including any aggravating or mitigating factors) as was available to it (s.18(3)). The number of units so determined could not exceed:

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

In the above context, a "level 1 offence" meant a summary offence which was punishable by a fine not exceeding level 1 on the standard scale, and corresponding expressions were construed accordingly.

⁵⁰ *Criminal Justice Act, 1991*, s.18(2). In this regard, the amount determined in the case of any offender could not be: (a) less than 1/50th of level 1 on the standard scale (£4 at the commencement of s.17); or (b) more than 1/50th of level 5 on that scale (£100 at the commencement of s.17) (s.18(5)). However, where the fine was payable by a person who was under the age of 18 years, the foregoing fractions and monetary amounts had to be construed

2.08 Section 19 of the 1991 Act required a court, in fixing the amount of a fine,⁵¹ to take into account, *inter alia*, the means of the offender so far as they appeared or were known to the court, irrespective of whether the effect of so doing was to increase or reduce the amount of the fine.⁵²

2.09 As noted above, the units fines system introduced by sections 18 and 19 of the 1991 Act was abolished by section 65 of the *Criminal Justice Act, 1993*.⁵³ In this regard, it is appropriate to explore the reasons for the downfall of the units fines system in England and Wales. The Minister of State for the Home Office offered the following explanation on behalf of the British Government:

“[T]here was widespread dissatisfaction with its operation among sentencers and the general public.⁵⁴ 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.”⁵⁵

as:

- (a) a reference to 1/20th of that fraction or amount in the case of a fine payable by a person who was under the age of 14 years; and
- (b) a reference to 1/5th of that fraction or amount in the case of a fine payable by a person who had attained that age (s.18(6)).

⁵¹ Other than one the amount of which had to be fixed under s.18.

⁵² *Criminal Justice Act, 1991*, s.19(1).

⁵³ Chapter 36 of 1993.

⁵⁴ Forston observes that “the abolition of the unit fines system followed considerable consultation with the public, the judiciary and interested bodies” (annotations to Part VI of the *Criminal Justice Act, 1993* in 3 *Current Law Statutes Annotated, 1993* at 36-115).

⁵⁵ Standing Committee B, col. 240, 17 June 1993.

2.10 Professor Andrew Ashworth highlighted several problems with the unit fines system that had been introduced.⁵⁶ First, “the amount of unit fines under the statutory scheme was far higher than in the experimental schemes”⁵⁷ and it, therefore, “resulted in a scheme with a quite different flavour”.⁵⁸ Secondly, “the scheme emphasised income to the exclusion of capital and other indicia of wealth – an approach aimed at simplicity, but productive of some injustice.”⁵⁹ Thirdly, “the statutory scheme became extremely complex, not merely in the exceptions incorporated in section 18 of the Act but also in the regulations for calculating weekly disposable income.”⁶⁰ Fourthly, “a vocal group of magistrates, particularly some stipendiary magistrates, felt that the scheme was misconceived because it was too rigid and overlooked the problems of determining the income of certain types of offender, such as prostitutes and foreign tourists.”⁶¹ However, Professor Ashworth observed that it was a fifth difficulty that was probably the major factor in the decision to abolish unit fines:

“The system resulted in particularly high fines for offenders who might previously have received relatively low fines, particularly middle-class motoring offenders with moderately- or well-paid jobs. This, of course, was one of its aims: the 1990 White Paper referred to the need to impose substantial fines on ‘an increasing minority of offenders with greater resources.’ If courts had routinely announced fines in terms of the number of units imposed, rather than the total payment, this element in the new scheme might have been less open to

⁵⁶ Ashworth, *Sentencing and Criminal Justice* (3rd ed., Butterworths, 2000) at 273 *ff.*

⁵⁷ As Professor Ashworth noted, few of the experimental courts went above the £25 per unit, whereas the statutory scheme went up to £100 per unit. *Ibid.* at 273.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* Professor Ashworth observed that “since the scheme was never intended to be precise, but merely to mark a significant step towards equality of impact, it was unfortunate that it became so complex; it was also inappropriate for a scheme to be operated by lay magistrates.” *Ibid.*

⁶¹ *Ibid.*

misinterpretation. As it was, the press, and particularly one newspaper group, began assiduously to collect examples of different levels of fines being imposed on people who had committed similar offences. One newspaper headline ran: ‘Two cases, minutes apart, but with very different penalties. For a Mr. Rothschild, a £2,000 fine; for a man named Bell, an £84 fine.’ No mention was made of the principle of equal impact that lay behind the new scheme. The journalists almost seemed to be assuming that the two men should have received the same fine, despite the vast difference in their incomes. The widely publicised case of a man who was fined £1,200 for dropping an empty crisp packet in the street increased the pressure on the Government to ‘do something about’ the new scheme, even though it quickly became apparent that the reason why magistrates had fined him at £100 per unit was that he failed to disclose his income to the court.”⁶²

2.11 Professor Ashworth noted that when proposing unit fines, the White Paper included the portentous statement that “it can be difficult to make it clear to the public, and to offenders, that a particular fine is a fair punishment when another equally culpable is given a fine of a different level.”⁶³ He observed that although it was difficult, “at the time when some magistrates, many newspaper editors and many politicians were failing to grasp the point, little effort was made to promote the claims of the principle of equal impact.”⁶⁴

2.12 The difficulties that beset the English unit fines system were also recently considered by the Criminal Justice Policy Group of the New Zealand Ministry of Justice (“the New Zealand Group”).⁶⁵ The New Zealand Group concluded that the abandonment of the unit fines system seemed to result from the widespread media criticism of apparently very high fines being imposed for minor offences: “[p]art

⁶² Ashworth, *Sentencing and Criminal Justice* (3rd ed., Butterworths, 2000) at 273 – 274.

⁶³ *Ibid.* at 274.

⁶⁴ *Ibid.*

⁶⁵ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5.

of the difficulty was that the media were reluctant to acknowledge the rationale of equal impact between offenders of different means, and criticised different fines for similar offences committed by rich and poor individuals as though they were grotesque aberrations, rather than the result that the legislation had been intended to achieve.”⁶⁶ Even so, the Group considered that “it was difficult to view the sheer size of the increase in fines for the better-off offenders as good justice in some cases”:

“This arose because of constraints in the wording of the Act and the increase in the upper limit of the daily monetary unit from that which applied in the pilots. The unit value was assessed as one-third of the residual income after taking account of allowances but if there were few allowances to set against income the maximum £100 unit value could be reached on relatively modest incomes. People on a variety of middle-range incomes were pushed fairly quickly towards the top level of £100 since fixed allowances more suited to a lower income level/standard of living had been set by the bench. There also developed a tendency for the maximum unit value to be applied in the absence of proper means information, although sentencers had the discretion to impose whatever value they thought reasonable in such cases. Many of the highly publicised inappropriate fines had been subject to the maximum unit value. These were reduced on appeal, but because the same media coverage did not accompany these adjustments, the harmful publicity could not be undone. A notorious example was a fine of £1,200 for discarding a crisp packet on the ground instead of placing it in a litter bin (the offender also refused to pick the litter up and was cheeky to the policeman who was on the scene). The unit value had been fixed at £100 after the offender failed to provide any means information. This fine was subsequently reduced to £48 or 12 units at £4 when evidence was produced that the offender was unemployed.”⁶⁷

⁶⁶ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5.

⁶⁷ *Ibid.*

2.13 The New Zealand Group also highlighted “the discrepancy between fixed penalties and the unit fines that could be imposed if the fixed penalty offence was taken to court”:⁶⁸

“The legislation provided for the unit fine to be increased to the level of a fixed penalty (presumably so poor offenders would not have an incentive to take trivial cases to court) but there was no corresponding power to reduce the fine to the level of the fixed penalty. An example of the sort of anomaly that could arise, which received publicity, was when a fine of £500 was imposed for illegal parking on an individual whose car had broken down on a road where parking was prohibited. The defendant had exercised his right to take the case to court rather than pay the infringement fee by mail, because he thought he had a legitimate defence. A faulty means assessment resulted in the maximum £100 unit rate being set. The resulting fine was reduced to the level of the fixed penalty.”⁶⁹

2.14 The New Zealand Group also noted that “there was perhaps insufficient attention paid to sentencing judges’ reluctance to increase fines for richer offenders”:⁷⁰

“Old attitudes of charitable munificence towards the poor (which accounted for the initial welcome of unit fines during the pilots, which only involved reducing fines for poorer people) were misinterpreted by policy-makers as a willingness to embrace the principles of ‘equality of impact’ implied by unit fines. Central to the failure of unit fines was the perception of sentencing judges that their discretion in the area of fines was being eroded. According to one unpublished study, magistrates felt that the old system had worked well, that they had not been consulted about the new system, and that it created insuperable problems. They found it difficult to think in units and remained wedded to the notion of ‘set

⁶⁸ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

worth'. The magistrates saw certain crimes as being worth certain amounts of money irrespective of who the offender was. Double parking was worth so many pounds and no more regardless of how much the offender earned. A few magistrates actually resigned because they felt they were being forced to adhere to rigid rules which resulted in unfair penalties. The point was also made that this early reaction of judges and the technical difficulties regarding the maximum sums to be attached to units (discussed above) could have been viewed as 'teething problems' (and presumably could have been relatively easily corrected), so that the fact that the whole system was abandoned in less than a year suggested a lack of political commitment."⁷¹

2.15 The New Zealand Group highlighted the following lessons from the English experience:

- (a) If the range of unit values is too wide, the amount of the fine is influenced much more by the assessment of means than by offence seriousness. This can bring about small fines for relatively serious matters and large fines for minor offences. The extent of this uneasy contrast will also be dependent on the range of minor offences included in the scheme.
- (b) Anomalies may arise between offences with fixed penalties and minor offences subject to unit fines. The infringement offence procedure does not lend itself to be included in a unit fines scheme (that is for fees to be adjusted according to the offenders' income). The fundamental basis of the infringement procedure are fixed fees which ensure that defendants know with certainty, at the outset, the amount of the fine to be imposed.
- (c) There may be administrative problems of getting accurate and timely information on offenders' financial circumstances in order to be able to base fines on their discretionary income. In general, it showed the need to have rules that achieve consistency but that are not so

⁷¹ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5.

mechanistic, rigid, and non-discretionary that sentencers are too often faced with the dilemma of either breaking the rules or imposing sentences they consider are unfair.⁷²

2.16 In England and Wales, section 65(1) of the *Criminal Justice Act, 1993* substituted the following for the provisions of section 18 of the *Criminal Justice Act, 1991*:

- “18-(1) Before fixing the amount of any fine, a court shall inquire into the financial circumstances of the offender.
- (2) The amount of any fine fixed by a court shall be such as, in the opinion of the court, reflects the seriousness of the offence.
- (3) In fixing the amount of any fine, a court shall take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.
- (4) Where:
- (a) an offender has been convicted in his absence in pursuance of section 11 or 12 of the *Magistrates’ Courts Act, 1980* (non-appearance of accused),
- (b) an offender: (i) has failed to comply with an order under section 20(1) [of the 1991 Act];⁷³

⁷² Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5.

⁷³ Section 20(1) of the 1991 Act provides that where a person has been convicted of an offence by a magistrates’ court, the court may, before sentencing him, order him to furnish to the court within a period specified in the order such a statement of his means as the court may require. A person who, without reasonable excuse, fails to comply with an order under s.20(1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s.20(2). It is an offence for a person, in furnishing any statement pursuant to an order under s.20(1) to:

- (a) make a statement which he knows to be false in a material particular;
- (b) recklessly furnish a statement which is false in a material particular;
- or

- or (ii) has otherwise failed to co-operate with the court in its inquiry into his financial circumstances, or
- (c) the parent or guardian of an offender who is a child or young person: (i) has failed to comply with an order under section 20(1)(B) [of the 1993 Act]; or (ii) has otherwise failed to co-operate with the court in its inquiry into his financial circumstances,
- and the court considers that it has insufficient information to make a proper determination of the financial circumstances of the offender, it may make such determination as it thinks fit.
- (5) Subsection (3) above applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.”

(b) Commonwealth of Australia

2.17 As noted in the 1991 Report,⁷⁴ the Australian Law Reform Commission recommended the adoption of a penalty unit system for both federal and Australian Capital Territory offences.⁷⁵

2.18 Penalty units were introduced by the Federal Government in section 4AA of the *Crimes Act, 1914 (Cth.)*, as inserted by the *Crimes Legislation Amendment Act 1992 (Cth.)*. Section 4AA provides that in the law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears, a “penalty unit means A\$110.”

(c) knowingly fail to disclose any material fact.

On summary conviction in respect of the latter offence, one is liable to imprisonment for a term not exceeding three months and/or a fine not exceeding level 4 on the standard scale (s.20(3)).

⁷⁴ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 25.

⁷⁵ Australian Law Reform Commission, *Report on Sentencing* (ALRC 44 – 1988).

2.19 By way of example, section 29D of the *Crimes Act, 1914* provides that a person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence and imposes a penalty of 1,000 penalty units and/or 10 years imprisonment in respect thereof. Section 29D was recently considered by the Federal Court of Australia in the case of *Joyce v. Grimshaw*.⁷⁶

2.20 It should be noted that the Australian Law Reform Commission is presently considering the relationship between criminal, civil and administrative penalties and the principles that should guide the formulation and application of civil and administrative sanctions. The terms of reference direct the Commission to articulate and evaluate principles relevant to federal civil and administrative penalties, including, *inter alia*, the principles for determining and setting maximum penalties.⁷⁷

(c) Australian Capital Territory

2.21 The law in this area is governed by the *Crimes Act, 1900*, as amended. This Act does not provide for any system of indexing fines.

2.22 It should be noted, however, that section 431A of the *Crimes Act, 1900* provides that before imposing a fine on a person for an offence against a law of the Territory, the court shall take into account the financial circumstances of the person where those circumstances can be ascertained, in addition to any other matters that the court is required or permitted to take into account. Section 429A provides that in determining the sentence to be imposed on a person, the matters to which a court shall have regard include, *inter alia*, such of the following matters as are relevant and known to the court:

- (a) the cultural background, character, antecedents, age, means and physical or mental condition of the person;
- (b) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants; and

⁷⁶ [2001] FCA 52.

⁷⁷ See the Australian Law Reform Commission conference papers, *Penalties, Policy, Principles and Practice in Government Regulation* (7-9 June 2001).

- (c) whether the recording of a conviction or the imposition of a particular sanction would be likely to cause particular hardship to the person.

(d) New South Wales

2.23 Part III of the *Crimes (Sentencing Procedure) Act, 1999*⁷⁸ is concerned with the penalties that may be imposed under the laws of New South Wales. Section 17 provides that unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying A\$110 by that number of penalty units. By way of example, section 27(1) of the *Marine Pollution Act, 1987* provides that “[i]f a discharge to which this Part applies occurs, each appropriate person in relation to the discharge and any other person whose act caused the discharge, are each guilty of an offence punishable, upon conviction, by a fine not exceeding: (a) if the offender is a natural person – 2,000 penalty units; or (b) if the offender is a body corporate – 10,000 penalty units.” This section was recently considered by the Supreme Court of New South Wales (Court of Criminal Appeal) in *Thorneloe v. Filipowski*.⁷⁹ The Court noted that the conversion of those penalty units into monetary sums is A\$220,000 for a natural person and A\$1,100,000 for a body corporate.

2.24 Section 19 of the 1999 Act provides for the effect of an alteration in penalties⁸⁰ as follows:

- (1) If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.

⁷⁸ Act No. 92/1999.

⁷⁹ [2001] NSWCCA 213.

⁸⁰ In s.19, a reference to a penalty includes a reference to a penalty that is expressed to be a maximum or minimum penalty (s.19(3)).

- (2) If an Act or statutory rule reduces the penalty for an offence, the reduced penalty extends to offences committed before the commencement of the provisions of the Act or statutory rule reducing the penalty, but the reduction does not affect any penalty imposed before that commencement.

2.25 Section 6 of the *Fines Act, 1996*⁸¹ provides that in the exercise of its discretion to fix the amount of any fine, a court is required to consider:

- (a) such information regarding the means of the accused as is reasonably and practicably available to the court for consideration; and
- (b) such other matters as, in the opinion of the court, are relevant to the fixing of that amount.

2.26 In its 1996 *Report on Sentencing*,⁸² the New South Wales Law Reform Commission noted that a disadvantage of the court-imposed fine is its potentially discriminatory effect on offenders of different financial standing who are required to pay the same amount of money following conviction for offences of similar gravity. It observed that the fine system may operate unfairly in two ways: (a) a fine for a certain amount of money may represent a much more severe punishment for one offender than for another; and (b) the imposition of a further penalty for fine default may be more likely for an offender who does not have the financial means to pay than for an offender who does. The Commission considered two options for reducing the inequities in court-imposed fines, one of which was the adoption of a day fine system. The Commission explained that “[u]nder the day-fine system, the sentencing court determines the amount of the fine to be imposed in an individual case on the basis of a specified number of day-fine units, the amount of each unit being calculated by reference to the offender’s daily income.”⁸³ It observed that the object of a day-fine system “is to provide a more effective

⁸¹ Act No. 99/1996.

⁸² New South Wales Law Reform Commission, *Report on Sentencing* (NSWLRC 79-1996).

⁸³ *Ibid.*

means of tailoring the fine to fit the individual offender's income".⁸⁴ Nevertheless, the introduction of the day fine had only received limited support in the submissions to the Commission:

"While recognising that the current system may give rise to inequities, the majority of submissions considered that there were inherent difficulties in implementing a day-fine system in New South Wales. For example, problems would arise in trying to formulate a scheme to take account of those who are asset-rich but income-poor. It was also argued that the effect of the system may be to reduce consistency in sentencing in terms of the nature and gravity of the offence, with an additional problem that those with higher incomes may be more likely to be fined than those with lower or no incomes.

A significant practical objection to the day-fine system was that it would require too much time and money to assess and verify each person's income or financial standing. In response, self-reporting was suggested as a simple mode of assessment. The offender would be required to complete a standard form as evidence of income, with sanctions available for wilful misstatement of finances. A similar procedure is already used for declaring income in applications for legal aid. A self-reporting procedure may be a relatively efficient way of assessing income. However, it will not always be a true representation of an offender's financial means and may result in white collar criminals being able to conceal their financial position from the courts."⁸⁵

2.27 The Commission considered that it was a compelling objection to the court-imposed fine if it operated as a harsher penalty for offenders with fewer resources, with the potential for an increase in the incidence of fine default if offenders are obliged to pay fines which are beyond their financial means. In this regard, the Commission highlighted that an advantage of the day fine is that it requires the sentencing court to calculate the fine according to a formula which is directly based on the offender's income. The

⁸⁴ New South Wales Law Reform Commission, *Report on Sentencing* (NSWLRC 79-1996).

⁸⁵ *Ibid.*

Commission noted that other jurisdictions had expressed approval of the day-fine system, at least in theory, because of this advantage.⁸⁶

2.28 Notwithstanding the benefits outlined above, the Commission concluded that a day-fine system should not be introduced in New South Wales for the following reasons:

“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.”⁸⁷

(e) Northern Territory of Australia

2.29 The law in this area is governed by the *Sentencing Act, 1995*, as amended, and the *Penalties Act, 1999*, as amended. Section 3(1) of the *Penalties Act* provides that a reference to a penalty for an offence⁸⁸ against a provision of an Act expressed as a number of penalty units (whether fractional or whole) is to be read as a reference to an amount of money equal to the amount obtained by multiplying A\$100 by the number of penalty units. Section 3(2) provides that in its application to an Act, subsection (1) yields to a contrary intention in the Act. Section 4 provides that if the amount prescribed by section 3 is changed, the new amount applies in calculating the amount of each penalty unit for an offence against a provision of an Act only in respect of an offence committed after the commencement of the provision effecting the change.

2.30 Section 17(1) of the *Sentencing Act, 1995* provides that where a court decides to fine an offender, it must, in determining the amount

⁸⁶ New South Wales Law Reform Commission, *Report on Sentencing* (NSWLRC 79-1996) at Chap.3, paras.3.10 – 3.13.

⁸⁷ *Ibid.* at para.3.14.

⁸⁸ “Penalty for an offence” includes an amount that may be paid under an infringement notice instead of the penalty that may otherwise be imposed for the offence (s.5(1)).

of the fine and the way in which it is to be paid, take into account as far as practicable: (a) the financial circumstances of the offender;⁸⁹ and (b) the nature of the burden that its payment will impose on the offender. However, a court is not precluded from fining an offender because it has been unable to ascertain these matters.⁹⁰ In fixing the amount of a fine, a court is permitted to have regard to, *inter alia*: (a) the loss or destruction of or damage to property suffered by a person as a result of the offence; and (b) the value of any benefit derived by the offender as a result of the offence.⁹¹ A court is required to give preference to restitution or compensation where it considers that it would be appropriate to impose a fine and to make a restitution or compensation order but that the offender has insufficient means to pay both.⁹² Nevertheless, a court is not precluded from imposing a fine *and* making a restitution or compensation order.⁹³

(f) Queensland

2.31 Queensland has adopted a penalty units system. Pursuant to section 5 of the *Penalties and Sentences Act, 1992*, a reference in any Act to a penalty of a specified number of penalty units is a reference to a fine of that number of penalty units.⁹⁴ Thus, for example, if a statutory provision provides that the maximum penalty is 10 penalty units, the offender is liable to a maximum fine of 10 penalty units.⁹⁵ The value of a penalty unit is:

- (a) for the *State Penalties Enforcement Act, 1999* or an infringement notice under that Act: A\$75; or

⁸⁹ In considering the financial circumstances of an offender, a court must take into account any other order that it or any other court has made or that it proposes to make: (a) providing for the confiscation of the proceeds of the crime; or (b) requiring the offender to make restitution or pay compensation (s.17(3)).

⁹⁰ *Sentencing Act, 1995*, s.17(2).

⁹¹ *Ibid.* at s.17(5).

⁹² *Ibid.* at s.17(4).

⁹³ *Ibid.*

⁹⁴ *Penalties and Sentences Act, 1992*, s.5(4).

⁹⁵ *Ibid.*

- (b) for the *Cooperatives Act, 1997*: A\$100; or
- (c) in any other case, for the *Penalties and Sentences Act, 1992* or another Act: A\$75.⁹⁶

2.32 If an Act expresses a penalty or other matter as a number (whether whole or fractional) of penalty units, the monetary value of the penalty or other matter is the number of dollars obtained by multiplying the value of a penalty unit by the number of penalty units.⁹⁷ If an order of a court expresses a penalty or other matter as a monetary value, the number of penalty units is to be calculated by dividing the monetary value of a penalty unit by the value of the penalty as at the time the order is made.⁹⁸

2.33 Section 205 of the 1992 Act provides that a reference in an Act or document to the *Penalty Units Act, 1985* may, if the context permits, be taken to be a reference to the *Penalties and Sentences Act, 1992*.

2.34 Section 48(1) of the 1992 Act provides that if a court decides to fine an offender, it must, in determining the amount of the fine and the way in which it is to be paid, take into account as far as practicable: (a) the financial circumstances of the offender;⁹⁹ and (b) the nature of the burden that its payment will impose on the offender. However, a court is not precluded from fining an offender because it has been unable to ascertain these matters.¹⁰⁰ In fixing the amount of a fine, a court is permitted to have regard to, *inter alia*: (a) the loss or destruction of or damage to property suffered by a person as a result of the offence; and (b) the value of any benefit derived by the offender as a result of the offence.¹⁰¹ A court is required to give

⁹⁶ *Penalties and Sentences Act, 1992*, s.5(1).

⁹⁷ *Ibid.* at s.5(2).

⁹⁸ *Ibid.* at s.5(3).

⁹⁹ In considering the financial circumstances of an offender, a court must take into account any other order that it or any other court has made or that it proposes to make: (a) providing for the confiscation of the proceeds of the crime; or (b) requiring the offender to make restitution or pay compensation (s.48(3)).

¹⁰⁰ *Penalties and Sentences Act, 1992*, s.48(2).

¹⁰¹ *Ibid.* at s.48(5).

preference to restitution or compensation where it considers that it would be appropriate to impose a fine and to make a restitution or compensation order but that the offender has insufficient means to pay both.¹⁰² Nevertheless, a court is not precluded from imposing a fine *and* making a restitution or compensation order.¹⁰³

(g) South Australia

2.35 The law in this area is governed by the *Criminal Law (Sentencing) Act, 1988*. This law does not provide for any system of indexing fines. However, a penalty units system is provided for by section 20(2) of the *Corporations (Ancillary Provisions) Act, 2001*. Section 20(2) provides, *inter alia*, that for the purposes of an offence against an applied law, the amount of a penalty unit specified in relation to that offence by the applied law, or a provision taken by force of section 19(1) to apply to the matter that is the subject of the declaratory provision, is A\$100.

2.36 Section 33(1) of the 1988 Act provides that on imposing a fine upon a defendant, a court may, by order: (a) specify a period within which the fine must be paid; or (b) direct that the fine be paid in instalments of a specified amount at specified times or at specified intervals. In determining the time within which a fine is to be paid, a court must have regard to the effect of the fine on the welfare of dependants of the defendant and on the defendant's ability to satisfy any order or direction for compensation made, or to be made, by the court under the Act or any other Act.¹⁰⁴ A court is not obliged to inform itself of these matters but it should consider any evidence in relation thereto which has been placed before it by the defendant or the prosecutor.¹⁰⁵

¹⁰² *Penalties and Sentences Act, 1992*, s.48(4).

¹⁰³ *Ibid.*

¹⁰⁴ *Criminal Law (Sentencing) Act, 1988*, s.33(2).

¹⁰⁵ *Ibid.* at s.33(3).

(h) Tasmania

2.37 As noted in the 1991 Report,¹⁰⁶ the Tasmanian Law Reform Commission recommended the adoption of a penalty unit system similar to that implemented in Victoria by the *Penalties and Sentences Act, 1981*.¹⁰⁷

2.38 A penalty units system was introduced in Tasmania by the *Penalty Units and Other Penalties Act, 1987*. Section 4 of the Act provides that where, in any Act or subordinate instrument for the time being in force, a number (whether whole or fractional) of “penalty units” is prescribed as the penalty for an offence against that Act or subordinate instrument or is specified for some other purpose in that Act or subordinate instrument, the Act or subordinate instrument shall¹⁰⁸ be construed as setting out a penalty of a number of dollars equal to the product obtained by multiplying A\$100 by the number of penalty units so prescribed or so specified. By way of example, section 37(2) of the *Workplace Health and Safety Act, 1995* lists the following penalties in respect of conduct that frustrates the work of an inspector or a person assisting an inspector under the Act:¹⁰⁹ (a) in the case of a body corporate, a fine not exceeding 500 penalty units; and (b) in the case of a natural person, a fine not exceeding 200 penalty

¹⁰⁶ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 25.

¹⁰⁷ Tasmanian Law Reform Commission, *Report on Fines* (Tas LRC 41-1985) at 9-10.

¹⁰⁸ Subject to s.37 of the *Acts Interpretation Act, 1931*.

¹⁰⁹ Section 37(1) provides that a person must not:

- (a) obstruct, wilfully delay, threaten, intimidate or attempt to intimidate an inspector, a person assisting an inspector or an interpreter in the execution of the inspector’s functions under this Act; or
- (b) without lawful excuse, refuse or fail to comply with a requirement made, or answer a question asked, by an inspector under this Act; or
- (c) furnish an inspector with information requested under this Act knowing that it is false or misleading in a material particular; or
- (d) directly or indirectly, prevent or attempt to prevent any person from appearing before or being questioned by an inspector.

units. This section was recently considered by the Supreme Court of Tasmania in the case of *Dougherty v. Ling*.¹¹⁰

(i) Victoria

2.39 As noted in the 1991 Report,¹¹¹ a penalty unit system was introduced in Victoria by the *Penalties and Sentences Act, 1981*. The law in this area is presently governed by the *Sentencing Act, 1991*,¹¹² as amended. Section 109(2) of the 1991 Act, as amended by section 12 of the *Sentencing (Amendment) Act, 1997*¹¹³ provides that an offence which is described in an Act, subordinate instrument or local law as being an offence of a level specified in column 1 of the following table or as being punishable by a fine of a level specified in that column is, unless the contrary intention appears, punishable by a fine not exceeding that specified opposite it in column 2 of that table.

<i>Level</i>	<i>Maximum Fine</i>
1	-
2	3000 penalty units
3	2400 penalty units
4	1800 penalty units
5	1200 penalty units
6	600 penalty units
7	240 penalty units
8	120 penalty units

¹¹⁰ [2001] TASSC 63.

¹¹¹ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 25.

¹¹² Act No. 49/1991.

¹¹³ Act No. 69/1997.

9	60 penalty units
10	10 penalty units
11	5 penalty units
12	1 penalty unit

2.40 Section 110 of the 1991 Act provides that if in an Act, subordinate instrument or local law there is a statement of a number (whether whole or fractional) of what are called “penalty units”, that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying A\$100 by that number of penalty units. By way of example, there is a fine of 100 penalty units for non-compliance with section 17 of the *Accident Compensation (Work Cover Insurance) Act, 1993*. Thus, the maximum fine for non-compliance with section 17 is A\$10,000. This section was recently considered by the Supreme Court of Victoria in *Victorian Workcover Authority v. I. R. Cootes Pty. Ltd.*¹¹⁴

2.41 Section 114 of the 1991 Act provides for the effect of an alteration in penalties as follows:

- (a) If an Act or subordinate instrument increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to offences committed after the commencement of the provision effecting the increase.
- (b) If an Act or subordinate instrument reduces the penalty or the maximum or minimum penalty for an offence, the reduction extends to offences committed before the commencement of the provision effecting the reduction for which no penalty had been imposed at that commencement.

2.42 Section 50(1) of the 1991 Act provides that if a court decides to fine an offender, it must, in determining the amount and method of

¹¹⁴ Supreme Court of Victoria, 6 June 2001.

payment of the fine, take into account, as far as practicable, the financial circumstances of the offender¹¹⁵ and the nature of the burden that its payment will impose. However, a court is not precluded from fining an offender simply because it has been unable to ascertain the financial circumstances of the offender.¹¹⁶ In fixing the amount of a fine, a court is permitted to have regard to, *inter alia*: (a) any loss or destruction of, or damage to, property suffered by a person as a result of the offence; and (b) the value of any benefit derived by the offender as a result of the offence.¹¹⁷ A court is required to give preference to restitution or compensation where it considers that it would be appropriate to impose a fine and to make a restitution or compensation order but that the offender has insufficient means to pay both.¹¹⁸ Nevertheless, a court is not precluded from imposing a fine *and* making a restitution or compensation order.¹¹⁹

(j) Western Australia

2.43 The law in this area is governed by the *Fines, Penalties and Infringement Notices Enforcement Act, 1994* and the *Sentencing Act, 1995*. These laws do not provide for any system of indexing fines. However, it should be noted that a penalty units system has been incorporated into the following statutory schemes: the *Road Traffic Act, 1974*, as amended, and the *Corporations (Ancillary Provisions) Act, 2001*.¹²⁰ In respect of the former, section 5(1)(a) provides, *inter*

¹¹⁵ In considering the financial circumstances of an offender, a court must take into account any other order that it or any other court has made or that it proposes to make: (a) providing for the forfeiture of the offender's property or the automatic forfeiture of the offender's property by operation of law; or (b) requiring the offender to make restitution or pay compensation (s.50(3)).

¹¹⁶ *Sentencing Act, 1991*, s.50(2).

¹¹⁷ *Ibid.* at s.50(5).

¹¹⁸ *Ibid.* at s.50(4).

¹¹⁹ *Ibid.*

¹²⁰ The relevant provisions of s.20(2) of the 2001 Act are set out above. The long title of this Act is as follows:

“An Act to enact ancillary provisions, including transitional provisions, relating to the enactment by the Parliament of the Commonwealth of new corporations legislation and new ASIC legislation under its legislative powers, including powers with respect to matters referred to that

alia, for the use of the abbreviation “PU” in describing penalties for offences. In this regard, “PU” stands for penalty units and a reference to a number of PUs is a reference to an amount in dollars, that is, that number multiplied by 50.¹²¹ By way of example, the penalty for driving a motor vehicle while one’s driver’s licence is cancelled or suspended is a fine of not less than 20 PU or more than A\$2,000 and/or imprisonment for a term not exceeding 18 months. Section 5(1)(a) was recently considered by the Supreme Court of Western Australia in *Nebro v. Duxbury*.¹²²

2.44 Section 53(1) of the *Sentencing Act, 1995* provides that, subject to Division 1 of Part 2 of the Act,¹²³ if a court decides to fine an offender, it must, in deciding the amount of the fine, as far as is practicable, take into account the means of the offender and the extent to which payment of the fine will burden the offender. A court can fine an offender even though it has been unable to ascertain these matters.¹²⁴ A court must not fine an offender if satisfied that, after paying compensation to the victim in accordance with a compensation order under Part 16 of the Act, the offender will be unable to pay the fine within a reasonable time.¹²⁵

(k) New Zealand

2.45 The law in this area is governed by the *Criminal Justice Act, 1985*, as amended. This Act does not provide for any system of indexing fines.

2.46 The imposition of monetary penalties in New Zealand was recently reviewed by the Criminal Justice Policy Group at the

Parliament for the purposes of s.51(xxxvii) of the Constitution of the Commonwealth.”

¹²¹ *Road Traffic Act, 1974*, as amended, s.5(1)(a).

¹²² (2000) 31 MVR 499.

¹²³ Division 1 of Part 2 of the Act concerns sentencing principles. Specifically, s.6 concerns general principles, s.7 concerns aggravating factors and s.8 concerns mitigating factors.

¹²⁴ *Sentencing Act, 1995*, s.53(2).

¹²⁵ *Ibid.* at s.53(3).

Ministry of Justice.¹²⁶ The Group noted the existence of indexation systems in a number of other jurisdictions and considered the adoption of such systems in New Zealand as follows:¹²⁷

“Whenever fines are defined in fixed dollar amounts the extent of the punishment involved tends to be devalued by the effect of inflation, which reduces their economic impact on offenders. Fineable offences are so numerous that the adjustment of all maximum fines authorised by statute according to the consumer price index (or some other measure of inflation) is going to be so time-consuming that it will hardly ever be done on a regular basis. The same difficulty does not apply to reparation, which is calculated with reference to the value of the property or estimated harm involved in the offence.

An alternative to having maximum fine amounts for offences is to express penalties in terms of numbers of penalty units and set down the dollar value of the penalty unit. The number of penalty units is multiplied by whatever their value is in order to fine an offender. This makes it easier to maintain the real value of fines, as a single short legislative change to the value of the penalty unit from time to time is all that is required. This in effect adjusts the fining provisions contained in a large number of Acts at the same time and means inflationary (or deflationary) changes can be accommodated expeditiously. Such a system has been adopted in a number of overseas jurisdictions.

The initial transition from dollar amounts to penalty units would be the most difficult part of such an exercise. All current fine amounts would need to be converted to penalty units by dividing the dollar amount by the value of the penalty unit that is to be applied in future (with rounding applied).”¹²⁸

¹²⁶ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000).

¹²⁷ *Ibid.* at Chaps.4 and 5.

¹²⁸ *Ibid.* at Chap.5.

2.47 Section 27(1) of the *Criminal Justice Act, 1985* provides that in fixing the amount of any fine to be imposed on an offender, a court must take into consideration, *inter alia*, the means and responsibilities of the offender so far as they appear or are known to the court. Where a court imposes a fine in addition to a sentence to make reparation, it must, in fixing the amount of the fine, take into consideration the amount payable under that sentence.¹²⁹ The impact of section 27 was considered by the New Zealand Group:

“The courts have interpreted [section 27] to mean that the fine must be within the limits of an offender’s ability to pay. This principle has been repeatedly stated in a significant body of case law. In practice this involves the court treating the ability to pay as if it were a mitigating factor, reducing the amount of a fine that might otherwise be imposed on the basis of the gravity of the offence. It has not been considered appropriate to increase a fine on account of the offender’s means beyond the level normally associated with the seriousness of the offence.”¹³⁰

2.48 The New Zealand Group noted that there was minimal guidance as to how and to what extent the offender’s means should be taken into account when the court is considering the imposition of a fine. Consequently, the courts are limited in the extent to which the means of the offender affect the amount of the fine. This affects the ability of fines to be fairly adjusted to the individual circumstances of the offender and may discourage the use of fines for those on very low or very high incomes. In this light, the Group considered the question of whether a unit fines system should be adopted. The Group noted that “the unit fine system is a different concept of fining, with the seriousness of an offence to society no longer expressed by the dollar value of the fine but as a period of time when an offender must make a financial sacrifice”:

“The unit fine approach requires the court to consider two distinct components separately. First, the seriousness of the offence, expressed as a number of units (of time) during

¹²⁹ *Criminal Justice Act, 1985*, s.27(2).

¹³⁰ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.2.

which an offender must make a financial sacrifice, is assessed. Secondly, the means of the offender is assessed, usually from the discretionary income available to the offender (income adjusted for cost of living, dependants, and other allowances). The monetary amount of the fine is figured by multiplying the number of fine units by the selected portion of the offender's income. Not only will the fine amount reduce if the offender has limited means, it will increase if the offender is well-off."¹³¹

2.49 The New Zealand Group articulated a number of arguments in favour of the unit fines system. First, it facilitates a just and fair approach to punishment in line with the principle of equal impact on offenders. Secondly, unit fines are consistent with most other sanctions of the court through expressing the penalty as a period of time. Thirdly, unit fines promote uniformity of approach to fines. Fourthly, unit fines remove the necessity to update the level of fine to take account of inflation. Fifthly, unit fines will be used more often than fixed or standard fines because they can be more punitive for the more affluent offenders and, as a result, sanctions involving supervision or incarceration can be used less thereby saving resources.

2.50 The introduction of a unit fines system in New Zealand was considered by the Penal Policy Review Committee in 1981.¹³² In its Report, the Committee commented that a unit fine system such as the

¹³¹ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.2. The New Zealand Group provided the following overview of the development of day fines:

“Day fines (when the value of the fine units is based on a portion of daily income) were a Scandinavian innovation. Finland introduced a day-fine system in 1921, Sweden in 1931 and Denmark in 1939. They now operate in a variety of countries such as Germany (since 1975 in West Germany), Austria (since 1975), Hungary, Poland, France (since 1983) and Portugal (since 1983). In the United States a trial day system was instituted in a lower court in Richmond County (Staten Island), New York in 1988 and subsequently in Phoenix, Arizona. Day fine schemes (usually called structured fines in the United States) have since been applied in other jurisdictions or are being developed.” *Ibid.*

¹³² See, generally, Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000).

Swedish one required an accurate and independent check of the offender's income which was not available in New Zealand. In light of this fact and, also, the complexity of the Swedish system, the Committee concluded that such a system was unsuitable for New Zealand. Some members of the Committee were strongly opposed to the upward adjustment of fines for wealthier offenders.

2.51 In April 1994, the Government agreed that a pilot scheme of time fines (based on a unit fines system) should proceed for the purpose of assessing the fiscal impact of such a scheme, the implications for efficient case flow management in the courts, and the general acceptability of time fines. The Department of Justice was directed to develop the proposal further following consultation. Having studied the operation of the unit fines scheme in England and Wales, a scheme that avoided its shortcomings was proposed. In particular, the proposed scheme retained flexibility for the courts and avoided the rigid application of a formula that in England and Wales led to such variation among fines for offences of the same gravity depending on the income of the offender. The proposed scheme would have required the court, having reached the decision that a fine was the appropriate sentence, to:

- (a) 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;
- (b) consider the amount the offender could afford to pay per week (with maximum and minimum amounts to be specified in regulations);
- (c) calculate the amount of the fine to be imposed by multiplying the number of weeks by the dollar amount determined under the above calculations.

2.52 The proposed scheme was to cover all offences in respect of individuals except:

- (a) offences where a defendant was liable to pay a fine or fee fixed by law (that is, infringement offences);
- (b) offences punishable by a term of, for example, 5 years imprisonment or more (it being decided to specify a level of imprisonment above which the scheme would

not apply in order to ensure that serious indictable offences for which a fine was not an appropriate penalty were not captured).

2.53 It was argued that the scheme had the capacity to increase the use of fines in preference to the more costly community-based sentences and so to assist with the ratcheting down of sentence types and levels, although the fiscal impact was uncertain because of the range of variables involved (sentencing practice, administrative costs of new procedure and payment patterns). For this reason, a trial of the scheme was recommended in order to test these variables. Further work was to be undertaken on minimum and maximum dollar amounts to be applied to the number of weeks, how 'income' would be assessed, and the procedures involved. Legislative amendments (to the *Criminal Justice Act* and *Summary Proceedings Act*) were also necessary.

2.54 In November 1994 officials reported to the government that both the Judiciary and the Law Commission had reservations about the proposal for a time fines scheme. Their major concern was that many infringement fees were set at a very high level relative to court-imposed fines and that a time fines scheme would exacerbate those inconsistencies. In August 1995, the Government decided that no further work would be undertaken by officials on the development of a time fine system.

2.55 Against this background, the New Zealand Group outlined the following arguments against the adoption of a day/unit fine system:

- “(a) It is inconsistent with just deserts / proportionality whereby the degree of punishment should be determined chiefly by reference to the seriousness of the offence (which is also an argument against the current practice of reducing fines for impecunious offenders).
- (b) There are simpler, speedier and more effective methods of increasing the imposition of fines.
- (c) 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.

- (d) The likely public perception that, because of the assessment of their means, certain individuals will end up being disproportionately punished for minor offences. This is the reason why the system failed in England and Wales.
- (e) 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.
- (f) 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.
- (g) 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.
- (h) There would need to be a review of all the maximum fine penalties.
- (i) It requires accurate information on the financial circumstances of the offender (difficulties in this area have resulted in such systems failing in some overseas jurisdictions).
- (j) 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.¹³³

2.56 The New Zealand Group concluded that in order to address the above concerns the following issues would need to be resolved prior to the introduction of a unit fines system:

- (a) the interface between unit fines and other fines (particularly infringement fees) and reparation;
- (b) which offences to include in the system;

¹³³ Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000).

- (c) how and when courts should obtain and check information on means;
- (d) what the means assessment should include (for example, income and/or assets of offender/partner);
- (e) a means of ensuring that information supplied is reliable;
- (f) resource implications for the courts (including the costs involved in implementing a unit fines system). Additional costs for courts may arise from: (a) costs involved in arranging for defendants to provide means information (for example, means forms) and checking that information; (b) costs flowing from when a stand-down for the offender to supply means information is required; (c) costs for extra time for judges to consider sentence.
- (g) the full extent of the legislative changes required for a unit fines system, including maximum penalties; and
- (h) the attitude of other participants in the criminal justice system to unit fines (for example, the judiciary and prosecuting agencies).

(l) Canada

2.57 The law in this area is governed by Part XXIII of the *Criminal Code*. This Code does not provide for any system of indexing fines.

2.58 In 1999, the Canadian Institute for the Administration of Justice held a conference entitled, “Changing Punishment at the Turn of the Century: Finding a Common Ground”.¹³⁴ The indexation of fines does not appear to have been addressed at this conference.

2.59 Section 734(2) of the *Criminal Code* provides that, except when the punishment for an offence includes a minimum fine or a fine imposed in lieu of a forfeiture order, a court may fine an offender only if it is satisfied that the offender is able to pay the fine or

¹³⁴ Canadian Institute for the Administration of Justice papers, *Changing Punishment at the Turn of the Century: Finding a Common Ground* (<http://www.ciaj-icaj.ca/sentencing/english.html>).

discharge it by way of a work programme (in provinces where such programmes exist).

(m) Hong Kong

2.60 Section 113C(2) of the *Criminal Procedure Ordinance*¹³⁵ provides that where an Ordinance provides for a fine, other than an excluded fine, for an offence expressed as an amount of money, the fine shall be deemed to be a fine at the level relevant to the amount of the fine in the following table:

<i>Fine</i>	<i>Level applied</i>
\$1 to \$2,000	Level 1
\$2,001 to \$5,000	Level 2
\$5,001 to \$10,000	Level 3
\$10,001 to \$25,000	Level 4
\$25,001 to \$50,000	Level 5
\$50,001 to \$100,000	Level 6

2.61 Section 113C(3) provides that where a provision in an Ordinance specifies a fine, other than an excluded fine,¹³⁶ expressed as an amount of money that may be prescribed under subsidiary legislation, the fine shall be deemed to be a fine at the level relevant to the amount of the fine in the above table. The Chief Executive in

¹³⁵ Chapter 221 of the *Criminal Procedure Ordinance*.

¹³⁶ An excluded fine means:

- (a) a fine of an amount greater than the maximum set out in the above table;
- (b) a daily fine or daily penalty; and
- (c) a fixed penalty within the meaning of the Housing Ordinance, the Fixed Penalty (Traffic Contraventions) Ordinance or the Fixed Penalty (Criminal Proceedings) Ordinance (s.113C(2)).

Council is empowered to amend by regulation the amounts set out in the table to reflect his opinion of the effect of inflation on the value of the amounts set out in the table since the date that the amounts in the table were last amended.¹³⁷

(n) United States of America

2.62 As noted in the 1991 Report,¹³⁸ section 6.03 of the American Law Institute *Model Penal Code*¹³⁹ proposes a hybrid category system whereby dollar limits are set for each degree of felony and misdemeanour. Section 6.03 does not appear to have been revised since the publication of the 1991 Report.

C. Conclusions

2.63 It is clear from the above that most of the jurisdictions surveyed have established a legislative framework for updating fine values, thus combating their erosion by inflation. It is also notable that, in many jurisdictions, this was achieved in the context of a codification of sentencing laws generally.

2.64 It is also appropriate to highlight that most of the jurisdictions surveyed have enacted legislative provisions specifying certain matters which, in so far as practicable, a court is required to take into account when determining an appropriate sentence. These include some or all of the following:

- (a) the financial circumstances of the offender;
- (b) the nature of the burden that payment of a particular fine will impose upon the offender;
- (c) whether the imposition of a particular fine would be likely to cause particular hardship to the offender; and

¹³⁷ Hong Kong *Criminal Procedure Ordinance*, Chap.221, s.113C(4).

¹³⁸ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 35.

¹³⁹ American Law Institute, *Model Penal Code* (Philadelphia, 1985).

- (d) the probable effect that any sentence or order under consideration would have on any of the offender's family or dependants.

2.65 England and Wales adopted a unit fines scheme in 1992¹⁴⁰ but abolished it in 1993 primarily because of the perception that very high fines were being imposed for minor offences. The desirability of unit fines schemes has been considered subsequently in a number of other jurisdictions and the arguments against the adoption of such schemes would appear to have prevailed.¹⁴¹

¹⁴⁰ The unit fines system was provided for by ss.18 and 19 of the *Criminal Justice Act, 1991* but it only came into force on 1 October 1992. See Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2000) at 273.

¹⁴¹ See, in particular, New Zealand Ministry of Justice Criminal Justice Policy Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5, and New South Wales Law Reform Commission, *Report on Sentencing* (NSWLRC 79-1996) at Chap.3.

CHAPTER THREE: CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

3.01 In its 1991 *Report on the Indexation of Fines*, the Commission concluded that there was a pressing need for action to combat the erosion by inflation of the value of criminal fine maxima.¹⁴² The Commission articulated three core objectives of any reforming legislation in this area. First, it should ensure the imposition of equal fines for offences of equal gravity. Secondly, it should take account of the past and future effect of inflation on the real value of fines. Thirdly, it should be flexible enough to adjust for the differing means of those upon whom fines are imposed. Having surveyed the laws of several jurisdictions, the Commission recommended, *inter alia*, that priority should be given to the immediate introduction of a standard category fine system.¹⁴³

3.02 The recommendations in the 1991 Report of the Commission have not yet been implemented by legislation. However, there have been a number of legislative developments primarily in the field of environmental law which are rooted in the same policy considerations as those underlying the recommendations of the Commission. Thus, the enactment of legislative provisions such as those contained in the *Litter Pollution Act, 1997* and the *Waste Management (Amendment) Act, 2001* is welcome to the extent that it provides a means of updating certain fines and levies in accordance with, *inter alia*, the value of money and thus achieves, at least in part, the central objective of reforming legislation articulated by the Commission in 1991. However, the Commission believes that a systematic approach to the indexation of fines is required and that it is undesirable and

¹⁴² Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 2 and 67.

¹⁴³ *Ibid.* at 68.

unnecessarily complicated to attempt indexation on a piece-meal legislative basis. Rather, the Commission favours the enactment of legislation establishing a standard fines system based on the categories model outlined in its 1991 Report. Such a system would apply to fines for summary offences across the full spectrum of legislation, thus obviating the need to target laws on an individual basis while enhancing accessibility to and the clarity of the relevant provisions of such laws.

3.03 If legislation based on the categories model favoured by the Commission is to be enacted, it will be necessary to make provision for the indexation scheme for litter fines established by the legislation referred to above. One option would be specifically to exclude the monetary amounts encompassed by this scheme from the general indexation of fines framework. Another option would be to repeal the indexation scheme, thus allowing the monetary amounts covered by it to be updated in accordance with the general indexation of fines framework. For reasons of clarity, consistency and practicality, the Commission favours the latter approach.

3.04 Legislative developments in other jurisdictions provide a significant added impetus to the recommendations of the Commission. As is clear from the survey of laws in other jurisdictions contained in Chapter 2, most of the jurisdictions have enacted legislative measures aimed at combating the erosion by inflation of criminal fine maxima, thus achieving the central objective that the Commission argued should underpin any reforming legislation in this jurisdiction.¹⁴⁴ In this regard, the codification of sentencing laws undertaken by most Australian states and the concomitant adoption of penalty units schemes is particularly notable.

3.05 It is also appropriate to highlight that most of the jurisdictions surveyed have adopted legislative measures which achieve, at least in part, another of the three objectives which the Commission posited should underpin any reforming legislation, namely, that it should be flexible enough to adjust for the differing means of those upon whom fines are imposed. Most of the sentencing laws in those jurisdictions

¹⁴⁴ In para.3 of the Conclusions in its 1991 Report, the Commission stated that the central task was to counter the effect of inflation: Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 67.

specify various matters which, in so far as practicable, a court must take into account when determining the sentence to be imposed in a particular case. They include some or all of the following:

- (a) the financial circumstances of the offender;
- (b) the nature of the burden that payment of a particular fine will impose upon the offender;
- (c) whether the imposition of a particular fine would be likely to cause particular hardship to the offender; and
- (d) the probable effect that any sentence or order under consideration would have on any of the offender's family or dependants.

3.06 It should be noted, however, that while it was implicit in the objective concerning the flexibility of any reforming legislation that fines should be adjusted upwards for wealthier offenders, the means-related provisions of the sentencing laws referred to above have generally been interpreted as though the ability to pay a fine is a mitigating factor, with the result that the amount of a fine that might otherwise be imposed on the basis of the gravity of the offence is reduced.¹⁴⁵

3.07 In its 1991 Report, the Commission expressed confidence in the potential merits of a variable fine system and suggested that the question be considered again, after a standard fine system has been introduced, and in the light, in particular, of British experience.¹⁴⁶ As noted above, England and Wales adopted a unit fines scheme in 1992¹⁴⁷ but abolished it in 1993 mainly because of the perception that very high fines were being imposed for minor offences. The desirability of unit fines schemes has been considered subsequently in a number of jurisdictions and the arguments against the adoption of such schemes would appear to have prevailed.¹⁴⁸

¹⁴⁵ Cf. s.18 of the English *Criminal Justice Act, 1991*, as substituted by s.65(1) of the English *Criminal Justice Act, 1993* (above at para.2.16).

¹⁴⁶ Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991) at 65 – 66.

¹⁴⁷ The unit fines system was provided for by ss.18 and 19 of the *Criminal Justice Act, 1991* but it only came into force on 1 October 1992. See Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2000) at 273.

¹⁴⁸ See, in particular, New Zealand Ministry of Justice Criminal Justice Policy

3.08 The experience of jurisdictions in which unit fines systems were adopted or considered yields a number of lessons which are relevant not simply to the question of whether such a system should be adopted in this jurisdiction but, also, to the broader question of how legislation aimed at achieving the three core objectives outlined in the 1991 Report¹⁴⁹ should be structured. One of the core lessons in this regard is the need to convey the principle of equality of impact to all involved in the administration of the criminal justice system and to the public generally. Specifically, it is imperative to convey that the imposition of different fines in respect of similar offences in circumstances where the means of the offenders differs is not an aberration, productive of inequality, but, rather, a result that accords entirely with the underlying principle of equal impact upon offenders of different means.¹⁵⁰ As noted above, the failure to appreciate this principle was central to the downfall of the unit fines system in England and Wales. An appreciation of this principle will be essential to the success of any reforming legislation that requires a sentencing judge to have regard to the financial circumstances of an offender, irrespective of whether the effect of so doing would be to increase or to reduce the amount of the fine. In this context, it will also be important to have due regard to the difficulties of obtaining accurate and timely information on the financial circumstances of an offender.¹⁵¹ More generally, a complex and rigid legislative scheme

Group, *Review of Monetary Penalties in New Zealand* (June 2000) at Chap.5, and New South Wales Law Reform Commission, *Report on Sentencing* (NSWLRC 79-1996) at Chap.3.

¹⁴⁹ The Commission advocated that reforming legislation should (a) ensure the imposition of equal fines for offences of equal gravity; (b) take account of the past and future effect of inflation on the real value of fines; and (c) be flexible enough to adjust for the differing means of those upon whom fines are imposed.

¹⁵⁰ As Walsh J observed in *de Burca v. Attorney General* [1976] IR 38, 68 in relation to the ambit of the equality guarantee in Article 40.1 of the Constitution of Ireland:

“Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances.... It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.”

¹⁵¹ See, in this context, s.18 of the English *Criminal Justice Act, 1991*, as substituted by s.65(1) of the English *Criminal Justice Act, 1993*, and s. 20(1)

for the computation of fines must be avoided. By extension, the discretion of sentencing judges must be preserved.

B. Recommendations

3.09 The experience of jurisdictions in which unit fines systems were adopted or considered provides strong reasons for caution in respect of the adoption of such a system in this jurisdiction. The Commission believes that it would be inappropriate to adopt such a system at the present time and that many of the positive features of such a system can be achieved by adopting the recommendations which follow.

3.10 A standard fine system based upon the category model proposed by the Commission in its 1991 Report should be introduced by legislation as a matter of urgency.

3.11 The scheme for the indexation of litter fines should be repealed so that the monetary amounts covered by that scheme can be updated within the general indexation of fines framework established in accordance with the foregoing recommendation.

3.12 The reforming legislation should also provide that when a court is determining the amount of a fine, it should, in so far as is practicable have regard to, among other factors,¹⁵² the financial circumstances of the offender and the nature of the burden that payment of a particular fine will impose upon the offender and his dependents. In this regard, the legislation should also provide that a court should have regard to such matters irrespective of whether the effect of so doing would be to increase or to reduce the amount of the fine.¹⁵³ The relevant provisions of such legislation should be

of the English *Criminal Justice Act, 1991* (above at para.2.16). See, also, the Law Reform Consultation Paper on *Penalties for Minor Offences* (LRC CP18-2002) at paras.7.18 – 7.21.

¹⁵² See generally the Law Reform Commission *Report on Sentencing* (LRC 53-1996) at Chap.3.

¹⁵³ See, in this context, s.18 of the English *Criminal Justice Act, 1991*, as substituted by s.65(1) of the English *Criminal Justice Act, 1993* (above at para.2.16). The Commission made a similar recommendation in its

structured in such a way as to convey that they are founded upon the principle of equality of impact upon offenders of different means. The said provisions should also be without prejudice to the general discretion of the sentencing judge to impose a penalty that is appropriate and just having regard to all of the circumstances of the case.

3.13 In the light of the foregoing recommendation, the Commission also recommends that section 43(2) of the *Criminal Justice Administration Act, 1914* should be repealed and there should be substituted for Order 23, Rule 4 of the *District Court Rules, 1997*¹⁵⁴ a rule which accords with the relevant provisions of the reforming legislation.¹⁵⁵

Consultation Paper on *Penalties for Minor Offences* (LRC CP18-2002) at para.7.16.

¹⁵⁴ S.I. No. 93 of 1997.

¹⁵⁵ See para.1.08 above. It may also be appropriate to amend section 109 of the *Children Act, 2001* in the light of the above recommendation at para.3.12.



The Law Reform Commission

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