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# THE 'DAY FINE' - IMPROVING EQUALITY BEFORE THE LAW IN AUSTRALIAN SENTENCING

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## ABSTRACT

*In sentencing offenders in Australia to a fine it has long been considered uncontroversial that the principle of equality before the law is upheld. This is because similar sanctions are imposed on offenders convicted of the same offence and the circumstances of the financially disadvantaged offender are taken into account in the imposition of a reduced fine. However, this long-held view fails to address the large number of offences for which a minimum fine is legislatively prescribed and where, in circumstances where judicial discretion is allowed, fines are not increased relative to the offender's wealth. In contrast, Germany and many other continental European countries have adopted an income-based fining system known as the 'day fine'. This is a fining system in which the economic burden of the fine is felt similarly by both the wealthy offender and the financially disadvantaged offender. With a particular emphasis on Germany, this article argues that the 'day fine' has the potential to reduce Australia's reliance on imprisonment, increase public confidence in sentencing and better meet the principle of equality before the law.*

## I INTRODUCTION

From time to time newspaper reports appear in Australian newspapers of exorbitant fines being sanctioned in European courts for what appear to be minor transgressions. Examples include a Finnish businessman ordered to pay a staggering €116,000 for speeding, a German footballer penalised €90,000 for insulting a policeman and an Englishman fined £1,200 for littering. While these sentences at first appear to be disproportionately harsh, they are in fact founded on recognition of the principle of equal treatment, that is, that the impact of the sentence should be similar despite the wealth or financial disadvantage of the offender.<sup>1</sup>

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<sup>1</sup> See Section II.

In Germany and many other continental European countries the principle that the fine should have a similar punitive bite on all offenders is applied in practice.<sup>2</sup> Alternatively, Australia and the majority of jurisdictions with a common law tradition have embraced a different system, in which judicial starting points or 'tariffs' of what an appropriate fine is, mean that there is little discretion to increase the amount of a fine on a wealthy offender. Additionally, many offences require the imposition of a minimum fine, for which no discretion exists to reduce the amount of the fine for financially disadvantaged offenders.<sup>3</sup> Paradoxically, despite the well-reported difference in fine amounts imposed, the principle of equal treatment is aspired to in both systems, with Australia adopting literally the mantra 'like penalty for like offence', whereas in Germany the mantra is 'like punitive bite of penalty for like offence'.

At first the European 'day fine' appears to encourage unequal treatment, as offenders committing similar offences may be sanctioned to significantly different fine amounts. However, the underlying justification is that fairness in the imposition of a fine is best achieved through the adoption of a two-step process. Firstly the gravity of the offence is assessed on the basis of the culpability of the offender to determine the number of day fine units, and then the value of each unit is dependent on the means of the offender to ensure that the economic burden is felt equally on offenders.<sup>4</sup> The ability of the day fine to both reflect the seriousness of the offence and to equalise the impact of the sentence has ensured that it remains the preferred sanction for a broad spectrum of criminal offences, some of which were formerly subject to a custodial sentence.<sup>5</sup> In Australia on the other hand, proposals for the introduction of the day fine continue to be rejected, despite criticism of the sentencing system's reliance on imprisonment and its failure to adequately consider the financial circumstances of the offender when imposing a fine.<sup>6</sup> With a particular emphasis on Germany, this article argues that the day fine system legitimises the credibility of the fine as a

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<sup>2</sup> Other European countries that have adopted forms of the 'day fine' system include Austria, Denmark, Finland, France, Hungary, Poland, Portugal, Spain, Sweden and Switzerland. See, eg, Gerhardt Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* (Institute of Criminology, Occasional Papers No 9, 1982).

<sup>3</sup> For the purposes of this article the imposition of a minimum fine refers to a statutory provision requiring a court to impose a fine of a minimum amount. Driver-related offences such as speeding or breathalyser offences are examples.

<sup>4</sup> See Section V.

<sup>5</sup> See Section VII.

<sup>6</sup> See, eg, Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 110 [7.15].

sentencing sanction, ensuring broad application and concomitantly reducing dependence on custodial sentences.

This article begins with an overview of the principle of equality before the law including the right to non-discrimination and equal treatment. A brief outline is provided of how the criminal justice system sanctions a disproportionate number of socially and financially disadvantaged offenders and it is argued that the sanctions imposed against them often fail to meet the principles of non-discrimination and equal treatment. A critical discussion of Australia's imprisonment system follows, in which it is argued that many of the assertions underpinning legislative and judicial support for custodial sentences are either false or can be achieved through less intrusive sanctions. The article then turns to a comparison of the Australian and German fining systems, concluding that the establishment of the day fine system in Australia's sentencing regime would lead to greater adherence to both non-discrimination and equal treatment, and thereby better meet the important principle of equality before the law.

## II EQUALITY BEFORE THE LAW: NON-DISCRIMINATION AND EQUAL TREATMENT

Equality before the law is one of the fundamental rights of the international community, recognised in human rights instruments internationally, nationally and in Australia at a state level.<sup>7</sup> Equality before the law seeks to safeguard two principles: non-discrimination and equal treatment.<sup>8</sup> The principle of non-discrimination requires that people are not discriminated against on grounds including race, gender, religion, sexual orientation or wealth.<sup>9</sup> Equal treatment on the other hand recognises that difference exists, but seeks to ensure that substantive equality is achieved.<sup>10</sup> In short, the principle of equality

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<sup>7</sup> See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19<sup>th</sup> December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26; *Universal Declaration of Human Rights*, opened for signature 10 December 1948, 217 A (III) (entered into force 10 December 1948) arts 2, 7; *American Convention on Human Rights*, opened for signature 21 November 1969, 1144 UNTS 143 (entered into force 18 July 1978) art 1; *African Charter on Human and People's Rights*, opened for signature 27 June 1981, 21 ILM 58 (1982) (entered into force 21 October 1986) art 2, *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 3; *United States Constitution* amend XIV; *Human Rights Act 1998* (UK) c 42 sch 1 pt 1 art 14; *Bill of Rights Act 1990* (NZ) s 19; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3); *Human Rights Act 2004* (ACT) s 8(3).

<sup>8</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 2010) 99.

<sup>9</sup> *Ibid.*

<sup>10</sup> See, eg, *Purois v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 154-155 [202] in which Gummow, Hayne and Heydon JJ noted: "Substantive equality"

seeks to prevent like situations being treated differently, and different situations being treated alike.

In Australia, the principle of equality before the law is assured through a number of measures including the requirement that judicial officers take an oath to administer the law without fear, favour, affection or ill-will and the availability of legal assistance through Legal Aid Commissions and Community Legal Centres. In sentencing, the principle is thought to be achieved through the long-held common-law principle that in imposing a fine on financially disadvantaged offenders the amount will be reduced. In such cases, non-discrimination is assured through the courts sanctioning of both the wealthy and the financially disadvantaged offender with a fine, thereby upholding the principle that offenders convicted of the same offence will be sanctioned similarly where the degree of culpability is comparable.<sup>11</sup> Equal treatment is also recognised through the sanctioning of a socially disadvantaged offender with a reduced fine. The fine amount is different but at the same time equal in terms of impact.

Unfortunately, for a number of reasons, the principle of equality in Australia's criminal justice system has been compromised. Firstly, financially disadvantaged offenders are more likely than their more wealthy counterparts to be sanctioned in the criminal courts.<sup>12</sup> A good example is social security fraud, which is more likely to be prosecuted than tax fraud, although the economic impact of tax fraud is significantly higher.<sup>13</sup> Additionally, crimes committed

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directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that "in order to treat some persons equally, we must treat them differently".

<sup>11</sup> See, eg, *Lowe v Plaister* (1986) 4 MVR 41. In this Tasmanian case Wright J observed: 'It is a consistent tenet of penal philosophy that an offender should not be permitted to buy his way out of a distasteful sentencing option': at 42. See also *Hollett v The Queen* (1985) 14 A Crim R 467, 469-470 (Wallace J), citing *R v Cobby* [1983] WACCA 19 (19 April 1983). His Honour acknowledged that the fine should be considered an alternative to imprisonment, but should 'avoid giving the impression that a rich person can purchase absolution from a crime for cash'.

<sup>12</sup> See, eg, Christine Coumarelos, Zhigang Wei and Albert Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Law and Justice Foundation of NSW, 2006). The authors argue that there is an association between being socially disadvantaged and vulnerability to legal problems. See also Beth Midgely, 'Achieving Just Outcomes for Homeless People through the Court Process' (2005) 15(2) *Journal of Judicial Administration* 82. Midgely argues that the homeless are disproportionately represented in the criminal justice system.

<sup>13</sup> See, eg, *Annual Report 2010/11* (Report, Commonwealth Director of Public Prosecutions, September 2011) 142-144 [Table 15]. This report shows that 60.27 percent of prosecuted offenders had been referred from Centrelink whilst only 2.17 percent had been referred from the Australian Taxation Office. See also *Annual Fraud Indicator* (Report, National

disproportionately by the wealthy, such as white-collar crime, are far more frequently dealt with outside the formal criminal justice system, such as a statutory agency 'policing' and where prosecution is considered a last resort.<sup>14</sup>

In fining offenders, the disproportionate number of financially disadvantaged offenders means that the tariff adopted by the courts will usually be at the lower end ensuring that the fine imposed on wealthier offenders cannot meet the principle of equal treatment. It should also be acknowledged that even a reduced tariff does not ensure that the effect of the fine will not be onerous for the financially disadvantaged offender. As well, the widely accepted judicial view holds that unless legislatively mandated, the fine will not be increased because of the offender's wealth,<sup>15</sup> meaning that the fine continues to be imposed disproportionately harshly on financially disadvantaged offenders.

Further, despite the common-law assurance of a fine reduction for financially disadvantaged offenders, there is no guarantee that consideration of the financial circumstances of the offender actually occurs in practice. For example, a study carried out in 2004 in the Brisbane Magistrates Court established that whilst more than half (56 percent) of those convicted of public nuisance offences were financially disadvantaged, the fine imposed was *higher* than that imposed on offenders convicted of the same offence but not assessed as financially disadvantaged.<sup>16</sup> The failure to consider the financial circumstances of the offender is not limited to Queensland with a survey of Magistrate Courts carried out in New South Wales during 2007 reporting that 76 percent of Magistrates would only 'sometimes' impose an alternative sentence in circumstances where the offender could not afford to pay the fine.<sup>17</sup>

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Fraud Authority, January 2011) 15. This report shows that in the United Kingdom in 2008 tax fraud amounted to more than £15 Billion in lost revenue whereas social security fraud amounted to a little more than £1 Billion.

<sup>14</sup> Ashworth, above n 8, 253.

<sup>15</sup> Ibid 329; Kate Warner et al, *Sentencing in Tasmania* (Federation Press, 2002) 128.

<sup>16</sup> Tamara Walsh, 'Won't Pay or Can't Pay? Exploring Fines as a Sentencing Alternative for Public Nuisance Types' (2005) 17 *Current Issues in Criminal Justice* 217. This study also found that the court granted only one extra week as grace for re-payment of the fine ensuring that the financially disadvantaged were required to pay more per month than those assessed as not financially disadvantaged.

<sup>17</sup> Katherine McFarlane and Patrizia Poletti, 'Judicial Perceptions of fines as a Sentencing Option: A Survey of NSW Magistrates' (Monograph 1, NSW Sentencing Council, August 2007) 14-15. This high figure should be accepted with some caution however due to the fact that for some offences no sanction other than a fine is available.

Additionally, the principle of non-discrimination, with its emphasis on ensuring that financially disadvantaged offenders are not treated less favourably, is breached when wealthier offenders, who have paid restitution, receive a reduced sentence, when compared with the financially disadvantaged offender, who is unable to make such payment.<sup>18</sup> Further, the courts may discriminate by imposing a more severe sentence on the financially disadvantaged offender. For example, Ashworth noted that the financially destitute are more likely to be sanctioned with the more severe sentence of community service, when they should in fact receive either a conditional or absolute discharge.<sup>19</sup>

With the evidence demonstrating that the criminal courts continue to sanction a disproportionate number of socially and financially disadvantaged offenders and that the sanctions imposed are often harsher than those imposed on their wealthy counterparts, it is no surprise that Australia's prisons are filled with a disproportionate number of socially and financially disadvantaged offenders.<sup>20</sup> An analysis of Australia's increasing reliance on custodial sentences and its underlying rationales follows.

### III THE EFFECTIVENESS OF IMPRISONMENT IN REDUCING CRIME

In Australia the sentencing system increasingly relies on imprisonment, with the imprisonment rate having almost doubled in little more than a quarter of a century from 89.8 per 100,000 persons in 1982 to 168 per 100,000 persons in July 2012.<sup>21</sup> As well as the increased rate of imprisonment, there has also been an increase in the numbers of prisoners serving longer sentences with government statistics pointing out that between 1999-2009 the percentage of offenders sentenced to between 1-5 years imprisonment increased from 35.8 percent to 43.4 percent.<sup>22</sup> These statistics show that in Australia custodial sentences are imposed more often and for longer periods, pointing to a harsher sentencing system. However, while Australia and other common law

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<sup>18</sup> Ashworth, above n 8, 251-254.

<sup>19</sup> Ibid 252.

<sup>20</sup> Mark Halsey, 'Imprisonment and Prisoner Re-Entry in Australia' (2010) 34(4) *Dialectical Anthropology* 545, 548 (footnote 3).

<sup>21</sup> Australian Bureau of Statistics, *Prisoners in Australia 2012* (2012) 4517.0 ABS Canberra; Ibid, 545-546. In comparison, Germany had an imprisonment rate of 89.3 and the United Kingdom 152.3 per 100,000 persons in 2009: Council of Europe, *Annual Penal Statistics* (Strasbourg, 22 March 2011) 26.

<sup>22</sup> Halsey, above n 20, 547.

countries, such as the United Kingdom and the United States of America, continue to rely heavily on imprisonment to achieve a range of sentencing aims, legislatures in Germany and other European countries have implemented a sentencing regime where the same aims are met by the imposition of a fine. A critical discussion of Australia's reliance on the imprisonment system is therefore necessary, as an alternative exists.

There are four often-repeated assumptions for the belief that imprisonment will lead to a reduction in crime.<sup>23</sup> Firstly, that the threat of imprisonment acts as a form of general deterrence, in which offenders are discouraged from offending through an assessment of the likely consequences. Secondly, that imprisoning more offenders will lead to a reduction in crime. Thirdly, that imprisonment achieves the aims of specific deterrence in which identified offenders will be deterred from committing crimes in the future. Finally, it is sometimes suggested that imprisonment can rehabilitate offenders. All of these assumptions are reviewed and conclusions drawn.

With regards to general deterrence, research has shown that an increased probability of being punished is a more effective deterrent than the severity of the punishment.<sup>24</sup> It is the increased likelihood of detection that leads to deterrence rather than the length or harshness of the sentence. A good example of the failings of harsher sanctions is outlined in Walker's book *Why Punish?* in which he reviews the murder rate in two jurisdictions with death penalty provisions. Walker points out that in the United States, the criminological evidence is unable to point to any difference in the murder rate between those states that have abolished and those that retain the death penalty. A similar finding is also observed in New Zealand where despite the abolition, re-introduction and re-abolition of the death penalty between 1924-1969 no noticeable change in the murder rate could be demonstrated.<sup>25</sup> Although some economic modeling studies have been able to demonstrate limited support for the deterrence effects of the death penalty,<sup>26</sup> there remains no compelling evidence establishing the greater

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<sup>23</sup> Don Weatherburn, 'The Effect of Prison on Adult Re-Offending', *Crime and Justice Bulletin No 143* (NSW Bureau of Crime Statistics and Research, 2010) 1.

<sup>24</sup> See, eg, Andrew von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999).

<sup>25</sup> Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 15-16.

<sup>26</sup> Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 65(3) *American Economic Review* 397; Isaac Ehrlich, 'Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence' (1977) 85(4) *Journal of Political Economy* 741.

deterrent effects of the death penalty compared with life imprisonment.<sup>27</sup>

Another example used by Walker to highlight the failure of harsher sentences on general deterrence is an English study that investigated the rate of robbery both before and after an offender was sentenced to twenty years imprisonment for a particularly brutal robbery. The harsh sentence attracted significant media interest and it was expected that a corresponding decrease in the rates of robbery would follow. However, the study found no evidence of a decrease in robberies, despite the extraordinary sentence imposed.<sup>28</sup>

More recently, following an extensive literature review of deterrence studies, Doob and Webster concluded that they 'could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence'.<sup>29</sup> This led the authors to conclude that 'we propose acceptance of the null hypothesis that variations within the limits that are plausible in Western countries will not make a difference'.<sup>30</sup> In other words sentence severity, at least when it remains within reasonable boundaries, plays no role in effecting the levels of crime in society.

The difficulty of general deterrence as a sentencing aim is three-fold. Firstly, the theory assumes that an offender will rationally consider the consequences of his or her actions and will be deterred from committing the crime.<sup>31</sup> In actual fact, most criminal offences are committed on the spur of the moment and under the influence of alcohol and other drugs.<sup>32</sup> Secondly, studies indicate that people generally underestimate the severity of sanctions imposed, and hence offenders are generally not fully aware of the repercussions.<sup>33</sup> Finally, it

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<sup>27</sup> For an analysis of the studies see Janet Chan and Deborah Oxley, 'The Deterrent Effect of Capital Punishment: A Review of the Research Evidence' (Crime and Justice Bulletin No 84, NSW Bureau of Crime Statistics and Research, 2004).

<sup>28</sup> Walker, above n 25, 20.

<sup>29</sup> Anthony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143, 187.

<sup>30</sup> *Ibid* 191.

<sup>31</sup> Ashworth, above n 8, 79.

<sup>32</sup> See, eg, Australian Institute of Health and Welfare, 'Statistics on Drug Use in Australia 2002' (Drug Statistics Series No 12) 79. In this self-reporting study of male prisoners in Australia 53.1 percent of all violent offenders, 65.7 percent of all property offenders and 62.5 percent of all other offenders were under the influence of alcohol and/or other drugs at the time of the offence.

<sup>33</sup> Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation?' (2004) 24(2) *Oxford Journal of Legal Studies* 173, 175-177; von Hirsch et al, above n 24.



is widely acknowledged that for many reasons most crimes do not result in arrest and conviction, which leads to the optimistic view of many offenders that they will not be caught.<sup>34</sup>

As well as the practical limitations of sentencing an offender to imprisonment for the purposes of achieving general deterrence, critics also point to the inherent unfairness of the sentence, as offenders are essentially made an example of in order to assure societal obedience to the law.<sup>35</sup> As an Australian offender observed about the judicial treatment meted out to him:

In my case, the sentencing judge specifically stated that a relatively severe sentence was required to achieve the effect of general deterrence that is, modifying future behavior of other practitioners in the tax industry... I have great difficulty with the concept of making someone the 'scapegoat' with the objective of modifying the future behavior of others. The offender should be charged with the offence they committed without reference to the sentence's potential deterrent effect on others...<sup>36</sup>

The second often recited assumption is that a custodial sentence for those offenders likely to re-offend can reduce crime. Collective incapacitation refers to the general lengthening of custodial sentences, as well as the lengthening of custodial sentences for those convicted of particular offences and is often characterised by the use of mandatory or mandatory minimum terms of imprisonment.<sup>37</sup> Specific incapacitation on the other hand targets offenders, who are likely to re-offend at a frequency or seriousness that warrants a longer custodial sentence.<sup>38</sup> However, according to criminological research neither collective nor specific incapacitation has been successful in efforts to reduce crime. Research from around the world suggests that released prisoners in comparison to offenders sanctioned to other sentences are more likely to once again be sentenced before the courts.<sup>39</sup>

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<sup>34</sup> Ashworth, above n 8, 83.

<sup>35</sup> Critics include most famously Immanuel Kant, who insisted 'Always recognize that human individuals are ends, and do not use them as means to your end': Immanuel Kant, *Metaphysik der Sitten* [Metaphysics of Morals] (Meiner, 1945) 197; See also John Rawls, who wrote that justice can only occur and be seen to occur when every offender is treated as an individual: John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 3-4.

<sup>36</sup> Australian Law Reform Commission, above n 6, 49-50 [4.10].

<sup>37</sup> Bernadette McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94.

<sup>38</sup> For an analysis of collective and specific incapacitation in Australia see the McSherry article, cited in n 37.

<sup>39</sup> William Spelman, 'The Limited Importance of Prison Expansion' in Alfred Blumstein and Joel Wallman (eds), *The Crime Drop in America* (Cambridge University Press, 2000) 97,

Imprisonment also proves to be ineffectual when the offender is easily replaced, such as for drug trafficking and burglary. In such circumstances imprisoning the offender may well increase crime rates.<sup>40</sup> As well, collective incapacitation is often criticised on cost grounds. For example, a study carried out in Australia estimated that a 10 percent reduction in crime could only take place by doubling the prison population.<sup>41</sup> The folly of adopting such a radical policy is exemplified in the United States, where despite the prison population having skyrocketed from 110 inmates per 100,000 persons in 1973 to 680 per 100,000 at the end of the twentieth century,<sup>42</sup> a recent analysis concluded that even if half of all prisoners convicted of non-violent offences were released back into the community not only would there be a cost saving of \$16,900,000,000 *per year* but there also would be no increase in the crime rate.<sup>43</sup>

Some reports suggest that the effect of imprisonment is most effective when imposed on particularly dangerous offenders. However, serious crimes are relatively rare events ensuring that their accurate prediction is difficult. This acknowledgement has been borne out in numerous criminological studies with predictions of the dangerousness of offenders having a success rate of between one-third and 50 percent.<sup>44</sup> Expressed in another way, up to two-thirds of offenders labeled dangerous will not re-offend. Selective incapacitation is also criticised for conflicting with the principle of finality, that an offender should be released after having served their sentence<sup>45</sup> and the principle of legality, which demands that 'persons become criminals because of their acts, not simply because of who or what they are'.<sup>46</sup>

The third assumption is that an offender will be deterred from committing crimes in the future when they are sentenced to

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124; Jörg-Martin Jehle et al, *Legalbewährung nach Strafrechtlichen Sanktionen: Eine bundesweite Rückfalluntersuchung 2004 bis 2007* [Probation following criminal sanctions – a nationwide study of recidivism between 2004 - 2007] (Bundesministerium der Justiz, 2010) [Federal Ministry of Justice, 2010]; Halsey, above n 20.

<sup>40</sup> Spelman, above n 39, 116-117; Janet Chan, 'The Limits of Incapacitation As a Crime Control Strategy', *Crime and Justice Bulletin No 25* (NSW Bureau of Crime Statistics and Research, 1995).

<sup>41</sup> Chan, above n 40.

<sup>42</sup> David Garland, 'Introduction: The Meaning of Mass Imprisonment' (2001) 3 *Punishment & Society* 5, 5.

<sup>43</sup> John Schmitt, Kris Warner and Sarika Gupta, 'The High Budgetary Cost of Incarceration' (2010) *Center for Economic and Policy Research* 1.

<sup>44</sup> Ashworth, above n 8, 235-236.

<sup>45</sup> McSherry, above n 37, 106.

<sup>46</sup> Francis Allen, 'The Habits of Legality: Criminal Justice and the Rule of Law' cited in McSherry, above n 37, 107.

imprisonment instead of other available sentences such as a suspended sentence or a fine. Alternatively, that the offender will be deterred from further crime through the imposition of a more severe custodial sentence. Unfortunately, a large number of studies have proved the opposite, namely that the rate of re-offending by otherwise similar offenders will often be higher for the offender sentenced to imprisonment.<sup>47</sup> For example, researchers in the United States examined similar drug offenders (similar in terms of sex, age, race/ethnic background, criminal record and employment status), who were sentenced to either a custodial sentence or a suspended sentence. The results demonstrated

that offenders who were sentenced to imprisonment were significantly more likely than offenders placed on probation to be arrested and charged with a new offence; they were also significantly more likely to be convicted of a new offence and sentenced to jail or prison for a new offence.<sup>48</sup>

Comparable results were found in a study recently published in Australia, in which almost 200 burglary offenders and 800 non-aggravated assault offenders were matched, with one member of the pair having been sentenced to imprisonment and the other to a non-custodial sentence.<sup>49</sup> The study results demonstrated that particularly offenders, who were sentenced to terms of imprisonment following non-aggravated assault, were more likely to re-offend. The study warned that

the consistency of the current findings with overseas evidence on the effects of prison on re-offending suggests that it would be unwise to imprison offenders when the only reason for doing so is a belief in the specific deterrent effects of prison.<sup>50</sup>

The final assumption about imprisonment is that an offender may be 'cured' through his or her time spent in prison. However, as has already been noted, offenders sentenced to terms of imprisonment generally have an increased risk of re-offending. An excellent example is

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<sup>47</sup> Alec Samuels, 'The Fine: The Principles' [1970] *Criminal Law Review* 201, 206-207; Ashworth, above n 8, 289.

<sup>48</sup> Cassia Spohn and David Holleran, 'The Effect of Imprisonment on Recidivism Rates for Felony Offenders: A Focus on Drug Offenders' (2002) 40(2) *Criminology* 329, 342.

<sup>49</sup> The pairs were matched on the basis of the offence, the number of offences, as well as prior prison and court experience. Typical criminological differences such as age, sex, and race/ethnic background as well as age of first sanction, and whether legal representation was available were also taken into account: Weatherburn, above n 23, 10.

<sup>50</sup> *Ibid.*

demonstrated in a German study in which the files of all persons sanctioned for criminal offences during 2004, as well as all prisoners released during 2004, were re-examined three years later. The results showed that those sentenced to a fine had a re-offending rate of 28 percent compared to offenders, who received suspended sentences with a re-offending rate of 41 percent and those sentenced to imprisonment with a re-offending rate of 52 percent.<sup>51</sup> Similar results in other western democratic countries<sup>52</sup> have led to the widely accepted view that imprisonment does not rehabilitate and 'even if imprisonment does not change an offender for the worse, it may affect society's response to him, making it more difficult for him to find stable employment, secure suitable housing or reconcile with his family'.<sup>53</sup>

Further grounds for reducing the reliance on imprisonment is the unified belief of the international community that imprisonment should be a sentence of last resort<sup>54</sup> and the cost. Official statistics from Australia calculated prisoner costs in 2010/2011 at \$289 per day or \$105,485 per prisoner per year. When it is noted that in the same year there were on average 28,711 prisoners per day, the Australian prison system cost a staggering \$3.28 billion.<sup>55</sup>

When it is recognised that imprisonment is by far the most expensive sentencing option, has limited effectiveness in reducing crime and has proved to be 'an expensive way of making bad people worse',<sup>56</sup> alternatives need to be found. This acknowledgement is confirmed in the warning that increasingly harsh sanctions with their incapacity to reduce crime will lead to demands for harsher sentences. As the Australian Law Reform Commission cautioned more than twenty years ago:

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<sup>51</sup> Jehle et al, above n 39.

<sup>52</sup> In Australia, for example, it has been noted that over half (55 percent) of prisoners in custody at 30 June 2012 had served a sentence in an adult prison prior to the current episode. Of those prisoners sentenced in the last twelve months, 60 percent had served time previously in a prison: Australian Bureau of Statistics, *Prisoners in Australia 2012* (2012) 4517.0 ABS Canberra.

<sup>53</sup> Spohn and Holleran, above n 48, 351; See also Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 20; Halsey, above n 20, 551.

<sup>54</sup> See, eg, General Assembly of the United Nations, *Standard Minimum Rules for Non-Custodial Measures*, UN Doc 45/110 (14 December 1990).

<sup>55</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2012* (2012) [8.5], [8.26].

<sup>56</sup> Great Britain Home Office, *White Paper: Crime Justice and Protecting the Public* (1990) [2.7] cited in Ashworth, above n 8, 289.

Imprisonment should therefore be a sanction applied only in cases of the most serious crimes. The value of imprisonment as a punishment option will be enhanced by its being used more sparingly. If imprisonment continues to be used as frequently as it presently is for a broad range of crimes, a community perception will tend to arise that serious cases of serious offences are not being punished appropriately even by the imposition of a custodial order. Pressure will arise for unacceptable punishments to be re-introduced. An overuse of imprisonment will reinforce this pressure.<sup>57</sup>

The broader use of the fine provides one such option for reducing our reliance on imprisonment, with its ability to meet the sentencing aims of retribution, denunciation, deterrence, rehabilitation and restitution, while at the same time limiting the harmful effects of imprisonment. In the words of Lord Lane of the English Court of Appeal 'if people can be dealt with properly by means of non-custodial sentences, and fines are possibly the best of all the non-custodial sentences, then that should be done'.<sup>58</sup> This article now turns to examining the Australian fining system with its emphasis on statutorily required minimum fines and tariff fines, before then turning to the German day fine system.

#### IV THE FINE IN AUSTRALIA

In Australia the fine is available as a sentencing option for both summary and indictable offences. In general, the fine is imposed for summary offences, that is, offences able to be dealt with summarily, for example minor traffic offences. For such offences, the fine often requires the imposition of a statutorily required minimum amount.<sup>59</sup> Although the fine is available as a sentencing option for indictable offences,<sup>60</sup> the generally accepted judicial and legislative view is that the fine remains at the lower end of the sentencing spectrum.<sup>61</sup> It is therefore not

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<sup>57</sup> Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 26-27 [52].

<sup>58</sup> *Olliver v Olliver* (1989) 11 Cr App R (S) 10 cited in Ashworth, above n 8, 250.

<sup>59</sup> Warner et al, above n 15, 128.

<sup>60</sup> The potential of the fine as a criminal sanction is clearly demonstrated at a Federal level, where s 4B of the *Crimes Act 1914* (Cth) allows for the conversion of imprisonment into a fine. For similar provisions at a State level see the *Crime (Sentencing Procedure) Act 1999* (NSW) s 15; *Criminal Law (Sentencing) Act 1988* (SA) s 18; the *Criminal Code 1924* (Tas) s 389(3). See also the Western Australian decision of *James v R* (1985) 14 A Crim R 364 in which the Court of Appeal held that the fine was a true alternative to a term of imprisonment and should not only be considered for those cases in which no term of imprisonment can be imposed.

<sup>61</sup> Michael Tonry and Mary Lynch, 'Intermediate Sanctions' (1996) 20 *Crime and Justice* 99, 128; Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 2006) 18; *Sentencing Act 1995* (WA) s 39; the *Sentencing Act 1991* (Vic) s 5(7); New South Wales

surprising that in Magistrates Courts, where summary offences are dealt with, the fine is the most frequently imposed sentence, whereas in the Supreme Court it is seldom imposed.<sup>62</sup>

Where the court is of the view that the fine is the most appropriate sanction, the court will normally adopt a starting point or 'tariff', which depends on the seriousness of the offence; mitigating and aggravating circumstances and prior criminal convictions, which can either increase or decrease the fine amount.<sup>63</sup> For some offences the minimum amount that must be imposed is determined by legislation.<sup>64</sup> In most jurisdictions the maximum amount that may be imposed is noted, although in some jurisdictions the maximum is expressed in units rather than a dollar amount.<sup>65</sup>

In circumstances in which the fine will be imposed, all Australian jurisdictions require that the court consider the financial circumstances of the offender.<sup>66</sup> However, as a general rule, there is no duty on the offender to disclose this information to the court. Section 6 of the *Fines Act 1996* (NSW), for example, provides that the court consider 'such information regarding the means of the accused as is reasonably and

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Sentencing Council, *Interim Report: The Effectiveness of Fines as a Sentencing Option: Court Imposed Fines and Penalty Options* (2007) 9-10.

<sup>62</sup> Statistics from the Magistrates Court in Victoria show that in 2008-2009 the fine was imposed on 52 percent of offenders, while imprisonment was imposed on 4 percent of offenders. In the Supreme Court the imposition of sanctions were reversed with 50 percent of offenders sentenced to imprisonment and 4 percent sentenced to a fine: Statistics are available on the Sentencing Advisory Council of Victoria website: <[www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)>; Similar statistics are found in New South Wales with 42.5 percent of offenders sentenced to a fine in the Local Court during 2010 and 7.1 percent sentenced to imprisonment. In the higher courts (defined as District and Supreme Courts) it is noted that the 'most frequently imposed principal penalty' was imprisonment (70 percent), the suspended sentence (17.6 percent) and the Bond (7.4 percent): New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2010* (Department of Attorney General and Justice).

<sup>63</sup> Andrew Ashworth, 'Sentencing' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2007) 990, 1006-1007; Sally Hillsman and Judith Greene, 'Tailoring Criminal Fines to the Financial Means of the Offender' (1988) 72(1) *Judicature* 38, 39.

<sup>64</sup> Drink driving laws and other traffic offences are good examples.

<sup>65</sup> The worth of the unit depends on the jurisdiction: \$110 at a federal level (*Crimes Act 1914* (Cth) s 4AA); \$100 in Victoria (the *Sentencing Act 1991* (Vic) s 110) and; \$100 in Queensland (*Penalty and Sentences Act 1992* (Qld) s 5).

<sup>66</sup> *Crimes Act 1914* (Cth) s 16C; *Fines Act 1996* (NSW) s 6; *Sentencing Act 1991* (Vic) s 50(1); *Penalties and Sentences Act 1992* (Qld) s 48; *Sentencing Act 1995* (WA) s 53(1); *Criminal Law (Sentencing) Act 1988* (SA) s 13(1); *Sentencing Act 1995* (NT) s 17; *Crimes (Sentencing) Act 2005* (ACT) s 14(3). In Tasmania the case of *Broughton v Lowe* [1979] Tas R (NC 7) Serial No 7/1979 is a precedent for the requirement that the financial circumstances of the offender be considered.

practicably available to the court for consideration'. In general, the widely accepted judicial view is that although the fine can be reduced because of financial disadvantage, unless legislation provides otherwise, the fine cannot be increased because of the offender's wealth.<sup>67</sup>

Different systems of collecting the fine have been adopted by Australian jurisdictions, however, a common problem is enforcement in the case of offenders either not paying or unable to pay the fine.<sup>68</sup> Non-payment of the fine may lead to offenders having to reappear in court leading to a congested court system, increased administrative costs and in some instances imprisonment. During the 1970s and 1980s blame for non-payment of the fine was partly attributed to the courts and their failure to take the financial circumstances of the offender into account.<sup>69</sup> Criticism of the judiciary's failure followed, particularly where the imposition of a fine on an impecunious offender resulted in imprisonment, which was considered both disproportionately harsh and increased the risk of re-offending.<sup>70</sup> As a result, all Australian jurisdictions introduced amendments to ensure that when sentencing, courts had to consider the financial circumstances of the offender.<sup>71</sup> However, this course of action remains meaningless, when a minimum amount is legislatively prescribed or in cases in which the court pays scant regard to the financial circumstances of the offender. Not surprisingly, despite supposed recognition of financial circumstances, some commentators continue to point out that the number of prisoners imprisoned, due to non-payment of fines, remains unsatisfactory.<sup>72</sup>

Continued criticism of the disproportional effect of the fine saw legislative amendments introduced at the end of the twentieth century in all Australian states. Instead of imposing a custodial sentence for non-payment of the fine, at least as a first step, suspension of the offender's driver's license was made available. The driver's license remained suspended, according to the relevant legislative provisions,

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<sup>67</sup> Ashworth, above n 8, 329; Warner et al, above n 15, 128.

<sup>68</sup> John Raine, Eileen Dunstan and Alan Mackie, 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' (2004) 43(5) *Howard Journal of Criminal Justice* 518, 519-521.

<sup>69</sup> See, eg, Alec Samuels, 'The Fine: The Principles' [1970] *Criminal Law Review* 268, 268.

<sup>70</sup> Samuels, above n 46, 206.

<sup>71</sup> Mary Dauntton-Fear, 'The Fine as a Criminal Sanction' (1971-1972) 4 *Adelaide Law Review* 307, 311-313; Rod Morgan and Roger Bowles, 'Efficiency and Magistrates' Courts Expenditures' (1983) 61(3) *Public Administration* 203, 205.

<sup>72</sup> Ashworth, above n 8, 337-338; Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) 148 [3.9.8].

until the fine was paid.<sup>73</sup> In terms of reducing the number of offenders imprisoned, due to non-payment of the fine, the measure has been a success with South Australia, the Northern Territory and New South Wales reporting nine, seven and zero persons respectively being imprisoned for fine default in 2008-2009.<sup>74</sup> However, these figures are probably misleading, with the New South Wales Sentencing Council for example noting that some non-payment of fine offenders are continuing to be imprisoned, but as a result of secondary offences, such as driving whilst disqualified.<sup>75</sup> Estimates suggest that one in every ten disqualified drivers, who are caught driving are imprisoned,<sup>76</sup> which is a significant figure, when it is recognised that studies in the United Kingdom, the United States and Canada have demonstrated that the percentage of disqualified drivers, who continue to drive, lies between 30-75 percent.<sup>77</sup>

Despite the amendments introduced by legislatures over the last thirty years to improve the principle of equal treatment, it is clear that the underlying system of fining in Australia remains flawed. Fines are often subject to legislatively prescribed minimum amounts, ensuring that courts are often restricted in their ability to reduce the disproportionate effects of the fine on financially disadvantaged offenders. Additionally, in circumstances in which the discretion to sanction a fine amount is left to the courts, the widely accepted judicial view holds that the fine will not be increased because of the offender's wealth. In Australia, these legislative and judicial restrictions on the fine's application mean that disproportionate, unjust and ultimately inequitable outcomes follow, leading to calls for the introduction of the 'day fine'.

## V THE FINE IN GERMANY

Less than fifty years ago, the Federal Republic of Germany (West Germany) had a traditional fining system in which the court

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<sup>73</sup> *Fines Act 1996* (NSW) ss 66-67; *Infringements Act 2006* (Vic) pts 7-8; *State Penalties Enforcement Act 1999* (Qld) ss 104-105; *Fines, Penalties and Infringement Notices Act 1994* (WA) ss 42-43; *Criminal Law (Sentencing) Act 1988* (SA) s 70E; *Monetary Penalties Enforcement Act 2005* (Tas) s 54; *Crimes (Sentencing) Act 2005* (ACT) s 30; *Fines and Penalties (Recovery) Act 2001* (NT) s 60.

<sup>74</sup> Mary Williams and Robyn Gilbert, *Reducing the Unintended Effects of Fines* (Indigenous Justice Clearinghouse, Current Initiatives Paper 2, 2011).

<sup>75</sup> New South Wales Sentencing Council, above n 61, 157.

<sup>76</sup> Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualifications as an Effective Legal Sanction in Western Australia* (Crime Research Centre, 2003) 66.

<sup>77</sup> *Ibid*, 6. See also Franz Streng, 'Modernes Sanktionsrecht' [Modern Sanctions] (1999) 111(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal of Criminal Law], 827, 855.



determined the amount of the fine based on the gravity of the offence and mitigating and aggravating circumstances.<sup>78</sup> The financial circumstances of the offender were rarely considered, although section 27(c) of the *Criminal Code* (West Germany) required that the court 'consider the financial circumstances of the offender'. Following a major review of the *Criminal Code* (West Germany) during the 1950s and 1960s, West Germany introduced two significant legislative reforms, which both complement the dominant role of the fine in German sentencing practice.

In 1969 the *First Criminal Law Amendment Act* (West Germany) came into effect, abolishing custodial sentences of less than one month<sup>79</sup> and requiring custodial sentences of less than six months, except in exceptional circumstances and where there would be no 'undue hardship', to be converted into fines or suspended sentences.<sup>80</sup> The *Second Criminal Law Amendment Act* (West Germany) saw the introduction of the day fine, a sentence that remains to this day Germany's primary sanction.

In German sentencing, the *Geldstrafe* (fine), along with a custodial sentence, are the two principal sanctions imposed under the German *Strafgesetzbuch* (Criminal Code). The *Geldstrafe* can only be imposed for criminal offences, both summary and indictable,<sup>81</sup> and is determined following a consideration of the offender's income.<sup>82</sup> This is known as the *Tagessatzsystem* (day fine system). According to sentencing statistics from the German Bureau of Statistics 81.6 percent of all offenders convicted of a criminal offence in 2010 were sentenced to a day fine.<sup>83</sup> In

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<sup>78</sup> Gerhardt Grebing, 'Die Geldstrafe im deutschen Recht nach Einführung des Tagessatzsystems' [The Fine in German Law following the introduction of the Day Fine] in Hans-Heinrich Jescheck and Gerhardt Grebing (eds), *Die Geldstrafe im deutschen und ausländischen Recht* [The Fine in German and Foreign Law] (Nomos Verlagsgesellschaft, 1978) 72.

<sup>79</sup> *Strafgesetzbuch* [Criminal Code] (Germany) § 38 ('StGB').

<sup>80</sup> StGB § 47; *Strafprozeßordnung* [Criminal Procedure Code] (Germany) § 459f ('StPO'). Examples of 'undue hardship' include a partner's illness leading to inability to care for children or loss of employment where long-term unemployment is the likely outcome: Löwe-Rosenberg Großkommentar, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz* [The Criminal Procedure Code and the Court Constitution Act] (Walter de Gruyter, 2010) § 459f, 288.

<sup>81</sup> Section 24 of the *Gerichtsverfassungsgesetz* [Court Constitution Act] (Germany) provides that the *Amtsgericht* [Magistrates Court] will have jurisdiction over criminal matters where a custodial sentence of more than four years is not expected to be imposed. While s 74 of the same Act provides that offences likely to attract a custodial sentence of more than four years will be heard by the *Landgericht* [Supreme Court].

<sup>82</sup> Fixed-sum fines are available but may only be imposed for *Ordnungswidrigkeiten* [infringements] and are referred to as a *Geldbuße* [Infringement notice].

<sup>83</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice

Germany the day fine is measured in units,<sup>84</sup> with the amount of each unit dependant on the personal and financial circumstances of the offender:

**Section 40 - Day fine units**

(1) A fine shall be imposed in daily units. The minimum fine shall consist of five and, unless the law provides otherwise, the maximum shall consist of three hundred and sixty full daily units.

(2) The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the offender. In doing so, it shall typically base its calculation on the actual average one-day net income of the offender or the average income he could achieve in one day. A daily unit shall not be set at less than one and not at more than thirty thousand euros.

(3) The income of the offender, his assets and other relevant assessment factors may be estimated when setting the amount of a daily unit.

(4) The number and amount of the daily units shall be indicated in the decision.

The fine amount is arrived at through the application of a two-stage process. First, the court determines the culpability of the offender, based on the gravity of the offence and mitigating and aggravating circumstances.<sup>85</sup> This process determines the *number* of day fine units to

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Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed') 90. This figure has remained remarkably consistent with one study finding that during the 1980s and 1990s the number of offenders sentenced to a day fine lay between 81.1 percent in 1984 and 83.9 percent in 1993: Elske Fehl, *Monetäre Sanktionen im Deutschen Rechtssystem* [Monetary Sanctions in the German Legal System] (Peter Lang Verlag, 2002) 15. Of the 18.4 percent of offenders sentenced to imprisonment, the statistics demonstrate that approximately two-thirds receive suspended sentences. In 2010 for example of the 129,717 persons sentenced to imprisonment, 92,057 received suspended sentences (71 percent): Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungssstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 3.1 'Verurteilte nach Dauer der Freiheitsstrafe' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 3.1 (Length of custodial sentence imposed) 153.

<sup>84</sup> The day fine is usually imposed as a minimum of five and a maximum of three hundred and sixty units, however in cases in which more than one offence has been committed, the number may be increased to a maximum of 720 day fine units: StGB § 54(2). Additionally StGB § 49 reduces the maximum number of day fines units able to be imposed for particular offences to 270. Examples include aiding and abetting or inducing another to commit a crime (StGB § 27, 30 respectively).

<sup>85</sup> StGB § 46. The financial circumstances of the offender may only be assessed as a mitigating or aggravating factor when it relates directly to the offender's culpability, such as acting out of necessity: Adolf Schönke and Horst Schröde, *Strafgesetzbuch Kommentar*

be imposed. It is only after this determination has been concluded that the court turns its mind to the personal and financial circumstances of the offender, that is, the *amount* of each day fine. It is the multiplication of these two factors that produces the total amount of the fine.

The legal minimum amount of each unit is €1 and the maximum amount is €30,000.<sup>86</sup> The starting point for assessing the fine amount is the net income of the offender including allowances<sup>87</sup> pensions and other financial benefits, such as interest accrued or share dividends.<sup>88</sup> The extent to which the courts take into account the offender's assets is discretionary, but generally larger assets, such as a house or investment portfolios, will be considered.<sup>89</sup> Net income deductions include work-related expenses, maintenance costs and other necessary financial obligations.<sup>90</sup> The system allows for a consideration of the total amount of each day fine unit in circumstances in which the offenders income is likely to change, for example where employment is foreseeable for the unemployed offender or where the offender has intentionally foregone employment in an attempt to reduce the severity of the sanction.<sup>91</sup> The amount of the day fine unit takes into consideration financially disadvantaged groups, such as students, the unemployed and other social security recipients. In most cases involving such persons, the amount of the day fine unit will be set at a very low level.<sup>92</sup> On the other

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[Criminal Code Commentary] (CH Beck, 2010) § 40, 718-719; Bernd-Dieter Meier, *Strafrechtliche Sanktionen* [Criminal Sanctions] (Springer, 2006) 63.

<sup>86</sup> Day fine units must not always be considered in full Euros. The day fine unit may be assessed for example at €2.50: Schönke and Schröde, above n 85, 719.

<sup>87</sup> Case law has determined that 'allowances' include free board and lodging at the parents home, or board and lodging provided for soldiers at a barracks: Schönke and Schröde, above n 85, 720; Meier, above n 85, 65-66.

<sup>88</sup> To better attain fairness in net income, the courts will usually divide income over the full twelve months in circumstances in which the offender's income fluctuates, such as for the self-employed or seasonal workers: Meier, above n 85, 65.

<sup>89</sup> In the case of the offender's house the court will usually include the rental value of the property in the income. At the same time smaller assets such as savings and family jewellery will not be considered: Gerhard Schäfer, Günther Sander and Gerhard van Gemmeren, *Praxis der Strafzumessung* [Imposing Sentences] (CH Beck, 2008) 26. One-off sources of income such as an inheritance, a present or lotto win are not assessed as income, whereas pensions, such as social security and aged pensions will be assessed: Schönke and Schröde, above n 85, 721-723.

<sup>90</sup> There is general agreement that legal costs, including compensation, restitution, lawyers and court costs will not be considered. However out of the ordinary costs, such as those associated with a disability or with care of children will be considered: Meier, above n 85, 67-68; Schönke and Schröde, above n 85, 721.

<sup>91</sup> StGB § 40(2). See also Schönke and Schröde, above n 85, 722; Schäfer, Sander and van Gemmeren, above n 89, 29.

<sup>92</sup> Schönke and Schröde, above n 85, 722.

hand, the financial circumstances of a stay-at-home partner will often be based on half of the 'working' partner's income.<sup>93</sup>

In many cases the offender's income will be voluntarily provided, particularly when requested. It is unclear exactly how many offenders provide income information but studies suggest that it is around 50 percent.<sup>94</sup> This figure is achieved through a co-operative system in which the police, the prosecution and the courts work together to collect information necessary for estimating the offender's income. Specific details of the offender such as age, address, occupation, income, family status and number of children are normally sought in a police questionnaire.<sup>95</sup> Prosecution powers then allow for more detailed investigations and finally the judge is able to ask questions of the offender during the hearing.<sup>96</sup> For those cases in which the offender's financial circumstances are unclear,<sup>97</sup> the court is able to estimate the offender's income.<sup>98</sup> This estimation may be adopted where the carrying out of an investigation would not be proportional to the day fine likely to be imposed.<sup>99</sup> Courts are not allowed to estimate the offender's income by selecting an arbitrary amount, but rather, must base their decision on information provided to the court.<sup>100</sup> In exercising their right to silence, the offender runs the risk of being sanctioned with a

<sup>93</sup> Although this principle is adopted as a general rule and is in line with *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 1360 ('BGB') providing for equality of 'family maintenance' the court may deviate from this rule in circumstances in which the stay-at-home partner is seen to have a higher or lower income: Schäfer, Sander and van Gemmeren, above n 89, 29; Meier, above n 85, 65-66.

<sup>94</sup> A study by the Max-Planck Institute for Foreign and International Criminal Law for example, noted that 46 percent of offenders sanctioned to a fine had provided income information to the police and that the prosecution initiated further investigations in only 1.7 percent of cases reviewed: Hans-Jörg Albrecht, *Strafzumessung und Vollstreckung bei Geldstrafen* [Imposition and Enforcement of Fines] (Duncker & Humblot, 1980) 204-205; In a further study carried out of all offenders sanctioned to the day fine in one municipality of Germany, it was noted that 65.5 percent had provided either the police or prosecution with income information: Wolfgang Fleischer, *Die Strafzumessung bei Geldstrafen* [The Imposition of Fines] (Gahmig Druck, 1983) 188.

<sup>95</sup> For copies of police and prosecution questionnaires see Fleischer, above n 94, 105-116; 124-131.

<sup>96</sup> *Ibid.*

<sup>97</sup> Either because the offender relies on the right to silence (StGB § 136), the information provided is considered unreliable or the investigating authorities have carried out an inadequate investigation.

<sup>98</sup> StGB § 40(3). This estimation is arrived at by dividing the assumed monthly income of the offender by thirty to arrive at the amount of each day fine unit.

<sup>99</sup> This is generally applied to fines likely to attract less than 90-day fine units: Heinz Zipf, *Probleme der Neuregelungen der Geldstrafe in Deutschland* [Problems of the new Fine provisions in Germany] (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal of Criminal Law] 513.

<sup>100</sup> Schäfer, Sander and van Gemmeren, above n 89, 32.

higher day fine amount, although appellate courts have made it clear that courts cannot intentionally overestimate the offender's income in an attempt to extract accurate information from the offender.<sup>101</sup> As a 'rule of thumb', the courts will usually apply a 20-25 percent reduction for an unemployed partner and a 10-15 percent reduction for the upkeep of a child.<sup>102</sup> Nevertheless it is generally accepted that the total amount of the day fine unit must not be reduced by more than 50 percent.<sup>103</sup>

It is expected that the offender will repay the day fine in one lump sum, if possible, but the court may grant an extension of time or allow for payment in installments, which in practice has resulted in almost one third of all fines paid in installments.<sup>104</sup> In circumstances in which the offender fails to pay the fine, the court is able to convert the fine into a custodial sentence, whereby one day fine unit corresponds to one day of imprisonment.<sup>105</sup> This has the benefit of ensuring that courts cannot impose disproportionate sentences. The court cannot increase the number of day fine units imposed because the offender is being sentenced to a fine rather than to imprisonment.<sup>106</sup> In practice, most custodial sentences for non-payment of a fine are converted into a community service order.<sup>107</sup>

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<sup>101</sup> Ibid; Meier, above n 85, 71.

<sup>102</sup> Schönke and Schröde, above n 85, 724.

<sup>103</sup> Thomas Fischer, *Strafgesetzbuch und Nebengesetze* [The Criminal Code and Supplementary Statutes] (Beck Juristischer Verlag, 2009) 333; Peter König, 'Grundwissen zur Zumessung der Geldstrafe' [Basic Knowledge of the Fine's Imposition] (2009) *Juristische Arbeitsblätter* [Legal Worksheets] 809, 815; Schönke and Schröde, above n 85, 724.

<sup>104</sup> *Criminal Code*, s 42; Albrecht, above n 94, 274.

<sup>105</sup> StGB § 43. A similar provision is contained in Article 36 of the *Schweizerisches Strafgesetzbuch* [Switzerland Criminal Code]: StGB § 36. In Austria, s 19(3) of the *österreichisches Strafgesetzbuch* [Austrian Criminal Code] provides that two day fine units equate to one day in prison. Two day fine units for one day in prison is also imposed in Finland but imprisonment for nonpayment of a fine can only be imposed for at least four days and at most ninety days: Tapio Lappi-Seppälä, 'Sentencing and Punishment in Finland' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 92, 94.

<sup>106</sup> StGB § 47(2) notes that 'If the law provides for an increased minimum term of imprisonment, the minimum fine... shall be determined by the minimum term of imprisonment...'. This ensures that where an offence provides for a minimum custodial sentence of 3 months, that the number of day fine units imposed must be at least 90. An example is grievous bodily harm (StGB § 224) which provides that an offender 'shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years'.

<sup>107</sup> *Einführungsgesetz zum Strafgesetzbuch* [Introductory Act to the Criminal Code] (Germany) § 293 ('StGBEG'): Generally, 6 hours community service = 1 day imprisonment. The program is often referred to as 'Sweat it out instead of sitting it out' (Schwitzen statt Sitzen); See, eg, Justizministerium Baden-Württemberg [Ministry of

The day fine is usually imposed for offences likely to attract a custodial sentence of less than six months. For example 94.5 percent of offenders sentenced in 2010 to traffic offences,<sup>108</sup> 86.8 percent of offenders sentenced to fraud and embezzlement offences<sup>109</sup> and 73.3 percent of offenders sentenced to property crime offences<sup>110</sup> under the *Strafgesetzbuch* (Criminal Code) received a day fine. That the day fine is usually applied to light and moderately serious offences is confirmed in the acknowledgement that the overwhelming majority (93 percent) of imposed day fine units amounted to less than 90 day fine units.<sup>111</sup> The day fine is also available for more serious offences, including offences against the person with 79 percent of offenders convicted of assault in 2010 sentenced to a day fine.<sup>112</sup>

Despite regional differences in the average number of day fine units imposed, the courts in Germany, particularly for drink driving offences, have adopted tariffs.<sup>113</sup> The use of tariffs mirrors the practice adopted in

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Justice Baden-Württemberg], *Schwitzen statt Sitzen* <[http://www.olg-  
karlsruhe.de/servlet/PB/menu/1238838/index.html](http://www.olg-karlsruhe.de/servlet/PB/menu/1238838/index.html)>

<sup>108</sup> Statistisches Bundesamt [Bureau of Statistics], Strafverfolgungsstatistik 2010 (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed')] 90. There are a large number of offences included within the term 'traffic offences' but the main offences are drink-and-other-drug driving and endangering road traffic.

<sup>109</sup> Statistisches Bundesamt [Bureau of Statistics], Strafverfolgungsstatistik 2010 (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed')] 90. Fraud and embezzlement offences are those provisions contained within StGB §§ 263-266b and include fraud, obtaining services by fraud, deception and abuse of trust.

<sup>110</sup> Statistisches Bundesamt [Bureau of Statistics], Strafverfolgungsstatistik 2010 (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed')] 90. Property crime offences are those provisions contained within StGB §§ 242-248c. These provisions include theft, aggravated theft, carrying of a weapon during theft and unlawful appropriation.

<sup>111</sup> Statistisches Bundesamt [Bureau of Statistics], Strafverfolgungsstatistik 2010 (Fachserie 10, reihe 3, 2010) Tabelle 3.3 'Verurteilte nach Zahl und Höhe der Tagessätze der Geldstrafe' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010) Table 3.3 (Number and amount of fine imposed')] 190. According to one commentator the judicial avoidance of sanctioning more than 90 day fine units is because there are increasing difficulties in payment of the fine and the general view that the aims of special or general deterrence are not achieved in imposing a fine of more than 90 day fine units: Meier, above n 85, 76.

<sup>112</sup> Statistisches Bundesamt [Bureau of Statistics], Strafverfolgungsstatistik 2010 (Fachserie 10, reihe 3, 2010) Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010) Table 2.3 (Type of sentence imposed')] 90.

<sup>113</sup> For example a first time drink-driving offender is usually sanctioned with around 40 day fine units. According to the German Bureau of Statistics the average German wage in 2011 was around €33,600 per year meaning that a first time drink-driving offender would be sentenced to a fine of around €3,700 euros before deductions, such as for children and maintenance costs. This is worked out by dividing the monthly income €2800 by the

Australia with similar offences attracting a similar number of day fine units. However, this does not mean that the fine amount will be similar, as there is a clear separation between the gravity of the offence and the culpability of the offender (to which the court will often apply a tariff) and to the fine amount, which depends solely on the personal and financial circumstances of the offender.

## VI AN ANALYSIS OF THE FINING SYSTEMS

The imposition of a fine in Australian courts will sometimes be dictated by the prescribed minimum amount provided for in legislation. Where there is discretion, the courts will generally apply a tariff based principally on the gravity of the offence, meaning in practice (as a result of the disproportionate number of socially and financially disadvantaged offenders) that the tariff tends towards the lower end of the sentencing spectrum. This legal position is confirmed in the widely acknowledged judicial view that while social and financial disadvantage may be considered a mitigating circumstance, leading to a reduced fine, the wealth of the offender cannot lead to a higher than reasonable fine.<sup>114</sup>

The failure to ensure that the fine has a similar punitive bite means that the principle of equal impact is not met. When two offenders pay the same fine but one has a higher income, the fine cannot have the same effect. For wealthy offenders the fine may be too easily paid and hence no real punishment<sup>115</sup> or even seen as payment of a 'license fee' in order to continue offending. These outcomes both result in the important aims of sentencing including retribution, deterrence and rehabilitation not being met.<sup>116</sup> As the New Zealand Court of Appeal observed:

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calendar month and then multiplying it by the 40 day fine units sanctioned. For first time property crime offenders the number of day fine units imposed will usually be between 20-60 day fine units, although this is dependant on the worth of the goods stolen. Stolen property valued at less than €50 will generally not be prosecuted (StGB § 248a). Fraud offences depend largely on the value of the goods fraudulently obtained but for the first time offender where the value of the goods is less than €500 the number of day fine units imposed will usually be between 20-40 day fine units. Assault offences are usually sanctioned with 40-60 day fine units, although again this depends on the damage caused: Schäfer, Sander and van Gemmeren, above n 89, 369-388.

<sup>114</sup> Ashworth, above n 8, 329; Warner et al, above n 15, 128.

<sup>115</sup> Hans-Jörg Albrecht, 'Post-Adjudication Dispositions in Comparative Perspective' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 293, 308.

<sup>116</sup> Dennis Ryan, 'Criminal Fines: A Sentencing Alternative to Short-term Incarceration' (1983) 68 *Iowa Law Review* 1285, 1303.

If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.<sup>117</sup>

On the other hand, as both the Chief Justice of the Supreme Court of Tasmania and a large number of the Justices of the Supreme Court of New South Wales have noted, the fine can have a particularly 'draconian' effect on economically disadvantaged offenders, leading to an inability to repay the fine and ultimately imprisonment.<sup>118</sup> Another effect may be that a court may hesitate to sentence a financially disadvantaged offender to a fine either because of the resulting injustice or because of the belief that an inability to pay will result in imprisonment. All of these objections may lead to discontent in the sentencing process. For example, a study of the socially and financially disadvantaged in Australia, who had been in contact with the criminal justice system, noted that the effect of punishment was often unjust depending on whether the offender was rich or poor.<sup>119</sup> In contrast to the legislatively prescribed minimum amount or tariff fine, the day fine system expressly requires a consideration of the offender's financial circumstances.

A further advantage of the day fine system is its 'transparency of proportionment'<sup>120</sup> achieved by the sentencing process being separated into two discernable steps. Proportionality is assured in the first-step because of its focus on the gravity of the offence and the culpability of the offender. The second-step, namely a consideration of the offender's personal and financial circumstances, assures that the principle of equal treatment is achieved. On the other hand, in Australia 'the extent to which the two factors, guilt and financial circumstances are reflected in the sum imposed cannot be established'.<sup>121</sup> As a result, the ability of the offender to follow the court's decision-making process means that the day fine system avoids any perception of arbitrariness, ensuring a better

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<sup>117</sup> *R v Radich* [1954] NZLR 86, 87.

<sup>118</sup> According to the former Chief Justice of the Supreme Court of Tasmania the legislatively prescribed minimum fine was capable of being 'draconian': Tasmanian Law Reform Institute, above n 72, 151-152 (3.9.18). Just under half of the judges surveyed in New South Wales (48 percent) noted that the fine for socially disadvantaged offenders was disproportionately severe: McFarlane and Poletti, above n 17, 31.

<sup>119</sup> Midgely, above n 12.

<sup>120</sup> Grebing, above n 2, 70.

<sup>121</sup> *Ibid* 90.



understanding of the sentencing process and trust in the sentencing system.<sup>122</sup>

The day fine system also improves the perceived legitimacy of the fine as a sentencing option. In other words, the fine is not just considered a mild punishment but is available for more serious offences such as property crime, fraud and assault. The broader use of the fine should in turn lead to the reduced use of the custodial sentence, and 'consequently, day fines help concentrate criminal justice resources on the small group of most serious offenders'.<sup>123</sup>

A final advantage of the day fine system is that a clear method is applied in the conversion of the fine into a custodial sentence. In Australia the common practice is that when alternative sanctions, such as driver disqualification have failed, non-payment of a fine will be converted into a term of imprisonment in which approximately \$100 corresponds to one day in custody.<sup>124</sup> In Germany, imprisonment for failure to pay a fine is not based on dollar amounts but rather the number of day fine units imposed.<sup>125</sup> Hence, it is the gravity of the offence and not the financial circumstances of the offender that determines the number of days the offender must spend in prison.

The strongest objection to the day fine system arises from the difficulty of ascertaining the offender's financial circumstances.<sup>126</sup> Critics point to the day fine systems of Sweden and Finland where income tax declarations are readily accessible,<sup>127</sup> submitting that without such accessibility the day fine system is impaired.<sup>128</sup> Further, it would be 'uncomfortable' for courts to have to request information about the financial circumstances of the offender prior to conviction, and yet if requested following conviction, a further court appearance would be

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<sup>122</sup> Nicholas Queloz, 'Vorschläge zur Verstärkung der Rechtmässigkeit der Geldstrafe, der Hauptstrafe Nummer 1 in der Schweiz' [Proposals to Improve the Legitimacy of the Fine, the Primary Sentence in Switzerland] (2010) *Schweizerische Zeitschrift für Kriminologie* [Swiss Journal of Criminology] 31-32.

<sup>123</sup> Albrecht, above n 115, 308.

<sup>124</sup> See, eg, *Sentencing Act 1997* (Tas) s 51(1); *Sentencing Regulations 2008* (Tas) r 8.

<sup>125</sup> Albrecht, above n 115, 308.

<sup>126</sup> See, eg, the Sentencing Commission for Scotland, *Basis on which Fines are Determined* (2006) 37 [7.26].

<sup>127</sup> Hans Thornstedt, 'Skandinavische Erfahrungen mit dem Tagesbußensystem' [Scandinavian Experiences with the Day Fine] (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* (Journal of Criminal Law) 595, 600; Morgan and Bowles, above n 71, 213.

<sup>128</sup> Similar concerns have been raised in relation to penalty notices with critics pointing to both the administrative complexity and prohibitive implementation costs as reasons why the day fine could not be introduced for penalty notices: New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012) 114 [4.105] 238 [11.18].

required, resulting in a congested court system.<sup>129</sup> Although there are impediments to Australia introducing the day fine based on the Swedish or Finnish models, the difficulties are not insurmountable. For example, in order to resolve the problem of tax declaration secrecy,<sup>130</sup> Germany implemented measures in which police questionnaires, prosecution powers and court questioning ensure that the required information is obtained.<sup>131</sup> Alternatively, provisions could be introduced in Australia in which offenders are requested to fill in a financial circumstances questionnaire prior to the hearing.<sup>132</sup> New Zealand courts for example may request a financial statement from the offender, although admittedly only in cases in which the court is unsure as to whether the offender has the means to pay the fine.<sup>133</sup> Whichever model is introduced, there will continue to be offenders, who refuse to provide income information, resulting in possible overestimations and default of payment for some offenders. In Germany for example statistics point to increasing numbers of persons being sent to prison as a result of their failure to repay the fine,<sup>134</sup> although studies suggest that this may be the result of self-represented offenders not being aware that they are able to request an extension of time or for payment in installments.<sup>135</sup>

A further concern is that the courts could deliberately circumvent the two-step day fine system by continuing to sentence offenders to amounts similar to those currently imposed. Rather than imposing a number of day fine units on an offender based on their culpability and then determining the value of each unit, the court may instead continue to impose a 'fair' sentence by first determining the offender's income

<sup>129</sup> Sentencing Commission for Scotland, above n 126, 36-37 [7.24].

<sup>130</sup> StGB § 355.

<sup>131</sup> Fleischer, above n 94, 105-116, 124-131.

<sup>132</sup> This questionnaire could declare that it is an offence to provide false or misleading information, and to encourage completion, it could note that income details may otherwise be obtained from the employer: Gerhard Grebing, 'Probleme der Tagessatz-Geldstrafe' [Problems of the Day Fine] (1976) 88(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal of Criminal Law] 1049, 1102.

<sup>133</sup> *Sentencing Act 2002* (NZ) ss 40-43.

<sup>134</sup> Bernd-Dieter Meier, 'Kriminalpolitik in kleinen Schritten' [Crime policy in small steps] (2008) 28(5) *Der Strafverteidiger* [The Defence lawyer] 263, 269. In 2009 around 4000 offenders who failed to re-pay the fine were imprisoned (around 8 percent of the prison population): Schönke and Schröde, above n 85, 733.

<sup>135</sup> For example a study of payment default resulting in imprisonment demonstrated that in more than half the cases (49.1 percent for traffic offenders; other crimes 56.6 percent) in which imprisonment was imposed, the offender had not asked for either an extension of time or for payment in installments, leading the author to conclude that they lacked knowledge of court procedures: Helmut Janssen, *Die Praxis der Geldstrafenvollstreckung* [Fine Enforcement] (Peter Lang Verlag, 1994) 147.

and then imposing the necessary number of day fine units so that the amount is reached. According to one law reform commission this could result, due to judicial support for the present system or the belief that the application of the day fine system is too complicated.<sup>136</sup> However, at least in Germany this does not appear to have transpired. Following the introduction of the day fine system the Max Planck Institute for Foreign and International Criminal Law examined the effects of the new fining system (1972-1975) finding that although the imposition of fines of less than 1500 DM (*Deutschmark* – German Dollar) remained consistent, a rise in fines of more than 1500 DM increased to 14 percent of all cases compared to 8 percent of cases heard three years prior.<sup>137</sup> Mindful that this increase may have been the result of increased judicial harshness the authors were also able to establish that in 54 percent of cases reviewed the court was not aware of the offender's income prior to the number of day fine units being imposed.<sup>138</sup>

Another criticism of the day fine is that whereas imprisonment or community service ensures that offenders are personally punished for offences committed, the day fine can provide no such guarantees.<sup>139</sup> This means that particularly for offences carried out during the course of employment, such as environmental or traffic offences, the day fine will often be paid by the employer, meaning that the offender escapes punishment.<sup>140</sup> On the other hand, the day fine imposed may detrimentally extend to family and others financially dependant on the offender.<sup>141</sup> In response to these criticisms it should be noted that whether the fine is a day fine or a conventional fine, the employer has always been able to pay the fine. Additionally, when comparing the fine with imprisonment, the fine has the advantage of maintaining bonds with family and community while at the same time ensuring that habits learnt in prison are avoided.<sup>142</sup> As well, consideration of the offender's personal circumstances is taken into account in the imposition of a day

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<sup>136</sup> This objection was raised during the 1970s by the Law Reform Commission of France. Found in Albrecht, above n 115, 309.

<sup>137</sup> Albrecht, above n 94, Graph 4, 202-203; Herbert Tröndle, 'Die Geldstrafe in der Praxis und Probleme ihrer Durchsetzung unter besonderer Berücksichtigung des Tagessatzsystems' [The Fine in Practice and Problems with its Implementation with particular regard to the Day Fine System] (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* (Journal of Criminal Law) 545, 549.

<sup>138</sup> Albrecht, above n 94, Graph 4, 204-205.

<sup>139</sup> Meier, above n 85, 59.

<sup>140</sup> Other examples noted include young offenders, who may have the fine paid for by the parents or grandparents, and stay-at-home partners, who may have the fine paid for by their spouse: *ibid*.

<sup>141</sup> Ryan, above n 116, 1302-1303; Meier, above n 134, 268.

<sup>142</sup> Spohn and Holleran, above n 48, 351.

fine, an option often not available for offenders sentenced to a legislatively prescribed minimum fine in Australia.

Finally, it is sometimes suggested that the imposition of a fine may lead to more crime, with the offender forced to carry out additional offences in order to repay the fine. An English study has however found this claim to be unsubstantiated with the fine usually paid out of regular sources of income.<sup>143</sup> In Germany, the evidence demonstrates that the day fine is generally imposed on offenders convicted of light and moderately serious offences and who are generally unlikely to re-offend.<sup>144</sup> The sanctioning of a fine for such offenders is ideal, as it provides the courts with the option of imposing a sentence that reflects the seriousness of the offence but at the same time allows the court to impose a more severe sanctions in circumstances in which the offender re-offends.

## VII THE DAY FINE IN AUSTRALIA?

The greatest advantage of the day fine system is the potential for reduced custodial sentences. In West Germany, for example, the introduction of the day fine saw a sharp drop in the number of offenders imprisoned, from 110,000 short-term custodial sanctions (defined as six months or less) shortly before the introduction of the day fine Criminal Code reforms, to 10,000 persons in 1976.<sup>145</sup> In contrast, the imposition of the short-term custodial sentence remains firmly entrenched in Australia.<sup>146</sup> In the Magistrates Court of Tasmania, for example, between 2001-2006, 67 percent of custodial sentences were for three months or less, and 89 per cent for six months or less, while in the Supreme Court of Tasmania, 18 percent of sentences for imprisonment were for three months or less, and 47 percent for six months or less.<sup>147</sup> The research demonstrates that short-term custodial sentences are most often imposed for light and moderately serious offences, making them particularly suitable to the day fine. The NSW Bureau of Crime

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<sup>143</sup> Paul Softley, 'A Survey of Fine Enforcement' (Home Office Research Study No 16, 1973) in Sally Hillsman, 'Fines and Day Fines' (1990) 12 *Crime and Justice* 49, 53.

<sup>144</sup> FehI, above n 83, 84.

<sup>145</sup> Robert Gillespie, 'Fines as an Alternative to Incarceration: The German Experience' (1980) 44(4) *Federal Probation* 20, 20-21. These statistics have remained steady. In 2001 for example 11.1 percent of offenders were sentenced to short-term custodial sentences: Bernd-Dieter Meier, 'Alternatives to Imprisonment in the German Criminal Justice System' (2003-2004) 16(3) *Federal Sentencing Reports* 222, 227.

<sup>146</sup> According to one Report, 6.8 percent of prisoners in NSW, 11.4 percent in Victoria and 7.2 percent in Queensland have been sentenced to short-term prison terms: Weatherburn, above n 23, 10.

<sup>147</sup> Tasmanian Law Reform Institute, above n 72, 547.94 [3.2.6].

Statistics and Research for example reported that more than 90 percent of offenders sentenced to short-term custodial sentences in NSW had committed assault, theft, breach of justice orders and traffic offences.<sup>148</sup> In Germany, all of these offences, with the exception of a breach of justice order, would normally attract a day fine, with the added benefit of reduced custodial costs.

It is also submitted that in Australia the day fine system could be particularly helpful in the sentencing of corporations. First, there is general acceptance that corporations will employ a cost-benefit analysis of the financial circumstances of particular actions prior to the commission of an offence. Consequently, general and specific deterrence could be particularly effective:

[c]orporate crimes are almost never crimes of passion: they are not spontaneous or emotional, but calculated risks taken by rational actors. As such they should be more amenable to control by policies based on utilitarian assumptions of the deterrence doctrine.<sup>149</sup>

Nevertheless, the efficacy of deterrence can only be considered a success, when the fine is considered a punishment and not simply a license fee or work expense.<sup>150</sup> In the English case of *R v F Howe & Son (Engineers) Ltd*<sup>151</sup> it was pointed out that in relation to corporations, the fine should not only consider the gravity of the offence but also the corporation's wealth.<sup>152</sup> On the other hand, studies show that the imposition of a fine is low in relation to corporations. A study from New South Wales for example, found that corporations punished following the death of an employee at the workplace were in 75 percent of all cases sanctioned to less than 20 percent of the maximum fine.<sup>153</sup> A good example that captured the attention of the Australian public was the case of *Director of Public Prosecutions v Esso Australia Pty Ltd*<sup>154</sup> in which two employees were killed and eight seriously injured. The offending corporation was sentenced to a \$2,000,000 fine, the largest

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<sup>148</sup> Bronwyn Lind and Simon Eyland, 'The Impact of Abolishing Short Prison Sentences', *Crime and Justice Bulletin No 73* (NSW Bureau of Crime Statistics and Research, 2002) 5.

<sup>149</sup> John Braithwaite and Gilbert Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28 *Crime and Delinquency* 292, 305. See also John Braithwaite and Gilbert Geis, 'Developments in the Law - Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions' (1979) 92 *Harvard Law Review* 1227, 1235.

<sup>150</sup> Albrecht, above n 115, 308.

<sup>151</sup> [1992] 2 All ER 249.

<sup>152</sup> *R v F Howe & Son (Engineers) Ltd* [1992] 2 All ER 249, 255 (Scott Baker J).

<sup>153</sup> Found in NSW Legislative Council Standing Committee Report, *Serious Injury and Death in the Workplace* (2004) 109-110.

<sup>154</sup> [2001] VSC 263.

fine for a workplace offence in Australia's history. However the severity of the sentence was called into question by some commentators in their observance that in the same year the offending corporation made a profit of US\$18 Billion.<sup>155</sup> Although some jurisdictions expressly provide that the fine for corporations is either unlimited or many times higher than for natural persons,<sup>156</sup> the generally accepted judicial position in Australia is that the amount of the fine is not dependant on the financial resources of the corporation but rather should be based on the fines imposed on corporations in similar cases.<sup>157</sup>

Another advantage of introducing the day fine would be that in relation to companies listed on the stock exchange access to financial records as a result of the duty to publicly publish records would be relatively simple. At least in the jurisdictions of the United Kingdom and New South Wales, courts are able to conclude that corporations that do not provide financial records are able to pay any and all fines imposed.<sup>158</sup>

## VIII CONCLUSION

Less than fifty years ago the fine in both West Germany and Australia was often a sanction resulting in imprisonment, with the courts rarely, if at all, considering the financial circumstances of the offender. On the other hand, often disproportionately mild fines were imposed on wealthier offenders.<sup>159</sup> Increasing criticism of short-term custodial sentences and the imposition of imprisonment for non-payment of a fine led to reform.<sup>160</sup> West Germany introduced a new *Criminal Code* in which the custodial sentence was restricted to cases of last resort and the overwhelming majority of offences were sanctioned with a day fine. In contrast, Australia introduced small ad-hoc amendments including that courts should consider the financial circumstances of the financially disadvantaged offender, as well as introducing broader sanctions for non-payment of a fine.

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<sup>155</sup> Karen Wheelwright, 'Corporate Liability for Workplace Deaths and Injury – Reflecting on Victoria's Laws in the Light of the Esso Longford Explosion' (2002) 7 *Deakin Law Review* 323; For other examples see Tasmanian Law Reform Institute, *Criminal Liability of Corporations*, Final Report No 9 (2007) 58-59 [7.2.3].

<sup>156</sup> *Crimes Act 1914* (Cth) s 4B; *Criminal Code 1924* (Tas) s 389(3).

<sup>157</sup> Ashworth, above n 8, 336.

<sup>158</sup> *R v F Howe & Son* [1999] 2 All ER 249, 254-255; *Port Stephens Council v Robinsons Anna Bay Sand Pty Ltd* [2007] NSWLEC 240 [23].

<sup>159</sup> See Sections IV-V.

<sup>160</sup> *Ibid.*

While the modest reforms introduced in Australia appeared to address concerns that the financially disadvantaged were subject to imprisonment by default, in reality, as the evidence shows, injustice remains with a failure to adhere to the principle of equal treatment and the financially disadvantaged continuing to be imprisoned, albeit for secondary offences. In practice, the financially disadvantaged offender will generally receive a harsher sentence than their wealthier counterpart, with either the fine being converted into a more severe sentence or little consideration being taken of the offender's wealth. In contrast, the introduction of the day fine in Germany has seen a significant reduction in the prison population as the sanctioning emphasis has shifted from imprisonment to the fine. This shift of emphasis has led to better safeguarding of the principles of both non-discrimination and equal treatment.

Australia can learn from the example set by Germany. The introduction of the day fine system offers a more transparent process, which will in turn increase public confidence in the criminal justice system. Additionally, there is likely to be a reduction in the prison population with concomitant reductions in recidivism and prison costs. Nevertheless, the most important goal achieved will be not only that justice and fairness towards both the rich and poor is done, but that it is also seen to be done.