

Your Ref:

Our Ref: Criminal Law Committee: 21000339/223

17 July 2012

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email: lacsc@parliament.qld.gov.au

Dear Research Director

PENALTIES AND SENTENCES AND OTHER LEGISLATION AMENDMENT BILL 2012

Thank you for the opportunity for the Queensland Law Society to provide comments to the Inquiry into the *Penalties and Sentences and Other Legislation Amendment Bill 2012* (the "Bill").

1. Short consultation timeframe

While we acknowledge that the setting of reporting dates is not within the control of the Committee, we wish to note the Society's deep concern over the exceptionally short reporting timeframes. This Bill was introduced on 11 July 2012, reported in Hansard on 12 July 2012, with submissions due by 17 July 2012. Therefore, only four business days were provided for responses to this omnibus Bill which proposes amendments to several pieces of legislation. This is concerning especially because the Explanatory Notes to the Bill state that there has been no public consultation on the amendments in the Bill. In addition, we have received reports that other legal practitioners would have been minded to make submissions, had the consultation timeframe been longer.

The Society does not consider this to be proper consultation by any measure. In the Society's view, the appropriate time for consultation is prior to the introduction of legislation into the House, not after. The fact that the legislation has been drafted and presented to the House without any prior public consultation, and is then the subject of an unrealistically short period for scrutiny thereafter, must raise the question about whether proper consultation is intended at all.

We note that the majority of this Bill does not involve the implementation of LNP election promises and is raising matters upon which there has been no previous public debate. In the interests of the democratic process, it is desirable that there should be, at least, some reasonable opportunity for the public to become aware and informed about the Government's policy agenda prior to it becoming law.

Given that there is a severely truncated opportunity for review of the amending legislation, an in-depth analysis has not been possible. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. That is a common by-product of legislation that is hurriedly drafted, and then introduced and passed without proper public consultation and scrutiny.

Industrial relations issues

2. Part 6 - Insertion of new ss 396A and 396B, *Industrial Relations Act 1999*

Part 6 of the Bill proposes to introduce a mechanism through which a health employer can recover an amount in relation to employment to which an employee is not entitled (an 'overpayment'), and also allows for the recovery of a 'health employment transition loan' made to an employee.

The Society refers to s 4(3)(a), *Legislative Standards Act 1992* which states that legislation should make "rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review". The Society can foresee situations where there may be errors or contentious issues in identifying a payment or a loan amount for recovery. We consider that it would be prudent for this proposed legislation to provide for an appropriate review mechanism if an employee seeks to object to the recovery.

We consider that an amendment to Schedule 1, *Industrial Relations Act 1999* to include "deductions to be made or proposed to be made from wages" as an 'industrial matter' for the purposes of the Act will make clear that an employee can access the dispute conciliation and arbitration provisions contained in the *Industrial Relations Act 1999*.

The Society also considers that it is important to ensure that any deductions do not result in financial hardship for the employee involved. We consider that the operation of these provisions should be reviewed in 12 months to ensure that hardship is not occurring in practice by virtue of arbitrary deductions and further amendments to the legislation can be made at that time, if necessary.

The Society would be pleased to review the draft ruling (directive) which is to be provided under the *Public Service Act 2008* so that we can consider the proposed internal process.

Criminal law issues

3. Clause 31 - Amendment of preamble

Clause 31 proposes an amendment to the preamble of the *Penalties and Sentences Act 1992* to include the following:

'Society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration.'

First, the Society notes that the proper funding of the administration of justice is the province of government and is one of the core tasks for which taxes are levied. Secondly, the Society does not support the levying of this tax to help pay for the cost of law enforcement. We consider that this will incentivise police officers to charge more people with more crimes in order to increase the likelihood that a person will be convicted of at least one offence, thereby securing the payment of the offender levy. The addition of more charges will only cause delay and increase court costs. Finally, we would be concerned if the public was not made fully

aware of the distribution of the offender levy. Therefore, we request clarification on exactly where these funds will be allocated.

4. Clause 34 - Amendment of s 5 (Meaning of penalty unit)

Clause 34 proposes the increase of a penalty unit from \$100 to \$110. We do not support this 10% increase in the value of a penalty unit. While we understand that this is a Government election commitment, no economic arguments for the increase have been provided in the Explanatory Notes to the Bill. We consider that this increase will have a negative impact on Queenslanders during this period of economic difficulty and uncertainty.

5. Clause 36 - Amendment of s 48 (Exercise of power to fine)

Clause 36 states that:

(3A) In considering the financial circumstances of the offender, the court must not take into account the offender levy imposed under section 179C.'

We consider that it is inappropriate to remove judicial discretion in the imposition of fines. The inability of the Court to take the offender levy into account on sentence is unjust (especially for those suffering under other economic burdens). This will have an unfair and economically devastating impact on some offenders which will only function to entrench these people in situations of economic uncertainty, disadvantage and poverty. In this regard, we note that this will negatively impact legally aided clients. This situation is concerning, especially due to the fact that there is no upper limit on the amount that can levied.

We propose that the offender levy be discretionary and allow learned judicial officers to decide on an individual case-by-case basis as to whether it would be in the interests of justice to impose the tax. At the very least, the Society strongly suggests that the Bill be amended to allow judicial officers to take the imposition of the mandatory offender levy into account when considering sentencing options.

6. Clause 44 - Insertion of new s 54A

We draw your attention to an article from The Courier-Mail dated 13 July 2012, entitled, "Unpaid fines flying towards \$1 billion". We have **enclosed** a copy of this article for ease of reference. This article notes the already heavy burden on the State Penalties and Enforcement Register which has been created by unpaid fines. The Society is concerned that this regulatory burden will only be increased when administration of the offender levy is added to the State Penalties and Enforcement Register's list of duties. In consideration of this burden and the amount of the levy, we question whether the value of imposing an offender levy will be outweighed by the administration costs to the State Penalties and Enforcement Register. This administration cost will be increased when levies must be returned to individuals who have had their adverse decisions overturned on appeal.

7. Clause 46 - Amendment of s 165 (Regulation-making power)

Clause 46 states:

(7) A regulation may be made about an offender levy including, for example, the prescribed particulars for an offender levy.'

The Society does not consider that changes to the prescribed particulars of the offender levy should be permitted to be made by regulation. In our view, like the increase or changes to the penalty unit system, such changes should be subject to the scrutiny that is necessary for legislative amendment.

8. Possible indirect discrimination

The Society is concerned that this offender levy has the potential to disproportionately affect Aboriginal and Torres Strait Islander persons, given their historical over-representation in the criminal justice system. We also consider that this tax will impact other marginalised and vulnerable groups such as people suffering from mental illness, the poor and regular users of public space. For example, homeless people or people at risk of experiencing homelessness who occupy public space are more likely to come into contact with the criminal justice system and will be negatively impacted by this offender levy.

In our view, the State Government is in effect causing more financial pressures to be placed on those who historically and statistically are least able to afford to pay the tax. This may then increase the recidivism of those disadvantaged and marginalised members.

Thank you again for the opportunity to provide these comments. We look forward to the Committee's report.

Yours faithfully

Dr John de Groot
President