Penalties & Sentences
(Indexation) Amendment Bill 2013
Submission 004

Submission by

YOUTH ADVOCACY CENTRE INC

to the

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE
of the
QUEENSLAND PARLIAMENT

Regarding the
PENALTIES AND SENTENCES (INDEXATION) AMENDMENT BILL 2013
JANUARY 2014

The Youth Advocacy Centre Inc (YAC) has been operating for over 30 years and offers free, legal services, youth support and family support assistance and services to young people generally 10 years to 18 years (inclusive), particularly those who are in, or are at risk of being in, the youth justice system or the child protection system, and who live in or around Brisbane. It provides support on a limited basis to those under 10 and over 18 years of age and to young people outside of Brisbane via telephone, website and publications.

All services offered are voluntary and confidential. This means that YAC staff only work with a young person if they want to work with YAC staff and no contact is made with anyone (eg families, teachers, police, other adults) without the young person's permission (unless there is a risk of serious, immediate harm to the young person or someone else).

In any dealings with a young person, YAC is guided by the Convention on the Rights of the Child, in particular:

- the right of young people to be treated equally irrespective of "colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status";
- the right of a young person to have an opinion and to be heard in all matters affecting the young person; and
- the best interests principle to include consideration of the views of the young person.

Our comments in relation to the law and legal processes are based in our understanding of young people's involvement with the law and legal systems as a result of our extensive experience in this area, this understanding and experience being confirmed by research – locally, Australia wide and internationally.

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Introduction

The Youth Advocacy Centre Inc (YAC) thanks the Committee for the opportunity to comment on *the Penalties and Sentences (Indexation) Amendment Bill 2013* (the Bill).

YAC submits that the amendments to provide for the annual indexation of the value of a penalty unit in the *Penalties and Sentences Act 1992* (PSA), as proposed by the Bill, are unnecessary and inappropriate, in summary, because:

- despite the objectives set out in the Bill, there is no evidence that increasing penalties is a deterrent and therefore no evidence that annual indexation of a penalty unit will have any increased deterrent effect
- the proposed amendments are unnecessarily complex
- the proposed amendments unnecessarily breach fundamental legislative principles
- in any event, the fixing of the monetary value of the penalty unit should not sit with the Treasurer as it is a matter of criminal justice policy, not fiscal policy. The lack of criteria or process to be used by the Treasurer in determining any increase is therefore particularly problematic.

1. Increasing fines does not have a deterrent effect

The Explanatory Notes which accompany the Bill state that the purpose of the proposed amendments is based on the need to deter people from committing crime by increasing the monetary value of any fines imposed on them. This argument is fundamentally flawed.

There is no empirical research that increasing the penalty that attaches to a criminal offence alone has any positive deterrent effect. Theories of deterrence revolve around the presumption that the commission of a criminal offence is based on a rational choice, where the benefit gained from committing the offence outweighs the risk of being caught and punished.[1] As a result there are two ways to increase deterrence and prevent people from engaging in criminal activity: either increase the penalty attached to the offence, or increase the certainty of apprehension, thus making the negative aspects of engaging in offending outweigh the benefits. Empirical research has established that the most effective way to increase deterrence is to increase certainty of apprehension.

With respect to young people, the research further indicates that their offending is often opportunistic and unplanned and is associated with a period of brain development where risk taking behaviour is predominant. Increasing fines will not be effective in this situation either.

Fines are also particularly unsuitable for young people and other disadvantaged groups who have no or little income. As YAC has submitted to the Committee previously[2], the most effective way to address offending by young people, particularly those who are entrenched in the justice system, is to address the issues which have brought, or are bringing, them into contact with the system.

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[1] Pyne, Derek. 2012. "Deterrence: Increased Enforcement versus Harsher Penalties." *Economic Letters* 117(3): 561-562.

[2] For example, submission in relation to the *Youth Justice (Boot Camp Orders) and other Legislation Amendment Bill 2012*

In any event, official crime statistics indicate that crime rates are decreasing, which calls into question the need to annually increase the value of a penalty unit in order to deter people from committing offences.[3]

It should be noted that legislation imposing criminal penalties generally provides a maximum fine and it is for the court to decide, in all the circumstances, what would be the most appropriate level of fine in a particular case up to that maximum. Whilst the legislation describes the maximum for an offence in penalty units rather than a monetary sum, usually magistrates or judges, knowing what that maximum translates to monetarily, impose a fine of a certain sum not a multiple of penalty units. That is, the court will set a fine of $220 rather than 2 penalty units. Indeed, the fine is often not a multiple of the current value of a penalty unit.

If an offence carries a maximum fine of 200 penalty units, that is currently $22,000. A 3.5% increase would make the maximum $22,700. For a maximum fine of 10 penalty units ($1100), the increase would mean $38.50 (which would be rounded down to $1138). The result will be such a variety of random dollar values, the increase is likely not to have any real meaning to the average person in any event.

It is, however, puzzling, in light of the expressed objective of the amendments, as to why the level of a penalty unit for the *Work Health and Safety Act 2011*, the *Electrical Safety Act 2002* and the *Safety in Recreational Water Activities Act 2011* would actually be **reduced** to 2012 levels. This includes serious matters which attract substantial penalties such as where a person has an electrical safety duty and, without reasonable excuse, exposes an individual to whom that duty is owed to a risk of death or serious injury or illness. This would seem to militate against the rationale for the Bill and sends conflicting messages.

2. The proposed amendments are unnecessarily complex

As set out in the first reading speech for the Bill, since 2000 the value of a penalty unit has been increased twice: once in 2009 where the value increased from $75 to $100 and in 2012 where the value increased from $100 to $110.[4] Not only does this bring into question the need for an increase at this time, since the value of the penalty unit was raised by 10% in August 2012, but this increase was achieved through a very simple process. All that is required to alter the value of a penalty unit is the amendment of section 5 PSA as can be seen from the 2012 amendment Bill:

> **Amendment of s 5 (Meaning of penalty unit)**
>
> (1) Section 5(1)(a), '$100'—
> *omit, insert—*
> '$110'.
>
> (2) Section 5(1)(b), '$100'—
> *omit, insert—*
> '$110'.

[3] Australian Institute of Criminology. 2012. "Australian Crime: Facts and Figures." Canberra: Australian Institute of Criminology.

[4] Queensland Government. 2013. "Penalties and Sentences (Indexation) Amendment Bill Introductory Speech (Hansard)." *Accessed 10 December 2013.*

(3) Section 5(1)(d), '$100'—
omit, insert—
'$110'.

Such an amendment can be included in any one of the number of pieces of legislation the Attorney-General brings before the Parliament in a year. Essentially, the current process allows for the government to monitor the level of fines and to have the dollar figure changed in section 5 PSA as and when required with minimal effort.

The process proposed by the current Bill makes amendment unnecessarily complicated if the Treasurer decides the change to the level of the penalty unit is to be other than the default position of 3.5%. In that situation the Treasurer firstly has to gazette the increase. Parliamentary Counsel then has to be instructed and has to draft legislation, albeit a Regulation rather than an amendment to the primary Act. There is therefore no saving in time or process.

One significant advantage of the current system is that the value of a penalty unit can be kept to multipliers of 5 and 10 which is easy to work with. The introduction of a percentage means that the proposed amendments have had to provide for rounding rules – and instead of rounding down to the nearest $5 or $10, the rounding is to the $1. As time progresses, the potential for errors in these calculations becomes greater – and for no public gain or assistance. Indeed, it is more likely to take up valuable court or registry time.

The current system also provides for the level of the penalty unit to be the same for all offences under all legislation. The differentiation between offences is the number of penalty units. It is unclear why different offences would have different penalty unit values. If it was considered that the fines under a particular piece of legislation were too high or too low, the response would be to adjust the number of penalty units, not apply a different level of penalty unit to that legislation. Doing so, again, simply adds unnecessary complexity.

3. Breach of fundamental legislative principles

Not only would there be no saving of time or process resulting from the proposed amendments, they would introduce a degree of uncertainty in that, instead of a proposed increase in the penalty unit being settled immediately on debate and passing (or otherwise) of an amendment to the Act, a regulation must lie on the table of the House for six weeks after introduction to see if a motion for disallowance is moved. If so moved, there is then a further period of time before the matter can be debated. In the meantime, the regulation is law and the penalty unit is the level in the regulation. It is then possible that the motion for disallowance is successful, in which case the level of the penalty unit would revert to its previous value, resulting in the potential for people prosecuted in the intervening period to be subject to greater fines than those following disallowance. This level of uncertainty in relation to sentencing is not appropriate.

The Explanatory Notes further concede that:

> The Bill potentially breaches the fundamental legislative principle that legislation should have sufficient regard to the institution of Parliament by providing that the amount of the percentage change (if it is not 3.5%) may be gazetted by the Treasurer; and the subsequent value of the penalty unit prescribed in regulation.

The Bill allows the Treasurer to determine the percentage change by which the penalty unit value will be increased and to gazette the percentage change by 31 March (our emphasis). This is presumptive of the Parliamentary process and should only be considered in the most unusual of circumstances to conform to democratic conventions. Gazettal is usually the consequence, not the precursor, of such a change.

4. The role of the Treasurer in the criminal justice system

It is also unclear why the level of the penalty unit is an issue for the Treasurer as it is not a matter of fiscal policy. The role of fines is not an income stream for consolidated revenue. The lack of criteria or process for use by the Treasurer in making any decision is therefore particularly problematic. In particular, there is no upper limit for any increase.

Overall, the likelihood is that the default position of 3.5% will be the one which prevails as this avoids any action on the part of the Treasurer or Parliament. There is no explanation as to how the figure of 3.5% has been arrived at as being an appropriate default position – and is currently above CPI and inflation. It is to be hoped that this proposal is not being introduced purely as a general income raising stratagem.

Conclusion

In conclusion, YAC would submit that there is no necessity for changes to be made to the simple, but highly efficient and easily understood system that is currently in place in relation to the level of fines and increasing them as appropriate.