QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Penalties & Sentences & Other Legislation Submission 013

The Research Director
Legal Affairs and Community Safety Committee

By Email: lacsc@Parliament.qld.gov.au

Dear Madam

Penalties and Sentences and Other Legislation Amendment Bill 2012

We refer to the enquiry in relation to the above Bill.

Lack of Consultation

We note that the Council was not consulted in relation to the proposals contained in the Bill. It seems from the explanatory memorandum neither the Law Society nor the Bar Association were consulted.

The complete lack of consultation is further compounded by the fact that the Bill was introduced on 11 July 2012. We were advised of the inquiry at 3:17 pm on 12 July 2012 and submissions closed on 17 July 2012.

The Queensland Council for Civil Liberties is a purely voluntary organisation. Like all other voluntary organisations it does not have the resources to address complicated issues in such a short period of time.

The Council raised the issue on lack of consultation on a number of occasions with the previous Government. However, that was a government that had been in office for a long period of time. Usually, consultation does not fall off until a government has been around for a while. It is in our submission a disturbing trend that the consultation is so poor, so early in the life of a government.

Increase in Penalty Units

We do not understand the justification for this increase. We can only assume that this is another revenue measure.

We are not aware that these increases in penalty units have any deterrent effect. We invite the Government to point to any evidence that the penalty unit increase in November 2008 has resulted in a reduction in crime during the last three and a half years.

The Administration fee on Criminal Justice Matters

Legal Issues

As noted above the Council is a voluntary organisation and our members have not had the time to consider in depth the constitutional issues raised by this measure particularly application of the principles described by the High Court in *Kable v DPP* (NSW) [1996] 189 CLR 51. In any event many constitutional lawyers have difficulty understanding the application of those principles.

In *South Australia v Totani* [2010] HCA 39 at para 69 Chief Justice French indicated that legislators may have to take "a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised.". In this light, we invite the Committee to ask the Attorney-General whether he has obtained an advice on the question of whether this measure coupled with the provision which prevents the Court from taking the fee into account in setting a penalty represents an unconstitutional fetter on the discretion of the Court.

In a similar vain on the basis of the decision of the High Court in *Momcilovic v the Queen* [2011] HCA 34 (per Gummow, Hayne and Heydon J J) it could be argued that this levy challenges the integrity of the Courts.

Moreover, in cases where a Queensland Court is exercising jurisdiction in relation to a Commonwealth criminal charge or offences which involve both Federal and State charges would the attempt to impose this fee in those circumstances be invalid because of Section 109 of the Constitution?

We refer the Committee to the decision of Gibbs CJ in *Winneke Ex Parte Gallagher & another* 44 ALR 577 at 581 which would suggest that if this impost is correctly characterised as a penalty rather than as a tax or 'Administration Fee' it seems likely that it would be invalid. The argument for this being a penalty and not a tax could we would suggest start with the usual definition of a sentence namely: "a dispositive order of a criminal court consequent upon the finding of guilt, whether or not a formal conviction is recorded see Fox and Freiberg, *Sentencing – State and Federal Law in Victoria* Second edition paragraph 1.507. The so called administration fee follows as a consequence of the finding of guilt.

In his decision in *Momcilovic* referred to above, Hayne J made the following observation on Section 109 inconsistency at paragraph 295:

> The specification of the penalty (both the type of penalty and it's quantum) is a defining and thus essential element of any crime. The specification of a penalty is the means by which the legislator seeks to secure that fewer of the prohibited actions are done as well as to provide punishment for those who contravene. That is why the consequences of contravention of Section 71AC of the *Drugs Act* and Section 302.4 of the Code cannot be dismissed from consideration in the application of Section 109.

Does the administrative levy also apply to regulatory offences? We can find nothing that limits it to criminal charges. If it does it could result in substantial unfairness. Here are some 1 penalty unit offences that might attract a levy larger than the fine (if any):

- refusing to allow entry for the purposes of a soil survey (Soil Survey Act);

- failing to vote in a referendum (Referendums Act);
- a prescribed offence under the Newstead House Trust Act 1939
- failing to display staffing notices under the Child Care Regulation
- consuming alcohol on local government land (Liquor Act s 173B)

Local law infringement notices can be 0.5 of a penalty unit. Challenging the fine in a court would attract the levy if unsuccessful because the Court would be sentencing the offender (see SPER Act s 12(2) for the penalty).

Policy Issues

It is clear that this change will fall most heavily on the poor in our community either because they were poor when they went to prison or because when they come out of prison they will be unemployed.

It is, in our view, simply not good public policy to impose financial penalties on people who are already poor. With so many barriers to those who have been through the criminal justice system entering back into the community it would be our view that the proposal is unlikely to be cost effective nor in the interests of society as it will discourage rehabilitation.

On the 15th day of September 2011 we received a letter from the office of the then Minister for Police which indicated to us that the level of imprisonment for the fine defaulters was gratifyingly low. We would be concerned that these extra imposts will result in increased imprisonment. It is trite to say that imprisoning a person is an extremely expensive exercise.

It is further trite to say that since the abolition of a debtor's prison it has been a clear policy that people should not be imprisoned for simply being poor.

We note that the previous government last year imposed an arbitrary and entirely unjustified increase in civil court fees. We are now concerned that this may have been the start of a trend.

We refer the Committee to the report of the Brennan Centre for Justice entitled 'The Hidden Costs of Florida's Criminal Justice Fees' by Rebekah Diller to be found at www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1. Whilst the situation in Florida is nowhere near as bad as that in Queensland there must be a very real concern that in the straightened financial circumstances of the State Government and its continuing limited revenue base the temptation will be to raise even more revenue through the justice system.

As that report notes at pages 9-10:

> Substantial reliance on fees to fund Court operations goes against best practice...chief among (the) concerns are the facts that dependence on Court fees interferes with the judiciary's independent constitutional role; diverts the Court's attention from essential functions and threatens the impartiality of Judges and other Court personnel with personal or institutional pecuniary incentives.

In fact, the Bill as drafted arguably gives judicial officers an interest in the outcome of cases because funds for the administration and enforcement of the laws are raised by the outcome of cases:

1. New provision in preamble: *society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration.*
2. New proposed Section 179A: *the purpose of this part is to provide for a levy imposed on an offender on sentence to help pay generally for the cost of law enforcement and administration.*

In addition, the financial health of the Courts could become dependant upon their collecting money from people who cannot pay. In the end, Courts may have insufficient funds to function.

A More Rational Method of Fine Collection

We draw the Committees attention to the paper by Chapman et al entitled *Rejuvenating Financial Penalties: Using the tax system to collect fines,* Centre for Economic Policy Research discussion paper number 461 March 2003.

The proposal in that paper is essentially for the collection of fines in the same manner as HECS.

This would be a far more rational method for the collecting of fines and it is about time it was given serious consideration by governments in this country.

Summary

In short, it is our view that the proposal to raise the value of a penalty unit and to impose a so called 'Administration Fee' on those who are found guilty in our courts represents extremely poor policy with potentially grave consequences for the future.

I thank Vice President Andrew Sinclair and Council member Peter Bridgman for their contributions to this submission.

Yours faithfully,

Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
17 July 2012

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