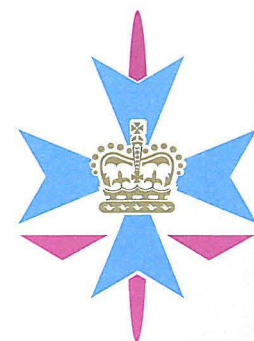


RNT;dgr

18 July 2012

Penalties & Sentences &  
Other Legislation  
Submission 018



BAR ASSOCIATION  
OF QUEENSLAND

Mr Brook Hastie  
Research Director  
Legal Affairs and Community Safety Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

Via email: [lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)

Dear Mr Hastie

**RE: Penalties and Sentences and Other Legislation Amendment Bill 2012**

**Inadequate Consultation**

1. The Bar Association of Queensland (BAQ) welcomes the opportunity to provide submissions on the *Penalties and Sentences and Other Legislation Amendment Bill 2012*.
2. Whilst the BAQ appreciates that the Committee is required to report to the Parliament by 23 July 2012, and is therefore working to a tight time frame, the BAQ considers that an inadequate consultation period has been allowed to make submissions on the Bill.
3. The call for submissions is dated 12 July 2012, and submissions were due by 17 July 2012, with an intervening weekend. This does not constitute proper consultation.
4. We have previously raised the question of proper consultation with the Committee, as well as the current and past Attorneys General.
5. In our view, absent exceptional circumstances, the principles of responsible and transparent government dictates that a reasonable period be granted to respond to calls for submissions.
6. The BAQ is an organisation with members of the highest level of expertise in almost every area of law. By granting an adequate consultation period, the Parliament is granting itself the opportunity to take advantage of this expertise and experience.

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## **Summary of the submission - the offender levy is opposed**

7. This submission is contained to the provisions in the Bill that deal with the proposed “offender levy”.
8. The BAQ opposes the introduction of the offender levy for the following reasons:
  - a. It is likely to impact most significantly on the disadvantaged;
  - b. The court does not have a discretion to reduce or waive the levy;
  - c. It is likely to result in injustice and harsh or unreasonable outcomes;
  - d. It will be disproportionate to the offending in minor cases, and unlikely to result in a considerable community benefit where imposed on those convicted of the most serious offences because of the difficulties in collecting the levy from those sentenced to substantial periods of imprisonment and without capacity to pay;
  - e. It is unlikely to have a deterrent effect on offenders;
  - f. It is likely to result in more trials in the Magistrates Court; and
  - g. The retrospective nature of the proposed levy is not justified.
9. In the event that the offender levy is introduced:
  - a. The court should have the ability to reduce or waive the levy in appropriate circumstances;
  - b. The court should be entitled to take the imposition of the levy into account on sentencing and in determining an offenders capacity to pay a fine;
  - c. The offender levy should not be imposed for minor offences, such as those that are not punishable by imprisonment, or where the sentence imposed is simply an absolute discharge, recognizance or minor fine;
  - d. Allocation of funding collected from the offender levy should reflect the likely increased burden on the courts, Legal Aid and community legal centres; and
  - e. The offender levy should not operate retrospectively.

## **Opposition to the Levy**

### *Impact on the disadvantaged*

10. The BAQ considers that the offender levy is likely to operate most harshly on the disadvantaged.
11. The offender levy is likely to have the greatest impact upon those in our society who are least able to afford the imposition of the levy. Set at \$100 for Magistrates Court matters, and \$300 for the District Court or Supreme Court, the levy is likely to have a significant impact upon the

homeless, the young, the unemployed, indigenous, and those with mental health issues. The experience of barristers demonstrates that many of the people who fall into these classes have been victims of crime, domestic violence, sexual abuse or neglect.

*Ability to pay – reduction, waiver and relevance of the levy to sentencing principles*

12. The Bill provides for the levy to be applied whether or not an offender has means to pay. For many offenders, the sum of \$100 is outside of their financial means.
13. The courts should be granted the discretion to reduce or waive the levy where the offender has insufficient means to pay. Factors to be taken into account in deciding whether to reduce or waive the levy might, for example, include the offender's age, antecedents and personal circumstances, the nature of the offence, and whether conviction was a result of a plea of guilty.
14. The absence of a power in the court to reduce or waive the levy is exacerbated by clause 35 and 36 of the Bill, which provides that in sentencing an offender, a court must not have regard to the offender levy imposed, and when exercising the power to fine, the court must not take into account the offender levy in considering the financial circumstances of the offender.
15. The BAQ opposes the proposed restrictions on the courts' power to take into account the offender levy in sentencing an offender and in considering their financial circumstances. Depriving a court of the power to consider all relevant circumstances is likely to result in injustice. Courts should be instruments of justice, not conduits of injustice.
16. The justice system is not a "one size fits all". The offender levy is a form of mandatory sentencing. Courts must be empowered to have the flexibility to deliver a just outcome across a range of circumstances. The proposed offender levy breaches this fundamental principle.

*Proportionality*

17. In many of the minor cases that come before the Magistrates Court, the offender levy itself is likely to have a more significant impact upon the offender than the actual penalty imposed by the court, especially in cases that could adequately be punished by way of an absolute discharge, a recognisance, or minimal fine.
18. A first time offender who has committed a minor offence of a technical or trivial nature will be liable to the same levy as an offender dealt with in the same court for multiple offences of a very serious nature.

19. That category of offenders that are guilty of the worst crimes and are sentenced to substantial periods of imprisonment are likely to evade any liability to pay the offender levy, or at least impose a significant cost on the State in recouping the levy through administrative processes.
20. The offender levy will be collected far more readily from the large volume of offenders convicted of minor offences, whilst those repeat offenders charged with offences that cause the greater level of public harm and suffering will contribute little to the system, and in some instances will simply cost the public money through the administrative burden of collecting the levy through enforcement channels. The limitations in collecting the levy from repeat and serious offenders (see proposed section 179F(3) and (7) which excludes fine option orders or imprisonment warrants for collecting the offender levy) suggests that compliance and collection rates for the offender levy is likely to be lower than those currently achieved by SPER, which predominantly collects fines imposed for offences towards the lower end of the scale of seriousness.
21. The proposed offender levy attaches to the sentence, rather than the nature of the offence. The setting of a uniform offender levy for particular courts, regardless of the nature of the offence, will, in many instances, be disproportionate to the offence committed, and will result in mere revenue raising from those minor offenders who have the means to pay, rather than those serious or repeat offenders who arguably have a higher moral obligation to compensate society for their offending.
22. For those minor offenders who don't have the means to pay, the offender levy is likely to operate most harshly and oppressively.

*The offender levy is unlikely to act as a deterrent*

23. The BAQ considers that the offender levy is unlikely to have any deterrent impact upon offenders.
24. The purpose of the offender levy is to “*help pay generally for the cost of law enforcement and administration.*” It is therefore intended to be a source of revenue for the government to fund law enforcement and administration costs.
25. Because the offender levy is connected to the sentence, rather than the nature of the offence, it is unlikely to have any deterrent impact on offenders or encourage them to accept responsibility for their actions.

*Adverse impact upon the efficient administration of justice*

26. The BAQ considers that the imposition of an offender levy is likely to result in more summary trials for minor offences.
27. The blanket application of the offender levy will provide little incentive to offenders charged with minor offences to plead guilty. The inability

of the court to reduce or waive the offender levy will exacerbate this problem.

28. Where an offender is charged with a minor offence, the offender levy imposed upon conviction is in many cases likely to exceed, or at least equal the sentence to be imposed, particularly for first time offenders. Whilst the discount given on sentence to those who plead guilty serves as a powerful incentive to those charged with minor offences to plead guilty, where that incentive is largely removed by the automatic imposition of an offender levy following conviction, it is not unreasonable to expect an increase in the number of summary trials in the Magistrates Court.
29. An increased number of summary trials in the Magistrates Court will impact most significantly upon the courts, police, and prosecutors.
30. Whilst the duty lawyer can represent most offenders charged with minor offences who elect to plead guilty, Legal Aid guidelines restrict the availability of legal aid for many of the less serious offences that are dealt with summarily. Accordingly, many of these trials are likely to be conducted by self-represented litigants, who place an additional strain on the justice system.

#### *Retrospectivity*

31. The BAQ opposes the retrospective nature of the offender levy contained in clause 39 of the Bill.
32. The BAQ recommends that if the government is determined to proceed with an offender levy, it should apply only to those offences where the initiating process (i.e. the arrest, notice to appear, summons etc.) was commenced after the date of assent.

#### **If the offender levy is enacted**

##### *Possible limits to be imposed upon the offender levy*

33. The BAQ considers that if the government were to maintain its intention to introduce an offender levy, it should exclude:
  - a. Offences that are not punishable by imprisonment (i.e. those where the maximum penalty does not include a period of imprisonment); and
  - b. Those offences that are sufficiently serious to justify the imposition of an offender levy. This might be achieved by excluding offences where a discharge or recognisance is imposed under sections 19, 22, 29, or 30 of the *Penalties and Sentence Act* 1992, where the only sentence imposed is an order for restitution or compensation under section 35, or where only a small fine is imposed, with a limit of, for instance, \$250, or alternatively, convictions where no conviction is recorded.

34. By removing the application of the offender levy to the most minor category of offences, the prospect of the offender levy operating disproportionately are minimised, and there is a reduced risk of spike in the numbers of self-represented summary trials for minor offences.

*The ability of the court to reduce or waive the offender levy and take it into account on sentence*

35. In the event that the offender levy is proceeded with:
- a. The court should have the ability to reduce or waive the levy in appropriate circumstances; and
  - b. The court should be entitled to take the imposition of the levy into account on sentencing and in determining an offenders capacity to pay a fine;
36. Allowing the court to reduce or waive the levy in appropriate circumstances, and take it into account on sentence, will remove the risk of it resulting in injustice or acting harshly on the disadvantaged.

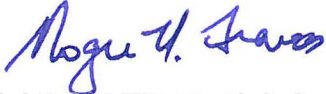
*Lack of detail regarding use of the offender levy and impact on the justice system*

37. The purpose given in the Bill for the imposition of an offender levy is to “*help pay generally for the cost of law enforcement and administration*”.
38. The lack of specificity in the Bill, the explanatory notes and the accompanying parliamentary speech regarding use of the funds from an offender levy mean that issues surrounding use of the fund are not able to have been examined by BAQ.
39. BAQ would appreciate an opportunity to make submissions on the proposed use of the levy once that is decided.
40. Any increase in funding to police and investigative or prosecutorial agencies will likely have an impact upon the justice system as a whole, including the courts, Legal Aid and community legal centres.
41. Accordingly, allocation of funds from any offender levy should reflect the likely increase in demands upon the entire justice system, not simply the prosecutorial side.

## **Continuing involvement**

42. The Bar Association of Queensland would be grateful to be kept informed of the passage of this Bill through the Committee, and the opportunity of commenting on the Committee's Report and any further drafts of the Bill.

Yours faithfully

A handwritten signature in blue ink, reading "Roger N. Traves". The signature is written in a cursive style with a large initial 'R'.

**ROGER N TRAVES S.C.**  
President