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

BY EMAIL: lacsc@parliament.qld.gov.au

Dear Colleagues,

RE: PENALTIES AND SENTENCES AND OTHER LEGISLATION AMENDMENT BILL 2012

We refer to the above and thank you for the opportunity to provide submissions. We do however note that due to time constraints (relating to the very minimal amount of time afforded within which to provide feedback), is entirely possible that important considerations might have gone unidentified (or insufficiently fleshed-out). Given the potential significance of the proposed amendments – such is disappointing.

Background – preliminary consideration

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for almost four decades has practiced at the coalface of the justice arena, we believe

we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

Offender Levy

One immediate impact of such a levy will be a wider reluctance on the part of some defendants to plead guilty – coupled with a corresponding increase in the number of matters listed for a contested hearing. This will also have a significant negative impact upon the public purse (not to mention problems with already over-crowded court calendars and increased demand for legal services).

We also envisage a number of other issues in regard to the introduction of an Offender Levy in respect to our clients. Many of our clients are unemployed or low income earners and are therefore ill equipped to pay a levy for court proceedings. We suggest that if a levy is to be introduced it should be done so on the basis of capacity to pay and/or based upon the nature of the charge and/or sentencing outcome:

- A system could be introduced where an exemption/waiver applies where a person is on a Centrelink payment and can produce a pension card, health care card or equivalent as proof (but should also include those who are unemployed and not in receipt of benefits at all). Whilst we note that the proposed amendments enable the levy to be referred to the State Enforcement Penalty Registry (SPER), many of our clients are already endeavouring to pay regular amounts to SPER for varying penalties, including for Victims Compensation and accumulated fines.
- An alternative (or addition) to exemptions for Centrelink beneficiaries– could be to exempt certain classes of minor offences (such as public nuisances charges; begging; regulatory offences etc) – where such a levy would be disproportionate to the nature of the offence (as well as act as a disincentive for defendants to enter pleas of guilty).
- Further, an exemption could be applied to certain categories of sentencing outcomes – for example where a good behaviour bond is imposed or a fine

of under $250.00; or the sentence is imposed in a "therapeutic" court (such as the Special Circumstances Court; Drug Court; Murri Court).

Such exemptions would go a long way towards ensuring a more equitable system which both accommodates the bringing to fruition of election promise undertakings and ensuring that the system does not disproportionately impact upon some of our most disadvantaged citizens. Such includes not only the socio-economically disadvantaged, including the homeless, but also those who suffer from mental health illnesses.

Note: we have assumed for the sake of this submission that the proposed amendments do not include a magistrate presiding in the Children's Court jurisdiction – as for reasons which would be well apparent, any such an inclusion would be strongly opposed.

The enforcement system (SPER) and the consequences of not engaging in it disproportionately impacts on Aboriginal and Torres Strait Islander peoples. Some of the reasons for this include the large number of people who are on Centrelink payments, the high number of people who are illiterate/innumerate, a large number of people with mental illness and who are homeless, the level of understanding of English and a higher likelihood of moving address. The consequences of these disadvantages and cultural differences mean that Aboriginal and Torres Strait Islander peoples may be less able to engage with SPER and are therefore more likely to have their licenses suspended or even be imprisoned as a result.[1] This of course, has ongoing consequences for the person, their family and their community. The addition of an offender levy only adds to this.

We submit that introducing the levy will cause Aboriginal and Torres Strait Islander peoples in particular, added financial stress beyond the person intended to pay the levy. There is also a failure to take into account cultural considerations, such as Aboriginal and Torres Strait Islander defendants not having the ability to pay and other family members being required to pay the money for them, or that money is a

[1] Mary Spiers Williams and Robyn Gilbert, *Reducing the unintended impacts of fines*, Indigenous Justice Clearinghouse, Current Initiatives Paper 2, January 2011.

shared resource and it being required to be spent on the levy and possibly fines reduces the amount available for other family members, including children.

The preclusion of Magistrates and Judges from considering the offender levy (Clause 35) in sentencing or when considering the financial circumstances (Clause 36) of the defendant, is likely to have the practical effect of those being sentenced, receiving harsher penalties than the court intends. This may mean that a person is punished beyond the purpose in s 9 *Penalties and Sentencing Act 1992.*[2]

We note the insertion of s 4 (Clause 31) in regard to the "entitlement" of society to recover monies from offenders to pay for law enforcement costs and administration. There is a lack of information in respect to this in terms of projections of amounts to be received and the effect on reducing existing taxes which presently pay for the justice system.

The Explanatory Notes provide very little information, excepting to call the levy a "nominal administration fee on criminal justice matters where a defendant is found guilty".[3] We fail to see how terming the fee a levy in the amendments makes it not a fee, as prohibited in the strong statement made in s 704 *Criminal Code 1899*. We acknowledge the statement in Clause 17 Explanatory Notes to clarify that the offender levy is not a fee as prohibited in s 704, however, for all practical purposes it amounts to such - albeit at the time of sentencing rather than on the basis that a person has been charged.

We agree that if introduced, the offender levy should not apply to offences under the Bail Act 1980 or when a person is resentenced, when they have already been subjected to the levy.

The different amount of the levy depending on the sentencing court (Magistrates compared to District and Supreme Courts) for some cases, may add to the unfairness. For example, the relevant sentencing court for certain charges such as assault occasioning bodily harm and serious assault, will be decided by the Prosecution, at a cost of either $100.00 or $300.00 to the defendant on sentence.

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[2] In particular s 9(1)(a) *Penalties and Sentencing Act 1992*
[3] At p. 1 under the heading *Reasons for the Bill*.

The retrospective applicability of the offender levy is also unfair. It does not comply with s 34 of the *Statutory Instruments Act 1992*, as referred to at 6.6 Retrospective provisions Legislation Handbook.[4] At s 34(2) *Statutory Instruments Act 1992* it is stated that "beneficial provision means a provision that does not operate to the disadvantage of a person (other than the State, a State authority or a local government) by—

(a) decreasing the person's rights; or

(b) imposing liabilities on the person."

It is difficult to suggest that the offender levy is capable of complying with s 34 of the *Statutory Instruments Act 1992* or s 4 of the *Legislative Standards Act 1992* in regard to fundamental legislative principles.

Raising Penalty Unit from $100.00 to $110.00

We would not support this proposed amendment – nor are we of the view that such a change would carry with it any deterrent effect. We are also conscious of the potential impact upon our most socio-economically disadvantaged citizens – which comprise a significant proportion of our Organisation's client base. We are also aware that many of our clients' fines are referred to SPER due to their inability to pay the fines imposed upon them. This is despite the common law principle that a defendant should not be fined a sum that they have no means of paying.[5] An increase in the penalty unit will only add to the existent large pool of unpaid fines. We reiterate that fines and in turn SPER for many Aboriginal and Torres Strait Islander peoples due to disadvantage and cultural considerations act to punish more than just the defendant. Some of the impacts of having less money include even less[6] access to services such as education and health and eating less healthy food, due to cost and access. We acknowledge that these are not intended consequences of these amendments, but given the already high levels of disadvantage within Aboriginal and Torres Strait Islander communities, we suggest wider consultation

[4] Queensland Government, Department of the Premier and Cabinet

[5] *R v Rahme* (1989) 43 A Crim R 81.

[6] Many of our clients are already isolated in relation to services and require money to pay for transport to larger centres to access services.

and consideration of comments prior to progressing with these amendments. There appears to be no pressing reason for such a swift process as is presently occurring and for such a limited consultation (within Government only).

We wish you well in your deliberations and trust that our submission is of assistance. As mentioned above, we welcome the opportunity for further dialogue. I also take this opportunity to thanks Ms Fiona Campbell from our Cairns office in terms of her assistance with the first draft of this submission – especially with such limited notification.

Yours faithfully,

Shane Duffy

Chief Executive Officer