

A Consideration of the Legitimacy and Equity of Queensland's Offender Levy

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Abstract

In 2012 the Queensland Government introduced an offender levy. The levy is applied to every offender, other than a child, who is sentenced in a Queensland court. Queensland's offender levy does not form part of the sentence imposed by the court and applies regardless of the offender's circumstances. The levy cannot be waived or reduced. Revenue raised from the levy is directed to consolidated revenue and will help pay for the cost of law enforcement and administration. Drawing on experiences of offender levies in other jurisdictions, this article examines the legitimacy and equity of the Queensland offender levy regime and the law reform process surrounding it.

Introduction

In 2012, the Queensland Government introduced an offender levy (*Penalties and Sentences Act 1992* (Qld) pt 10A ('*Penalties and Sentences Act*'). This levy is only one of a range of controversial policies and legislative reforms being championed by the current state government. Others include boot camps for young offenders (Youth Justice 2013), the closure of the Special Circumstances Court and significantly reduced funding for many non-government legal support organisations (Moore 2012a). From August 2012, the offender levy is applied to every offender, other than a child, who is sentenced in a Queensland court. Matters heard in the Magistrates Courts now attract a levy of \$100 and matters heard in the District and Supreme Courts attract a levy of \$300 (*Penalties and Sentences Regulation 2005* (Qld) reg 8A). Queensland's offender levy does not form part of the sentence imposed by the court and applies regardless of the offender's circumstances. Revenue raised from the levy is directed to consolidated revenue (Ryan 2012a), and will help pay 'generally for the cost of law enforcement and administration' (Bleijie 2012c; *Penalties and Sentences Act* s 179A).

Drawing on experiences of offender levies in a number of jurisdictions, this article examines the legitimacy and equity of the Queensland offender levy regime and the law reform process surrounding it. Some of the key concerns and deficiencies of the offender levy and the process underlying its introduction include the limited consultation undertaken

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about the rate, scope and purpose of the levy, its constitutional validity and retrospectivity, the appropriateness of applying administrative fees in criminal cases, and its potentially discriminatory and unfair application. After providing a short overview of the levy, these issues are discussed in turn.

The Queensland Offender Levy

On 11 July 2012, as one of its election commitments (Bleijie 2012a), the new Queensland Government introduced the *Penalties and Sentences and Other Legislation Amendment Bill 2012* ('the Bill') into Queensland Parliament. The Inquiry Overview (2012) set out the Bill's key objectives with respect to the proposed offender levy, which included that:

- where an offender is found guilty, a 'nominal administration fee' will be automatically imposed on criminal justice matters in the Supreme (\$300), District (\$300) and Magistrates Courts (\$100);
- it should be payable per sentencing event (regardless of number of convictions and whether or not a conviction is recorded);
- it does not apply to juveniles, or where the offence involves a breach of bail or on re-sentencing;
- it is not part of the sentence, so does not include fee waiver provisions;
- the court cannot have regard to the levy when determining the appropriate sentence for an offence;
- the State Penalties Enforcement Registry ('SPER'), which currently collects fines in Queensland, is responsible for collecting the levy.

The Bill was referred to the Legal Affairs and Community Safety Committee ('the Committee') on 11 July 2012 and, noting the 'truncated timeframe', the Acting Director-General for Queensland advised that the Committee was required to report back to 'the House' on the Bill by 23 July 2012 (Ryan 2012b). In this rushed context, a call for submissions on the Bill was made on 12 July 2012, with submissions required by 17 July. This provided only four working days for preparation and submission of comments. The Legal Affairs and Community Safety Committee Report ('the Report'), dated 'July 2012', was received by stakeholders on 24 July 2012 and recommended that the Bill be passed with minor amendments in relation to the levy (Legal Affairs and Community Safety Committee 2012). Specifically, the Report recommended that the Special Circumstances Court should retain discretion in imposing the levy (Walsh 2011; Moore 2012b) and that constitutional and other legal concerns raised in some of the submissions should be considered further (Legal Affairs and Community Safety Committee 2012). These matters are discussed below, but neither of these issues was addressed in the final legislation. The Bill was introduced to Parliament and passed without significant debate on 1 August 2012, with all of the key objectives outlined above incorporated into the Act.

Based on recent data, the 'real net recurrent expenditure per finalisation' in Queensland's Magistrates Courts during 2010–11 was \$394, in the District Courts \$6262 and in the Supreme Courts \$7573 (Productivity Commission 2012:table 7A.23). This indicates that the levy amounts to potential cost recovery of approximately 25 per cent for Magistrates Court matters, five per cent for District Court matters and four per cent for Supreme Court matters. During 2010–11 there were 1504 non-appeal matters finalised in the Supreme

Courts, 5854 non-appeal matters finalised in the District Courts, and 186 399 matters finalised in the Magistrates Courts (Productivity Commission 2012:table 7A.5), which would have seen almost \$19 million in revenue raised had they been subjected to the new offender levy. Clearly the levy has potential for contributing significantly to the cost of the criminal justice process in Queensland.

An offender levy of some description has been imposed in many other common law jurisdictions in Australia and internationally (see Table 2 below) and, although no such levy has been implemented to date in Western Australian (Banks 2010) or Victoria (Wilkinson 2010), governments in both jurisdictions have considered it. A key difference between the levy imposed in Queensland and the levy imposed in most other common law jurisdictions is that, while Queensland's levy will be used to fund law enforcement and administration, in most other jurisdictions the levy specifically contributes to the costs of providing services and compensation to victims of crime (see Table 2 below).

The consultation process and the issues raised

Despite the short time frame for consultation on the introduction of an offender levy in Queensland, several submissions were made to the Committee. The concerns expressed in the submissions related to the consultation process itself, legislative validity and fairness. Some submissions also raised the prospect of unintended consequences arising from the imposition of the levy. These issues are discussed in turn below.

Lack of consultation

The rushed nature of the consultation process was noted by many who made submissions about the offender levy (Legal Affairs and Community Safety Committee 2012:3–5). This was of particular concern because there was no public consultation regarding the Bill (Explanatory Notes 2012:5). The Queensland Law Society ('QLS') questioned whether the process of consultation was 'proper', noting that the 'appropriate time for consultation is prior to the introduction of legislation to the House, not after' (2012:1). The Bar Association of Queensland's ('BAQ') submission pointed to the fact that its members have the highest level of expertise in all areas of law, and failing to consult properly with this group resulted in the Government's missed opportunity to access high levels of expertise and experience (2012:1). The Legal Affairs and Community Safety Committee took the unusual step of noting the poor consultation surrounding the Bill in the Report. The Committee also observed that the development of the Bill would have been 'greatly enhanced' if there had been public consultation and discussions with stakeholders (Legal Affairs and Community Safety Committee 2012:5).

Proper consultation and inquiry on the development of new legislation may be considered an important aspect of responsible and transparent government (BAQ 2012:1). The Queensland Government's *Parliamentary Procedures Handbook* sets out the steps for a 'typical' inquiry process (2012c:16.6). According to the typical processes, a committee may decide it is appropriate to advertise for public submissions, write to individuals with special expertise or interest in the issues and ask for a submission, and hold public hearings (Queensland Government 2012c:16.6(4), (7)). In this case only relevant government departments and heads of jurisdiction were consulted; it seems that key stakeholders such as the QLS (2012:2) and BAQ (2012:1) came across the Bill, rather than being directly consulted. The Queensland Government's 'typical inquiry process' guide observes that 'where possible the committee will allow at least four weeks for the receipt of submissions'

(2012c:16.6(6)). In the case of the levy Bill, it is not clear why the Committee could not wait the appropriate four weeks and instead demanded submissions within four days. While the limited consultation and truncated timeframe are not unlawful, they are unusual and were not justified in the circumstances. Concerns about limited consultations have been noted elsewhere (Hurst 2012).

Unusually, the Auditor-General was contacted by the Chair of the Committee and asked to make a submission during the consultation process. However, the Auditor-General refused to make a submission citing the 'long held convention' that the Auditor-General does not comment on the merits of policy objectives of the state, which is also legislatively recognised in the *Auditor-General Act 2009* (Qld) s 37A(5) (Greaves 2012). Curiously, the Explanatory Notes to the Bill (2012:5) reveal that 'consultation occurred with all relevant government departments including the Queensland Audit Office', although this was subsequently noted as an 'erratum' (Erratum 2012:1).

The consultation process underlying the introduction of an offender levy in Northern Ireland in 2012 (*Justice Act (Northern Ireland) 2011* ss 1–6) represents a best-practice approach. It included significant background research and community consultations and provided ample time for community members to make submissions in response to a detailed summary of views and options arising from the research and consultation. The Northern Ireland levy was introduced to fund victims of crime compensation, so the views of victims were considered to be extremely important. After considering the results of a survey involving over 1100 victims of crime, the Northern Ireland Government's Criminal Policy Unit developed a draft guideline summarising the options and experiences in other jurisdictions which was made available to the public for comment, providing members of the public with a two-month period for consultation (Criminal Policy Unit 2010b). The final report concluded that the establishment of a victim levy and associated fund were generally welcomed and that respondents largely supported the principal aim of the levy 'of making offenders more accountable for the harm their actions cause' (Criminal Policy Unit 2010a). It seems likely members of the public would have more confidence in legislative reforms developed in this way.

*Constitutional validity*¹

In its submission, the Queensland Council for Civil Liberties (2012:2) questioned whether the levy offends the *Kable* principle (*Kable v DPP*). The *Kable* principle reflects the idea that a degree of separation of judicial and administrative powers is built into the structure of the *Australian Constitution*, pursuant to ch III and especially s 71, and applies to all federal courts. Courts in which the judicial power may be vested are the High Court, Federal Courts established by Parliament and 'such other courts as Parliament invests with federal jurisdiction'— this last category refers to state courts created by state law (Ratnapala and Crowe 2012:175). State courts are not permitted to behave in a manner that would undermine their institutional integrity or independence to a level where they are no longer a fit repository for the judicial power of the Commonwealth, as this would impact the integrated Australian legal system (*Kable v DPP* at 584). The levy will apply to offences prosecuted in state courts, including those involving non-state government prosecutors (Bleijie 2012a:1131).

One possible argument is that the levy offends the *Kable* principle because it constitutes a penalty, rather than an administrative fee, and as such is in conflict with the formal penalty

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for federal offences. However, the official classification of the levy is that of an 'administrative levy'. The Second Reading Speech states that 'the offender levy is a modest administrative levy that does not form part of the sentence' (Blejijie 2012b:1317). As long as the amount of the levy remains small enough that it merely recoups some of the costs associated with the defendant's engagement with the justice system, it is unlikely to be determined to offend the *Kable* principle. Analogously, in *Qureshi v Minister for Immigration and Multicultural and Indigenous Affairs* the Federal Court determined that a compulsory fee for unwanted services associated with immigration detention was a mere charge to recoup costs, and not a tax. If, however, the amount charged is disproportionate to the costs of the services provided (in this case the provision of a fair trial), it could be held to be a tax. If the tax is considered a levy on services, it may be regarded as a duty of excise and therefore inconsistent with the Federal Parliament's exclusive power under s 90 of the *Australian Constitution*. The levy would not be a tax if it were treated as a penalty.

Alternatively, the levy might offend the *Kable* principle because it is somehow repugnant to the judicial process and undermines public confidence in the integrity and independence of the judiciary. The levy is triggered after a person is found guilty and sentenced. Traditionally, the exercise of judicial power in a trial 'is exhausted by a finding of guilt or acceptance of a plea of guilty followed by sentence' (*Baker v The Queen* at 48). Therefore, as the levy is ordered after sentencing, it does not appear to impinge on judicial power, and an argument that the imposition of the levy interferes with the judicial power being exercised during sentencing is unlikely to succeed. The degree of interference seems to be far less than that involved in a mandatory sentence, and such regimes have been upheld as constitutionally valid (*Palling and Corfield* at 58, 68–9). Public confidence is an indicator of potential damage to institutional independence and integrity, but no actual loss of confidence is necessary to demonstrate damage to institutional independence and integrity (*Fardon v Attorney-General (Qld)* at 102). However, it may be difficult to argue that the mere existence of the levy damages public confidence in the courts and judiciary in any way. The trial itself remains impartial and the important questions of guilt or innocence and sentence are determined without interference as the levy is imposed at the completion of these processes.

Another possible argument is that the sentencing limitations associated with the levy — that the sentencing judge or magistrate is not allowed to take into account the levy in sentencing or in determining quantum of the fine based in consideration of the circumstances of the offender: see ss 9(7A) and 48(3A) of the *Penalties and Sentences Act* — constitute a (perceived) impermissible limitation on judicial discretion. Perhaps it could be argued that the levy imposes a mandatory penalty on the accused, but that it is cloaked under the illusion of a judicial discretion. It was noted in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*:

As a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals (at 201–2).

However, it is unlikely that merely appearing to impose constraints on what the judiciary may consider during 'sentencing' will reach the level of such an impermissible direction here. The *Kable* principle is offended when a supposedly judicial determination is so confined that the outcome is functionally a decision of the executive (see *South Australia v Totani* at 436) or legislature (*Kable v DPP*). Nevertheless, the High Court has found that any attempt to use the confidence the public reposes in the judiciary

(*Wainohu v New South Wales* at 37; Gavin 2012) to ‘cloak their decisions in the neutral colours of judicial action’ (*Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* at 51) is likely to offend the institutional integrity of a state court. It is possible that the penalty imposed on an offender in Queensland now effectively consists of two parts: that imposed by the judge independently of any consideration of the levy, and the levy itself, imposed by the legislature with the amount set by the executive. When attention is directed to matters of substance, rather than form (see *Wainohu v New South Wales* at 27–8), a levy that is imposed only upon a finding of guilt is likely to be construed by a layperson to be part of the sentence imposed for having been found guilty. The Queensland Council for Civil Liberties (2012:4) argued that it is difficult to see the levy as anything other than an addition to the sentence. In requiring the judge to disregard the levy for the purposes of sentencing, there is, perhaps, an illusion that the judge is determining the appropriate penalty independently, when in fact a part of it (potentially a very substantial part in the event of a moderate fine or where a good behaviour bond is ordered) is not allowed to feature in the judicial decision-making process.

While this is not a case of judicial discretion being exercised to determine whether it is appropriate that the defendant should bear the costs (as permitted under *Justices Act 1886* (Qld) s 157) — rather, a charge being imposed completely independently of the judicial process — it is likely that an ordinary member of the public would nonetheless consider the levy to be part of the sentence. The pertinent question then becomes whether this apparent departure from the ordinarily independent judicial process around sentencing is actually impermissible. This requires establishing that the departure is so ‘extraordinary’ (*Kable v DPP* at 608; *Fardon v Attorney-General (Qld)* at 144) that it actually affects the institutional integrity of the court. In previous cases this has ordinarily required something extreme, such as involving the judiciary in issuing control orders which curtail the liberties of individuals who had not actually been found guilty of any crime (*South Australia v Totani*) or making decisions with serious consequences without any reasons being required to be given (*Wainohu v New South Wales*). Where the complaint is limited to a perception of judicial involvement, rather than the actual fact, it may be more important to establish that public confidence in the judiciary and its ability to perform judicial functions is actually or is liable to be impacted as a result of the law. This would be a difficult argument to make in relation to the levy, as it would be necessary to find that the loss of confidence in the courts’ ability to perform the judicial function of sentencing appropriately is substantial enough, due to the limitation to discretion imposed by the *Penalties and Sentences Act* ss 9(7A) and 48(3A), to actually impact the institutional integrity of the court. A stronger argument may be that the retrospective imposition of the levy is unlawful.

Retrospective operation

Pursuant to the express language of the statute, the levy operates retrospectively, in the sense that it has the effect of altering the future legal consequences of past events (Palmer and Sampford 1994:220). The levy applies ‘in relation to an offence for which the offender is sentenced after the commencement, even if the offence was committed, or the offender was charged with or convicted of the offence, before the commencement’ (*Penalties and Sentences Act* s 224). While, in general, legislation does not operate retrospectively as it is contrary to fundamental legislative principles, it is clear that state parliaments can enact legislation that operates retrospectively (*Yrttiaho v Public Curator (Queensland)*). Some of the submissions expressed concern about the retrospective application of the levy (BAQ 2012:5; ATSILS 2012:5). The Aboriginal & Torres Strait Islander Legal Service’s (‘ATSILS’) submission observed that the retrospective application was unfair and

questioned whether it complied with the *Statutory Instruments Act 1992* (Qld) s 34 (2012:5). This provision is titled 'Beneficial retrospective commencement' and states:

- (1) A beneficial provision of a statutory instrument may be given retrospective operation if the statutory instrument expressly provides for that operation.
- (2) In this section—

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.

The Explanatory Notes to this provision, introduced in 1992, state that an instrument can have a retrospective effect if the person is not 'disadvantaged'; prior to the 1992 amendment it was necessary to demonstrate that the retrospective effect of legislation had a 'positive advantage' to a person affected by it (Explanatory Notes 1992:78). The offender levy imposes a liability on a person through the direct requirement to pay the levy and should not have a retrospective application. It is likely, for instance, that some individuals may have decided to contest traffic fine matters prior to the reform and may have made a different decision had they been aware of the levy in addition to any possible fine likely to be imposed. They will now discover that, if found guilty, the amount owed as a result of the imposition of the levy is greater than any fine they may be required to pay, and that it will be in addition to any fine imposed. Others who perhaps delayed their hearing for some reason may not have done so had they been aware of the levy.

The process within Queensland for ensuring legislation upholds fundamental legislative principles involves the Bill being examined by the Scrutiny Committee, which was a process implemented as a direct result of the Fitzgerald Inquiry (Fitzgerald Inquiry 1987:ch 3.1.2) and subsequent review of the role and functions of the Office of the Queensland Parliamentary Counsel (2008:6). The sponsoring department that prepares the Explanatory Notes to accompany the Bill is also required to explain and justify any departures from these fundamental legislative principles (Office of the Queensland Parliamentary Counsel 2008:2). In this instance, the issue of retrospectivity was identified in the Explanatory Notes, and the departure was argued to be 'justified on the basis that the community will benefit from collection of the levy from the widest possible class of offenders' (Explanatory Notes 2012:3). However, it is difficult to see how the retrospective nature of the legislation in this case will 'not operate to the disadvantage of a person'.

The appropriateness of charging an administrative fee in a criminal case

Court fees are already prevalent in civil litigation, where a range of fees are paid by applicants in all Australian states to lodge matters and have them dealt with in the courts. Such fees serve a range of functions, including recovering costs and sending appropriate price signals to potential litigants so as to ensure that parties consider all appropriate options to resolve disputes (Productivity Commission 2012:7.25).

In Queensland, the average civil court fee collected per lodgement in the Magistrates Court during 2010–11 was \$110; by comparison, the civil court fee collected in the Magistrates' Courts in Victoria, Northern Territory, Tasmania and Australian Capital Territory were all less than the Queensland offender levy of \$100 (Productivity Commission 2012:table 7.8). However, there is a strong argument that civil matters should be treated differently to criminal matters. In its submission, ATSILS (2012) pointed out that the levy

was introduced in contradiction to *Criminal Code Act 1899* (Qld) s 704, which, prior to the reforms, stated that ‘no fees can be taken in any court of criminal jurisdiction or before any justice from any person who is charged with an indictable offence for any proceeding had or taken in the court or before the justice with respect to the charge’. However, as part of the package of reforms, s 704 was amended for the first time since the Act’s introduction in 1899. Section 704(2) now states that the offender levy is ‘not a fee’.

While the premise underlying the levy is that offenders, and not taxpayers, should pay for their matters to be finalised in court (Bleijie 2012c), there are good reasons why this should not be the case specifically in criminal matters. Beckett and Harris (2011:509–10) argue that crime is a wrong against the state and, in response, the state usurps the dispute resolution process; the process becomes the responsibility of government. They argue that ‘compelling defendants to reimburse the state for its criminal justice expenditures is in tension with this principle’ (Beckett and Harris 2011:511). This is especially so as offenders are not given a choice whether to use the government ‘service’ or find alternative providers. Thus, as an offender is obliged to use the government service, the government should pay for it, and this in itself is an important check on government power in the context of criminal justice (Beckett and Harris 2011:511). As O’Malley (2011:548) argues, in a similar situation in the United States that could be applied to Queensland, ‘fees not fines are the primary villain in the piece’ and reflect misguided policy.

While Judge Learned Hand (1951:5) warned against the rationing of justice through the imposition of fees, others have suggested that charging a fee for the use of the courts is not in itself objectionable unless it really does hinder those who have insufficient resources to obtain justice (Bresnick 1982:37). The Queensland Council for Civil Liberties provided an example where the levy may lead to such rationalising of justice. Its submission noted that many local law infringement notices attract fines of less than \$110 (Brisbane City Council 2012) and the levy provides a disincentive to contest these matters in court because, if unsuccessful, such a matter will attract both the levy and the fine, in some cases doubling the monetary outlay for the offender (Queensland Council for Civil Liberties 2012:3). Contesting infringement notices will be too ‘risky’ and will only be an option for wealthier people.

The preamble of the *Penalties and Sentences Act* now includes a new subsection (4): ‘society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration’ and one of the purposes of the legislation is to ‘provide for the imposition of an offender levy’ (*Penalties and Sentences Act* s 3(i)). These latest additions sit very uneasily with the other purposes of the Act, which all relate to sentencing offenders.

The use of regulations rather than legislation to review the levy

Another concern raised by the Queensland Law Society is that, unlike penalty units which are subject to legislation (*Penalties and Sentences Act* s 5), the levy amount is subject to regulation (QLS 2012:4; *Penalties and Sentences Regulation 2005* (Qld) reg 8A). Jurisdictions vary in approach; for example, in Tasmania the levy is dealt with under an Act (*Victims of Crime Compensation Act 1994* (Tas) s 5). This means that while fine penalty unit changes are subject to parliamentary scrutiny, the amount of levy can be changed easily and quickly by the delegated entity. The *Legislation Handbook* (Queensland Government 2012b:6.1) notes that ‘it can be necessary’ for legislative power to be delegated for any of the following reasons:

- to save pressure on parliamentary time;
- when the legislation is too technical or detailed to be suitable for parliamentary consideration;
- to deal with rapidly changing or uncertain situations;
- to allow for swift action in the case of an emergency.

The levy is neither technical nor likely to need to respond to rapidly changing circumstances or emergencies. The only possible explanation for placing the levy in the regulations is to save pressure on parliamentary time. This in itself should raise alarm: how often is it anticipated that the levy will be changed, presumably increased, that saving parliamentary time is a significant concern? The significant impact on vulnerable people of any increase to the levy should ensure that changes are subject to parliamentary scrutiny.

The levy may be discriminatory

The Queensland Law Society suggested that the levy may indirectly discriminate against people on the basis of race, mental health and intellectual impairment (QLS 2012:4). The *Anti-Discrimination Act 1991* (Qld) s 11 provides a definition of 'indirect discrimination':

- (1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term—
 - (a) with which a person with an attribute does not or is not able to comply; and
 - (b) with which a higher proportion of people without the attribute comply or are able to comply; and
 - (c) that is not reasonable.
- (2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example—
 - (a) the consequences of failure to comply with the term; and
 - (b) the cost of alternative terms; and
 - (c) the financial circumstances of the person who imposes, or proposes to impose, the term.

The *Anti-Discrimination Act 1991* (Qld) s 7 prohibits discrimination on the basis of attributes of race and impairment. Indigenous heritage, intellectual impairment and mental illness are now attributes clearly over-represented in criminal sentencing cases (Ogloff et al 2007; Allard 2010:9). In *New South Wales v Amery* the High Court considered alleged indirect discrimination against women teachers employed on a temporary basis by the New South Wales Education Department. While the women teachers were unsuccessful, in their joint judgment Gummow, Hayne and Crennan JJ commented (at 68, referring to *Foreign Affairs & Trade v Styles* at 258) that 'the concept of indirect discrimination posited by [certain] provisions ... was said in *Styles* to be "concerned not with form and intention, but with the impact or outcome of certain practices"'. While it is likely that the levy impacts on people with certain attributes in a discriminatory way, on a practical level the argument is ultimately unlikely to succeed. As Kirby J observed in *New South Wales v Amery* (at 88):

[I]n no decision of this [the High] Court in the past decade concerned with anti-discrimination laws, federal or State, has a party claiming relief on a ground of discrimination succeeded. If the decision in the courts below was unfavourable to the claimants, it was affirmed. If it was favourable, it was reversed.

The levy is likely to have a discriminatory effect on the most vulnerable — Indigenous people, those who have intellectual impairment or mental illness, and poor and homeless people — especially because there is no possibility of waiver or discretionary reduction in Queensland. This is discussed further directly below.

Fairness

The levy is applied to all of those who are sentenced in the courts. For the purposes of the levy, a sentence includes ‘any order made by a court to deal with the offender for an offence instead of passing sentence’ (*Penalties and Sentences Act* s 179B). It is applied even when a conviction is not recorded (s 179C(2)) and in cases where courts decide that only a nominal punishment is appropriate, such as an order to be of good behaviour for a period of time (ss 16–19). No offences are excluded from the remit of the levy. The levy applies to low-level offending including summary and regulatory offences, such as shoplifting and begging in a public place (see *Summary Offences Act 2005* (Qld) s 8; *Regulatory Offences Act 1985* (Qld) s 5). In sentencing many such lower-level offences it is likely that the levy will be the harshest aspect of the experience of going to court. The Queensland Council for Civil Liberties pointed out that when offences attract a maximum one penalty unit (or \$110) fine, the added burden of the levy almost doubles the court-imposed costs associated with conviction (Queensland Council for Civil Liberties 2012:3).

Similarly to other jurisdictions, in Queensland, if the court decides to fine an offender, the court ‘must’ take into account, as far as is practicable, two separate matters; the financial circumstances of the offender and ‘the nature of the burden that payment of the fine will be’ (*Penalties and Sentences Act* s 48(1); see also *Sentencing Act 1995* (WA) s 53). In order to ensure that the levy ‘does not result in fewer and smaller court imposed fines’ (Bleijie 2012a:1131), one of the amendments to the Queensland *Penalties and Sentences Act* is that the offender levy cannot be taken into account by the court when considering the financial circumstances of the offender (*Penalties and Sentences Act* s 48(3A)). It may be possible, however, for the court to take into account the levy in considering the nature of the burden of the fine. In *Kumar v Garvey* (at [31]) a licence disqualification period imposed upon the offender was considered to be an additional burden that could impact on the amount of the fine imposed. In *Demaj v Hall* it was noted that the recording of a conviction was part of the burden of the sentence to be considered. Thus it may be argued that in consideration of the burden of the levy on the offender a fine may need to be adjusted. If this provision is not interpreted in this way it seems unjust that the levy cannot be considered along with other ‘financial considerations’ as poorer people will be disproportionately affected by the impact of the levy (Queensland Council for Civil Liberties 2012:3). Certainly the debt accrued as a result of the sentence and levy combined will, in many cases, be collected through the same process (the SPER) and the separate components of the debt will be indistinguishable. The levy will operate as a de facto penalty (Beckett and Harris 2011:510).

A number of the submissions commented on the inequitable nature of the levy and the fact that it would have a disproportionate impact on people who are already severely disadvantaged, including Indigenous people, poor people and homeless people (Caxton Legal Centre Inc 2012; ATSIILS 2012; QLS 2012; BAQ 2012:2). In her study of public nuisance offences and fines Walsh observed that:

Indigenous people, people who are homeless or poor ... and people with a mental illness are more likely than other members of the population to occupy public space, they are more visible to police, more vulnerable to surveillance, and thus more likely to be charged with public nuisance type offences (Walsh 2006a:220).

The most common response to public nuisance-type offences, such as drunkenness, begging, offensive language and offensive behaviour, is a fine (Walsh 2006a:221; see also Walsh 2006b:208). The added impact of the levy will be particularly harsh on the disadvantaged people likely to commit such offences. In Magistrates' Courts in Queensland for the period 2010–11, 20 per cent of those before the courts were Indigenous. For 45 per cent of Indigenous and 24 per cent of non-Indigenous people before the court, their most serious offence was a public order offence (Australian Bureau of Statistics 2012). During the same period, 80 per cent of all finalisations in which a person was found guilty in the Magistrates' Court in Queensland resulted in a monetary order (Australian Bureau of Statistics 2012:table 3.11).

While the fine enforcement systems in place throughout Australia may appear to treat Indigenous and non-Indigenous people equally, as suggested earlier, these systems already have a disproportionate impact on Indigenous people (Spiers Williams and Gilbert 2011:1). In its submission ATSILS emphasised that Indigenous people are more likely to have low incomes or be unemployed, have poor literacy and numeracy skills and higher levels of mobility (2012:3; Spiers Williams and Gilbert 2011:1). This leads to difficulties engaging with fine-collection authorities and thus greater likelihood of loss of licence and imprisonment resulting from non-payment of the fine and levy (*State Penalties Enforcement Act 1999* (Qld) ss 104, 107). ATSILS suggested that the burden of fines is already often taken on by extended family, reducing money available to pay for the family's needs (2012:4; see also Beckett and Harris 2011:523).

The accumulated impact of the imposition of the levy on those who re-offend is also of concern. Based on re-offending rates provided by Queensland Police, during 2008–09 police proceeded against more than 31 per cent of all offenders on multiple distinct occasions (Productivity Commission 2012:table C.3). In the same period, 41 per cent of all prisoners released from custody had returned within two years to a corrective services order of either prison or community corrections, and 31 per cent of all offenders discharged from a community corrections order had returned with a new correctional sanction within two years (Productivity Commission 2012:tables C.4, C.5). Given this high level of repeat offending, the offender levy will affect a subgroup of the offending population in a disproportionate way, as a high proportion of disadvantaged individuals will be required to pay the offender levy multiple times within a given year, let alone in subsequent years. Further, from longitudinal research conducted on cohorts of individuals in Queensland it is well known that persons on chronic offending trajectories are disproportionately Indigenous (Allard et al 2012).

Unmanageable levels of debt are already experienced by many homeless people, and inability to pay often eventually leads to untenable levels of debt, contributing to a poverty spiral (QPILCH 2012:2; Clarke et al 2008:1, 3). In a study of homeless people and the law conducted in South Australia and Western Australia, homeless people listed debt and fines as their top two (of 10) legal issues (Walsh and Douglas 2008:364). Queensland's Homeless Person's Legal Clinic ('HPLC') has estimated that 70 per cent of those experiencing long-term homelessness have debts registered with the SPER, averaging approximately \$4000, but debts of \$15 000 to \$50 000 are reported to be 'not uncommon' (QPILCH 2012:2; Clarke et al:1, 3). While the increased financial obligation associated with the levy will be difficult for many homeless people to bear, the levy will also potentially contribute to, or even cause, financial crisis for some, and sometimes it is a financial crisis that tips people into homelessness (Homelessness Australia 2010). If greater financial stress is placed on people, they may have no option but to serve a period of imprisonment to pay off the debt owed. Currently, as a last resort, fine debts can be paid off by serving approximately

one day in prison for every \$110 owed (Queensland Government 2012e). It is notable that the cost of imprisonment is much higher than this; in a 2012 report, it was estimated to be about \$289 per prisoner per day on average (Productivity Commission 2012:table 8A.7). Ultimately it is possible that the levy may contribute higher levels of incarceration (and its costs) for unpaid levies and fines, rather than raising significant extra revenue.

There is a wide diversity of approaches in amounts of levies imposed, who they are imposed upon and whether they can be reduced or waived in consideration of the offender's circumstances. In some jurisdictions, after the initial implementation of the levy, governments have sought to increase either the rate or scope of the levy. For example, in New South Wales the levy was increased from \$148 to \$156 per indictable offence in 2012 (*Victims Support and Rehabilitation (Compensation Levy) Amendment Notice 2012* (NSW) 2012 No 230). In terms of scope, some jurisdictions apply the levy to all offenders dealt with by a court, while others apply it only to those issued a fine or monetary order, with significant variability in between (see Table 2 below). In those jurisdictions that have a levy, the levy is applied in addition to the sentencing outcome as well as any direct restitution or compensation to the victim. The amount imposed also varies considerably across jurisdictions, with some choosing to impose a flat rate or fee for the levy, whilst others adopt a tiered levy, depending upon either the seriousness of the offence or the final outcome. The seriousness of the harm caused to the victim has been used to justify the tiered fee structure (see, for instance, Criminal Policy Unit 2010a:19); however, in Queensland the justification for the levy is use of system resources and therefore it does not bear any relationship to the level of harm experienced by victims of crime.

Unintended consequences

Several submissions to the Committee identified unintended consequences that may result from the imposition of the levy. For example, a number of submissions suggested that there may be a greater incentive to run summary trials in the Magistrates' Court instead of pleading guilty, as there will always be a guaranteed cost of \$100 and, in a sense, less for a defendant to lose (Caxton Legal Centre Inc 2012:2; BAQ 2012:4-5; ATSILS 2012:3). Such trials are unlikely to be legally aided, leaving the accused unrepresented (BAQ 2012:5). Trials involving unrepresented accused often take much longer and place a much higher burden on the magistrate or judge (Supreme Court of Queensland 2012:ch 12). However, an incidental effect of the offender levy may be to encourage the use of 'justice mediation' for adult offenders (see generally the *Dispute Resolution Centres Act 1990* (Qld)). In Queensland, justice mediation is an alternative response to criminal court, requiring the voluntary participation of both victim and offender, with an independent mediator assisting them to come to an agreement as to how the offender can repair the harm he or she caused. In matters referred by the police or prosecutor, where a successful agreement is reached, it is possible that no contact with the criminal court system eventuates (Queensland Government 2012a), in which case offenders would not be liable to the offender levy.

Of concern is the potential for defendants to be burdened with multiple levies for conduct that has resulted from a single investigation by police because, under the Queensland *Criminal Code Act 1899* s 567, an indictment must generally contain only one charge (s 567(1)), except if charges are founded on the same facts, form part of a series of offences of the same or similar character, or are a series of offences committed in the prosecution of a single purpose (s 567(2)). In practice, it may be that during an investigation multiple separate prior incidents are disclosed which are unable to be joined on a single indictment, in which case an accused will have multiple sentencing events, resulting in the imposition of the offender levy for each separate sentencing event.

Cash bail, pursuant to *Bail Act 1980* (Qld) ss 14 and 14A, is a form of bail available for summary offences and not usually considered to be a sentence. When cash bail is applied by a magistrate to an accused person the case is adjourned with a requirement that the accused pay a certain sum of money into the court. Police have a similar power and can release a person on the basis that he or she pays a certain amount of money and that the money will be forfeited if the accused fails to attend court on the required date. If the accused attends the court on the required day, the cash bail amount is returned to the accused; if not, the cash bail is retained by the court and the matter is considered finalised. In circumstances where an accused person does not attend court and rescinds the cash bail it is likely that the order to forfeit the cash bail will be considered a sentence for the purposes of the levy. Pursuant to *Penalties and Sentences Act* s 179B, 'sentence includes any order made by a court to deal with the offender for an offence instead of passing sentence'. Caxton Legal Centre suggested that those who may have originally forfeited cash bail may now turn up to have a hearing in the hope of getting a lower penalty, so that the effect of the levy is minimised (Caxton Legal Centre Inc 2012:2). Should this occur, it would add to the administrative burdens experienced by the courts.

The fines system in Queensland already represents an unmanageable administrative burden. As at 30 June 2012 there was over \$760 million owed in fines (see Table 1 below). While around \$208 million in fines was collected over the 2011–12 period (Queensland Government 2012d), the cost of running the SPER was no doubt high in the same period. One source claims that the amount of new fines exceeded amounts collected by nearly \$170 per minute and unpaid fines grow by almost \$100 million each year (Ironsides 2012; QLS 2012:3). The Queensland Department of Justice Acting Director-General and Attorney-General, Terry Ryan, observed that there 'could be administrative flow-on costs for the State Penalties Enforcement Registry' resulting from the introduction of the levy, and such costs would need to be considered in the next Queensland budget (Ryan 2012a:2). The Chief Justice of the Supreme Court of Queensland, the Hon Paul de Jersey, similarly noted that the offender levy would have resourcing implications for the courts as, in every case, the 'proper officer of the court', defined as the person who imposed the sentence, is required to provide particulars of the levy to the SPER (de Jersey CJ 2012:1; *Penalties and Sentences Act* ss 179B, 179F). Justice de Jersey noted that the levy may raise substantial issues for Publicity which would come at a cost in terms of human and other resources in court registries (de Jersey CJ 2012:1).

Table 1: Debts registered with the SPER at 30 June 2012 (Queensland Government 2012d)

Category	Number of penalties	Value (\$)
Total debts under active compliance	1 067 903	267 057 851
Total debts under active enforcement	415 973	125 902 737
Total debts under deferral	159 016	61 380 895
Total debts awaiting enforcement	1 241 759	323 148 265

In some jurisdictions where levies have been introduced, problems have been found in relation to collection of the levy under similar programs to the SPER in Queensland. In the case of *Walker v Meredith* heard in the Northern Territory the Court considered the distinction between levies and fines and whether levies could be paid along with fines

through the serving of time in prison. The Court found that it could not make an order for the levy to be paid by the serving of a period of imprisonment. In the New South Wales case of *Reznitsky v Roads & Traffic Authority (NSW)* there was debate over the timeframe for recovery of the levy after a successful appeal. Issues also surround the deduction of payment for the levy from prisoner earnings in cases where the offender is immediately sent to custody (see, for example, *R (on the application of) S and KF v Secretary of State for Justice*).

In terms of the order of collection when an enforcement order is imposed, the *State Penalties Enforcement Act 1999* (Qld) s 112(2) sets out a hierarchy of 12 items. The levy comes in at number five (s 112(2)(e)), below restitution and compensation orders but above witness expenses, professional costs, fines and money ordered to be paid to the government under the *Victims of Crime Assistance Act 2009* (Qld) (see Bleijie 2012a:1131). Victims may be disheartened by this order of collection. The Deputy Mayor of Townsville Council has observed that the levy may negatively affect council revenues obtained from fines, given that payment of fines is lower on the collection hierarchy than the levy. He has suggested that this could have implications for ratepayers (Bateman 2012).

Alternative approaches

Many submissions made suggestions about how the offender levy could be more fairly applied. Some suggested that certain categories of crimes (such as minor summary offences) and circumstances where certain sentencing responses were applied (such as conviction but no further punishment) should be exempt from the offender levy (ABC News 2012). In its report, the Legal Affairs and Community Safety Committee recommended that those who were dealt with by the Special Circumstances Court, essentially a diversionary court, should not be subjected to the levy, although this is now irrelevant since that court has been abolished as part of the broad sweep of reforms introduced by the current government (Legal Affairs and Community Safety Committee 2012:30; Moore 2012). Others recommended the amount of the levy should be subject to the sentencer's discretion and ordered in light of a consideration of the offender's financial circumstances, similar to the approach to fines (see, for example, QPILCH 2012:3). The ability to waive or reduce the amount of the levy imposed in other jurisdictions varies. Some jurisdictions allow courts the discretion to reduce the amount of the levy, or waive it entirely based on the offender's means (see Table 2 below). In some jurisdictions the waiver provisions originally implemented have subsequently been removed, or the provisions have been adjusted to require judges to specifically note the reasons for invoking such provisions so as to reduce excessive use of them (Law and Sullivan 2006).

While the Leader of the Opposition in Queensland responded to the proposed levy by calling for a reduction of the levy in all cases to \$50 (see Palaszczuk 2012:1318) the Queensland Council for Civil Liberties submission had a more radical suggestion: that an alternative method of fine collection should be introduced based on the work of Chapman and colleagues (Queensland Council for Civil Liberties 2012:4; Chapman et al 2004). Chapman and colleagues (2004:20) note the high levels of default on fines and the high expense associated with collecting them and suggest that fines (and the offender levy) could be paid using levies on offenders' future income in a way similar to the current Higher Education Contribution Scheme. This latter suggestion has significant merit and would ensure that only those who can pay are actually required to pay (Walsh 2006a). In any event,

none of the suggested alternatives were seriously considered by government, nor were they reflected in the final legislation.

Table 2: Offender levies (as at January 2013)

Place and year introduced	Scope	Amount	Purpose	Juveniles covered
Australia				
Queensland 2012	All offenders convicted of offence in court	\$100 Magistrates' Court \$300 Higher courts Cannot be waived or reduced	Law enforcement and administration	No
South Australia 2001 ¹	All offenders convicted of an offence or given an on-the-spot fine	\$60–520 per offence, depending on the offence. Smaller levy for juveniles, but otherwise cannot be waived or reduced	Revenue for Victims of Crime Fund	Yes
Northern Territory 2006 ²	All offenders convicted of an offence, but not imprisoned or specifically excluded	\$60 per indictable offence \$40 per other offence \$20 per offence of a child Cannot be waived or reduced	Revenue for Victims Assistance Fund	Yes
New South Wales 1996 ³	All offenders convicted in a court of an offence and not specifically excluded minor offences	\$156 per indictable offence \$69 per other offence Exemption for juveniles discretionary	Revenue for Victims Compensation Fund	Yes
Australian Capital Territory 2007 ⁴	All offenders convicted in a court of an offence where fine imposed	\$10 per offence Can be waived in case of hardship	Victim services levy	No
Tasmania ⁵	All offenders convicted of an offence under the <i>Criminal Code</i> or other specified offences	\$20–500 (or prescribed amount) per offence, depending on the offence Can be waived in case of hardship	Revenue for Victims Assistance Fund	No
New Zealand				
New Zealand 2009 ⁶	All offenders convicted of an offence	NZ\$50 per sentencing event	To fund entitlements and services for victims of crime	No

Place and year introduced	Scope	Amount	Purpose	Juveniles covered
United Kingdom				
England and Wales ⁷	Applied when a court 'deals with' an offender	GB£10–120 per sentencing event, depending on the offence. Reduced for juveniles. Excludes Mental Health Act orders and absolute discharges. Can be reduced in case of hardship	Victim surcharge: to fund victim and witness initiatives	Yes
Northern Ireland 2012 ⁸	Applies to fixed penalties and to offences determined in court	GB £5–50 per sentencing event, depending on the offence Can be reduced in case of hardship	To fund the Victims of Crime Fund	No
Canada				
Canadian Federal System 1988 ⁹	All offenders convicted or discharged of an offence	15% of any fine imposed; if no fine \$50 summary conviction, \$100 indictable conviction, or greater amount at court's discretion Can be waived in case of hardship	To fund assistance to victims	Yes
<p>¹ Victims of Crime Act 2001 (SA) s 32; Victims of Crime (Fund and Levy) Regulations 2003 (SA) sch 1.</p> <p>² Victims of Crime Assistance Act 2006 (NT) ss 60, 61; Victims of Crime Assistance Regulations 2007 (NT) reg 26.</p> <p>³ Victims Support and Rehabilitation Act 1996 (NSW) ss 78, 79; Victims Support and Rehabilitation (Compensation Levy) Notice 2011 (NSW) 2011 No 344 cl 2.</p> <p>⁴ Victims of Crime Act 1994 (ACT) ss 24–26.</p> <p>⁵ Victims of Crime Compensation Act 1994 (Tas) ss 3, 5, 6.</p> <p>⁶ <i>Sentencing Act 2002</i> (NZ) ss 105A–105J.</p> <p>⁷ Criminal Justice Act 2003 (UK) ss 161A, 161B.</p> <p>⁸ <i>Justice Act 2011</i> (Northern Ireland) ss 1–6.</p> <p>⁹ <i>Criminal Code</i>, RSC 1985, c C-46, s 737. Note many provincial governments in Canada also impose a surcharge, including British Columbia, Newfoundland and Labrador, as well as New Brunswick, with slight differences in scope and rate across provinces.</p>				

Conclusion

The offender levy is only one of many contentious criminal justice reforms currently being rolled out in Queensland; others include the implementation of two strikes law for sex offenders and boot-camps for young offenders, the scrapping of specialist courts such as the Special Circumstances Court and Murri Courts, the removal of court-ordered youth justice conferences and reduced funding for Indigenous community justice groups and other non-government legal support services (see Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld); Moore 2012a; Youth Justice 2013). However, it will affect every adult who is sentenced in a court in Queensland.

There are a number of concerns that are raised in this discussion. The consultation on the Bill was insufficient and stakeholders were not given a reasonable opportunity to provide feedback on the proposals. While this probably does not show that the levy is invalid, there are other arguments that may support a legal challenge to the levy. For example, it is arguable that the levy offends the *Kable* principle (*Kable v DPP*) and s 71 of the

Australian Constitution. Most ordinary people are likely to construe the levy as part of the sentence, giving the illusion that the levy is a judicial determination, when this is not the case. Further, in cases where the levy operates retrospectively, it may be possible to challenge its application because the levy clearly operates to the disadvantage of the individual offender and thus may not comply with *Statutory Instruments Act 1992* (Qld) s 34. It is also arguable that, in the context of the prosecution of a criminal offence (essentially a wrong against the state), it is improper for governments to charge a fee for service.

In a criminal prosecution the dispute resolution process is the responsibility of the government and access to justice should not be rationalised by the imposition of a fee. Broader taxes may be more appropriate than fees as a means of raising the requisite funds. It may also be argued that the levy offends the *Anti-Discrimination Act 1991* (Qld). As there is no provision for waiver or discretionary reduction of the amount to be paid, the effect of the levy is that it is indirectly discriminatory towards Indigenous (and other vulnerable) people.

While the Queensland Government is hopeful, with good reason, that the levy will provide significant funds to support the administration of justice, the costs associated with the levy, including higher numbers of hearings, increased administrative work for the SPER and the judiciary and increasing levels of incarceration for unpaid fines, are likely to diminish the expected windfall.

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