

Statutory Review of the Summary Proceedings
Court Costs Levy

Legal Aid NSW submission to the
NSW Department of Justice

December 2015

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance to socially and economically disadvantaged people across NSW.

Legal Aid NSW provides information, community legal education, advice, assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 Community Legal Centres (CLCs) and 28 women's domestic violence court advocacy services.

Legal Aid NSW thanks the Department of Justice for the opportunity to make submissions on the statutory review of the Court Costs Levy imposed by section 211A of the *Criminal Procedure Act 1986* (NSW).

This submission considers the following issues:

1. Whether the policy objectives of provisions introduced by the *Criminal Procedure Amendment (Court Costs Levy) Act 2013* are still valid, and
2. Whether the terms of section 211A are still appropriate for securing these policy objectives.

Should you require any further information or wish to discuss this submission, please contact Nicholas Ashby, Solicitor, Strategic Planning and Policy, Legal Aid NSW, telephone 02 47254608 (ext. 54608) or Nicholas.ashby@legalaid.nsw.gov.au.

Validity of the policy objectives of Criminal Procedure Amendment (Court Costs Levy) Act 2013

The *Criminal Procedure Amendment (Court Costs Levy) Bill* 2013 amended section 215 of the *Criminal Procedure Act* 1986 replacing the Local Court discretion to award costs with a statutory costs levy which would automatically follow a conviction in the Local Court.

In the Second Reading Speech, the then Attorney General and Minister for Justice, the Honourable Greg Smith SC, reported that the Productivity Commission's 2013 report on government services estimated a cost of finalising a criminal matter in the NSW Local Court at \$750 per matter and that the payment of a levy, consistent with the filing fee (\$83 at the time of the Second Reading) would represent a 'modest contribution by the offender towards the community's costs in bringing that person to justice' (28 February 2013).

In addition the Minister stated the Bill contained certain exceptions, including:

- Children's Court matters
- Local Court traffic offences involving children dealt with under the *Children (Criminal Proceedings) Act*
- Local Court matters involving defendants who are under 18
- Convictions resulting in sentences of imprisonment (other than a suspended sentence)
- Drug Court convictions
- Orders under 10(1)(a) *Crimes (Sentencing Procedure) Act*

Legal Aid NSW agrees that a 'modest' contribution to the cost of the Local Court proceedings is a reasonable burden to be placed upon defendants who are in a position to pay. To that extent Legal Aid NSW supports the broad policy objectives evident from the Second Reading. However, for the reasons set out below, Legal Aid NSW submits that the practical outcome of section 211A *Criminal Procedure Act* 1986 is somewhat at odds with this policy objective.

The second aspect of the policy objective is the automatic imposition of the costs levy save in the situations listed above. Legal Aid NSW does not support the automatic imposition of the levy as this system entirely disregards the capacity of the defendant to pay and also the degree of indebtedness to the State that may already exist.

Operation of s211A

Section 211A (1) states:

An accused person who is convicted of an offence in summary proceedings before a court is, by virtue of the conviction, liable to pay a court costs levy that is of the amount prescribed by the regulations.

The effect of this legislation means that, unless an exception applies (set out in section 211A(2), (3) and (8)), the defendant is required to pay a court costs levy per *conviction* in summary proceedings.

Legal Aid NSW submits that the Second Reading makes it clear that the objective of the payment of the levy is towards the finalisation of a *matter* (paragraph 2).

Court Attendance Notices (CANs) prepared by the NSW Police Force set out the charges faced by the accused person. These can contain a number of charges which collectively form the 'matter' (proceedings) before the Local Court. Each matter is allocated an eight digit 'H' number (the letter 'H' followed by eight numbers). These are unique matter numbers (or sequence numbers) which are then the numbers used to track the matter through the court proceedings and appear on the police bail reports. The outcome of the case is ultimately recorded on the police bail reports against the unique matter number.

As stated above, the effect of section 211A is the automatic imposition of an \$85 (currently) costs levy per conviction.

Some matters can attract numerous individual charges, for example, a single event of illegal driving could result in several charges arising from the same course of conduct. This means a corresponding number of convictions is the most likely outcome.

Other examples include the 'typical' drug dependant individual committing a series of low-level offences which often occur over a short period of time. Examples include defendants committing a shoplifting 'spree' in a single shopping mall, or using a stolen 'pay-wave' bank debit card. The latter in particular could result in over twenty charges appearing on a single CAN. These and similar matters are commonly encountered by Legal Aid NSW duty lawyers at local courts.

It is also common for recidivist offenders to amass a number of concurrent ongoing Local Court matters which are ultimately finalised at a single sentence hearing. Section 211A as currently drafted means the imposition of a costs levy per *conviction* in each *matter* unless an exemption applies.

The most likely exemption to apply in these examples is the imposition of full time gaol. In the experience of Legal Aid NSW, full time gaol remains the sentence of last resort and very often is imposed only after numerous attempts at rehabilitative orders, for example for drug, alcohol or mental health treatment.

Such rehabilitative orders are likely to be conditions of good behaviour bonds under section 9 or section 12 of the *Crimes (Sentencing Procedure) Act* 1999. It is only upon breach of such orders that full time gaol may result. Legal Aid NSW is uncertain as to whether in these circumstances the costs levy is rescinded pursuant to the exemption under section 211A(2)(a), but if it is not, then the liability to pay the levy stands and the defendant will have to settle this upon release from gaol.

Legal Aid NSW also observes that while the costs levy does not follow a non-conviction disposal under section 10(1)(a) *Crimes (Sentencing Procedure) Act*, the levy is imposed where matters are finalised under section 10(1)(b) (non-conviction with good behaviour bond) and section 10A (conviction recorded but no further penalty imposed) of the Act. Legal Aid NSW clients are often confused when they have left court under the impression that they have been dealt with 'without further penalty' but are then charged the costs levy (and victims support levy-see below), potentially a significant financial burden.

The court costs levy is imposed in addition to the victims support levy. Section 106(1) of the *Victims Rights and Support Act* 2013 provides:

A person who is convicted of an offence to which this Part applies is, by virtue of the conviction, liable to pay to the State a levy of:

(a) \$156, if the person is convicted on indictment or pursuant to a committal under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act* 1986, or

(b) \$69, if the person is convicted otherwise than as referred to in paragraph (a).

Many clients of Legal Aid NSW live on the margins of society, often with acute mental health, drug and alcohol problems. The majority of these clients receive Centrelink benefits and have limited prospects of securing meaningful employment. Incomes for this class of individuals are therefore low and payments to the State Debt Recovery Office are made directly from benefits. Cumulative liability for fines, costs and victims levies may run into many thousands of dollars with no realistic prospects of ever being discharged.

Legal Aid NSW therefore submits that the actual practical operation of section 211A undermines the stated policy objectives contained in the Second Reading, in some cases attracting the imposition of accumulated court costs levies which are excessive and wholly disproportionate to the costs of finalising Local Court matters.

Are the terms of section 211A are still appropriate for securing these policy objectives?

Legal Aid NSW submits that for the reasons outlined above, the terms of section 211A are at odds with the stated policy objective of securing a 'modest' contribution towards the community's costs in bringing a defendant to justice. Legal Aid submits that section 211A should be amended. Recommendations for reform are set out below.

Recommendations

1. Legal Aid NSW recommends that imposition of the court costs levy should not be automatic. In considering the imposition of other pecuniary penalties the Magistrate has regard to the means of the defendant. Legal Aid submits that the Magistrate should be able to exercise a discretion as to whether the levy should be imposed at all, having regard to the means of the defendant.
2. Legal Aid NSW recommends that the court costs levy should be imposed on a per matter basis, as defined by the eight digit 'H' sequence number, regardless of the number of charges.
3. In the event that the statutory review rejects recommendation 2, and the amount of the levy needs to be set to reflect the additional work involved in the finalisation of several offences, Legal Aid NSW recommends that the levy should be set to apply at two graduated levels: for example, at the current rate of \$85 for up to five charges; and at \$156 (the higher victims support levy figure for matter prosecuted on indictment) for more than five convictions.
4. Legal Aid NSW recommends that section 211A should be amended to make allowance for the levy to be automatically rescinded if a full time gaol sentence is imposed:
 - for breach of a good behaviour bond or suspended sentence which had been imposed for the offence which on conviction attracted the levy, or
 - for fresh offences, where the sentence of imprisonment is greater than a minimum gaol term, of for example, three months gaol.