CRIMINAL PROCEDURE REVIEW
MAGISTRATES COURTS

VOLUME ONE: SUMMARY REPORT 2023

Queensland Government

Acknowledgment of Country

We respectfully acknowledge Aboriginal and Torres Strait Islander peoples as Traditional custodians of this country. We recognise their continuing cultural and spiritual connection to land, sea and community and pay our respects to Elders past, present and emerging.

Criminal Procedure Review — Magistrates Courts

Independent Reviewer

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Criminal Procedure Review – Magistrates Courts: Consultation Paper (April 2022) available at <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/consultation>.

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The law and other material referred to in this Report is current as at 14 April 2023.

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To: **Honourable Shannon Fentiman MP**
Attorney-General and Minister for Justice
Minister for Women and
Minister for the Prevention of Domestic and Family Violence

Dear Attorney,

In accordance with the terms of reference, I am pleased to present my Summary Report, *Criminal Procedure Review — Magistrates Courts,* dated 30 April 2023.

Michael Shanahan AM

Reviewer
Criminal Procedure Review — Magistrates Courts

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PREFACE

The achievement of this Report in the allotted time frame would not have been possible without the hard work and expertise of the Criminal Procedure Review — Magistrates Courts Team.

My heartfelt thanks to Executive Director, Eryn Voevodin; Director, Elise Ho; Principal Legal Policy Officers Cassandra Fleming and Elizabeth (Libby) Daniels; Senior Legal Policy Officer, Samantha Smith; Principal Project Officer, Jennifer Mashiter and Executive Support Officer, Brooke Mcbeath. My thanks also to Mary Burgess who was the Director of the team in late 2021 and early 2022.

Thank you also to the members of the Consultation Reference Group who gave freely of their time and whose advice was greatly appreciated.

Finally my thanks to all who made submissions to the Review, either in person or in response to the Consultation Paper.

Michael Shanahan AM

Reviewer
Criminal Procedure Review — Magistrates Courts

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ABBREVIATIONS AND GLOSSARY

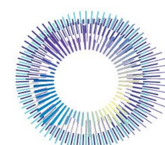
The glossary and supporting definitions are intended to build knowledge and awareness and do not intend to serve as legal definitions.

Note on terminology

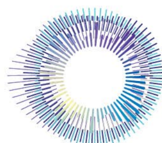
We acknowledge there is no single set of terminology that suits all situations and people. No exclusion or harm is intended in these terms.

Term	Definition
Aboriginal and Torres Strait Islander peoples	Also referred to as First Nations peoples or Indigenous peoples; refers to two distinct peoples of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal person or Torres Strait Islander person and is accepted as such by the community in which they live.[1]
ARJC	Adult Restorative Justice Conferencing
ATSILS	Aboriginal and Torres Strait Islander Legal Service
BAQ	Bar Association of Queensland
Charge sheet *NEW*	The document formally alleging the charge against the defendant which contains the basis for the allegation and sufficient particulars.
Chief Magistrate	Appointed by the Governor in Council to ensure the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts. The functions of the Chief Magistrate are set out in section 12 of the *Magistrates Act 1991*.
CJG	Community Justice Group
Committal	An administrative procedure to transfer an indictable criminal charge from the Magistrates Courts to the higher courts. This can occur with the consent of both parties (see *registry committal*), or the magistrate may be required to determine if there is sufficient evidence to commit (see *court committal*).
Complainant	In the context of the *Justices Act 1886*, a person who commences criminal proceedings by laying a complaint. Under the Justices Act, a reference to the complainant is usually also a reference to the prosecutor. In the context of the Criminal Code and more generally, a person who makes an allegation of a criminal offence.
Complaint	A formal allegation made in writing that a person has committed a criminal offence. This is generally made by a complainant under the *Justices Act 1886* and connected with a summons or a warrant.

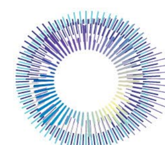
[1] This definition is taken from the recent report of the Women's Safety and Justice Taskforce: Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report No 2, July 2022) vol 2, 750.



Court event	An occasion that requires both parties to attend court in relation to the court case. See also: *Hearing* or *Mention*
Costs	An amount of money incurred in relation to legal work. A person's costs may include, but is not limited to, lawyer fees, filing fees and postage fees.
Court Attendance Notice *NEW*	The instrument notifying the defendant of the charge(s) alleged against them and the requirement to attend a court location on a specific date and time.
Court committal *NEW*	A committal proceeding that takes place in a Magistrates Court courtroom with the parties in attendance. See also: *Committal*
CSQ	Court Services Queensland Agency within the Department of Justice and Attorney-General responsible for providing administrative support to Queensland courts.
Criminal Procedure Review Team (CPRT)	The Secretariat supporting the Independent Reviewer in the conduct of the Criminal Procedure Review in the Magistrates Courts. The team is situated within the Department of Justice and Attorney-General.
Defendant	The person in court who is charged with committing an offence.
Deposition	The evidence of a particular witness, both in statement form and any oral evidence given.
Director of Public Prosecutions (DPP)	The **DPP (Qld)** is the person responsible for prosecuting indictable offences under Queensland law, in the higher courts. The **DPP (Cth)** is the person responsible for prosecuting crimes against Commonwealth law. This can be in the Magistrates Courts or the higher courts. The staff working for a Director of Public Prosecutions (whether state or Commonwealth) form the Office of the Director of Public Prosecutions. These are referred to as the ODPP for Queensland, and the CDPP for the Commonwealth.
DJAG	Department of Justice and Attorney-General
Hearing	A court event where the magistrate hears evidence from the parties and decides the outcome based on that evidence. Hearings can be held to decide applications from a party (sometimes known as interim hearings) or to decide the defendant's guilt (known as final or summary hearings).
Higher courts	The District Court of Queensland (including the Childrens Court of Queensland) and the Supreme Court of Queensland.
Justices Act	*Justices Act 1886* (Qld)
LAQ	Legal Aid Queensland
Magistrate	A judicial officer responsible for presiding over matters in the Magistrates Courts.

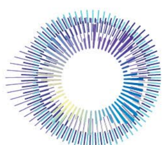


Mention	A short court event, usually no more than 10 minutes long, where the parties update the court on the progression of the matter and inform the court of the next steps. Subsequent court events are usually scheduled (or listed) at a mention.
Notice to appear	A document issued by Queensland Police Service, charging a defendant with an offence and requiring attendance at a particular courthouse on a particular date and time to answer the charge.
Police prosecutor	An employee of the Queensland Police Service (Prosecution Services) who attends court to conduct prosecutions on behalf of the QPS. See also: *Prosecutor*
PPS	Police Prosecution Services Each office within the PPS is called a Police Prosecution Corps (PPC).
Prosecutor	The agency conducting the prosecution against someone in respect of a criminal charge. A prosecutor appears on behalf of the prosecution in court and calls witnesses and presents evidence to prove the charge. The prosecution is also responsible for deciding to start a prosecution. Sometimes, but not always, the person who starts a proceeding will also be the prosecutor.
Prosecution	The process of conducting legal proceedings against someone in respect of a criminal charge. This involves presenting evidence in court to prove the charge (that is, prove that the defendant is guilty).
QCS	Queensland Corrective Services
QLS	Queensland Law Society
QPC	Queensland Productivity Commission
QPS	Queensland Police Service
QWIC	Queensland Wide Inter-linked Courts The record management system used by Court Services Queensland for criminal proceedings across various courts' jurisdictions.
Registrar/Clerk of the Court	The person responsible for managing the registry for that courthouse and ensuring the registry fulfils its administrative functions. In the civil jurisdiction, this role is the registrar. In the criminal jurisdiction the role is called the clerk of the court. Despite the different titles, the registrar and the clerk of the court are the same person.
Registry committal	A committal that takes place in the Magistrates Courts registry. Both the defendant and prosecution must consent to this occurring, and the parties are not required to attend. See also: *Committal*
Rehearing	When a matter has been finalised in the absence of one or more of the parties, the absent party may apply to the court for a rehearing. This is usually granted when



	the party had a good reason for not attending the hearing the first time, such as they were not aware of the court date. The decision from the original hearing is set aside and decided again.
Reopening	When a matter has been finalised but there was some error in the decision or order of the court, that same court may reopen the proceeding to rectify the error. The case is not being decided again, no new evidence is admitted, and it is not an appeal.
SPER	State Penalties Enforcement Registry
Summarily	Matters heard and determined in a Magistrates Court before a magistrate sitting alone (without a jury) are referred to as being dealt with 'summarily'. Offences that may be dealt with in the Magistrates Courts are often referred to as 'summary offences'.
Summons	A document requiring a person to attend court at the date and time stated on the document.
Warrant	Commonly, an order of the court conferring powers of arrest upon members of the agency (usually the police) named in the warrant. There are also other kinds of warrants.

Unless otherwise indicated, all references to legislation are to Queensland Acts.



FOREWORD

i. Queensland's Magistrates Courts deal with approximately 94% of the criminal matters in Queensland. In 2021–22, it dealt with 359,081 charges against 174,767 adult defendants and 47,001 charges against 17,190 child defendants.[1] These consisted of regulatory offences, simple offences and indictable offences. The most common sentence imposed is a fine.

ii. The Magistrates Courts are extremely busy courts, which deal with summary hearings, sentences and committal proceedings. Many court mentions occur in the lead up to finalisation of a matter. Some courts regularly deal with more than 100 matters a day (for example, on 10 October 2022, the Brisbane Magistrates (Arrest) Court at Roma Street dealt with 145 defendants). If a person is charged with an offence, that person is going to come to a Magistrates Court. It is a frontline court and has a fundamental role in the criminal justice system, being the court most people experience.

iii. The Magistrates Courts' criminal procedures are governed by the *Justices Act 1886* (Justices Act). It commenced on 1 January 1887. It is substantially written in archaic language and is difficult to understand. Many of its current provisions resemble the original form. The title itself refers to justices of the peace who then constituted the court. The Justices Act has been amended numerous times with little regard to consistency of language or terms. It has never been completely reviewed.

iv. Its limitations are widely known. As Justice Dowsett said in the 1992 Court of Criminal Appeal case of *Williamson v Trainor*, 'This case offers yet another example of the inadequacy of the procedural provisions of the *Justices Act*. If any single piece of legislation requires review, it is that Act'.[2]

v. Mr Martin Moynihan AO QC in his 2008 *Review of the civil and criminal jurisdiction in Queensland*[3] (the Moynihan review or reforms) envisaged that stage two of his recommendations would see the introduction of a 'Criminal Justice Procedure Act' that would 'highlight the need for an Act to provide for the substantive criminal jurisdiction of the Magistrates Court to replace the *Justices Act 1886*'.[4]

vi. That never happened.

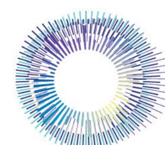
vii. All other Australian jurisdictions have introduced modern criminal procedure Acts for its Magistrates Courts or equivalent courts.

[1] Information provided by Court Services Queensland, 9 August 2022. See also Queensland Courts, *Magistrates Courts of Queensland: Annual Report 2021–2022* (October 2022) Apps 1, 1A.

[2] [1992] 2 Qd R 572, 583.

[3] Martin Moynihan, *Review of the civil and criminal Justice system in Queensland* (Report, December 2008).

[4] Ibid 81.



viii. I was appointed by the Attorney-General in 2022 to independently undertake the Criminal Procedure Review — Magistrates Courts (the Review). This is a comprehensive review of criminal procedure laws in Queensland's Magistrates Courts, primarily contained in the Justices Act. It includes making recommendations for a new contemporary and effective legislative framework to replace the Justices Act. The terms of reference were set by the Attorney-General.[5]

ix. The task was a complex one. The Justices Act's scope of operation is significant. The Act is both highly technical and general in specific aspects of procedure at the same time. Its provisions tend to be circular and have meanings derived from the past. It is a difficult document for anyone to pick up and read in a way that leads to confident understanding. It also contains a range of provisions that in my view are obsolete. Much time has been spent working through these provisions to unravel the intended function and find the true and relevant meaning.

x. In addition, the Justices Act is embedded in the statute books and is mentioned in 207 current Acts of the Queensland Parliament. Its procedures are adopted in all prosecutions in the Magistrates Courts. There are approximately 90 prosecution authorities (Federal, State, Local and statutory (for example, the RSPCA)) that use its procedures. By far the majority of prosecutions are carried out by the Queensland Police Prosecution Service (PPS) following charges by the Queensland Police Service (QPS). In 2021–22, QPS lodged 183 651 charges against adult defendants by way of a notice to appear and lodged 1 856 charges against adult defendants using complaints and summons. There were also 167 336 charges against adult defendants lodged by Bench Charge Sheet, which is used when a defendant is arrested and brought to court.[6]

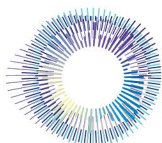
xi. Wide consultation was undertaken for the Review, which revealed a consistency of issues:[7]

- The large number of minor matters coming before the court.
- A lack of understanding in defendants, witnesses and victims of the court processes and outcomes.
- Long delays in the resolution of matters leading to numerous court appearances that achieve little, if anything.
- Inconsistencies of practice between magistrates in different court locations (and sometimes within the same courthouse).

[5] The terms of reference are included in Appendix A.

[6] Information provided by Court Services Queensland, 9 August 2022. Not all cases commenced by Bench Charge Sheet can be attributed to QPS; they are also used by Queensland Corrective Services on occasion.

[7] See further Chapters 4 and 5.



- A reliance on paper documents and files, original documents and manual entry of data with inconsistent use of digital systems.

xii. Many of these issues are founded in the requirements of the Justices Act.

xiii. These observations have informed the principles of my Review. Any new laws replacing the Justices Act should be easily understood, efficient, fair, and contain consistent criminal procedures.

xiv. An aim of the Review is to reduce the number of minor and other matters coming before the court so that appropriate consideration can be given to each matter. Numerous people consulted spoke of the court as 'a sausage factory'. It is difficult to disagree.

xv. For example, by far the most common types of offences dealt with in the Magistrates Courts are breaches of the *Bail Act 1980* (Failure to Appear (8,869) and Breach of Bail Condition (5,963) in 2021–22).[8] In my view those are a consequence of the requirement of personal attendance by each defendant at most mentions and the difficulty in understanding bail obligations, as compounded by the form of the undertaking as to bail. The court seems to be making work for itself by not being able to simplify the process. This does not even take into account the impact on a defendant of having a bail offence recorded.

xvi. An issue raised in the consultation process in relation to less serious offences was increasing the scope of in-court diversion out of the criminal justice system. Diversion is a way of dealing with charges that addresses some of the underlying causes that lead to offending. If successful, it is to the benefit of a safer society as it can reduce reoffending. It is also a way of appropriately stemming unnecessary contact with the criminal justice system. Increased diversion opportunities are not new concepts and have been recommended by several other reviews including, in particular, the report of the Queensland Productivity Commission (QPC), *Inquiry into Imprisonment and Recidivism*.[9]

xvii. Many of the defendants before the Magistrates Courts have underlying issues of poverty, mental illness, disability, cultural disadvantage, trauma, (including sexual, physical or emotional abuse) and drug addiction. Some have multiple and overlapping issues.

xviii. In *Clarke*, Lord Justice Lawton spoke of the danger of criminal courts becoming dustbins where 'judges use their sentencing powers to dispose of those who are socially inconvenient'.[10]

xix. Justice Terry Connolly of the Supreme Court of the Australian Capital Territory documented in his paper, 'Human Rights Aspects of Sentencing':

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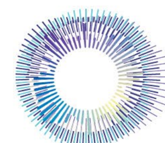
[8] Information provided by Court Services Queensland, 31 August 2022.

[9] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019).

[10] *R v Clarke* (1975) 61 Cr App R 320, 323.



> … [A]s we all know, particularly colleagues in Magistrates Courts, so many of the defendants who come before us daily are people with long-standing mental illnesses or drug addictions. They are often poor, unemployed and with limited formal education. Given the ever-present constraints on the public purse, critics may point out that the criminal justice system functions as somewhat convenient alternative to meaningful improvements to education, employment, housing and leisure facilities for the disadvantaged. To some degree the criminal justice system is a coercive mechanism that supplants expensive institutional and social change. It seems that when the carrot is too expensive, we make do with the stick. …[11]

xx. In terms of the difficulties court users often face in understanding court processes, it is my view the system itself should have an obligation of ensuring understanding. This would flow on to requirements for the way information is presented in and out of court, expectations on court registry staff, possible roles for court liaison officers, providing simple explanations in appropriate formats, and simplification of court forms and material.

xxi. I believe the format of all court information (whether orders, procedures, general contact advice or forms) needs review as a priority. This assessment and redrafting exercise to make information easier and simpler to understand does not need to wait for the outcomes of this Review. The justice system would benefit now from such reform.

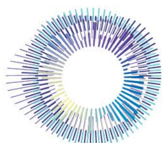
xxii. Delay is endemic and the legislation needs to ensure that each mention effectively moves the matter forward towards resolution. Some of the delay is caused by protracted prosecution disclosure, which is partly due to delays in forensic reporting. However, the system should minimise the number of required mentions to lessen the impact on defendants, witnesses, victims and costs.

xxiii. Inconsistencies in practice may be partly explained by the obtuseness of the Justices Act and the current geographic appointment of magistrates to the Magistrates Court for a particular jurisdiction. The move to a single Magistrates Court (or Local Court) and a more effective, clearer, and simpler Criminal Procedure Act may overcome this.

xxiv. The Justices Act places some restrictions on the full use of technology and digital mechanisms by requiring original documents that are sworn and filed. Those impediments should be removed. Modern businesses use technology to engage with consumers. The community expects technological formats to be available. Currently when the court receives an email it must print it out, create, find, or retrieve the paper file, place it on the file, and have all paper files required for a given day located and brought to the court. The reverse process is then conducted. Magistrates' work is conducted through handwritten orders recorded on bench charge sheets or, remarkably in 2023, by the use of rubber stamps.

xxv. The current paper-based files should be replaced with electronic systems as soon as possible. It shocked me to learn that Brisbane registry staff wheel trolley loads of files backwards and

[11] Terry Connolly, 'Human Rights Aspects of Sentencing' (Conference Paper, National Judicial College of Australia and Australian National University Conference, 11 February 2006) 6.



forwards each day between the George Street central Magistrates Court building and the Roma Street Arrest Courts in Brisbane.

xxvi. I do not think there is any other choice but to modernise. It is long overdue and failure to change will undoubtedly affect the credibility and sustainability of this high-volume jurisdiction, especially given how much of society has already been altered by, and embraced, the technological revolution. Like the continued reliance on the Justices Act, the court simply cannot continue to operate in this way.

xxvii. I acknowledge the Queensland Government's recent budget announcement towards technological improvements through a five-year Information and Communication Technology (ICT) strategy that will allow for e-files and e-filing in the courts. Again, this has potential to redirect the considerable administrative work burden, improve efficiency and reduce unnecessary delays. It is a daunting but necessary task. This work alongside modern legislation will bring about one of the biggest transformations in the administration of justice in Queensland. I trust it will happen.

xxviii. One of the difficulties uncovered during the Review was the lack of detailed statistics about the throughput of work in the Magistrates Courts. This is a consequence of the limitations in its Queensland Wide Inter-linked Courts system (QWIC) used to record court outcomes. For example, it is impossible to further analyse the results of summary hearings to discover whether it was a finding of guilt or the entry of a plea of guilty.[12] It is impossible to further particularise the types of cost orders made.[13] The system also does not permit the recording of information about a particular defendant such as language or disability which impact on their interactions with the court system.[14] It also does not allow the notation of the appointment of the Public Guardian for a legal matter in relation to a person with impaired decision-making capacity. A result is that there is no notification to the Public Guardian when that person is before the courts.[15]

xxix. I appreciate this Review is not the first to recognise the pitfalls of the QWIC system. Its limitations were highlighted in recommendation 177 of the *Women's Safety and Justice Taskforce's Hear her voice (report two)*, which recommended the replacement of QWIC.[16] I also acknowledge the Queensland Government's response that it will 'replace [QWIC] with a

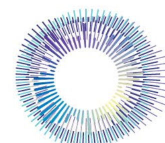
[12] See Chapter 2 for further discussion of data.

[13] See Chapter 18 for further discussion of costs.

[14] I note a current DJAG initiative to consider the development and implementation of a data reporting system that identifies people with a disability who are interacting with the criminal justice system is in progress: Queensland Government, *Progress report on 2020 government election commitments* (September 2022) 92.

[15] See Chapter 2 for further discussion of courts data about defendants.

[16] Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report No 2, July 2022) vol 1, Rec 177.



modern, dynamic solution that allows for data to be extracted, analysed and leveraged to meet community expectations and inform future investment.'[17]

xxx. To this I would add the development of any new ICT database system must be done in a way that provides appropriate data to manage the workload of the court and assists with the efficient administration work of the court registry. The new ICT system should be designed to meet the desired procedures. Procedures should not be adopted or adapted to meet the ICT system.

xxxi. The Review of the Justices Act is an opportunity to substantially improve criminal procedure in the busiest criminal courts in Queensland. The recommendations, if accepted, would form the basis of an evolving modern court with the opportunity to continue innovations into the future. Any new legislation cannot be the end state. The resultant new Act cannot be left to languish and must be continually improved in line with contemporary practice reflecting its critical role in the administration of justice in Queensland.

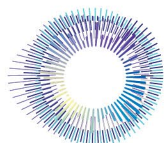
xxxii. The complexity of change involved in successfully moving from the Justices Act and paper files to a modern and future focused court is not to be underestimated. The law is a creature of tradition, and the Justices Act has anchored the court to unchallenged custom and practice. If accepted, any new legislation will be a reset for all court users. However, it is only one piece of the picture and requires positive adoption by all participants, judiciary, court registry staff, prosecutors, and defence representatives alike.

xxxiii. While this Review sets out the plans for the new legislation, the detailed drafting of the new Criminal Procedure Bill will be challenging in the time frame allocated. Criminal procedure in the Magistrates Courts is not quarantined to a single aspect but has a multitude of connections and possibilities. I am keenly aware of the intense range of subject matter the new legislation traverses and technical expertise it entails.

xxxiv. My recommendations have been collated and form the basis of drafting instructions (Appendix C) included in this Report. The drafting instructions are essentially a point-in-time document forming a blueprint for the proposed new legislation. Many people may be unfamiliar with the style of such a document. They should be viewed as a starting point only. The iterative drafting process will transform the linear style and continue to build on how the proceedings are explained and interconnected. I am also aware this work requires a parallel project of identifying and making a Consequential Amendment Bill. This is also a large and testing project.

xxxv. Frankly, I see the drafting phase as being in many ways more challenging than the conduct of the Review, particularly in ensuring the successful operation of the legislation given the span and importance of its subject matter. The criminal justice system requires functional procedure laws. I would caution in a race between getting it done and getting it right—you must get it right.

[17] *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report two; Women and girls' experiences across the criminal justice system* (2022) 53.



This will undoubtedly involve extensive consultation and collaboration in drafting, editing and feedback cycles.

xxxvi. To this end, I am indebted to the voluntary members of the Consultation Reference Group who have provided their insight and expertise at an early stage with feedback on proposals.[18] I would greatly encourage a similar format to be used in the drafting phase to assist with quality assurance. A period of meaningful consultation is also essential to getting the content of this work right. As I have said, getting it right is critical to the operation of the Magistrates Court and its role in the broader justice system.

xxxvii. The implementation phase is also going to be vast and intricate. Again, this period cannot be rushed. Familiarising magistrates, court staff and the legal profession with new systems and procedures will require a coordinated strategy. I talk more about this in Chapter 20, however implementation involves another cycle of complex work to develop regulations, rules of court, practice directions, internal policy and procedures, training, and improved forms. The current Justices Act forms are overly legalistic and difficult to understand. Clear and simple support material needs to be developed which cuts through to the actual and necessary meaning. I encourage the use of Easy English documents to assist with understanding.

xxxviii. If enacted, I am suggesting there should be a mandated review of the new criminal procedure legislation, to ensure it works as intended and enable timely amendments to meet developing needs. New and clear legislation and meaningful data will allow for targeted and responsive amendment reforms to occur to address practice and performance challenges and emerging issues. The new criminal procedure laws should not be regarded as cast in stone, so that the next review occurs in another 130 years.

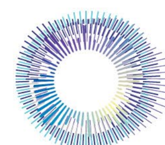
xxxix. Finally, throughout this Report, I have used the current terms ‘magistrate’ and ‘Magistrates Courts’, pending a government decision on a change of terminology and a single court structure.

Other Matters

xl. There are several other relevant matters I have identified during the Review, which although beyond the terms of reference, are worthy of comment and future consideration.

xli. Diversion from the court system is an important way of ensuring public safety by addressing the causes of crime with an aim of reducing reoffending. During my time as President of the Childrens Court, I saw the value of mediation in the form of youth justice conferencing (restorative justice orders). This is a wider concept than victim-offender mediation (Adult Restorative Justice Conferencing) as it can involve conferencing where there is not an actual victim but with representation from the community to explain the impact of the offence. Youth Justice, within the Department of Children, Youth Justice and Multicultural Affairs, have

[18] See further [14.47] ff.



resourced youth justice conferencing state-wide. Consideration should be given to widening victim-offender mediation in this same way.

xlii. As discussed in Chapter 15, enabling mediation to be available state-wide has resource implications. This could involve expansion of the adult restorative justice capacities of the Dispute Resolution Branch within the Department of Justice and Attorney-General. This allows for increased uptake for this beneficial option by alleviating the current geographic limitations of the service. In relation to First Nations justice issues for Aboriginal and Torres Strait Islander peoples (First Nations peoples), I believe an expanded role for Elders, Respected Persons and Community Justice Groups in mediation should be considered. In consultations around the state, it became clear that the QPS are already accessing such assistance in relation to certain matters.

xliii. Again, I am not the first to come to the realisation about the need to offer adult restorative justice state-wide. The Women's Safety and Justice Taskforce recommended the Queensland Government develop a sustainable long-term plan for its expansion and funding.[19] It is pleasing the Government response already commits to exploring options for a sustainable expansion plan.[20]

xliv. I am hopeful the recently established Criminal Justice Innovation Office within the Department of Justice and Attorney-General (DJAG) will have a role in bringing this to fruition given its remit is to provide expert advice on systemic issues and advise on system priorities.[21] This Review contains a framework for how adult restorative justice should work in the Magistrates Courts and will be a practical companion piece prepared and ready to operationalise. Its commencement could be timed to coincide with the finalisation of the broader work about expansion and funding.

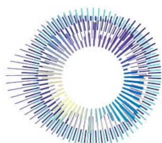
xlv. As discussed in Chapter 15, the Review considered whether a caution could be introduced as a court diversion option before a plea is entered. Following consultation and further consideration my view now is a caution is more appropriately introduced as a sentencing option. Cautions would better align with existing options under section 19(1)(a) of the *Penalties and Sentences Act 1992*, where the court has the power to release an offender absolutely in limited circumstances without recording a conviction.

xlvi. In my view, the introduction of a formal caution (or warning, as in Scotland) as a sentencing option should be considered. This would be a mechanism to deal with minor offences and supplement the police power of cautioning. A power such as the one contained in section

[19] Women's Safety and Justice Taskforce (n 16) vol 1, Rec 90.

[20] *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear her voice – Report two; Women and girls' experiences across the criminal justice system* (2022) 29.

[21] Matt Dunn, 'Bumper justice budget for Queensland' (21 June 2022) *Proctor* (available at: <https://www.qlsproctor.com.au/2022/06/bumper-justice-budget-for-queensland/>).



175(1)(a) of the *Youth Justice Act 1992* with the title 'Formal Warning' would provide an additional sentencing option in relation to adults. This matter could benefit from detailed consideration and referral for inquiry by the Queensland Sentencing Advisory Council.

xlvii. In relation to both cautions as a sentencing option and my recommendations for a Summary Offences Diversion Program, I note the report by the former QPC[22] recommended that those two diversion options be introduced. I note the Queensland Government's response indicated that whilst no legislative amendments were planned, the Government 'support[ed] all options available to police, including the increased use of existing adult cautioning options, facilitating more police referrals to Adult Restorative Justice Conferencing, and exploring implementation of deferred prosecution agreements'.[23]

xlviii. This was reiterated in the second report of the Queensland Women's Safety and Justice Taskforce which recommended Government 'continue to explore conditional cautioning and deferred prosecution agreement schemes as viable options for diverting low-level offenders from the criminal justice system'.[24] The Queensland Government's response stated, '[t]he Queensland Government supports the intent of this recommendation and will explore conditional cautioning and deferred prosecution agreement schemes as viable options for diverting low-level offenders from the criminal justice system'.[25]

xlix. I see the introduction of the new criminal procedure legislation, which provides in-court diversion options, as an opportunity to act on those recommendations. Consultation revealed contemporary and effective criminal procedure laws need to incorporate ideas of diversion and broader ideals of therapeutic jurisprudence. This is a significant change from the policy concepts underpinning the development of the Justices Act in the late 1880s. I have approached this Review with a practical outlook, to give reality to diversion pathways. I urge the Government to implement other diversionary options.

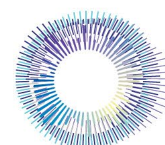
l. During the consultation process, the Review was informed of innovative proposals to address the overrepresentation of First Nations peoples in the criminal justice system and, particularly, those in custody. I received a written response to the Review's Consultation Paper from First Nations Elders Groups and met with them at the Cooee Indigenous Family and Community Education Centre in Cleveland. They provided me with a substantial submission previously made to the Queensland Government proposing an innovative model, setting out a rehabilitative framework for First Nations peoples charged with or convicted of offences.

[22] Queensland Productivity Commission (n 9).

[23] *Queensland Government response to the Queensland Productivity Commission inquiry into imprisonment and recidivism* (January 2020) 7, 11.

[24] Women's Safety and Justice Taskforce (n 16) vol 1, Rec 100.

[25] *Queensland Government response to the Queensland Productivity Commission inquiry into imprisonment and recidivism* (January 2020) 32.



It involved secure assessment centres, addressing causes of offending behaviours, treatment plans and healing centres instead of detention centres and prisons where there is little opportunity for meaningful rehabilitation.

li. The groups have been providing submissions about this to various Queensland Governments since 2006. In 2019, the QPC supported a trial of this model.[26] Various group members continue to advocate for such a trial.[27] The overrepresentation of First Nations peoples in the criminal justice system, and particularly in custody, is an ongoing and seemingly insoluble scandal. The current approach is plainly not working in reducing numbers. The damage to our community is incalculable. I urge the Government to seriously consider innovative measures to address this national tragedy.

lii. I also note the recent allocation of funding for the co-design of a strategy to address over-representation of First Nations peoples in the criminal justice system and establishment of a First Nations Justice Office in DJAG as a part of the Women's Safety and Justice Taskforce reforms. Again, it may not seem readily apparent, but the criminal procedure review should be considered a practical and connected part of this work.

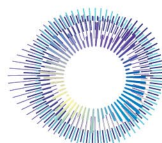
liii. In relation to innovative processes aimed at addressing the causes behind criminal offending, the current Court Link program within DJAG operates as an 'integrated court assessment, referral, and support program'.[28] It connects participants (who are charged with criminal offences) to treatment and support services to address the causes behind the offences. It is available in eight court locations in Queensland. I have observed its operation and am impressed with its impact. Its operational resources are limited and thus the number of participants it can assist is constrained. It is clearly having an impact in reducing reoffending. I urge the Government to consider expanding its operations.

liv. In considering the issue of whether magistrates should become judges, I was met with several submissions concerning the appropriateness of that title applying where magistrates behave inappropriately in court, or where some magistrates' decisions are consistently overturned on appeal and those magistrates give little regard to the appellate decisions. I am of the view these concerns have some weight in relation to some magistrates. It may be the title of judge encourages those magistrates to take a more judicial approach. However, in relation to misbehaviour or misconduct, less than that which requires dismissal from office, the establishment of a judicial commission to have oversight of complaints about judicial officers

[26] Queensland Productivity Commission (n 9) Rec 30.

[27] For example, A O'Flaherty, 'Renewed calls for juveniles offenders to be sent to assessment centres rather than detention', *ABC News* (online, 19 November 2022) <https://www.abc.net.au/news/2022-11-19/calls-for-healing-assessment-centres-for-juvenile-offenders/101660826>; S Richards and K McKenna, 'Former Queensland corrections boss Keith Hamburger says 'urgent' change needed to fight youth crime', *ABC News* (online, 1 February 2023) <https://www.abc.net.au/news/2023-02-01/qld-government-not-taking-youth-crime-advice/101918246>.

[28] Queensland Courts, *Court Link* (Web Page, 2 February 2023) <https://www.courts.qld.gov.au/services/court-programs/court-link>.



would go a long way to address the problem. I note the Queensland Government committed to considering the issue and best model of a judicial commission in Queensland. Should my recommendation about the title of Local Court judge be accepted, that may be another argument for establishing such a body.[29]

Conclusion

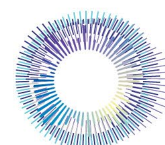
lv. I want to acknowledge the hard-working judicial officers, court registry staff, legal representatives and system support workers who are committed to delivering justice services in the Magistrates Courts in the face of its challenges which includes operating within the confines of the Justices Act. Their dedication deserves recognition.

lvi. In the last year, I have come to appreciate this Review as profoundly important work. It stems from the realisation of the practical opportunity to reform a body of law that is so integral to everyday justice for the people of Queensland. This is not front-page law reform, but if accepted it will have great impact and influence on the way the Magistrates Courts operate in the future.

Michael Shanahan AM

Reviewer
Criminal Procedure Review — Magistrates Courts

[29] This is discussed further at Chapter 7.



CHAPTER 1: INTRODUCTION

The terms of reference

1.1 I was appointed by the Attorney-General to undertake the Criminal Procedure Review—Magistrates Courts (the Review). The Review is 'a comprehensive review of Queensland Magistrates Courts criminal procedure laws'.[1] In undertaking the Review I have been supported by a small secretariat provided by the Department of Justice and Attorney-General (DJAG), known as the Criminal Procedure Review Team (CPRT).

1.2 The *Justices Act 1886* (Justices Act) is the key criminal procedure legislation for Queensland's Magistrates Courts. It establishes the court processes and procedures used in the prosecution of criminal offences, including the way criminal matters are commenced, dealt with and determined.

1.3 The Justices Act has long been recognised as requiring modernisation. It has never been comprehensively reviewed and is difficult to understand and apply in practice. In late 2020, the Queensland Government committed to a comprehensive review of the Justices Act and the associated *Criminal Practice Rules 1999*.[2]

1.4 The terms of reference for this Review require me to 'make findings and recommendations to the Attorney-General for a new legislative framework for contemporary and effective summary criminal procedure laws in Queensland to replace the Justices Act'.[3] The framework should follow the chronology of a criminal proceeding from start to finish, including an appeals process.

1.5 In making recommendations, I am required to consider:

- the role and context of the Magistrates Courts in the criminal justice system in Queensland
- alternative ways for the Magistrates Courts to deal with matters, … not restricted to the existing summary criminal procedures contained in the Justices Act
- necessary or desirable reforms that achieve contemporary and effective summary criminal procedure laws and practices
- exploring options to improve existing summary criminal procedures

[1] The terms of reference are set out in full in Appendix A.

[2] Queensland Law Society, 'Call to Parties: Palaszczuk Labour Government response' (20 October 2020) <https://www.qlsproctor.com.au/2020/10/call-to-parties-palaszczuk-labor-government-response/>. The Liberal National Party also supported this review: Queensland Law Society, 'Call to Parties: Response from the LNP' (21 October 2020) <https://www.qlsproctor.com.au/2020/10/call-to-parties-response-from-the-lnp/https://www.qlsproctor.com.au/2020/10/call-to-parties-palaszczuk-labor-government-response/>.

[3] The terms of reference explain that 'summary criminal procedure laws include committal proceedings and mechanisms available to the court for managing how matters are dealt with, for example closing the court, attendance of witnesses, access to the court files. It does not include consideration of sentencing options or procedures'.

- consolidating existing summary criminal procedure laws where this is necessary to promote a contemporary and effective legislative framework
- summary criminal procedural laws that balance the interests of victims and accused persons
- more efficient and effective methods of the court dealing with criminal offences, including ways to reduce court operational costs and procedural delays
- adopting summary criminal procedures that enhance consistency across Queensland courts, where appropriate and particularly in relation to the [*Criminal Practice Rules 1999*]
- leveraging where relevant, existing criminal procedure reviews and reforms undertaken in Queensland and in other relevant jurisdictions that align with a contemporary and effective framework
- the need to protect and promote human rights
- supporting increased use of technology and electronic processes for summary criminal procedure, including electronic lodgement, filing and service of documents
- the extent to which existing legislation should be repealed or amended to give effect to the recommended new summary criminal procedure laws
- any other related matters [that are considered] relevant.

1.6 The terms of reference also require me to 'provide expert criminal law guidance, knowledge, and oversight to the secretariat team in developing new criminal procedure legislation for the Magistrates Courts'.

1.7 Accordingly, this Report is a summary of my recommendations for a new legislative framework. These recommendations have informed the development of drafting instructions,[4] which are the basis for the writing of new criminal procedure legislation to replace the Justices Act.

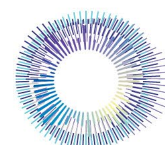
1.8 As a separate matter, the terms of reference also require me to consider whether a single Magistrates Court of Queensland should be established, and whether magistrates and Magistrates Courts should be retitled as Local Court judges and Local Courts, having regard to the costs and benefits of that change.[5]

Some limitations

1.9 The scope of this Review is limited to laws about criminal procedure applying in Queensland's Magistrates Courts. It is not a broader examination of the criminal justice system in Queensland, as it is delivered through the Magistrates Courts. I have not reviewed matters such as the general workings of the Magistrates Courts' criminal

[4] Set out in Appendix C of this Report.

[5] Disclosure: My wife is an Acting Magistrate, appointed by the Attorney-General on 1 July 2018 and extended to the present time.



jurisdiction, the offences that can or cannot be finalised in the Magistrates Courts (except in relation to the procedural matters connected with those offences), or broader criminal laws and systems.

1.10 I have not examined other institutions or issues associated with matters such as service delivery, drivers of crime, policing, diversionary options implemented outside of court or imprisonment. I understand that many of these issues have great impact on users of the Magistrates Courts and are connected with matters of criminal procedure in many ways, but I am unable to make recommendations for change in those areas. This means, for example, that I have not made recommendations about access to legal advice and services, changes to bail laws, criminal responsibility, the use of diversionary options by police as an alternative to criminal charges or the types of sentences that are given in the Magistrates Courts.

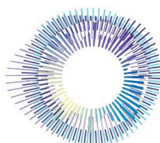
1.11 I did not reconsider the changes made to the Justices Act (and other Acts) by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*. Broadly, those relate to which criminal offences can be finalised in the Magistrates Courts, disclosure obligations and the conduct of committal proceedings. Those laws will be part of the new framework. However, I have recommended changes to the processes and procedures associated with those laws to improve how they operate in practice.

1.12 Other more general matters were also outside the scope of this Review. They include:

- specific court procedures applying when a child[6] is charged with an offence, which are set out in the *Youth Justice Act 1992*
- changes to parts of the *Criminal Practice Rules 1999* that only apply to the District and Supreme Courts
- the roles and responsibilities of justices of the peace[7]
- civil procedure, including proceedings under domestic violence legislation (and any other types of proceedings) in the Magistrates Courts
- criminal procedure laws for the District and Supreme Courts
- specific criminal offences (including their classification into crimes, misdemeanors and simple offences
- the operation of other Acts that are relevant to criminal procedure laws, such as the Criminal Code, *Bail Act 1980*, *Penalties and Sentences Act 1992*, *Evidence Act 1977*,

[6] In Queensland, a child is an individual under the age of 18: *Acts Interpretation Act 1954* (Qld) sch 1 (definition of 'child').

[7] See generally, *Justices of the Peace and Commissioners for Declaration Act 1991* (Qld).



State Penalties Enforcement Act 1999, *Police Powers and Responsibilities Act 2000* and *Victims of Crime Assistance Act 2009*.

The structure of this Report

1.13 Chapter 2 of this Report gives a brief overview of Queensland's Magistrates Courts, including their role in Queensland's judicial system and data about their current operations, as well as the current Justices Act.

1.14 This remainder of the Report is divided into three parts.

Part A of the Report

1.15 Part A of this Report explains how the CPRT and I undertook this Review. Chapter 3 gives an overview of our approach, including research and analysis of the law, consultation and the development of guiding principles.

1.16 The terms of reference for this Review required 'consultation with a wide range of key stakeholders'. This included consultation with the judiciary and court staff, prosecuting agencies, government bodies, legal practitioners and the public. Chapter 4 explains the wide-ranging ways we consulted during this Review and Chapter 5 explains what consultation told us, with reference to some key themes.

1.17 Chapter 6 sets out the eight internal guiding principles that I have used to guide my decision-making during the Review. It also identifies some of the relevant human rights that have been considered throughout the Review.

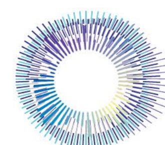
Part B of the Report

1.18 This part of the Report addresses the separate topic of whether a single Magistrates Court of Queensland should be established, and whether magistrates and Magistrates Courts should be retitled. Chapter 7 sets out my recommendations on that topic.

Part C of the Report

1.19 Part C of the Report sets out, in a summary way, my recommendations for the repeal of the Justices Act and the creation of a new framework for contemporary and effective summary criminal procedure laws in Queensland. It should be read together with the drafting instructions for the new legislation, which provide more detail.[8] Chapter 8 gives an overview of this part and a summary of some of the key differences between the current law and the recommended new framework.

[8] Set out in Appendix C of this report.



1.20 Chapter 9 discusses the proposed objects and guiding principles for the new legislative framework.

1.21 Chapter 10 discusses the use of technology and the ability to do things electronically in the Magistrates Courts.

1.22 Chapter 11 explains the different types of charges that can be dealt with in the Magistrates Courts. It also discusses the use of the term ‘simple offence’ in the Justices Act and proceedings for a ‘breach of duty’.

1.23 Chapters 12 and 13 deal with how proceedings are started in the Magistrates Courts. They explain my recommendations for a new way of starting proceedings using a notice for public officers and other authorised persons; and a new application process for any other person wanting to start a private prosecution.

1.24 Chapter 14 discusses how matters are managed as they progress through the Magistrates Courts. It recommends a structured process of case management, which includes requirements for disclosure to take place at certain points during a criminal proceeding and for parties to engage in case conferencing.

1.25 Chapter 15 is about in-court diversion. It proposes clear procedures for matters referred to Adult Restorative Justice Conferencing as well as a new program to divert people charged with some offences out of the Magistrates Courts.

1.26 Chapter 16 considers a range of matters related to pleas, summary hearings and matters dealt with in a party’s absence.

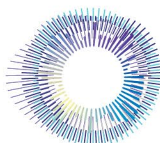
1.27 Chapter 17 deals with committal proceedings used when a matter cannot be finalised in the Magistrates Courts, including recommendations to streamline and clarify procedures for registry committals and committal proceedings taking place in court.

1.28 Chapter 18 considers the issue of costs that can be obtained in relation to criminal matters in the Magistrates Courts.

1.29 Chapter 19 is about a range of other general matters related to criminal procedure in the Magistrates Courts.

1.30 Chapter 20 discusses the implementation of my recommendations for a new criminal procedure framework in the Magistrates Courts. This includes a consideration of how the courts will operationalise any new laws, the making of new regulations, rules and forms, and the need for ongoing review and data collection to make sure the new laws are working in practice.

1.31 Chapter 21 explains the consequential amendments that would be required for other Queensland Acts, if the Justices Act is repealed and a new legislative framework is enacted in its place.



Appendices

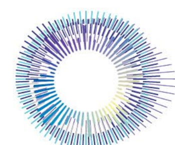
1.32 The terms of reference for this Review are set out in Appendix A.

1.33 Lists of stakeholders we met with during this Review and stakeholders who responded to our consultation documents, as well as a list of presentations given, are included in Appendix B.

1.34 Appendix C includes a list of all the recommendations made in this Report. It also includes the drafting instructions for the proposed new criminal procedure legislation for the Magistrates Courts, which are based on those recommendations. As explained previously, this summary Report and these drafting instructions should be read together.

Terminology

1.35 A list of Abbreviations and Glossary of terms commonly used in this Report is set out at the beginning of the Report.



CHAPTER 2: QUEENSLAND MAGISTRATES COURTS

Queensland courts

2.1 The criminal justice system in Queensland is made up of three levels of courts, each with distinct jurisdictions. A court can only process or finalise matters within its jurisdiction. This allows each court to fulfil a unique role in the administration of justice.

2.2 The Magistrates Courts are the entry point into the court system, with even the most serious of charges usually commencing in the Magistrates Courts. Magistrates sit alone (without a jury).

2.3 The next court is the District Court, which hears most indictable offences and appeals from the Magistrates Courts' criminal jurisdiction.[1] Matters are heard by judges, and criminal trials usually involve a judge and jury. Appeals are decided by a judge only.

2.4 The Supreme Court hears the most serious indictable offences. Like the District Court, matters are heard by judges and trials normally involve a judge and jury. District and Supreme Courts are sometimes called 'the higher courts'.

2.5 The Supreme Court structure includes the Court of Appeal, which generally hears criminal appeals from the District and Supreme Courts. The Court of Appeal can be made up of three to five judges of the Supreme Court. Criminal cases heard by the Court of Appeal can be appealed to the High Court of Australia.

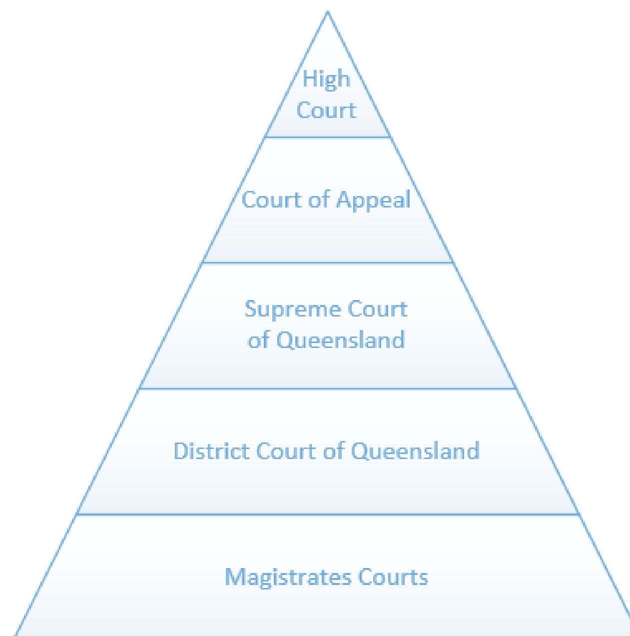


Diagram 2.1: The court hierarchy

[1] *Justices Act 1886* (Qld) s 222.

Queensland Magistrates Courts

2.6 There are approximately 130 Magistrates Court locations across Queensland,[2] with 101 magistrates appointed.[3]

2.7 The Magistrates Courts finalise the vast majority of criminal proceedings, with approximately 94% of all criminal matters finalised in the Magistrates Courts and not proceeding to a higher court.[4] Most of these matters are relatively minor and are finalised within one or two court events.[5]

2.8 The Magistrates Courts have jurisdiction to finalise many types of offences, including simple offences, regulatory offences and a range of indictable offences that can be dealt with summarily.

2.9 If an indictable offence cannot be decided summarily it must be transferred to the appropriate higher court by an administrative process known as a 'committal proceeding'. More information about the different types of offences and how they are dealt with in the Magistrates Courts is included later in this Report.[6]

Criminal procedure in the Magistrates Courts

2.10 Criminal procedure is the way criminal charges are dealt with by a court from beginning to end. It is the 'sequence of steps'[7] in the court process. This includes how and when a criminal charge is started, progressed, and finalised.

2.11 Having good criminal procedure is important. It helps to make sure the criminal justice system operates in a way that ensures community access to a fair system of justice that protects the rights of individuals, keeps the community safe and is responsive to community needs. It is about how the courts do their core business. Proper criminal procedure laws contribute to the effective operation of the courts and the administration of justice. They bolster confidence in the criminal justice system and underpin its key objectives of fairness, accessibility and timeliness.

2.12 Criminal procedure laws for the Magistrates Courts are set out in the Justices Act.

2.13 The Justices Act applies in the Magistrates Court, except in relation to an appeal from the Magistrates Courts. Criminal procedure in the higher courts is mostly set out in

[2] Queensland Courts, *About the Magistrates Court* (Web Page, 21 June 2022) <https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>.

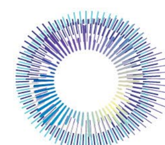
[3] Queensland Courts, *Magistrates Courts of Queensland: Annual Report 2021–2022* (October 2022) 15.

[4] Ibid 23.

[5] Martin Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 65.

[6] See in particular, the discussion of types of offences in Chapter 11.

[7] Moynihan (n 5) 64.



part 8 of the Criminal Code. As a result, there are variations in criminal procedure between the Magistrates Courts and the higher courts.

2.14 The *Criminal Practice Rules 1999* were introduced to create more uniform criminal practice across the courts. Not all the rules apply to criminal proceedings in the Magistrates Courts.

2.15 While amendments have been made to the Justices Act over the years, its limitations due to its age and style are broadly recognised. In December 2008, retired Supreme Court Judge Martin Moynihan QC AO, recommended the development of a modern criminal procedure Act. A full review of the Justices Act was a significant part of the reform package recommended, with Mr Moynihan stating:[8]

> It is hardly surprising that the substantive and procedural provisions of the *Justices Act 1886* are no longer appropriate to the world in which they now apply. There are limits to the extent to which processes developed in the late 19th century environment can be effectively applied to, or adapted for today's dynamic and complex world.
>
> …
>
> While there has been significant and constant reform to both the substantive and procedural law over the last century, there has not been a single, comprehensive review to evaluate the effectiveness of criminal justice processes in Queensland. In addition there has been little consideration and much less accommodation of the impact of technology on the creation, storage, manipulation and evaluation of information and the importance of this to the justice system as a whole.
>
> Until recently the reform process has been episodic, fragmented and ad hoc. This Review presents a fresh opportunity to bring the criminal justice system into the 21st century, to begin the important and ongoing task of aligning criminal justice processes with social needs, expectations and values as well as developments and opportunities.

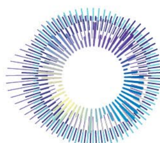
2.16 Mr Moynihan's review made extensive recommendations, including:[9]

- introducing new criminal procedures legislation and replacing the *Justices Act 1886*
- reducing the need for mentions that do not progress a matter, and increasing the use of administrative adjournments so parties do not need to attend court
- increased use of technology
- extensive changes to the committals process
- expanding the cases that can be finalised by a magistrate, reducing the number of cases that need to be committed to a higher court for finalisation.

2.17 The Government response at the time supported some of these recommendations, including changes to the committals process and expanding the cases (indictable

[8] Ibid 45-46.

[9] Ibid 5-16.



offences) that can be finalised by a magistrate.[10] Most of the legislative changes were introduced in the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*.

2.18 The terms of reference for the Criminal Procedure Review in the Magistrates Courts exclude any evaluation of the 2010 reforms.

Current procedure

2.19 Once a criminal charge is lodged with the Magistrates Courts, the general progression of a matter is set out in Diagram 2.2 below. The course of a matter will depend on whether the offence is indictable and if so, whether the offence will be committed to a higher court or remain in the Magistrates Courts to be dealt with summarily. If the offence is not indictable, then it must remain in the Magistrates Courts and be dealt with by a magistrate.[11]

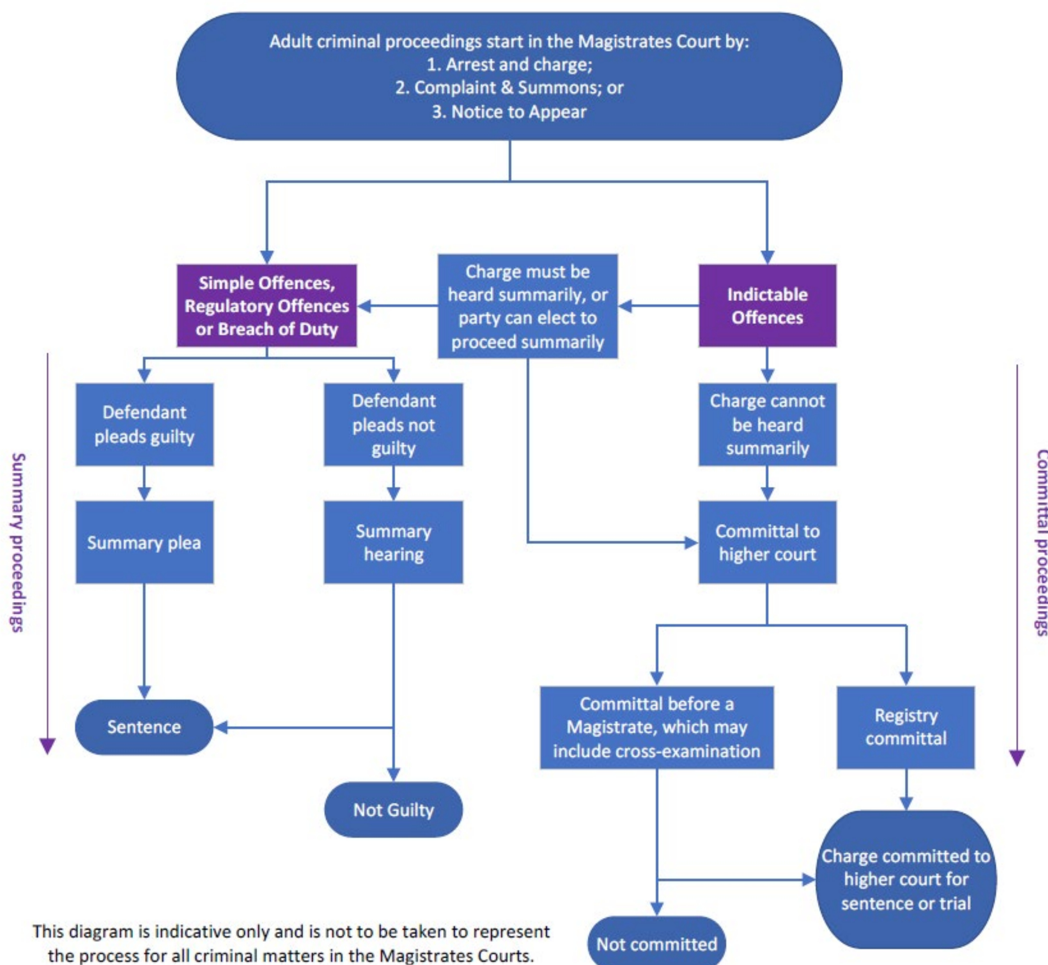


Diagram 2.2: The progression of an adult criminal matter through the Magistrates Courts

[10] *Queensland Government response to the Review of the civil and criminal justice system in Queensland* (July 2009).

[11] Subject to the Criminal Code section 651, which allows summary offences to be transmitted to a higher court in limited circumstances.

Magistrates Courts data[12]

2.20 As of September 2022, the population of Queensland was over 5.3 million people, with over 20% of the Australian population living in Queensland. Queensland's population is growing at a rate of 2.2% (from the previous year), much higher than the national population growth of 1.6%, and is the fastest growing state or territory in Australia.[13] As the population grows, so too will the demand for government and social services. Population increases will naturally have flow on effects to the already busy criminal workload of the Magistrates Courts.

2.21 Throughout this Report I refer to data where possible, to illustrate the workload of the Magistrates Courts in its criminal jurisdiction. The data has assisted in developing, presenting and understanding the courts' current performance, identifying areas of potential reform and examining any impacts of change. Unless otherwise stated, the data has been supplied by Court Services Queensland (CSQ) and is subject to the limitations of the case management system currently in use, QWIC.

2.22 As part of the Review, I made an extensive data request to CSQ which covered all aspects of the criminal process in the Magistrates Courts. This included number of lodgements, types of offences lodged, who the prosecuting agencies were, what the outcomes were (plea of guilty or found guilty after a summary hearing) and how long it took to get to those outcomes. I also sought information on the background of the defendants before the Magistrates Courts, including how many defendants were Aboriginal and Torres Strait Islander peoples,[14] how many defendants had a disability or how many people were from culturally or linguistically diverse backgrounds.

2.23 The data received from CSQ demonstrates the shortcomings of maintaining a paper file system. All data is entered into QWIC manually by courts staff after every court event so is subject to human error. These errors may be noticed and corrected throughout the proceedings, but this is not always the case. These errors could mean a single defendant is counted multiple times because they have a different date of birth or a slight variation in the spelling of their name, or because some court outcomes are entered differently at the discretion of a staff member. For example, a case where the prosecutor withdraws the charge in court could be entered into QWIC with the final outcome as 'withdrawn', 'no evidence to offer' or 'dismissed'. The lack of data rules means registry staff have

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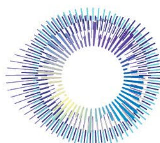
[12] All data is provided by Court Services Queensland on 9 August 2022, unless otherwise indicated. The data relates to adults only unless otherwise indicated. QWIC is a live case management system that is constantly being updated, and any data quoted is subject to change.

[13] Australian Bureau of Statistics, *National, state and territory population* (Web Page, 16 March 2023) <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release>.

[14] The court data generally refer to 'Aboriginal and Torres Strait Islander people'. The phrase 'Indigenous people' is also sometimes used in relation to data.



discretion about how data is entered into QWIC, which makes consistent practices across over 130 courthouses unlikely.

Adult defendant background

2.24 Over the last five years, the number of defendants coming before the Magistrates Courts has been decreasing, but during the 2021-22 financial year the courts still dealt with over 170,000 adult defendants and 17,000 child defendants.

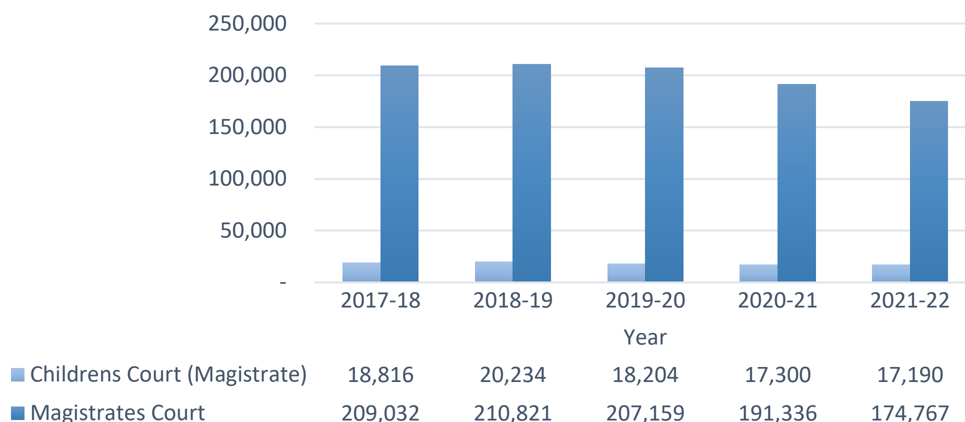


Diagram 2.3: Individual defendants in the Magistrates Courts for the last five financial years

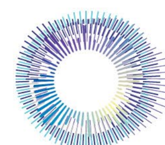
2.25 The data on defendant backgrounds is limited to details such as their full name, date of birth, address and whether they identify as Aboriginal or Torres Strait Islander. This information is usually provided by the prosecuting agency (for example, QPS) as part of their initiating material provided to the court. Generally, the Magistrates Courts does not collect this information from defendants directly.

2.26 Despite the limitations in available data, evidence demonstrates First Nations peoples are significantly overrepresented in the Magistrates Courts criminal jurisdiction.

2.27 As of 30 June 2021, First Nations peoples made up 5.5% of the Queensland population, with Queensland having the second largest population after New South Wales.[15] Yet during the 2021-22 financial year, 22% of the defendants in the Magistrates Courts identified as Aboriginal or Torres Strait Islander.

2.28 QWIC does not contain information on whether a defendant is from a culturally and linguistically diverse background or if a defendant has a disability, including whether they

[15] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Web Page, 21 September 2022) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/jun-2021>.



have a legal guardian appointed. If the court does not hold this information, it is necessary for the parties to bring these matters to the attention of the magistrate every time they are before the court. While specific needs may be noted on the physical court file, once that file closes, the information is not carried over to any new files.[16] Relying on people with disability or from non-English speaking backgrounds to continue to explain their circumstances and advocate for themselves and their specific needs is disadvantageous.

Workload of the Magistrates Courts

2.29 From the available data, it is clear the bulk of the Magistrates Courts adult criminal workload relates to dealing with and finalising summary proceedings. Most criminal charges lodged in the Magistrates Courts over the last five years were either not indictable or were for indictable offences that could be dealt with summarily.

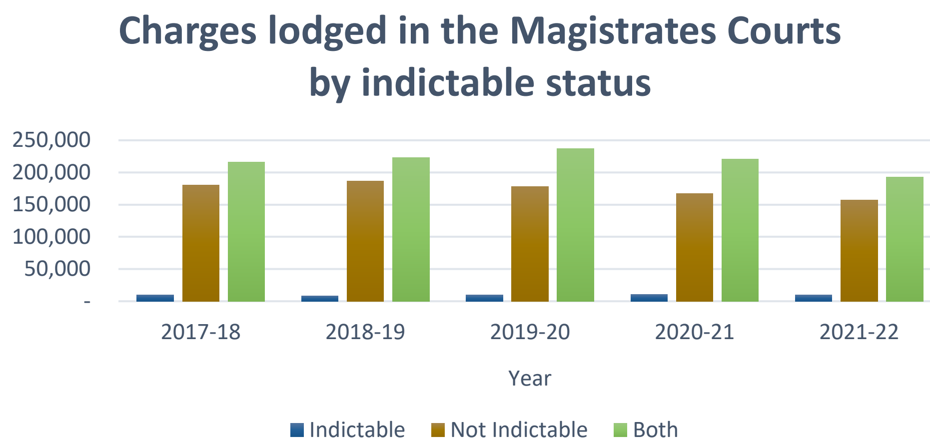


Diagram 2.4: Charges lodged in the Magistrates Courts for the last five financial years, divided by indictable status of offence[17]

2.30 In the 2021–22 financial year, the most common summary offences[18] lodged in the Magistrates Courts were offences for failing to comply with orders, such as bail, or failing to appear at a court event. The five most common summary offences lodged in 2021-22 are listed in the table below.

[16] The use of paper files in the Magistrates Courts is discussed further in Chapter 10 on technology.

[17] Charges with 'Both' status mean the offence is an indictable offence that can be dealt with summarily in the Magistrates Courts. How the charge is actually dealt with depends on the individual circumstances of each matter.

[18] In this context, 'summary offence' is a term used in the courts database which seems to refer to non-indictable offences.

Summary Offence	Lodgements
Fail to appear in accordance with undertaking	8,869
Breach of bail	5,963
Drug driving	5,493
Obstruct police	5,267
Contravene direction or requirement of police	4,934

Diagram 2.5: Five most common summary offences lodged in the Magistrates Courts in 2021–22

Length of time to finalisation

2.31 Data from CSQ provides the average number of events to finalisation. The term 'finalise' refers to any ending to the proceeding, which can include sentence (including after a summary hearing), conviction, dismissal, committal, or the charge/s being withdrawn by the prosecutor.

2.32 An 'event' is usually anytime the parties attend court, such as a mention or a hearing, but can also include administrative adjournments that are completed without the parties present at court. From the data available, indictable offences take significantly longer to finalise than non-indictable offences. In 2021-22, indictable offences took an average of 7.5 events to finalise, but non-indictable matters have been increasing in duration in the last five years, with the current average event count being 4.4 attendances. Finalising an indictable offence can include dealing with it summarily in the Magistrates Courts or committing the matter to a higher court.[19]

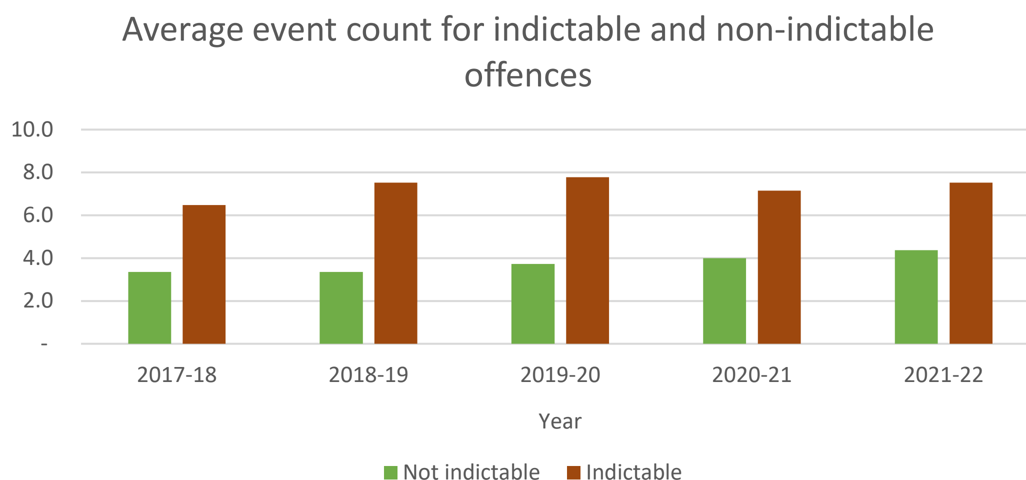
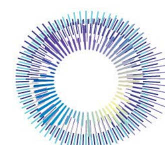


Diagram 2.6: Average event count to finalisation for the last five years in the Magistrates Courts, divided by indictable status

[19] Once the matter is committed, the Magistrates Court file is closed, and the higher court will open a new file.



2.33 The event duration data can also be broken down by the most serious outcome[20] for the defendant, and how many events (on average) it takes to get to that outcome. The below table contains some finalisation outcomes for the 2021-22 financial year, but not all possible outcomes.[21]

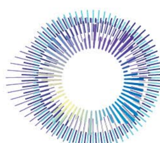
Most serious outcome of matter	Average event count 2021-22
Monetary fine	2.5
Withdrawn	4.0
Community service order	4.8
Graffiti removal order	5.5
Accused discharged	5.7
Probation order	6.4
No evidence to offer (*prosecution withdrawing charge*)	6.5
Convicted - not punished	7.3
Imprisonment	7.4
Committal order (registry)	7.6
Committal order	9.3
No action taken	10.9

Diagram 2.7: Average court events to finalisation of a matter in the Magistrates Courts in 2021–22

2.34 Looking at the number of days a proceeding takes to finalise, the average case duration of a case in the Magistrates Courts has more than doubled over the last five years, with cases now taking an average of 268 days to finalise. CSQ does not record the reasons for adjournment of a matter, so it cannot be said with any certainty what is causing the significant increase in case duration. One reasonable assumption may be that COVID-19 has contributed to these delays.

[20] Most serious outcome is used in the above table because a defendant may be charged with two offences at once, which have different outcomes. For example, on one offence the defendant may be sentenced to a fine, and the other offence may be withdrawn by the prosecution. In this example, the most serious penalty from that case is the fine, so the case would be counted above as a case that ended in a fine, rather than a case that was withdrawn.

[21] The limitations of this data are discussed further at paragraph 12.23[12.23].



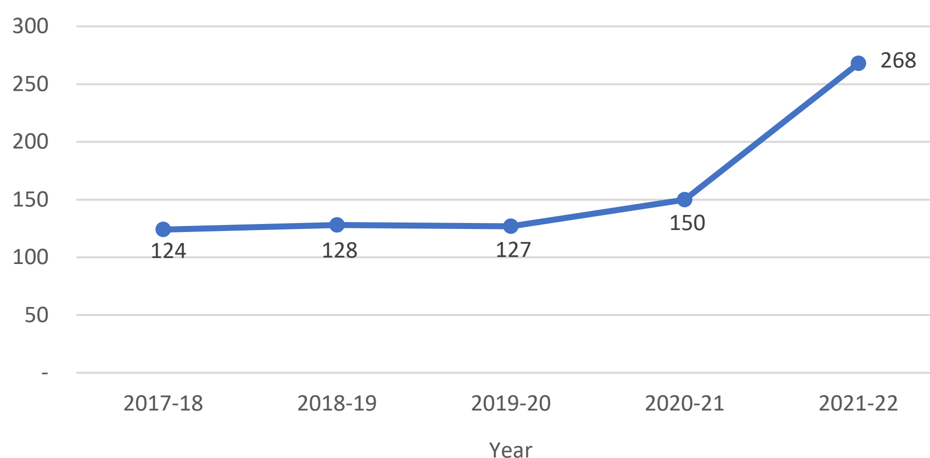


Diagram 2.8: Average duration of a case in the Magistrates Courts in days, across the last five years

2.35 Whilst QWIC can calculate the duration of court matters or how many court events occurred, data is not available on what occurs at those events, why the case was adjourned and whether a court event is just a short mention of the matter or an interim or final hearing. It also does not capture where a hearing is scheduled to occur but does not go ahead on the day, usually because one of the parties is unable to proceed or the defendant has chosen to plead guilty. These limitations mean, among other things, that we do not have data about how many summary hearings take place each year and we do not know how many defendants pleaded guilty to an offence or were found guilty at the conclusion of a summary hearing.

Outcomes in the Magistrates Courts

2.36 When reviewing the most serious penalty handed down in Magistrates Courts cases, the need for more efficient case management becomes clear. In many cases before the Magistrates Courts, the most serious penalty is a fine or monetary order, with 44.3% of cases resulting in a fine in 2021-22. Fewer defendants in the Magistrates Courts are sentenced to imprisonment (16.6%).

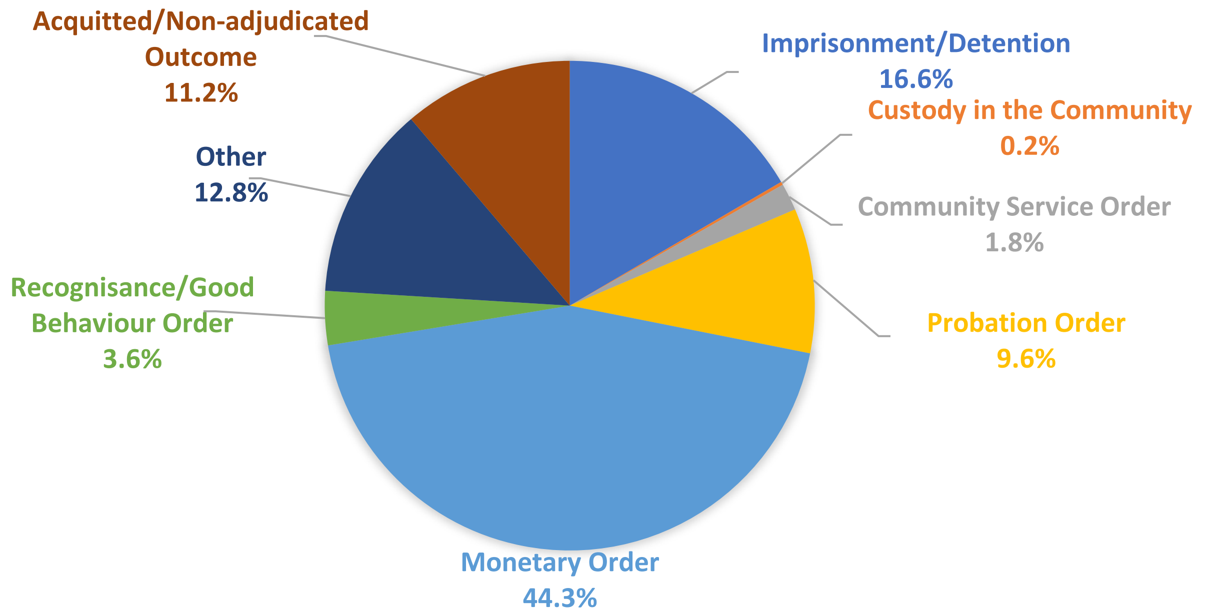


Diagram 2.9: Most serious penalties given to adults in the Magistrates Courts in 2021-22[22]

2.37 After a matter is finalised in the Magistrates Courts, a party may appeal the decision to the District Court. In the District Court, appeals against sentence are classified as criminal appeals, and appeals against convictions are classified as civil appeals. In 2021-22, 299 criminal appeals and 88 civil appeals[23] were lodged in the District Court.[24] As per Diagram 2.4 at [2.29], there were 359 081 charges lodged in the Magistrates Courts in 2021-22 (noting not all charges can necessarily be finalised in the Magistrates Courts), which makes an overall appeal rate of approximately 0.001%

[22] The order 'Custody in the Community' may refer to 'Intensive Correction Order'; 'Conditional Release Order' or 'Intensive Supervision Order', the last two of which are only available in the Childrens Court. The order 'Other' may refer to nominal penalties, such as 'convicted and not further punished'. In some instances, a court may sentence a defendant to a term of imprisonment on one offence and convict and not further punish them on a lesser offence. The order 'Acquitted / Non-adjudicated Outcome' may, in addition to a finding of not guilty, refer to 'Dismissed', 'Struck Out' and 'NETO'.

[23] Civil appeals also include appeals from the Magistrates Court civil jurisdiction and appeals under the *Domestic and Family Violence Protection Act 2012* and the *Child Protection Act 1999*. Due to the combined nature of the data, it cannot be said how many of the civil appeals relate to appeals against a criminal conviction.

[24] *District Court of Queensland Annual Report 2021/2022* (28 October 2022) 16.

CRIMINAL PROCEDURE REVIEW
MAGISTRATES COURTS

PART A: THE REVIEW

CHAPTER 3: OUR APPROACH TO THIS REVIEW

Introduction

3.1 This chapter explains, in general terms, the approach the CPRT and I took to completing this Review of criminal procedure laws in the Magistrates Courts.

3.2 It also explains the approach that we have taken to writing this Report.

The law in Queensland and other jurisdictions

3.3 We have undertaken a comprehensive review and analysis of the law about criminal procedure in the lower courts in Queensland and elsewhere.

3.4 In Queensland, most criminal procedure laws for the Magistrates Courts are contained in the Justices Act, and in analysing that Act we have been greatly assisted by Mr Allen's annotated version.[1]

3.5 We have undertaken a comprehensive analysis of the Justices Act to understand what is included in the current law and its history, intentions, successes and shortcomings. We have considered in detail what we must recreate in the new law and what needs to change.

3.6 We have also undertaken a comprehensive analysis of the Magistrates Courts and the role of magistrates in Queensland. We have traced the evolution of both over time and have considered how to best preserve and improve the courts' current role and functions within the Queensland criminal justice system.

3.7 We have also considered other relevant laws. These include the *District Court of Queensland Act 1967*, the *Supreme Court of Queensland Act 1991*, the Criminal Code and the *Criminal Practice Rules 1999* (the Criminal Practice Rules). Some of these laws apply to the Magistrates Courts, at least in part. Others do not directly apply but help us to understand what contemporary and effective laws might include.

3.8 Queensland is the last Australian jurisdiction to reform its criminal procedure laws. We have also reviewed, analysed and compared criminal procedure laws applying to the lower courts in other Australian jurisdictions, as well as some international jurisdictions. Some of these laws have been recently reformed. They include:[2]

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[1] William Kennedy Abbott Allen, *The Justices Acts of Queensland 1886 to 1949 with conspectus, annotations, supplementary forms and a selection of cognate legislation* (3rd ed, 1956).

[2] This is a list of the primary Acts about criminal procedure in the lower courts in other jurisdictions. It does not include Regulations, Rules or other Acts that are of some relevance. It is not intended to be a comprehensive list of all Acts relevant to criminal procedure, or of all the law that we considered while completing this review.

- *Magistrates Court Act 1930* (ACT)
- *Criminal Procedure Act 1986* (NSW)
- *Local Court (Criminal Procedure Act) 1928* (NT)
- *Criminal Procedure Act 1921* (SA)
- *Justices Act 1959* (Tas)
- *Magistrates Court (Criminal and General Division) Act 2019* (Tas) (not in force)[3]
- *Criminal Procedure Act 2009* (Vic)
- *Criminal Procedure Act 2004* (WA)
- *Criminal Procedure Act 2011* (NZ)
- *Magistrates' Courts Act 1980* (UK)
- *Criminal Procedure (Scotland) Act 1995*

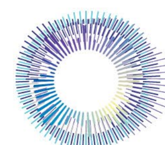
3.9 We have also reviewed and considered many reports from national and international bodies about criminal procedure laws and other relevant matters such as committal proceedings, early resolution, imprisonment and sentencing, alternative ways of dealing with criminal offending, and the role and involvement of victims of crime. These reports were written by a variety of organisations including government departments, law reform commissions, advisory councils, taskforces, parliamentary committees and other similar bodies.

3.10 The focus in this Report is on new contemporary and effective criminal procedure laws for Queensland's Magistrates Courts. We have not used this Report to give detailed explanations of the current law in Queensland, or to explain in detail the approaches taken elsewhere, why options are discounted here, and the conclusions reached in other reports. However, these have all been considered throughout the Review and have informed the decisions that led to my final recommendations in this Report.

Consultation

3.11 One of the most important parts of the approach we took to completing this Review was to engage in detailed and ongoing consultation with the community of stakeholders. This included:

[3] The *Magistrates Court (Criminal and General Division) Act 2019* (Tas) and the *Magistrates Court (Criminal and General Division) (Consequential Amendments) Act 2019* (Tas) were both given Royal Assent on 12 December 2019. The Acts are to commence on a day to be proclaimed and are not currently in force. See further: Magistrates Court of Tasmania, *Annual Report 2021–2022* (November 2022) 15–16.



- early consultation with relevant legal stakeholders to gather information and identify issues with the current law
- publication of a Consultation Paper, consultation video and Easy English paper calling for submissions to the Review, with a total of 88 submissions received
- meetings with a range of stakeholders following release of the Consultation Paper, including visits to regional areas of Queensland
- establishing a Consultation Reference Group, made up of those whose work is closely connected with this Review, to provide 'user testing' feedback of important proposed changes to the law.

3.12 Our consultation process is described in detail in Chapter 4 of this Report.

3.13 In Chapter 5, we have described some of the key themes that we learned about during consultation. These included, for example, that current criminal procedures are complex and difficult to understand, that people want a legal system that is simple and efficient, and that the system needs to be culturally safe and accommodate the different needs of court users.

3.14 Throughout the Report, we have also included more information about what we heard from stakeholders in relation to specific procedural issues.

Guiding principles

3.15 Early in this Review, I decided it would be important for my decision-making to be subject to a range of 'guiding principles'. These principles are based around some of the key themes we heard about during consultation and reflect the objectives of the Review.

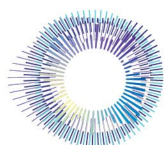
3.16 Broadly, these guiding principles relate to concepts such as simplicity, efficiency, fairness and consistency, and focus on court users and their rights. They also take into account the need to use technology and to divert people away from the courts.

3.17 Throughout the Review, I have used these principles as a way of making clear and consistent decisions that reflect what stakeholders told us, and that are consistent with the objective of creating contemporary and effective criminal procedure laws for the Magistrates Courts

3.18 These guiding principles and their application are explained in detail in Chapter 6, as well as being referred to throughout this Report.

Human rights

3.19 The human rights of people involved in the criminal justice system, particularly as defendants, victims and witnesses, are recognised in international human rights instruments and in Queensland's *Human Rights Act 2019*.



3.20 This Review has a strong focus on human rights. Developing new criminal procedures that are compatible with human rights is one of my guiding principles and is also a requirement under the *Human Rights Act 2019*. Compatibility with human rights is further explored in Chapter 6, and in relation to the specific issues discussed later in the Report. The human rights of each person involved with the Magistrates Courts must continue to be a focus of criminal procedure laws.

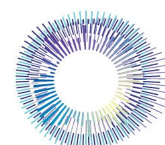
Drafting instructions for new criminal procedure laws

3.21 I have been asked to write a Report that guides the preparation of legislation for contemporary and effective criminal procedure laws in Queensland's Magistrates Courts.

3.22 To achieve this, Appendix C includes drafting instructions for the writing of a new Bill about criminal procedure in the Magistrates Courts, to be called the Criminal Procedure (Magistrates Courts) Bill.

3.23 The drafting instructions give a detailed explanation of what should be included in new laws about Magistrates Courts criminal procedures, based on this Review. In many parts, these instructions recreate existing laws and practices and are not controversial. These changes are limited to simplification by using modern language.

3.24 Because of this, I have not explained or repeated all the drafting instructions in this Report. Rather, the Report focuses on the key changes and relevant issues and makes recommendations about contemporary and effective laws for those matters. Those recommendations are reflected in the drafting instructions.



CHAPTER 4: CONSULTATION DURING THE REVIEW

Introduction

4.1 Consultation has been one of the most important parts of this Review.

4.2 The CPRT and I have consulted with a broad range of relevant stakeholders including the judiciary, court staff, legal practitioners, community legal centres, community groups and people with lived experience of the criminal justice system.

4.3 This chapter explains the consultation process we used throughout the Review. The following chapter explains what we learned from consultation and how we have used information learnt to write this Report.

Early engagement

Stakeholder meetings

4.4 Consultation about the Review began in late 2021.

4.5 Members of the CPRT and I held initial meetings with approximately 30 individual stakeholders. These were primarily legal stakeholders involved with the Magistrates Courts, including the judiciary, registry staff and the courts, prosecuting agencies such as the QPS, Director of Public Prosecution (Commonwealth) (DPP(Cth)) and Director of Public Prosecutions ((Queensland) (DPP (Qld)), defence lawyers (including Legal Aid Queensland (LAQ) and the Aboriginal and Torres Strait Islander Legal Service (ATSILS)), the Bar Association of Queensland (BAQ) and the Queensland Law Society (QLS).

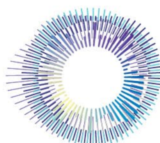
4.6 These meetings were used to explain the scope of the Review, gather information about current approaches and initiatives in the Magistrates Courts and ask stakeholders to identify issues with the current law. I also outlined the intended progress of the Review, as well as the importance of stakeholders and I working together to create a contemporary and effective system that could meet their needs and the needs of other users.

4.7 A list of stakeholders we met with throughout the Review is set out in Appendix B.

ABC Radio

4.8 In April 2022, I was interviewed by Rebecca Levingston on the ABC Radio Brisbane morning program. This interview included a discussion of the Review, what it might achieve and how people could get involved.[1]

[1] 'Review of the Justices Act 1886', *Mornings with Rebecca Levingston,* ABC Radio Brisbane, 6 April 2022. A recording is available at 'Resources and media' *Criminal Procedure Review – Magistrates Courts* (Web Page, 14 March 2023) <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/resources-and-media>.



Consultation publications

4.9 During the Review, several documents were published for consultation purposes.

Consultation Paper

4.10 A Consultation Paper about the Review was released in April 2022.[2]

4.11 The Consultation Paper was written in plain English so that it could be read and understood by anyone interested in the Review, including those with limited or no knowledge of criminal procedure laws in Queensland's Magistrates Courts.

4.12 The Consultation Paper outlined some of the key issues relevant to creating new contemporary and effective criminal procedure laws for the Magistrates Courts (which are also dealt with later in this Report), but it was not a comprehensive discussion of all relevant issues.

4.13 The Consultation Paper asked 51 questions about criminal procedure laws and ways to make improvements. It also asked about whether a single Magistrates Court of Queensland should be established, and whether magistrates and Magistrates Courts should be renamed as Local Court judges and Local Courts.

4.14 After the release of the Consultation Paper, we wrote to more than 170 organisations and individuals inviting submissions to the Review. They included members of the judiciary and legal profession, the QLS and the BAQ, community legal centres, victim support services, academics, state and Commonwealth prosecution agencies and government departments.

4.15 The Attorney-General issued a ministerial media statement to publicise the release of the Consultation Paper and the opportunity to make a submission in May 2022.[3]

4.16 Advertisements calling for submissions to the Review were published in *The Courier Mail*[4] and in 11 regional newspapers.[5] Notices calling for submissions were also placed on the Review's webpage, the Queensland Government 'Get Involved' website and the Department of Justice and Attorney-General's Facebook and LinkedIn pages.

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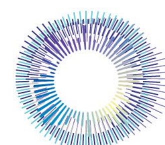
[2] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) available at Criminal Procedure Review – Magistrates Courts, *Consultation* (Web Page, 14 March 2023) <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/consultation>.

[3] Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, 'Queenslanders have chance to be heard in ground-breaking justice review' (Media Statement, 5 May 2022) <https://statements.qld.gov.au/statements/95103>.

[4] The advertisement was published on Saturday, 14 May 2022.

[5] The advertisement was published in the *Toowoomba Chronicle*, *Gold Coast Bulletin*, *Townsville Bulletin* and *Cairns Post* on 19 May 2022, in *CQ Today* (Rockhampton) on 21 May 2022, in the *Cape York Weekly* on 24 May 2022, in the *North West Star* (online) and *Gladstone Today* on 26 May 2022, and in *Bundaberg Today*, *Gympie Today* and *The Longreach Leader* on 27 May 2022.



4.17 Submissions in response to the Consultation Paper closed on 30 June 2022. However, we also advertised that if a person did not want to respond to the Consultation Paper or wanted to tell us about any other issues, we would accept general submissions about the Review. General submissions closed on 31 August 2022.

Consultation video

4.18 In June 2022, I released a consultation video about the Review.

4.19 The video was published on the Review's webpage[6] and on the Department of Justice and Attorney-General YouTube channel. Information about the video was also sent to those stakeholders who were previously contacted about the Review.

4.20 This video gave a general summary of the Review and explained some of the issues raised in the Consultation Paper. It was designed to broaden access to the Review.

4.21 The video also invited interested people to make a submission to the Consultation Paper or the Review by 31 August 2022.

Easy English paper

4.22 An Easy English paper about the Review was released in August 2022.[7]

4.23 The Easy English paper uses a combination of words and images to give people access to information about the Review in a simple way. This paper was also published to broaden access to the Review. It is useful for people with low English literacy, including people with disability, people from a culturally and linguistically diverse background and elderly people.

4.24 The Easy English paper was also published on the Review's webpage and sent to stakeholders who were previously contacted about the Review. We understand some stakeholders further shared the Easy English paper to targeted groups.

4.25 We also sent copies of the paper to each correctional centre in Queensland, to broaden access to the Review for people with lived experience of Magistrates Courts procedures. The papers were accompanied by postage paid self-addressed envelopes so that prisoners could make written submissions to the Review.

4.26 Because prisoners did not have access to information about the Review until August 2022, the due date for their submissions was extended to 30 September 2022.

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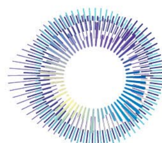
[6] Criminal Procedure Review – Magistrates Courts, *Resources and media* (Web Page, 14 March 2022) <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/resources-and-media>.

[7] Criminal Procedure Review – Magistrates Courts, *Consultation* (Web Page, 14 March 2022) <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/consultation>.



Submissions

4.27 Anyone was welcome to make a submission to the Review. We accepted submissions made in writing and sent via post or email, as well as submissions in the form of audio or video files (which could be emailed or sent to us on a USB).

4.28 We received a total of 88 submissions. Some submissions were specifically in response to the Consultation Paper and others were general submissions about issues related to the Review.

4.29 Submissions were made by a wide range of respondents. Many of the stakeholders who we met with initially, as well as those we wrote to about the Review, made submissions. In addition, we received submissions from advocacy groups, community legal centres, First Nations Elders groups, and people with lived experience of the system as a victim or defendant. We received 22 submissions from prisoners.

4.30 A selection of the submissions we received from organisations, public bodies and government departments is published on the Review's webpage.[8] A list of submissions to the Review is set out in Appendix B.

Consultation meetings throughout Queensland

4.31 Between June and August 2022, the CPRT and I met with many stakeholders about the Review. In total, approximately 40 focussed discussion meetings were held.

Court visits

4.32 The CPRT and I visited court locations in Brisbane, Southport, Beenleigh, Mount Isa, Cairns and Rockhampton. We had also intended to travel to Townsville and Thursday Island, but COVID-19 restrictions meant we had to consult remotely in those places.

4.33 At each location, we met in person with local magistrates, court registry staff, lawyers from the Queensland Police Prosecutions Service (PPS), LAQ and ATSILS. In some locations we also met with other stakeholders, such as community corrections staff or the local dispute resolution centre. We also observed court proceedings and learnt about court registry practices.

4.34 These meetings gave us valuable insight into how Magistrates Courts' criminal procedures operate in regional and remote areas, and how they can be improved in ways that will benefit those stakeholders.

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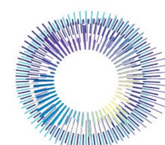
[8] Criminal Procedure Review – Magistrates Courts, *Responses* (Web Page, 16 September 2022) <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/responses>.



4.35 In several places, we met with First Nations groups that work with the Magistrates Courts. We have met with the Magistrates Courts' Cultural Advisory Group, made up of First Nations peoples from around the state. This group are essential partners on the Magistrates Courts' reconciliation journey and ensure court initiatives are culturally appropriate.

4.36 We also met with Community Justice Groups in Mount Isa, Cairns, Rockhampton, Townsville and Thursday Island. These groups have an important role in building the courts' cultural capacity and helping First Nations peoples involved in the Murri Courts and mainstream Magistrates Courts system. They gave us valuable insight and advice about what could be improved so that First Nations peoples can better participate in the Magistrates Courts system.

Stakeholder meetings

4.37 We have also met with a variety of other stakeholders that are involved in the criminal justice system or have a role in the Magistrates Courts, and stakeholders supporting people who have lived experience.

4.38 We met with community legal centres that assist people who are defendants in the Magistrates Courts including LawRight, Caxton Legal Centre and Queensland Advocacy for Inclusion. The Caxton Legal Centre also arranged for us to meet several of their clients with lived experience as a defendant in the Magistrates Courts, which gave us valuable insights into how the system affects its users.

4.39 We also held a roundtable with services that support victims through the criminal justice system. These included Victims Assist Queensland, the Centre Against Sexual Violence and legal and support services representing women, people experiencing domestic violence and people who are elderly or have a mental illness or disability.

4.40 We met with other groups that represent the rights and interests of vulnerable people, such as Sisters Inside and Multicultural Australia. We also met with Elders and Respected persons at the Cooee Indigenous Family and Community Education Centre to discuss their written submission to the Review.

4.41 A list of stakeholders we met with throughout the Review is set out in Appendix B.

Correctional centres

4.42 In July 2022, members of the CPRT visited a correctional centre. We met with Queensland Corrective Services staff to discuss ways that current procedures could be improved for prisoners and staff. We also met with prisoners (including First Nations men) to hear about their lived experience with the Magistrates Courts and their views on what should change.

4.43 Unfortunately, planned visits to other correctional centres were cancelled due to COVID-19. However, with assistance from Queensland Corrective Services, copies of the Easy English paper were distributed in all correctional centres to enable important participation from persons generally outside traditional consultation methods.

How we have used this information

4.44 The consultation undertaken during this Review has shaped our understanding of criminal procedure in the Magistrates Courts, including the difficulties and practicalities faced by users of the system as defendants, victims, witnesses and professionals. It has enriched our understanding of the current issues and the options available for reforming criminal procedure laws in ways that will be helpful and meaningful for users of the Magistrates Courts.

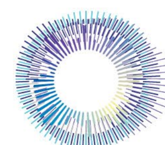
4.45 As part of completing this Review, all the information we received during consultation has been carefully reviewed and analysed. That analysis has informed the identification of relevant issues, the consideration of viable options for reform, and the development of the proposals and recommendations provided to the Consultation Reference Group (see below) and set out in this Report.

4.46 Throughout this Report, we have summarised the key consultation themes and what stakeholders told us about specific topics. These summaries draw on what we learned during consultation, at stakeholder meetings and from written submissions. However, they are only summaries and do not necessarily refer to everything we heard or to all the submissions we received about a particular topic.

The Consultation Reference Group

4.47 I also established a Consultation Reference Group (CRG). This is a small group of people representing organisations or departments whose work is most closely connected with criminal procedure in the Magistrates Courts. Its members include:

- the Chief Magistrate, and representatives from Court Services Queensland
- prosecuting bodies such as the DPP (Qld), DPP (Cth), Brisbane City Council, QPS and Workplace Health and Safety Prosecutions
- legal representatives such as LAQ and ATSILS, as well as more generally the QLS, the BAQ and the Indigenous Lawyers Association of Queensland
- Victims Assist Queensland
- Government departments such as Queensland Corrective Services and the Department of Transport and Main Roads.



4.48 A full list of members is included in Appendix B.

4.49 The CRG met on six occasions between August 2022 and February 2023. These meetings took place after most other consultation was complete. Their purpose was to review proposals I developed for changing and modernising key parts of the criminal procedure laws.

4.50 The topics addressed in proposals given to the CRG included:

- Guiding principles, both for internal use throughout the Review and for inclusion in new criminal procedure legislation
- Use of technology in the Magistrates Courts
- Starting proceedings
- Disclosure, case conferencing and case management
- Procedures for hearings, pleas and matters heard in a party's absence
- Options for in-court diversion in the Magistrates Courts
- Committal proceedings
- Costs
- A list of sections from the Justices Act not being recreated in the new criminal procedure legislation.

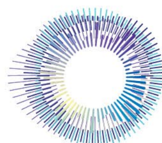
4.51 The CRG being technical legal operators provided a form of 'user-testing' of the workability of my proposals and offered feedback about how those proposals would (or would not) work in practice based on their experience and their organisation's point of view.

4.52 CRG members were given a written proposal about each topic. Generally, the proposal included relevant background information about the current law and reasons for change, consultation feedback and an explanation of the proposed new model for the new criminal procedure laws.

4.53 The material for each CRG meeting was sent one week prior to the meeting. CRG members were invited to attend each meeting to discuss the proposal and provide their feedback. Alternatively, or in addition, CRG members were invited to provide written feedback about the proposals. CRG members were given two weeks from the date of the material being sent to provide written feedback about each proposal.[9]

4.54 The feedback provided by the CRG was invaluable. For each topic, all feedback was carefully considered against the initial proposal and that proposal was revised to form the final recommendations for each topic in my Report.

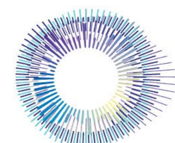
[9] On several occasions, CRG members were granted an extension of time within which to provide written feedback.



4.55 In some parts, the CRG's feedback reinforced the current issues faced by court users and confirmed that the proposed changes would assist in resolving those issues. In other parts, the CRG's feedback identified practical and legal issues that required careful consideration before a topic could be finalised.

Thank you

4.56 The CPRT and I want to extend our sincere thanks to everyone who has participated in this Review. The information you have given us, and the support you have offered to us as we complete this complex task, has been invaluable.



CHAPTER 5: WHAT CONSULTATION TOLD US

Introduction

5.1 Wide-ranging consultation has been an essential part of the Review. We have heard about current criminal procedure laws in the Magistrates Courts and what needs improving from various court user groups, including people with lived experience, and professionals appearing in court or supporting people coming to court. This has allowed us to better understand issues, identify workable solutions and make productive recommendations for positive new laws.

5.2 Consultation raised many important themes to consider in reshaping criminal procedure laws. It has greatly assisted us to know what the community and legal sector think needs exploring. It has given us a clear map of what any new procedure laws need.

5.3 This chapter focuses on the key themes from consultation. These ideas have influenced the development of the internal decision-making principles detailed in Chapter 6 and are reflected in the substance of the Review's recommendations. Consultation feedback on specific topics we asked about in the Consultation Paper is outlined further in the chapters of this Report.

5.4 This chapter is not a summary of everything we have been told in the consultation process. However, all the information we have been given through submissions, focussed discussions, meetings, and from our research and reading has helped us to work out what procedural reforms are needed to achieve our objectives.

About Magistrates Courts users

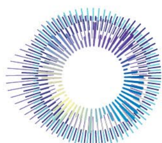
Prosecution agencies

5.5 There are a range of prosecution agencies using the Queensland Magistrates Courts.[1] Any new criminal procedure laws need to meet a mix of prosecutorial needs.

5.6 Our stakeholder analysis found there are over 90 prosecution agencies made up from all levels of government and public authorities, each with specific prosecutorial roles and functions. Many of these prosecution agencies made submissions to us about issues and suggestions for improvements.

5.7 The variety of prosecution agencies is different to the position in the higher courts, where the Queensland Office of the Director of Public Prosecutions (ODPP) and the

[1] Private prosecutions by individuals in a private capacity can also occur: See Chapter 13.



Commonwealth Office of the Director of Public Prosecutions (CDPP) are generally the main agencies prosecuting people charged on indictment with criminal offences.[2]

5.8 In the Magistrates Courts, investigating (arresting) officers in the Queensland Police Service (QPS) start most criminal proceedings either by arrest and charge, or by issuing a notice to appear. The Police Prosecution Service (PPS) is the prosecution agency for these matters.[3] The PPS conducts proceedings from first court appearance to the ending of most summary criminal and traffic prosecutions, including summary hearings. Except in three Magistrates Court locations, the PPS also does all committal proceedings in Queensland.

5.9 The ODPP has a limited prosecution role in the Magistrates Courts. It only does committal proceedings (prepares and appears on committal matters) in Brisbane and Ipswich Magistrates Courts, and at Southport Magistrates Court if the charges relate to sexual offending.[4] In these locations, the ODPP conducts sentencing proceedings if a committal resolves into a plea of guilty and can be finalised summarily.

5.10 The Prosecution Guidelines[5] developed by the ODPP also apply to QPS. These guidelines make clear the important idea that ‘the community’s interest is that the guilty be brought to justice and that the innocent not be wrongly convicted’.[6]

5.11 The Prosecution Guidelines clearly state: ‘the duty of a prosecutor is to act fairly and impartially, to assist the court to arrive at the truth’.[7] This is a responsibility to ensure the prosecution case is presented properly and with fairness to the accused. A ‘fundamental obligation’ of the prosecution is to ‘assist in the timely and efficient administration of justice’ (for example, cases should be prepared as quickly as possible).[8]

5.12 The guidelines require a prosecutor to make an independent assessment about the decision to prosecute based on two tests: 1) Is there sufficient evidence? A prosecution

[2] *Director of Public Prosecutions Act 1984* (Qld) s 10 (on behalf of the State); *Director of Public Prosecutions Act 1983* (Cth) s 6 (on behalf of the Commonwealth).

[3] Within the QPS, Prosecution Services provide prosecutorial functions and legal support. Police Prosecution Corps (PPC) are each units within Prosecution Services: Queensland Police Service, *Legal Division* (Web Page, 14 October 2021) <https://www.police.qld.gov.au/organisational-structure/strategy-and-corporate-services/legal-division>.

[4] The former Criminal Justice Commission favourably evaluated the ‘Brisbane Central Committals Project’ in 1996 and there has not been any further evaluation: Martin Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 204, App 2 p 11.

[5] Department of Justice and Attorney General (Queensland), *Director’s Guidelines* (as at 30 June 2016) <https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf>. These guidelines were accessed 14 April 2023 and are currently under review at the time of writing.

[6] Ibid 1.

[7] Ibid.

[8] Ibid 2.

should not proceed if there is no reasonable prospect of conviction; and 2) Does the public interest require a prosecution?[9]

5.13 The CDPP is a national body that prosecutes offences against the Commonwealth law in all Australian jurisdictions. Under the *Judiciary Act 1903*, offences are dealt with in state courts applying local criminal procedure laws.[10] Like all other non-QPS agencies it uses a complaint and summons method to start proceedings. Some Commonwealth cases may be separately started by an investigating officer (for example, the Australian Federal Police) by arrest and charge in certain circumstances.

5.14 The CDPP also uses a prosecution policy based on principles of fairness, openness, consistency, accountability, and efficiency which it applies in deciding whether to prosecute Commonwealth offences.[11]

5.15 There are other national specialist prosecuting agencies, such as the Australian Health Practitioner Regulation Agency (AHPRA) and the Australian Securities and Investment Commission (ASIC). We learned that many national prosecution agencies have staff employed in offices throughout Australia, not just working in the place they are starting proceedings. This means that certain procedural requirements like needing to attend before a Queensland justice of the peace where the complainant is interstate, or in person filing can cause added cost and inconvenience.

5.16 Some agencies like AHPRA are also self-funded through payment of practitioner registration fees. AHPRA told us that 'any amendments which reduce the time spent on administrative steps and unnecessary physical attendance at court reduces the direct financial cost of the prosecution for AHPRA and defendants (and ultimately health practitioners) and frees up resources for substantive matters'.

5.17 Agencies with a national practice also gave useful feedback about which procedures in other Australian jurisdictions were preferred as being easier to use from this nationwide operating perspective.

5.18 Queensland Corrective Services' (QCS) officers based in its Community Corrections division provide court advice and prosecute breaches of community-based sentencing orders. These officers also prepare the required Justices Act court documents to start proceedings in the Magistrates Courts. This work is in addition to managing existing caseloads and is undertaken by professional staff, although they are non-legally qualified.

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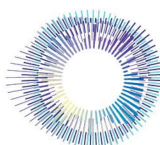
[9] Ibid 2–5.

[10] *Judiciary Act 1903* (Cth) s 68(1).

[11] Commonwealth Director of Public Prosecutions, *Prosecution policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (19 July 2021) <https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>, 2.



5.19 In addition, QCS has a unique broader role involving several other interaction points with the Magistrates Courts' criminal jurisdiction, including: the receipt and interpretation of court remand and sentencing documents; the custody of adult defendants; and ensuring adult defendants on remand attend at court as required (in person or through video-link technology).

5.20 Consultation feedback reinforced the critical role prosecuting agencies play in ensuring criminal procedures work in practice, especially in terms of fairness. More information on this role is in Chapter 14, which is about case management, disclosure and case conferencing.

Defendants

5.21 There are a range of defendants coming to court on a broad mix of charge types and seriousness. This is expected given the wide scope of criminal proceedings dealt with by the Magistrates Courts.

5.22 Consultation feedback emphasised the diversity of defendants, and the reality that the bulk of people who come before the Magistrates Courts have complex health and welfare needs, often having experienced considerable social and economic disadvantage.

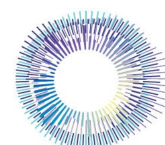
5.23 We were told many individuals coming to court are increasingly likely to be affected by several overlapping vulnerabilities and disadvantages.

> *Many of our clients are from culturally or linguistically diverse backgrounds, Aboriginal or Torres Strait Islander individuals, experiencing homelessness, experiencing addiction, financially disadvantaged, experiencing domestic and family violence, or have a physical or mental disability. It is apparent that individuals who experience one of these factors are likely to experience an intersection of a number of these factors, and they are more likely to be exposed to the criminal justice system.*
>
> — Caxton Legal Centre

5.24 In addition to reviewing existing research and inquiries, consultation reinforced to us that in the criminal justice system:

- First Nations peoples continue to experience unacceptable levels of over-representation. The incarceration rates of First Nations peoples are amongst the highest rates of any group in the world.[12] Many people told us this is a consequence of greater contact with risk factors that lead to offending and is

[12] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) xlii.



deeply-rooted in historical economic and social disadvantage and institutional bias based in colonisation.

- People with disability are significantly over-represented and experience significant disadvantage throughout the criminal justice system. Also, people with disability are diverse with different types and levels of disability requiring differing responses.
- People with cognitive disability are significantly over-represented among the group of people charged with criminal offences.
- First Nations peoples with disability face particular disadvantages in the criminal justice system and are substantially over-represented – often experiencing multiple types of discrimination due to a combination of race and disability, with stakeholders referring to information suggesting this group are about 14 times more likely to be imprisoned than the general population.[13]

5.25 The recent Women's Safety and Justice Taskforce detailed the experiences of women as offenders in the criminal justice system. It reported that between 2011-12 and 2020-21 the number of recorded female offenders in Queensland increased by 30.7%, and that First Nations women are significantly over-represented in the female offender population. Nearly one third of females sentenced in Queensland between 2005–06 and 2018–19 identified as Aboriginal and Torres Strait Islander peoples (31.1%).[14] Almost all female offenders are sentenced in the Magistrates Courts.[15]

5.26 Consultation emphasised the need to recognise the broad diversity of defendants, including the LGBTQIA+ community, neurodiverse people, those from culturally and linguistically diverse (CALD) backgrounds and people living in regional, rural and remote Queensland.

Unrepresented defendants

5.27 In many instances defendants in Magistrates Courts represent themselves or use the temporary assistance of a duty lawyer[16] available on the day. There are limits on the services a duty lawyer can provide. A duty lawyer can generally only adjourn a matter or appear on a bail application or straightforward sentencing proceedings (on a 'plea of

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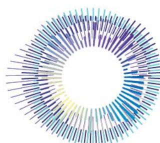
[13] See generally, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (October 2020); First Peoples Disability Network Australia, *Promoting Inclusion Issues Paper: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*.

[14] Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report No 2, July 2022) vol 2, 405. (Aboriginal and Torres Strait Islander women and girls make up four per cent of the Queensland female population aged 10 and above.)

[15] Queensland Sentencing Advisory Council, *Engendering justice – The sentencing of women and girls in Queensland* (August 2022) 17.

[16] A duty lawyer is a free lawyer available at most Magistrates Courts in Queensland, who may be able to help with certain court events: Legal Aid Queensland, *Criminal law duty lawyer* (Web Page, 13 April 2023) <https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Criminal-law-duty-lawyer>.



guilty’). A duty lawyer cannot act in traffic offences, committal proceedings, summary hearings or complex pleas of guilty.[17]

5.28 It is common for defendants to be dealt with in the Magistrates Courts without any legal representation. This is different to the higher courts where most defendants are legally represented.

5.29 We tried to find out exactly how many unrepresented defendants appear in the Magistrates Court, but that information is not available. The Police Prosecution Services Sustainability report by Mr Brendan Butler AM KC (the Butler Report) stated:

> [I]n 2018-19, 34.8 per cent of defendants were self-represented at their finalising event. Legal aid is not usually available for traffic offences which in 2018-19 made up almost a quarter of all defendants finalised by the Magistrates Court. Of these defendants 67.59 per cent were self-represented.[18]

5.30 We were told there is a perception by many in the sector that legally unrepresented defendants are an increasing trend. We also do not know the personal characteristics of unrepresented defendants. We assume they must also reflect the disadvantage and marginalisation profile of the broader defendant group.

5.31 Defendants can be legally unrepresented for a variety of reasons including choice, convenience, and circumstance. However, we were frequently told being unrepresented likely relates to the limited availability of legal aid funding in Magistrates Courts matters. Funding for these matters depends on eligibility criteria, including the likelihood of imprisonment (the ‘merit test’).[19]

5.32 We heard how complex and stressful the system can be for unrepresented defendants. For those with vulnerabilities, navigating the system can be especially difficult.

5.33 This is the case even though the Magistrates Courts are recognised as being less procedurally formal than criminal proceedings in the higher courts.[20] Despite this, we were told not to minimise engaging in a strange setting where shorthand legal jargon is still used, unspoken court protocols are followed, and there is a maze of important and invisible decisions to be made about procedural options. This can appear impenetrable and mysterious to people not familiar with coming to court, especially first-time defendants. We were asked to remember that coming to court is a significant event.

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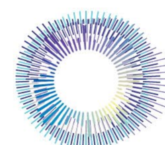
[17] Ibid.

[18] B Butler, *Police Prosecution Services Sustainability Review – Final Report* (December 2019) 37.

[19] Legal Aid Queensland, *Grants Policy Manual: Guidelines – State – Criminal* (Web Page, 14 December 2015) <https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/Guidelines-State-%E2%80%93-Criminal>.

[20] The higher courts have a range of observed solemn rituals, requiring certain forms of words.



> *Current procedure varies in practice from Court to Court, and can be opaque, particularly to those appearing before a court without legal representation…. Clients with no experience of the justice system or who are navigating the system without a lawyer find the experience overwhelming and intimidating.*
> — Caxton Legal Centre

5.34 We were told not having the professional skills, assistance and objectivity of a lawyer can be a disadvantage to an unrepresented defendant by preventing them from adequately protecting their interests. For example, they may not know relevant matters to raise in court, may be unaware of some procedural options such as matters being dealt with in their absence or the possibility of diversion, and may not have the knowledge to decide whether it is in their best interests to plead guilty or not.

5.35 We heard a significant challenge for unrepresented defendants is participating in case conferencing, particularly with PPS. Case conferencing is a process intended to assist the early resolution of court matters. It works to narrow the contested issues, help identify appropriate pleas of guilty, and avoid unnecessary delays.

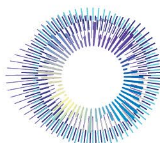
5.36 We were told being unrepresented can have procedural impacts on the business of the court, with outcomes such as multiple adjournments or unnecessarily listing matters as summary hearings leading to overall delay. However, this can also occur with legally represented defendants.

5.37 We also heard hearings involving unrepresented defendants may take longer as magistrates have a range of obligations to explain procedures and rights to ensure unrepresented defendants receive a fair trial. Overall, a lack of legal representation may contribute substantially to court delay.

Victims

5.38 Victims of crime do not have a singular profile. Again, this is related to the broad scope of matters dealt with in the Magistrates Courts, and consultation reinforced the need to consider all victims – older persons, women, Aboriginal or Torres Strait Islander persons, persons from culturally and linguistically diverse backgrounds and victims with disability.

5.39 Consultation focused on exploring how criminal procedure in the Magistrates Courts could be improved for victims' needs. Consistently, we were told in this context victims' interests would be best served by ensuring criminal procedure was clearer, simpler, and quicker. The ability of the courts to manage expectations for victims by giving better procedural information and support would reduce uncertainty and feelings of



powerlessness. Prioritising the early resolution of court matters significantly contributes to overall wellbeing of victims.

I am a victim of crime… my issue is that the matter was allowed to languish in the Magistrates Court.
— Submission to the Review

5.40 In summary, stakeholders requested that procedures not re-traumatise victims and focus on practical improvements, including reduction of undue delay and better explanations about process.

5.41 Some stakeholders recognised requiring additional victim processes such as increased consultation obligations could negatively affect the therapeutic benefits offered by finalising matters promptly.

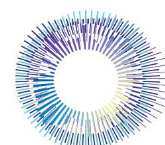
5.42 Some cautiously supported additional consideration of victims' interests in procedure although not if it impacted the defendant's rights to a fair trial — which was considered a higher priority. On the other hand, others advocated that victims' rights in criminal proceedings should be specifically recognised in the *Human Rights Act 2019* as part of the right to a fair trial. While this is outside the scope of this Review, the recent work of the Women's Safety and Justice Taskforce examining the experience of women as victims of sexual violence recommended the first required statutory review of the *Human Rights Act 2019* give consideration to the formal protection of victim's rights. The Queensland Government accepted this recommendation.[21]

5.43 Most stakeholders suggested the best way of empowering victims and providing for engagement in summary proceedings is by the appropriate use of diversionary processes. Adult Restorative Justice Conferencing was particularly identified as providing a stronger pathway for victim participation than traditional court processes.

About current Magistrates Courts criminal procedure

5.44 The main consultation feedback we heard from everyone we spoke to is that most defendants do not understand what is going on in court or what is happening to them.

[21] Women's Safety and Justice Taskforce (n 14), vol 2, Rec 20; *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report two: Women and girls' experiences across the criminal justice system* (November 2022) 13 (referring to Recommendations 18–20).



> *For those that do proceed through the Magistrates Court, the process needs to be made easier to navigate and understand. The women we support frequently have no idea what is going on in their matters and find it impossible to participate in matters that so profoundly affect their lives.*
> — Sisters Inside Inc.

5.45 To clarify, when we speak about defendants not understanding court processes or procedures, we are not referring to a lack of understanding from, for example, a psychiatric or intellectual disability that raises questions of capacity and establishes considerations such as unfitness for trial under the *Mental Health Act 2016.*[22]

5.46 When we speak about defendants not understanding, we mean not comprehending what is going on in the court room in a way that impacts their ability to follow and fully participate in their court proceedings. This undermines a key justice objective of accessibility.

5.47 Being able to broadly understand and be involved throughout criminal proceedings is known as 'effective participation'. It is directly linked to the right to a fair trial recognised at common law and in sections 31 and 32 of the *Human Rights Act 2019*.

5.48 The criminal justice system is based on the principle that defendants understand what they are charged with and what the evidence is, so they can make informed decisions and give instructions about what to do, or how to present their own case (if unrepresented).

> *A system which is effectively meaningless to its participants undermines the system generally.*
> — Youth Advocacy Centre

5.49 We have been told that effective participation can be enhanced by removing barriers within the system that block understanding — examples might include reducing complicated language and making court processes clear and simple for everyone.

5.50 We also heard Magistrates Court criminal procedure varies between court locations, and sometimes even between magistrates at the same location. This contributes to the confusion experienced by defendants, especially unrepresented defendants. It also has

[22] For example, under the *Mental Health Act 2016* (Qld) ch 6 pt 2, a Magistrates Court can dismiss certain complaints if satisfied the defendant is of unsound mind or unfit for trial. See also *Criminal Code 1899 (Qld)* ss 613, 645.

implications for service delivery and training by state-wide agencies, including defence organisations and court registry officers. We frequently heard about the need to have laws that promote and achieve consistent Magistrates Courts criminal practice.

A first timer is totally bewildered as to what is actually going on at a magistrates hearing and has no legal advice as to events or understanding of it.

— Prisoner

5.51 We were told the procedural options and outcomes were not always clear to people coming to court on criminal charges. We were told people did not know they could plead guilty without physically appearing in court, or that charges could be dealt with in their absence. We were often told procedures were not user-friendly. We heard this lack of understanding creates unnecessary court events and contributes to delays.

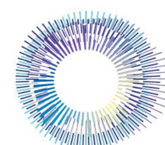
5.52 We heard that as most defendants eventually plead guilty, improving understanding of process options from the beginning, and making things clearer could increase the courts' efficiency. Better awareness could allow matters to resolve at the earliest point available.

5.53 We heard many times about the misunderstanding that a committal hearing is the complete end of a court matter, when in fact it is only the end of a matter in the Magistrates Courts. We were told how 'as a victim you almost need a law degree to understand the system yourself'.

5.54 It was sometimes unclear to defendants why they needed to come to court for a matter to be adjourned without any other action. Many thought these processes were time-consuming and unnecessary for everyone concerned. We were told a better way would be to create a purposeful framework with simple, clear and definite processes that set out expectations and signal what is going to occur, with clear procedural landmarks.

5.55 We know court time is valuable especially given the network of people involved in the court room process: magistrates, court services' officers, registry staff, duty lawyers, police prosecutors, witnesses, victims, privately and publicly funded lawyers, support agencies, defendants, and custodial officers. However, it was common to hear that, due to a range of systemic factors, it is easier for legal professionals to come to court and have the magistrate deal with matters in person than it is to deal with them administratively (such as registry committals or using online requests for consent adjournments).

5.56 We know this is the opposite approach to the civil jurisdiction. We presume it is related to resourcing and habitual criminal legal practices, such as preparing matters close to the set court date, obtaining instructions at court, late sharing of disclosable information, or a



looming court date assisting with the focused decision-making about what to do with charges.

5.57 We were told of the need to reduce unnecessary court attendances that do little to progress or resolve matters, and only contribute to confusion. We also heard that for many defendants, attending court when it is not needed or without any substantial outcome compounds disadvantage that is often invisible to the court. For example, for some, the prohibitive costs of travelling to court and the impact on employment or carer responsibilities is a significant strain which can lead to failing to appear in court, and then future difficulties obtaining bail causing further and prolonged contact with the criminal justice system. Again, the most common summary offence heard in the Magistrates Courts is a fail to appear under the *Bail Act 1980*.

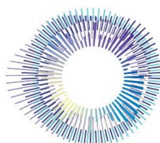
5.58 We heard from some that the Magistrates Courts heavy daily workload of bulk listings creates an impersonal 'factory' impression with an overall focus on administrative efficiency, and not on individuals. We were told this approach does not allow a magistrate to fully comprehend defendants' circumstances and contributes to court users' confusion. In some court locations, long pleas of guilty are matters considered by the parties to take more than 10 minutes and are adjourned to be heard on another day. Caxton Legal Centre provided an example of how difficult it was for a client.

Case study: Trevor

Trevor, a deaf client, attended a regional court four times before the first actual 'mention' was able to proceed. The matter kept being adjourned with Trevor sitting in the courtroom for hours with little comprehension and growing frustration. It was not until he attended Caxton and could make his requirement for an interpreter understood that we were able to call the court and ensure an interpreter was booked for the next mention.

5.59 We were frequently told of the need to make the court process quicker by removing unproductive court events. We heard that being able to resolve matters quickly promotes the interests of justice. Summary justice systems have largely developed around this key objective. However, some matters fail to progress and experience excessive delay with additional court attendances required. We were told some delays are due to outside factors, such as waiting times on forensic reports.

5.60 Delay greatly affects a person who is being remanded in custody until the court proceedings are finalised. Delay and repeated court attendances disrupts employment and family connections. Stakeholders emphasised how this is compounded if a person is



on remand. This has broader system impacts, with the costs of extra detention and community safety funding.

5.61 Several submissions from prisoners commented on delays in the Magistrates Courts system ‘where continual mentions are the norm’, and ‘where the magistrate should be allowed more control over the whole process’. A prisoner told us, ‘the time spent awaiting a hand-up is incredibly long, often taking between a year or more to see a higher court’. A person’s remand time spent waiting for a brief of evidence could sometimes be more than the time they would serve if convicted of the charge.

5.62 A prisoner described their experience:

> *[T]he matter stayed in the Magistrates Court for over one year, adjournment after adjournment every time the magistrate ordered the police prosecutor to get all the evidence to me and my legal team, every time we went back to court, we had to ask for more as they would only hand over one bit and a lot of court time and money was wasted in the process…*
>
> — Prisoner

5.63 We heard the potentially fast and focused resolution offered by Magistrates Courts proceedings is a key asset in giving positive system outcomes, especially to victims, defendants, investigators, and the broader community by reducing costs, disruption, stress and waiting times. We were told it is important that we do not stop the fast resolution of matters by adding extra procedural steps.

5.64 We were told more needs to be done by all parties, including the court, to ensure matters are dealt with efficiently, and to create certainty and consistency. Many people told us these objectives need to be balanced with flexibility to deal with individual circumstances and the overriding principle of fairness. In simple terms, speed of process cannot be at the expense of a fair process. As Mr Moynihan stated in his report: [23]

> *In procedural terms the single most important contribution courts can make to the criminal justice system is to minimise what I have referred to as justified delay and to eliminate unjustified delay.*

5.65 We were struck by the fact that consultation feedback about ways court procedure could reduce delays revisited many of the solutions identified in the Moynihan Report, written

[23] Martin Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 35.

almost 15 years ago. In particular, the report identified the need for mechanisms to prioritise early resolution of matters and said that 'court occasions should be focused on delivering an outcome of moving the case actively towards finalisation, rather than mentions which have no other reason than setting another court date which has no outcome'.[24]

About the Justices Act

5.66 We heard the Justices Act is no longer a proper basis for operating a modern court. Its overhaul and modernisation are long overdue and strongly supported by all stakeholders. Many of its provisions are archaic and difficult to understand. For example, below are some basic provisions about who can constitute a Magistrates Court.[25]

Division 4 Hearing and quorum

27 Hearing of complaint

(1) Subject to the provisions of any other Act, every complaint shall be heard and determined by a Magistrates Court constituted by 2 or more justices.

(2) If any Act authorises a matter of complaint to be heard and determined by—

(a) a Magistrates Court constituted by 1 justice; or

(b) 1 justice;

that matter of complaint may be heard and determined by a Magistrates Court constituted by 1 justice.

28 Majority to decide

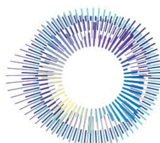
(1) When 2 or more justices are present and acting at the hearing of any matter and do not agree, the decision of the majority shall be the decision of the justices, and if they are equally divided in opinion, the case shall be reheard at a time to be appointed by the justices.

(2) Despite subsection (1), on a complaint for an indictable offence, any 2 or more of the justices may commit the defendant for trial even though a majority of the justices are of the opinion that the defendant should be discharged.

(3) If the defendant is committed under subsection (2), a memorandum of the dissent of the majority of the justices is to be made on, or attached to, the depositions

[24] Ibid 35–6.

[25] These have been the subject of judicial interpretation: *Tierney v Commissioner of Police* (No 2) [2020] QDC 33.



29 When 2 justices required, must be present throughout the case

Where a complaint must be heard and determined, or a conviction or order must be made, by 2 or more justices, the justices making the decision must be present and act together during the whole of the hearing and determination.

Division 5 Magistrates

30 Magistrates

(1) A magistrate constituting a Magistrates Court shall have power to do alone whatever might be done by 2 or more justices constituting a Magistrates Court, and shall have power to do alone any act which by any Act may or shall be done by 2 or more justices.

(2) Unless otherwise expressly provided, when a magistrate is present at a place appointed for holding Magistrates Courts and is available to constitute any such court to be held at that place the court shall be constituted by the magistrate alone.

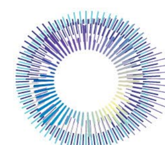
(3) Nothing in subsection (2) shall be construed to abridge or prejudice the ministerial power of justices in taking an examination of witnesses in relation to an indictable offence, or the powers of justices to receive a complaint or to issue, grant or endorse a summons or warrant, to grant bail or to adjourn a hearing of a complaint of a simple offence or breach of duty.

5.67 Stakeholders suggested the Justices Act blocks the efficient performance of the Magistrates Courts. Its old-fashioned style restricts improvement opportunities, for example with its requirements for sworn and hardcopy documents lodged in person.

5.68 We were told the Justices Act actively prevents understanding of court procedures and its density contributes to inconsistency of practice. It serves as a barrier to access to justice, especially for unrepresented defendants. We heard that not many defendants referred to it, and that if they did it was not helpful. Its current form compounds the difficulties court users already have in navigating a complex criminal justice system.

5.69 We heard the Justices Act needs to be replaced with new legislation that sets out clear, certain and effective criminal procedure laws for the Magistrates Courts to improve the delivery and experience of the criminal jurisdiction of the Magistrates Courts.

5.70 It is important for any new criminal procedural framework to remain current and avoid legislative impediments to the continual achievement of this goal. Also, in devising any new criminal procedure framework subordinate legislation should be used as these can be amended to allow for timely responses to emerging issues.



About what is contemporary and effective Magistrates Courts Criminal procedure

Key themes identified

5.71 The objective of the Review is to develop contemporary and effective criminal procedure for a Magistrates Court setting.

> *The aim to update the courts to be contemporary and effective is both a procedural mission to be efficient and fair as much as it is equally a mission to acknowledge human rights and diversity in the process.*
> — LGBTI Legal Service

5.72 We specifically asked in the Consultation Paper what was meant by this idea, and how this can be achieved in Magistrates Courts' criminal procedure laws. There was broad agreement among stakeholders that the new criminal procedure laws should include the following essential parts.

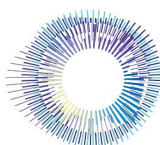
Simple, efficient and user-friendly procedures — making the law easier to understand

5.73 We were told that even just modernising the legislative framework and language used would be a step towards improving understanding of criminal procedure.

5.74 Most people want user-friendly and simple procedures. These should provide purpose and certainty about the steps in a criminal proceeding and clarify the requirements of each occasion, as much as possible.

5.75 In general, the new legislation should:

- Use plain and simple language and require the courts to do the same.
- Contain straightforward procedures that are easy to understand, logical and sequential.
- Remove unnecessary administrative steps and reduce needless court events.
- Minimise the times people need to attend court in person.
- Provide the court with clear structured procedures that facilitate the early and appropriate resolution of matters and ensure hearings that do occur are focused on the actual important issues.



- Enable quick and fair finalisation of matters, especially where matters are uncontentious and the defendant intends to plead guilty — reducing unnecessary remand time and additional distress to victims and witnesses.
- Promote consistency of state-wide Magistrates Courts practice and procedure, in line with higher courts where possible.
- Require the courts to ensure, as far as practicable, the defendant understands the alleged offence, court procedures and the consequences of orders made.
- Be accompanied by information in a range of formats that broadens understanding for court users with diverse needs, including by presenting information in an Easy English format, in ways that are culturally appropriate and in languages other than English.

Adoption of in-court diversionary options

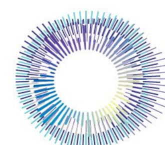
5.76 We learnt there is strong support for any new procedural framework to include diversionary options. We heard contemporary expectations are that one of the core functions of a modern Magistrates Court should be to enable access to diversionary options and pathways to deal with some criminal matters. There is broad recognition of the benefits of diversion to the defendant and victim.

5.77 We heard diversionary programs can play an important role in reducing the number of First Nations peoples and other over-represented groups from entering and cycling through the criminal justice system. There is strong interest in its use in this way.

5.78 People referred to the 2019 Queensland Productivity Commission's (QPC) report[26] about the importance of diversionary options in reducing the adverse impacts of contact with the criminal justice system, by providing a more proportionate response to low harm adult offending and diverting offenders to health and welfare supports that can address some of the factors which often drive offending. Addressing the underlying causes of offending can prevent criminal behaviour taking hold and promotes public safety.

5.79 We often heard of difficulties in accessing diversion services, and uncertainty about availability. We were told access is often limited to specific areas due to resourcing issues. Many people commented on the need for diversion to be available throughout Queensland, and the opportunity to make processes culturally responsive by involving expert groups, such as First Nations Elders and respected persons and Community Justice Groups (CJGs).

[26] Queensland Productivity Commission (n 12) 154.



Greater use of technology

5.80 Everyone strongly supported allowing electronic/digital processes, identifying this as a key component of contemporary and effective criminal procedure laws. Court users clearly want to move away from manual processes such as filing paper documents in person at a court registry, attending court in person for an uncontested adjournment and having to provide original documents with handwritten signatures to the court or other parties.

5.81 Support for greater use of technology is provided on the condition there are still other options for court users who do not have access to technology, noting the risk of denying a person access to justice if it is only available electronically. We heard that in regional and remote communities there are issues with access to a computer or adequate and quality phone reception due to their geographic location. We were also told attending court allows for engagement with legal and other services, and that for some vulnerable groups requiring only electronic processes would be another barrier to participation and contribute to further marginalisation.

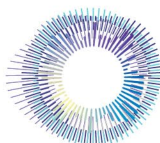
Better account of court users' needs to enable participation

5.82 All people coming to the Magistrates Courts should be treated fairly and with dignity, and their individual rights should be respected. An inclusive system ensures equal access for all people and reinforces a fair justice system.

> *We consider that a contemporary and effective system is one that responds to the current realities of individuals who come before the Court.*
> — Caxton Legal Centre

5.83 We regularly heard culturally appropriate and accessible court procedures that consider and accommodate individual users' vulnerabilities are needed to maximise people's participation in Magistrates Courts proceedings. Many submissions called this taking a 'human rights-based' approach.

> *We appreciate that the criminal justice process necessarily limits some human rights of court users, particularly defendants, but it should not limit the right to equal protection of the law without discrimination and should be structured in such a way as to implement human rights principles.*
> — Caxton Legal Centre



5.84 We heard court procedures need to better consider individual and cultural needs and preferences, crossover factors and lived experience. Better consideration and meeting of an individual's needs improves their understanding, involvement and effective participation in criminal proceedings. We heard that legislation gives stronger signals about this than other types of guidance, such as practice directions or Benchbooks.[27]

5.85 We know understanding a person's circumstances is a key part of the sentencing process.[28] During sentencing a defendant's background, including all the factors that may have contributed to offending, are told to the court to provide context. We heard this approach should be taken at an earlier stage of proceedings to identify appropriate needs and accommodations particularly as this is often when important procedural decisions are made.

If I don't understand something someone has said, or worse, if someone wants me to do something I don't understand, I only have two reactions, and I either shut down or melt down.

— Wayne (ASD)[29]

5.86 This adds further complexities to an already difficult system. We were told a failure to understand individual circumstances can lead to negative outcomes, and often links with overrepresentation. For example, we were again referred to an ALRC report 'that communication barriers, alienation and disconnection from mainstream court processes contribute to the complexity of Aboriginal and Torres Strait Islander legal needs and limit access to justice'.[30]

5.87 Many other examples were shared with us about barriers to participation involving:

- the use of complicated legal jargon and terms surrounding already unclear court processes.
- the high rate of hearing loss may make it difficult for First Nations peoples to participate and understand proceedings.

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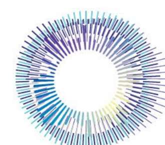
[27] A 'benchbook' is a publication that can give magistrates or judges guidance about the law.

[28] *Penalties and Sentences Act 1992* (Qld) s 9.

[29] ASD means 'Autism Spectrum Disorder'. This quote appears in the submission from TASC National Limited (The Advocacy and Support Centre).

[30] Australian Law Reform Commission, *Pathways to Justice – An inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, 27 March 2018) 319.



- the common approach of just agreeing to everything suggested by the person in authority - even when a person does not agree or the proposition is not correct ('gratuitous concurrence').
- the sometimes-intimidating nature of traditional open court settings, for example where cultural practice may be for women not to speak in front of men.

5.88 Consultation said that to allow an understanding of individual circumstances to happen, greater time and attention must be paid to individual matters proceeding through the Magistrates Courts. They also said that the court should make its own efforts to identify and address the diverse needs of those navigating the system. Others suggested the court needed to have flexibility to be able to respond to the wide range of court users and their circumstances.

5.89 We were told how important it is to involve First Nations peoples, and people with lived experience to inform and design requirements to best provide insights and make recommendations for change.

5.90 While cultural diversity is a feature of contemporary Australia, we were asked to consider First Nations peoples as separate and distinct from other cultural groups.[31]

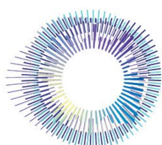
5.91 We met with CJGs and learnt more about their work in the Murri Court and mainstream Magistrates Courts, supporting victims and offenders through court processes and building cultural awareness in the courts. We know CJGs have an essential role in providing greater cultural understanding.

5.92 We were also told to consider ways of incorporating into mainstream Magistrates Courts certain Murri Court processes, which are culturally respectful and relevant and allow for adjustments in usual court procedure formalities.

5.93 This is consistent with Recommendation 4 of the *Evaluation of Murri Court*, which stated participants' poor experiences in mainstream courts 'could be improved through mechanisms similar to those in Murri Court without the full implementation of a Murri Court' and while a full Murri Court 'may not be practical in every location, … changing Magistrates Courts is possible'.[32] The evaluation stated this could include considering making simple physical changes to the courtroom (such as seating arrangements).

[31] This is consistent with the approach taken in the *Human Rights Act 2019* (Qld) s 28.

[32] Ipsos Aboriginal and Torres Strait Islander Research Unit, *Evaluation of Murri Court* (June 2019) Rec 4.



Murri Court

There is flexibility in regard to the wearing of formal uniforms, language and the seating arrangements in Murri Court. QPS representatives may choose to wear civilian clothes, and Magistrates may choose to de-robe. Elders and Respected Persons may choose to wear a Murri Court uniform or sash. Alternatively, a Magistrate may choose to wear specially painted robes featuring the artwork of Aboriginal and/or Torres Strait Islander individuals. This is to present as a more personable and encouraging figure than she/he otherwise would in traditional Magistrate Courts.

Magistrates are to speak in more conversational language and directly with the participants throughout, for instance to confirm that the participant understands the court process and are to permit the Elders to talk with the defendant in the court room. Magistrates also receive information from the panel about the personal circumstances of the defendant.

Ideally, to encourage communication and participation, the Murri Court Magistrate, the prosecutor, the participant, the participant's legal representative and the CJG representative will all be seated at the same level and in a circle when hearing Murri Court matters. Whether this seating is possible will depend on the physical features of each courtroom and the needs and wishes of participants.

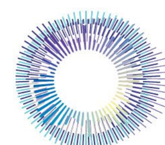
Regardless of the seating arrangements, less formal set-ups are encouraged to support open communication between all parties. The layout of Murri Court is intended to reflect the Court's aims of delivering a process that is culturally appropriate, that respects and acknowledges Aboriginal and/or Torres Strait Islander culture and that encourages all parties to fully engage in the court process.

Wherever possible, symbols, flags, artwork and artefacts of significance to the Aboriginal and/or Torres Strait Islander community will be present in the room where Murri Court is held. The Courts Innovation Program has supplied each location with one or two sets of three flags – an Aboriginal flag, a Torres Strait Islander flag and an Australian flag: one small set for positioning on the bench and/or one tall set to be placed where practicable in the court room.[33]

5.94 We were also told about the importance of a criminal justice system that responds effectively to the complex needs of people with disability,[34] or people from different cultures and backgrounds, or people who have different communication needs. We heard

[33] Ibid 28–9.

[34] See also *Summary of Australia's Disability Strategy 2021-2031* (December 2021) 4 (referring in particular to the '*Safety, rights and justice*' outcome) <https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-11/1796-summary-strategy-accessible.pdf>.



the court can often have trouble identifying whether a person has a disability and needs adjustments.

5.95 There are distinct human rights obligations in relation to people with disability that must be considered when creating a new set of contemporary and effective criminal procedures. For example, the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) contains articles aiming to ensure effective access to the justice system for persons with disabilities on an equal basis with others. Article 13 of the CRPD requires:

> effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[35]

5.96 Article 2 of the CRPD defines reasonable accommodations to mean 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'[36] Reasonable accommodations must be provided (among other things) to promote equality and eliminate discrimination, and when a person is deprived of their liberty.[37]

5.97 We know in Queensland that persons with a disability who are witnesses or victims are necessarily allowed a range of extra measures while giving evidence or when required to appear in court, such as an emotional support person.[38] It is less clear what arrangements can be made when a person with a disability is the defendant. While the common law allows for courts to control its own processes and order appropriate adjustments, having the clear signposted ability in legislation to consider adjustments overcomes problems with court users not knowing about these options.

5.98 We heard any new legislation should change the criminal procedure rules to require the court to inform itself if any adjustments are needed to be able to participate effectively in the proceedings. It should further include the right for defendants to have reasonable procedural adjustments based on individual needs. These could include making required appropriate adjustments in the interests of justice, such as:

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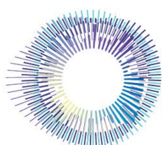
[35] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008); *Human Rights Act 2019* (Qld) s 32(2).

[36] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

[37] Ibid arts 5, 14.

[38] *Evidence Act 1977* (Qld) s 21A(2). This law relates to evidence given by a special witness.



- a support person to provide emotional support to the defendant
- listing the case at a preferred time
- informal seating arrangements
- removing formal attire such as uniforms, and robes
- permitting additional breaks or questions limited by time
- reducing the number of personal court appearances required
- accessing and using video-link or other technology
- closing the court
- using communication devices
- using simple language and terms
- allowing extra time for the defendant to understand and respond.

About what else needs to be done beyond new legislation

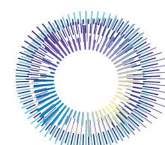
5.99 Discussions about new criminal procedure legislation often raised connected ideas of what the court and legal stakeholders should focus on to improve overall criminal justice system performance.

5.100 During consultation we heard many other valid ideas for a contemporary and effective justice system delivered in the Magistrates Courts, outside the scope of this Review, which is practically focused on creating new criminal procedure legislation. We have listed below a range of common ideas for other actions to improve and strengthen the overall Magistrates Courts' system for future consideration.

Reduce the matters coming to the Magistrates Courts

5.101 We heard the Magistrates Courts' significant workload could be reduced by:

- undertaking a stocktake of criminal offences to identify those that require a criminal justice system response at all. We were told minor low level or poverty-related crimes are better suited to a health and welfare response.
- reviewing criminal offences that need to be heard and determined by a magistrate. Other options include greater use of infringement notices and expanded police diversion.



- considering police charging practices. We were told the Australian Law Reform Commission[39] has previously identified that police charging practices can result in First Nations peoples being subject to overcharging. We were also told that young Aboriginal people and culturally diverse people who offend are more likely to be charged than receive a police caution or diversion.

Improve court data collection and quality

5.102 Effective business processes and decisions rely on the quality and timeliness of data. Currently in the Magistrates Courts, initial court orders are recorded by a magistrate's stamp, or pen and paper method to be manually entered into the court case management system by registry staff after the court event. For Magistrates Courts criminal cases, this is the Queensland Wide Inter-linked Courts (QWIC) system. This current process introduces the risk of data entry errors as well as timeliness issues for other reliant agencies, such as QCS.

5.103 The current systems also prevent an accurate court user profile being created and analysed. This relates to both personal characteristics and time taken to resolve matters, especially to identify problems. We note there is a strong need for this comprehensive information to be able to properly evaluate court performance and pinpoint where reforms are required.

5.104 Court Services Queensland (CSQ) advise this is changing with the Queensland Government's recent 2022–23 budget announcement dedicating approximately $40 million over five years to digitise court functionality. CSQ says it 'will deliver a new criminal case management system within the next five years'.

Magistrates' continuing legal education and training

5.105 A common message is the need for ongoing training for Magistrates in key areas such as trauma, gender, cultural-awareness and safety, the value of restorative justice and understanding the experience of victims.

5.106 A greater awareness of disability, the early identification of a person's disability and tailoring supports to that person's needs to enable understanding and participation in the criminal process was also suggested.

5.107 Magistrates and court staff should have training and ongoing professional development in effective engagement and communication with a wide variety of people and their circumstances.

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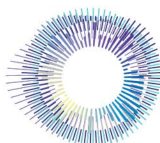
[39] Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, ALRC Report No 133, December 2017) 457.



Role for a judicial commission

5.108 Consultation feedback suggested a judicial commission could play a substantial role by offering training and continuing education in necessary programs. It could also examine complaints against judicial officers, including delays and inappropriate conduct. Consultation shared that some experiences in court were sometimes marked by inappropriate comments and conduct from magistrates.

Interpreters

5.109 Consultation suggested access to court interpreters can be difficult. They highlighted the importance of the availability of interpreters at each court attendance, from the first occasion a person is brought before the court.[40] Also, it is important that supporting information about court processes is available in languages other than English and involves the use of pictures to aid understanding.

Expanded role for intermediaries

5.110 Stakeholders also acknowledged that there could be a greater role for intermediaries in providing better supports for a defendant, and potential to expand the pilot Queensland Intermediary Scheme (QIS).[41] The QIS contributes to accessibility by assisting some child prosecution witnesses in child sex cases/matters.

5.111 There may be possible future roles for intermediaries in supporting people with disability, and a further specialised role to support First Nations peoples. This may assist with addressing particular communication difficulties experienced by First Nations peoples, who are often multilingual (with English being a second or third language) and from isolated communities. There may be a role for an intermediary to support a defendant who gives evidence like in the Australian Capital Territory and South Australia.

5.112 A final evaluation of the current QIS pilot will be conducted in July 2023.[42]

Importance of Community Justice Groups

5.113 Community Justice Groups (CJGs) play a critical role in embedding cultural awareness in the courts, especially providing expertise and knowledge for local solutions and community involvement. The role of CJGs is expressly included in bail and sentencing legislation, with the ability to give the court information about cultural considerations.

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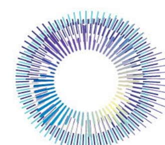
[40] Queensland Courts, *Guideline – Working with Interpreters in Queensland Courts and Tribunals* (14 September 2022) (available at <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/618384/guideline-working-with-interpreters-in-courts-and-tribunals.pdf>).

[41] The Queensland pilot scheme is in two locations: Brisbane and Cairns.

[42] See Queensland Courts, *QIS Pilot program* (Web Page, 28 February 2023) <https://www.courts.qld.gov.au/services/queensland-intermediary-scheme/qis-pilot-program>.



5.114 Consultation feedback highlighted the importance of CJGs in providing support to First Nations victims and defendants coming to court, including explaining court processes and obligations. In fact, the CJG model could be used to bridge awareness for other cultural groups.

> *So when the Magistrate sees these people in court and reads all the charges, that's just a piece of paper, whereas when the Elders can actually speak up and give their submissions of who this person is in their community and [they've] watched them grow, and they know what's happened to these people. You're not going to get that from their legal rep[re]s[entatives] at all. And they feel more comfortable with an Elder telling their story as opposed to someone who has flown in for the day for court.*
>
> — DJAG staff member, Evaluation of Community Justice Groups [43]

5.115 While CJGs operate at Murri Courts and mainstream Magistrates Courts, the recent Evaluation of CJG report acknowledged, 'groups funded to support Murri Courts provide a more structured and intensive level of support through the court process than those that work in mainstream courts'.[44]

5.116 People we spoke with were positive about giving CJGs a clearer role in mainstream Magistrates Courts, noting the significant contribution to enabling understanding and participation for First Nations peoples. Further, the Review is an option for strengthening the role of CJGs in a Magistrates Courts criminal procedure setting.

5.117 We know it is important to be guided by CJGs and further First Nations consultation as to any expanded role for CJGs in the mainstream adult criminal Magistrates Courts. The current three-year evaluation of CJGs may provide the opportunity to identify and strengthen the role of CJGs in the mainstream Magistrates Courts. The first evaluation report states its next phase will specifically 'identify whether there are ways that the legislative framework for CJGs could be strengthened to make them more effective.'[45]

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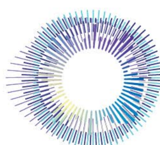
[43] The Myuma Group, *Phase 1 Report: Evaluation of Community Justice Groups* (November 2021) 75.

[44] Ibid 56.

[45] Ibid 149.

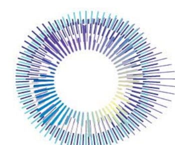


Conclusion

5.118 We have heard from a range of people and groups about what we need to consider when developing new contemporary and effective criminal procedure legislation in Queensland's Magistrates Courts.

5.119 What we have learned is reflected in further detail throughout this Report and in the recommendations for the new criminal procedure legislation.

5.120 Thank you to everyone who shared their views with us. We have really appreciated the generosity of your time, insights and advice. We have been greatly encouraged by the interest in this reform and the acknowledgement of its importance to a modern, just, fair and timely criminal justice system in Queensland.



CHAPTER 6: GUIDING PRINCIPLES FOR THE REVIEW

Introduction

6.1 In this Review I have been asked to make recommendations about new criminal procedure laws in the Magistrates Courts. This means I need to consider many valid ideas and suggestions from multiple viewpoints, and decide which ones best achieve the objective of the Review.

6.2 To support this complex decision-making process, I have developed my own set of internal guiding principles. These have been settled after extensive consultation about the main concerns with the current procedures and what the Review should achieve.

6.3 In such an important Review affecting so many people, it has been useful for me to have a structured central point of reference for me to check my decision-making against, to make sure all recommendations are consistent with consultation, align with each other and with the objective of this Review.

Objective of the Review

6.4 The terms of reference set out the scope and intent of the Review. I am required to 'make recommendations to create a new framework for contemporary and effective criminal procedure laws applying in Queensland's Magistrates Courts'.[1] The meaning of 'contemporary and effective' has been discussed in Chapter 5. It broadly means criminal procedures should meet the needs and expectations of the community, now and into the future.

Purpose of internal guiding principles

6.5 Early in the Review, I developed a set of internal guiding principles to refer to when making decisions about what changes are needed.

6.6 Settling and sharing these internal principles early established a clear and consistent decision-making process. Consistent use of the principles makes my decision-making process transparent, especially where my recommendations require further explanation of why one way has been adopted in preference of another. This internal guidance also helped to make sure all recommendations align and reflect what we learnt from consultation.

6.7 Where there was a choice between multiple suitable outcomes, the one that most closely aligned with the internal guiding principles was chosen. Where necessary, the principles

[1] The terms of reference are set out in full in Appendix A.

were balanced against each other to best achieve the goal of contemporary and effective criminal procedures in the Magistrates Courts.

6.8 Internal guiding principles were also used in Scotland during a 2004 review of the summary criminal justice system and a 2015 review of evidence and criminal procedure laws. Principles were chosen which considered the kind of criminal justice system to which Scotland should aspire. Generally, these included a system that is fair, efficient, simple and easily understood, and that provides access to justice, protection from the damage crime can cause and a positive experience for participants.[2] The methods by which these reviews were conducted was of great assistance to myself and the CPRT.

Consultation and development

6.9 The Consultation Paper discussed a range of guiding principles that could be included in the new criminal procedure legislation for the Magistrates Courts.[3] My internal guiding principles have the same general themes and focus as those proposed legislative guiding principles.

6.10 Respondents to the Review and other stakeholders supported having guiding principles in the new legislation, as proposed in the Consultation Paper.[4] In my view, it is appropriate and fair that I should adopt similar principles when I am making decisions and recommendations.

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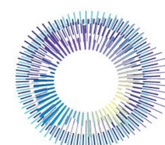
[2] Scottish Court Service, *Evidence and Procedure Review Report* (Report, March 2015) 4–5 (available at <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>); The Summary Justice Review Committee (Scotland), *Report to Ministers* (Report, January 2004) 6–10.

[3] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) [3.8].

[4] See Chapter 9.



Internal guiding principles

6.11 My internal guiding principles for use during the Review are set out below.

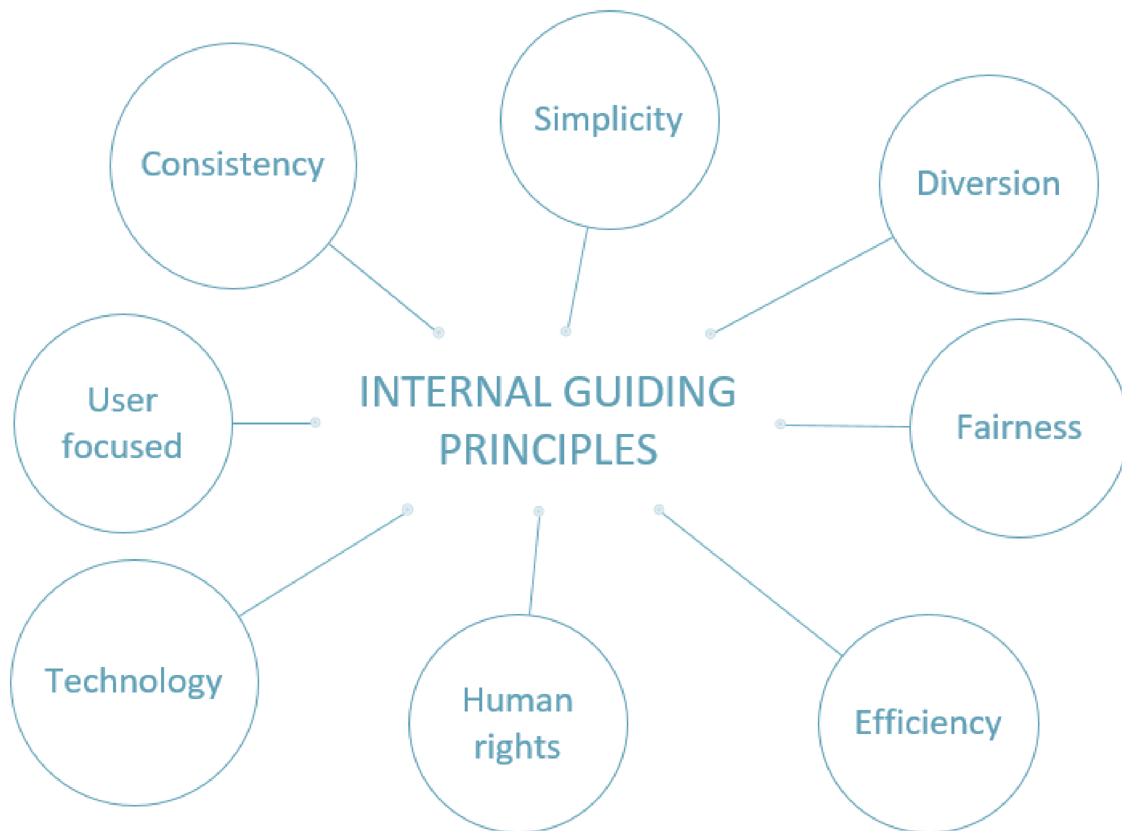


Diagram 6.1: Internal guiding principles

6.12 These internal guiding principles are not stand-alone considerations. Together, they represent the essential elements of contemporary and effective criminal procedure in the Magistrates Courts and serve as reference points to be balanced in designing the new legislative framework.

Simplicity

6.13 Criminal procedures in the Magistrates Courts should be simple, clear, accessible, and easy to understand. They should also be explained to people in a way they can understand. Many defendants who go to the Magistrates Courts do not have a lawyer and represent themselves in court. With this in mind, these court procedures should be simple enough for a self-represented person (without formal legal education) to understand and navigate.

6.14 Simplicity also requires a degree of flexibility and reduced formality in Magistrates Courts procedures. All court documents (such as forms and explanatory material) should be simple and free of legal jargon, to improve understanding.

Efficiency

6.15 Magistrates Courts criminal procedures need to be efficient. All matters should be dealt with efficiently by the parties and the court, in relation to both time and resources. This means, for example, that parties must come to court ready to proceed with a matter, and that unnecessary court events should not be scheduled. There is a cost to the public each time a court event is held, so it is important these publicly funded events are meaningful and work towards resolving the matter as soon as possible.

Fairness

6.16 Court procedures must be fair for defendants, victims and witnesses. This is a foundational principle of the criminal justice system, which must be embedded in any new criminal procedures for the Magistrates Courts to ensure procedural fairness.

Consistency

6.17 Magistrates Courts criminal procedures need to promote consistency of practice. Procedures should be consistent across Magistrates Courts around Queensland, so the public can expect similar practices at any court location. As far as possible, procedures in the Magistrates Courts should also be consistent with those in the higher courts.

6.18 However, other principles such as simplicity and efficiency will be prioritised over consistency with the higher courts where required.

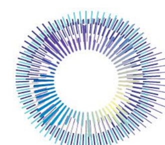
Technology

6.19 Court procedures should embrace technology, but also recognise there are many people in our community who do not have regular or reliable access to technology. The use of technology will be enabled by the new Magistrates Courts criminal procedure laws, but not mandated. Parties will not be disadvantaged in court because they do not have access to the internet or other digital services.

6.20 The use of technology is constantly evolving, and laws should not be a barrier to adopting new ways of doing things in the future. Courts should have the ability to adopt new technologies and processes without having to first change the law.

Human rights

6.21 Court procedures must promote and protect human rights. This principle reinforces strong messages heard in consultation, as well as the broader obligation to promote and protect rights under the *Human Rights Act 2019* and rights under international conventions that are not explicitly stated in Queensland's *Human Rights Act 2019*.



User focused

6.22 Criminal procedures should operate in a way that focuses on users of the Magistrates Courts' system, noting the wide range of people who attend the Magistrates Courts. Procedures should be flexible and appropriate to encourage meaningful participation.

6.23 Defendants, victims and witnesses are often experiencing some disadvantage in their life, and that should not be perpetuated in the Magistrates Courts. People who have a disability, people from a culturally and linguistically diverse background, First Nations peoples and victims of crime (among others) all have different needs when coming to court, and these should be accommodated as much as possible. For a criminal justice system to be effective, it is critical that defendants and victims understand what is happening in court and why, and can participate in the processes affecting them.

6.24 Focusing on the needs of court users also links with other principles, such as simplicity and consistency. It is for the users of the court that criminal procedures must be simple to understand and consistent across the state.

Diversion

6.25 Criminal procedures in the Magistrates Courts should include diversion. Wherever possible, diversion out of the court system or alternatives to prosecution need to be available for consideration.[5] This is a strong expectation of a contemporary justice system.

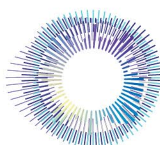
Translating Review guiding principles into legislative guiding principles

6.26 The internal guiding principles set out in this chapter are only intended to guide me during this Review. They are not intended to be included in any new laws.

6.27 The internal principles I use to make decisions about new criminal procedures for the Magistrates Courts are different to the principles that should apply to magistrates and parties using those procedures in individual criminal cases. This means the matter of *legislative* guiding principles must be considered separately to these *internal* guiding principles. That is why the two sets of guiding principles are dealt with separately in this Report. However, although there are differences, they will also have similarities since both are intended to support contemporary and effective criminal procedures.

6.28 The objects and guiding principles for the new legislation will be discussed further in Chapter 9.

[5] See Chapter 15 for further discussion on the use of diversion in the Magistrates Courts.



Human rights considerations

6.29 The *Human Rights Act 2019* applies to any new legislation in Queensland and must be carefully considered throughout this Review. Parliament, courts and the executive (government departments) are all required to make decisions in a way that is compatible with the Act.[6]

6.30 Parliament must scrutinise all proposed laws for compatibility with human rights. This includes a requirement that all new legislation introduced into parliament must be accompanied by a statement about compatibility of the proposed laws with human rights.[7] As part of the process of drafting new criminal procedures for the Magistrates Courts, a human rights statement of compatibility will also be written.

6.31 The below rights under the *Human Rights Act 2019* can apply to criminal procedures.[8] These rights will be referred to throughout the Report, along with other rights that may be relevant to a particular issue.

Recognition and equality before the law

6.32 Every person has the right to recognition as a person before the law, and to enjoy their human rights without discrimination, and to equal and effective protection against discrimination. Also, every person is equal before the law and is entitled to the equal protection of the law without discrimination.

6.33 Where a person or group is disadvantaged due to discrimination, measures taken to assist or advance that person or group do not constitute discrimination.

Cultural rights

6.34 Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied their rights to enjoy, maintain, control, protect and develop their identity and cultural heritage. They also have the right not to be subjected to forced assimilation or destruction of their culture.

6.35 More generally, people with a particular cultural, religious, racial or linguistic background must not be denied their right to enjoy their culture, declare and practice their religion, or use their language — and to do those things in community with other people of the same background.

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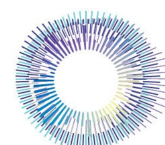
[6] *Human Rights Act 2019* (Qld) s 4.

[7] *Human Rights Act 2019* (Qld) pt 3 div 1; Queensland Human Rights Commission, *The role of Parliament under the Human Rights Act 2019* (Fact Sheet, January 2021) (available at <https://www.qhrc.qld.gov.au/your-rights/human-rights-law/the-role-of-parliament>).

[8] *Human Rights Act 2019* (Qld) pt 2 div 2.



Right to liberty and security of person

6.36 People must not be subjected to arbitrary arrest or detention and must not be deprived of their liberty except in accordance with the law. A person who is arrested or detained must be promptly informed about any proceedings against them and brought before a court and has the right to be brought to trial without unreasonable delay.

Right to fair hearing

6.37 A person charged with a criminal offence has the right to have the charge 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing'. Although a court may sometimes be closed, judgements or decisions must be publicly available.

Right not to be tried or punished more than once

6.38 Where a person is convicted or acquitted of an offence in accordance with the law, they must not be tried or punished for that offence another time.

Rights in criminal proceedings

6.39 Specific rights in criminal proceedings are set out in section 32 of the *Human Rights Act 2019*. A person charged with an offence has the right to be presumed innocent until proven guilty, and is also entitled without discrimination to a range of 'minimum guarantees':[9]

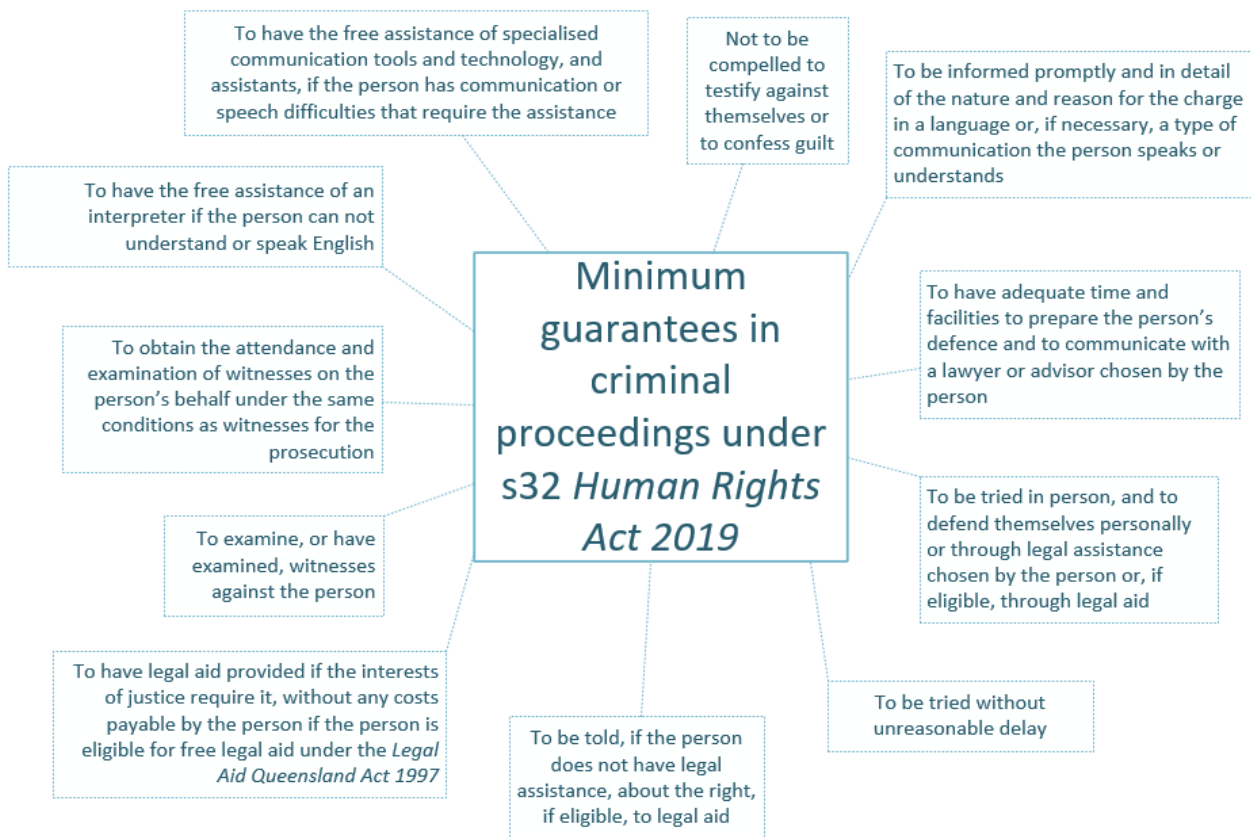


Diagram 6.2: Minimum guarantees in criminal proceedings, as set out in section 32(2) of the *Human Rights Act 2019*.

6.40 By having human rights as internal guiding principles, I am embedding human rights considerations throughout the Review as well as ways to make Magistrates Courts criminal procedure compatible with human rights.

[9] Section 32(4) of the Act also states that a person convicted of a criminal offence has the right to have the conviction and any sentence reviewed by a higher court in accordance with the law.

CRIMINAL PROCEDURE REVIEW
MAGISTRATES COURTS

PART B: THE MAGISTRATES COURTS AND MAGISTRATES

CHAPTER 7: ONE COURT, NEW TITLES

Introduction

7.1 Queensland's lower courts are called the Magistrates Courts. These courts are presided over by magistrates. Queensland has a complex Magistrates Courts structure, with multiple courts separated by geographic boundaries.

7.2 In undertaking this Review, I was tasked with reviewing criminal procedure in Queensland's Magistrates Courts and making recommendations to create new, contemporary and effective laws. The terms of reference for this Review also require me to consider, as part of the modernisation of Queensland's laws:[1]

- if the Magistrates Courts should be consolidated into a single Magistrates Court of Queensland; and
- if magistrates and the Magistrates Courts should be retitled as Local Court judges and Local Courts respectively, having regard to the cost and benefits of such a change.

7.3 Although these proposals are not directly connected to the Review and modernisation of summary criminal procedure legislation, they are considered as a part of the holistic review of the modernisation of the Magistrates Courts.

The current position

7.4 Section 22 of the Justices Act recognises the continued existence of Queensland's Magistrates Courts. This is a continuation of earlier historical court structures, which established multiple lower courts to hear less serious matters.[2]

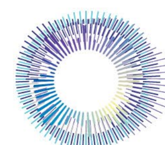
7.5 Magistrates Courts are located in separate districts and divisions throughout the state, and each magistrate is appointed to a particular courthouse. That courthouse is the place where they are to constitute a Magistrates Court, but they can also constitute a court at another place.[3] In addition to these magistrates, a Chief Magistrate (who may also be a District Court Judge) and Deputy Chief Magistrates are also appointed. The Chief

[1] Terms of reference, Appendix A.

[2] G Dean, *Here Comes the Judge: The Queensland Magistrate* (Department of Justice and Attorney-General, 2008) 5-6; Department of Justice and Attorney General (Qld), *Criminal Justice Procedure in Queensland: Discussion paper* (April 2010) 20.

A recent ruling of the Federal Court of Australia, *Pauga v Chief Executive of Queensland Corrective Services (No 4)* [2022] FCA 339, determined that there is no such entity as the Brisbane Magistrates Court: '…Magistrates Courts are constituted by magistrates in particular places all over Queensland. When constituted they are separate courts. There may be a number of such courts convened in Brisbane at any time'.

[3] *Justices Act 1886* (Qld) ss 22, 22B; *Justices Regulation 2014* (Qld) regs 17, 18, sch 1; *Magistrates Act 1991* (Qld) s 5; see also Department of Justice and Attorney General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 12; Department of Justice and Attorney General (Qld), *Criminal Justice Procedure in Queensland: Discussion paper* (April 2010) 20.



Magistrate is 'responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts'.[4]

7.6 Magistrates are appointed under the *Magistrates Act 1991.* Magistrates are categorised as judicial officers for many purposes,[5] but do not receive the same entitlements as judges. However, if the Chief Magistrate is a District Court judge, then legislation recognises that they are 'paid the salary, expenses and allowances of, and has the title, tenure and seniority of, a District Court judge'.[6]

7.7 The *Justices Regulation 2014* sets out the districts, divisions and places appointed throughout the state for the purposes of holding Magistrates Courts. There are currently 146 separate places listed in the regulations for holding Magistrates Courts in Queensland.[7] This approach can give rise to complex jurisdictional issues and difficulties.

7.8 Under the Justices Act, there are complicated laws about where criminal proceedings can be commenced. As a general rule, proceedings commenced in a Magistrates Court must be started within the same district as where the offence is alleged to have been committed.[8]

7.9 The Justices Act requires prosecutors to start, and permits magistrates to hear, matters within the district or division in which an offence is alleged to have occurred. Because of these requirements, a magistrate has power to determine only matters which are lawfully brought before them in the district in which they are sitting. Essentially, the effect of the current law is that if a matter is not started in the correct Magistrates Court, then it will not be lawfully before a court, and if a matter is not lawfully before a court, then it cannot be heard by that court.[9]

7.10 This approach has the result that some criminal proceedings are unable to continue. Where a proceeding is started in the wrong Magistrates Court, it will be necessary to strike out that proceeding and re-start it in the correct court. There is no discretion for a magistrate to hear the matter anyway, or to adjourn a matter to the place where it should have been started. However, some Acts have by-passed these limitations by providing that a matter can be heard in any Magistrates Court, or an alternative Magistrates Court.[10]

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[4] *Magistrates Act 1991* (Qld) s 12; and see generally pts 3, 4.

[5] The District Court and Supreme Court are recognised and constituted by the Queensland Constitution; however, the Magistrates Court is not: *Constitution of Queensland 2001* (Qld) ch 4.

[6] *Magistrates Act 1991* (Qld) s 11.

[7] *Justices Regulation 2014* (Qld) sch 1.

[8] *Justices Act 1886* (Qld) ss 23C, 139.

[9] If a matter is lawfully before one Magistrates Court, then it can be transferred to another Magistrates Court. However, if a matter is not lawfully before a court (for example, because it was started in the wrong court) then there is no power to transfer the matter: *Justices Act 1886* (Qld) s 139.

[10] *Bail Act 1980* (Qld) s 15A; *Drugs Misuse Act 1986* (Qld) s 118(3A).

7.11 This is different to the centralised structure of Queensland's Supreme Court and District Court.[11] For example, a District Court Judge can sit in a District Court in any location within Queensland.[12]

Other jurisdictions

7.12 All states and territories in Australia, except New South Wales and the Northern Territory, have Magistrates Courts as their lower court in the court hierarchy.

7.13 The current Magistrates Courts structure in Queensland stands in contrast with other jurisdictions, which have introduced a single Magistrates Court or Local Court structure.[13]

7.14 The lower court in New South Wales[14] is the Local Court, which was established in 1982, replacing the Courts of Petty Sessions.[15] However, up until 2007, New South Wales' Local Courts were separately constituted. These separate Local Courts were consolidated with the passage of the *Local Court Act 2007* (NSW). Proceedings in the Local Court are heard and determined by magistrates.

7.15 The Northern Territory's lower court (in its two-tier court system) is also called the Local Court. In 2015, a new Local Court of the Northern Territory was established, consolidating the previous lower courts in the jurisdiction, the Northern Territory Local Courts and the Northern Territory Court of Summary Jurisdiction.[16] The same Act also renamed magistrates as Local Court judges.[17] The Northern Territory is the only jurisdiction within Australia to have this title.

7.16 In the Commonwealth, in 2012 the former Federal Magistrates Court was retitled as the Federal Circuit Court of Australia and Federal Magistrates were renamed Federal Circuit Court Judges.[18]

7.17 Overseas jurisdictions including New Zealand, Canada and England have changed the name of magistrates in some capacity, to reflect a more contemporary understanding of the role that these judicial officers perform.

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[11] *Supreme Court of Queensland Act 1991* (Qld)*; District Court of Queensland Act 1967* (Qld).

[12] *District Court of Queensland Act 1967* (Qld) ss 19–21, 63. A single District Court was established in 1997. Previously, there were separate District Courts throughout Queensland: *Justice and Other Legislation (Miscellaneous Provisions) Act (No 2) 1997* (Qld) pt 10 (as passed). Under section 63 of the *District Court of Queensland Act 1967*, the court may make an order to change the venue for a proceeding and allow a trial to be held in a different place.

[13] Eg, *Local Court Act 2015* (NT) s 4; *Magistrates' Court Act 1989* (Vic) s 4; *Local Court Act 2007* (NSW) s 7.

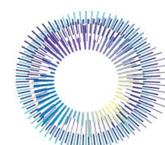
[14] Note that New South Wales has a three-court system. The Local Court is the lowest tier, followed by the District Court and Supreme Court.

[15] *Local Courts Act 1982* (NSW) s 9 (repealed).

[16] *Local Court Act 2015* (NT) ss 4, 84. The Norther Territory's other court is the Supreme Court.

[17] *Local Court Act 2015* (NT) s 50.

[18] *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth) s 3, sch 1.



7.18 In Canada, the title of police magistrate and stipendiary magistrate has shifted to Provincial Judge. The lower court in the Canadian court hierarchy is now the Provincial or Territorial Court.[19]

7.19 In 1980, New Zealand renamed its Magistrates' Courts to District Courts and expanded their jurisdiction. At the same time, New Zealand renamed its stipendiary magistrates to District Court Judges.[20]

7.20 In 2000, England and Wales changed the name of their stipendiary magistrates to District Judge (Magistrates' Courts), who preside over the Magistrates Courts in those countries.[21] The change in name was designed to reflect the professional status of stipendiary magistrates and 'provide a judicial title which is easier for the public to recognise'.[22]

Consultation

7.21 In the Consultation Paper, I asked whether respondents would be in favour of a single unified Magistrates Court structure. I also asked questions about a potential name change for the title of the Magistrates Courts and the title of magistrate, to Local Courts and Local Court judge respectively.

7.22 I also wrote to the heads of jurisdiction in Queensland and significant legal stakeholders to seek their views on the proposed changes. This included for example, the Chief or President of each court, prosecution and defence agencies, the QLS and the BAQ. The views of these stakeholders were all taken into account in conducting this Review and reaching my recommendations.

A single Magistrates Court

7.23 The majority of respondents and stakeholders who indicated their views on a single Magistrates Court of Queensland were in favour of the change. Some submissions noted if this path was taken, there would be some operational matters to address, such as ensuring there are ways for witnesses to give evidence from different districts and determining an internal reporting structure. However, respondents generally expressed

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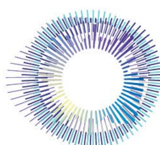
[19] Note that the history and structure of the Canadian courts is complex and is not analogous to court structures in Queensland. The changes occurred over time across the different provinces. See Department of Justice Canada, 'The Judicial Structure', *Canada's System of Justice* (Web Page, 1 September 2021) <https://justice.gc.ca/eng/csj-sjc/just/07.html>.

[20] 'History of Court System', *Courts of New Zealand* (Web Page, 2022) <https://www.courtsofnz.govt.nz/about-the-judiciary/copy-of-overview/>. Note that New Zealand defines its court system as having four tiers, but there are only two courts in which cases can be started: 'Structure of the Court System', *Courts of New Zealand* (Web Page, 2022) <https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system>.

[21] *Access to Justice Act 1999* (UK) s 78.

[22] Victoria MacCallum, 'Stipendiaries Become Judges', *The Law Society Gazette* (Web Page, 8 September 2000) <https://www.lawgazette.co.uk/news/stipendiaries-become-judges/30450.article>.



positive views regarding potential systemic operational improvements as a result of the unified structure.

7.24 I heard from stakeholders that the establishment of a single Magistrates Court structure would assist in centralising resources and improving case management. It was also submitted that this change would improve consistency and uniformity in procedure and practice, leading to improvements in understanding and reducing court delays. It may also improve efficiency in registry administration.

7.25 Respondents raised concerns with the current dispersed structure of the Magistrates Court, including difficulties transferring matters between separate Magistrates Courts. I heard that this system is confusing and time-consuming for legal professionals and stakeholders, and has caused unnecessary hardship for defendants, particularly those who are self-represented and must navigate the system without advice. The current state of operation compounds the complexity of matters, contributing to delays in hearing and resolving matters in the Magistrates Courts. It also encourages individual variation in practice across different Magistrates Courts across the state, which increases unpredictability.

7.26 Whilst the establishment of a single unified Magistrates Court structure was highly supported by almost all stakeholders, the proposed title changes received mixed responses.

Change of titles

7.27 A number of stakeholders provided feedback that the title of Magistrates Court is old-fashioned, being based on the archaic position title of the judicial officer (discussed below). These stakeholders expressed the view that the title of Local Court better reflects the contemporary role of the Magistrates Courts in the modern era, and emphasises the role of the court, rather than the position of the judicial officer. Stakeholders also expressed that 'Local Court' is an accessible name that is likely to be better understood by the general community.

7.28 However, some respondents noted that the change would incur costs and therefore must be assessed in terms of value, with some providing feedback that they viewed the proposed change as minor or cosmetic in nature. However, most stakeholders were relatively neutral about this proposal, in contrast to the other two questions.

7.29 Many stakeholders were strongly in favour of changing the title of magistrate. Arguments in favour of changing the title included:

- The title of magistrate is based on a historic position that bears little resemblance to the functions and powers exercised by magistrates in today's courts;

- Magistrates have seen a significant increase in their jurisdiction and powers across the last several decades, including assuming duties and hearing cases that were previously within the jurisdiction of the higher courts; and
- Magistrates are widely considered to be independent judicial officers as a result of reform over the last fifty years and are bound by the same expectations as judges.

7.30 In addition to the above, stakeholders also provided positive feedback that the title of 'Local Court judge' is more likely to be understood by defendants.

7.31 However, not all stakeholders expressed positive feedback about the retitling of magistrate to Local Court judge. Some stakeholders had concerns about the proposed title change, noting that although there are many similarities between the responsibilities of magistrates and judges in the higher courts, there are also some differences. These differences include that a judge can direct a jury in relation to indictable offences and can decide serious criminal matters or civil disputes.

7.32 Some stakeholders expressed concerns about the behaviour of some magistrates in court and the quality of their decision-making.

7.33 Stakeholders also raised concerns in relation to the current acting magistrate arrangements, as well as any implications for tenure and wages for magistrates.

New model

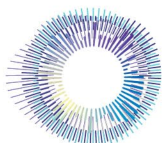
7.34 I recommend that the Magistrates Courts should become a single Magistrates Court of Queensland, and that the court and magistrates should be retitled as the Local Court and Local Court judges.

7.35 My view is that all three of these changes should take place and should be implemented at the same time. However, it is important to note that, if required, these recommendations could be separated. For example, the Magistrates Courts can be made a single court without any retitling taking place. Equally, it is theoretically possible to retitle either the Magistrates Courts or the magistrates, as has occurred in New South Wales.

Establishment of a single court

7.36 I recommend that for ease, and in alignment with the intention to establish a contemporary Magistrates Court, a single court structure is established, with some parameters to ensure the transition is as seamless as possible.

7.37 Queensland's Magistrates Courts structure is inconsistent with other jurisdictions in Australia, which have a single unified lower court structure. It is also inconsistent with the higher courts in Queensland.



7.38 Queensland's Magistrates Court structure was established in the Justices Act in 1886. As with other provisions in the Justices Act, it is appropriate to consider if there is an alternate way forward, including considering the practice in other jurisdictions and contemporary community expectations.

7.39 Queensland has previously considered these matters when establishing a single District Court structure in 1997. Until then, the District Court in Queensland also existed as separately constituted District Courts across the state.[23]

7.40 There are a number of potential benefits associated with a single Magistrates Court of Queensland. The creation of a single structure would establish consistency in practice across Queensland Magistrates Courts and improved uniformity across Australian jurisdictions. It would also increase the ability of the Chief Magistrate to establish consistent practices in different places.

7.41 It is evident from consultation that the current dispersed nature of the Magistrates Courts is confusing and causes difficulties for court participants, including defendants and registry staff. Importantly, adopting a single court structure would promote efficiency in the transfer of matters through the removal of the requirement to strike out a matter that has been incorrectly filed in the wrong Magistrates Court district.[24] Although there will still be requirements in the legislation about where to start a proceeding, having a single court structure will mean that proceedings can be more easily transferred to the place where it should have been started or (if appropriate) heard in a different place.

7.42 A number of Queensland Acts implicitly acknowledge this limitation and already override the current restrictions in the Justices Act, including the *Drugs Misuse Act 1986*[25] and the *Bail Act 1980*.[26]

7.43 The prescribed places (locations and districts) *where* a Magistrates Court can sit across Queensland will not change.[27] The current system will still be required even with a single Magistrates Court and is also integral to the proper functioning of many parts of the Queensland justice system (including the jury system and civil jurisdiction). A number of legislative schemes are dependent on the Magistrates Courts districts.[28]

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[23] See, for the establishment of a single District Court: *Justice and Other Legislation (Miscellaneous Provisions) Act (No. 2) 1997* (Qld) pt 10.

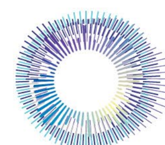
[24] See currently, *Justices Act 1886* (Qld) s 139.

[25] *Drugs Misuse Act 1986* (Qld) s 118(3A).

[26] *Bail Act 1980* (Qld) s 15A.

[27] See *Justices Act 1886* (Qld) s 22B; *Justice Regulation 2014* (Qld) pt 5, sch 1.

[28] For example, the districts form the basis of a number of subordinate legislative instruments. The *Evidence Regulation 2017* s 2A and the *Uniform Civil Procedure Rules 1999* pt 6 are contingent upon the Magistrates Courts districts. The District Court and Supreme Court districts are also based on the Magistrates Courts districts: see *District Court of Queensland Act 1967* (Qld) s 7; *Supreme Court of Queensland Act 1991* (Qld) s 57.



7.44 Establishing a single unified Magistrates Court structure will require amendments to legislation, including the *Magistrates Courts Act 1991*. These are discussed in more detail in Chapter 21.

7.45 This approach will also require consequential amendments to ensure the Queensland statute book is consistent in its references to a single Magistrates Court. These consequential amendments will require careful consideration; however, the difficulties are not unsurpassable. When the single District Court was established in Queensland in 1997, the amendments required were relatively simple but affected a wide range of legislation which referenced the District Courts.

7.46 To be clear, although these proposed changes will involve changes to the law in Queensland, for most purposes, the changes to achieve a single unified court structure will not be difficult for legal practitioners and other court users to understand. When this was implemented for the District Court, there was no consequent upheaval for the judiciary or the legal profession.

Retitling the Magistrates Courts and magistrates

7.47 I recommend that the title of the Magistrates Court be changed to the Local Court, and that Magistrates be renamed as Local Court judges.

Title of Judges

7.48 The tradition of the magistracy has developed significantly over the last two hundred years in Queensland, and Australia more broadly, through a process of 'judicialisation' involving multiple stages of complex and interlapping reforms.[29] The general professionalisation of the magistracy remains a constant across Australia.[30]

Historical context of the development of the Australian magistracy

7.49 The position of magistrate has a significant history which I will not reiterate extensively.

7.50 The position was inherited in Australia from the English common law tradition.[31] It is important for context to note the term 'magistrate' was at that time interchangeable with the term 'justice of the peace' in the *Justices of the Peace Act 1361* (UK). It is from this usage that the name of the Justices Act originates.

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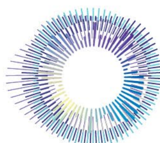
[29] This is also reflected in the separation from justices of the peace, who continue to play an important community-based justice role.

[30] John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond — Part I' (2000) 74 (August) *The Australian Law Journal* 509. (See also, generally on this topic, John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond — Part II' (2000) 74 (September) *The Australian Law Journal* 592).

[31] See Marilyn Bromberg and Michael Montalto, '"Say My Name, Say My Name": Changing the Title "Magistrate" to "Judge" in Australia' (2019) 29 *Journal of Judicial Administration* 45 for further information about the historic underpinnings of the term.



7.51 At the time that this tradition was inherited in Australia, magistrates and justices of the peace were appointed by the Governor unilaterally. Holders of these offices were unpaid, as the office was 'entirely honorary and largely confined to members of the country landowning class'.[32] The office itself was considered to confer prestige.[33]

7.52 At time of settlement, civil and military officers in Australia were appointed as magistrates by the Governor.[34] As was customary, these magistrates were primarily tasked with managing the function of the Australian convict workforce.

7.53 In the early development of the magistracy, magistrates did not need a specialised understanding of law to perform the functions of the role. Holders of the office were said to hold a 'smattering of legal knowledge'.[35]

7.54 At this time, magistrates performed a variety of administrative and extra-judicial functions, in addition to exercising limited jurisdiction over summary offences. For example, an 1810 document notes:

> The cases brought before … [magistrates] consist of breaches of the peace, larcenies of a petty nature, prisoners brought up for neglect of work, and complaints of a trivial nature. In these cases the Magistrates act in a very summary manner, and proceed without the form of indictment or information.[36]

7.55 However, the role, functions and responsibilities of magistrates quickly took on their own application within an Australian context.[37]

7.56 Prior to Queensland's separation from the colony of New South Wales in 1859, the appointment of police magistrates in New South Wales commenced in 1832.[38] Police magistrates were responsible for a wide range of non-judicial functions, including acting as electoral officers and registrars of birth, as well as performing functions related to customs, immigration and quarantine. The same year also saw the creation of the Courts of Petty Sessions in New South Wales.[39] These courts were constituted by two or more lay justices of the peace sitting together, with jurisdiction over minor criminal offences. By

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[32] BH McPherson, 'Early Development of the Queensland Magistracy', (Conference Paper, Conference of Magistrates, 4 June 1990) 2.

[33] David Neal, 'Law and Authority: The Magistracy in New South Wales 1788–1840', (1985) 3 *Law in Context* 45, 45–6.

[34] Note that this occurred in the colony of New South Wales, which at that time encompassed all of Queensland.

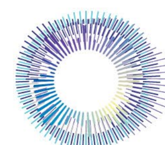
[35] McPherson (n 32) 2.

[36] Lowndes (n 30) 513 citing JW Smail, *Justices Act Annotated and Rules and Regulations NSW* (Butterworths, Sydney, 1966) 114.

[37] Lowndes (n 30) 511 ff.

[38] Ibid 513.

[39] *Offenders Punishment and Justices Summary Jurisdiction Act 1832* (3 Wm 4, c 3) s 16.



the time of Queensland's separation from New South Wales, a number of Courts of Petty Sessions had been established in what was to become the state of Queensland.[40]

7.57 As a result of increased difficulties managing the convict population, as well as challenges across the division of labour between honourary magistrates and justices of the peace, the first paid magistrates were created in 1825 in the colony of New South Wales (which included parts of Queensland). These paid magistrates were drawn from the ranks of the police and water police and were referred to formally as 'police magistrates'.[41] The system of police courts and police magistrates operated alongside the justices of the peace system.[42]

7.58 Police magistrates were appointed by the Governor of each respective state and allowed the Governor further control over the managing the population. As a result, police magistrates did not have judicial independence in any meaningful sense:

> The appointment of police magistrates constituted an item of government patronage and gave the governor a lever over the police magistrates that he did not have over the honoraries [honourary magistrates]. Some suggested … that the police magistrates were spies for the central government.[43]

7.59 Upon separation in 1859, Queensland adopted the New South Wales' laws in respect of the police magistracy tradition. These laws were revised and reformed under the Justices Act and subsequent amendments.

7.60 In 1909, the Justices Act was amended to give police magistrates the exclusive power to adjudicate at Courts of Petty Sessions, to the exclusion of honourary justices of the peace.[44] This meant that a police magistrate was able to constitute a court exclusively, whereas justices of the peace continued to be able to constitute a court only when two or more were present and the police magistrate was not available.

7.61 In 1941, another amendment to the Justices Acts changed the designation 'police magistrate' to 'stipendiary magistrate'.[45] Stipendiary magistrates were paid.

7.62 In 1964, the Justices Act was amended, with the merging of the Courts of Petty Sessions (criminal) and the Courts of Requests or Small Debts Courts (civil) to collectively

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[40] Queensland State Archives, 'Research Guide to Court Records at Queensland State Archives' (September 2022) (available at <https://www.publications.qld.gov.au/dataset/brief-guides-at-qsa/resource/98e44d9d-483f-4321-a187-20a985f52a17>).

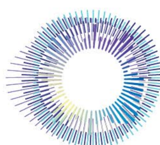
[41] Lowndes (n 30) 513 citing Walker, 'The New South Wales Police Force, 1862-1900', (November 1984) 15 *Journal of Australian Studies*, 25-38.

[42] See generally, Lowndes (n 30).

[43] Neal (n 33) 58 citing J McLaughlin, 'The Magistracy in New South Wales 1788-1850' (LLM Thesis, University of Sydney, 1973) 36.

[44] *Justices Act Amendment Act 1909* (Qld) s 2; Lowndes (n 30) 513–14.

[45] *Justices Acts Amendment Act 1941* (Qld) s 4; Lowndes (n 30) 513–14.



constitute the Magistrates Courts. These amendments gave the Magistrates Courts a civil and criminal jurisdiction.[46]

7.63 However, there was still no formal requirement for legal or other qualifications for magistrates in Queensland until 1971, when this was introduced for new appointments.[47]

7.64 Throughout the 1900s in Queensland, until 1991, stipendiary magistrates were public servants, and were considered to be a part of the executive branch of government. This became increasingly untenable as the judicial functions of magistrates were inhibited by the lack of separation from the executive.

7.65 Between 1977 to 1991, all Australian states enacted legislation to formally separate the magistracy from the public service. Tasmania was the first Australian jurisdiction to do so. Queensland was the last Australian state with the passage of the *Stipendiary Magistrates Act 1991*. Separating the magistracy from the public service was a key reform in protecting the judicial independence of magistrates.

7.66 I consider that renaming magistrates as judges would act as a 'final severing' of the magistracy from the executive branch, promoting the separation of powers as a foundation of democracy with strong rule of law.

Current role and expectations of the Queensland magistracy

7.67 There is a perception in some legal spheres that the matters that magistrates deal with on a daily basis are insignificant or inconsequential. I disagree with this. Magistrates Courts have a significant criminal and civil jurisdiction.

7.68 As I have noted elsewhere in this Report, within Queensland (as in other Australian jurisdictions), magistrates now hear the vast majority of criminal matters that appear before the courts. They also hear matters related to a number of areas, which I discuss below.

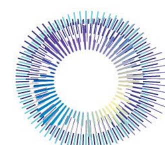
7.69 Almost all people who enter the Queensland criminal justice system will appear before a magistrate, in a Magistrates Court.

7.70 The role of a magistrate is now in many ways akin to that of judges in the Supreme and District Courts. Magistrates make judgements of fact *and* law that determine most criminal matters in Queensland, including a wide range of serious offences.

7.71 The complexity of the matters heard before a magistrate has also expanded drastically since the role was first established, and even within the last few decades alone. There is

[46] *Justices Act Amendment Act 1964* (Qld) s 14.

[47] Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, December 2008) 45.



significant breadth and depth to the matters that magistrates routinely hear and are expected to have the skillset to decide.

7.72 It is true that a magistrate does not oversee or direct a jury, as occurs in Queensland's Supreme and District Courts. The corollary of this is that, in hearing and deciding summary offences, magistrates make all determinations in fact and law, including penalties. A magistrate is held accountable for any errors of judgement that they may make through an appeals process.

7.73 Magistrates also have significant sentencing powers. The maximum sentence that can be imposed by a magistrate is generally three years' imprisonment (although a sentence of up to 4 years' imprisonment can be imposed by a Magistrates Court sitting as the Drug and Alcohol Court).

7.74 It is also true that part of the role of magistrates is to commit offences to the higher courts to be dealt with, and that this is an administrative (not judicial) function. However, although committals are administrative, they nonetheless require the magistrate to act judicially[48] and to hear the evidence and conduct the committal proceedings in a manner that is just and fair.[49]

7.75 As the Moynihan review pointed out, criminal justice legislation drafted in the 1800s bears little resemblance to contemporary criminal justice legislation:

> [During colonial society] [p]ublic drunkenness, fist fights, disputed mining claims and stealing stock were the typical business of magistrates. … In contrast, modern society is increasingly complex, technologically advanced and diverse. … As society has become more complex, so too has criminal behaviour. New offences have been, and continue to be, created to deal with drug crimes, international money laundering, fraud, terrorism, internet crime and child pornography.[50]

7.76 This trend has continued in recent years. The reforms that were brought in as a result of the Moynihan report, for example, substantially increased the jurisdiction of magistrates, including by expanding the jurisdiction of the Magistrates Courts to determine indictable offences in the *Criminal Code* and the *Drugs Misuse Act 1986*, shifting some criminal indictable matters from the District Court to the Magistrates Court, and by increasing the civil jurisdictional limit to $150,000.[51]

7.77 Magistrates are also not restricted to making decisions about criminal offences, even though that is the focus of this Review, and necessarily what I have focused on. Queensland does have specialist magistrates and a number of coroners covering

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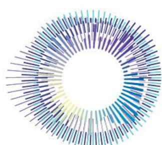
[48] *Purcell v Vernardos (No 2)* [1997] 1 Qd R 317, 320–21.

[49] *Grassby v The Queen* (1989) 168 CLR 1, 15 (Dawson J).

[50] Moynihan (n 47) 44.

[51] *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld).



different regions, but all magistrates are empowered to also hear Childrens Court matters,[52] decide coronial inquests,[53] operate as members of the Queensland Civil and Administrative Tribunal,[54] hear minor family court hearings,[55] and decide arrest and bail hearings. All these jurisdictions have different laws and procedures that magistrates must follow.

7.78 As the most recent Magistrates Courts' annual report notes:

> In addition to the founding *Justices Act 1886* and *Magistrates Courts Act 1921*, there are a number of other pieces of legislation which establish a variety of jurisdictions within the Magistrates Courts. Each of these Acts essentially limits the court to dealing with a particular kind of matter within a specialised court that uses a variant set of rules. Examples are the *Childrens Court Act 1992* which establishes the Childrens Court of Queensland jurisdiction and the *Industrial Relations Act 1999* which establishes the Industrial Magistrates Court jurisdiction.
>
> In these various jurisdictions, the Magistrates Courts are required to deal with an extensive number of different types of offences, claims, applications and appeals incorporated in over 300 different pieces of legislation from Federal, State and Local governments.[56]

7.79 The calibre of appointees to the Magistrates Court has also been professionalised since its establishment in Queensland, when originally no specialised expertise was demanded. Under current legislation, to qualify as a magistrate, a person must be:

> (a) a barrister or solicitor of the Supreme Court [of Queensland]; or
>
> (b) a barrister, solicitor, barrister and solicitor or legal practitioner of —
>
> (i) the Supreme Court of another State or a Territory; or
>
> (ii) the High Court;
>
> of at least 5 years standing.[57]

7.80 The contemporary process of application and formalisation of the appointment of a magistrate is governed by strict parameters under the *Magistrates Act 1991,* as well as the *Protocol for Judicial Appointments in Queensland*,[58] which establishes a merit-based

52 *Childrens Court Act 1992* (Qld) s 5(3).

53 *Coroners Act 2003* (Qld) s 82.

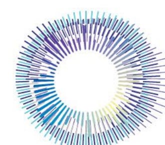
54 *Queensland Civil and Administrative Tribunal Act 2002* (Qld) s 171(2).

55 Queensland Courts, *About the Magistrates Court* (Web Page, 21 June 2022) <https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>.

56 Queensland Courts, *Magistrates Court of Queensland: Annual Report 2021-22* (October 2022) 22.

57 *Magistrates Act 1991* (Qld) s 4(1).

58 Department of Justice and Attorney-General (Qld), *Protocol for Judicial Appointments in Queensland*, located at Queensland Courts, *Judicial appointments* (Web Page, 4 April 2023) <https://www.courts.qld.gov.au/about/judicial-appointments>.



selection criteria based on the Australasian Institute of Judicial Administration's *Suggested Criteria for Judicial Appointments*.[59]

7.81 Once appointed, magistrates are subject to the same standards of judicial conduct as judges. They are expected to uphold these standards.[60]

7.82 As a result of these developments over time, I consider it is no longer sensible that magistrates should remain titularly distinct from the judges of higher courts. Simply put, magistrates are a critical and fundamental part of the judiciary. Their title should reflect the role that they play in the operation of the courts in exercise of judicial power.

7.83 The only interaction the vast majority of the public will ever have with the judicial system is through the Magistrates Courts. For the people coming to court, retitling magistrates as judges reinforces their role as part of the Queensland judiciary.

7.84 The proposed title change would serve to further symbolically separate the magistracy from the executive, and recognise its status as an integral part of the judiciary. This is the latest evolution of the profound shift in the judicial and public expectations and responsibilities of a magistrate since the role was established in Queensland.

7.85 I also consider that changing the title is likely to elevate the public understanding of the role of a magistrate. I heard during consultation that a significant number of defendants do not understand the current distinction between a magistrate and a judge. Although the legal profession has a strong understanding of this concept, this change will improve understanding for defendants and other court users.

7.86 The proposed change provides an opportunity to re-promote to the public the integral role that magistrates play as a part of the judiciary, the courts, and in society.

7.87 This change is supported by the Australian Judicial Officers Association (consisting of judges and magistrates), which has a policy of supporting a change from 'magistrate' to 'judge' in all Australian jurisdictions.[61]

Other considerations

7.88 Consultation identified some practical matters that would also need to be considered if the title of magistrates were to be changed to judge.

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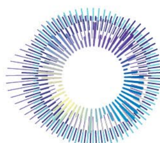
[59] The Australasian Institute of Judicial Administration Incorporated, *Suggested criteria for Judicial Appointments* (2015) (available at <https://aija.org.au/publications-introduction/guidelines/>).

[60] The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3rd ed, December 2022) 1. The introduction of the document states, 'The words "judge" and "judiciary" when used [in the guide to judicial conduct] include all judges and magistrates'.

[61] Australian Judicial Officers Association (formerly Judicial Conference of Australia), 'Northern Territory magistrates' change of title' (May 2015); Australian Judicial Officers Association, 'Compendium of Policies' (ver 2, July 2019) *Magistrates* (made July 2007, affirmed March 2008 and March 2013) 10.



Industrial Court of Queensland

7.89 First, there are some concerns about how changing the title of magistrate to judge would interact with the Industrial Court of Queensland, which has its own structure.[62] In that court, matters are often heard and determined by a Vice President or Deputy President, who are not referred to as judges although they are appointed on judicial terms. It is true that a change in title may have the result that those members of a 'superior court' would hear appeals from judges sitting in an 'inferior court'. However, the proposed change in title will not affect the role, jurisdiction, functions or entitlements of a person who is currently a magistrate and will not affect the matters heard before the Magistrates Court or the Industrial Court. Although this is a relevant consideration, I do not consider that it is best resolved by denying the magistracy a change in title.

Acting magistrates

7.90 Second, some stakeholders had concerns about the appointment of acting magistrates in the context of the proposed title change, expressing the opinion that this process should be changed if magistrates are given the title of Local Court judge.

7.91 Acting magistrates provide a necessary relief service when magistrates are on leave, enabling consistent service delivery across Queensland. Given the high quantity of matters that proceed through the Magistrates Courts annually, this is critical to ensuring that matters are heard.

7.92 During the 2021-22 financial period, there was a pool of 52 acting magistrates appointed (in comparison to 93 full time, appointed magistrates).[63] Acting magistrates are appointed for a fixed term and to a specific place, and act only when called upon by the Chief Magistrate.

7.93 Under the *Magistrates Act 1991*, there is a structured process for the appointment of acting magistrates, which requires that the Minister must consult with the Chief Magistrate before making a recommendation to the Governor in Council regarding a proposed appointment.[64] This process provides a system of checks and balances when a person is appointed. It is within the remit of the Chief Magistrate to determine who is appropriate to hold this position, in consultation with the Minister.

7.94 A person who is appointed as an acting magistrate is considered for all Acts to be a magistrate, and to have the powers and functions of a magistrate.[65] Magistrates, including

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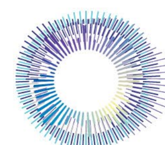
[62] The Industrial Court of Queensland is constituted by the President, Vice President or Deputy President sitting alone. The President of the Court is also the President of the Queensland Industrial Relations Commission. The Court hears appeals on errors of law and lack of jurisdiction against decisions of the Queensland Industrial Relations Commission, Industrial Registrar or Industrial Magistrates.

[63] Queensland Courts, *Magistrates Court of Queensland: Annual Report 2021-22* (October 2022) 15.

[64] *Magistrates Act 1991* (Qld) s 6(2).

[65] *Magistrates Act 1991* (Qld) s 6(8).



acting magistrates, are accountable through the public nature of their work. They must provide reasons for any decisions made, and decisions are subject to appeal through the higher courts. With limited exceptions, court hearings are open to the public, and, subject to certain statutory limitations can be reported in the news media. Any complaints about an acting magistrates' judicial conduct (as distinct from a judicial officer's decision on a matter before them) are managed through the Magistrates Complaint Policy.

7.95 I note that acting arrangements for judges also operate in the District and Supreme Courts.[66]

7.96 There was some concern among stakeholders about the current legislative basis for appointing acting magistrates, specifically that a clerk of the court can be appointed as an acting magistrate under section 6(2) of the *Magistrates Act 1991*. It was suggested that this should be amended to more closely reflect the power to appoint acting judges under section 6 of the *Supreme Court of Queensland Act 1991* or section 17 of the *District Court of Queensland Act 1967*.

7.97 I share these concerns. In my view, the ability to appoint a clerk of the court as an acting magistrate interferes with the important separation of powers between the executive and judicial branches of government. As the appointment of acting magistrates is outside the Review's terms of reference, I have not made any recommendations about this matter. However, if my recommendation to retitle magistrates as judges is accepted, there should also be consideration of the legislative process for appointing an acting magistrate, to determine if it should be amended in line with the processes under the District Court and Supreme Court Acts. In particular, the ability to appoint a clerk of the court as an acting magistrate should be discontinued. This would be an important part of severing the executive and the judiciary.

Judicial conduct

7.98 Finally, I note that some stakeholders raised concerns regarding the conduct of some magistrates, specifically in relation to magistrates who do not conduct themselves in court with the appropriate demeanour; magistrates who make decisions that are not in keeping with appellate decisions of higher courts; and magistrates whose decisions are consistently overturned on appeal. As noted in my Foreword, I accept these arguments do hold some weight, however I consider these concerns are not sufficient to recommend that the title of magistrate does not change.

7.99 The establishment of a Judicial Commission to have oversight of complaints about judicial officers would go a long way to address this issue.

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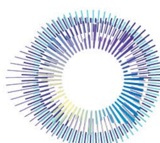
[66] *Supreme Court of Queensland Act 1991* (Qld) s 6; *District Court of Queensland Act 1967* (Qld) s 17.



Legislative amendments

7.100 If adopted, the change in title from magistrate to judge would result in consequential amendments to legislation. These consequential amendments are not substantial in nature. To be clear, the proposed legislative amendments would be primarily technical in nature, as there will be no change in the duties, entitlements and jurisdiction of Queensland magistrates.

7.101 However, a change in title would mean there should also be consideration of whether other related matters require review or change. One example is the legislative processes for removal of a magistrate from office, and whether those processes should also be amended for consistency with the processes for removing judges in the higher courts. This is a policy decision that will require specific consideration by the Queensland Government and is outside the remit of this Review. Other issues may also need to be identified and considered.

7.102 There may be some minor changes to Commonwealth and interstate legislation as a result of the proposed change in title, however, as above, because the title reflects a change of name only, these changes are also likely to be minor. I consider this an implementation matter, to be canvassed in consultation and correspondence with the Commonwealth and other states and territories.

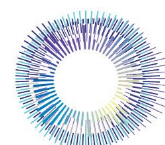
Title of Local Court

7.103 I consider that in addition to establishing a single, unified Magistrates Court structure, as well as in recognition of the significant changes I have recommended to modernise criminal procedure, the single Magistrates Court should be titled the Local Court.

7.104 In Queensland, there are approximately 130 operational Magistrates Courts across the state.[67] These courts sit in local communities. Changing the name to Local Court reflects the important role that the Magistrates Courts play in these communities, particularly in rural and remote communities.

7.105 There is significant symbolic value in making this name change, which I consider to be important. This is especially the case if the recommendation to change the title of magistrate is adopted. Renaming the court will provide a clear signal to the public that, consistently with the reforms proposed in this Report, the court and its procedures have been modernised and made contemporary.

[67] Queensland Courts, *About the Magistrates Court* (Web Page, 21 June 2022) <https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>.



7.106 As with the proposed title change for magistrates, the adoption of a new name for the Magistrates Court would result in consequential amendments to legislation. I also consider that these would be primarily administrative and are not substantial in nature.

7.107 I consider that if the title of magistrate is changed to Local Court judge, it is logical that the name of the Magistrates Court is also concurrently changed. The two changes, made together, will signify to the public and the legal community that the new criminal procedure legislation is the beginning of a new era in Queensland's courts.

Costs and benefits

7.108 In making these recommendations, I am required to have regard to the costs and benefits of each change. Any potential change of title to the Court or to magistrates has advantages and disadvantages. Here, on balance, the advantages of adopting this approach outweigh the disadvantages, including the anticipated financial costs incurred in the retitling.

7.109 There is no doubt that there will be costs associated with any proposed change to the titles of both the Court and magistrates. These will relate to things such as:

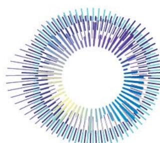
- The state-wide replacement of current court and magistrate signage within and around Queensland Magistrates Court.
- Queensland Courts website changes.
- Changes to internal business artifacts including court seals, registry stamps, and published material.

7.110 I have requested that the Department of Justice and Attorney-General (DJAG) provide an estimate of the total cost for these changes. I have been provided with the following costings information, noting that it is an estimate only and that it must be regarded as an approximation subject to timing and other assumptions:

> The Department of Justice and Attorney-General (DJAG) estimates the total costs for Court Services Queensland (CSQ) associated with retitling are between $4.34 - $4.98 million. The estimate is based on a brief preliminary analysis and may be subject to change upon further analysis and investigation. Costs are indicative only and do not include costs more broadly within DJAG such as agency websites or artefacts outside CSQ that may require review and any identified updates.[68]

7.111 These are the estimated costs relating to Court Services Queensland only. There may also be broader implementation costs for DJAG.

[68] Information provided to Mr Michael Shanahan AM from Mr David Mackie, Director General, Department of Justice and Attorney-General on 7 December 2022.



7.112 Of the estimated costs associated with the proposal, the majority relate to the proposal to retitle the Courts. Although there are some costs incurred by the proposed change of magistrate to judge, these are comparatively minor.

7.113 I consider, however, if the title of magistrate is changed to judge, then it is logical to change the name of the courts – although I note, as in New South Wales, that the two proposals do not have to be mutual.

7.114 As a part of the costs and benefits, I note there is no proposed change to the salaries and entitlements of magistrates, even if retitled as judges, and therefore the proposal to change their title would incur minimal cost. In Queensland, legislation sets out the way judicial salaries are calculated.[69] There is a difference in the salary that magistrates and judges receive under this legislation. However, I do not propose to make any recommendations regarding changes to the wages of magistrates. The feedback I have heard from magistrates and professional legal associations is that they are generally in favour of the title change and are not expecting a consequent change to their salaries and entitlements.

7.115 In their submission to the Review, the Magistrates Association of Queensland reaffirmed the position of Queensland magistrates that they would support the proposed retitling without any change in entitlements.[70]

7.116 The entitlements and benefits that magistrates receive will remain unchanged. For example, the *Judges (Pension, Long Leave) Act 1957* defines 'Judge' to mean a Supreme Court Judge or a District Court Judge. Magistrates do not receive a pension. Instead, they are part of a separate superannuation scheme. This will not change, regardless of whether a change of title is adopted. There is also no proposed change to the security of tenure for magistrates or acting magistrates.[71]

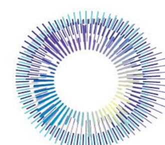
7.117 There will not be any other change to the allowances received by magistrates.

7.118 This was the approach taken when Federal Magistrates were given the title of Federal Circuit Court Judge with no change to their entitlements. Federal Circuit Court Judges continue to be exempt from the judges' pension scheme, and instead belong to a

[69] See generally, *Judicial Remuneration Act 2007* (Qld); Queensland Courts, *Judicial Salaries* (Web Page, 13 February 2023) <https://www.courts.qld.gov.au/about/publications/judicial-salaries>.

[70] Magistrates Association of Queensland, Submission to the Criminal Procedure Review—Magistrates Courts, 24 June 2022 (available at <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/responses>).

[71] I note that as acting magistrates are appointed for a fixed term, they do not have security of tenure. There is no proposal to change this current arrangement and acting judges in the District Courts follow a similar process.



superannuation scheme.[72] This should provide confidence that the same approach can be adopted in Queensland.

7.119 However, I do note that there will be a cost to the Queensland Government in providing resources to consider other possible implications of the proposed title change, such as formally considering if the process for removal of magistrates requires any amendments.

7.120 There are also many benefits associated with the retitling of the Magistrates Courts and magistrates, as I have outlined above. These include increasing accessibility and understanding for the community, and fairly reflecting the important role magistrates play in our legal system and our society more broadly. These cannot be quantified, which complicates any cost-benefit analysis. However, I consider that these are important benefits with valuable long-term impacts and that, on balance, these continuing benefits will outweigh the initial costs outlay associated with making the changes.

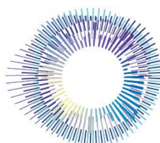
7.121 Finally, in my view, there is significant benefit to be gained from making these changes at the same time as the introduction of new criminal procedures for the Magistrates Courts. Practically, this approach makes sense. Further, renaming the courts and the magistrates at this time would bolster the delivery of a contemporary and effective criminal court structure for Queensland.

Human rights considerations

7.122 The proposed change of title to Local Court judge and Local Court of Queensland does not limit any of the protected human rights under the *Human Rights Act 2019*. These changes are symbolic in nature, and do not affect the operation or jurisdiction of magistrates and the Magistrates Court.

7.123 The proposal to establish a unified, single Magistrates Court is protective of human rights, including the rights of a person in criminal proceedings, as the current system results in undue delays when transferring matters between Magistrates Courts. Any increase in the court's capacity to efficiently deal with a matter will be protective of the right established in section 32(2)(a) of the *Human Rights Act 2019*, which protects an individual's right to be tried without unreasonable delay.

[72] Commonwealth Department of Finance, *Judges' Pension Scheme* (Web Page, 8 March 2023) <https://www.finance.gov.au/government/superannuation/arrangements-federal-judges-governors-general-and-federal-circuit-court-judges/judges-pensions-scheme>.

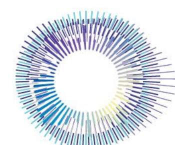


Recommendations

R7.1 The current Magistrates Courts should be combined into a single Magistrates Court of Queensland. However, the districts and places currently appointed for the holding of Magistrates Courts must be preserved.

R7.2 Each Magistrates Court should be retitled as a Local Court (or, if Recommendation 7.1 is accepted, the Magistrates Court of Queensland should be retitled as the Local Court of Queensland).

R7.3 Magistrates should be retitled as Local Court judges. However, for clarity, this will not affect matters relating to magistrates' wages, superannuation, entitlements or allowances.



CRIMINAL PROCEDURE REVIEW
MAGISTRATES COURTS

PART C: THE NEW CRIMINAL PROCEDURE LEGISLATION FOR THE MAGISTRATES COURTS

CHAPTER 8: NEW CRIMINAL PROCEDURES FOR THE MAGISTRATES COURTS

Introduction

8.1 As the previous chapters have set out, there is a strong case for reform of the criminal procedures in the Magistrates Courts. The remainder of this Report will consider what those reforms should be, what current procedures should be maintained and how the reforms will be achieved.

8.2 Implementing reform in the summary criminal jurisdiction is particularly complex given the large number of stakeholders who will be impacted by legislative changes, all of whom will need to update their own practices for participating in Magistrates Courts proceedings. At any one time in Queensland, there are thousands of cases before the Magistrates Courts, which must be able to continue uninterrupted. Defendants have the right to be tried without unreasonable delay;[1] additionally witnesses, prosecutors, victims and the general community are entitled to expect any changes to procedure will not cause disadvantage or significant delays.

8.3 This chapter provides an overview of the new model for criminal procedure legislation in the Magistrates Courts.

Repealing the *Justices Act 1886*

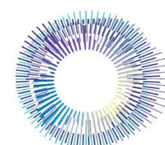
8.4 The Justices Act was first introduced in 1886. Since that time, the language and style has remained relatively unchanged, resulting in archaic legislation that is not fit for a modern Queensland court. The procedure laws used in Queensland's busiest courts should be easily accessible and understood by all court users, regardless of whether they have a legal education. Many people who come to the Magistrates Courts do not have a lawyer, so it is critical to have procedural laws that are clear and direct.

8.5 The limitations of the Justices Act and the effects of those on Magistrates Courts highlight the need for contemporary and effective criminal procedure legislation. Accordingly, I recommend the Justices Act be repealed.

8.6 Repealing the Justices Act will also automatically repeal the *Justices Regulation 2014* and all approved forms under the Justices Act.[2] As part of the drafting and implementation

[1] *Human Rights Act 2019* (Qld) s 32(2)(c).

[2] Some approved forms are available under the *Justices Act 1886* heading at: Queensland Courts, *Forms* (Web Page, 12 October 2022) <https://www.courts.qld.gov.au/about/forms>.



process, these instruments will need to be recreated under the new criminal procedure legislation, as appropriate.

New criminal procedure legislation

8.7 I recommend the Justices Act be replaced with new contemporary criminal procedure legislation. The draft legislation should be called the Criminal Procedure (Magistrates Courts) Bill.[3] The Bill should be drafted in accordance with the drafting instructions attached to this Report, at Appendix C.

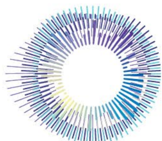
8.8 The new criminal procedure legislation must be drafted in a way that is easy for court users to follow and understand, so self-represented defendants can access the procedures and know what is required of them. This means the language must be plain and direct, and it must follow a chronological order of proceedings. For example, the procedures for starting a criminal proceeding should be at the beginning of the legislation, and the procedures for appealing a decision should be towards the end.

8.9 Each of the subsequent chapters in this Report considers a different topic and makes recommendations for what the new legislation should contain as far as that topic is concerned. The chapters cover the following topics:

- **Objects and guiding principles** of the new legislation
- **Technology** and the Magistrates Courts
- **Types of charges** in the Magistrates Courts
- **Starting proceedings**
- **Private prosecutions**
- **Disclosure**, case conferencing and case management
- **In-court diversion**
- **Hearings, pleas** and dealing with matters in a party's absence
- **Committal** proceedings
- **Costs and enforcement**
- Other general matters, including **appeals**.

8.10 As explained earlier, this is a Summary Report. Each chapter generally summarises the current law and consultation feedback received during the Review, considers what some other jurisdictions are doing and ends with recommendations for the new model in

[3] Or otherwise, the *Criminal Procedure (Local Court) Bill* if the name of the Magistrates Courts is changed and a single court structure is adopted.



Queensland. The recommendations have been translated into drafting instructions, which are available in full at Appendix C.

8.11 If accepted, the drafting instructions will be provided to the Office of the Queensland Parliamentary Counsel (OQPC), who draft the new legislation in accordance with the instructions.

8.12 As a result of the new criminal procedure legislation, there will also need to be consequential amendments made to many other Acts. For example, the term '*Justices Act 1886'* occurs in 207 Acts and 8 pieces of subordinate legislation in Queensland.[4] If the Justices Act is repealed, all 207 Acts that mention the Justices Act must be amended to refer to the new criminal procedure legislation instead.

8.13 Most of the consequential amendments will be minor word substitution, as outdated terminology is replaced with contemporary terms. For the avoidance of doubt, I will not be removing terminology that is being used in a context other than the summary jurisdiction. For example, the terms 'complaint' and 'complainant' are used across many Acts, but not only in reference to the process of starting criminal proceedings. Any irrelevant occurrences will not be changed as part of the consequential amendments.

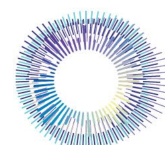
Key changes

8.14 The new criminal procedure legislation aims to achieve a balance between maintaining what is working well in the current system and streamlining procedures to ensure cases in the Magistrates Courts are finalised as efficiently as possible.

8.15 If the new legislation is implemented, court users and legal practitioners who have worked in the Magistrates Courts jurisdiction will notice the following **significant changes** to practice and procedure:

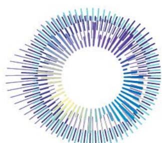
- There will be a set of **guiding principles** to be followed by the court and participants.
- Anything that can be done under the new Act, can be done **electronically** and barriers to technological advancement will be removed. There will be no requirement for physical attendance at courts to file documents or sign paperwork. This is subject to other laws that already exist, which may still require physical processes.
- Complaints and summons are being replaced with a new way of **starting proceedings**. Defendants charged with an offence will now receive a Court Attendance Notice or a notice to appear. The notice to appear currently exists but

[4] Results are current as at 26 April 2023 and are subject to change as legislation is amended.



can only be issued by QPS, and that process will not be changing under these amendments. All prosecutors who would ordinarily use a complaint and summons will now issue a Court Attendance Notice.

- **Private prosecutions** (any charge brought by a member of the public in a private capacity) cannot proceed until authorised by a magistrate. A person must make an application to the Magistrates Court for authorisation to start a private prosecution. If the application is granted, then the person becomes an 'authorised person' and may issue a Court Attendance Notice to the defendant. Once authorisation is given by the court, the private prosecution will proceed in the same way as any other criminal proceeding.
- The laws about when indictable offences in the Criminal Code may or may not be **dealt with summarily** are relocated, revised and updated, including to provide more clarity around the procedure for making an election and the circumstances in which the court must abstain from dealing with a matter.
- **Disclosure** obligations on prosecuting agencies are generally unchanged. However, they have been clarified and made consistent with current requirements. The court has greater powers to strike out certain charges where disclosure obligations are not met. Limited disclosure obligations will apply to some defendants.
- Parties must meaningfully participate in **case management** and **case conferencing**, to ensure early resolution of matters where possible and reduce delay. Cases will follow a structured path, with obligations to progress criminal matters in a timely way.
- Clear options for **in-court diversion**. This includes clearer processes for diverting a matter to Adult Restorative Justice Conferencing, and the creation of a new Summary Offences Diversion Program which would allow a defendant to fulfil certain conditions tailored to the circumstances and the court to order the dismissal of the charge (without conviction or sentence).
- Clearer laws for **entering pleas** and **conducting summary hearings** in the Magistrates Courts. The courts will also have clearer, more efficient and appropriate processes for when one (or both) of the parties do not attend court, allowing the matter to **proceed in their absence** in some cases.
- Streamlining of the **registry committals** process and providing for registry committals for self-represented defendants in appropriate circumstances.



- Clearer laws about procedures for **court committals**, including to streamline the process for the attendance and cross examination of witnesses.
- The rules for applying for **costs** are clarified and simplified, including so that the same test applies to all parties, with a recommendation that the scale of costs is updated.

Next steps

8.16 If my recommendations are accepted by government, the drafting process will be a significant undertaking and must not be underestimated, due to the complexity of the summary jurisdiction.

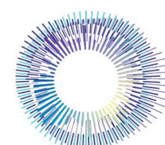
8.17 Stakeholder consultation and feedback will be critical in this stage, as it has been during this Review, to ensure the new legislation meets the needs of all court users. To assist with this, the drafting process should make allowances for consultation drafts of the new legislation being shared for stakeholder feedback.

8.18 This Report is the first step in the legislative reform process, and there is much more work to be done to ensure contemporary and effective criminal procedures are embedded within Queensland's Magistrates Courts.

Recommendations

R8.1 The *Justices Act 1886* (Qld) should be repealed.

R8.2 New legislation for criminal procedures in the Magistrates Courts, called the Criminal Procedure (Magistrates Courts) Bill, should be drafted and implemented in Queensland, in accordance with the drafting instructions annexed to this Report.



CHAPTER 9: OBJECTS AND GUIDING PRINCIPLES OF THE NEW CRIMINAL PROCEDURE LEGISLATION

Introduction

9.1. The new criminal procedure legislation provides the opportunity to set the stage for modern court proceedings through the inclusion of objects and guiding principles, which establish what the legislation will do and how people must act when applying the legislation.

9.2. In Chapter 6, I set out the internal guiding principles that informed this Review. As discussed in that chapter, the internal guiding principles are separate to the proposed objects and guiding principles for the legislation, although the two are underpinned by similar ideals.

9.3. The objects and guiding principles will signpost the intention of the new legislation, which will begin a new era in Queensland's Magistrates Courts criminal procedures.

The current position

9.4. The current Justices Act does not contain either objects or guiding principles. The preliminary sections of the Act contain only definitions, a short title, and a short note.[1]

9.5. Contemporary legislation in Queensland, including pivotal laws that set out important parts of the Queensland legal system, contains objects, guiding principles, or both. Some legislation contains other equivalent provisions, such as purposes of an Act.

9.6. For example, the *Youth Justice Act 1992* includes a list of the Act's principal objectives, as well as a set of principles that underlie the operation of that Act.[2]

9.7. Another example is the *Mental Health Act 2016*, which contains both an objects section and principles for the administration of the legislation. The Act specifically states that a person must have regard to these principles in performing a function or exercising a power under the Act.[3]

9.8. Other examples of guiding principles in legislation were included in our Consultation Paper.[4]

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[1] *Justices Act 1886* (Qld) pt 1.

[2] *Youth Justice Act 1992* (Qld) ss 2, 3, sch 1.

[3] *Mental Health Act 2016* (Qld) s 3, pt 2.

[4] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) [3.4]–[3.8].

Consultation

9.9. In the Consultation Paper, I asked whether the new legislation should include guiding principles. A number of respondents provided input on this matter. Some suggested principles included:

- Procedural fairness for all court users.
- Efficiency in dealing with matters.
- A focus on simplifying court procedures for court users.
- Engagement with local communities where possible.
- Recognition of the diversity of Aboriginal and Torres Strait Islander peoples, and a commitment to cultural appropriateness.[5]

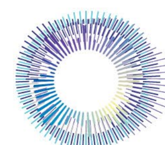
9.10. Respondents were overwhelmingly in favour of the inclusion of guiding principles.[6]

9.11. There was considerable overlap between many of the suggested themes that respondents submitted should be either explicitly acknowledged in the guiding principles or should inform their development. In addition to general support for the types of principles suggested in the Consultation Paper, these themes included:

- Increased access to justice for all participants, with a particular focus on participants from disadvantaged or over-represented communities in the criminal justice system.
- Consideration and facilitation of reasonable adjustments where required, for defendants, victims and witnesses.
- Consideration of cultural appropriateness and respect, particularly for Aboriginal and Torres Strait Islander peoples.
- Increased efficiency in all processes, including the finalisation of matters as soon as practicable without infringement of the right to a fair trial or any other rights of the defendant or other parties.
- A commitment to treating all court users with dignity and respect.
- Enhancing and promoting transparency and understanding for all court users, and a commitment to maintaining fairness throughout all processes.

[5] Ibid [3.8].

[6] One submission did not believe a guiding principles section was necessary, however agreed that the proposed guiding principles canvassed in the Consultation Paper would be sufficient.

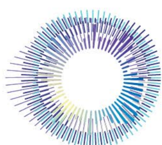


- A commitment to using technology, where appropriate, to facilitate the more efficient transfer and finalisation of matters in a way that does not disadvantage court users, particularly in rural and remote areas.

9.12. Specific feedback was also sought on what a 'contemporary and effective' criminal justice system looks like. Respondents submitted that their vision of a contemporary and effective criminal justice system was one that:

- Is underpinned by clear and understandable legislation.
- Guides users through the criminal justice system through access to information about the courts and court procedures, to enable participants to understand what is happening and to facilitate their participation to the greatest possible extent.
- Actively prioritises the efficient resolution of matters, including minimising the impact to court users, through streamlined court processes that avoid unnecessary adjournments and appearances.
- Accommodates the needs of participants who are vulnerable or have disadvantages.
- Is up-to-date with technology, and aligns with community expectations.
- Facilitates the use of diversion to avoid criminalising people, particularly for low-level offending, where it is not within the public interest to do so.
- Promotes the human rights of all courts users at all times.
- Seeks to address the needs and safety of victims, including:
    - by enabling greater participation in the court process
    - minimising the impact of proceedings, including earlier resolution of matters where possible
    - facilitating engagement in alternative resolution options such as mediation where appropriate and desired by the victim.

9.13. Although respondents provided a range of specific answers to what values should be upheld and maintained through the objects and guiding principles, it is apparent from the strong response that all stakeholders hold a vision of the Queensland Magistrates Courts as a court that is fair, open, effective, timely, and accessible to all participants. It should be a court that administers justice according to law and does not maintain or perpetuate inequality.



The new model

9.14. I recommend the new criminal procedure legislation should include both objects and guiding principles. The concepts included in these objects and principles are based on the feedback I heard from stakeholders in this Review, specifically in relation to these provisions and also more generally in relation to the themes and issues that are important to the creation of contemporary and effective criminal procedure.

Objects

9.15. An objects provision is usually located at the beginning of a piece of legislation. It 'outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity'.[7]

9.16. An objects provision has multiple purposes, including:

- Explicitly setting out the purposes and aims of the legislation.
- Providing clarity to guide the interpretation of the legislation for future reference.
- Signalling the values that have informed the legislation and will be served through its enactment.[8]

9.17. Objects can be used as an interpretive aid if there is any perceived uncertainty or ambiguity, in court and by those applying a law in another setting. The *Acts Interpretation Act 1954* establishes that when interpreting a provision of an Act, 'the interpretation that will best achieve the purpose of an Act is to be preferred to any other interpretation'.[9] The meaning or purpose of an Act and its provisions can be ascertained in different ways, including through the use of extrinsic materials,[10] however an objects provision in an Act provides further clarity if there is a question about interpretation.

9.18. To be clear, objects provisions are not intended to perform substantive legal work. It is intended that the body of the Act will be written in a way that is clear and easily understood in and of itself, and a reader should not have to refer to the objects provision to understand

[7] Australian Law Reform Commission, *For your Information: Australian Privacy Law and Practice* (ALRC Report No 108, 2008) [5.90].

[8] See generally, as to objects provisions in Acts, Australian Law Reform Commission, *For your Information: Australian Privacy Law and Practice* (ALRC Report No 108, 2008) [5.90]–[5.130]. See also generally: New Zealand Legislation Design and Advisory Committee, 'Designing purpose provisions and statements of principle', *Legislation Guidelines: 2021 edition* (Web Page, 30 June 2022) <http://www.ldac.org.nz/guidelines/supplementary-materials/designing-purpose-provisions-and-statements-of-principle/>; Western Australia Parliamentary Counsel's Office (2011), 'How to Read Legislation, a beginner's guide' (May 2011) <https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/howtoreadlegislation.pdf/$FILE/How%20to%20read%20legislation.pdf>. 15-16, 20.

[9] *Acts Interpretation Act 1954* (Qld) s 14A(1).

[10] *Acts Interpretation Act 1954* (Qld) s 14B. Extrinsic material includes things like a report from a commission, inquiry or parliamentary committee, explanatory material about the Bill containing the provision, and the speech made to parliament when the Bill was introduced: s 14B(3).

the legislation. However, if there is any uncertainty, an objects provision should provide greater clarity in understanding an Act's overall intention and purpose.

9.19. The objects of an Act have an effect on the powers and duties created by that Act. For this reason, an objects provision should not be overly descriptive in setting out the policy or symbolic intent of the legislation. It is important to understand its significance in relation to the rest of the document, rather than intending for the objects to be read in isolation.

9.20. I recommend that the new criminal procedure legislation contains the following objects at the start of the Act:

(1) The object of the Act is to set out a contemporary and effective criminal procedure framework for the Magistrates Courts that:

(a) simplifies court procedures and encourages better understanding for all court users;

(b) enables matters to be dealt with in a way that is accessible, fair, just, consistent and timely; and

(c) facilitates and improves the use of technology.

Additional objects

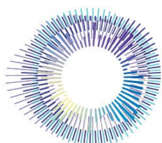
9.21. Where appropriate, I have also recommended specific objects for some particular parts of the new criminal procedure legislation that are more specialised or have been informed by other considerations.

9.22. For example, in Chapter 15, which sets out a new proposed framework for in-court diversion, I have recommended that the new legislation contain specific, additional objects for that framework.

9.23. This is to establish that there is a specific intent underpinning that part of the new law, which adds to the proposed general objects applying to the whole Act. To be clear, the overall objects of the criminal procedure law would still apply even if there were also specific objects for a particular part.

Guiding principles

9.24. Guiding principles are a more detailed set of values that generally sit and operate underneath the objects of an Act. The intention of the guiding principles is to set out how the new proposed criminal procedure legislation and those who are applying it will achieve the objects of the new Act. The principles provide guidance for the administration of the Act, as well as making decisions and exercising powers under the Act.

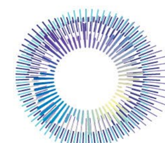


9.25. I recommend that the new criminal procedure legislation contain guiding principles at the start of the Act, following the objects, consisting of the following:

> *(1) The Court and every participant in a criminal matter act in a way that applies and promotes the objects of the Act.*
>
> *(2) In criminal proceedings, there should be a focus on court users and steps should be taken to ensure court users understand procedures and outcomes.*
>
> *(3) The Court and every participant treat all court users with respect and dignity, and in a way that promotes human rights.*
>
> *(4) In criminal proceedings, the Court and every participant act in a way that promotes:*
>
> > *(a) a defendant's right to a fair trial according to law*
> >
> > *(b) the interests and safety of victims and witnesses*
> >
> > *(c) the needs of individual court users and makes reasonable adjustments to meet those needs.*
>
> *(5) The Court and its procedures recognise the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples in all stages of criminal proceedings.*
>
> *(6) In criminal proceedings, the Court and every participant have an obligation to move matters forward, including by:*
>
> > *(a) preparing, administering and conducting matters in a way that is purposeful and timely*
> >
> > *(b) genuinely engaging in case conferencing and case management procedures*
> >
> > *(c) promoting the early resolution of matters, including through the use of diversion in appropriate circumstances*
> >
> > *(d) using technology when appropriate and available.*

9.26. To be clear, the term 'participant' is used in the guiding principles in the broadest possible way. This term is intended to encompass all people who engage in the criminal justice system through the Magistrates Courts. This includes (but is not limited to) court users such as defendants, witnesses and victims, legal practitioners, registry staff, and judicial officers including magistrates. It is the responsibility of all participants in the system to uphold these principles and apply them when fulfilling their obligations towards all parties in the Courts.

9.27. Like the objects of the new legislation, the guiding principles will also assist in the interpretation of the legislation, including by judicial officers and other professional users of the court who are charged with giving effect to the law. The objects and guiding principles



will not restrict or impact upon a magistrate's judicial independence. Instead, they will simply provide a magistrate with guidance about how to exercise their judicial independence, in keeping with their other legislative obligations.

Underpinning themes

9.28. I have proposed a set of objects and guiding principles that are based on the visions and values articulated by stakeholders during consultation.

9.29. Both the proposed objects and guiding principles are underpinned by a shared set of values, some of which are briefly outlined below. In many ways, these values align with my internal guiding principles.

9.30. These ideas are not new concepts in the goals and expectations of the criminal justice system. They are based on existing policies, practices, laws, duties and obligations, including fundamental legal principles and ideals and international law standards such as human rights.

9.31. For example, the courts' obligation to inform the defendant about proper process and their rights was highlighted in a recent District Court case:

> [I]t is … appropriate to observe that at no stage in the proceeding did it appear that the Magistrate addressed the appellant in any substantial way about matters of rights and procedure. … [T]he need to provide such assistance to a litigant in person goes beyond matters of convenience. In some cases, the failure to apprise a defendant in person of at least any fundamental procedure or right that may be advantageous to their case may result in an unfair trial and a miscarriage of justice. It may be that the need for such advice is even more critical where… the litigant in person does not speak English as a first language. Advising a defendant of matters of rights and procedure need not be onerous. A template from which such advice might be adapted is easily found as part of the *Supreme and District Courts Criminal Directions Benchbook* and there… [is] no reason why that could not form part of the introductory remarks at any summary trial involving a litigant in person.
>
> …
>
> [T]here was more that could have been done, and done easily, to ensure the appellant had the best opportunity to be heard. A little time could have been spent explaining to the appellant the elements of the alleged offence, process of the trial, the expected order of events, how to raise an objection to evidence, the importance of allowing witnesses the opportunity to comment upon disputed issues of fact, and other matters.[11] (notes omitted; emphasis in original)

9.32. As the above quote indicates, these concerns are of particular importance when dealing with a self-represented defendant. This, and a range of other relevant considerations, are outlined in the Supreme Court of Queensland's Equal Treatment Benchbook. This

[11] *Paixao v Commissioner of Police* [2022] QDC 193, [10], [36] (Cash J).

benchbook is intended to assist judicial officers in discharging their responsibilities and obligations to treat all people fairly and equally.[12]

Consistency, transparency and fairness

9.33. Fairness in legal proceedings is a foundational common law concept.[13] The *Human Rights Act 2019* protects the rights to a fair hearing for any person charged with an offence.[14] What constitutes fairness in legal proceedings depends on the facts of the case and requires weighing a number of public interest factors, including the rights of the accused and the victim.

9.34. However, in the criminal law context, an initial requirement for fairness is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system can be said to be operating in a way that is predictable to the defendant.

9.35. The criminal justice system must operate in a way that is consistent but flexible—this means it must be equipped to respond to the facts of a matter and allow freedom for judicial officers to exercise their independence and judgement when making a determination, whilst also being underpinned by a transparent framework.

9.36. The promotion of consistency is not to say that, for example, two defendants who have been prosecuted for an offence should necessarily receive the same sentence when the facts of both cases are materially different. It is part of a magistrates' judicial independence to examine the facts of a case and make a determination informed by the information available to them.

9.37. Procedural consistency does mean, however, that defendants should not be treated significantly differently across the criminal justice system as a result of factors such as the place in which their matter is being heard. A number of recommendations in this Review are aimed at providing legislative clarity and consistency. For example, the new proposed case conferencing and disclosure requirements have been drafted with the aim of increasing consistency across the state and providing clarity around how matters progress.[15]

9.38. A principle of transparency also means that any person should reasonably be able to read the relevant legislation and understand, in a general sense, the procedures which

[12] Supreme Court of Queensland, *Equal Treatment Benchbook* (Supreme Court of Queensland Library, 2nd ed, 2016) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf>.

[13] The right to a fair trial is a common law concept and is also one of the minimum guarantees of the International Covenant on Civil and Political Rights: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 14.

[14] *Human Rights Act 2019* (Qld) s 31.

[15] See Chapter 14 for further detail.

determine the course of a matter through the courts. That is to say, criminal procedures should be broadly able to be known by the community.[16]

Accessibility and focus on court users

9.39. Accessibility is a cornerstone of the criminal justice system, which enhances both fairness and consistency. Access to justice can take many forms.

9.40. It may sometimes be argued there are ways in which the court can conduct itself to increase accessibility for its participants that, on their face, seem unequal. The distinction between equity and equality is important here.[17] Simply, equality means that each individual or group of people is given the same rights, resources or opportunities. Equality is an incredibly important concept, however a system that focuses on equality only can result in unfair outcomes, particularly in relation to historically marginalised and vulnerable communities, or individuals who have disadvantages such as disabilities.

9.41. Equity is a more complex concept that generally refers to recognising the different circumstances in each person's case and providing them with the resources and opportunities needed to ensure that they are on a 'level playing field'. In the context of the courts, ensuring equity can mean providing different treatment to different people, to ensure that all people are treated as fairly as possible.

9.42. As the Judicial Commission of New South Wales notes:

> Equality before the law is sometimes misunderstood. It does not necessarily mean "same treatment". As McHugh J succinctly explained: 'discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different.'[18]

9.43. For example, if a defendant has a barrier such as difficulty understanding legal proceedings due to a disability or speaking English as an additional language, it is not an additional concession on behalf of the court to accommodate these needs. Being able to understand proceedings is a baseline expectation for the courts, and it does not give the defendant an unfair advantage. On the contrary, to fail to do so would be fundamentally unjust, and further exacerbate any existing disadvantages.

9.44. I have considered the Magistrates Court's commitment to accessibility throughout this Report, including the making of reasonable adjustments in Chapter 19.

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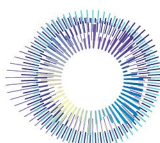
[16] Under the international law concept of the rule of law, laws should be 'publicly known, consistently enforced, and even-handedly applied': Sandra Day O'Connor, 'Vindicating the Rule of Law: The Role of the Judiciary' (2003) 2 *Chinese Journal of International Law* 1, 1.

[17] See generally Martha Minow; 'Equality vs. Equity' (2021) 1 *American Journal of Law and Equality* 167 for a comprehensive consideration of this debate.

[18] Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2022) [1.1] citing *Waters v Public Transport Corporation* (1991) 173 CLR 349, 402 (available at: <https://www.judcom.nsw.gov.au/publications/benchbks/equality/section01.html>).



9.45. The proposed objects and guiding principles emphasise the role of the court user in proceedings. The criminal legal system is a system with significant power. It is important that the courts strive to make court processes as clear as possible, and work to make courts as navigable as possible for the users who are most impacted by it.

9.46. This also includes consideration of cultural safety and the rights of First Nations peoples. The Magistrates Courts should deliver culturally appropriate court processes that respect and acknowledge these cultures.

9.47. The unique cultural rights of Aboriginal peoples and Torres Strait Islanders peoples are enshrined in Queensland's *Human Rights Act 2019.*[19] This guiding principle also aligns with a number of current court commitments, most notably the Magistrate Courts' Stretch Reconciliation Action Plan (RAP), which demonstrates the ongoing commitment of the Magistrates Courts to reconciliation with First Nations peoples.[20]

9.48. There may be concerns about how some of the proposals in this Review that are intended to provide an increased focus on court users, such as options for in-court diversion, are balanced against predictability and consistency. For example, many of the proposals about in-court diversion are fundamentally underpinned by a magistrate's discretion.

9.49. The framework established in this Review aims to ensure that courts and magistrates are empowered to be flexible, whilst establishing clear rules that do not take away from judicial independence.

9.50. Consideration of court users also includes consideration and accommodation of victims, which I have addressed throughout this Review.

Efficiency and timeliness

9.51. Throughout consultation, I heard strongly from stakeholders that the new criminal procedure legislation should prioritise the efficiency of matters.

9.52. One of the rights protected under the Queensland *Human Rights Act 2019* is the right to have a criminal trial heard without delay.[21]

9.53. The number of matters heard in the Magistrates Courts is staggering and is likely to increase with any population growth in the state or changes in legislation.[22]

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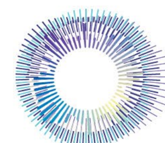
[19] *Human Rights Act 2019* (Qld) s 28.

[20] Magistrates Court of Queensland, *Stretch Reconciliation Action Plan April 2022 – April 2025* (available at: <https://www.publications.qld.gov.au/dataset/mcq-reconciliation-action-plan/resource/f632ba19-6422-4b0f-bad7-9712b43441af?inner_span=True>).

[21] *Human Rights Act 2019* (Qld) s 32(2)(c).

[22] In the 2021-22 financial year, 359,081 charges were lodged in the Queensland Magistrates Courts. See Chapter 2 for further detail about the workload of the Magistrates Courts.



9.54. Participation in the criminal justice system, as a defendant, victim or witness, is highly disruptive to an individual's life, and it is incumbent upon the courts to try to minimise the number of court events wherever possible. This is particularly the case when a defendant must attend in person.

9.55. While there are varying reasons behind the current number of cases in the Magistrates Courts, I heard from several stakeholders that it is not uncommon for matters to be adjourned repeatedly with very little movement.

9.56. The guiding principles recognise that all parties should be expected to attend court with the intention of moving matters forward. There will inevitably be delays outside of parties' control, however delays should not occur as a result of any party's lack of preparation.

9.57. The proposed guiding principles also recognise that court users should work to meaningfully resolve a matter as quickly as possible, including through alternate pathways such as diversion, as well as by using the case management and case conferencing processes.

9.58. To resolve a matter quickly does not mean to treat it superficially, or without due care. To do so would be to deny the rights of participants, particularly defendants. It is important that the rights of defendants are upheld at all stages of proceedings, and that matters are not rushed through the courts in a way that disadvantages a defendant.

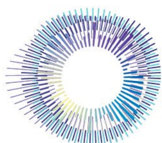
9.59. It is also important to resolve matters quickly for victims and witnesses, given the significant impact legal proceedings have on their lives.

Technology

9.60. Throughout consultation, stakeholders reported widely that the courts' use of outdated technology hinders the easy and fast resolution of matters.

9.61. In order to be a contemporary court that delivers services which meet community expectations, the Magistrates Courts must have a commitment to using up-to-date technology, and actively strive to consider how technological solutions can enable better outcomes for court participants in the future. It is not acceptable for a contemporary court to be constrained in its daily operations by the use of technology that is decades out of date, or by the inability to use technology because of outdated laws that still require manual processes.

9.62. However, while the courts must have a genuine commitment to exploring and updating technology to facilitate better and more equitable access to justice, any use of technology must not disadvantage those who do not have access to technology or do not feel comfortable using it.



9.63. I have considered this issue in Chapter 10, which makes a number of recommendations to allow the use of technology where appropriate, to reduce delays and increase accessibility.

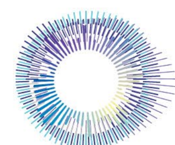
Human rights considerations

9.64. Human rights underpin a number of the values in the objects and guiding principles. For example, the right to a fair trial and other minimum guarantees in criminal proceedings for defendants are recognised under international human rights obligations, including the International Covenant on Civil and Political Rights.

9.65. All the protected rights under the *Human Rights Act 2019* will apply to the proposed new legislation.

9.66. In addition to this, the proposed objects and guiding principles explicitly make the promotion of the rights of all individuals a general objective of the legislation.

9.67. The proposed guiding principles also recognise the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, which are a protected right.



Recommendations

R9.1 The new criminal procedure legislation should contain objects, consisting of the following:

(1) The object of the Act is to set out a contemporary and effective criminal procedure framework for the Magistrates Courts that:

(a) simplifies court procedures and encourages better understanding for all court users;

(b) enables matters to be dealt with in a way that is accessible, fair, just, consistent and timely; and

(c) facilitates and improves the use of technology.

R9.2 The new criminal procedure legislation should contain guiding principles, following the objects clause, consisting of the following:

(1) The court and every participant in a criminal matter act in a way that applies and promotes the objects of the Act.

(2) In criminal proceedings, there should be a focus on court users and steps should be taken to ensure court users understand procedures and outcomes.

(3) The court and every participant treat all court users with respect and dignity, and in a way that promotes human rights.

(4) In criminal proceedings, the court and every participant act in a way that promotes:

(a) A defendant's right to a fair trial according to law;

(b) The interests and safety of victims and witnesses; and

(c) The needs of individual court users, and makes reasonable adjustments to meet those needs.

(5) The court and its procedures recognise the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples in all stages of criminal proceedings.

(6) In criminal proceedings, the court and every participant have an obligation to move matters forward, including by:

(a) Preparing, administering and conducting matters in a way that is purposeful and timely;

(b) Genuinely engaging in case conferencing and case management procedures;

(c) Promoting the early resolution of matters, including through the use of diversion in appropriate circumstances; and

(d) Using technology when appropriate and available.

CHAPTER 10: TECHNOLOGY

Introduction

10.1 Given its duration, and the piecemeal approach to amending the Justices Act, it is inevitable there will be provisions which do not properly allow for the technological advancements made in the last 130 years. Consultation was clear that contemporary and effective criminal procedures must facilitate and encourage efficiencies wherever possible, including by using technology that may not yet exist.

10.2 However, while efficiencies should be identified and adopted wherever possible, I recognise there are many parts of Queensland which may not have adequate infrastructure (such as mobile phone reception or reliable internet access) to support the mandatory use of technology. People in those locations must not be prevented from accessing justice and exercising their legal rights in the criminal process.

10.3 I also recognise many people who attend the Magistrates Courts as a defendant, victim or witness may not have the financial resources or technical ability to access technological solutions, and must still be supported to participate in proceedings in ways that meet their needs.

The current position

10.4 Technological innovation in the Magistrates Courts is sometimes limited by the terminology used in the Justices Act, which requires actions to be completed in a certain way. When the Act was introduced, the terms were no doubt contemporary and modern for the time, but throughout the years have become outdated. Court procedure, however, continues to use many of these outdated terms which has resulted in also using outdated methods of practice.

10.5 Within the Justices Act, there are currently references to fax machines,[1] fax numbers,[2] original documents,[3] sending documents by post[4] and documents being signed 'under the hand' of a person,[5] meaning using pen and paper.

10.6 At the time, these terms and requirements were the best way to ensure actions were completed by the intended person and all documents were authentic. However, in later

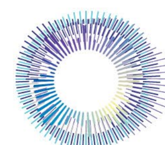
[1] *Justices Act 1886* (Qld) s 69E.

[2] *Justices Act 1886* (Qld) s 222C.

[3] *Justices Act 1886* (Qld) ss 23D, 69A, 69E, 142, 142A.

[4] *Justices Act 1886* (Qld) ss 23D, 56, 91, 102B, 102C, 113A, 133, 139, 142, 142A, 146B, 150.

[5] *Justices Act 1886* (Qld) ss 20, 54, 181.



years, these terms and requirements have prevented the court and parties from updating their practices and embracing new technology.

10.7 As an example of the Magistrates Courts relying on outdated systems, all criminal files are currently paper-based. The reliance on paper files by the Magistrates Courts was significantly felt during the COVID-19 pandemic.

10.8 Each criminal proceeding is accompanied by a paper file containing all material filed with the court. The paper files can include a vast array of documents such as bench charge sheets, court copies of any notices to appear issued by the QPS, emails between parties and the registry (which are printed out and placed on the file) and all endorsements and orders from the magistrate. At the conclusion of every court event, the magistrate must record their orders on the bench charge sheet.[6] The file is then given to a registry staff member (the depositions clerk) to enter the outcomes and orders into QWIC and distribute if necessary. Common practice remains for magistrates to record court event outcomes and orders by handwriting them on the bench charge sheet. If registry staff cannot read the magistrate's handwriting, staff must return to the magistrate and seek clarification, adding further delay to the processing of court orders.

10.9 There are some more recent examples where the Justices Act has enabled, and the courts have adopted, modern technological solutions for their work. For example, computer warrants are permitted under the Justices Act, which allows for types of warrants to be made and transmitted electronically. These provisions do not require the warrant to be printed and signed by a magistrate, or physically handed or posted to the QPS for execution of the warrant.[7]

10.10 Some documents can be filed or transmitted electronically. Examples includes documents required to be filed or given under the Criminal Code,[8] documents sent from a Magistrates Courts registry to a defendant (in limited circumstances), and documents forming part of a registry committal.[9] However as discussed earlier, the nature of having a paper-based file system means that even if parties submit a document electronically to the court, the court registry generally has to print out the document to place on the court file.

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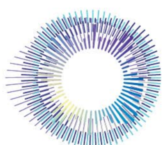
[6] As required by *Justices Regulation 2014* (Qld) reg 15.

[7] *Justices Act 1886* (Qld) pt 4, divs 6A, 6B.

[8] *Criminal Practice Rules 1999* (Qld) r 10.

[9] *Justices Act 1886* (Qld) ss 114–15. Committals are discussed further in Chapter 17.



10.11 In addition, CSQ has developed an online form for defendants to plead guilty to certain offences,[10] and for legal representatives to apply online for a court event.[11] I understand an online portal for registry committals is also currently under development.

10.12 Traditionally, court proceedings are held in a courtroom with the physical attendance of all parties required. In certain circumstances, parties can apply to a magistrate seeking permission to appear by phone or video-link. The most common applications include for a witness to give evidence, to make an application for bail, or to be sentenced for an offence.[12]

10.13 Defendants in custody regularly appear by video-link in Magistrates Courts, especially for simple court mentions or when seeking adjournments.[13] In accordance with section 178C(2) of the Justices Act, if a defendant is in custody in a correctional facility and is appearing in relation to bail or remand, video-link facilities must be used unless the court, in the interests of justice, orders otherwise. Video-link facilities are an important mechanism to reduce the cost and associated impacts of transporting prisoners to and from courts.

10.14 During COVID-19 lockdowns, general procedures were put in place allowing court users to appear remotely, without having to first apply to a magistrate for approval. [14]

10.15 In recognition of society's increasing use of technology, many other Queensland Acts are allowing some processes to be conducted electronically. The COVID-19 pandemic was a significant catalyst in quickly transitioning existing manual systems to remote processes, reducing the need for people to leave their homes and have close contact with others. While COVID-19 forced a quicker transition, the benefits of removing manual processes have been recognised and some of the measures introduced have been maintained in current legislation.[15]

10.16 Initially developed in response to COVID-19, legislative amendments came into effect from 30 April 2022 which permanently allowed remote and electronic execution of oaths and affirmations under the *Oaths Act 1867*,[16] all proceedings under the *Domestic and Family*

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[10] Queensland Courts, *Plead guilty online* (Web Page, 13 December 2021) <https://www.courts.qld.gov.au/going-to-court/plead-guilty-online>.

[11] Queensland Courts, *Magistrates Court online application for a court event* (Web Page, 7 February 2022) <https://www.courts.qld.gov.au/services/do-it-online/online-application-for-a-court-event-magistrates-courts>.

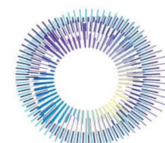
[12] For example, as permitted under *Justices Act 1886* (Qld) pt 6A; *Domestic and Family Violence Protection Act 2012* (Qld) s 142A; *Penalties and Sentences Act 1992* (Qld) s 15A; *Evidence Act 1977* (Qld) s 39R; *Criminal Practice Rules 1999* (Qld) r 53.

[13] *Justices Act 1886* (Qld) s 178C.

[14] Magistrates Courts (Qld), *Court Arrangements (COVID-19)* (Practice Direction No 3 of 2020); Queensland Courts, *COVID-19 Magistrates Court Arrangements – Information Guide* (29 September 2021) 8 <www.courts.qld.gov.au/__data/assets/pdf_file/0008/695825/magistrates-court-guidelines-for-covid-19-v1.pdf>.

[15] The *COVID-19 Emergency Response Act 2020* (Qld), *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* (Qld) and *COVID-19 Emergency Response and Other Legislation Amendment Act 2020* (Qld) were introduced in 2020 to address legislative barriers to remote processes, among other matters.

[16] *Justice and Other Legislation Amendment Act 2021* (Qld) pt 6.



Violence Protection Act 2012 to be conducted by audio visual or audio links if approved by the court,[17] and for parties in domestic violence proceedings to file documents electronically if approved by the principal registrar.[18]

10.17 The gathering and presentation of evidence in court proceedings is also changing due to increasing use of technology. Traditionally, evidence is presented to the court by having a witness attend and give oral evidence. There can often be complicated factors associated with witnesses giving evidence personally in court. Some witnesses and victims are considered vulnerable, for example because they are a child or because of the type of offence alleged to have been committed against them. It has been long-recognised that this can impact a witness' willingness and ability to give evidence in court. To address this, some witnesses can pre-record evidence or give evidence via video-link from a different room or remotely.[19] There is also a new pilot underway to allow for recorded statements to be used as evidence in domestic violence proceedings.[20] This pilot commenced in Ipswich and Southport Magistrates Courts in September 2022 and will run for 12 months.[21]

Other jurisdictions

10.18 The opportunities for legal innovation are significant, and many criminal jurisdictions are considering how to strike the right balance between efficient justice administration and the rights of the parties. Again, the onset of the COVID-19 pandemic was a significant factor in these considerations, as well as ensuring court processes are agile enough to adapt to unforeseen circumstances.

10.19 Within Australia, Victoria was particularly impacted by extended COVID-19 lockdowns, which required the criminal justice system to choose between indefinitely adjourning thousands of cases or proceeding using electronic methods. As a result, Victoria has an Online Magistrates' Court[22] and allows lawyers (not self-represented parties) to share documents with the court via an online portal, removing the need to physically attend court.[23] This portal is a preliminary step as Victoria transitions to a new case management

[17] *Justice and Other Legislation Amendment Act 2021* (Qld) s 16.

[18] *Justice and Other Legislation Amendment Act 2021* (Qld) s 22.

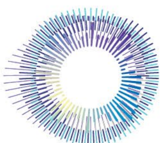
[19] *Evidence Act 1977* (Qld) pt 2 divs 4 (for special witness), 4A (for affected children), div 6 (for protected witnesses), pt 3A (for use of audio-visual and audio links).

[20] *Evidence Act 1977* (Qld) pt 6A.

[21] Queensland Police Service, *Pilot of video recorded evidence-in-chief statements* (Web Page, 24 March 2023) <https://www.police.qld.gov.au/VRE>.

[22] Magistrates' Court of Victoria, *Online Magistrates' Court* (Web Page, 6 October 2022) <https://www.mcv.vic.gov.au/lawyers/online-magistrates-court>.

[23] Magistrates' Court of Victoria, *eDocs Portal* (Web Page, 30 September 2022) <https://www.mcv.vic.gov.au/lawyers/edocs-portal>.



system, which is intended to remove the need for physical filing of paper documents and reduce the need to physically attend court.[24]

10.20 Victorian legislation allows the Chief Magistrate to make rules of court which permit electronic processes, as long as they are not inconsistent with the criminal procedure legislation already in place.[25] This allows for a staged transition to electronic processes as the technology becomes available and reinforces the importance of criminal procedure legislation allowing for electronic processes.

10.21 The United Kingdom is in the midst of transforming court procedures to permit greater use of technology and remote courts.[26] As part of this transition, significant consideration has been given to ensuring justice remains accessible,[27] transparent,[28] and efficient.[29] Given Queensland's legal system is based on the criminal procedure laws in England, the issues facing the United Kingdom and the proposed solutions are of great assistance in the Queensland context.

10.22 England and Wales have introduced remote hearings, with over 7,000 hearings conducted and 700 organisations using the service as of February 2023.[30] Initially introduced in response to the COVID-19 pandemic, it is now commonplace for one or multiple parties to attend hearings remotely.

10.23 While not legislated, it is also interesting to note England and Wales have introduced a national digital support service to assist court users who do not have access to the internet, or otherwise are not comfortable using technology on their own, to access digital court services. Court users are supported to enter a plea of guilty online, lodge administrative appeals and pay court or tribunal fees, among other court services.[31]

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[24] Magistrates' Court of Victoria, *CMS Portal* (Web Page, 15 December 2022) <https://www.mcv.vic.gov.au/lawyers/cms-portal>.

[25] *Magistrates' Court Act 1989* (Vic) s 16(1A)–(1AB).

[26] HM Courts & Tribunals Service, *The HMCTS Reform Programme* (Web Page, 24 March 2023) <https://www.gov.uk/guidance/the-hmcts-reform-programme>.

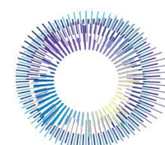
[27] Linda Mulcahy and Anna Tsalapatanis, 'Exclusion in the interests of inclusion: who should stay offline in the emerging world of online justice?' (2022) 44(4) *Journal of Social Welfare and Family Law* 455.

[28] Justice Committee, United Kingdom House of Commons, *Open justice: court reporting in the digital age* (Fifth report of session 2022–23, 25 October 2022).

[29] HM Courts & Tribunals Service, *Fact sheet: Single Justice Service* (Web Page, 15 March 2023) <https://www.gov.uk/government/publications/hmcts-reform-crime-fact-sheets/fact-sheet-single-justice-service>.

[30] HM Courts & Tribunals Service, *Fact sheet: Video Hearings service* (Web Page, 13 March 2023) <https://www.gov.uk/government/publications/hmcts-reform-infrastructure-and-enabling-services-fact-sheets/fact-sheet-video-hearings-service>.

[31] HM Courts & Tribunals Service, *Fact sheet: National digital support service* (Web Page, 1 February 2023) <https://www.gov.uk/government/publications/hmcts-reform-infrastructure-and-enabling-services-fact-sheets/fact-sheet-national-digital-support-service>.



Consultation

10.24 The Consultation Paper asked whether technology should be accommodated in the new criminal procedures, what processes should and should not be transitioned to electronic processes, and whether a summary hearing should be able to be held remotely.

10.25 The technology questions were some of the most answered questions in the Consultation Paper. A wide range of respondents, including government departments, lawyers, and individuals, were unanimously in favour of increasing the use of technology in the criminal justice system.

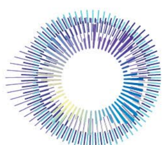
10.26 However, many respondents also expressed concern about electronic processes becoming mandatory in court, which could disadvantage those who are not able to use technology. It was submitted that where it is possible a party may not be able to participate electronically, there should still be manual processes available to ensure there are no barriers to justice.

10.27 Respondents suggested the following court procedures could be suitable for electronic processes, some of which already exist:

- filing material with the court
- serving material on parties
- disclosure of evidence
- attending court, specifically to reduce the need for any party, victim or witness to physically attend a courthouse
- accessing court orders and court material
- applying for subpoenas
- committals
- explaining criminal procedures to defendants who do not have lawyers, without giving legal advice on their particular case
- applying for and granting administrative adjournments (where a court event is adjourned before it is scheduled to occur, without the need for parties to attend court) and court scheduling
- making payments online, including court filing fees and fines.

10.28 Court procedures that respondents did not consider would be suitable for electronic processes included:

- sentencing via video-link, due to concerns the defendant may not understand what is being said to them



- matters involving vulnerable defendants such as children, people speaking a language other than English or people with impairments, where the defendant is at risk of not understanding the process if it were conducted electronically
- matters where it is not known if the defendant has suitable access to the internet or required technology, or is capable of participating electronically
- personal assessments of defendants required for diversion or support programs.

Remote hearings

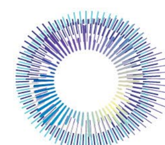
10.29 Respondents had mixed views about whether a summary hearing should be conducted remotely — that is, by audio or audio-visual link. There was general support for allowing remote hearings in cases where the parties were all in agreement, there were limited issues in dispute and all parties had suitable access to the required technology. However, most respondents submitted the magistrate should maintain discretion about how the hearing is conducted, to ensure the legal rights of the defendant are paramount and not infringed. It was suggested the ability to hold remote hearings may be of particular benefit to remote and regional court users, who are often limited by circuit court schedules and have to wait until a magistrate is back in town to hold a hearing, potentially delaying a matter by months.

10.30 It was further submitted witnesses should have the option to give evidence remotely, as long as it is in the interests of justice to do so and not prejudicial to the defendant. For example, if the credibility of a witness is in dispute, then that witness should be required to attend court so the magistrate can decide what weight to give the testimony. In contrast, if a witness is a professional witness and the evidence is not controversial, remote appearance could reasonably be permitted.

10.31 Reducing the requirements for parties to physically travel to court will also decrease the legal costs involved in proceedings, as travel costs for lawyers, counsel and witnesses are usually paid for by the client or the unsuccessful party if there is a costs order.[32] ATSILS provided the following example of the unforeseen costs of requiring personal attendance at court:

> [A] pensioner couple originally from Roma but now living in Brisbane were charged with a domestic violence offence for having raised voices in a verbal argument in Roma. Even though the only other pertinent witnesses were the neighbour who complained about the noise to police and the arresting officer who laid the charge, police did not consent to a hearing in Brisbane with the two other witnesses appearing by phone. Unable to afford the cost of travelling to Roma and obtaining temporary accommodation to contest the charge in Roma, the couple felt they had no option other than to plead guilty in Brisbane.

[32] See Chapter 18 for further discussion on costs orders.



10.32 During consultation with prisoners in Queensland correctional centres, feedback was unanimous in suggesting the increased use of court attendance by video-link, both when the defendant's appearance is not strictly required but the defendant wants to know what is happening in their proceeding, and when personal attendance would usually be required. Prisoners reported unnecessary disruption and delays in order to attend court physically, including being transported to court in the days before the actual court date.[33] This could involve being held in the police watchhouse until their matter was heard, then return to the police watchhouse afterwards to await transport back to the correctional centre. At various points throughout this process, prisoners are subject to invasive strip searches as they enter and leave secure facilities and miss attending any programs at the correctional centre. During COVID-19 restrictions, prisoners were subject to other risk reduction measures.

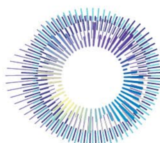
10.33 However, some prisoners said that while it is better to attend court via video link, the current arrangements for video conferencing can often leave them feeling left out of proceedings. They do not know who is in the courtroom, who is talking or what the final outcome is. The camera in the courtroom is often focused only on the magistrate and the defendant cannot see if their lawyer, family or support people are in the courtroom. Defendants can sometimes leave feeling confused about what occurred.

> *Video court is good but prisoners must have more involvement not just sat there and never being asked one single question or a chance to speak.*
> — Prisoner

10.34 During a visit to a correctional centre, CPRT members viewed the video conferencing suites used by prisoners attending court by video. The suites had been newly renovated and allowed for multiple prisoners to attend any Queensland court simultaneously in individual rooms. When it is time to attend court, the prisoners are transferred from a holding cell to a video conference suite and are left in the room to appear in court on their own. Staff from QCS remain outside the room and transfer the prisoner back to their cell once court is complete. If the prisoner has any questions about what happened in court, they can speak to their lawyer (if they have one) or make an appointment with a QCS officer in sentence management, who can advise when prisoners are being released (if they were sentenced) or when their next court date is (if the court case was adjourned).

10.35 Logistically speaking, QCS advised it is much easier for prisoners to attend court via video than in person. It is also safer for the community to have fewer prisoner transfers and frees up QCS and police resources for other responsibilities. In their submission, QCS advised

[33] Transport times naturally vary depending on the location of the correctional centre and the courthouse.



that during 2021–22 they managed 1 855 prisoner transfers to facilitate personal attendance in the Magistrates Courts. This is compared to approximately 30 180 video appearances by prisoners in the Magistrates Courts.

New model

10.36 It is clear from reviewing the current position and consultation feedback there is a need for technological improvements within the Magistrates Courts. As part of this, the terminology in the Justices Act requires modernisation to reflect contemporary methods for administering justice.

10.37 It is common to use the term 'electronic' when referring to the use of technology. For example, submitting documents electronically can refer to the process of submitting documents by email. The term 'electronic' is generally related to doing or accessing things using a computer or another electronic device or system, including over a network. In relation to devices, it usually means that the device has or operates with components such as microchips or transistors that control electric currents.[34] This definition does not necessarily encompass all future technology such as online solutions, cloud-based storage or future systems that move away from physical components. Those may sometimes be referred to as 'digital', which is defined as relating to the use of computer technology.[35]

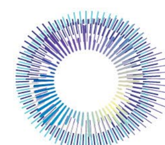
10.38 Given the extensive use of the term electronic across current Queensland legislation, it is likely the term electronic will also be used in the new criminal procedure legislation. For the avoidance of doubt, if the term electronic is used, this does not mean I intend to exclude any future digital methods. I encourage the use of the most suitable technology is available at the time and support continuous improvement where it is in the interests of justice.

10.39 Generally, legislation should be specific enough to ensure laws are consistently applied across Queensland in the same way, regardless of where parties are located. However, being too specific with the methods of completing tasks can inadvertently limit technological improvements in the sector.

10.40 How court proceedings are conducted is a matter for the Magistrates Courts, and I do not intend to prevent any future improvements in this space. For example, I will not be prescribing that documents must be sent by a specific method, or that a particular program is used for video conferencing. As technology and society advances, there will continue to be new ways to improve user participation and understanding, and criminal procedure laws should be flexible enough to accommodate this without requiring legislative amendments.

[34] *Oxford Dictionary of English* (online at 23 March 2023) 'electronic' (defs 1, 3); *Macquarie Dictionary* (online at 23 March 2023) 'electronic' (def 2).

[35] *Oxford Dictionary of English* (online at 23 March 2023) 'digital' (def 1); *Macquarie Dictionary* (online at 23 March 2023) 'electronic' (def 8).



10.41 While new technology should be embraced, I recognise there are some members of our community who are not capable or comfortable conducting legal matters electronically, and I want to ensure no person is prevented from accessing justice because they have limited technological access, skills or knowledge. To address these concerns, I recommend where the courts may use electronic mechanisms for criminal proceedings, those mechanisms must generally not be mandatory and will only be used at the discretion of a magistrate and if suitable in the circumstances of the case. For example, where a defendant does not have access to the internet, there should be no requirement to do anything that would normally require the internet. However, where parties are willing and able to participate in electronic court processes, it is in the interests of justice that the more efficient process be adopted.

10.42 Nothing in these recommendations is intended to affect the use of technology that is already provided for in the Justices Act[36] or other Acts. For example, any changes will not affect other laws under which the evidence of a victim must be, or can in some circumstances be, pre-recorded or given via video-link or with other accommodations.

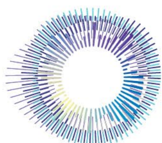
Documents

10.43 The new criminal procedure legislation should allow for anything that can be done under that Act to be done electronically, including execution, filing and transmission of documents. There will be no requirement for original documents to be provided in court or to a party to prove authenticity, unless required under another law (for example, the *Evidence Act 1977*). There is no intention to impose requirements on legal representatives to keep original documents unless another Act provides otherwise.

10.44 It is my intention that this includes collating briefs of evidence and their disclosure, which can be transmitted electronically. When I say electronically, I am also referring to emerging technologies such as online portals that can be used to securely transmit large volumes of material to specific parties, encouraging prompt disclosure whilst protecting the confidentiality of the evidence. While it will be a matter for prosecuting agencies to embrace technology and consider how their own practices can be updated in light of new criminal procedures, removing barriers to electronic disclosure and permitting the greater use of electronic materials in court proceedings will help streamline this process.

10.45 Registry staff should also be able to communicate and transmit information to court users electronically where that method of communication is available to the registry and the party has indicated they may be contacted that way. For example, where a court user emails the registry or uses an online portal, the registry will be able to respond via the same method.

[36] For example, the use of video-link is already permitted under section 178C of the *Justices Act 1886* (Qld).



10.46 Further, there should be no requirement for any document to be hand signed as proof the document came from that person. There are multiple ways to authenticate a document, including by completing a digital signature, making a declaration confirming identity, or using a digital identification process. Requiring hand signatures is not inclusive for individuals who may have difficulty holding a pen or writing. Many people may have access to a form of technology (such as a smartphone) but do not have a computer or printer available to them, so a requirement to print, sign and send a form may present a barrier which unfairly limits their access to justice.

10.47 The current file management system in the Magistrates Courts is completely reliant on physical paper files. This will likely be the case for quite some time until QWIC is replaced. Removing requirements for physical documents from the legislation will not automatically transform how the Magistrates Courts conduct their business, but it will remove current legislative barriers that are preventing process improvements. Any changes in current registry document management will ultimately be a matter for the Chief Magistrate.

10.48 On 21 June 2022, the Attorney-General announced that $246.8 million over five years has been allocated to the modernisation of courts.[37] This includes upgrades to courthouse buildings and technological improvements, including electronic filing and electronic files. It is anticipated that updated criminal procedures which facilitate the use of technology will assist in any courts modernisation project, including planned transition and implementation.

Attending court

10.49 Any reference in the new legislation to parties attending court is not to be taken as a requirement for physical attendance (excepting the defendant's first appearance).[38] There are many ways for an individual to participate in court proceedings without physical attendance, and these should be accommodated.

10.50 The requirement for a person in the community to physically attend court is burdensome for those who do not have the physical ability or financial resources to travel to court but could participate in court proceedings using technology from their current location. It also places pressure on defendants who maintain employment or have other commitments, such as childcare or carer roles. If defendants are employed, the requirement for physical attendance at court may place this employment at risk. Secure employment is a significant rehabilitative factor for defendants, and defendants should not have to risk losing their job so they can physically attend a courthouse.

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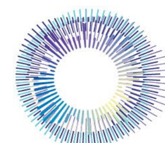
[37] Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, 'Budget delivers access to justice for Queenslanders' (Media Statement, 21 June 2022) <https://statements.qld.gov.au/statements/95446>.

[38] See further information about the defendant's first appearance in Chapter 12.



Defendants

10.51 Prisoners we spoke to had an overwhelming preference for appearing in court remotely, rather than being physically transported to court. Appearing by video-link reduces the personal impact on defendants and reduces risk and cost to public agencies such as QCS and QPS, allowing for these resources to be redeployed to other areas of need.

10.52 Whilst encouraging remote attendance wherever possible, I recognise the concerns of legal practitioners who need to be able to consult with their clients throughout court proceedings, which can sometimes be difficult if the lawyer is in the courtroom and the defendant is on video.

10.53 For anyone appearing remotely (including other court users), I recommend rules of court be developed which set out the best practice for remote appearances. This might include a requirement for the attendees in court to introduce themselves to the defendant, for the court to advise whether anyone is in the public gallery and to explain the purpose of the court event at which the defendant is appearing. Multiple prisoners at correctional centres reported difficulty with full participation on the video-link, and the camera was only on the magistrate which meant the defendant could not see what else was happening in the courtroom. This new approach is consistent with a user-focused system that promotes understanding of court proceedings. Research has been conducted in the Childrens Court jurisdiction on the use of video-links,[39] and a practice direction already exists in the Childrens Court setting out the protocol for video appearances.[40]

10.54 I recommend the current provisions in the Justices Act about the use of video-link or audio link facilities be retained.[41] They allow for legally represented defendants to appear remotely when it is in the interests of justice. They also allow for remote appearances by defendants in correctional centres in certain circumstances.[42] Importantly, these provisions also include requirements for there to be facilities for a defendant appearing remotely to communicate privately with their lawyer.

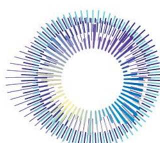
10.55 The concerns from legal practitioners and defendants about the use of video-links are valid, but in my view can be addressed by improving video-link practices, rather than by not utilising video-link and resorting to physical attendance. For example, there is no reason for the camera in the courtroom to be solely focused on the magistrate, and there should be adequate provisions for clients appearing remotely (especially from a correctional

[39] Terry Hutchinson, 'Court appearances via video-link for young people in detention in Queensland' (Trends & Issues in Crime and Criminal Justice No 631, Australian Institute of Criminology, August 2021).

[40] Childrens Court of Queensland, *Use of video-link or audio-link appearances* (Practice Direction No 1 of 2019).

[41] *Justices Act 1886* (Qld) pt 6A.

[42] Section 178C(2) of the *Justices Act 1886* (Qld) states video-link is the required method for a defendant in custody appearing on a bail application.



centre) and lawyers to communicate confidentially. There is also scope for the supports available to defendants attending via video from correctional centres to be enhanced, including immediate access to a person who can explain what is happening in court. Such practices are not something that can be legislated, but I encourage the relevant agencies responsible for video appearances to consider the user experience and how this can be enhanced to ensure participants understand and can be involved in the proceedings.

Other participants

10.56 Anyone else required to attend court, such as magistrates, legal practitioners, victims or witnesses giving evidence, should also be able to attend remotely in appropriate circumstances, and there should be no barriers in the new legislation to this occurring. Generally, whether remote attendance is appropriate in a particular matter should be determined by a magistrate taking into account all the relevant circumstances, including any reasons for requesting remote attendance and any submissions made by the prosecution and the defendant.

10.57 An application for a person to appear remotely should be made in advance of a relevant court date, and any application for witnesses to give evidence remotely should be resolved as part of a directions hearing. The Chief Magistrate may issue practice directions about how remote appearances can occur and the process required to make and determine an application for remote appearance. Practice directions can be easily updated by the Chief Magistrate as technology changes. Some of the best practices for remote appearance discussed earlier, such as introducing attendees and telling the witness who is in the courtroom, would also be appropriate here.

10.58 For the avoidance of doubt, I am not changing any other legislation which currently allows for court users to appear remotely, for example the provisions relating to special witnesses and affected children in the *Evidence Act 1977*.

Remote summary hearings and committal proceedings

10.59 Allowing any action under the new procedures legislation to be completed electronically will include allowing for remote summary hearings.[43] A remote hearing occurs when the parties and magistrate are not in the same physical room but are each participating in the hearing by remote means, usually telephone or video-link. However, a magistrate will at all times maintain a discretion about whether conducting a proceeding remotely using electronic

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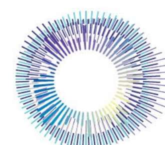
[43] This is consistent with current provisions in part 6A of the Justices Act. See, for sentencing, *Penalties and Sentences Act 1992* (Qld) s 15A.



means is appropriate, based on the circumstances of the case. The defendant will always maintain the right to be tried in person, consistent with their human rights.[44]

10.60 I note the County Court in Victoria embraced virtual hearings as a result of the extended COVID-19 lockdowns in Victoria,[45] and I recommend the Victorian model, including the forms and guides given to parties, be considered for adoption in Queensland.

Electronic Transactions (Queensland) Act 2001

10.61 The *Electronic Transactions (Queensland) Act 2001* (ET Act) is part of a national legislative scheme intended to allow for business transactions to be conducted electronically, and ensuring those electronic transactions and communications are valid within Australia and parties are able to rely on them.[46]

10.62 When Queensland implemented this legislation, schedule 1 was added to set out transactions to which the ET Act does not apply.[47] This includes a requirement or permission for:

- a person to file a document with a court or tribunal for a proceeding.
- a person to sign a document to be filed with a court or tribunal for a proceeding.
- a person to produce a document —
    - to a court or tribunal in a proceeding
    - to a party to a proceeding for the proceeding.
- a person to retain a document that has been —
    - filed with, or produced to, a court or tribunal in a proceeding
    - admitted in evidence in a proceeding before a court or tribunal
    - issued by a court or tribunal for a proceeding.
- a document to be served personally or by post.

10.63 There is an argument suggesting that by excluding court proceedings from the ET Act, it means transactions (which can include filing material) within the court cannot be conducted electronically at all. A counter argument is the exclusion means matters cannot be conducted electronically under this Act specifically, but there is nothing to stop other Acts (or rules of court) legislating for electronic proceedings in the court system. That argument

[44] *Human Rights Act 2019* (Qld) s 32(2)(d).

[45] County Court Victoria, *Virtual hearings* (Web Page, 4 November 2022) <www.countycourt.vic.gov.au/going-court/virtual-hearings>.

[46] *Electronic Transactions (Queensland) Act 2001* (Qld) s 3.

[47] *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A(1), sch 1.

is supported by the fact that higher court rules currently allow for the electronic filing, giving or issuing of documents.[48]

10.64 The ET Act states that a transaction is not invalid under Queensland law merely because it was completed by electronic communications, such as email.[49] Shortly after commencement, the current schedule 1 was added which set out the exclusions discussed previously. At the time, the reason for adding the exclusions was to accommodate existing legal requirements which prevented the use of electronic communications, including legal requirements to serve material personally or to physically sign a document.[50] Therefore it would seem the intent of schedule 1 is not to limit electronic transitions in the courts, but rather to accommodate the existing legal restrictions already in place. As such, there appears to be no good reason existing legal restrictions, including those in the Justices Act, could not be amended to allow for electronic processes as appropriate.

10.65 As these legislative barriers are identified and removed, it may be appropriate that the exceptions in schedule 1 of the ET Act are repealed as they are no longer relevant. This would allow for the ET Act to apply to court proceedings in Queensland as it does in other states.[51] Such amendments to the ET Act are outside the scope of this Review and are more appropriately considered in the future, and only if the court system has capacity to accommodate the ET Act.

Human rights considerations

10.66 The use of technology in criminal proceedings is intended to be a mechanism to support the legal rights of defendants and enhance their participation and understanding of the criminal process.[52] It is also intended to create efficiencies within the system, resulting in matters being finalised without unreasonable delay.[53] These improvements are protective of the rights for those charged with criminal offences under s32 of the *Human Rights Act 2019.*

10.67 The efficient finalisation of criminal matters is not only in the defendant's interests, but also other participants in the proceedings, including witnesses and victims.

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[48] *Criminal Practices Rules 1999* (Qld) r 10.

[49] *Electronic Transactions (Queensland) Act 2001* (Qld) s 4(1)(a).

[50] Queensland, *Parliamentary Debates*, Legislative Assembly, 8 August 2002, 2850–51 (K Shine).

[51] For example, Victoria has multiple references to the *Electronic Tractions (Victoria) Act 2000* (Vic) in the *Criminal Procedure Act 2009* (Vic), confirming the Electronic Transactions Act applies to enable a document to be served electronically: *Criminal Procedure Act 2009* (Vic) ss 6, 392–94. New South Wales also references the *Electronic Transactions Act 2000* (NSW): *Criminal Procedure Act 1986* (NSW) s 57.

[52] *Human Rights Act 2019* (Qld) s 32(2).

[53] *Human Rights Act 2019* (Qld) ss 29(5)(b), 32(2)(c).

10.68 Technology already allows certain people to give evidence in criminal proceedings remotely. This can be helpful in matters where a victim does not wish to physically attend court and potentially face the defendant, causing further trauma and distress. This does not impact the defendant's minimum guarantees, including the right to examine or have examined, witnesses against the defendant,[54] as permitted by law. Restrictions on how the defendant may cross-examine witnesses are (appropriately) balanced against the wellbeing and safety of the witnesses, most of whom did not choose to become participants in criminal proceedings. This is why the magistrate maintains discretion to decide how court events are to be conducted, to ensure the right balance is struck for all participants.

10.69 While the defendant has the right to be tried in person,[55] this does not mean other parties, victims and witnesses must also attend in person. The intent of the right to be tried in person is to ensure the defendant is not prevented from attending the hearing of any offences against them. Defendants appearing remotely are still tried in person, because attending remotely is still attending. However, there will be nothing in the legislation to prevent defendants from personally attending the courtroom, if deemed suitable by the magistrate.[56]

10.70 It must be acknowledged that the use of technology can in some cases disadvantage certain people, who cannot use technology for various reasons. This includes instances where defendants do not have access to this technology such as in rural and remote areas. To address this, the use of such technology will not be mandatory in criminal proceedings.

10.71 The magistrate must decide if it is in the interests of justice, including the defendant's rights, to hold a hearing remotely. Defendants will still maintain their right to be tried in person and to defend themselves from any charge personally, consistent with the protected human rights.[57]

10.72 There are many procedural aspects that can be completed using technology without impacting the defendant's rights, such as information sharing between criminal justice agencies or internal court registry procedures. These modernisation measures will not impact the protected rights of any person in Queensland and will also promote the right to trial without unreasonable delay.

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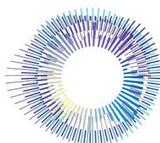
[54] *Human Rights Act 2019* (Qld) s 32(2)(g).

[55] *Human Rights Act 2019* (Qld) s 32(2)(d).

[56] Other factors, such as COVID-19 restrictions in place at the time or other legislation, may also be considered.

[57] *Human Rights Act 2019* (Qld) s 32(2)(d).



Recommendations

R10.1 The new criminal procedure laws for the Magistrates Courts should provide that any action or function that can be done, or power that can be exercised under those laws may be completed electronically, unless another Act provides otherwise. This should include, but is not limited to:

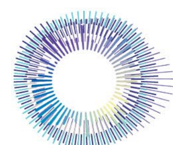
(a) executing, filing and transmitting documents, notices or other information;

(b) attending court as a magistrate to conduct criminal proceedings;

(c) attending court as a legal practitioner, defendant, victim or witness (including, for defendants, from a correctional centre or another place in the ways currently provided); and

(d) conducting remote summary hearings and committal proceedings.

R10.2 However, where a court participant does not have access to the technology used in the court, they must not be disadvantaged by this and must be able to access manual processes as meets their needs.



CHAPTER 11: TYPES OF OFFENCES DECIDED IN THE MAGISTRATES COURTS

Introduction

11.1 In Queensland, Magistrates Courts can only finalise (hear and decide) certain types of charged offences or breaches of duty. For these proceedings, a magistrate sits alone (without a jury) to hear a charge, decide if a person is guilty or not guilty, and impose a sentence or dismiss the charge. A person can also plead guilty, meaning there is no need for a hearing.

11.2 The process of being dealt with by a magistrate alone is referred to as dealing with a matter 'summarily'. It can also be called a 'summary proceeding' or 'summary prosecution', or as the court exercising 'summary jurisdiction'.[1] Consequently, offences that may be dealt with in the Magistrates Courts are often referred to as 'summary offences'.[2]

11.3 The types of offences that can be decided in the Magistrates Courts will not change as a result of this Review. However, there will be some changes to the underlying procedural laws related to these types of offences, especially to make sure the law is simple, efficient and easily understood.

11.4 This focus of this chapter is on identifying which offences can be decided by a Magistrates Court in a summary proceeding. The chapter then addresses how the new criminal procedure legislation should identify indictable offences dealt with summarily, changes to the use of the term 'simple offence' in the context of the Justices Act, and how the new legislation will deal with breaches of duty.

Offences

11.5 The Criminal Code defines an 'offence' as 'an act or omission which renders the person doing the act or making the omission liable to punishment'. Offences are divided into two kinds: regulatory offences and criminal offences (which are further made up of crimes, misdemeanours and simple offences).[3]

11.6 In the Criminal Code and other Acts, each offence is classified as one of these kinds of offences. Classifying an offence establishes the time limit within which a criminal

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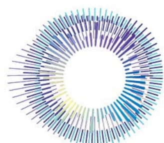
[1] As to this terminology, see also *Acts Interpretation Act 1954* (Qld) s 44.

[2] Matters not able to be decided in the Magistrates Courts progress to the higher courts as a committal proceeding: See Chapter 17.

[3] Criminal Code (Qld) ss 2, 3(1)–(2).



proceeding for the offence must be started, as well as which court has jurisdiction to deal with the offence. These things will not change as a result of this Review.

11.7 Generally, regulatory offences and simple offences are heard and determined in the Magistrates Courts. Crimes and misdemeanours are typically finalised in the higher courts, but some can be heard and determined summarily by the Magistrates Courts. This is set out in the Diagram 11.1 and explained further below.

General offence types heard and determined in the criminal jurisdiction of the Magistrates Courts

Regulatory Offences
Simple Offences (Criminal Code definition)
Simple Offences (Justices Act definition)
Crimes
Misdemeanours

Non-Criminal Offences dealt with in the Magistrates Courts
Criminal Offences dealt with in the Magistrates Courts
Criminal Offences that are indictable – Can be dealt with in the Magistrates Courts or committed to a higher court, depending on the offence

Diagram 11.1: Visual representation of different offence types dealt with in the Magistrates Courts and their overlay with other offence types

Regulatory offences

11.8 Magistrates Courts hear and determine regulatory offences. These offences, which can be used as an alternative to a charge of a simple or indictable offence, are:[4]

- unauthorised dealing with shop goods valued at $150 or less (often known as 'shoplifting')
- leaving a restaurant or hotel (or similar) without paying for food and drinks, accommodation or other goods and services valued at $150 or less
- wilful damage or destruction of property without consent of the person in lawful possession of it, which causes a loss of $250 or less.

Simple offences

11.9 Magistrates Courts also hear and determine proceedings about 'simple offences', as defined by the Criminal Code. A simple offence is a criminal offence that is not a crime or a misdemeanour, and that cannot be prosecuted on an indictment.[5] Simple offences can be found in the Criminal Code and many other Queensland Acts, including the *Summary Offences Act 2005*.

11.10 This has a different meaning from the term 'simple offence' as defined in the Justices Act, which is discussed separately below.

Indictable offences: Crimes and misdemeanours

11.11 Other kinds of criminal offences are 'crimes' and 'misdemeanours'. These offences are together known as 'indictable offences'. This means that, unless the law expressly says otherwise, the offence must be prosecuted on an indictment and in the District or Supreme Court of Queensland. An indictment is a written document listing the offences that a person is charged with, which is traditionally presented to a higher court.[6] Generally, crimes and misdemeanours are more serious criminal offences.

11.12 Some indictable offences can be heard and decided summarily in a Magistrates Court, where this is expressly provided for by the law. Many of those offences are identified in chapter 58A of the Criminal Code, which is discussed separately below. Where a crime or misdemeanour cannot be finalised in a Magistrates Court, it will be committed to the District Court or Supreme Court to be dealt with on indictment.

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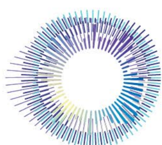
[4] Criminal Code (Qld) s 3(1), (4); *Regulatory Offences Act 1985* (Qld) ss 5–7.

[5] Criminal Code (Qld) s 3(2)–(5).

[6] Criminal Code (Qld) ss 1 (definition of 'indictment'), 3(2)–(3).



11.13 Simple and regulatory offences can sometimes be finalised in a higher court if the defendant is also being prosecuted on an indictment and (among other things) they intend to plead guilty to the offence.[7]

Time limits for starting proceedings

11.14 The Justices Act provides that a proceeding for a regulatory offence, a simple offence or an indictable offence dealt with summarily must be started within one year of the matter arising, although another law can provide for a different time limit.[8] This limitation exists to make sure that offences are dealt with in a timely way. A magistrate has jurisdiction to decide whether a proceeding has been started within the correct time frame.[9]

11.15 There are some exceptions to the time limits in the Justices Act. If a proceeding for a matter is started as an indictable offence against the Criminal Code or the *Drugs Misuse Act 1986* and the proceeding has been or will be discontinued, another proceeding about the matter must be started within two years of the matter arising.[10] This may apply when a prosecutor does not proceed with an indictable offence and instead charges a defendant with a simple offence related to the same conduct. For example, a charge of threatening violence (an indictable offence) might be substituted with a charge of public nuisance (a simple offence) in appropriate circumstances.[11]

11.16 An Act creating an offence can also give the Magistrates Courts jurisdiction over the offence for a longer period, or regardless of when the matter arises. For example, there is no time limit on when a proceeding for an indictable offence in the Criminal Code must be started. A Magistrates Court has jurisdiction to hear and decide an indictable offence summarily under chapter 58A of the Criminal Code regardless of how much time has passed since the matter arose.[12] However, for indictable offences in other Acts that must or may be decided summarily, unless that Act specifies a different time limit, the requirement to start the proceeding within one year will apply.[13]

11.17 For an indictable offence dealt with on indictment in the District Court or the Supreme Court, there are no limitations. The proceeding may be started at any time.

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[7] Criminal Code (Qld) s 651; see also ss 652–53.

[8] *Justices Act 1886* (Qld) s 52(1), (3). This is a consequence of the definition of 'simple offence' under the Justices Act, discussed further below in this Chapter. These time limits also apply to proceedings about a breach of duty.

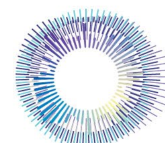
[9] William Kennedy Abbot Allen, *The Justices Acts of Queensland 1886 to 1949 with conspectus, annotations, supplementary forms and a selection of cognate legislation* (3rd ed, 1956) 140; Heather Douglas, Malcolm Barrett and Emma Higgins, *Criminal Process in Queensland* (Lawbook Co, 2nd ed, 2017) [5.80].

[10] *Justices Act 1886* (Qld) s 52(2).

[11] Criminal Code (Qld) s 75(1); *Summary Offences Act 2005* (Qld) ss 6, 46.

[12] *Justices Act 1886* (Qld) s 52(3); Criminal Code (Qld) s 552F.

[13] *Justices Act 1886* (Qld) s 52(1), (3). See further Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 15.



11.18 These time limits will not change because of this Review. However, consistent with the general approach to the new criminal procedure framework for the Magistrates Courts, the provision will be rewritten to make sure it is clear and easily understood.

11.19 I do not consider that these general time frames should be made longer to accommodate other factors, such as agencies requiring lengthy periods to investigate matters or consider whether to start criminal proceedings. However, in some cases, it may be appropriate for specific offences to have a longer period within which proceedings must be started to accommodate those types of requirements. This is most appropriately addressed in the legislation creating those offences, and that option is already provided for in the current law.

Indictable offences dealt with summarily

11.20 In Queensland, many indictable offences are dealt with summarily — that is, they are heard and decided in a Magistrates Court.

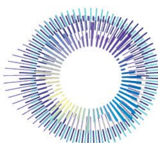
Chapter 58A of the Criminal Code

11.21 The majority of indictable offences are located in Queensland's Criminal Code. Chapter 58A of the Criminal Code sets out the circumstances in which an indictable offence located in the Code may or must be dealt with summarily by a Magistrates Court. Broadly:

- An offence must be heard and decided summarily if it is a 'relevant offence'. In general terms, this means that the offence is punishable by a maximum period of imprisonment of three years or less, or that the offence is against part 6 of the Criminal Code (which is about offences related to property and contracts) and is not otherwise excluded from these provisions.[14]
- Some specific offences must be heard and decided summarily on the prosecution's election — that is, if the prosecution chooses to have the charge heard and decided summarily. These offences include escaping lawful custody, serious assault, and some assault offences punishable by a maximum period of imprisonment of between three and five years.[15]
- Some specific offences must be heard and decided summarily unless the defendant elects for jury trial — that is, unless the defendant informs a Magistrates Court that they want to be tried by a jury in the District Court or the Supreme Court. These

[14] Criminal Code (Qld) s 552BA. An offence against part 6 of the Criminal Code is excluded from these provisions if it is an 'excluded offence': s 552BA(4)(b)(iii). Excluded offences and, if applicable, relevant circumstances relating to exclusion (including where the value of any property exceeds $30, 000), are listed in section 552BB. An offence against part 6 is also excluded if the maximum term of imprisonment exceeds three years, or if it is against chapter 42A of the Code (which relates to secret commissions): s 552BA(4)(b)(i), (ii).

[15] Criminal Code (Qld) s 552A.



offences include, for example, some assault offences, unlawful drink spiking, stalking if the maximum term of imprisonment is not more than five years, and prostitution offences if the maximum term of imprisonment is more than three years.[16]

11.22 For any offence dealt with summarily by a magistrate, the maximum available penalty is generally 100 penalty units ($14 375) or three years imprisonment. However, this increases to four years imprisonment if the magistrate is imposing a drug and alcohol treatment order.[17] The penalty cannot be higher than it would have been if the offence was dealt with on indictment in a higher court.[18] Where a person is summarily convicted of an indictable offence, the conviction is deemed to be a conviction of a simple offence (rather than of an indictable offence).[19]

11.23 Whether an offence is dealt with summarily is always subject to section 552D of the Criminal Code.[20] First, a Magistrates Court must not deal with an offence summarily if satisfied, at any time and after hearing submissions from the parties, that 'because of the nature or seriousness of the offence or any other relevant consideration' the defendant may not be adequately punished in the Magistrates Court.[21]

11.24 Second, a Magistrates Court must not deal summarily with a relevant offence if satisfied, following an application made by the defendant, that 'because of exceptional circumstances' the charge should not be dealt with in that way. The term 'exceptional circumstances' is not defined, but the Code includes as examples that the offence should be tried together with other offences being dealt with on indictment, that there is an 'important issue of law' involved, or that the matter involves an 'issue of general community importance or public interest'.[22]

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[16] Criminal Code (Qld) s 552B.

[17] A drug and alcohol treatment order may be imposed under part 8A of the *Penalties and Sentences Act 1992* (Qld). It is available when (among other things) a defendant has pleaded guilty and it would be appropriate to sentence the defendant to imprisonment, but the court is satisfied the defendant has a severe substance use disorder which contributed to the commission of the offence, and it would be appropriate to make a treatment order.

The treatment order must be explained by the court, and the defendant must agree to the order being made and agree to comply with it. The treatment order must include a custodial part (a sentence of imprisonment for four years or less, which is suspended) and a rehabilitation part (a treatment program of not more than two years, with which the defendant must comply). A treatment order may be revoked for noncompliance or other reasons, after which the court may deal with the defendant as if they were just convicted of the offence for which the order was made.

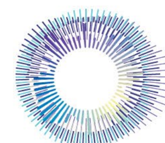
[18] Criminal Code (Qld) ss 552C(1)(a), 552H. A Magistrates Court dealing summarily with an indictable offence can also be constituted by a justice appointed by the Attorney-General. However, the jurisdiction of a justice is limited to an offence dealt with on a plea of guilty, that can be adequately punished by the maximum penalty available to a justice and, where property is involved, it is of a value of not more than $2500. The maximum penalty that can be imposed by a justice is 100 penalty units ($14 375) or six months imprisonment: ss 552C(1)(b), (2)–(6), 552H(1)(c).

[19] Criminal Code (Qld) s 659.

[20] Criminal Code (Qld) ss 552A(3), 552B(3), 552BA(3).

[21] Criminal Code (Qld) s 552D(1).

[22] Criminal Code (Qld) s 552D(2).



11.25 Finally, there are some specific exceptions. A Magistrates Court must not deal with a relevant offence summarily if the charge is an alternative to an offence that need not be dealt with summarily, or if the offence is connected with serious organised crime.[23]

Other provisions of chapter 58A

11.26 Chapter 58A of the Criminal Code also includes other provisions relevant to indictable offences that are finalised summarily. Some of these, such as section 552F about the time for prosecution of these offences, have also been dealt with elsewhere.[24]

11.27 Several of these other provisions are procedural in nature. Section 552E provides that a charge dealt with summarily may be heard and decided at a court in the district where the accused person was arrested or served with a summons.[25]

11.28 Section 552I sets out procedures that apply where the defendant must make an election about how an offence will be finalised. Importantly, if a defendant is not legally represented, then the court must explain to the defendant that they are entitled to a trial by jury and ask the defendant whether the charge should be dealt with summarily.[26] This section also includes procedures for asking a defendant how they plead to an offence and for taking a plea to multiple charges, which are discussed separately in Chapter 16.[27]

11.29 Finally, section 552J provides that the grounds on which a person can appeal, or on which the Attorney-General can appeal against sentence, include that the magistrate erred by proceeding summarily.

11.30 Each of the provisions of chapter 58A are discussed in more detail below, in connection with the new model proposed in this Review.

Other Acts providing for matters to be dealt with summarily

11.31 Many other Acts also include indictable offences and provide for those to be dealt with summarily. Generally, there are four types of provisions that allow this to take place.[28] The first, consistent with the Criminal Code, is that an Act may provide that it is mandatory for an offence to be dealt with summarily.[29] Secondly and thirdly, and also consistent with

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[23] Criminal Code (Qld) s 552D(1A), (2A), (4). As to serious organised crime, this refers specifically to a prescribed offence that is alleged to have been committed with the serious organised crime circumstance of aggravation stated in section 161Q of the *Penalties and Sentences Act 1992* (Qld).

[24] See the discussion of s 552F in [811.16].

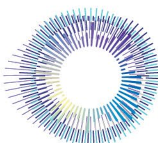
[25] Criminal Code (Qld) s 552E.

[26] Criminal Code (Qld) s 552I(1)–(2).

[27] Criminal Code (Qld) s 552I(3)–(8).

[28] Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 27–8.

[29] See, for example: *Public Interest Disclosure Act 2010* (Qld) s 69; *Guardianship and Administration Act 2000* (Qld) s 250B.



the Code, an Act may provide that an offence must be dealt with summarily if the prosecution[30] or the defence[31] make that election (subject, in any case, to a magistrate's discretion).

11.32 The fourth type of provision is different to the Criminal Code. Generally, it provides that an offence may be dealt with summarily at the prosecution's election subject to both the defendant's consent (that is, if the defendant asks at the start of a proceeding for the matter to be prosecuted on indictment) and the magistrate's discretion.[32]

Consultation

11.33 The Consultation Paper asked what procedural changes (if any) should be made to chapter 58A of the Criminal Code and the laws about indictable offences dealt with summarily. It asked, for example, if they should be relocated or redrafted to improve their readability.[33]

11.34 A number of respondents expressed support for redrafting chapter 58A including LAQ, the QLS, ATSILS, the BAQ, government departments, community legal centres and members of the public.

Sections 552A through 552BB

11.35 Most respondents focused on the initial sections of chapter 58A, which set out indictable offences in the Criminal Code that must or may be heard and decided summarily. Respondents described the current law as complicated, confusing and difficult to understand (both generally and for self-represented defendants), and submitted this leads to error, delay, and inconsistent application. They expressed the view that the law should be redrafted so that it is easier to understand and apply. This approach would provide clarity for the courts and users about which offences may be dealt with summarily and in what circumstances, including (if applicable) which party has the right to make an election about summary disposition.

11.36 Some respondents told us during consultation that their organisations use internal documents to efficiently identify offences that must be dealt with in the Magistrates Courts. These often take a schedule form, identifying the offences by listing the section and legislation. For example, LAQ stated '[t]o overcome the cumbersome nature of the

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[30] See, for example: *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 52A; *Electoral Act 1992* (Qld) s 385A; *Integrity Act 2009* (Qld) s 40B; *Public Health Act 2005* (Qld) s 213I.

[31] See, for example: *Prostitution Act 1999* (Qld) s 128; *Classification of Films Act 1991* (Qld) s 61; *Classification of Publications Act 1991* (Qld) s 33. The latter two Acts do not state that the election is subject to a magistrate's discretion.

[32] See, for example: *Lotteries Act 1997* (Qld) s 208; *Nature Conservation Act 1992* (Qld) s 165; *Water Supply (Safety and Reliability) Act 2008* (Qld) s 493.

[33] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) Q 13, 33.

current legislation, unofficial tables of offences interpreting the provisions of Chapter 58A have been circulating since … 2010'.

11.37 Consistent with this approach, multiple respondents suggested that instead of the current format of these sections, a list or schedule could be used to set out which indictable offences can be dealt with summarily and in what circumstances (including any limits on that jurisdiction). This type of approach would assist magistrates, practitioners and court users to more readily identify when a charge can be dealt with summarily (including on whose election) and when a charge must be indicted. LAQ submitted that this type of approach 'would save considerable confusion, time, unnecessary production and appearances of defendants, and prevent error'.

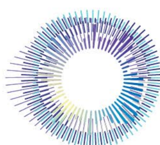
11.38 ATSILS and the QLS both supported this approach, observing that the use of the terms excluded offences and relevant circumstances is a 'key over-complication' in the way these laws are currently drafted. Those respondents submitted:

> One option would be to replace the provisions currently set out in ss 552A to 552BB with a single section referring to a schedule, similar to that provided in s 552BB, which would simply set out each offence provision and in lieu of Column 3 'Relevant Circumstances' it would set out whether it can be dealt with summarily and any limitations. There would be no need, then, for the repetitive statements that all such subsections apply subject to s 552D. Further, the schedule would make it more workable for practitioners and the courts, who need simply look up the offence provision in numerical order and confirm the rule for that offence.

Section 552D

11.39 Two respondents, the QLS and ATSILS, also made submissions about section 552D (which sets out when a Magistrates Court should not deal with an offence summarily). They stated that this section can be 'unnecessarily complicated' for magistrates and parties determining how a matter should proceed. They submitted that this part should be redrafted to clearly list the circumstances in which a magistrate must abstain from dealing with an offence summarily.

11.40 In addition, it was submitted that a magistrate's discretion following an application by a defendant relating to 'exceptional circumstances' should be made clearer. It was suggested that the provision could be redrafted to make it plain that this matter is discretionary, and that this discretion could operate 'if the magistrate is satisfied that it is in the interests of justice' to abstain from dealing with the matter summarily. However, it was also acknowledged by those respondents that to change the substance of the discretion may be outside the scope of this Review.



Relocation of chapter 58A of the Criminal Code

11.41 Both LAQ and ATSILS submitted that the laws in chapter 58A of the Criminal Code, in a redrafted format, should be relocated to the same Act as other procedural laws applying to the Magistrates Courts.

11.42 The QLS did not have a 'firm view' about this matter, however noted that since their view is that redrafting these laws would be beneficial, it may also be desirable to relocate them to the same Act as other laws about summary procedure.

11.43 Another respondent expressed support for moving the 'procedural provisions' about summary jurisdiction from chapter 58A of the Code to the new criminal procedure legislation, and then redrafting the remainder of chapter 58A in a way that clearly sets out which offences may be dealt with summarily.

11.44 On the other hand, the Department of Regional Development, Manufacturing and Water submitted that chapter 58A of the Code, as well as other specific laws about indictable offences dealt with summarily,[34] 'can continue to operate as they presently are in conjunction with new Magistrates Court criminal procedure legislation'.

Other matters

11.45 A retired magistrate submitted that the new criminal procedure legislation must include clear procedures for a Magistrates Court to follow to satisfy itself that it is acting within its jurisdiction. It was submitted that '[o]n the basis that it is the Court itself to be satisfied in all cases that it is acting within jurisdiction', a magistrate should be required to explain to all defendants (whether or not legally represented):[35]

- the defendant's right to ask for trial by jury, if any
- the defendant's ability to consent to summary jurisdiction or not
- any right of the prosecution to curtail trial by jury (that is, to elect the matter be dealt with summarily).

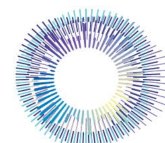
11.46 In making this submission, it was stated that '[t]he right to ask for trial by jury and the right to consent to summary jurisdiction should be procedurally placed on an equal footing controlled by the Court'.

The new model

11.47 I share the views expressed by stakeholders about chapter 58A of the Criminal Code. Chapter 58A is complex, difficult to navigate, and difficult to apply in practice.

[34] Examples given were s 931 of the *Water Act 2000* (Qld) and s 493 of the *Water Supply (Safety and Reliability) Act 2008* (Qld).

[35] Citing *R v Rochow* (1983) 1 Qd R 304.



I recommend that it be redrafted so it can be more easily understood and applied by court users, and that it be relocated to the new criminal procedure legislation for the Magistrates Courts.

11.48 Specifically, the new criminal procedure legislation should include a chapter about the summary disposition of indictable offences. The first part of that chapter should replicate some sections of chapter 58A, to clearly and simply set out the indictable offences in the Criminal Code that can be dealt with summarily. The second part of that chapter should set out some general procedural matters applying to all indictable offences dealt with summarily, particularly related to the making of an election. There are also some sections in chapter 58A that do not need to be recreated, or that should be moved to another Act. These recommendations are explained further below.

11.49 As I have explained throughout this chapter, redrafting and relocating chapter 58A will not (and is not intended to) make substantive changes to the content of the law. In particular, it will not change the classification of offences, and there will be no changes to which offences can be dealt with summarily and in what circumstances.

11.50 However, I have recommended changes to some of the procedural matters connected with chapter 58A. These changes will simplify and improve court processes and procedures and increase understanding of the law and the court process.

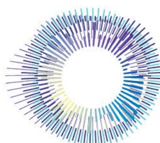
Indictable offences in the Criminal Code dealt with summarily

11.51 Sections 552A through 552BB set out the indictable offences in the Criminal Code that must be heard and decided summarily, either generally or following an election by a party. Although there will be no change to the effect of these sections, it is necessary for them to be redrafted.

11.52 Feedback from stakeholders made it clear that these provisions are not working well in practice, and that many organisations have had to come up with their own 'workarounds' to be able to effectively use the law. In a system that is meant to be simple and efficient, it is particularly important that the law does not have this kind of complicating effect on practice.

11.53 Accordingly, I recommend that sections 552A through 552BB are redrafted into a simple list format.

11.54 The list should include all offences in the Criminal Code that can be dealt with summarily, in numerical order. Next to each offence, the list should state whether any election for summary disposition is required (and if so, who is to make the election) and any limitations or requirements associated with the offence being dealt with summarily. The intention is that a person can use the list to easily find the offence they need to know about, and then



be able to access all relevant information about dealing with that offence summarily in one place.

11.55 As explained, this will not change which offences can be dealt with summarily or the circumstances in which that can occur. However, in 2012 two matters were previously identified as needing clarification:[36]

> An offence involving an offence of a sexual nature where the victim is 14 years or more and the penalty is more than three years is currently a 'defence election' offence if the defendant pleads guilty. However, a defendant cannot plead guilty and elect to go to jury trial. In practice, these are decided summarily, so it was proposed to change the offence to one that must be decided summarily.
>
> It was proposed to update the reference to an offence against section 339(1) of the Criminal Code, which relates to unlawful assault, to refer to 339(1) and 339(3), consistent with the position of the Supreme Court.[37] It was also noted that clarity was required about the meaning of the term 'an offence involving an assault'.[38]

11.56 If my recommendation to redraft sections 552A through 552BB is accepted, these matters could also be reconsidered at that time.

11.57 Sometimes, the value of property or damage to property will determine whether an offence can be decided summarily. In general terms, a matter cannot be dealt with summarily if that value exceeds $30,000. Section 552G states that a Magistrates Court may decide the value of any property or damage to property in a particular matter. For example, in a case where there is damage to a car, a magistrate may hear evidence about the cost of repairing the damage and decide about the value of the damage in that case. This provision should be retained but redrafted, so its operation is clearer.

11.58 Section 552F states that if a charge is heard and decided summarily, a Magistrates Court has jurisdiction despite the amount of time that has passed since the matter arose. As discussed above, this specific law overrules the general effect of section 52 of the Justices Act, which otherwise requires that proceedings for a simple offence are started within one year of a matter arising. This section must also be retained.

When the Magistrates Courts must abstain from dealing with a charge summarily

11.59 Section 552D is closely related to these sections. As explained, it sets out the circumstances in which a magistrate must abstain from dealing with an offence summarily. This includes that the defendant, if convicted, may not be adequately

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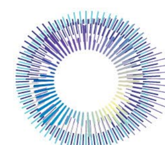
[36] Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 33–4.

[37] *Fullard v Vera & Byway* [2007] QSC 050.

[38] There is more recent case law on this point. In *EFN v Lehmann* [2018] 1 Qd R 126, the Supreme Court held that the words 'an offence involving an assault' in section 552B(1)(c) refer to an offence of which an assault, as defined, is an element, and therefore that an offence of choking in section 315A of the Criminal Code could not be dealt with summarily.



punished on summary conviction. This section should also be retained but should be redrafted in a clear and simple way.

11.60 Section 552D(2) permits the defence to make an application for the Magistrates Court to abstain from dealing with a charge that must be heard and decided summarily (where there is no election to be made) on the basis that because there are 'exceptional circumstances', the charge should not be decided summarily. Although I do not propose to change the substantive law on this point, I note there may also be circumstances in which it would be reasonable for the prosecution to be able to bring an application to this effect, or for the court to act on its own initiative.[39]

11.61 Section 552D(3) makes clear that if the court abstains from dealing with a matter summarily, then the offence must be dealt with as a committal proceeding. Without limiting the effect of this section, for consistency with other committal proceedings,[40] the redrafted legislation must make clear that if a defendant entered a plea and evidence was heard before a magistrate decided to abstain from hearing the matter:

- the defendant's plea should be disregarded
- any evidence already heard should be deemed to be part of the evidence in the committal proceeding
- the matter must proceed as a committal, which must take place in court so that before the defendant is committed, they are addressed by a magistrate in accordance with the equivalent of section 104 of the Justices Act.

11.62 Where a magistrate abstains from dealing with a matter summarily after the defendant has been found guilty and convicted of the offence at a summary trial, then the matter should be committed for sentence. This concept is explained further below when discussing the use of a defendant's criminal history in determining if a matter should be dealt with summarily, because it is most likely to arise in that scenario.[41]

Maximum penalties for a charge dealt with summarily

11.63 Section 552H sets out the maximum penalties that can be imposed in the Magistrates Courts for an indictable offence under the Criminal Code that is dealt with summarily. Generally, these are:

- for a magistrate: 100 penalty units ($14,375) or three years imprisonment

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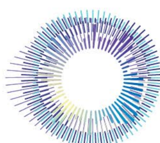
[39] See, similarly, Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 32.

[40] See further Chapter 17.

[41] See further [811.85] ff below.



- for a magistrate imposing a drug and alcohol treatment order: 100 penalty units ($14,375) or four years imprisonment
- for justices of the peace: 100 penalty units ($14,375) or six months imprisonment.[42]

11.64 In each case, the person may not be punished more than if the offence had been dealt with on indictment.[43]

11.65 For indictable offences in other Acts, the maximum penalty that can be summarily imposed is specified in the Act. Sometimes, the maximum penalty for an offence dealt with summarily is less than the overall maximum penalty for the offence.[44]

11.66 Section 552H should also be relocated to the new criminal procedure legislation, with the other provisions of chapter 58A that are being recreated. However, the specific provision about the maximum penalty that can be imposed by justices (section 552H(1)(c)) should be relocated to the same place as those parts of section 552C that are about justices of the peace. This is discussed further below.[45]

Procedural matters related to indictable offences dealt with summarily

11.67 Section 552I of the Criminal Code applies specifically to offences that must be heard and decided summarily unless the defendant elects for jury trial (that is, unless the defendant elects for the matter to be committed to a higher court).

11.68 First, this section establishes a process for a self-represented defendant to make an election about whether a matter is dealt with summarily. The court must:

- state the substance of the charge to the defendant
- explain that the defendant is entitled to be tried by jury, and is not obliged to make a defence, and
- ask the defendant whether they want the charge to be dealt with summarily.[46]

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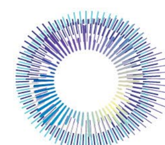
[42] In relation to justices constituting the court, see also Criminal Code (Qld) s 552C discussed at [811.101]–[811.102] and more generally the discussion of justices of the peace in Chapter 19.

[43] Criminal Code (Qld) s 552H(2).

[44] See, eg, *Nature Conservation Act 1992* (Qld). Under that Act, it is an offence for a person to take, interfere with or keep wildlife unless certain conditions are met. That offence is punishable by 3000 penalty units or 2 years imprisonment, which makes it an indictable offence (specifically a misdemeanour). Proceedings for an indictable offence may, in some circumstances, be taken by way of summary proceedings under the Justices Act. The maximum penalty that may be summarily imposed for an indictable offence that is dealt with summarily is 1 year's imprisonment: ss 97, 164, 165.

[45] In 2012, it was proposed that the maximum penalty of three years imprisonment would stay the same. However, consultation demonstrated support for increasing the maximum fine that could be imposed. It was suggested that, where a person was convicted by a Magistrates Court, the fine should be increased from 100 penalty units to 500 penalty units. The maximum penalty that could be imposed by justices was not increased: Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 32.

[46] Criminal Code (Qld) s 552I(2).



11.69 This section also sets out a process that applies to all defendants (whether or not legally represented) where a charge is to be dealt with summarily. The court must ask whether the defendant is guilty or not guilty, convict the defendant or hear the defence respectively, and then deal with the charge summarily. The section also established a method for taking a bulk plea from a defendant.[47]

11.70 Finally, this section states that unless a defendant's criminal history is admissible in evidence in relation to a change, the court must not have any regard to it before receiving a plea of guilty or making a decision about guilt, or for deciding whether the defendant may be adequately punished on a summary conviction.[48]

11.71 I have recommended here and elsewhere in this Report that the matters dealt with in section 552I should be recreated, with clarifications or additions. For the use of a defendant's criminal history as it relates to the summary disposition of an indictable offence, I have recommended some changes.[49] However, these matters need not be specific to charges under the Criminal Code and should, in the new legislation, operate to apply to all indictable offences dealt with summarily.

Making an election for a matter to be dealt with summarily

11.72 As part of the new case management model in the Magistrates Courts, it is appropriate for a magistrate to make enquiries about any election, including which party is to make the election and when it will be made.[50]

11.73 The current procedure for taking an election from a self-represented defendant before they are asked to plead is sound and should be recreated in the new criminal procedure legislation. Importantly, this process requires the defendant to be told the charge they are facing and given an explanation of the available options. This is consistent with the overall approach taken in this Review, and my guiding principles.

11.74 In my view, it is appropriate that this process is not required where a defendant is represented and therefore has a lawyer to give this explanation and communicate the defendant's decision to the court. However, given that an election cannot be changed without application (see below), the defendant should be present in court when the election is made by their lawyer. This can include being present remotely. This approach is consistent with the fact that a lawyer may enter a plea for a defendant when instructed, if the defendant is present in court.[51]

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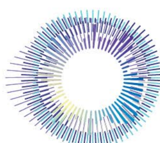
[47] Criminal Code (Qld) s 552I(3)–(8).

[48] Criminal Code (Qld) s 552I(9).

[49] See further [811.85] ff.

[50] See further [14.149].

[51] See further [16.33].



11.75 Currently, chapter 58A does not include a process for the prosecution to make an election about whether an offence is dealt with summarily. To make the steps in the criminal process clear, the new model should also require the court to ask the prosecutor whether the prosecution wants the charge to be decided summarily. This must take place before the defendant is asked to enter any plea to the charge.

11.76 I also recommend the process for making elections should apply to any offence, not only offences in the Criminal Code and not only those where the defendant must make an election. These matters are procedural, so will not otherwise affect the disposition of the offence. Having these processes apply to any offence will assist in standardising procedure and making the court process easier to understand.

11.77 I acknowledge that there are sometimes additional steps in an election made under another Act — for example, an election may also be subject to a defendant's consent.[52] The process for making an election should be able to accommodate any extra steps and should also require the magistrate to provide an adequate explanation of those steps to the defendant so they can properly participate in the process.

Changing an election

11.78 Currently, there is nothing preventing a party from changing an election after it has been made. During consultation, I heard this sometimes occurs (or occurs multiple times throughout a matter) and can lead to delays in matters being finalised.

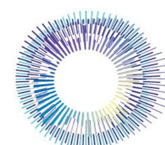
11.79 In my view, there should not be an unlimited ability for a party to change an election. For the prosecution and for legally represented defendants, this decision is a considered one that is informed by legal knowledge and advice. Self-represented defendants are given an explanation in court before making this decision, as discussed previously. Against that background, the ability to change an election an unlimited number of times and on any basis is not reasonable or necessary.

11.80 I recommend that the new criminal procedure law should make clear that once a party has made an election, it cannot be changed without the permission of the Magistrates Court. This will apply equally to the prosecution and the defendant.

11.81 A party seeking to change their election must make an application to the court and give reasons for their application. Consistent with the process for making an election, the requirement to make an application to change an election should apply in relation to any offence for which an election is required.

11.82 There must be reasonable limits on when an application to change an election can be made. Specifically, an application must not be permitted after the prosecution has called

[52] See the examples in [811.31]–[811.32].



evidence to prove the charge at a summary hearing or committal proceeding. At that time, the matter will have progressed too far for it to be reasonable or fair to permit a change of election.

11.83 When an application is made, the court may hear submissions and consider evidence about the application and must consider the relevant circumstances when reaching a decision. The court may grant the application for good reason, taking into account all relevant circumstances.

Taking a plea from a defendant

11.84 The provisions in section 552I about the process for taking a plea and dealing with a matter summarily do not need to be recreated along with the other parts of chapter 58A. These will be adequately addressed by the provisions of the new criminal procedure legislation about hearings and pleas, explained in Chapter 16.

Use of a defendant's criminal history

11.85 Generally, a court should not have information about a defendant's criminal history, character or background before deciding the defendant's guilt or convicting the defendant of an offence. This kind of knowledge might influence the decision of a judge or magistrate (or, in the higher courts, of a jury).[53]

11.86 As explained, where a defendant may elect how an indictable charge under the Criminal Code is dealt with, there are limits on the use of their criminal history. Section 552I(9) states that unless a defendant's criminal history is admissible in evidence in relation to a charge, the court must not have any regard to it before receiving a plea of guilty or making a decision about guilt, or for deciding whether the defendant may be adequately punished on a summary conviction.

11.87 However, chapter 58A of the Criminal Code does not state that the same restriction applies where the prosecution has the election or where an offence must be decided summarily. In those cases, it is arguable that the common law would permit consideration of the defendant's criminal history.[54]

11.88 Where the defendant may elect whether a charge is dealt with summarily, it is unclear whether the court may rely on a defendant's history to conclude that it cannot adequately punish a defendant after deciding guilt and then commit the defendant to a higher court. For offences in the Criminal Code, this appears to be prevented by section 552I(9)(b), which prohibits use of a defendant's criminal history for deciding whether a defendant

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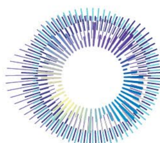
[53] *Hall v Braybrook* (1956) 95 CLR 620, 648.

[54] *Hall v Braybrook* (1956) 95 CLR 620; *Minney v White* (2003) 154 A Crim R 470; Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 29. See also, generally, Westlaw AU, *The Laws of Australia* (online at 30 March 2023) 11 Criminal Procedure '11.4 Summary Proceedings' [11.4.180].



may be adequately punished on summary conviction.[55] However, this course does appear to be contemplated by other Acts, which allow a magistrate to abstain from dealing with a matter summarily if the magistrate considers it should be prosecuted on indictment and provide a process for disregarding a plea and instead dealing with the matter as a committal proceeding.[56]

11.89 Other jurisdictions have dealt with this issue more explicitly. For example, in Victoria the legislation explicitly states that for the purpose of deciding whether a charge is appropriate to be determined summarily, the court 'must have regard to… the adequacy of sentences available to the court, having regard to the criminal record of the accused'.[57] In Western Australia, if the court convicts the defendant of an offence but considers that it cannot adequately sentence the defendant due to the seriousness of the offence, the court may commit the defendant for sentence.[58]

11.90 The law on this point is plainly unclear in Queensland and should be clarified in this Review. It is illogical to require a magistrate to decide whether a matter can be appropriately sentenced in the Magistrates Courts in the absence of any knowledge about the defendant's criminal history. Even where a defendant's criminal history is unrelated to the offending before the court, it is highly relevant to deciding the appropriate penalty for an offence.

11.91 I recommend that, for all indictable offences in the Criminal Code and in other Acts, the law should clearly permit a magistrate to consider a defendant's criminal history when deciding whether the defendant can be adequately punished for the offence on summary conviction. This should be permitted at any stage of a proceeding. This will mean that when a magistrate is deciding whether to abstain from dealing with any charge summarily, the magistrate can consider the defendant's criminal history. This will apply regardless of which party has the election, and where it is mandatory to deal with the matter summarily.

11.92 As part of the case management model in the Magistrates Courts and any enquiries made about an election, the magistrate could ask whether the defendant's criminal history has been adequately considered. This might be particularly relevant where it is mandatory to

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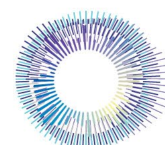
55 See further Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 30. Case law would permit this approach.

56 See further [811.61] and Chapter 17.

57 *Criminal Procedure Act 2009* (Vic) s 29(2)(b).

58 *Criminal Code* (WA) s 5(9). More generally, in the Northern Territory, a court may discontinue summary proceedings and proceed as a committal matter if 'having regard to its seriousness, the intricacy of the facts or the difficulty of any question of law likely to arise at the trial or any other relevant circumstances', it considers the charge should be tried by the Supreme Court: *Local Court (Criminal Procedure) Act 1928* (NT) s 122A. In Tasmania, the new Act states that at any time the court can determine it is appropriate for an offence to be committed, but the legislation specifically states that in making that determination the court is to take into account the seriousness of the offence and the number and nature of other pending charges: *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 101(6)–(7) (not in force).



deal with an offence summarily, as in those matters the adequacy of a summary sentence may not be given early consideration by either party.

11.93 This approach is consistent with the law in Victoria, and with my principle of efficiency. It means that a magistrate can make an informed decision about whether a matter can be dealt with summarily earlier in the proceeding, preventing delays associated with matters later being identified as too serious and therefore unable to be finalised.

11.94 It is also consistent with my earlier recommendation that a circumstance of aggravation that is a previous conviction should be included on a court attendance notice and a charge sheet, with a requirement that a magistrate disregard it unless and until the defendant is found guilty.

11.95 In providing for early consideration of the defendant's criminal history, it is important the law also explicitly states that a magistrate must disregard the defendant's criminal history unless it is otherwise admissible for the purposes of determining the charge, unless and until the defendant is found guilty or convicted of the offence. This is an important caveat on this power which is necessary to protect the defendant's right to a fair hearing.[59]

11.96 Where a magistrate considers a defendant's criminal history and decides that a charge cannot be adequately dealt with summarily, the matter must be committed to a higher court. If any evidence was heard, then the matter must be committed in court as described in [11.61]. That is, any plea entered by the defendant must be disregarded and any evidence already heard must be deemed part of the evidence in the committal. This is consistent with the approach recommended in this Report and taken in other legislation.[60]

11.97 Further, if the magistrate's decision is made after the defendant is found guilty and convicted of the offence at a summary trial, then the matter should be committed for sentence in the higher courts. This might be viewed as a change to the current law, given that the law on this point states only that if a magistrate abstains from dealing with a matter summarily then the offence will be dealt with as a committal proceeding. However, in my view, this is the most sensible approach.

11.98 First, this approach follows logically from the concept that if evidence is heard in a matter, that evidence will form part of the committal — here, if the court has heard evidence and convicted the defendant, that conviction will form part of the committal. Second, this approach is efficient because it avoids rehearing the matter in the higher court, but it is also fair to the defendant because it occurs only when the matter has been the subject of

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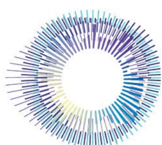
[59] *Human Rights Act 2019* (Qld) s 31.

[60] See further Chapter 17.



a summary hearing in the Magistrates Court. Finally, it is consistent with the approach taken in other jurisdictions, such as Western Australia.

11.99 As stated earlier, I recommend that this approach apply to all indictable offences in the Criminal Code and all indictable offences in other Acts, where those offences can be dealt with summarily. However, if another Act includes different laws about the use of a defendant's criminal history in relation to particular offences, then those more specific laws should continue to apply.

Parts of Chapter 58A relocated or not recreated

11.100 Some sections in chapter 58A of the Criminal Code do not need to be recreated. Others would be better located in a different part of the new criminal procedure laws, or in another Act.

Constitution of the Magistrates Court

11.101 Section 552C of the Criminal Code provides that a Magistrates Court dealing summarily with an indictable offence must be constituted by a magistrate, or by two justices of the peace appointed by the Attorney-General to that place. The section also includes requirements about who may be appointed in this way and limits the places to those that are within an Indigenous local government area or are remote. Those justices may only determine less serious matters dealt with on a plea of guilty.

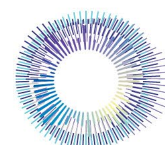
11.102 Section 552C performs an important role, but it is related to the constitution of the Magistrates Courts and not to criminal procedure. It should be relocated to the *Magistrates Courts Act 1921* with other like provisions. The parts of this section about justices of the peace relate mostly to how a justice can be appointed to constitute a court, so it could also be appropriate to relocate them to that Act. However, during drafting of any new legislation, consideration should also be given to whether it would be preferable for those provisions about justices to be located with other provisions about the powers of justices or at least cross-referenced there.[61]

Where a charge can be heard and decided summarily

11.103 Section 552E states that a Magistrates Court may summarily hear and determine an indictable offence under the Criminal Code at a place within the district where the person was arrested or served with a summons under the Justices Act. This applies without limiting any of the places where a charge can already be determined summarily. This section will not be recreated in the new criminal procedure laws. First, if the Magistrates Courts become a single court, this section will be unnecessary.[62] Second, there are clear

[61] As to the powers of justices of the peace, see Chapter 19.

[62] See further Chapter 7, which recommends that the Magistrates Courts should be centralised and become the Magistrates Court of Queensland and explains the benefits of this change.



provisions in the new laws about where proceedings are started and heard that will adequately provide for these matters.[63]

Ground of appeal where a matter is dealt with summarily

11.104 Section 552J provides a specific ground of appeal that can be used when a matter is appealed to the District Court under section 222 of the Justices Act. If a defendant is summarily convicted or sentenced for an indictable offence under the Criminal Code, the defendant may appeal on the ground that it was an error for the Magistrates Court to have decided the conviction or sentenced summarily. The Attorney-General may appeal against a sentence on the same ground. If a sentence is varied following an appeal, the appeal court may give the sentence it considers appropriate, up to the maximum sentence that could have been given if the matter was committed and dealt with on indictment.

11.105 In this Review, recommended changes about appeals from matters dealt with in the Magistrates Court are generally minor and for the purpose of clarifying the current law. Consistent with that approach, I do not intend to change this ground of appeal. However, in maintaining the goal of making the legislation easy to understand, this section should be moved so that it is located with the other laws about appeals and can be more easily found and understood (especially by self-represented appellants).

11.106 This approach will create something of an anomaly because section 552J applies only to indictable offences under the Criminal Code. This means a ground of appeal for a Criminal Code offence could be that the Magistrates Court erred in deciding the conviction or sentence summarily, but for an offence under another Act this ground will not be available unless it is specifically provided for in that other Act. There are some Acts that do provide for this ground of appeal in relation to specific offences.[64]

11.107 This could lead to confusing or illogical results. A person might be charged with multiple offences under the Criminal Code and another Act stemming from the same factual circumstances, but only be able to appeal the Code offences on the ground that it was an error for them to have been decided summarily.

11.108 There may be a sound argument for extending this ground of appeal to all indictable offences dealt with summarily. However, that would be a substantive change to the law. Further, it would require careful consideration of whether that ground should always be available, and individual consideration of existing provisions in other Acts. This extends beyond the Review's scope and capacity.

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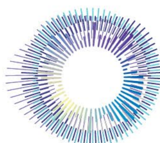
[63] See further Chapter 12.

[64] See, eg, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 43AI; *Police Service Administration Act 1990* (Qld) s 10.23C*, Penalties and Sentences Act 1992* (Qld) s 161ZU.



Relocating the redrafted chapter 58A of the Criminal Code

11.109 As stated above, I recommend chapter 58A, in its redrafted format, be relocated to the new criminal procedure legislation for the Magistrates Courts. These provisions are procedural in nature. This approach is sensible and practical, primarily because the outcome will be that these laws are located in the same Act as other laws about summary procedure in the Magistrates Courts.

11.110 This approach will make it easier for users of the court, including legal practitioners and self-represented defendants, to find these laws and apply them in context. It is also in keeping with my guiding principles for this Review, particularly the principles of consistency, simplicity and user-focused procedures.

11.111 Of course, chapter 58A is limited in its application to indictable offences that are in the Criminal Code. As identified earlier, there are many other Acts that also create indictable offences and provide for those offences to be dealt with summarily. It is not proposed to move the laws about the disposition of those other indictable offences into the new criminal procedure legislation. It is also not proposed to include a list of all those other indictable offences that can be dealt with summarily in the new legislation. To do so would be an enormous undertaking, which is beyond both the scope and capacity of this Review.

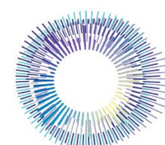
11.112 At this stage, indictable offences that are not in the Criminal Code will remain in their current Acts. Some of these Acts specifically state that where an offence is dealt with summarily, it is to proceed under the Justices Act.[65] Other Acts state more generally that an offence must be dealt with as a summary offence (or use other similar language), in which case the *Acts Interpretation Act 1954* applies to make it clear that this means the matter will be dealt with under the Justices Act.[66] Some Acts also include different or specific provisions about proceedings for offences dealt with summarily, or the process for committing an offence to a higher court.[67]

11.113 The approach in these Acts is sufficient to make clear that, unless there is some specific provision otherwise, the general laws about criminal proceedings in the Magistrates Courts apply. Following the introduction of the new criminal procedure legislation for the Magistrates Courts these will be amended, if necessary, to refer to the new criminal procedure legislation instead of the Justices Act. Otherwise, at this time, they will remain unchanged.

[65] Eg, *Integrity Act 2009* (Qld) s 40B(3)(a); *Lotteries Act 1997* (Qld) s 208(1)(a); *Prostitution Act 1999* (Qld) s 128(1)(a).

[66] *Acts Interpretation Act 1954* (Qld) s 44.

[67] Eg, as to committal proceedings: *Prostitution Act 1999* (Qld) s 128; *Drugs Misuse Act 1986* (Qld) s 118.



11.114 Whether and how the summary disposition of indictable offences located in other Acts should be incorporated into the new criminal procedure legislation is a matter for separate, future consideration. To take this approach would require careful consideration of each offence and the provisions about its disposition, followed by a variety of amendments to many Acts.

The term 'simple offence' in the Justices Act

11.115 The term 'simple offence' is also used in the Justices Act, but it has a different (broader) meaning than in the Criminal Code.

11.116 In the Justices Act, the term 'simple offence' means 'any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise'.[68] In plain English, a simple offence under the Justices Act is any offence that may be finalised in a Magistrates Court. This includes:

- regulatory offences
- simple offences (as defined by the Criminal Code)
- indictable offences that can be dealt with summarily.

11.117 The application of the term 'simple offence' within the Justices Act is important. It is a short and useful way of referring collectively to all offences that the Magistrates Courts can finalise and differentiating those from the remaining offences that those courts cannot finalise. It is used in this way to set out the criminal procedures applying to 'simple offences' and the different procedures applying to other remaining offences.

11.118 The term 'simple offence', as it is defined by the Justices Act, is also used in other legislation. For example, the *Mental Health Act 2016* relies on the term to establish a procedure for adjourning or dismissing complaints about simple offences.[69]

Consultation

11.119 The Consultation Paper asked how new legislation about criminal procedures in the Magistrates Courts should deal with these two different definitions of 'simple offence'. It suggested that the new legislation could change the term 'simple offence' to 'summary offence' but retain its current meaning.[70]

11.120 Numerous respondents, including the QLS, DPP (Cth), BAQ and ATSILS, agreed that the term 'simple offence' should be renamed as 'summary offence' without changing the

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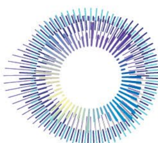
[68] *Justices Act 1886* (Qld) s 4 (definitions of 'simple offence' and 'summary conviction or conviction'). The term 'summary conviction' or 'conviction' means 'a conviction by a Magistrates Court for a simple offence'.

[69] *Mental Health Act 2016* (Qld) ch 6 pt 2.

[70] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) Q 12, 33.



meaning of the term. It was submitted that this approach would improve understanding for users of the criminal justice system and make clear that these offences are dealt with summarily. It was also supported on the basis that it would decrease inconsistencies in legislation, and more specifically would promote consistency between the Criminal Code and other criminal procedure laws.

11.121 The DPP (Cth) emphasised that it is important to retain the current meaning of the term 'simple offence' as defined in the Justices Act, so that Commonwealth matters can be dealt with summarily. This respondent observed that the term 'summary offence' is also used in the *Crimes Act 2014* (Cth) and stated that while there might be 'some confusion' by the dual use of the term summary offence, there would be 'no difficulty' if the proposal to rename simple offence was adopted.

11.122 Other respondents, including community legal services, agreed that the term 'simple offence' should be renamed, but they preferred a different name. Suggestions for alternative terms included 'offence which can be dealt with summarily' or 'offence which may be finalised in the Magistrates Courts', which were acknowledged as being lengthy but also considered to be clearer. Another suggestion was to use the term 'Local Court offence'.

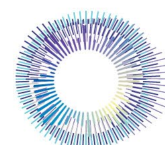
11.123 A few respondents also suggested some changes to the definition of 'simple offence' in the Justices Act. The QLS and ATSILS suggested that rather than referring to 'any offence (indictable or not)', the definition should refer to 'indictable, simple or regulatory offences' to avoid any ambiguity. They also suggested that it might be useful to directly refer to the provisions of chapter 58A of the Criminal Code. Another respondent submitted that all offences that can be dealt with summarily could be listed in a schedule 'for ease of reference'.

The new model

11.124 The fact that the term 'simple offence' has two different meanings in the Justices Act and the Criminal Code is confusing and unclear. It is an issue that plainly needs to be corrected as part of this Review.

11.125 The application of the term 'simple offence' in the Justices Act is important. As explained, it differentiates between offences that can and cannot be finalised in the Magistrates Courts and is used to identify the criminal procedures applying to offences that are finalised there. It is also used in important ways in other Acts.

11.126 Because of its important role, it is necessary for new legislation about criminal procedures in the Magistrates Courts to retain the meaning of the term 'simple offence' as defined in the Justices Act and the concepts connected with it. However, to avoid the confusion that



comes with using the same term in two different ways and consistently with the guiding principle of simplicity, this term should be renamed.

11.127 Accordingly, I recommend the term 'simple offence' in the Justices Act be renamed as 'summary offence' in the new criminal procedure legislation. This is intended as a renaming of the term only; there is no intent to change the meaning of that term. As currently defined, the term clearly differentiates between offences that can and cannot be finalised in the Magistrates Courts and it is important for that clear distinction to remain. If, in drafting the new legislation, changes are made to the definition to allow for the use of clear and simple language, it is not intended that those changes to language would amount to a change in the meaning of the term itself.

11.128 This approach will not have any effect on the use or meaning of the term 'simple offence' in the Criminal Code. The outcome will be that the term simple offence has only one meaning in criminal law, and that will result in greater clarity for court users.

11.129 I acknowledge that the term 'summary offence' is also used in other ways in the law. The DPP (Cth) observed that it is used in the *Crimes Act 2014* (Cth). In Queensland, the *Summary Offences Act 2005* identifies a number of simple offences 'that may be dealt with in a summary way'.[71] A range of other Acts provide generally that an offence is a 'summary offence', that an offence should be 'prosecuted in a summary way' or that a prosecution will be 'by way of summary proceeding'.[72] Those types of general provisions have the effect that a proceeding for an offence will be a summary proceeding under the Justices Act.[73]

11.130 Despite this, renaming the term 'simple offence' in the Justices Act as 'summary offence' is not confusing. Rather, the approach is consistent with the use of the term 'summary offence' elsewhere, as well as the use of other similar concepts such as 'summary proceeding' or prosecution in a 'summary way'. More specifically, with respect to the *Summary Offences Act 2005*, each of the offences in that Act would also meet the definition of a 'summary offence' in the new criminal procedure legislation, which achieves a degree of greater overall consistency.

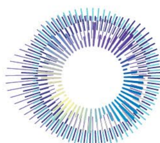
Breach of duty proceedings

11.131 The Justices Act defines the term 'breach of duty' to mean an act or omission about which, following a complaint, a Magistrates Court can order a person to pay money or to do or refrain from doing any other act. A breach of duty cannot be a simple offence or

[71] *Summary Offences Act 2005* (Qld) long title, s 46.

[72] For example, see *Animal Care and Protection Act 2001* (Qld) s 178; *Building Act 1975* (Qld) s 256; *Chemical Usage (Agricultural and Veterinary) Control Act 1988* (Qld) s 28*; Fisheries Act 1994* (Qld) s 220; *Maintenance Act 1965* (Qld) s 136.

[73] *Acts Interpretation Act 1954* (Qld) s 44.



non-payment of a mere debt.[74] A breach of duty is dealt with in the same way as a simple offence (as defined by the Justices Act).[75]

11.132 This Review has not included a comprehensive search of Queensland's statute book, but within our scope of work we have not identified with any certainty laws that establish a 'breach of duty' which is not otherwise an offence.[76] Some possible examples of a breach of duty which are not otherwise an offence are:

- *Traffic Offences (Road Use Management) Act 1976* section 76: A person who negligently or willfully 'injures' an official traffic sign is answerable in damages for that injury, and those damages may be recovered in a summary way under the Justices Act.

- *Queensland Temperance League Lands Act 1985:* Section 7(1) of this Act requires the Queensland Temperance League (the league) to always own real property of a prescribed value. The Act does not state this is a duty but provides the league 'shall not be taken to be in breach of its duty prescribed by section 7(1)' if a sale reduces the value of real property owned but occurs in particular circumstances. The Act is silent about any legal action if the duty is breached.

11.133 Other jurisdictions also recognise breach of duty proceedings in the lower courts. For example, the 2019 Tasmanian Act defines the term 'breach of duty' in a similar way and provides that the court has 'jurisdiction to hear and determine a charge for a breach of duty'. The Act applies, with necessary modifications, to a breach of duty as if it were a summary offence.[77] The Chief Magistrate can issue practice directions about the necessary modifications and, on application, a district registrar can give directions about how the Act applies to proceedings for a breach of duty.[78]

Consultation

11.134 The Consultation Paper asked respondents to identify circumstances where breach of duty proceedings have been used in practice in the Magistrates Courts.[79]

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[74] *Justices Act 1886* (Qld) s 4 (definition of 'breach of duty'). The reference to the term 'simple offence' refers to that term as used in the *Justices Act 1886*.

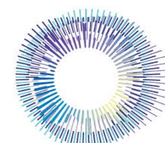
[75] This includes the same general time frame of one year for starting a proceeding: *Justices Act 1886* (Qld) s 52(1).

[76] For example, section 17 of the *Animal Care and Protection Act 2001* (Qld) states that a person owes a duty of care to an animal and must not breach that duty. The maximum penalty is 300 penalty units or 1 year's imprisonment. This section does not specifically refer to an 'offence', but the operation of section 41 of the *Acts Interpretation Act 1954* (Qld) has the effect that a contravention of the section constitutes an offence.

[77] The term 'summary offence' is similar to be term 'simple offence' in the Justices Act: *Magistrates Court (Criminal and General Division) Act 2019* (Tas) ss 4 (definition of 'summary offence') (not in force).

[78] *Magistrates Court (Criminal and General Division) Act 2019* (Tas) ss 4 (definitions of 'breach of duty', 'breach of duty order', 'charge' and 'defendant'), 11(1)(b), 123–24 (not in force). There are also references to breach of duty in relation to costs, payment of fees, and the making of rules about written pleas of guilty and matters dealt with in the defendant's absence: ss 152(4), 158(3), 162(1)(h), (i) (not in force).

[79] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) Q 11, 33.



11.135 Stakeholders did not identify any specific laws establishing a breach of duty or any proceedings about a breach of duty. LAQ and the Caxton Legal Centre stated that they have limited or no involvement in these types of proceedings, and the BAQ stated that they were 'not aware' of proceedings in the Magistrates Court about breaches of duty.

11.136 The QLS and ATSILS submitted:

> In general, breaches of duty as provided for in the Justices Act typically involve regulatory matters, relating to a positive duty placed on a person by the provisions of an Act, where such are not defined in that Act as simple (or indictable) offences. Other sources of duties for invoking the jurisdiction of the Court may be derived from international and maritime obligations.[80]

11.137 ATSILS also stated that by setting out procedures for a breach of duty, the provisions of the Justices Act are important because they 'put in place the procedural machinery and fairnesses to be applied to the defendant in such proceedings, especially requirements for proper service of the complaint and time limits'.

11.138 Both ATSILS and the QLS suggested these matters could be renamed to be more easily understood (for example, by referring to them as 'regulatory breaches'), but that otherwise there is 'no specific need' to amend the provisions of the Justices Act that treat breaches of duty in the same way as simple offences.

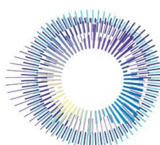
The new model

11.139 It is not desirable for the new legislative framework about criminal procedures in the Magistrates Courts to include frequent references to 'breach of duty' proceedings. It is unclear which (if any) laws establish a breach of duty, and there are very few (if any) proceedings in the Magistrates Courts about breaches of duty. The new legislative framework should be simple, clear and easy to understand, meaning that it should not routinely refer to proceedings that very rarely (if ever) take place.

11.140 However, it cannot be said with certainty that the Queensland law does not (in legislation or common law) establish any breaches of duty that are to be dealt with under the Justices Act. For that reason, it is still necessary and appropriate to retain the Magistrates Courts jurisdiction to hear proceedings about a breach of duty.

11.141 Retaining this jurisdiction is most appropriately achieved by providing for it in the *Magistrates Courts Act 1921*, which establishes each Magistrates Court as a court of record. This Act currently sets out the civil jurisdiction of the Magistrates Courts, and elsewhere I have recommended that it should also set out their criminal jurisdiction. Generally, it is appropriate that all jurisdictional provisions are contained in that Act.

[80] This quote is from the submission by ATSILS. The QLS did not refer to international or maritime obligations.



11.142 To adequately provide for clear court procedures in these matters, the new criminal procedure laws should apply (with necessary modifications) to proceedings for a breach of duty as if it were a summary offence. This approach would establish clear procedural laws for breach of duty matters and continue to treat those proceedings in the same way as they are presently treated, without changing other laws that establish breaches of duty or the outcomes that can be sought in a breach of duty proceeding.

11.143 If further guidance about court procedures for a breach of duty is required, this could be provided for in the Rules or, as in the Tasmanian approach, through practice directions issued by the Chief Magistrate.

Human rights considerations

11.144 The proposal to allow a magistrate to access a defendant's criminal history for the purposes of deciding whether a matter can be dealt with summarily engages protected rights under the *Human Rights Act 2019*, including the right to privacy and reputation.[81]

11.145 Accessing a defendant's criminal history limits their right to privacy, however it is justifiable and reasonable under the *Human Rights Act 2019*.[82] This is because failing to allow a magistrate to consider a defendant's criminal history at an early stage could result in cases where the need for a matter to be committed to a higher court is not identified until late in a proceeding, resulting in delays in the matter being finalised. Allowing magistrates access to this information early is justifiable to ensure the defendant's matter is dealt with efficiently and without unreasonable delay,[83] and to achieve the objectives of the criminal justice system.

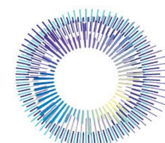
11.146 The proposal limits the use of a defendant's criminal history to the magistrate, who may only use the criminal history for determining if a charge can be dealt with summarily, but otherwise must not take it into account until a defendant is convicted (unless it is admissible for another reason). This information is not widely published, and not anticipated to be released to the broader community.

11.147 The new legislation also provides for a matter to be committed for sentence (not trial) if the need for a committal is identified after a defendant has found guilty and convicted of the offence at a summary trial. Although a defendant's minimum guarantees include being tried in person and defending themselves against a charge, these are not limited in this scenario because a summary hearing will have taken place in the Magistrates Court.

[81] *Human Rights Act 2019* (Qld) s 25.

[82] *Human Rights Act 2019* (Qld) s 13.

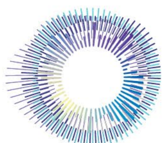
[83] This is consistent with the minimum guarantees for a person charged with an offence, which required that the person is tried without unreasonable delay: *Human Rights Act 2019* (Qld) s 32(2)(c).



11.148 The new legislation will seek to clarify a number of provisions and terms in the Justices Act which currently cause confusion for court users and professional legal staff, including the definition of a 'simple offence'.

11.149 The new criminal procedure legislation will also seek to relocate and simplify provisions currently in the Criminal Code about indictable offences dealt with summarily. As such, these changes will broadly support the protected rights of a person who has been charged with an offence.[84]

[84] *Human Rights Act 2019* (Qld) s 32.



Recommendations

R11.1: Chapter 58A of the Criminal Code should be redrafted in the way set out in Recommendations R11.2 – R11.6, and those redrafted provisions should be located in the new criminal procedure legislation.

Indictable offences in the Criminal Code that are dealt with summarily

R11.2: For indictable offences in the Criminal Code that may be dealt with summarily, the new criminal procedure legislation should:

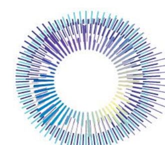
- **(a)** include a numerical list of all indictable offences in the Criminal Code that can be dealt with summarily, which includes information about any election required and any limitations or requirements associated with the offence being dealt with summarily (based on sections 552A through 552BB);
- **(b)** permit a Magistrates Court to decide the value of any property or damage to property in a particular matter (based on section 552G);
- **(c)** provide for an indictable offence to be dealt with summarily despite the amount of time that has passed since the matter arose (based on section 552F);
- **(d)** provide for the circumstances in which a magistrate must abstain for dealing with an offence summarily (as set out in section 552D) and make it clear that if a matter is dealt with as a committal proceeding following any evidence being heard, the matter must be committed in court in accordance with Recommendation 17.22; and
- **(e)** provide for the maximum penalty that can be imposed when a matter is dealt with summarily (based on section 552H).

Procedural matters for indictable offences dealt with summarily

R11.3 For any indictable offence where a party must make an election about whether the charge is dealt with summarily, the new criminal procedure legislation should include procedures for:

- **(a)** a self-represented defendant to make an election, which includes giving the defendant an explanation of the charges and their options (based on section 552I(2);
- **(b)** a lawyer to make an election on a defendant's behalf, including a requirement for the defendant to be present when it is made;
- **(c)** a prosecutor to make an election, which must take place before the defendant is asked to enter any plea;

and in each case, these procedures must be flexible enough to accommodate any additional requirements for making an election that are included in another Act.



R11.4 A party may apply to change their election about whether an offence is or is not to be dealt with summarily. The application:

- **(a)** will apply in relation to any offence for which an election is required, when the party who has made an election wants to change it;
- **(b)** may not be made after any evidence to prove the charge has been called by the prosecution at a summary hearing;
- **(c)** will be heard by a Magistrates Court, which may hear submissions and consider evidence about the application, and must consider all relevant circumstances when reaching a decision; and
- **(d)** may be granted by the court for good reason, taking into account all relevant circumstances.

R11.5 In considering whether the court should abstain from dealing with any indictable offence summarily, regard may be had to the defendant's criminal history when making the decision unless that is prohibited by another Act. However, a magistrate must disregard the defendant's criminal history unless it is otherwise admissible for the purposes of determining the charge, unless and until the defendant is found guilty or convicted of the offence.

R11.6 If a Magistrates Court abstains from dealing with any indictable offence summarily, unless some other Act applies, the new criminal procedure legislation should provide a clear pathway for the matter to be committed to a higher court. In circumstances where a defendant is found guilty and convicted at a summary hearing, the matter must be committed for sentence.

Parts of Chapter 58A that are relocated or not recreated

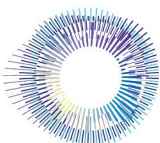
R11.7 The laws about the constitution of a Magistrates Court dealing summarily with an indictable offence in the Criminal Code (section 552C) should be relocated to the *Magistrates Courts Act 1921*.

R11.8 The laws about where an indictable offence in the Criminal Code can be heard and decided summarily (section 552E) are adequately addressed in other parts of the new criminal procedure legislation and should not be recreated.

R11.9 The ability to appeal an indictable offence in the Criminal Code on the ground that it was an error for the Magistrates Court to have decided the charge summarily (section 552J) should be included in the new criminal procedure legislation. However, it should be located in the same place as other laws about appeals.

The term 'simple offence' in the Justices Act

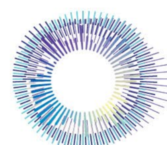
R11.10 The new criminal procedure legislation should retain the meaning of the term 'simple offence' as it is defined in the *Justices Act 1886*, but the term should be renamed 'summary offence'.



Breach of duty proceedings

R11.11 The 'breach of duty' jurisdiction that currently exists in the *Justices Act 1886* should be included in the *Magistrates Courts Act 1921*.

R11.12 The new criminal procedure laws should apply, with necessary modifications, to a proceeding for a breach of duty as if it were a summary offence.



CHAPTER 12: STARTING PROCEEDINGS

Introduction

12.1 In Queensland, regardless of the type of offence, most criminal proceedings are started in the Magistrates Courts.

12.2 The way in which a criminal proceeding is started is critical to upholding natural justice and procedural fairness. A person being charged with an offence has a right to know what they have been charged with in sufficient detail. The associated court procedures should be clear and easy to understand for all court users to make sure matters progress through the criminal justice system efficiently.

12.3 While any person can start a criminal proceeding in Queensland, this chapter is specifically about criminal proceedings started by public officers (other than police officers) by filing and serving a complaint and summons.

12.4 Proceedings started by other people are referred to as 'private complaints' or 'private prosecutions'. They are discussed in the next chapter.

The current position in Queensland

12.5 Currently, any person can start a criminal proceeding in Queensland.[1] The way a criminal proceeding is started in a Magistrates Court will vary depending on who is starting it and the circumstances in which it is started. Generally, a proceeding may be started by:[2]

- arrest and charge,[3] with or without a warrant
- issue and service of a notice to appear by a police officer[4]
- service of a complaint and summons.[5]

[1] *Acts Interpretation Act 1954* (Qld) s 42. Private prosecutions can also occur in the higher courts under procedures contained in the Criminal Code (Qld) ch 70.

[2] Proceedings can also occur in other ways including, for example, if a person disputes an infringement notice, or if an Act creating an offence states proceedings can occur without a written complaint: eg *Bail Act 1980* (Qld) s 33.

[3] For citizens' powers of arrest, see Criminal Code (Qld) ch 58.

[4] *Police Powers & Responsibilities Act 2000* (Qld) s 382.

[5] *Justices Act 1886* (Qld) ss 42, 53. Sometimes a warrant is issued with or instead of a summons: pt 4 div 6.

Current methods of starting a criminal proceeding in Queensland

Notice to Appear

- Issued by Queensland Police Service under the *Police Powers & Responsibilities Act 2000*
- A written, paper-based notice telling the defendant the date, time and place they have to attend court and what they are being charged with
- Police must give the notice to defendant and will also file a copy of the notice with the court

Arrest and Charge

- Used by Queensland Police Service under the *Police Powers & Responsibilities Act 2000*
- Police have obligations after arresting a person, including to bring an arrested person before a court as soon as possible to be dealt with

Complaint & Summons

- Used by a complainant to start a criminal proceeding under the *Justices Act 1886*
- The complaint sets out what offence has allegedly occurred
- The summons section states the date, time and place where the defendant is required to attend court
- The complainant must serve a copy to the defendant so they know about the court date and charge
- The complainant must also file a copy with the court registry
- Sometimes, instead of a summons, there can be a warrant issued for the defendant's arrest

Diagram 12.1: Summary of common methods of commencing criminal proceedings in the Magistrates Courts in Queensland

12.6 A Queensland police officer can start a criminal proceeding by any of the above methods. However, for police officers, the most common methods are arrest and charge or issue of a notice to appear.[6]

12.7 Police officers will commonly issue and serve a notice to appear 'on the spot' when the officer 'reasonably suspects the person has committed or is committing an offence'.[7] The short notice tells the person what offence they are alleged to have committed and includes a time and date on which the person is required to come to court. Generally, this notice is treated as the equivalent of a complaint and summons under the Justices Act.[8]

12.8 The police officer must file the notice in court as soon as reasonably practicable after service and before the time the person is required to appear.[9] The police officer must also provide a separate bench charge sheet for each charge. The bench charge sheet provides further details about each charge alleged.[10]

12.9 This Review does not involve an analysis of the police powers to arrest and charge a person, or their ability to issue a notice to appear. I will not be making any

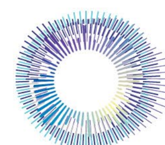
[6] See generally, *Police Powers and Responsibilities Act 2000* (Qld).

[7] *Police Powers and Responsibilities Act 2000* (Qld) s 382(2).

[8] *Police Powers and Responsibilities Act 2000* (Qld) ch 14 pt 5, particularly ss 384, 388.

[9] *Police Powers and Responsibilities Act 2000* (Qld) s 385(1).

[10] *Justices Regulation 2014* (Qld) regs 13(3), 14. See further [812.22] below.



recommendations for any changes to these specific police procedures, except to include a provision allowing the court to enlarge a notice to appear.[11]

12.10 Generally, people other than Queensland police officers start a criminal proceeding by making a written complaint (information about what the charge is) and issuing a summons (information about the place, date, time of the court appearance).

12.11 The Justices Act recognises different categories of people who can make a complaint and sets up different processes depending on this classification. A complaint may be made by a 'public officer' or by another person who, in making the complaint, is acting to execute a duty imposed on them by law, or to properly administer a Queensland Act or a Commonwealth Act.[12]

12.12 The Justices Act defines a 'public officer' as:

(a) an officer or employee of the public service of the State or the Commonwealth; or

(b) an officer or employee of a statutory body that represents the Crown in right of the State or the Commonwealth; or

(c) an officer or employee of a local government;

who is acting in an official capacity.[13]

12.13 Other people can also make complaints, but they are referred to as 'private prosecutions' or 'private complaints' and there are sometimes additional procedural requirements. These are discussed in the next chapter.

Complaint and summons

12.14 The Justices Act provides for criminal proceedings to be started using a complaint and summons. The complaint[14] sets out in writing the offence (or offences) the defendant is accused of committing.[15] It may be made by the complainant, their lawyer or another authorised person where the defendant is guilty of or suspected of having committed an offence.[16] The summons states when the defendant is required to appear in court.[17] Both

[11] See [812.78], Recommendation 12.15.

[12] *Justices Act 1886* (Qld) s 4 (definition of 'private complaint').

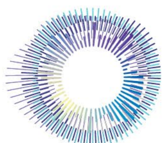
[13] *Justices Act 1886* (Qld) s 4 (definition of 'public officer').

[14] *Justices Act 1886* (Qld) s 4 defines the term 'complaint' to include the terms 'information', 'information and complaint' and 'charge' when used in any Act, and means an information, complaint, or charge before a Magistrates Court.

[15] *Justices Act 1886* (Qld) s 43 sets out rules about charges on a complaint.

[16] *Justices Act 1886* (Qld) s 53.

[17] *Justices Act 1886* (Qld) s 54.



the complaint and summons must be made before a Queensland justice of the peace, filed in court and served on the defendant.[18]

12.15 There are requirements for documents to be served on a person throughout the Justices Act, as well as details about the way service occurs. Generally, this means that the document must be provided to the person in some way. For most complaints and summons, and for most notices to appear, the document is 'personally served', meaning it must be given to the defendant in person.[19]

12.16 The Justices Act does not state 'when' a proceeding has started — it is unclear if it starts once the complaint and summons is served on the person, or after the complaint and summons is filed in court. A complaint and summons must be filed at the Magistrates Court where the defendant is required to appear within three days of the summons being issued (which may be before or after it is served).[20]

12.17 Generally, a complaint will be heard and determined in the court district where the offence is alleged to have taken place.[21] There are lengthy rules about the geographical districts of the Magistrates Courts and how these are applied when starting a criminal proceeding by a complaint and summons.[22] For example, they state that a matter can also be heard and determined at a 'Magistrates [Court] within the district within 35km of the boundary of the which the offence … was committed.'[23] There are also rules relating to an offence alleged to have occurred in or on, or in relation to, a vehicle, vessel or aircraft.[24]

12.18 A complaint and a warrant for the defendant's arrest can sometimes be used, instead of or in addition to a summons. The warrant allows police to bring the person to court. Where a warrant is issued by a justice of the peace, a complaint must be sworn on oath.[25]

Particulars of the offence

12.19 In Queensland, the offence alleged to have been committed must be described in a written complaint. The Justices Act states if an offence is described using the words (or

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[18] *Justices Act 1886* (Qld) pt 4 divs 1, 3, 5.

[19] *Justices Act 1886* (Qld) s 56 allows for alternative ways of service. In relation to simple offences or breaches of duty, a summons can be sent by registered post at least 21 days before the required appearance date. Generally, if a person cannot reasonably be found, a copy can be left with another person at the person's usual or last-know place of business or residence.

[20] *Justices Act 1886* (Qld) s 54(2).

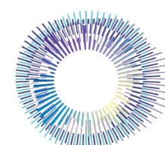
[21] *Justices Act 1886* (Qld) s 139(1)(a).

[22] *Justices Act 1886* (Qld) ss 23C, 139.

[23] *Justices Act 1886* (Qld) s 139(1)(b).

[24] *Justices Act 1886* (Qld) s 139(1)(c), (d).

[25] *Justices Act 1886* (Qld) pt 4 divs 3, 6.



similar words) of an Act, order, by-law, regulation or other instrument that creates the offence, then the description will be 'sufficient in law'.[26]

12.20 In recent years, the common (case) law has also considered what needs to be included (or 'particularised') in a complaint to make it valid. Generally, an offence must be sufficiently described so that the person can understand the charge or charges against them.[27]

12.21 A police notice to appear only requires general particulars, such as the type of offence and when and where it is alleged to have occurred.[28] This is a consequence of the notices being carried and issued on the spot by police officers. But there are also additional requirements under the Justices Act.

12.22 When police have arrested a person or issued a notice to appear, they must enter the particulars of each charge onto a separate bench charge sheet that is filed with the court. A bench charge sheet must state:

- the name of the complainant and defendant
- the charged offence and 'adequate particulars' to inform the defendant about the nature of the charge, such as the time and place of the offence, any person who is aggrieved and any property in question
- any circumstances of aggravation (matters that make the offence more serious).[29]

12.23 Like in the Justices Act, it is enough to describe the offence using the words (or similar words) of the Criminal Code or the Act defining the offence.[30]

12.24 The fact that a police notice to appear only requires 'general particulars' does not affect the prosecution's duty to provide 'proper particulars' during a prosecution. When a person appears in response to a notice, the court must ensure they are promptly given proper particulars (and, if necessary, adjourn proceedings so that the person can consider them).[31]

12.25 In the higher courts, an indictment must set out the offence with which the person is charged, including sufficient particulars to inform the accused person of the charge. This can include the time and place of the offence, the alleged victim and any property in

[26] *Justices Act 1886* (Qld) ss 42, 47(1). The Justices Act also says that if a description of a person or thing would be sufficient for an indictment, then it will be sufficient in a complaint: s 46.

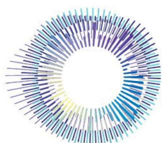
[27] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

[28] *Police Powers and Responsibilities Act 2000* (Qld) s 386(1).

[29] *Justices Act 1886* (Qld) s 42; *Justices Regulation 2014* (Qld) regs 13–14.

[30] *Justices Regulation 2014* (Qld) s 14(2)–(3). These regulations also state that if a description of a person or thing would be sufficient for an indictment, then it will be sufficient in a complaint.

[31] *Police Powers and Responsibilities Act 2000* (Qld) s 387.



question, and must also include any circumstances of aggravation.[32] Further particulars about the charge can be given to the defendant separately from the indictment (and, if necessary, proceedings adjourned).[33]

Other Australian jurisdictions

12.26 The Review considered how proceedings are started under criminal procedure laws in other Australian states and territories.

12.27 Other jurisdictions have moved away from the use of complaint and summons and instead adopted a broader approach of using notices. New South Wales, Victoria and Western Australia have all introduced a notice mechanism (referred to as a 'court attendance notice', 'notice to appear' or 'prosecution notice') in their criminal procedure legislation.[34]

12.28 These notices all require similar types of specific information, such as:

- the full name and contact details of the person issuing the notice
- the full name and address of the person served with the notice
- the offence the accused person is alleged to have committed
- the general circumstances of the alleged offence, such as the date, time and place of offence
- that the accused person is required to appear before the court at a specified date, time and place.[35]

12.29 Other jurisdictions also include a clear provision about 'when' a proceeding starts. For example, in New South Wales, proceedings are started by issuing and filing a court attendance notice and are considered to have started on the date the notice is filed in court.[36]

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[32] Criminal Code (Qld) s 564.

[33] Criminal Code (Qld) s 573. See also section 574 which states the provisions of chapter 60 of the Criminal Code relating to indictments also apply to indictable offences dealt with summarily.

[34] *Criminal Procedure Act 1986* (NSW) s 172 ('court attendance notice'); *Criminal Procedure Act 2009* (Vic) s 21 ('notice to appear'); *Criminal Procedure Act 2004* (WA) s 23, sch 1 div 2 ('prosecution notice'). A notice mechanism is also included in the 2019 Tasmanian Act: *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 40 ('court attendance notice') (not in force).

[35] *Criminal Procedure Act 1986* (NSW) s 175; *Criminal Procedure Act 2009* (Vic) s 21(2); *Criminal Procedure Act 2004* (WA) s 23(2), sch 1 div 2. See also, in the 2019 Tasmanian Act: *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 55 (not in force).

[36] *Criminal Procedure Act 1986* (NSW) ss 47, 53, 172, 178.

Consultation

12.30 Feedback during the Review's public consultation consistently highlighted the need for clearer and simpler procedures for criminal proceedings in the Magistrates Courts. Strongly voiced feedback about starting proceedings related to the initiating documents, the language used and the need for clearer indicators or signposts at particular stages of proceedings.

12.31 Most respondents supported replacing the current complaint and summons mechanism with a more contemporary court notice or notice to appear model, such as the New South Wales 'court attendance notice'. There was strong feedback in support of the following key features being adopted in such a 'court notice':

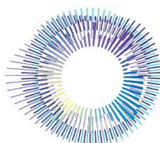
- there should be no requirement for the notice to be sworn before a justice of the peace
- the notice must contain sufficient description of the details of the offence
- the notice must be able to be filed electronically
- personal service of the notice should be required to start the proceeding, but there should still be some flexibility and discretion for substituted service.

12.32 For example, the Queensland Law Society submitted:

> The Society supports replacing the complaint and summons procedure with a notice that the person must appear in court. The commencement of criminal proceedings by public officers via complaint and summons is outdated and inefficient. Persons (other than police officers) who are capable of commencing criminal proceedings are generally senior officers within statutory organisations, vested with significant statutory responsibilities. The current Justices Act requirement that such persons lay a complaint before a Justice of the Peace (in circumstances where the Justice of the Peace is often less experienced than the complainant themselves) is both time-consuming and unnecessary.
>
> We highlight police officers from the most junior rank of constable can commence criminal proceedings via notice to appear, without review by a Justice of the Peace. The distinction between that process and the commencement of an offence by a public official is not justified, particularly so where a statutory body is vested with legislative power to commence proceedings for alleged offences within its legislative framework. In such circumstances, it should be sufficient for the appointed person to themselves execute the documentation (that is, a notice to appear or similar) necessary to commence proceedings.

12.33 While some submissions suggested maintaining the current complaint and summons mechanism, these submissions proposed that the drafting of the approved forms for a complaint and summons could be updated and modernised.

12.34 Most stakeholders also highlighted the need for a legislative requirement to adequately describe the offence when proceedings are started. Multiple stakeholders submitted that the requirements in section 47 of the Justices Act (explained in [12.19]) should be maintained. Other stakeholders suggested alternative options to improve consistency



across jurisdictions, such as a provision that mirrored the requirements set out in either section 564 of the Criminal Code (explained in [12.25]) or the requirements in the *Police Powers Responsibilities Act 2000*[37] when police officers issue a notice to appear (explained in [12.7]).

12.35 Stakeholders also supported having a clear milestone or signpost in the legislation about 'when' a proceeding has started. Stakeholders want certainty so that all parties can recognise this milestone, determine if it is started within time limits, and understand the status of a proceeding and how to progress it from there. Multiple submissions supported the approach adopted in New South Wales, to the effect that proceedings should start on the date the notice is filed in court.

12.36 In relation to police notices to appear, magistrates and the legal profession noted there is no ability to enlarge a notice to appear[38] at the first mention when a defendant has a reasonable excuse for not appearing, such as being unable to travel to the court due to flooding. Some magistrates stated that the inability to enlarge the notice meant they were required to issue a warrant for the defendant's arrest for failing to personally appear, and that this outcome seemed unjust in the circumstances.

12.37 A legal practitioner submitted that if a defendant engages a lawyer before their first appearance, they [the lawyer] 'should be able to state that we are in contact with the accused and are retained, therefore eliminate the client's appearance [at the first mention]'.

New model

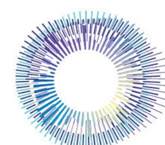
The need to modernise how proceedings are started in Queensland

12.38 Current procedures for starting a criminal proceeding under the Justices Act are old-fashioned and inefficient. Stakeholders overwhelmingly supported an approach that would overhaul and modernise the way a criminal proceeding is started, including clear and simple procedures allowing all court users to understand the process and what is required of each party. There is a clear need for efficient processes around when and how defendants are notified of a criminal proceeding against them, particularly to protect their human rights.

12.39 The processes associated with completing, filing and serving a complaint and summons are time-consuming and inefficient. The *Police Powers and Responsibilities Act 2000*

[37] *Police Powers and Responsibilities Act 2000* (Qld) s 384.

[38] In this context, to 'enlarge' means to extend the time during which, or by which, something must take place. For example, if a court were to enlarge a notice to appear, this would extend the date on which the defendant is required to appear in court. Another common example is where the court enlarges a defendant's bail so that the defendant will continue to be on bail until the next scheduled court date.



expressly acknowledges the inefficiencies of the current complaint and summons process by allowing police officers to instead issue a notice to appear for offences. Section 382(1) of that Act states:

> The object of this section is to provide an alternative way for a police officer to start or continue a proceeding against a person that reduces the need for custody associated with arrest and does not involve the delay associated with issuing a complaint and summons under the *Justices Act 1886*.

12.40 There is a clear need for the current complaint and summons model to be updated in a way that prioritises simplicity, clarity and efficiency for court users. In the new framework for criminal procedure laws in the Magistrates Courts, this will be replaced with a notice-based model.

12.41 The new framework I have recommended for starting proceedings has many similarities to the existing police process for issuing notice to appear procedures. This mirroring will, in particular, provide more consistency in court processes. However, there are also some differences. There will be no change to the police processes in relation to starting a charge.

Language

12.42 The terminology or language used in the new procedure legislation needs to be simplified and clarified. It should be modernised and easy to understand for all court users.

12.43 Currently, a person bringing a complaint is the 'complainant'. The Justices Act does not define the term 'complainant', although it is referred to throughout the Act. The term 'complainant' is confusing as it can mean different things and refer to different people. Sometimes it can mean the person against whom the offence was committed (also referred to as the 'victim'), and other times it can mean the person bringing or starting the proceeding (such as a police officer or public officer) for an offence. In the context of the Justices Act, it usually refers to the person starting the proceeding.[39]

12.44 I recommend the new criminal procedure legislation use simple and easy to understand language. Accordingly, references to 'complainant' will be replaced with two new terms, as follows:

(a) Authorised Person – the person who is authorised to start a criminal proceeding for a charge (or charges) by completing and signing the court documents.

(b) Prosecutor – the person who appears in the proceeding and prosecutes the charge (or charges).

[39] *United Petroleum Pty Ltd v Sargent* [2019] QDC 93.

12.45 Because I will be recommending the complaint and summons model be replaced, the term 'complaint' will also need to be changed. When I refer to a 'complaint', I am referring to the charge documenting the offence before a court. Therefore, the term 'complaint' should be changed to 'charge'.[40]

How to start a proceeding

12.46 It is contemporary and effective to replace the complaint and summons model in the Justices Act with a new notice to appear model. I recommend a model similar to the approach adopted in New South Wales which allows for a 'Court Attendance Notice'.

12.47 The Court Attendance Notice should be a modern, user-friendly document written in clear and simple language. Generally, it should be sufficient for the authorised person to sign the notice and declare that its contents are true and correct, and there should be no requirement for the notice to be sworn before a justice of the peace.[41] The procedures should allow for electronic methods of filing.

Who can issue a Court Attendance Notice

12.48 There will be no change to who may start a criminal proceeding in the Magistrates Courts. Any person will be able to issue a Court Attendance Notice, but there will be separate processes for notices issued by the different types of authorised persons.

12.49 I recommend the Court Attendance Notice be able to be issued directly to a defendant by the following people, referred to as 'authorised person':

(a) a 'public officer' as currently defined by the Justices Act

(b) a person who is acting in the execution of a duty imposed by law or the proper administration of a Queensland or Commonwealth Act

(c) another prescribed person or category of persons

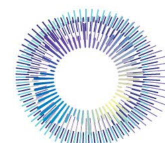
(d) a person who has been authorised by the Magistrates Court to issue a Court Attendance Notice.

12.50 The first two categories are consistent with the current approach in the Justices Act about when a complaint is not a 'private complaint'.[42] The inclusion of another prescribed person or category of persons allows for a mechanism to include any other entities. This recognises that other entities or officers have statutory powers to prosecute certain types of offences, and those prosecutions should not be treated as private complaints.

[40] See [812.98] ff for further discussion of charges recorded on a Charge Sheet.

[41] Except when seeking an arrest warrant: See further [812.79] ff.

[42] *Justices Act 1886* (Qld) s 4 (definition of 'private complaint').



12.51 RSPCA Inspectors, who have powers under the *Animal Care and Protection Act 2001* to investigate and prosecute animal welfare and cruelty offences, should be included as prescribed persons. I have heard that sometimes these types of prosecutions have proceeded as private complaints. However, RSPCA Inspectors perform an important function in society and should be able to operate in the same way as public officers.

12.52 The procedures for a private prosecution or private complaint will involve a specific requirement for an individual member of the public to first make an application to the Magistrates Courts to seek authorisation before issuing a Court Attendance Notice on the accused person. Once the court has provided the authorisation, then the person making the application will become an 'authorised person' for the purposes of starting a criminal proceeding by way of a Court Attendance Notice.[43]

When to issue a Court Attendance Notice

12.53 The threshold test for when a Court Attendance Notice ought to be issued by an authorised person should be consistent with the test applied by police when they issue a notice to appear.[44] That is, a Court Attendance Notice can be issued and served on a defendant if the authorised person:

(a) reasonably suspects the person has committed or is committing an offence

(b) is asked by another authorised person who has the suspicion mentioned in paragraph (a) to issue and serve the notice.

Contents of a Court Attendance Notice

12.54 Natural justice and procedural fairness indicate that there should be information given in the notice to allow a person charged with an offence to understand what they are charged with, as well as where and when they are required to appear in court. To achieve this, I recommend the requirements in section 47(1) of the Justices Act and section 384 of the *Police Powers and Responsibilities Act 2000*[45] be incorporated into the new procedure legislation to set out content required for a Court Attendance Notice.

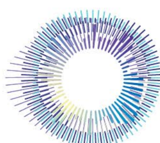
12.55 A Court Attendance Notice can be issued for one offence, or for multiple offences, even if those offences cannot be dealt with together (that is, they are not joinable at law).[46] The effect of the of the Court Attendance Notice is simply to notify the accused person of the

[43] See Chapter 13 as to the procedures relating to private prosecutions.

[44] *Police Powers and Responsibilities Act 2000* (Qld) s 382(2).

[45] See [12.7] and [12.19].

[46] See Chapter 19 for further discussion about joinder.



offences alleged against them and the requirement to attend court on the specified date and time.

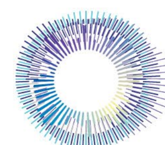
12.56 As a minimum, the Court Attendance Notice must state the following:

- the provision number of the alleged offence under a specific Act or Regulation
- the description of the offence alleged to have been committed in the words of the Act, order, by-law, regulation or other instrument creating the offence
- the general particulars of the alleged offence, such as the date, time and place of the offence, and any persons or property involved in the offence
- if known, any circumstances of aggravation or that the offence is a domestic violence offence
- the name of the defendant
- whether the defendant was, at the time of the alleged offence, an adult or a child
- a requirement that the defendant appear before a court at a stated date, time and place:
    - for an adult - at least 14 days from the date of the notice (or, with the defendant's written agreement, a stated shorter time after the notice is served)
    - for a child – as soon as practicable after service of the notice.
- the signature, name and contact details of the authorised person
- any requirements or authorisations to commence a proceeding (for example, the consent of the Attorney-General).

12.57 The timing for the defendant's first appearance at court is similar to the requirements in the *Police Powers and Responsibilities Act 2000*. There is no specific limit or 'cap' on the maximum time frames for future court dates due to a range of practical issues. For example, there are regional and remote courts throughout Queensland that only sit at certain times of the year and there can be months between sittings. It would be unreasonable to impose a strict limit on the maximum time frame within which the defendant must appear as there would be many cases where it would be infeasible.

12.58 The guiding principles for the new criminal procedure legislation require that the authorised person should act promptly, expeditiously and in good faith when starting a criminal proceeding.[47] Further, the *Acts Interpretation Act 1954* applies generally to the

[47] See Chapter 9.



effect that if no time is provided or allowed for doing anything, the thing is to be done as soon as possible.[48]

12.59 The form of the Court Attendance Notice should also provide the defendant with some information about the court process. For example, it should explain that they have the option to plead guilty or not guilty, including how to enter a plea of guilty in writing, and give information about the consequences of failing to appear in court, including that the charge may be dealt with in their absence.

12.60 Issues about the form and content of charges or particulars in a complaint and summons have previously been used as the basis for legal arguments the court does not have jurisdiction over a matter because the charge as written is defective and cannot be 'cured' by using the amendment power in section 48(1) of the Justices Act, making the complaint a nullity.

12.61 In recent years, Queensland courts have considered the scope of the amendment power under section 48 of the Justices Act in relation to defects in written charges, with an emerging principle developing that 'it is not to be assumed that every failure to allege a necessary ingredient of a charge is beyond the reach of the power of amendment under [section] 48'[49] subject to the applicable principles.

12.62 The scope of section 48 applying to this scenario was recently considered in 2022 by the Queensland Court of Appeal, in *J Hutchinson Pty Ltd v Guilfoyle* [2022] QCA 186. This case clarified that section 48 of the Justices Act allows amending a complaint that fails to disclose an offence (defect in substance) provided it involves a consideration of whether the defendant would in fact suffer material injustice or prejudice if the amendment is allowed. The Court stated, '[f]ailure to disclose an offence … is comprehended by the phrase "defect of substance or in form"'.[50]

12.63 The case endorsed the approach in a similar Northern Territory matter,[51] particularly that the power of amendment in the Justices Act is 'wide-ranging and extends to <u>any defect</u> in a charge whether in substance or in form …. It serves the purpose of ensuring that justice is not defeated by errors and omissions which are not productive of injustice'.[52]

12.64 For these reasons, I recommend the new criminal procedure legislation contain a provision replicating section 48 of the Justices Act. In order to improve understanding, it would be useful to make clear the application of this recent clarifying interpretation.

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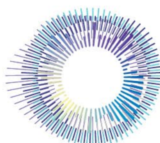
[48] *Acts Interpretation Act 1954* (Qld) s 38(4).

[49] *Harrison v President of the Industrial Court of Queensland* [2016] QCA 89 [132].

[50] *J Hutchinson Pty Ltd v Guilfoyle* [2022] QCA 186, [56].

[51] *S Kidman & Co Ltd v Lowndes* CM [2016] NTCA 5, examining *Local Court (Criminal Procedure) Act 1928* (NT) ss 182–83.

[52] Ibid [115] (emphasis added); see also [116]–[119].



Signing a Court Attendance Notice

12.65 Currently, all complaints need to be made before a justice of the peace. If an arrest warrant is required, then the complaint must be sworn on oath before a justice of the peace. These requirements will change in the new criminal procedure framework.

12.66 Generally, similar to a police notice to appear, the new Court Attendance Notice does not need to be sworn before a justice of the peace. The authorised person must sign the Court Attendance Notice. If a proceeding is to be started by an arrest warrant, then the Court Attendance Notice should accompany an application that has been declared before a justice of the peace to be true and correct for a warrant to be issued by the justice of the peace. This is due to the seriousness of obtaining a warrant for someone's arrest.[53]

Service and filing of a Court Attendance Notice

12.67 It is fundamental that personal service is a requirement of starting a proceeding. The person accused of committing an offence has a right to be notified of the charges against them.

12.68 In the first instance, a Court Attendance Notice should be personally served on a defendant except where otherwise authorised by another Act or law. For example, a notice to appear for offences under the *Transport Operations (Road Use Management) Act 1995* or the *Heavy Vehicle National Law (Queensland)* may be served on a person by registered post.[54]

12.69 The Court Attendance Notice and a signed declaration of service should be filed within seven days of service, but before the person is required to appear in court under the notice. This is usually at least 14 days from the date of the notice (but can be shorter if the parties agree).[55] In any circumstance, it should be filed at least two clear days before the first appearance date. If an agreement to appear earlier does not allow this to happen, then it should be filed as soon as possible.

12.70 The notice and declaration should be filed with the registry of the Magistrates Court where the charge is to be heard. However, if it is not filed in the 'correct' court registry then the notice is not invalid. Steps can be taken to transfer the matter to the correct court.[56] There is no requirement that the authorised person themselves must be the person to file the notice.

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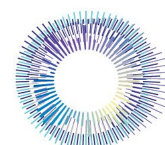
[53] See further [812.79] ff as to arrest warrants.

[54] *Police Powers and Responsibilities Act 2000* (Qld) s 382(4).

[55] This is different to the *Police Powers and Responsibilities Act 2000* (Qld) s 385. That section does not set a time frame, it states 'as soon as reasonably practical after service of a notice to appear on a person, and before the time the person is required to appear at a place before a court under the notice, the notice must be lodged with the clerk of the court at the place'.

[56] See [812.88] about where to start a proceeding, and Chapter 19 about transferring proceedings.



12.71 There may be occasions when personal service is simply not possible or efficient; for example, where a defendant lives in a remote location and personal service cannot be carried out by an authorised person. The Justices Act allows for service:

- in relation to a simple offence or breach of duty: by posting a copy of a complaint and summons (by registered post) to the person at their place of business or residence last known to the complainant at least 21 days before the date on which the defendant is required to appear
- for all matters: by delivering a complaint and summons personally or, if the defendant cannot reasonably be found, by leaving a copy with another person at the defendant's usual or last known place of business or residence.[57]

12.72 The new criminal procedure legislation will require personal service of a Court Attendance Notice for any offence and will recreate the right of entry for service of a summons for public officers.[58] This will allow a public officer, or a person aiding an officer, to enter a place and stay for a reasonable time for the purpose of serving a Court Attendance Notice. If the premises (or part of the premises) are exclusively for residential purposes, the occupier must consent.

12.73 If a defendant cannot be personally served, then provisions should allow for substituted service by way of registered post or leaving the notice with another person, as currently provided for in the Justices Act, or another authorised method. It is appropriate for the detailed requirements of substituted service to be dealt with in regulations or rules related to the new criminal procedure legislation.

12.74 When proceeding by way of substituted service, the Court Attendance Notice should be filed within the same time frame as a notice that is personally served, with a declaration detailing the reasons why the defendant was not personally served.

12.75 A Court Attendance Notice should be struck out by the court if the defendant does not appear, and the court is not satisfied the defendant was properly served. This would mean that the court proceeding for that charge would not go ahead, and the defendant would not be punished for failing to appear in court or required to appear later. However, striking out the notice would not prevent another proceeding from being started for the same offence, and a new notice being served on the defendant to require them to appear in court. This is consistent with the procedure relating to police notices to appear.[59]

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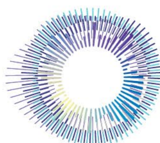
[57] *Justices Act 1886* (Qld) s 56(1).

[58] *Justices Act 1886* (Qld) s 56A.

[59] *Police Powers and Responsibilities Act 2000* (Qld) s 390.



12.76 In circumstances where the defendant does not appear, and the court is satisfied the defendant was properly served with the Court Attendance Notice and made aware of the requirement to appear in court, the law should allow for a warrant to be issued for the defendant's arrest or for the matter to be dealt with in the defendant's absence. However, if the defendant has a reasonable excuse for not appearing then the court should have the authority to instead enlarge the original notice and adjourn the matter to another date (with the defendant's appearance required on that date). This is particularly fair and appropriate where a person's appearance is genuinely affected by real-world issues outside of their control, such as a global pandemic or catastrophic weather event.

Police notices to appear

12.77 If a person fails to appear in court as required by a police notice to appear, the court may hear and decide the matter in their absence or order that a warrant be issued for their arrest. The enforcement of the warrant can be postponed to give the person a further opportunity to appear in court, but the initial notice cannot be enlarged.[60]

12.78 During the Review, we received feedback that there is currently no authority for a police notice to appear to be enlarged even when the defendant has a reasonable excuse for not appearing in court. It would be fair and reasonable, as well as consistent, for the law to allow a police notice to appear to be enlarged in similar circumstances.

Proceedings started by a warrant

12.79 Currently, the Justices Act allows for a complaint to be followed by the issue of a warrant for the defendant's arrest in some circumstances, including:

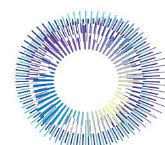
- when the person is suspected of committing an indictable offence
- for a simple offence that is not indictable, when a justice is satisfied that proceeding by way of complaint and summons would be ineffective, or that the Act or law creating the offence authorises issuing a warrant 'in the first instance'.

12.80 Where that is the case, a complaint must be sworn on oath.[61]

12.81 The new criminal procedure legislation will also allow for an authorised person who has completed a Court Attendance Notice charging a person with an offence to obtain an arrest warrant in particular circumstances. As explained, the Court Attendance Notice and an application for a warrant must be declared before a justice of the peace to reflect the formality and seriousness associated with an arrest warrant.

[60] *Police Powers and Responsibilities Act 2000* (Qld) s 389.

[61] *Justices Act 1886* (Qld) pt 4 divs 3, 6.



12.82 The new legislation should also outline the criteria on which a justice of the peace must be satisfied to issue a warrant. These criteria should always apply to a warrant for any type of offence and should include:

(a) proceeding by way of a Court Attendance Notice without a warrant would be ineffective. Some examples of this could be there are reasonable grounds to suspect that if the defendant were not arrested, the defendant:
  (i) would avoid service of the Court Attendance Notice; or
  (ii) would not comply with the requirement to appear in court; or
  (iii) would commit an offence; or
  (iv) would continue or repeat an offence charged in the Court Attendance Notice; or
  (v) would endanger another person's safety or property; or
  (vi) would interfere with witnesses or otherwise obstruct the course of justice; or

(b) the authorised person has proof the defendant no longer lives at their last known address; or

(c) the defendant's whereabouts are unknown; or

(d) the defendant is the subject of another warrant for his or her arrest; or

(e) the Act or law creating the offence authorises issuing a warrant in the first instance.[62]

12.83 The Court Attendance Notice and the warrant issued by the justice of the peace must be filed with the court as soon as practical, but no later than 7 days after the issuing of the warrant. This is consistent with the proposed 7-day period for filing after service. Further, the matter must be filed in the court in a way that complies with any time limits for proceedings.[63]

Warrant after notice served but before court date

12.84 There may be circumstances where a Court Attendance Notice has been issued and served but it becomes apparent that a warrant may be needed for the defendant's arrest. For example, the defendant may indicate they intend to leave the state or may pose a risk to an alleged victim or witness.

12.85 Currently in Queensland, once an adult has been given a notice to appear or a summons for an offence, a police officer may arrest that person without a warrant if the officer reasonably suspects the person is directly or indirectly harassing or interfering with a possible witness or is likely to fail to appear before the court.[64]

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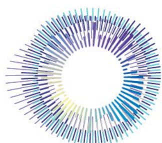
[62] For example, see *Penalties and Sentences Act 1992* (Qld) s 128.

[63] See 'Time limits for starting proceedings' in Chapter 11.

[64] *Police Powers and Responsibilities Act 2000* (Qld) s 368. This applies whether or not the adult has been arrested for the offence: s 368(1). It does not apply if the defendant is a child: s 368(2).



12.86 In New South Wales, after a Court Attendance Notice has been issued but before the date the matter is first before the court, a registrar[65] can issue a warrant for the accused person's arrest if satisfied there are substantial reasons to do so and it is in the interests of justice, taking into account:

- whether the offence is serious enough to justify the issue of a warrant, having regard to whether the offence is punishable by imprisonment
- whether there is, and the nature of, any risk to the safety of an alleged victim, witness or other person if the accused is not arrested and brought before the court
- whether the accused person is the subject of any other warrant
- if a warrant is sought on the basis that a notice has not been served, whether reasonable attempts at service have been made and whether an order for substituted service would be preferable to a warrant.[66]

12.87 There should be a provision in the new criminal procedure legislation applying between service of a Court Attendance Notice and the first court appearance, where new information causes the authorised person to request a warrant for the defendant's arrest. In these circumstances, given the matter is before the court, it is appropriate for the application to be made to the court registry, for the registrar or a magistrate to issue the warrant if there are substantial reasons to do so and it is in the interests of justice. The criteria to issue a warrant should be similar to the criteria for a justice of the peace to issue a warrant, and this can be provided for in the Rules. In cases where a registrar has refused to issue a warrant, there should be no right to review this decision. The matter would simply be heard on the first appearance date by the court.

Where to start a proceeding

12.88 It is practical that a matter should be heard and determined in the court closest to where an offence is alleged to have occurred. In New Zealand, a criminal proceeding is commenced by filing material in the court that is:

(a) nearest to where the offence is alleged to have been committed; or

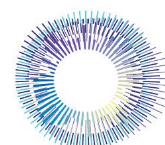
(b) nearest to where the person filing the charging document [for our purposes the Court Attendance Notice] believes the defendant can be found.[67]

12.89 However, despite those general rules:

[65] The legislation specifically provides that a warrant can be issued by an 'authorised person', which means a registrar of a court, or an employee of the Attorney-General's Department authorised by the Attorney-General: *Criminal Procedure Act 1986* (NSW) s 3 (definition of 'authorised person').

[66] *Criminal Procedure Act 1986* (NSW) s 181; *Local Court Rules 2009* (NSW) r 7.3.

[67] *Criminal Procedure Act 2011* (NZ) s 14(1).



> (a) if all parties to the proposed proceeding agree, the charging document may be filed in another [court]; and
>
> (b) if 2 or more charging documents are to be filed in respect of the same defendant, they may all be filed in a [court] in which any 1 of them could be filed.[68]

12.90 The New Zealand legislation states that a failure to file a charging document in the correct court does not invalidate any proceeding.[69]

12.91 The New Zealand model reflects the guiding principles of simplicity and efficiency, and its use would improve understanding of criminal procedures in the Magistrates Courts. The new criminal procedure legislation will adopt a similar model for Queensland, in that criminal proceedings should commence nearest to where the offence is alleged to have been committed, at an agreed place or, for multiple charges, all in one place. I also recommend that the new criminal procedure legislation recognises that proceedings may be started in another place authorised by an Act or law.[70]

12.92 I do not recommend adopting the New Zealand provisions relating to commencing proceedings by filing material nearest to where an authorised person 'believes the defendant can be found'. I hold concerns that this could allow for procedures to be open to abuse of process.

12.93 Currently, under the Justices Act, if a proceeding is brought in the wrong court, that mistake has resulted in the proceeding being invalid and having to be re-started in the correct court. To avoid these issues, the new law should explicitly state that if a matter is brought before the wrong court, the proceeding will not be invalid. In that case, an application could simply be made to transfer the matter to a different court.

12.94 Other provisions in the Justices Act relating to an offence alleged to have occurred on a vehicle, vessel or aircraft[71] will need to be maintained, but the language of the provisions will be simplified and made clear. Generally, this will be to the effect that where an offence occurs:

- in, on or in relation to a vehicle, vessel or aircraft; and
- in the course of a journey or a flight landing in Queensland; and
- the court district within which the offence occurred is uncertain;

the Court Attendance Notice may be filed in any court district that the vehicle, vessel or aircraft passed through or over during the relevant journey or flight.

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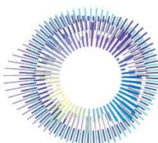
68 *Criminal Procedure Act 2011* (NZ) s 14(2).

69 *Criminal Procedure Act 2011* (NZ) s 14(3).

70 For example, *Justices of the Peace and Commissioners for Declaration Act 1991* (Qld) s 37(2).

71 *Justices Act 1886* (Qld) s 139(1)(c)–(d).



When does a proceeding start?

12.95 The Justices Act does not state 'when' a proceeding has started. This lack of clarity is unhelpful and should be corrected to improve understanding of court procedures. The new criminal procedure legislation will explicitly state when a proceeding has started, to ensure certainty for all court users.

12.96 I recommend that the New South Wales approach be adopted. This makes it clear that proceedings are considered to have started on the date the Court Attendance Notice (and related material, such as a signed declaration of service or a warrant and charge sheet) is filed in the court registry.

12.97 This approach is fair to the defendant. Elsewhere, I recommend that the defendant should be served with the Court Attendance Notice and then the notice and declaration of service should be filed in court. By making the date of filing also be the date the proceeding has started, the effect is that proceedings generally will not start until after the defendant is aware of them.

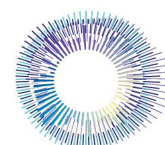
Charge sheet

12.98 At the same time as a Court Attendance Notice is filed, there should also be a requirement for a second document to be filed. This second document will be the same as the bench charge sheet filed by police and should be known as a 'Charge Sheet' for the purposes of starting a proceeding. A copy of the Charge Sheet should be provided to the defendant at the first court appearance date.

12.99 This Charge Sheet will set out adequate particulars of the offence alleged. It formally puts the charge before the court. In practice, it will serve a similar purpose to the indictment used in the higher courts. It will be used when the defendant is called upon to enter a plea, and if charges need to be amended. This model will allow for more consistency between the procedures in the Magistrates Courts and the higher courts, and for consistency with procedures for police notices to appear.

12.100 Consistent with the current requirements of the police bench charge sheet, the Charge Sheet relating to a Court Attendance Notice will contain the following information:

- The name of the defendant and of the authorised person.
- The offence with which the defendant is charged and adequate particulars of the charge to inform the defendant of the nature of the charge, including for example, the following particulars –
    - particulars of the alleged time and place of committing the offence
    - particulars of the person, if any, alleged to be the victim



  - particulars of the property, if any, in question.

- A number for each alleged offence.
- Any circumstances of aggravation on which it is intended to rely, or a statement that the offence is a domestic violence offence.
- Anything else prescribed by the Regulations.[72]

12.101 A Charge Sheet can have one or multiple offences listed, subject to the rules of joinder. This may mean that a defendant is issued one Court Attendance Notice and there is one corresponding Charge Sheet. Alternatively, if the charges are not joinable, there may be one Court Attendance Notice and multiple corresponding Charge Sheets.

12.102 Each offence alleged should be issued with its own unique charge number by the Court, so that it is identifiable throughout the course of a criminal proceeding. This allows for ease of reference when charges are amended or dealt with by the court. However, if a charge is to be substituted in the future, then the newly substituted charge should be given a new charge number.

12.103 Where co-offenders are charged with offences arising out of the same set of facts, separate Charge Sheets will be issued to each defendant. Each defendant will have their own individual charge numbers listed according to those offences which they are alleged to have committed, although these offences can be cross-referenced in the Charge Sheet to the other alleged co-offender. The court may order that the charges against co-offenders are heard together.

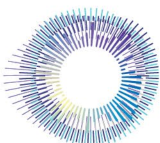
12.104 As is currently provided for under the Justices Act, it will be sufficient to describe the offence in the words of the Criminal Code or the Act defining it, or in similar words. Further, a description of persons or things that would be sufficient for an indictment will also be sufficient for a charge sheet.

12.105 Currently, the rules about the contents of the Bench Charge Sheet are set out in the *Justices Regulations 2014*. For certainty and to make sure people can understand the law, I recommend that the requirements about what must be in a Charge Sheet at the time of filing it with the court should be included in the new procedure legislation.

Circumstances of aggravation

12.106 A person accused of an offence has a right to know what they are charged with, and this includes whether a circumstance of aggravation is being alleged against them. Generally, a ‘circumstance of aggravation’ is a particular fact about an offence that makes it more serious, and means the maximum penalty is higher. For example, it can include a person

[72] *Justices Regulation 2014* (Qld) reg 14.



being armed or in the company of others at the time of the alleged offence. It is important for both the defendant and the magistrate to be aware of the full extent of the alleged offence. Circumstances of aggravation are also relevant to other matters that need to be considered early on in a proceeding, such as whether a defendant should be granted bail.

12.107 Another circumstances of aggravation can relate to whether a defendant has a criminal history and has previously been sentenced for a similar type of offending. Currently, section 47 of the Justices Act requires that the defendant be served a notice that the complainant intends to advise the court of an alleged previous conviction if the defendant is convicted of the current offence. If the notice is not given then the conviction cannot be relied on to increase the maximum penalty for the offence, although it will still be relevant to deciding the defendant's sentence.[73]

12.108 In the higher courts, a circumstance of aggravation must be charged in an indictment. However, a circumstance of aggravation that is a previous conviction can be relied on for sentencing an offender even if it is not charged in the indictment, although it does not increase the maximum penalty that may be imposed.[74]

12.109 The current notice process under section 47 of the Justices Act is cumbersome and time-consuming, and I recommend that it be replaced in the new framework. It is a delicate matter of how much information about a previous conviction is included in a Court Attendance Notice and a Charge Sheet — it is necessary to include the information to inform the defendant, but this means it will also be on court records and knowledge of a person's criminal history may influence a magistrate's decision about whether they are guilty of the current offence.

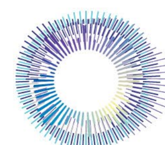
12.110 On balance, I have concluded that a circumstance of aggravation should be included in the Court Attendance Notice and the Charge Sheet, if these circumstances are known at the time the proceeding is started. This is because it is fundamental that a person knows exactly what they are being charged with. If it becomes apparent later that a circumstance of aggravation is to be alleged or relied on, then it should be amended on the Charge Sheet.[75]

12.111 I acknowledge there are real concerns about a magistrate knowing a person's criminal history before they are convicted of an offence. However, this is difficult, sometimes even impossible to avoid in smaller and more regional courts where there is only one magistrate sitting in that court district.

[73] *Justices Act 1886* (Qld) s 47(2)–(8).

[74] Criminal Code (Qld) s 564(2)–(2A), (5). However, the defendant is not arraigned on a circumstance of aggravation that is a previous conviction if the matter proceeds to trial, so that the jury are unaware of the defendant's criminal history: s 630.

[75] See Chapter 19 in relation to amending a charge.



12.112 Where a matter proceeds by way of a summary hearing and a Charge Sheet alleges a previous conviction as a circumstance of aggravation, the law should explicitly state that a magistrate is to disregard that circumstance of aggravation for the purposes of determining the charge unless it is otherwise admissible, unless and until the defendant is found guilty of that offence.

12.113 A defendant's criminal history is relevant for sentencing, whether or not a previous conviction has been alleged as a circumstance of aggravation. However, for clarity and consistency with the current law and the Criminal Code, the new legislation should state that a defendant's criminal history can be relied on for sentencing even if a relevant previous conviction is not alleged as a circumstance of aggravation on a Court Attendance Notice or a Charge Sheet. This will not increase the maximum penalty that can be imposed for an offence.

12.114 If, after a defendant has been convicted, a magistrate decides that their criminal history means they cannot be adequately sentenced in the Magistrates Court, the matter should be committed to the higher courts.[76]

First appearance

12.115 Generally, a defendant must still be required to attend court in person in response to a notice to appear. It is important that a defendant is required to personally appear and resolve the matter or give the court an indication of how they will be proceeding with a charge. In 2021-22, there were 149 429 adult criminal cases that resolved at the first court date.[77]

12.116 However, a requirement to personally appear in court in response to a notice is not intended to prevent a defendant from entering a plea of guilty in writing at the first mention (when available). The new procedures legislation will also maintain provisions allowing the court to deal with some matters in a defendant's absence.[78]

Human rights considerations

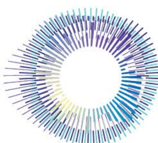
12.117 This Review has a strong human rights focus. The impacts on the human rights of all court users in the criminal justice system have been considered throughout the Review.

12.118 In Queensland, the *Human Rights Act 2019* protects the right to certain minimum procedural guarantees in criminal proceedings for those charged with a criminal

[76] See further [811.96] ff and [17.157] ff.

[77] Information provided by Court Services Queensland, 9 August 2022. This data does not differentiate between the different outcomes possible, including pleas made in person and pleas made in writing.

[78] See Chapter 16 in relation to written pleas and matters dealt with ex parte.



offence.[79] The proposed model for starting proceedings by way of issuing a Court Attendance Notice includes requirements to be personally served and to give the defendant sufficient information to be properly informed about the charge and how to appear at Court. Those requirements, as well as the requirement for further details to be provided in a Charge Sheet, are consistent with these 'minimum guarantees'.

12.119 My recommendations to clarify and simplify the terminology around an 'authorised person', a 'prosecutor' and the information required in the Court Attendance Notice is consistent with the rights in criminal proceedings, by ensuring language is accessible to court users and people who have been charged with offences.

12.120 In relation to when and how a criminal proceeding is started, I have considered the rights of a defendant in criminal proceedings to be presumed innocent until proved guilty according to the law.[80]

12.121 If an authorised person seeks to start a criminal proceeding by way of an arrest warrant, then there are certain requirements which must be satisfied to justify such a course of action. This is consistent with the protections set out in the right to liberty and security of person.[81]

12.122 Introducing a procedure to allow a magistrate to enlarge a Court Attendance Notice when a defendant has a reasonable excuse for not appearing at court for a first mention date allows for appropriate judicial discretion. This will apply instead of the current blanket requirement to issue an arrest warrant for failing to appear. This type of procedure allows for flexibility and permits the court to respond to circumstances outside the defendant's control. Overall, this approach protects the defendant's rights in a criminal proceeding in a simple yet effective way.

12.123 In relation to the issue of a circumstance of aggravation that is a previous conviction, the proposed approach is for a magistrate hearing the matter to disregard a defendant's previous criminal convictions of similar offending in reaching a decision. This provides a formal procedure to ensure a fair trial, recognising the presumption of innocence and ensuring no bias is attached to a circumstance of aggravation unless the defendant is found guilty. In that case, the conviction can be taken into account at sentencing. This specific procedural requirement engages the rights to a presumption of innocence and a fair hearing decided by a competent, independent and impartial court.[82]

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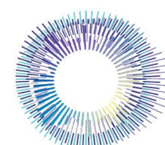
[79] *Human Rights Act 2019* (Qld) s 32(2).

[80] *Human Rights Act 2019* (Qld) s 32(1).

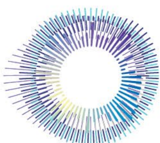
[81] *Human Rights Act 2019* (Qld) s 29.

[82] *Human Rights Act 2019* (Qld) s 31(1), 32(1).



12.124 I have also considered whether serving a Court Attendance Notice may be viewed as restricting the right to freedom of movement[83] as it notifies the defendant that they are required to appear in court at a specified date, time and place. However, this is reasonably justified by the threshold test that is applied when an authorised person is considering whether to issue a Court Attendance Notice.

[83] *Human Rights Act 2019* (Qld) s 19.



Recommendations

R12.1 The new framework for criminal procedure laws applying in Queensland's Magistrates Courts establishes a notice-based model for starting criminal proceedings which requires that to start a proceeding a court attendance notice must be issued, served on the defendant, and filed in court.

Language

R12.2 The criminal procedure legislation uses simple and easy to understand language by:

- **(a)** replacing the term 'complainant' with, as appropriate:
  - **(i)** 'authorised person' – the person who starts a criminal proceeding for a charge (or charges) by completing and signing the court documents;
  - **(ii)** 'prosecutor' – the person who appears in the proceedings and prosecutes the charge (or charges).
- **(b)** replacing the term 'complaint' with 'charge'.

How to start a proceeding

R12.3 A criminal proceeding can be started in the Magistrates Courts by an authorised person using a Court Attendance Notice.

Who can issue a Court Attendance Notice

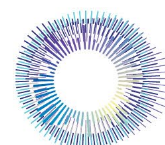
R12.4 A Court Attendance Notice can be issued directly to a defendant by an 'authorised person', which means:

- **(a)** a public officer;
- **(b)** a person who is acting in the execution of a duty imposed by law or the proper administration of a Queensland Act or a Commonwealth Act;
- **(c)** another prescribed person or category of persons; and
- **(d)** a person who has been authorised by the Magistrates Court to issue a Court Attendance Notice.

R12.5 The term 'public officer' means:

- **(a)** an officer or employee of the public service of the state or the Commonwealth; or
- **(b)** an officer or employee of a statutory body that represents the Crown in right of the state or the Commonwealth; or
- **(c)** an officer or employee of a local government;

who is acting in an official capacity.



R12.6 A prescribed person under Recommendation 12.4(c) should include an RSPCA Inspector.

When to issue a court attendance notice

R12.7 A Court Attendance Notice can be issued and served on a defendant by an authorised person if the authorised person:

(a) reasonably suspects the person has committed or is committing an offence; or

(b) is asked by another authorised person who has the suspicion mentioned in paragraph (a) to issue and serve the notice.

Contents of a Court Attendance Notice

R12.8 As a minimum, the Court Attendance Notice must state the following details:

(a) the provision number of the alleged offence under a specific Act or Regulation;

(b) the description of the offence alleged to have been committed in the words of the Act, order, by-law, regulation or other instrument creating the offence;

(c) general particulars of the alleged offence, such as the date, time and place of the offence, and any persons or property involved in the offence;

(d) if known, any circumstances of aggravation or that the offence is a domestic violence offence;

(e) the name of the defendant;

(f) whether the defendant was, at the time of the alleged offence, an adult or a child;

(g) a requirement that the defendant appear before a court at a stated date, time and place:

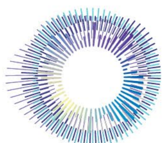
(i) For an adult — at least 14 days from the date of the notice (or, with the defendant's written agreement, a stated shorter time after the notice is served); or

(ii) For a child — as soon as practical after service of the notice;

(h) the signature, name and contact details of the authorised person; and

(i) any requirements or authorisations to commence a proceeding (for example, the consent of the Attorney-General).

R12.9 If there is a technical defect in the wording of a charge, this cannot be relied on to allow the charge to be struck out. The charge may be amended to correct any defects, provided the defendant would not suffer material injustice or prejudice if the amendment is allowed.



[See further Chapter 19 as to amendment]

Signing a court attendance notice

R12.10 The authorised person must sign the Court Attendance Notice. If the authorised person is seeking a warrant, the notice should also include an application for a warrant. It must be declared before a justice of the peace that the contents of the application are true and correct. There must be a discretion in the justice of the peace to issue the warrant.

Service and filing of a Court Attendance Notice

R12.11 A Court Attendance Notice must be personally served on a defendant, except where otherwise authorised by another Act or law. A public officer, or a person aiding an officer, may enter a place and stay for a reasonable time for the purpose of serving a summons, but only with the occupier's consent if the premises (or part of the premises) are exclusively for residential purposes.

R12.12 If a defendant cannot be personally served with a Court Attendance Notice, the authorised person may follow procedures (to be set out in Regulations or Rules) for substituted service by way of registered post, by leaving the notice with another person, or by any other authorised method allowed for under the Regulations or Rules.

R12.13 A Court Attendance Notice and a signed declaration of service must be filed:

(a) for personal service — within seven days of service but before the person is required to appear in court under the notice, which is usually 14 days (but can be shorter if the parties agree). In any circumstances, it should be filed at least two clear days before the first appearance date. If an agreement to appear earlier does not allow this to happen, then it should be filed as soon as possible.

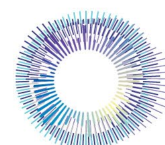
(b) for substituted service — within the same time frames, and with a signed declaration of service detailing the reasons why the defendant was not personally served.

R12.14 If the defendant does not appear in court and:

(a) the court is not satisfied the defendant was properly served with the notice — the court must strike out the attendance notice. This would not prevent another proceeding being started for the same offence.

(b) the court is satisfied the defendant was properly served with the notice — the court may issue a warrant for the person's arrest or deal with the matter in the defendant's absence.

(c) the court is satisfied the defendant was properly served with the notice but has a reasonable excuse for not appearing — the court may enlarge the original notice and adjourn the matter to another date, with the defendant's appearance required on that date.



R12.15 Recommendation 12.14(c) should also apply to a notice to appear issued by a police officer under the *Police Powers and Responsibilities Act 2000*.

Proceedings started by warrant

R12.16 A Court Attendance Notice relating to any charge may be accompanied by a warrant issued by a justice of the peace only if:

- **(a)** the contents of the Court Attendance Notice and the application for a warrant are declared true and correct before a justice of the peace (see Recommendation 12.10); and
- **(b)** the justice of the peace is satisfied that:
  - **(i)** proceeding by way of a Court Attendance Notice without a warrant would be ineffective because the defendant:
    - **(A)** would avoid service of the Court Attendance Notice; or
    - **(B)** would not comply with the requirement to appear in court; or
    - **(C)** would commit an offence; or
    - **(D)** would continue or repeat an offence charged in the Court Attendance Notice; or
    - **(E)** would endanger another person's safety or property; or
    - **(F)** would interfere with witnesses or otherwise obstruct the course or justice; or
  - **(ii)** the authorised person has proof that the defendant no longer lives at their last known address; or
  - **(iii)** the defendant's whereabouts are unknown; or
  - **(iv)** the defendant is the subject of another warrant; or
  - **(v)** the Act or law creating the offence authorises issuing a warrant in the first instance.

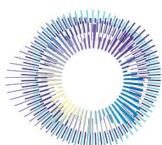
R12.17 A Court Attendance Notice and warrant must be filed with the court as soon as practical, but no later than 7 days after the issuing of the warrant.

R12.18 Where a Court Attendance Notice has been issued and filed, and before the date the matter is first before the court, the registrar or a magistrate may, on application by the authorised person or prosecutor, issue a warrant for the defendant's arrest if satisfied there are substantial reasons to do so and it is in the interests of justice, taking into account relevant matters set out in the Rules.

Where to start a proceeding

R12.19 A Court Attendance Notice must be filed in a court registry that is:

- **(a)** nearest to where the offence is alleged to have been committed; or



(b) authorised by another Act or law.

R12.20 Despite recommendation 12.19:

(a) if the authorised person and the defendant agree, the Court Attendance Notice may be filed in another court; and

(b) if two or more Court Attendance Notices are to be filed in respect of the same defendant, they may all be filed in a court in which any one of them could be filed.

R12.21 Where an offence occurs:

(a) in, on or in relation to a vehicle, vessel or aircraft; and

(b) in the course of a journey or a flight landing in Queensland; and

(c) the court district within which the offence occurred is uncertain;

the Court Attendance Notice may be filed in any court district that the vehicle, vessel or aircraft passed through or over during the relevant journey or flight.

R12.22 If a Court Attendance Notice is not filed in the 'correct' court registry, as set out in Recommendations 12.19 – 12.21, this does not invalidate any proceeding.

[See further Chapter 19 as to transfer of proceedings]

When a proceeding starts

R12.23 A criminal proceeding is taken to have commenced on the date that the Court Attendance Notice, with accompanying material regarding service of the notice or issue of a warrant and the charge sheet(s), are filed with the court registry.

Charge Sheet

R12.24 At the same time as a Court Attendance Notice (with or without an arrest warrant) is filed, a second document called a 'Charge Sheet' must also be filed. A copy of the Charge Sheet should be provided to the defendant at the first appearance date.

R12.25 The Charge Sheet must include the following information:

(a) the name of the defendant and of the authorised person;

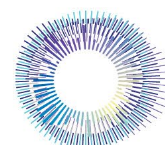
(b) the offence with which the defendant is charged and adequate particulars of the charge to inform the defendant of the nature of the charge, including for example, the following particulars –

(i) particulars of the alleged time and place of committing the offence;

(ii) particulars of the person, if any, alleged to be the victim;

(iii) particulars of the property, if any, in question;

(c) a number for each alleged offence;



(d) any circumstances of aggravation on which it is intended to rely, or a statement that the offence is a domestic violence offence; and

(e) any other requirements prescribed by the regulations.

R12.26 Each offence alleged on a Charge Sheet must be given a unique charge number by the Court.

R12.27 For the purposes of a Charge Sheet:

(a) it is sufficient to describe the offence in the words of the Criminal Code or the Act defining it, or in similar words; and

(b) a description of persons or things that would be sufficient on an indictment is sufficient on a charge sheet.

R12.28 The content of Recommendations 12.24–12.26 must be explicitly included in legislative requirements about starting proceedings (not in Regulations or Rules).

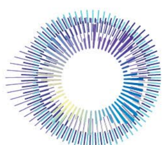
Circumstances of aggravation

R12.29 If a Court Attendance Notice or a Charge sheet alleges as a circumstance of aggravation that a defendant has been previously convicted of an offence, a magistrate must disregard that circumstance of aggravation for the purposes of determining the charge, until such time as the defendant is found guilty of the offence.

R12.30 Whether or not a previous conviction has been alleged as a circumstance of aggravation on a Court Attendance Notice or Charge Sheet, a defendant's criminal history can be relied on when sentencing the defendant for an offence. This will not increase the maximum penalty that can be imposed for an offence.

First appearance

R12.31 A defendant who has been served with a Court Attendance Notice must attend the first court appearance in person. However, this will not affect the defendant's ability to enter a guilty plea in writing, or the court's ability to deal with the matter in the defendant's absence.



CHAPTER 13: PRIVATE PROSECUTIONS

Introduction

13.1 This chapter follows on from the previous chapter about starting proceedings. It is specifically about private prosecutions in the Magistrates Courts of Queensland. This chapter does not review the procedures for private prosecutions in the Supreme Court of Queensland.[1]

13.2 For the purposes of this Report, the terms 'private complaint' and 'private prosecution' are the same and are used interchangeably.

13.3 The ability to bring a private prosecution in the Magistrates Courts provides access to justice, particularly if a public agency decides not to prosecute.

The current position in Queensland

13.4 In Queensland, a 'private complaint' or 'private prosecution' is a complaint made by a person who is not a public officer, or who is not acting in the execution of a duty imposed on them by law or the proper administration of an Act or Commonwealth Act.[2] Generally, they are complaints made by individual members of the public in a private capacity.

13.5 Private prosecutions do not occur frequently. Of the 359,081 charges lodged against adults in the 2021–22 financial year, only 2,878 were started by 'a non-government prosecuting authority'.[3] It is difficult to obtain exact data from the Magistrates Courts, as the majority of these prosecutions relate to animal protection, food safety and local council laws, suggesting most of these are actually conducted by investigators performing public functions. This could be a result of data entry rules within the Magistrates Courts or public officers inadvertently commencing proceedings as individuals rather than agencies. In any event, this represents a small portion of Magistrates Courts criminal matters.

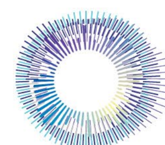
13.6 A private complaint can be made about any offence. However, if it is about an indictable offence, other than an offence alleging an injury to the complaint's person (body) or property, then additional procedural provisions apply. These include:

- The defendant can request written particulars at the first appearance, and the complaint will be struck out if sufficient particulars are not given.

[1] *Criminal Code* (Qld) ch 70.

[2] *Justices Act 1886* (Qld) s 4 (definition of 'private complaint').

[3] Information provided by Court Services Queensland, 6 August 2022.



- The defendant can apply for the complaint to be dismissed on the ground that it is an abuse of process, frivolous or vexatious.
- The complaint can be struck out if it is not prosecuted with ‘due diligence’.[4]

13.7 If the matter is dismissed or stuck out for any of the above reasons, there can be no further private complaint charging the same offence.[5]

13.8 The Justices Act creates an offence prohibiting the publication of information ‘allud[ing] to’ a private complaint against any person until it is established that the complaint will not be dismissed on the ground that it is an abuse of process, frivolous or vexatious.[6]

13.9 Where a charge cannot be dealt with summarily or can be dealt with summarily without the defendant’s consent, the defendant does not have to appear in person in response to a summons until after the court is satisfied there is sufficient evidence for the defendant to be tried for an indictable offence.[7]

13.10 The ability to bring a private prosecution in the Magistrates Court provides access to justice, particularly if a public agency decides not to prosecute. In Queensland, recent private prosecutions about matters such as assault[8] and threatening violence in the context of domestic violence[9] demonstrate the utility of private prosecutions in criminal procedure laws.

13.11 Other recent decisions demonstrate the application of the additional procedural provisions.[10]

13.12 Currently, the Justices Act allows for a magistrate’s decision to dismiss a private prosecution under section 102C on the basis that the proceeding is an abuse of process, frivolous or vexatious to be appealed to a judge of the Supreme Court in chambers by way of application made by originating summons. The decision on appeal will be final. Further, section 102D expressly provides that there are no other appeal rights in relation to that application, or a magistrate’s decision to strike out a matter due to lack of

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[4] *Justices Act 1886* (Qld) pt 5 div 2.

[5] *Justices Act 1886* (Qld) ss 102B(4), 102E, 102G(2).

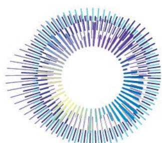
[6] *Justices Act 1886* (Qld) s 102F. In addition, section 102FA provides that if a corporation commits an offence against section 102F, each executive officer of the corporation may be taken to have also committed the offence if the officer authorised or permitted the conduct, or was (directly or indirectly) ‘knowingly concerned’ in the corporation’s conduct.

[7] *Justices Act 1886* (Qld) s 103A. The defendant can appear by way of their lawyer until ordered to appear in person.

[8] *Arndt v Rowe* [2011] QDC 313.

[9] B Smee, ‘Woman prosecutes former partner who doused her with petrol in case Queensland police refused’, *The Guardian* (online) (24 Feb 2020) <https://www.theguardian.com/australia-news/2020/feb/24/man-pleads-guilty-to-petrol-splashing-despite-queensland-police-refusal-to-lay-charges>.

[10] *DBX v TAT* [2021] QCA 242.



particulars.[11] This is inconsistent with the *District Court of Queensland Act 1967* which states that an appeal may not be made from a Magistrates Court to the Supreme Court.[12]

13.13 In addition, the Justices Act contains several costs provisions which apply only to private prosecutions, to provide additional protection for defendants who may be dealing with an abuse of process, frivolous or vexatious private complaints.

13.14 A magistrate can order a private prosecution be struck out and award the defendant 'such costs as to them seem just'.[13] This may occur when the prosecutor has failed to give the defendant sufficient particulars of the charge, or the prosecutor does not proceed with 'due diligence' and the charge is ultimately struck out.

13.15 If a defendant in a private prosecution applies to the court for the charge to be dismissed because the charge is an abuse of process, frivolous or vexatious, the court may order a private prosecutor to provide security for costs to the court and if they do not comply then the complaint will be struck out.[14] Further, if a defendant in a private prosecution applies for the charge to be dismissed because it is frivolous or vexatious or the charge is struck out due to non-payment of the security, the successful party in this application is eligible for costs.[15]

13.16 The state and Commonwealth prosecuting agencies have legislative powers to take over a private prosecution proceeding in certain circumstances.[16] I do not intend to review or make any recommendations about these specific provisions.

Other Australian jurisdictions

13.17 Other jurisdictions throughout Australia have formal procedures in place to assess whether private complaints should commence in certain circumstances.

13.18 In New South Wales, a private prosecution is started by issuing a court attendance notice signed by a registrar. However, a registrar must not sign the notice if, in their opinion:[17]

- the notice does not disclose the grounds for the proceedings
- the notice is not in the required form

[11] *Justices Act 1886* (Qld) s 102D(5).

[12] *District Court of Queensland Act 1967* (Qld) s 112.

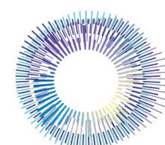
[13] *Justices Act 1886* (Qld) ss102B(3), 102G. Section 102G refers more specifically to 'such costs as to them seem just and reasonable'.

[14] *Justices Act 1886* (Qld) s 102C(2)-(2A).

[15] Justices Act 1886 (Qld) s 102C(5).

[16] See *Police Service Administration Act 1990* (Qld) s 10.24(2); *Director of Public Prosecutions Act 1984* (Qld) s 10(c)(ii); *Director of Public Prosecutions Act 1983* (Cth) s 9(5).

[17] *Criminal Procedure Act 1986* (NSW) ss 14, 49, 174; *Local Court Rules 2009* (NSW) r 8.4.



- the proceedings are 'frivolous, vexatious, without substance or have no reasonable prospect of success' (except for proceedings under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)).[18]

13.19 If a registrar refuses to sign, the question of whether the notice should be signed and issued will be decided by a magistrate on the application of the person attempting to commence proceedings.[19]

13.20 In Tasmania, a private prosecution for an offence in the Criminal Code requires consent of the Director of Public Prosecutions, who must be satisfied the person is acting in good faith and on reasonable grounds.[20]

Consultation

13.21 Feedback from the submissions in response to the Consultation Paper was that the current system could be improved. Submissions outlined issues such as a lack of clarity about how to start a private prosecution, and the potential for misuse of the procedures for malicious or vexatious purposes.

13.22 Feedback also outlined that private prosecutions are prohibitively expensive and require a person to engage private representation.

13.23 A number of submissions supported the New South Wales model and outlined the need for balance between bringing a prosecution in a private capacity and the need to ensure the court is not unnecessarily dealing with frivolous or vexatious complaints. Feedback supported a new model to assess private prosecutions or complaints before a matter can proceed. Court Services Queensland submitted that it supported an initial criteria test being introduced, however it raised concerns about how the New South Wales model would impact the court registry workloads and resourcing.

13.24 Any changes to the current provisions about private complaints must ensure sufficient safeguards are in place to uphold the right to procedural fairness and a fair trial. Some stakeholders also commented that any limits should be the 'minimum required' to manage vexatious proceedings and prevent abuse of process.

13.25 The overwhelming feedback from stakeholders was that the legislation should be clear, and plainly set out the procedure for starting a private complaint.

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[18] See, as to starting proceedings under that Act, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) pt 10 div 3.

[19] *Criminal Procedure Act 1986* (NSW) ss 49(3), 174(3).

[20] *Justices Act 1959* (Tas) s 27(3). See also *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 41 (not in force).

The new model

The need to modernise how private prosecutions are started in Queensland

13.26 The ability of a member of the public to bring a prosecution in a private capacity is an essential component of the criminal justice system. However, the procedures for starting a private prosecution should be modern and contemporary and written in a way that makes clear to the private prosecutor and the defendant the requirements for proceeding with these matters.

13.27 It is important to have safeguards built into the procedures, as people starting a private prosecution are generally members of the public who are not lawyers. These types of proceedings would not be something with which they are familiar, and the court should play a greater role in ensuring their understanding.

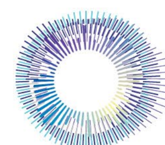
13.28 The current provisions in the Justices Act relating to private prosecutions are cumbersome. This can make following the procedures for a private prosecution a difficult task, especially for non-lawyers. The new criminal procedure legislation should have provisions that are clear and structured in a way that is easy to understand for all court users. Further, I recommend that the new criminal procedure legislation should contain a separate part specifically for the procedures relating to the initial application to a Magistrates Court for starting a private prosecution. This initial application process will be explained in further detail below.

13.29 Essentially, in this chapter I recommend that the steps for starting a private prosecution should be generally the same as other criminal proceedings started by way of a Court Attendance Notice. However, I recommend there be an extra initial requirement as a safeguard to balance the rights of parties and ensure court resources are utilised for genuine (bona fide) private prosecutions.

13.30 In summary, this initial requirement will be for a magistrate to assess the proposed private prosecution and decide whether to authorise the matter proceeding. Once authorisation has been given, the matter will proceed according to the general procedures applying to all criminal matters started by way of a Court Attendance Notice.

Language

13.31 Earlier in Chapter 12, I recommended that the terminology or language in the new procedure legislation be simplified and clarified. This is particularly important for private prosecutions, which involve legal action by members of the public.



13.32 As far as possible, the law about private prosecutions will use language consistent with the remainder of the law about criminal procedure. In particular, as discussed below, the terms ‘authorised person’ and ‘prosecutor’ will continue to be used.

Starting a private prosecution

13.33 Carrying on from the previous chapter relating to starting a criminal proceeding, the concept of an ‘Authorised Person’ being able to start a criminal proceeding for a charge (or charges) by completing and signing court documents will apply to private prosecutions. Earlier, I recommended that there be different types of Authorised Persons, including a person who has been authorised by the Magistrates Court to issue a Court Attendance Notice.

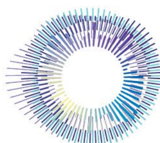
13.34 A person bringing a private prosecution should first have authorisation from a Magistrates Court to issue a Court Attendance Notice. This recognises that many private prosecutions are started by members of the public without legal expertise, and that it would be inappropriate to allow those people to issue a Court Attendance Notice without a degree of oversight. Accordingly, I recommend that a person seeking to start a private prosecution must make an application to a Magistrates Court for authorisation to bring a private prosecution and issue a Court Attendance Notice on the defendant. There should be no limit on the types of charges a person can apply to bring as a private prosecution, provided it involves an offence known to law.

13.35 Once authorisation has been given, the person would become an ‘Authorised Person’ for the purposes of starting a proceeding by way of a Court Attendance Notice. An authorised person is distinct from a ‘Prosecutor’, who is the person that appears in a proceeding and prosecutes the charge (or charges). In a private prosecution, the authorised person will usually also be the prosecutor, but the roles are distinct for the purposes of criminal procedures.

13.36 It is important this mechanism is accessible to private citizens, particularly in circumstances where public authorities do not prosecute a matter. However, given the gravity of criminal proceedings for a defendant, it is also appropriate to require that this application be made in relation to a private prosecution for any offence.

Application to the Magistrates Courts

13.37 The new criminal procedure legislation should include clear procedures for making and deciding an application to be an Authorised Person for the purpose of issuing a Court Attendance Notice to a defendant (an application).



Making an application

13.38 An application must generally be made by the person who wants to start the private prosecution. It could also be made by another person on their behalf; for example, a private lawyer that the person has engaged to assist them in this process.

13.39 The application should be in writing and should include details about the applicant (and any representative), information about the proposed charges, a summary of the evidence proposed to prove the charge and any other information required by the court. It should be accompanied by a completed Court Attendance Notice and Charge Sheet that can be served on the defendant if the application is granted.

13.40 The application should be filed with the Magistrates Court in which the proceeding must be started. In most cases, this will be the court nearest to where the offence is alleged to have been committed.[21] The application must also be filed within any time limit that applies to starting the proceeding.[22] For example, if a proceeding for an offence must be started within one year of the matter arising, the application must be filed in the correct court within that one-year period.

Hearing an application

13.41 An application must be listed for hearing only before a magistrate. The magistrate must assess the matter and decide whether they are satisfied, in all the circumstances that the private prosecution should be permitted to proceed.

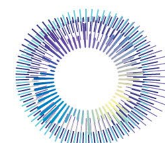
13.42 When assessing an application, the court may receive any information that it considers appropriate to enable it to properly consider the application. The magistrate must make the decision on the information that is reasonably available to them at the time. There is likely to be some information that is not readily available in these circumstances. Further, since the potential defendant is not required to appear at this application, information they may be able to provide about this matter will not be before the court.

13.43 In deciding this application, the magistrate may adjourn the matter for further information or evidence to be produced. For example, the magistrate could adjourn the matter and require an applicant to return to court on a later date with evidence of the offence or other additional information.

13.44 The magistrate must exercise a discretion when assessing and deciding whether to grant the application. In doing so, the magistrate may take into account a number of considerations, including:

[21] See 'Where to start a proceeding' in Chapter 12.

[22] See 'Time limits for starting proceedings' in Chapter 11.



- whether the charge alleged is an offence known at law
- whether any other prosecuting agency has already brought a charge against the accused person based on the same set of facts or circumstances
- whether there is sufficient public interest in prosecuting the matter
- whether the proceeding is frivolous, vexatious, misconceived or would be an abuse of process
- whether the proceeding is lacking in substance in terms of there being no reasonable or available evidence that could be disclosed, produced or relied on to prove the charge
- any other relevant circumstances.

13.45 If, after hearing the application, the magistrate is satisfied in all the circumstances that the private prosecution should proceed, then the magistrate may make an order that the applicant is an Authorised Person, the Court Attendance Notice may be served on the accused person and the prosecution may proceed. The magistrate may make an order about how the accused person should be formally served with the Court Attendance Notice.[23]

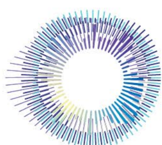
13.46 As part of this order, the matter must be listed for a first mention on a specific date and time at that court and those details must be included on the notice. This date must provide sufficient time for service and ensure as far as possible that the defendant will have sufficient notice about the mention.

13.47 If the magistrate refuses the application, the private prosecution must not proceed, and an order must be made in those terms. The magistrate must dismiss the application and give reasons for this order. An order dismissing the application can be appealed in the usual way by anyone aggrieved by an order made by the Magistrates Courts. Subject to any appeal, an order dismissing the application will mean that the application cannot be brought again — that is, the applicant cannot bring a second application to privately prosecute the defendant for the same offence or for another offence based on the same circumstances.[24]

13.48 The making of this application, as well as the hearing that follows, does not involve the person who would be the defendant in the private prosecution. This is because, at this stage, it is not known whether the matter will proceed so the potential defendant should not be required to incur legal costs to answer the application. Further, were the defendant

[23] See [813.55] and R13.14.

[24] See Chapter 19 in relation to appeals.



to be involved, then other requirements such as disclosure of potential evidence would also follow. Those would complicate and delay the initial application process. Of course, if the application is successful and the prosecution proceeds, all requirements regarding disclosure and other matters would apply and the defendant would have the opportunity to defend the case.

When does a private prosecution start?

13.49 Earlier, I recommended that a proceeding should be taken to have started after the defendant has been served with a Court Attendance Notice, on the date that the notice and charge sheet is filed with the registry.

13.50 This approach is less suitable for private prosecutions, which will be before the court prior to service as a result of the required application. Accordingly, it is preferable that I recommend a different approach.

13.51 For these matters, once an application is granted, a private prosecution should be taken to have started on the date that the application was filed with the registry. This has the effect of 'backdating' the start date, but this is appropriate as it accurately reflects when the matter first came before the court. It will also be necessary in some cases to ensure that a proceeding is started within any time limits for that offence. There may be occasions where an application is filed within time limits but is not heard or finalised until after that time has expired. A prosecution should not be prevented from starting in those circumstances.

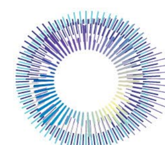
13.52 For clarity and to ensure understanding, these matters should be explicitly included in the new criminal procedure legislation. They should also be addressed by a magistrate when making an order, as appropriate.

Service of a Court Attendance Notice

13.53 Once an application has been approved and a court date allocated to the matter, the accused person must then be served with the Court Attendance Notice.

13.54 The same laws about service of the notice and filing of information about service should apply, as far as possible.[25] However, given the proceeding has started and a court date has been allocated, and to ensure the defendant has sufficient notice of the upcoming court date, it is appropriate for there be time frames within which service must take place. Accordingly, I consider it is appropriate to require that the defendant be served with the notice within seven days of the application being approved.

[25] See 'Service and filing of a Court Attendance Notice' in Chapter 12.



13.55 The magistrate may make specific orders about how the defendant may be formally served. This order can take into account the particular circumstances of the case and reflect that service in a particular way or by a particular person might not be suitable in some circumstances. For example, personal service by an applicant on a defendant may be unsuitable in matters involving violence.

13.56 Once the accused person is served with the Court Attendance Notice then the matter would proceed according to the procedures for all other criminal matters.

Starting private prosecutions by arrest warrant

13.57 There may be occasions when a person applying to be authorised to start a private prosecution also wants to apply for an arrest warrant, rather than serving the defendant with a Court Attendance Notice. In those circumstances, in addition to filing that application, the applicant should also file an application for an arrest warrant at the same time.

13.58 It is important that the same application and Court Attendance Notice is filed even where a warrant is sought because the magistrate may decide that the private prosecution should go ahead but a warrant should not be issued. In that case, the Court Attendance Notice process will be required to proceed.

13.59 The magistrate may hear and decide the two applications together. The application for a warrant should be considered in the same way as an application for a warrant made in any other proceeding, as described in the previous chapter.[26]

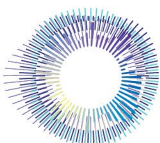
13.60 After hearing the applications, the magistrate may decide to make an order:

- refusing both of the applications and provide reasons for this
- adjourning the applications for further information or evidence to be provided on a later date
- that the applicant is an authorised person for the purposes of issuing a Court Attendance Notice and the prosecution is to proceed, and list the matter for a court date, with the Court Attendance Notice to be served on the defendant
- that the prosecution is to proceed (the applicant is an authorised person) and a warrant is to be issued for the defendant's arrest.

Publication of information about private complaints

13.61 It is important to balance a person's right to make an application to the Magistrates Courts for authorisation to start a private prosecution with the rights of the proposed defendant.

[26] See 'Proceedings started by a warrant' in Chapter 12.



The current provisions in the Justices Act prohibiting the publication of information about a private complaint until it has been established that the complaint will not be dismissed[27] could be adapted to apply to the new model.

13.62 Accordingly, I recommend there be a total prohibition on the communication or publication of information about a private prosecution by any person,[28] if the application to the Magistrates Courts for authorisation to start a private prosecution is unsuccessful. This should extend to any publication about the fact of the application itself. This prohibition should also extend to accessing any court records about the private prosecution in these circumstances. To be clear, this prohibition extends to any appeal period of a decision to refuse the application.

13.63 For matters where an application to proceed with a private prosecution is successful, this prohibition on communication or publication (with the same limits on access to records) should extend until the defendant's first court appearance. This allows time for the defendant to be made aware of the prosecution and served with the court attendance notice.

13.64 Generally, this prohibition should include communication in any format and publication in things like publicly distributed newspapers and magazines, public broadcasts, and public speeches (but not recognised law reports where the parties are anonymised). It should be an offence to breach this prohibition and the penalty should be consistent with other communication and publication prohibition offences or other offences related to breaching confidentiality.[29]

13.65 Similar prohibitions exist in other legislation. For example, the *Youth Justice Act 1992* prohibits the recording or disclosure of confidential information (such as identifying information and reports made about a child) except for particular purposes or to particular people.[30] The *Invasion of Privacy Act 1971* prohibits the communication or publication of a private conversation, or a report about the conversation, in particular circumstances.[31] The maximum penalty for both is 40 penalty units or two years imprisonment.

13.66 This approach is fair to the proposed defendant, who would have no knowledge of the private complaint against them until a magistrate had robustly assessed the complaint and authorised it to proceed. A prohibition on communication or publication (and access

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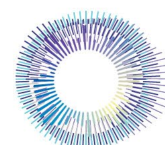
[27] *Justices Act 1886* (Qld) ss 102F, 102FA.

[28] This will include the applicant and any other person, as well as corporations. In addition, as is currently provided for in section 102FA of the Justices Act, this should also include the executive officers of a corporation in those identified circumstances. See further, as to corporations generally, the discussion in Chapter 19.

[29] When these provisions are implemented, consideration will also need to be given to related matters such as registry processes to manage the inspection of files about applications to start a private prosecution.

[30] *Youth Justice Act 1992* (Qld) pt 9.

[31] *Invasion of Privacy Act 1971* (Qld) s 44.



to records) protects the defendant's right to privacy and reputation and prevents the defendant finding out about the private prosecution in the media or elsewhere without first being served with a Court Attendance Notice. Any communication or publication about a private prosecution before it has been authorised by a Magistrates Court would be unfair to a defendant if the matter were to be dismissed, for example, because it was frivolous, vexatious, misconceived or an abuse of process, as their reputation and privacy would suffer.

13.67 Following the first court date (after the defendant has been properly served and notified of the matter), the private prosecution will be subject to the same general rules about publication as any other criminal proceeding.

Private prosecution proceedings following authorisation

13.68 Once a private prosecution has been through this application process and has started, it will proceed in the same way and according to the same procedures as any other prosecution for a criminal offence.

13.69 Once a private prosecution has run its course in the Magistrates Court, it can be appealed in the same way as any other summary criminal prosecution. An appeal should be able to be made by an applicant on the ground that their application to start a private prosecution was refused and they are aggrieved by that decision. An additional ground of appeal should also be available to a defendant, following the final determination of a private prosecution in the Magistrates Courts, where they are aggrieved by a decision to grant an application to start a private prosecution and allow the prosecution to proceed.

13.70 To be clear, I recommend that the new procedures legislation relating to any appeal allows for an appeal to the District Court and not the Supreme Court in chambers. This will provide for consistency with the *District Court of Queensland Act 1967*,[32] in relation to how all criminal proceedings are conducted and for transparency in terms of how matters are considered and decided.

13.71 For indictable offences, if a private prosecution proceeds by way of a committal proceeding, it will be committed to the appropriate higher court in the same way as other indictable matters. However, even following that process, a private prosecutor will need to seek the leave of the Supreme Court of Queensland to present an indictment for that offence.[33] This additional requirement means it is unnecessary to allow an appeal at the conclusion of the matter on the basis that the private prosecution should not have been

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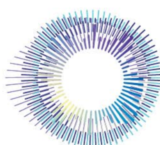
[32] *District Court of Queensland Act 1967* (Qld) s 112.

[33] Criminal Code (Qld) s 686. For any indictable offence, there is nothing preventing a person from bypassing this proposed process in the Magistrates Courts and proceeding directly to an application to the Supreme Court to present an indictment.



permitted to proceed, because the Supreme Court has effectively already decided that point.

13.72 Earlier in this chapter[34] I briefly mentioned that there are other legislative provisions that allow for state and Commonwealth prosecuting agencies to take over a private prosecutions (in certain circumstances).[35] In the event that a state or Commonwealth prosecuting agency does take over a private prosecution which is authorised by law and which proceeds to the higher court, then I do not consider it appropriate to allow an appeal on the ground that the private prosecution should not have been allowed to proceed. This is because that agency has made a decision to exercise their prosecutorial discretion, in accordance with public guidelines, to proceed with the matter on indictment, appropriately deciding that point. However, this should not be the case for matters that are finalised in the Magistrates Courts, where the same discretion will not necessarily be exercised in the same way.

13.73 Given I have recommended private prosecutions should follow the same procedures as any other prosecution for a criminal offence in the Magistrates Courts (after an application has been authorised to proceed), I also recommend that any application for costs in a private prosecution follow the same procedures as for any other prosecution.[36] This will mean that the current costs and security provisions in relation to private prosecutions in the Justices Act will no longer be required.

A comparison of the Justices Act and the proposed new model

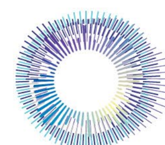
13.74 It is clear that the proposed new model for managing private prosecutions differs significantly from the current approach in the Justices Act. However, as discussed further below, I consider that the new model provides a clear, reasonable, and balanced approach that overall is more suitable to the circumstances.

13.75 First, I acknowledge that the proposed model applies to all offences, including simple and indictable offences. This is broader than the current law, which applies to only some indictable offences. This means that any person wanting to start a private prosecution will need to go through the initial application process. The application process allows the court to canvass any issues and protections from the outset. It does not prevent any rights that a party would have in the usual conduct of a criminal matter, it is simply a balance of all factors. For example, where an application is refused on the ground that there is no offence known to law, if that prosecution had been started it would nonetheless have

[34] See [813.16].

[35] See *Police Service Administration Act 1990* (Qld) s 10.24(2); *Director of Public Prosecutions Act 1984* (Qld) s 10(c)(ii); *Director of Public Prosecutions Act 1983* (Cth) s 9(5).

[36] For further information about costs in Magistrates Courts criminal matters, see Chapter 18.



ended on the same ground later in the process. On balance, this approach is reasonable and promotes efficiency and the proper use of court resources. It also does not impinge on the proposed defendant.

13.76 Second, I acknowledge that this proposed model does not include specific provisions for a defendant to make applications about a private prosecution, such as an application for particulars or an application for dismissal on the grounds that the proceeding is frivolous, vexatious or an abuse of process. It also does not include security for costs when such an application is made. However, these applications will be included in the new criminal procedure laws or are provided for in common law and can be made in any criminal proceeding (but there will be no power for security of costs), so there is no suggestion that the defendant is prevented from making those applications. Further, the initial application process by the person starting the proceeding will also have the effect of preventing those types of prosecutions from starting, meaning that these applications will be far fewer.

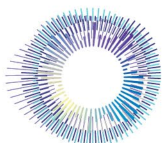
13.77 Third, the current law allows a magistrate to dismiss a proceeding on the basis that it is frivolous, vexatious or an abuse of process, and a decision on that point may be appealed to a judge of the Supreme Court. Although I accept that the new model is in that respect different from the current law, the proposed application process does recognise these matters as a relevant factor for consideration when deciding whether an application should be allowed. Further, since the inclusion of these procedures in the Justices Act, Queensland has introduced specific laws about vexatious proceedings.[37]

13.78 The new model does not include a specific provision for a private complaint to be struck out for want of prosecution if it is not prosecuted with 'due diligence'. This is unnecessary given that, once a private prosecution has started and is proceeding in the usual way, any relevant applications in the new criminal procedure laws or in common law will be available to the defendant.

13.79 The outcome of the new model will be that a privately prosecuted criminal proceeding is not started until an application is considered and granted by a magistrate, and therefore that a defendant will not be required to appear in court before it is appropriate to do so. This is consistent with the approach in the current law, which permits a defendant to delay their personal appearance for some private prosecutions of an indictable offence[38] until

[37] See the *Vexatious Litigants Act 1981* (Qld) (repealed) and the *Vexatious Proceedings Act 2005* (Qld). The provisions of the Justices Act were introduced in 1979.

[38] Specifically, private prosecutions of an indictable offence that cannot be dealt with summarily, or that can be dealt with summarily without the defendant's consent: *Justices Act 1886* (Qld) s 103A(1).



it is determined that there is sufficient evidence to put the defendant on trial for an indictable offence.[39]

13.80 Overall, the new model will introduce changes to the criminal procedures that apply to private prosecutions. However, it is clear both the current and new model have as their goal a system that permits private prosecutions to be brought but includes sufficient safeguards for the defendant against the starting and continuation of inappropriate proceedings. On balance, the new model has been structured in a way that maintains and achieves that goal and is reasonable and balanced in all the circumstances.

Human rights considerations

13.81 Without repeating those human rights engaged by the proposal for starting a proceeding using a Court Attendance Notice as set out in Chapter 12, I have considered the human rights implications for court users involved in a private prosecution.

13.82 On the face of it, the additional requirement for a person wanting to start a private prosecution to be subject to an assessment process by a magistrate may appear to limit the protected right of recognition and equality before the law.[40] However, measures to implement safeguards against prosecutions that are frivolous, vexatious, misconceived or lacking in substance ensure that only genuine or bona fide private prosecutions are allowed to proceed in the Magistrates Courts.

13.83 Additional assessment is only required for a certain group of people, namely those seeking to start a private prosecution; it could be argued that this limits the right to recognition and equality before the law. This extra step of making an application to a Magistrates Court to seek 'authorisation' to issue a Court Attendance Notice is not imposed on any other group of people who have the status of an 'authorised person'. However, it is not a limitation of the protected right, as authorised persons who do not need to make an application to the Magistrates Court are empowered to do so by other legislation. Any party who is not empowered to do so by law is therefore subject to the assessment process proposed in this chapter.

13.84 Many people who start a private prosecution do not have legal training. The proposed mechanisms to filter prosecutions that are frivolous, vexatious, misconceived or lacking in substance ensures that individuals are not misusing the private prosecution system to pursue, harass or discriminate against others without merit. The impact of a prosecution through the criminal justice system can be significant for a defendant, and it is appropriate to ensure safeguards around its usage through a private prosecution.

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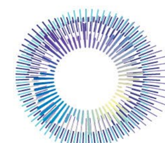
[39] *Justices Act 1886* (Qld) s 103A.

[40] *Human Rights Act 2019* (Qld) s 15.



13.85 The proposed new model for starting a private prosecution allows for a person to appeal a decision by a magistrate to dismiss the private complaint to the District Court. Under the previous provisions, a person could appeal that decision to the Supreme Court.[41] However, the new model provides for appropriate grounds of appeal to the District Court, and this approach is consistent with other appeal provisions in the criminal law. Any party who is aggrieved by a decision by a magistrate to dismiss still has the right to appeal this decision by a higher court.

13.86 The safeguards proposed, namely the initial application and assessment process, are therefore protective of a number of protected human rights under the *Human Rights Act 2019*, including: a defendant's rights in a criminal proceeding,[42] the right to liberty and security of person[43] and the right not to be tried or punished more than once.[44]

13.87 The safeguard of prohibiting the communication or publication of information about a private prosecution is protective of a defendant's right to privacy and reputation.[45] This ensures a defendant is not identified in a private prosecution until such time as it has been authorised to commence by a court. Once authorisation has been approved then the matter will proceed in the usual way.

13.88 Further, allowing any person to bring a private prosecution with no safeguards may, in addition to the impact on the person who is the subject of a private prosecution, contribute to the backlog of cases in the Magistrates Courts, which already hears a tremendous number of matters each year. To provide safeguards to 'filter' the private prosecutions is therefore protective of the right of a defendant to have any charges heard against them without undue delay.[46]

13.89 This additional requirement will not be unreasonably onerous for applicants and will not prevent genuine private prosecutions from proceeding or limit the way those prosecutions otherwise proceed after assessment and authorisation.

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[41] *Justices Act 1886* (Qld) s 102D.

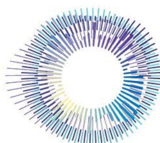
[42] *Human Rights Act 2019* (Qld) s 32.

[43] *Human Rights Act 2019* (Qld) s 29.

[44] *Human Rights Act 2019* (Qld) s 34.

[45] *Human Rights Act 2019* (Qld) s 25.

[46] *Human Rights Act 2019* (Qld) s 32.



Recommendations

Procedures for private prosecutions

R13.1 The new criminal procedure legislation should include a separate part for procedures relating to private prosecutions which sets out a process for a magistrate to assess a proposed private prosecution and decide whether the matter should be authorised to proceed.

Application to the Magistrates Courts

R13.2 A person bringing a private prosecution for any offence must make an application to the Magistrates Courts for authorisation to bring a private prosecution and issue a Court Attendance Notice on the defendant.

R13.3 The application must be made by the person who wants to start the private prosecution, or by another person on their behalf (for example, a private lawyer).

R13.4 The application should be in writing and include the following:

- **(a)** details about the applicant (and any representative);
- **(b)** information about the proposed charge(s);
- **(c)** a summary of the evidence proposed to prove the charge(s); and
- **(d)** any other information required by the court.

R13.5 The application must also be:[47]

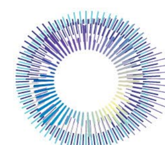
- **(a)** accompanied by a completed Court Attendance Notice and Charge Sheet that can be served on the defendant if the application is granted;
- **(b)** filed at the Magistrates Court where the proceeding must be started; and
- **(c)** filed within any time limits that apply to starting the proceeding.

Hearing an application

R13.6 The application must be listed for a hearing before a magistrate only, who must assess the matter and decide whether they are satisfied, in all the circumstances, that the private prosecution should be permitted to proceed. In making this decision, the magistrate may take into account a number of considerations, including:

- **(a)** whether the charge alleged is an offence known at law;
- **(b)** whether any other prosecuting agency has already brought a charge against the accused person based on the same set of facts or circumstances;
- **(c)** whether there is sufficient public interest in prosecuting the matter;
- **(d)** whether the proceeding is frivolous, vexatious, misconceived or would be an abuse of process;

[47] See Chapter 11 for further information about time limits, and Chapter 12 for further information about starting proceedings.



(e) whether the proceeding is lacking in substance in terms of there being no reasonable or available evidence that could be disclosed, produced or relied on to prove the charge; and

(f) any other relevant circumstances.

R13.7 In reaching a decision:

(a) the court may receive any information that it considers appropriate to enable it to properly consider the application; and

(b) the application may be adjourned for further information or evidence to be provided at a later date.

R13.8 If the magistrate is satisfied that the private prosecution should proceed, then the magistrate must make an order in the following terms:

(a) that the application is approved, and the private prosecution is permitted to proceed;

(b) that the person making the application has been granted authorisation to issue a Court Attendance Notice and is an 'Authorised Person' for the purposes of starting that proceeding by way of a Court Attendance Notice;

(c) that the matter be listed for first mention on a specific date and time at that court; and

(d) that the Court Attendance Notice include the information ordered above in (b) and (c) and be served on the accused person.

R13.9 The date included in the Court Attendance Notice (Recommendation 13.8(c)) must provide sufficient time for service and ensure that the defendant has sufficient notice of the date.

R13.10 If the magistrate refuses the application, an order must be made in those terms and the private prosecution must not proceed. The magistrate must give reasons for their decision.

When a private prosecution starts

R13.11 Once a magistrate makes an order approving an application, the prosecution must be taken to have started on the date the application was filed with the registry.

R13.12 Where an application is filed within any time limits for starting a proceeding (Recommendation 13.5(c)) but is not finalised until after that time has expired, the private prosecution must not be prevented from starting and continuing (if the application is granted).

Service of a Court Attendance Notice

R13.13 Once an application for a private prosecution has been approved and a court date is allocated to the matter, the defendant must be served with the Court Attendance

Notice within seven days of the approval and in accordance with the usual rules about service.

R13.14 The magistrate may make specific orders about how the defendant must be formally served.

Starting private prosecutions by arrest warrant

R13.15 To start a private prosecution by way of an arrest warrant, a person must file an application for authorisation to bring a private prosecution and issue a Court Attendance Notice on the defendant, as well as an application for an arrest warrant.

R13.16 The magistrate may hear and decide the two applications together, considering the application for a warrant in the same way as any other such application, and may make any of the following orders:

(a) that both applications are refused (and provide reasons for this);

(b) that both applications are adjourned for further information or evidence to be provided;

(c) that the application is approved, the private prosecution is permitted to proceed, the applicant is an authorised person for the purposes of issuing a Court Attendance Notice, and:

(i) list the matter for a court date with the Court Attendance Notice to be served on the defendant; or

(ii) a warrant is to be issued for the defendant's arrest.

Private prosecution proceedings

R13.17 A person must be prohibited from communicating or publishing information about, or accessing the court records for, a private prosecution (including the fact of the application itself):

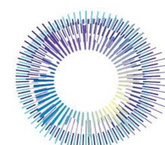
(a) until the defendant's first court appearance, if an application to start a private prosecution is granted; and

(b) always, if an application to start a private prosecution is refused.

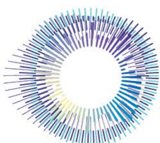
R13.18 Once a private prosecution has started, it must proceed in the same way and according to the same procedures as any other prosecution for a criminal offence in the Magistrates Courts.

R13.19 The new criminal procedure legislation relating to any appeal regarding a private prosecution should expressly provide for an appeal pathway to the District Court of Queensland:

(a) by an applicant, on the ground that their application to start a private prosecution was refused; or



(b) by a defendant, following a final determination of a private prosecution in the Magistrates Courts, on the ground that the application to start the private prosecution should not have been granted.



CHAPTER 14: DISCLOSURE, CASE CONFERENCING AND CASE MANAGEMENT

Introduction

14.1 After proceedings have started, they continue in the Magistrates Court until they are either resolved summarily or committed to a higher court.

14.2 Generally, this involves a series of court mentions — updates given by the parties to the court — which coincide with procedural steps during which evidence is disclosed, parties negotiate to try and resolve matters (case conference) and decisions are made about whether the matter should be finalised in the Magistrates Courts or committed to a higher court.

14.3 As charges progress through the Magistrates Courts, they can resolve in several ways, the more common being:

- plea of guilty
- summary hearing to determine whether a person is guilty or not guilty
- withdrawn by the prosecution
- struck out, or dismissed by the court
- via the committal process.

14.4 In Queensland, the process regulating how charges move through courts to resolution is somewhat unstructured. Sometimes matters can resolve quickly; sometimes matters can take years to finalise with multiple court mentions and adjournments. There are often no specific requirements on the parties about what needs to happen before a court mention and different courts across the state have adopted localised approaches to criminal procedure.

14.5 We have heard this lack of structure has created inconsistent practices, significant confusion surrounding the court process and is often associated with lengthy and unnecessary delay. These impacts are being experienced not only by defendants but by witnesses, victims and their families, and court users more generally (including key justice system stakeholders and agencies).

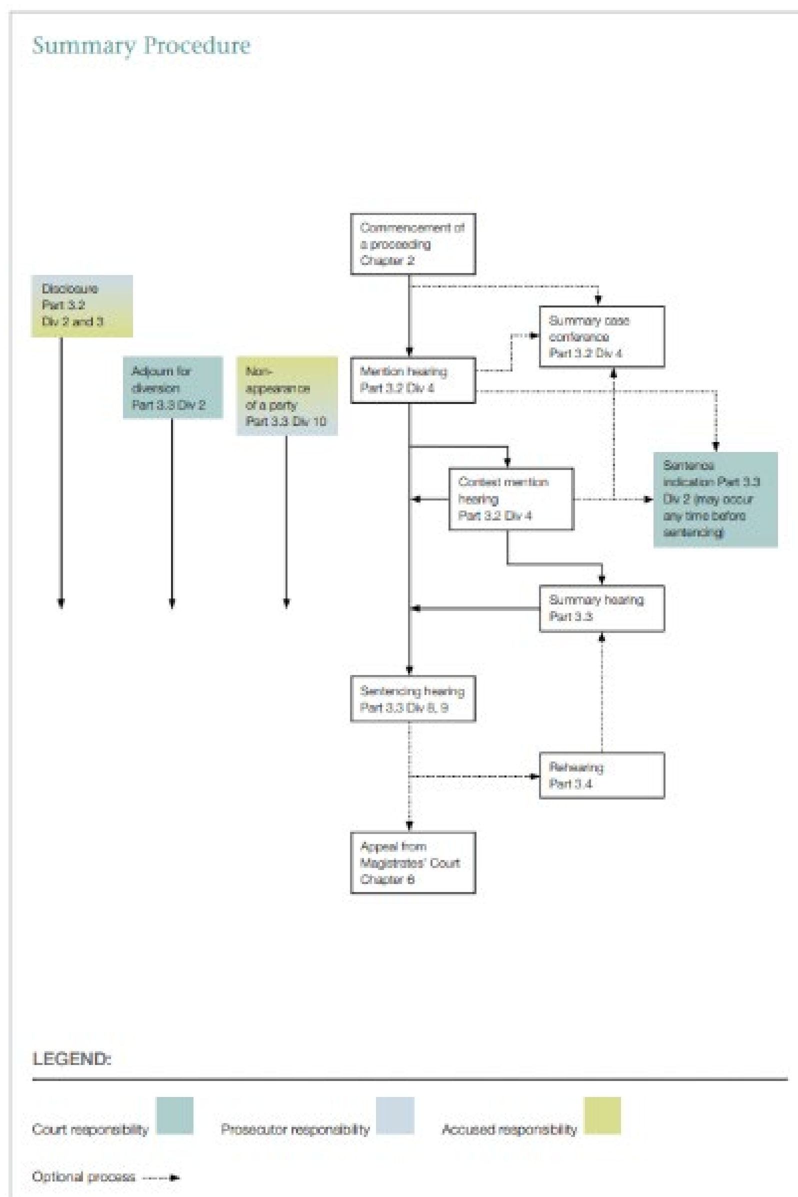
14.6 Other jurisdictions have developed and implemented structured processes to address these issues. These processes can involve different combinations of the following approaches:

- a set number of mentions, either spaced out at specific intervals or with each mention intending to have certain things happen. While there is scope for additional court

mentions (if required), generally the intent is that the matter will reach the point of hearing, plea or committal by the final mention.

- disclosure provisions which provide for more evidence to be given to a defendant earlier in proceedings, including by way of a preliminary brief before a full brief is required.
- requirements for parties to case conference (among other things) to narrow issues in contention, reach an agreed outcome, or discuss appropriate charges or facts to be alleged.

14.7 See, for example, the Victorian Magistrates' Court high level overview of summary procedure:[1]



[1] Department of Justice (Victoria), *Criminal Procedure Act 2009 – Legislative Guide* (February 2010) ch 3, 61 (available at: <https://www.justice.vic.gov.au/criminal-procedure-act-2009-legislative-guide-by-chapter>). This overview was created in 2010 and does not include changes since that year.

14.8 The objective of this Review is to create contemporary and effective criminal procedure laws for the Magistrates Courts. 'Effective procedural laws' include concepts of efficiency and timeliness. In the criminal justice setting, timeliness is regarded as reflecting 'a balance between the time required to properly obtain, present and weigh the evidence, law and arguments and unreasonable delay due to inefficient processes and insufficient resources'.[2]

14.9 These processes require reform to restore the focus on decision-making and moving proceedings towards resolution at each opportunity. The resulting system benefits in terms of cost savings and efficiency are well known and provide a compelling rationale for removing unreasonable delay. In addition, early resolution spares witness distress and uncertainty and can reduce unnecessary time on remand for a defendant.

14.10 I have concluded that Queensland needs to adopt a structured approach to summary procedure with elements of disclosure, case conferencing and case management. Much of what is recommended is legislating practices already occurring at a policy level and set out in current practice directions. Clear legislative guidance will create consistency of practice and improve efficiency for court, prosecution and defence resources.

14.11 I intend to recommend an integrated approach to disclosure, case conferencing and case management with the overarching framework for both summary hearings and committals being staged in nature. The approach will require parties to progress matters at each court event (where possible). The recommended new model and recommendations are set out in detail below.

Language

14.12 In the Justices Act, the term 'hearing' is used throughout to refer to all court events. In practice, the courts use their own terminology for different types of events — for example, 'mention', 'summary hearing' and 'committal hearing'.

14.13 It has been decided that under the Justices Act, a hearing starts from the defendant's first appearance in court and continues, subject to any adjournments, until it is finished.[3] In this way, sections of the Act that apply at a 'hearing' can be used at any court event throughout a proceeding, as appropriate.

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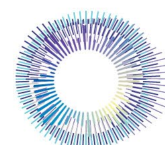
[2] *International Framework for Court Excellence* (3rd ed, May 2020) 7 (available at <https://www.courtexcellence.com/resources/the-framework>).

[3] *Shield v Topliner P/L Shield v Eaton* [2005] 1 Qd R 551, [4]–[5], [14], [22].



14.14 This approach is confusing and unclear, and it will not be maintained in the new criminal procedure framework. Rather, the new framework will identify court events using consistent and specific terminology. The primary terms used will be:

- **Mention** – any event where a case comes before the Magistrates Courts for the purpose of progressing the matter; for example, for the parties to advise the outcome of case conferencing, or to list a matter for summary hearing;
- **Summary hearing** – a court event where a contested charge (or charges) is heard and determined, during which the prosecution and defendant may present evidence and the magistrate must make a finding of guilty or not guilty. (The term summary 'trial' is not used given it is easily confused with trials in the higher courts. The term 'hearing' more accurately reflects the Magistrates Courts process.)
- **Committal** – a court event where it is decided whether the charge (or charges) will be transmitted to a higher court. This will include registry committals, full hand-up committals and committals with cross-examination (and any combination of same).

14.15 There may also be other types of court events, such as an 'application hearing' or a 'direction hearing'. These will be identified throughout the Report.

14.16 Overall, each time a matter is before a Magistrates Court in some capacity, this may be referred to as a 'court event'.

Disclosure

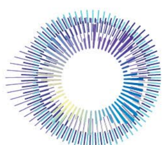
14.17 The process of disclosure in court proceedings is fundamental to ensuring a person receives a fair trial.[4] There is a prosecution duty to disclose, and that duty is ongoing.[5]

14.18 Disclosure requires the prosecution give all evidence which is to be relied on at trial, as well as any other relevant evidence, to the defendant so that the defendant is properly informed of the offences with which they are charged. The role of the prosecutor in criminal proceedings is unique and requires them to present the whole case and find where the truth lies.[6] Given the vital nature of this role, there are broad duties and obligations both at common law and in legislation which set out the requirements on the prosecution for disclosure.

[4] *Human Rights Act 2019* (Qld) s 32(2)(a)–(c).

[5] Criminal Code (Qld) s 590AB; *Grey v R* [2001] HCA 65; *Mallard v R* (2005) 224 CLR 125; Martin Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 87.

[6] *R v Apostilides* (1984) 154 CLR 563. Disclosure is part of the prosecutor's main duty to conduct the case fairly.



14.19 There are some limited disclosure obligations placed on a defendant in the higher courts. These are exceptions to the right to silence and include the requirement to give notice of alibi and expert evidence. This is discussed further below.[7]

14.20 Disclosure is also key in minimising court delays, facilitating timely pleas of guilty, narrowing issues in contest and supporting the effective use of public resources.[8]

The current position

14.21 In addition to the common law duty of disclosure, the Queensland Criminal Code has specific laws about disclosure for indictable offences, including indictable offences which can be heard summarily. Chapter 62, division 3 of the Criminal Code sets out the laws relating to disclosure for a 'relevant proceeding'. A 'relevant proceeding' is defined in section 590AD to include a committal proceeding, a prescribed summary trial or a trial on indictment.

14.22 A 'prescribed summary trial' is also defined in that section, and generally includes a summary trial of a charge for an indictable offence under the Criminal Code that must, or that will, because of an election made by the relevant party, be heard summarily.

14.23 The prosecution has an ongoing obligation to give the accused person (the defendant) 'full and early disclosure' of all evidence to be relied on, and all things in their possession that would help the accused's case, unless disclosure would be unlawful or contrary to the public interest.[9]

14.24 While the overarching positive obligation to disclose is ongoing during proceedings,[10] the Criminal Code does set out in section 590AH a detailed list of documents and other things the prosecution must always give to the defendant (mandatory disclosure) and section 590AJ sets out those documents or things which may be requested by defence. For a committal proceeding or prescribed summary trial, mandatory disclosure must take place at least 14 days before the date for hearing evidence. Following a request, disclosure must take place 'as soon as practicable'.[11]

14.25 In the Magistrates Courts, the formal disclosure obligations arising under the Criminal Code apply to committal proceedings and certain hearings for indictable offences heard summarily. For offences which can only be dealt with summarily (for example, 'simple

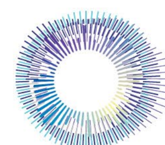
[7] Criminal Code (Qld) ss 590A–590C.

[8] Moynihan (n 5) 85–6.

[9] Criminal Code (Qld) ss 590AB, 590AQ.

[10] Criminal Code (Qld) ss 590AB, 590AL.

[11] Criminal Code (Qld) ss 590AI, 590AK.



offences' in the Criminal Code[12]) disclosure obligations arise from common law duties and apply in the form of established principles and practices, usually located in DPP (Qld) Guidelines and the QPS Operational Procedures Manual (OPMs).[13] Additionally, Magistrates Courts Practice Directions 9 and 13 of 2010 (PD9 of 2010 and PD13 of 2010) were drafted with the intent of giving guidance about how matters should progress through courts and how to meet disclosure obligations in summary proceedings.[14]

14.26 In Queensland, where police have started a criminal proceeding, initial disclosure is by way of the QP9 'Statement of Facts' and the defendant's criminal and traffic history. This is usually supplied by the arresting officer to prosecution and defence either at (or before) the first court date as required by OPM 3.7.2.[15]

14.27 For summary matters (including indictable offences which can be dealt with summarily), limited material can be requested by defence during the early disclosure and case conferencing process with a full brief of evidence usually only provided once a matter is 'set for trial'.[16] In some court locations across the state the full brief is only ordered after an indication of a plea of not guilty.

14.28 PDs 9 and 13 of 2010 provide guidance about what evidence is to be disclosed at which stage in proceedings, referring to 'substantial evidence' for case conferencing summary matters and a 'partial brief' for committals. PD 9 of 2010 refers to 'substantial evidence' as the evidence 'which tends to prove an offence but does not include corroborative evidence or continuity evidence or evidence of ownership (except where it is expected that such evidence will be a major point of the litigation)'.[17]

14.29 The 'partial brief' is defined in PD 13 of 2010 as 'a brief which contains copies of signed statements of the prosecution witnesses who will provide the "substantial evidence" in the matter and copies of exhibits of substantial evidence for the purpose of a committal for sentence'. The definition of 'substantial evidence' is the same as in PD 9 of 2010.[18]

14.30 There are occasions where the court can utilise its discretion and make orders outside of the current 'case management' processes, including in circumstances where a case

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[12] See further Chapter 11 about types of offences.

[13] Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) (available at <https://www.police.qld.gov.au/qps-corporate-documents/operational-policies/operational-procedures-manual>).

[14] Magistrates Courts (Qld), *Case Conferences and Callovers in Criminal Matters* (Practice Direction No 9 of 2010); Magistrates Courts of Queensland, *Disclosure* (Practice Direction No 13 of 2010) (located at: Queensland Courts, *Practice directions – Magistrates Court* (22 April 2022) <https://www.courts.qld.gov.au/courts/magistrates-court/practice-directions>).

[15] Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) [3.7.2]. See also Magistrates Courts (Qld), *Disclosure* (Practice Direction No 13 of 2010) [4].

[16] Magistrates Courts (Qld), *Disclosure* (Practice Direction No 13 of 2010) [6], [9].

[17] Magistrates Courts (Qld), *Case Conferences and Callovers in Criminal Matters* (Practice Direction No 9 of 2010) [3.6].

[18] Magistrates Courts (Qld), *Disclosure* (Practice Direction No 13 of 2010) [3.3], [3.7].

requires greater flexibility in case management than currently afforded by PDs 9 and 13 of 2010.

14.31 Currently there are also risks associated with requesting the full brief of evidence as a defendant may lose the benefit of entering an early plea of guilty under the *Penalties and Sentences Act*.[19] This is in circumstances where the defendant contests the matter, puts the prosecution to the 'effort' of disclosing the full brief and then pleads guilty to the original facts and charges. This becomes a key consideration for defence when requesting the full brief, even in circumstances where case conferencing is to occur.

14.32 Currently, there are no legislated 'mandatory' directions hearing or pre-trial mentions in the Magistrates Courts during which compliance with disclosure requirements can be checked or reviewed. In some locations, the full brief can be requested, and charges listed for summary hearing without any interim review mentions or pre-trial directions before the hearing.

14.33 This approach can be problematic in circumstances where the prosecution has failed, or appeared to have failed, in fulfilling their disclosure obligations. During consultation we heard some court locations have adopted local procedures to ensure prosecution disclosure is complied with. These procedures include listing charges for a summary review mention to ensure compliance before allocating a hearing date. It was reported this assisted in ensuring disclosure obligations are met and summary hearings are not 'falling over' on the day due to issues with disclosure.

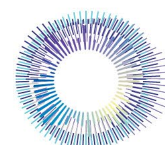
14.34 When disclosure obligations under the Criminal Code are not complied with, the defendant can make formal application to the Court seeking a direction hearing.[20] At the direction hearing, the court is then able to set a timetable for compliance.[21] An application for a direction hearing can be an onerous step, including because of the additional costs associated with appearing in court, particularly for the defence. Because of this, issues relating to disclosure in the Magistrates Courts are more commonly dealt with informally during the case conferencing stages, with problems ventilated during court mentions.

14.35 Where a formal direction hearing about disclosure has been conducted under the Justices Act and it appears a person has not complied with the directions given, the court may order the person to file an affidavit or give evidence in court, explaining and justifying the failure to comply. If the court is not satisfied with the explanation, it may adjourn the proceeding to allow disclosure to take place. Further, the court may award

[19] *Penalties and Sentences Act 1992* (Qld) s 13.

[20] *Justices Act 1886* (Qld) pt 4 divs 10A–10B.

[21] *Justices Act 1886* (Qld) pt 4 divs 10A–10B; *Criminal Practice Rules 1999* (Qld) ch 9A.



costs in favour of the defendant if satisfied the noncompliance was unreasonable, unjustified or deliberate.[22]

14.36 We heard from many respondents that these provisions are rarely utilised. There are limited applications for formal direction hearings and there is a high threshold to secure a costs order. Unfortunately, court data does not currently capture the circumstances in which costs orders are made, making it difficult to determine how these provisions are used in practice. During consultation we asked multiple magistrates if they had made costs orders about non-disclosure. Only one magistrate indicated she had done so, supporting our anecdotal understanding about the current limited use of these provisions.

14.37 The Criminal Code also contains a specific section which makes it clear that where there is a failure to comply with disclosure obligations, it will not affect the validity of the proceedings.[23] This section compounds the concern by stakeholders that there are very limited enforcement and compliance mechanisms in the current scheme.

14.38 For proceedings in higher courts, the defendant also has disclosure obligations. The defendant must give notice to the prosecution of any evidence of an alibi, any expert evidence they intend to rely on and any evidence about a representation made by a person who is unavailable to give evidence under section 93B of the *Evidence Act 1977*.[24]

Other jurisdictions

14.39 The approach to disclosure varies across Australian states and territories.

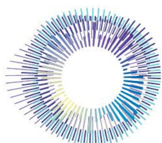
14.40 Consistent across jurisdictions is both the general ongoing obligation of prosecution disclosure and grounds for when disclosure may be refused — that is, where it is unlawful, discloses police methodologies or would endanger the physical safety of others.

14.41 There are several approaches to 'how' disclosure is conducted. Some jurisdictions adopt a 'staged approach'. Others adopt a similar approach to Queensland, with the full brief supplied either after the matter is set for trial or a plea of not guilty is entered, or where the matter is required to proceed via the committal process.

[22] *Justices Act 1886* (Qld) ss 83A(5)(aa), 83B.

[23] Criminal Code (Qld) s 590AC(2).

[24] Criminal Code (Qld) ch 62 div 4.



14.42 Jurisdictions such as Victoria and the Northern Territory have adopted a 'staged approach' with material provided to defendants at different 'points in time' during proceedings.

14.43 What these jurisdictions have in common is the provision of a 'preliminary brief'. This preliminary brief is usually mandatory, provided to defendants early in proceedings and contains available evidence to assist in the appropriate early resolution of matters by expediting pleas, elections and case conferencing. The material contained in the preliminary brief is similar to the 'substantial evidence' or 'partial brief' referred to in Queensland's Magistrates Courts practice directions. The key difference is the requirement for mandatory and early disclosure of the preliminary brief, as opposed to being on defence request, as is the case in Queensland.

14.44 Section 60AD of the Northern Territory *Local Court (Criminal Procedure Act) 1928* sets out the prosecution's obligations after the first mention. Within 7 days after the first mention, the prosecution must:

- serve a preliminary brief of evidence on the defendant; and
- file with the court a copy of the statement of the alleged facts on which the charge is founded.

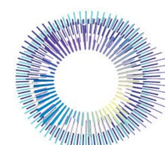
14.45 The purpose of filing the statement is to 'assist the court to facilitate the conduct of the directions hearing'.[25]

14.46 Section 60AE of the Act sets out the mandatory contents of the preliminary brief of evidence.[26] An example of the types of material to be in the preliminary brief include;

- a copy of the complaint
- a statement from the prosecution or informant that includes:
    - the alleged facts of the charge and the evidence supporting those facts
    - information about admissions made by the defendant
    - information about witnesses and their evidence, and whether they have made a statement
    - a list of documents or things that may be exhibits.
- any information recorded by audio-visual, audio or visual means (including CCTV) in relation to a charge (or if recordings are not available, a written statement by prosecution that there is information recorded it intends to obtain)

[25] *Local Court (Criminal Procedure) Act 1928* (NT) s 60AD(3).

[26] The full list of requirements for the preliminary brief can be found in *Local Court (Criminal Procedure Act) 1928* (NT) ss 60AE-60AF.



- a copy of the defendant's criminal record
- any other document or thing available which may assist the defendant in understanding the evidence that is available to the prosecution at the time the preliminary brief is served.

14.47 In Victoria, section 24 of the *Criminal Procedure Act 2009* requires a preliminary brief to be served on the accused within 21 days after the day on which the charge-sheet is filed. Section 35 sets out when the preliminary brief must be disclosed and provides that an accused may make a written request for a preliminary brief any time after a proceeding is started, which must be complied with within 14 days.[27]

14.48 Section 37 of the Victorian Act sets out the requirements for what a preliminary brief must include. Examples of the type of material required includes:

- the charge-sheet
- the accused's criminal record
- a notice explaining the rules of the court, including the importance of legal representation, the accused's right to legal aid and how to contact Victoria Legal Aid
- a statement from the informant which must include:
  - a statement of the alleged facts charged
  - a description of the background to and consequences of the alleged offence (if known)
  - a summary of any statements made by the accused concerning the alleged offence (including any admission or confession)
  - a list of all potential witnesses (known at that time), indicating whether those persons have made statements
  - a list of any things that may be exhibits, indicating whether they are in the possession of the prosecution at that time
  - notice of anything the informant refuses to disclose and the ground for refusing disclosure
  - any other information, document or thing relevant to the alleged offence that may assist the accused in understanding the evidence against them and is available to the prosecution (such as key witness statements).

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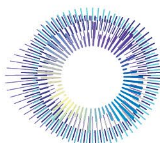
[27] *Criminal Procedure Act 2009* (Vic) ss 24, 35, 41; Department of Justice (Victoria), *Criminal Procedure Act 2009 – Legislative Guide* (February 2010) ch 3, 61 (available at: <https://www.justice.vic.gov.au/criminal-procedure-act-2009-legislative-guide-by-chapter>).



14.49 South Australia utilises preliminary briefs for indictable matters only.[28] In several jurisdictions, summary matters are dealt with by attending a 'contest mention' or pre-trial conference to discuss the issues in dispute, consider ways of resolving the matter and, if the matter is not resolved, make arrangements for it to proceed to hearing.[29] In New South Wales there are circumstances where no brief is required even when a matter is contested — for example, where a penalty notice may be issued, for some minor traffic offences or summary offences where the penalty is limited to a fine.[30]

14.50 Like Queensland, Western Australia requires the evidentiary material (other than the Prosecution Notice and Statement of Material Facts) to be provided upon the indication of a plea of not guilty or election for the matter to be dealt with via committal. In comparison to Queensland, Western Australia has a mandatory 'disclosure/committal hearing' for indictable offences to ensure compliance with disclosure obligations and determine how the matter should proceed.[31] For contested summary charges a pre-trial hearing is also usually conducted.[32]

Consultation

14.51 The Consultation Paper asked several questions related to disclosure. Many of the responses highlighted several key themes:

- disclosure obligations (particularly for summary offences) are unclear
- delay in disclosure is impacting the timely resolution of matters
- there is little uniformity in practical application
- the lack of enforcement and compliance provisions is problematic.

14.52 Stakeholders such as LAQ and Caxton Legal Centre raised specific concerns about the disclosure process. Both stakeholders agreed disclosure obligations were not working, citing common occurrences where briefs of evidence were not provided in accordance with directions, case conferencing was hindered and delayed due to material not being disclosed in a timely manner, and the noteworthy disparity in processes in different court locations. LAQ said 'it is not uncommon for evidentiary material to be handed over the

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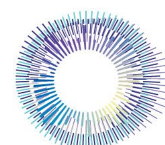
[28] *Criminal Procedure Act 1921* (SA) s 106.

[29] See, for example: Australian Capital Territory Magistrates Court, *Adult Criminal Matters* (Practice Direction Criminal No 1, 1 January 2020) 3–4; Courts Administration Authority of South Australia, *Pre-trial conference* (Web Page) <https://www.courts.sa.gov.au/going-to-court/preparing-for-court/pre-trial-conference/>; Magistrates Court of Tasmania *Contest Mention Guidelines*, located at Magistrates Court of Tasmania, *Contest Mention Information Guide* (Web Page) <https://www.magistratescourt.tas.gov.au/going_to_court/contest-mention>.

[30] *Criminal Procedure Act 1986* (NSW) s 187(5); *Criminal Procedure Regulation 2017* (NSW) reg 24.

[31] *Criminal Procedure Act 2004* (WA) ss 40–4.

[32] *Criminal Procedure Act 2004* (WA) ss 60–4.



bar table, once the matter has been called into court, leading for the need for the matter to be stood down or further adjourned'.

14.53 Members of the QLS sought to highlight 'inconsistent and irregular disclosure by the prosecution as a contributing factor to the current workability of the provisions'. Additionally, QLS members reported that 'in practice, despite the (mostly) clear obligations placed on the prosecution to provide disclosure in a timely manner, there is little consequence for noncompliance with these obligations'.

The absence of an effective costs regime to deal with non-disclosure means that weak prosecution cases are allowed to flourish; moreover, proceedings are drawn out over long periods, which causes significant distress

— Sisters Inside Inc.

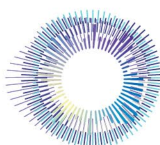
14.54 Sisters Inside Inc. drew specific attention to the need for set time frames for disclosure and for the court to have appropriate powers to ensure disclosure is complied with. They raised concerns about the delays, particularly for those in custody who may be spending excessive time in remand, and were concerned about the lack of enforcement provisions, commenting 'securing a costs order, or any other remedy, is exceedingly difficult and outside the grasp of most defendants, who have little ability to self-represent and limited access to Legal Aid'.

14.55 When asked about whether the Criminal Code provisions should be extended to all offences in Queensland, ATSILS strongly agreed, holding the view:

> [W]hile a lot of police prosecutors are punctilious about proper disclosure, others may refuse reasonable requests. Our service is aware of instances where failure to provide full and proper disclosure has led to unfairness. Oftentimes we only become aware of the problem when there is a change in police prosecutor or a DPP prosecutor reviews the file and remedies the defects in disclosure.
>
> There is a duty to afford fairness to an accused and the matters in Magistrates Courts should not proceed under some lesser standard.

14.56 The Consultation Paper asked how the disclosure process could be improved. Suggestions included:

- increased consistency in the disclosure obligations across jurisdictions (including being consistent with the higher courts) and having the same obligations apply to all offences in Queensland
- a clearly legislated process tied directly to the progress of matters through the Magistrates Courts, including a staged approach to disclosure



- the provision of a 'preliminary brief' or early disclosure of certain material would be beneficial, including by assisting in promoting early indications of pleas or elections and aiding in the case conferencing process
- more significant consequences for noncompliance with disclosure obligations.

14.57 LAQ supported the implementation of a 'staged approach' to disclosure with material available early in the proceeding, with the goal of:

- allowing additional time for fulsome instructions to be taken which could expedite the general process from the Magistrates Court to the higher courts
- enabling discussion to occur at an earlier stage with a view to resolving matters more quickly
- minimising delays in the court process, currently associated with late disclosure of evidentiary material.

14.58 Additionally, LAQ asked the Review to consider how to deal with noncompliance, including recommending a greater emphasis on training about disclosure.

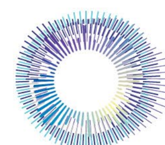
14.59 Several respondents also supported extending the disclosure obligations about evidence of an alibi and expert evidence that apply to defendants in the higher courts to defendants in the Magistrates Courts. For example, the QLS stated:

> [T]here should be disclosure obligations on defendants in the Magistrates Courts to ensure consistency between the relevant jurisdictions. It should be made clear that the obligations which would otherwise apply to defendants for trials by indictment also apply to summary trials. There are clear benefits to all parties for proper and timely disclosure of these matters to occur, particularly in relation to the provision of alibi evidence.

14.60 In their submission, the QPS suggested improvements to disclosure could be made by enabling prosecution disclosure to be conducted through digital means. Additionally, the QPS were supportive of extending the Criminal Code provisions for defendants, specifically those relating to expert reports being provided as soon as practical before the hearing.

14.61 Disclosure and the proposed introduction of a preliminary brief was a key point of consultation for this Report and my subsequent recommendations. The proposed changes were discussed both generally in the Consultation Paper and personally with several key stakeholders. Given the impacts of the changes proposed by my recommendations, I sought specific feedback about these issues.

14.62 Feedback highlighted to me from the outset that the proposed changes were most likely to have significant impact on the QPS, its staff (prosecution, investigation and administration), resourcing and its current operating models. I have taken this feedback



into account when drafting and finalising the proposed new model. In developing the new model, I have taken steps to accommodate the QPS with respect to certain issues raised, including the time frame for delivery of the preliminary brief and the requirements regarding its contents, by largely mirroring current practices and procedures. As mentioned below, disclosure is key in minimising court delays, facilitating timely pleas of guilty, narrowing issues in contest and supporting the effective use of public resources. A preliminary brief will substantially aid in improving the current approach to disclosure and case management of matters in Magistrates Courts.

Case conferencing and case management

14.63 The concepts of case conferencing and case management often overlap.

14.64 Case conferencing generally refers to the informal 'out of court' discussions between prosecution and defence to determine whether a criminal case can be resolved. The primary functions of case conferencing include:

- achieving a timely outcome in criminal cases while not interfering with the right to a fair hearing[33]
- attempting to reduce the number of matters listed for summary hearing or committal hearing, alleviating the impacts on resources required to facilitate same[34]
- proactively managing criminal cases through early decision making to save time at court and further court events[35]
- narrowing the issues which may be in contest at a hearing[36]
- facilitating timely pleas of guilty.

14.65 Case management refers to how matters progress through courts, including the time frames and requirements associated with each stage of proceedings. Case conferencing is one of the case management tools commonly used by courts.

14.66 Case conferencing and active case management of charges is an integral part of the criminal justice system. There are powerful reasons why early resolution of criminal matters is desirable.[37] Delay has negative effects for victims, witnesses, investigators and the use of public resources. Unnecessary delay can:

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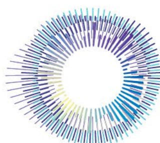
[33] Victoria Legal Aid, *'Best Practice Guide: Changes to summary procedure in the Magistrates' Court* (2010) 1, 6–7.

[34] Moynihan (n 5) 201.

[35] Victoria Legal Aid (n 33) 1, 6–7.

[36] B Butler, *Police Prosecution Services Sustainability Review – Interim Report* (October 2019) 17; B Butler, *Police Prosecution Services Sustainability Review – Final Report* (December 2019) 39–40.

[37] B Butler, *Police Prosecution Sustainability Review – Interim Report* (October 2019) 14; B Butler, *Police Prosecution Services Sustainability Review – Final Report* (December 2019) 10.



- cause victims stress due to uncertainty
- disrupt the life of a defendant and their family
- contribute to the loss of evidence or erode its reliability
- increase time spent on remand in custody with consequential cost to the community
- result in considerable cost to public resources including wasted court time and expense.[38]

14.67 The Moynihan report stated, 'in procedural terms, the single most important contribution courts can make to the criminal justice system is to minimise what I have referred to as justified delay and to eliminate unjustified delay'.[39]

The current position

14.68 In Queensland, the obligation to case conference is not a legislated requirement.

14.69 As a result of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*, PD 9 of 2010 was developed to assist with the case management of criminal matters. It encourages the prosecution and defence to enter case conferencing. It provides direction about what constitutes a case conference, when it is to occur and time frames for progressing criminal charges through courts.

14.70 To give effect to PD 9 of 2010, both the QPS Prosecution Corps (PPC) and the DPP (Qld) have established guidelines and policies about case conferencing.[40] While the DPP (Qld) Guidelines apply to PPC staff, additionally QPS PPC staff are required to adhere to chapter 3 of the QPS OPMs. The OPMs are prescriptive in nature, clearly setting out the conditions and limitations for case conferencing by members of PPC.

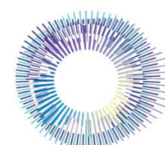
14.71 In practice, case conferencing can typically occur both formally and informally, commencing as early as the first mention and often continuing until the day of the summary hearing or when the matter is ready to proceed via committal. The way matters are case managed, including how case conferencing is conducted, generally differs in each court location depending on the approach of the local prosecution service and the listing arrangements and resources of a particular court.

14.72 There are several limitations to case conferencing in the Magistrates Courts. Key limitations relate specifically to PPC officers through the application of the OPMs and to the DPP (Qld) through the guidelines.

[38] Moynihan (n 5) 32–3.

[39] Ibid 35.

[40] Queensland Department of Justice & Attorney-General, '*Director's Guidelines*' (30 June 2016); Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) [3.16].



14.73 In 2019, the 'Police Prosecution Service Sustainability Review 2019 – Final Report' was commissioned by the QPS and prepared by retired judge Brendan Butler AM KC (the Butler Report).[41] The report and its interim findings[42] specifically addressed some of the limitations to case conferencing in Magistrates Courts, which included:

- police are restricted to case conferencing summary charges only (OPM 3.16), it does not occur for indictable matters proceeding by committal (OPM 3.16.2)
- limited prosecution and legal aid duty lawyer resources to conduct case conferencing early in proceedings (at first and second court appearances)
- restrictions on individual prosecutors' authority to conference, including withdrawal or amendment of charges (OPM 3.16.1; DPP Guidelines 17-20)
- requirement for PPC staff and the DPP (Qld) to consult the investigator or arresting officer (and sometimes victims) prior to withdrawing a charge due to insufficient evidence (OPM 3.16.1 and DPP Guidelines 21-22)
- OPMs do not allow police to case conference with self-represented defendants (OPM 3.16.2). The interim Butler Report stated that limits on conferencing with self-represented defendants may have arisen 'in recognition of the difficulty some defendants may pose if they misconstrue (deliberately or mistakenly) what has been said to them'. It also stated that '[s]ome prosecutors provide limited information to defendants, others refuse to deal with them orally even to receive requests for material'[43]
- limited access to evidentiary material sometimes makes it difficult to case conference and make decisions about charges prior to the provision of a partial or full brief of evidence.

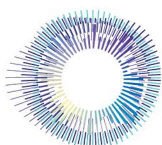
14.74 When addressing these limitations, it was noted in the Butler Report that case conferencing could be improved by PPC if:

- it was conducted as early as possible in the court process, including having a dedicated case conferencing prosecutor at the arrest courts
- prosecutors had access to more evidentiary material, including the provision of a partial type brief

[41] B Butler, *Police Prosecution Sustainability Review – Final Report* (December 2019).

[42] B Butler, *Police Prosecution Sustainability Review – Interim Report* (October 2019) 16–20.

[43] Ibid 17.



- it did not exclude conferencing with self-represented persons as this has the 'potential to resolve matters earlier', particularly in circumstances where legal aid is unable to assist (for example, traffic offences)
- the requirements and directions to consult with arresting officers be relaxed, especially in circumstances where the offences are minor in nature. Arresting officers' views should not be determinative as to case conferencing outcomes.[44]

14.75 Given the unique nature of Queensland including its geographical diversity, allocation of resources and differences in listing arrangements (including circuit courts and rural and remote courts) a variety of localised approaches have been developed to manage and respond to criminal jurisdiction workloads. Unfortunately, it appears this has seen significant deviation from PDs 9 and 13 of 2010 and led to confusion for court users and stakeholders such as LAQ and PPC about the approach to criminal cases in each respective jurisdiction.[45]

Data analysis

14.76 Magistrates Courts data for financial year 2021/22 indicates there were approximately 174,767 lodgements for 359,081 charges. Each lodgement is categorised as a unique defendant, however due to data limitations in court management systems, it is likely the same defendants are counted multiple times in this figure. Additionally, each lodgement can be for multiple charges and is referred to as a matter or case before the court. The average case duration for all cases in the Magistrates Courts is 268 days (over 8 months). This is the highest it has been in the last five years.

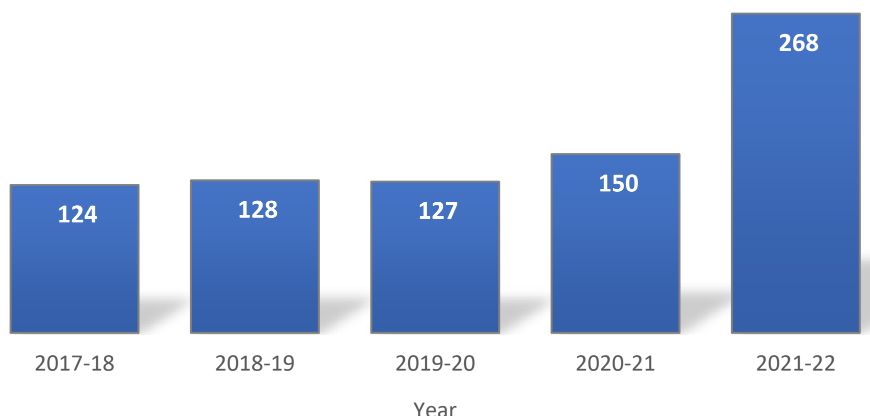


Diagram 14.1: Case duration in the Magistrates Courts for the last five years

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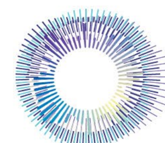
[44] Ibid 16–20; B Butler, *Police Prosecution Services Sustainability Review – Final Report* (December 2019) 40–45.

[45] See further the 'Consultation' discussion below.



14.77 The average duration for all Magistrates Courts cases *except* those that ended in a committal order was 196 days (over 6 months).

14.78 This suggests that more serious indictable charges that are progressing to committal take longer and are increasing the average case duration in the Magistrates Courts. The committal process is discussed further in Chapter 17, however the consultation feedback which related to delays in disclosure are particularly relevant to committal matters because the matter is not usually committed to the higher courts unless disclosure has been fully complied with.

Other jurisdictions

14.79 As canvassed more fully in the Criminal Procedure Review Consultation Paper, there are a variety of approaches to case conferencing and case management in Australian courts.[46]

14.80 With respect to case management, there are some approaches that apply rigid requirements, with each stage or step prescribed by criminal procedure legislation. In Victoria, for example, each stage of summary procedure (first mention, disclosure, summary case conference and contest mention hearing) is governed by its legislated criminal procedure scheme.[47]

14.81 Alternatively, some jurisdictions like Western Australia[48] have maintained a more generalist approach, lending itself to the court having broad powers of case management and utilising instruments such as Practice Directions to provide guidance to stakeholders about what is required.

14.82 Many jurisdictions have adopted separate approaches for summary and committal matters, with different requirements for case management.

14.83 Several different models have emerged regarding case conferencing and case management, some of the more specific features of which include:

- court-ordered case conferencing (ACT)[49]
- in-court case conferencing and directions before a magistrate (SA)[50]

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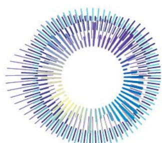
[46] *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) [3.80]–[3.91].

[47] *Criminal Procedure Act 2009* (Vic) ss 53–5.

[48] *Criminal Procedure Act 2004* (WA) s 137.

[49] Australian Capital Territory Magistrates Court, *Adult Criminal Matters* (Practice Direction Criminal No 1, 1 January 2020) 3–4.

[50] Magistrates Court of South Australia, *Consolidated Criminal Practice Directions* (October 2015) [6.00].



- fulfilling of 'pre-trial preparation', narrowing issues in contest and determining how long a hearing will take (SA)[51]
- embedded directions hearings to ensure conferencing has taken place, and to determine issues in dispute and indications regarding pleas (ACT, Tas, Vic)[52]
- filing of pre-trial certificates with the court, outlining the results of the conference (NSW)[53]
- case conferencing with self-represented persons (Vic and ACT)[54]
- time frames for pre-trial conferencing (SA).[55]

14.84 Criminal procedure laws in most Australian jurisdictions give courts general powers to hold directions hearings and make directions. An example of a more court-led prescriptive approach to progressing matters, including the use of directions, can be seen in the New South Wales approach to committal proceedings. It has (ideally) a total of four court steps. The parties are required to deal with procedural matters throughout the proceedings and the matter should be ready to proceed by the fourth appearance.

14.85 The four steps are:

- First step – brief orders: This includes orders for the service of the brief and an adjournment period of eight weeks for compliance.
- Second step – brief service: The prosecution confirm the brief is served and the matter is adjourned for six weeks for a charge certificate to be filed.
- Third step – charge certificate filed and case conferencing conducted: Unless a plea of guilty is entered, adjourn for eight weeks for case conferencing (where legally represented) or two weeks to obtain legal advice or representation (if unrepresented), or an application is made for cross-examination of prosecution witnesses.

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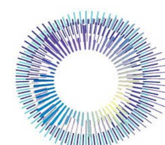
51 *Joint Criminal Rules 2022* (SA) pt 9; Courts Administration Authority of South Australia, *Pre-trial conference* (Web Page) <https://www.courts.sa.gov.au/going-to-court/preparing-for-court/pre-trial-conference/>.

52 Australian Capital Territory Magistrates Court, *Adult Criminal Matters* (Practice Direction Criminal No 1, 1 January 2020) 3–4; Magistrates Court of Tasmania Contest Mention Guidelines, located at Magistrates Court of Tasmania, *Contest Mention Information Guide* (Web Page) <https://www.magistratescourt.tas.gov.au/going_to_court/contest-mention>; *Criminal Procedure Act 2009* (Vic) s 54; *Magistrates' Court Criminal Procedure Rules 2019* (Vic) r 22.

53 Local Court of New South Wales, *Procedures to be adopted for committal proceedings in the Local Court pursuant to the Early Appropriate Guilty Plea Scheme* (Local Court Practice Note Comm 2, March 2018) 3–4.

54 Magistrates' Court of Victoria, *Summary Case Conference Procedure* (Practice Direction No 3 of 2010, July 2010); Australian Capital Territory Magistrates Court, *Adult Criminal Matters* (Practice Direction Criminal No 1, 1 January 2020) 3. In Victoria, a requirement for case conferencing may be dispensed with if the defendant is not legally represented.

55 Magistrates Court of South Australia, *Consolidated Criminal Practice Directions* (October 2015) [3.09].



- Fourth step – plea required and committal for trial or sentence conducted.[56]

Consultation

14.86 I want to acknowledge from the outset that PPC conduct most of the criminal prosecutions in the Magistrates Courts, so much of the consultation feedback we received relates to matters involving PPC. I also want to make it clear from the outset that the new criminal procedure framework is intended to make improvements and create efficiencies in relation to all prosecutions in the Magistrates Courts. Therefore, despite the following discussion being focussed primarily on PPC matters, the proposed new model (as discussed below) is intended to apply to all prosecuting authorities appearing in the Magistrates Courts.

14.87 From the consultation process, we heard overwhelmingly that stakeholders are concerned about the inconsistent approaches to case conferencing and case management in court locations across the state.

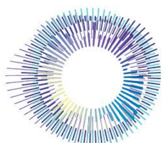
14.88 I appreciate place-based approaches have come from attempts to manage individual workloads in court locations, considering the respective court sitting arrangements and availability of resources in each. However, I have also heard that this individualised approach has compounded much of the confusion, delay and unpredictability reported by court users and stakeholders.

14.89 Stakeholders, including LAQ, the Caxton Legal Centre, Sisters Inside and ATSILS, generally reported that current case conferencing and case management requirements in Queensland are not working.

14.90 Multiple respondents were particularly concerned about the inconsistent approaches to case conferencing by police prosecution offices (and their staff). In larger centres, different prosecutors can conference at various stages of proceedings. It is not uncommon for the case conferencing prosecutor to be different from the hearing prosecutor and therefore have different motivations and authority for considering matters and resolving them accordingly. Other concerns included:

- PPC officers requiring defence to put their submissions in writing, increasing impost on defence resources including legal aid and community legal centres
- PPC officers refusing to case conference verbally or refusing to case conference at all

[56] Local Court of New South Wales, *Procedures to be adopted for committal proceedings in the Local Court pursuant to the Early Appropriate Guilty Plea Scheme* (Local Court Practice Note Comm 2, March 2018), 3—5.

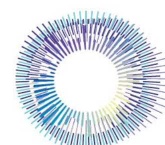


- prosecutors lacking the authority to case conference and having to adjourn for further consultation and assistance or approval from a prosecutor with authority
- issues with disclosure, including disclosure requests made to assist case conferencing being refused when no plea has been entered or where the prosecution 'argue that the disclosure of more than one or two items "may as well be the full brief"'
- the requirement to consult arresting officers is causing delay and increased friction, particularly in circumstances where the arresting officer refuses the submission despite the prosecutor being willing to accept it. This can occur when the prosecutor is of the view the available evidence does not support the charge and there are no reasonable prospects of success at hearing (commonly referred to as the 'sufficiency of evidence test')
- ongoing delays and lack of time frames for progressing a matter can be utilised as a litigation tactic
- complications for self-represented persons who are not permitted to case conference because of prosecution restrictions but might otherwise be able to resolve matters.

14.91 When it came to general case management, stakeholders were concerned about locations where charges are listed for summary hearings without any pre-hearing mentions or reviews to determine issues like disclosure, availability of witnesses and any pre-hearing applications. In our consultations, some stakeholders indicated this approach creates unnecessary delays where pre-hearing issues remained unventilated and ultimately leads to a significant portion of summary hearings 'falling over on the day' (not proceeding). It means time is spent preparing for matters that do not proceed and time in the court diary remains allocated despite the matters having little to no prospect of proceeding. This is a significant impost on many stakeholder resources and the efficiency of the Magistrates Courts generally.

14.92 To prevent this wastage many locations have adopted more rigid case management approaches, including the introduction of mandatory summary hearing reviews or pre-hearing mentions to determine if matters are ready to proceed. This has prevented the unnecessary listing of summary hearings without some certainty that the matter is likely to proceed and there are no outstanding pre-hearing issues to resolve.

14.93 This approach has been adopted in the domestic and family violence (DFV) jurisdiction in Queensland Magistrates Courts through the introduction of Practice Direction 4 of



2022 (PD 4 of 2022).[57] This PD is prescriptive about how DFV application hearings should be allocated, including all pre-hearing requirements and guidance for parties who are self-represented (which is common in that jurisdiction). The PD ensures pre-hearing applications about witnesses and whether they may be cross-examined, subpoenas and any other pre-hearing issues are determined prior to the allocation of a hearing date. This approach greatly assists in reducing the impacts on aggrieved persons appearing at hearing dates only to be told the hearing will not proceed. Greater certainty around hearing dates is imperative to complainant and witness experiences in the justice system.

14.94 When asked about whether the new criminal procedure legislation could include requirements about case management, of the respondents that addressed the issue, the majority were in favour of a more robust approach to case management.

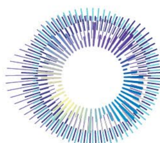
14.95 Those respondents, which included LAQ, Caxton Legal Centre, the BAQ and ATSILS, made various suggestions for improvement. Collectively, those suggestions included:

- embedding case management requirements into legislation, which would ensure compliance by all relevant stakeholders and reduce the current inconsistencies that exist between different court locations
- providing for earlier and increased disclosure of evidentiary material, which would improve the approach to case conferencing and the potential for matters to be more readily resolved
- a clearer and more proactive approach to disclosure, including consequences for failure to comply, to assist in the progression of matters
- a mandatory pre-hearing review, which would reduce the number of contested matters that are listed but 'fall over' on the day, together with being able to limit the hearing to the issues in dispute
- an improved approach to case conferencing, such as conducting it earlier in the court process (including verbal conferencing) and enabling prosecutors to case conference with self-represented persons.

14.96 Some stakeholders raised concerns about an overly rigid approach to case management. For example, the QLS was concerned that:

> [M]aking matters mandatory beyond disclosure risks creating a rigid and inflexible system that will not always meet with the realities of life for defendants, practitioners, police officers, witnesses etc. Self-represented defendants require a sufficient degree of flexibility. Imposing strict deadlines

[57] Magistrates Courts (Qld), *Domestic and Family Violence* (Practice Direction No 4 of 2022).



> on such defendants may only serve to create more opportunities for self-represented defendants to be in breach.

14.97 Caxton Legal Centre suggested a mixed approach which made the case management provisions mandatory while allowing some discretion in relation to extensions of time and adjournments. Caxton Legal Centre supported a model like Victoria, where the court 'actively encourag[es] all parties, including self-represented defendants, to comply with case conferencing requirements, while the court retains some discretion to dispense with the obligation'.

14.98 Women's Legal Service Queensland (WLSQ) were of the view that:

> More rigour should be implemented in relation to the progress of criminal matters to ensure victims have greater certainty about the resolution of matters and likely outcomes of listed court dates.
>
> …
>
> WLSQ are supportive of case management processes and the greater transparency and efficiency this can deliver.
>
> For the effective implementation of case management obligations, it will be necessary to ensure that there are consequences for non-compliance and that prosecuting authorities are adequately resourced to meet their obligations.

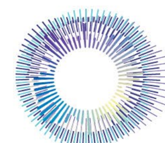
New model

14.99 As explained earlier in this chapter, I have concluded that Queensland needs to adopt a structured approach to criminal procedure in the Magistrates Courts. This approach will include the elements of disclosure, case conferencing and case management.

14.100 The discussion below and the proposed model focuses primarily on charges usually brought and prosecuted by the QPS, which are the charges most commonly heard and determined in the Magistrates Courts. However, it is intended this proposed model and the case management structure will also apply equally to all other prosecuting agencies.

14.101 Many of my recommendations in the proposed new model do not fundamentally change what is already required in practice in the Magistrates Court, including discretion for magistrates to make case management decisions. However, I am of the view that creating a legislative structure (together with adopting some proposed practical improvements) will create greater guidance and consistency in practice and in turn improve efficiency for courts and criminal justice stakeholders.

14.102 I have set out my recommendations about disclosure in the Magistrates Courts below. These recommendations, particularly as they relate to the disclosure of a preliminary brief, will work together with my other recommendations about case conferencing and case management.



14.103 Overall, these recommendations are intended to create a structured approach that ensures criminal charges move from commencement through to finalisation (whether by resolution in the Magistrates Courts or committal to the higher court) without being delayed or getting 'stuck' in an ongoing cycle of court events. This approach will be in line with the guiding principles to be created under the new criminal procedure framework including, for example, that parties must come to court prepared to move the matter forward.

14.104 In this Report, I have provided one description of the structured process I am recommending, in relation to both criminal matters that are resolved in the Magistrates Courts and those that are committed to the higher courts. This is because, in practice, the way that any matter progresses through the court will be largely the same until the final stages, when the matter is resolved or committed. However, there are some particular steps at the later stages of this process that are specific to matters dealt with summarily or committed.

14.105 A discretion that can be exercised by magistrates will also be built into each of the stages of the proposed case management model. This will ensure magistrates can decide that parties to a matter can 'opt out' of specific steps or stages or allow parties to adopt a specific case management approach depending upon the matter or parties before them. This is essential to ensuring the proper application of the proposed model.

14.106 A visual representation of the steps in the court process for a summary proceeding and a committal proceeding are set out in Diagrams 14.3 and 14.4, respectively, at the end of this chapter.

Objects

14.107 The overall objective of the proposed new legislation about disclosure, case conferencing and case management is to reduce delays in criminal proceedings in the Magistrates Courts by creating a clear, structured and staged framework for how charges progress, from the beginning through to a listing for a summary hearing or a committal proceeding. For clarity, this object should be expressly included in the new criminal procedure legislation.

Disclosure

14.108 Obligations for disclosure will be included in the new criminal procedure legislation for the Magistrates Courts.

14.109 The current disclosure obligations applying in the Magistrates Courts are confusing and lack proper application.

14.110 For several reasons, I am not expanding the Criminal Code disclosure obligations and how they currently apply in the Magistrates Courts. I note the Magistrates Court jurisdiction is supposed to be simpler in approach and as such I do not want to create greater obligations for matters which may be 'less serious' in nature. Additionally, I am aware of the impost a broader application of the Criminal Code provisions would have on the QPS and other prosecution agencies.

14.111 Rather, the Criminal Code and the common law obligations regarding disclosure will continue to apply as they do now. I intend to maintain these two disclosure regimes but with greater legislated safeguards for compliance created through a 'preliminary brief' and mandatory case conferencing. These safeguards will ensure issues relating to disclosure and compliance are more readily ventilated during the proposed case management framework.

14.112 The proposed approach will create legislative provisions to improve current system inefficiencies and address the following three key issues:

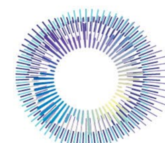
- clarity in disclosure obligations — uniformity in practical application of disclosure across the state
- increased disclosure of evidence earlier in the proceedings to assist in case conferencing and early resolution of matters — that is, a 'staged approach' to disclosure using the provision of a 'preliminary brief'
- strengthened provisions for noncompliance — giving the court greater power to strike out charges in certain circumstances.

14.113 Given the increased use of technology, the new provisions should enable material to be disclosed via electronic means. Body worn camera (BWC) footage, photographs and CCTV footage are all examples of evidence generally obtained and stored electronically, especially with the increased use of Evidence.com by QPS.

14.114 I am of the view the implementation of a 'preliminary brief' requirement will assist in more robust case conferencing and determination of issues between parties earlier in the court process. Generally, I recommend the prosecution make certain documents available at the first mention (as they do now) and that a magistrate have the discretion to order a preliminary brief be disclosed no later than 21 days after the second court mention.[58]

14.115 At the **first mention** of a matter, the prosecution **must** provide to the defendant the following:

[58] See further, as to time frames for the first and second mention, [14.150]–[14.152] below.



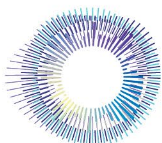
- a 'Statement of Facts' (currently for most criminal cases, the QP9 'Statement of Facts' provided by QPS)
- the defendant's criminal and traffic histories
- a notice explaining the rules of the court, including the importance of legal representation, the defendant's right to access advice from LAQ, ATSILS or a community legal centre and details of how to contact them
- a list of the prosecution witnesses intended to be relied upon (to the extent known at that time or able to be disclosed).

14.116 At the second mention, a magistrate may order the provision of a preliminary brief. The preliminary brief **may include** the following (as determined by the magistrate and informed by the prosecution and defence):

- the items set out in paragraph [14.115] above
- any evidentiary material including (but not limited to) BWC footage, electronic record of interview (EROI), photographs and witness statements
- any information, document or other thing that is relevant to the alleged offences, that may assist the defendant in understanding the evidence against them
- a list from a QPS officer, or another prosecuting agency officer, about any other outstanding evidence the prosecution may present in the future (such as forensic certificates or DNA evidence).

14.117 It is not envisaged the preliminary brief will contain forensic testing outcomes or QPS internal corroboration witnesses (unless material to the charge/s). Rather, the preliminary brief should be enough to identify the elements of the offence and include any relevant material that can be delivered to the defendant as early as possible in proceedings.

14.118 As explained further below, there will be some time frames for the disclosure of a preliminary brief. The starting point will be that the defendant appears at the first court mention and the matter should be adjourned for an initial period of 14 days. At the second court mention, if a preliminary brief is required, the magistrate (in consultation with prosecution and defence) can order a preliminary brief with certain evidentiary material to be included. Disclosure of the preliminary brief should take place no later than 21 days after the brief is ordered. However, a magistrate may use their discretion to decrease or extend time frames when appropriate (including in locations where court does not sit regularly) or based on additional information provided by the prosecuting authority. In summary, my view is a scheme centered on strict time frames does not provide sufficient flexibility. The court needs to make the appropriate orders based on



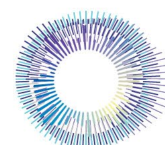
the information provided by the parties and not just routine adjournments to a date that does not allow anything to be meaningfully done.

14.119 The requirement for disclosure of a preliminary brief should be the ‘general’ or ‘default’ position in most matters. However, ordering a preliminary brief will be discretionary and can be dispensed with when appropriate. Importantly, I do not intend the introduction of the preliminary brief to prevent a defendant from pleading guilty on the first court appearance or in writing, or to prevent a matter being dealt with in a defendant’s absence. These approaches should be maintained where appropriate.

14.120 To recognise that there are some scenarios where a preliminary brief may not be suitable or required, the new framework should specifically provide that a preliminary brief will not be required:

- for traffic offences commenced under the *Transport Operations (Road Use Management) Act 1995*, including contested traffic offences commenced by way of Traffic Infringement Notice (TIN)
- other offences commenced by way of an infringement notice[59]
- for regulatory offences commenced under the *Regulatory Offences Act 1985*
- where defence do not require the preliminary brief as a plea of guilty is intended from the outset
- where the charges are contested, and the magistrate determines that a full brief can be ordered after being satisfied a preliminary brief is not sufficient to address the matters in contest (in these circumstances it is intended the matter will still be required to follow the case management steps, unless the court dispenses with those as well)
- in other circumstances the magistrate deems appropriate. Examples of the use of this discretion may include:
    - where the 21-day time frame cannot be met (for example, due to officer unavailability, exceptional circumstances or emergencies)
    - where witnesses are interstate or have complex needs (for example, child witnesses)
    - where the basis of the prosecution case relies on forensic analysis of evidence which will take time to prepare.

[59] See generally *State Penalties Enforcement Regulation 2014* (Qld).



14.121 It is appropriate to eliminate the requirement for a preliminary brief in relation to traffic and regulatory offences. Many of these are not criminal offences and many are uncontested, meaning it is reasonable to adopt this initial approach. Where a preliminary brief is not required but the charge is contested, the usual common law disclosure requirements will apply, and a magistrate will still have the power to make any necessary orders about disclosure. Additionally, the matter will still follow the same case management stages as other charges dealt with in the Magistrates Courts.

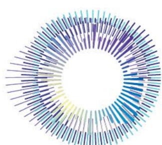
14.122 The requirements for the provision of a preliminary brief may initially seem burdensome, particularly for QPS and its often-limited resources. However, I consider that the overall benefits obtained from early disclosure will outweigh the initial impost associated with the requirements by focussing on early resolution and reducing the time and resources spent on preparing for unnecessary hearings. To be clear, this does not amount to a change to the current obligations set out in the Criminal Code and the common law, and in many ways these recommendations are consistent with current requirements set out in the OPMs and PDs. This approach will simply provide a structured method for disclosure at specific points in time, including earlier in the proceedings.

14.123 Additionally, through the increased use of more advanced solutions, such as Evidence.com or other online portals and general improvements in the availability and use of technological solutions, it is anticipated this impost will lessen over time. In their submission, the QPS acknowledged the future possibility of electronic disclosure through digital means, aligning with Recommendation 11 of the Butler Report.[60]

14.124 The provision of a preliminary brief will have significant benefits for the QPS and other prosecuting agencies because:

- it will mean PPC staff are not required to ‘request’ material from arresting officers in a ‘dribs and drabs’ approach, which takes up significant time in administrative tasks and court mentions, and is associated with delay
- credible and adequate preliminary briefs will optimise case conferencing and lead to early decision making, resulting in less matters remaining contested and requiring summary hearings or committal hearings, and reducing late pleas of guilty
- defence will be able to identify which witnesses are required if the matter remains contested and it can be determined at an early stage in proceedings whether operational police (particularly corroborating officers) will be required to attend hearings. This currently has significant impacts on rostering and on-road resources for QPS, especially in circumstances where hearings do not proceed on the day or

[60] B Butler, *Police Prosecution Services Sustainability Review – Final Report* (December 2019) 39.



witnesses are not required. This may also be a benefit for expert witnesses, such as doctors, and other witnesses in general

- it will strengthen public trust and faith in the criminal justice system, including stronger adherence to the *Human Rights Act 2019* and concepts relating to fair trial[61]
- state-wide organisations, like QPS, will have clear expectations and can adopt single training processes and tools for staff across the state.

14.125 With respect to noncompliance with disclosure obligations, I intend for these to be supported by greater powers for the court to require compliance or sanction parties in circumstances where disclosure in accordance with the Criminal Code is not met.

14.126 Generally, I recommend maintaining the current ability for the court to order a person provide an affidavit or give evidence explaining and justifying their failure to comply with a direction given about disclosure for both summary and indictable matters under the Criminal Code.[62] This type of requirement can be a useful mechanism for facilitating disclosure and moving matters forward.

14.127 Additionally, I recommend expanding the sanctions available to the court for noncompliance with disclosure as required by the Criminal Code. As is currently the case, if the Criminal Code disclosure obligations are not met and the court is not satisfied with any explanation, an order for costs may be made where noncompliance is unreasonable, unjustified or deliberate.[63]

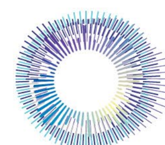
14.128 I recommend, following appropriate consideration of the disclosure issues and any submissions made by the parties made in court, the magistrate may strike out the charge in circumstances where the noncompliance is deliberate or ongoing and may also make an order for costs in those circumstances. Any decision to strike out a charge would be made in the context of a consideration of the relevant circumstances, including reasons for non-disclosure and the impact of that approach on the parties. This approach is intended to have a swifter and sharper response to deliberate and ongoing noncompliance, although striking out the charge will not be a bar to any further proceedings.

14.129 These powers will apply to disclosure required under the Criminal Code. Where those Criminal Code requirements do not apply, the prosecution is still subject to common law disclosure requirements and a magistrate will still have power to make orders about

[61] *Human Rights Act 2019* (Qld) ss 31–4.

[62] *Justices Act 1886* (Qld) s 83B(1).

[63] *Justices Act 1886* (Qld) s 83B(4)(b). See further, as to costs, Chapter 18.



those disclosure requirements as part of a general directions hearing. If any orders are not complied with and as a result a matter is adjourned, costs for the adjournment will be able to be sought.[64]

Disclosure obligations on the defendant

14.130 I also recommend that defendants in the Magistrates Courts be subject to the same obligations to give the prosecution notice of any alibi evidence, expert evidence or evidence of a representation made by a person who is not available to give evidence under section 93B of the *Evidence Act 1977* as currently required in the Criminal Code.[65] These requirements will be explicitly included in the new criminal procedure framework. Generally, it will be required that a defendant give the prosecution notice of those matters no later than 21 days before a summary hearing, but there will be a discretion to permit a different time frame if appropriate.

14.131 This approach ensures that the prosecution will be made aware of these matters so that they can be investigated or addressed, without requiring disclosure to occur before it is reasonably necessary. However, nothing will prevent disclosure at an earlier time, and the early disclosure of evidence that could resolve a matter is encouraged.

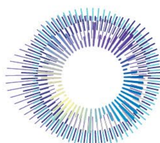
14.132 Additionally, including these obligations should reduce the number of adjournments occurring on the day of a hearing so that the prosecution can consider and investigate things such as expert reports and evidence of alibi. This will also reduce the wasted court time stemming from those delays.

Case conferencing and case management

14.133 The approach I recommend is one that adopts a 'staged approach' to proceedings, with dedicated steps embedded in legislative provisions. It is also intended the approach will include sufficient discretion for magistrates to vary the approach at each stage of the process if satisfied it is reasonable to do so in the circumstances. This is set out in the high-level overview of stages in Diagram 14.2 below and the detailed case management flow charts at the end of this chapter.

[64] See further the discussion of 'Costs on adjournment and non-disclosure' in Chapter 18, and the discussion of 'Applications and directions hearings' in Chapter 19.

[65] Criminal Code (Qld) ch 62 div 4.



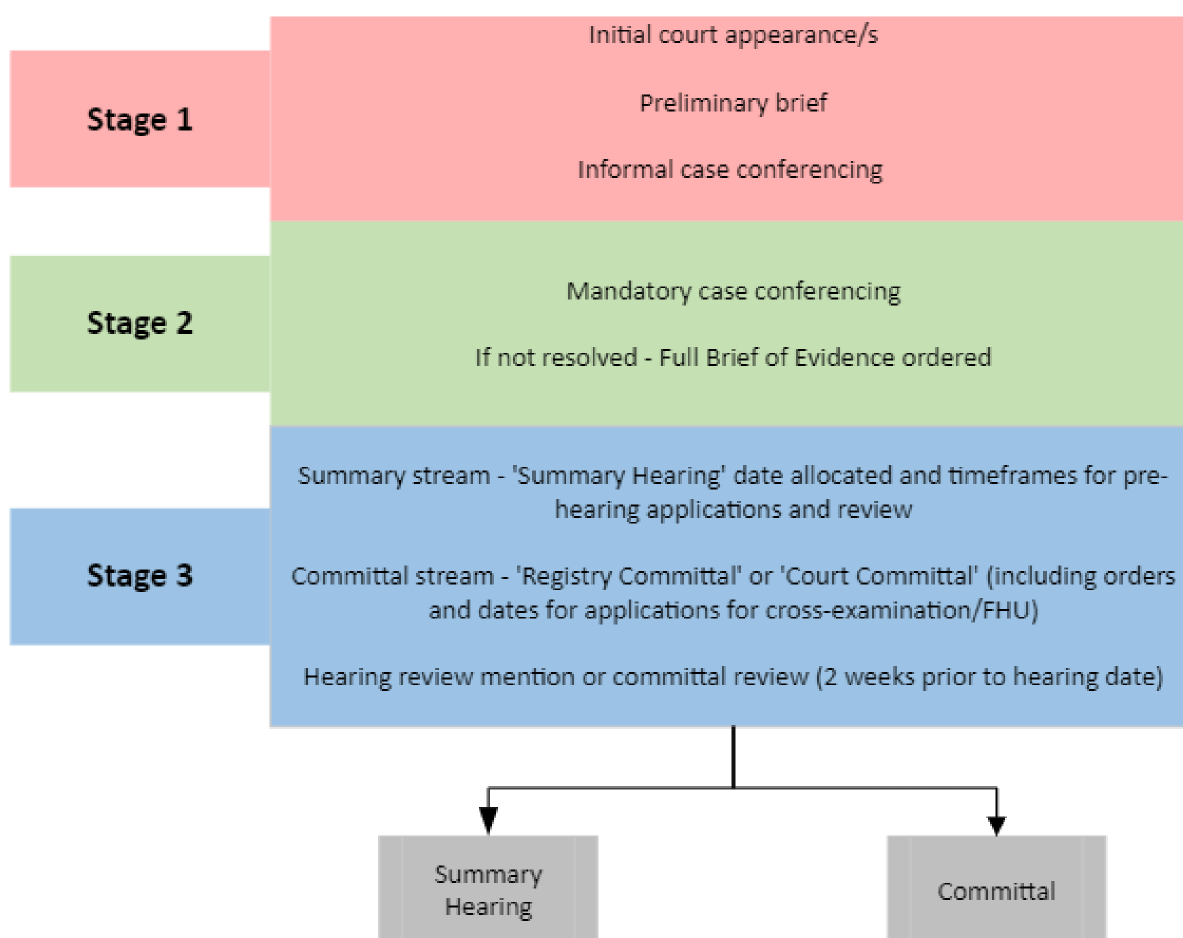


Diagram 14.2: Stages of Case Management

14.134 There will be some standard time frames connected with the initial court appearances and disclosure of a preliminary brief, but a magistrate may use the discretion to vary these when appropriate. Outside of those requirements, rather than being controlled by strict time frames, the stages of proceedings will require proactive steps to be taken at each court mention. Each court mention is intended to achieve one of the following:

- an outcome — such as a plea of guilty or not guilty, or an election made
- progress the matter to the next stage
- adjourn without steps taken if the magistrate is satisfied there are appropriate reasons for the adjournment.

14.135 Given the geographical differences and disparity in court operations across the state, prescriptive time frames for the progression of matters are not always practical. The staged approach will provide the court with a broad general power of case management

combined with some more formal requirements and time frames for progressing matters.

14.136 In practice, geographical differences and disparities are pronounced. In smaller locations, a single magistrate will hear and manage all matters regardless of whether they are to be finalised in the Magistrates Courts or committed. In those locations, court sittings may be less frequent and the standard time frames may be unsuitable for the court's schedule or the parties.

14.137 The new model will provide sufficient discretion for magistrates to vary these stages and time frames; for example, to allow for a longer period between the second and third mention for provision of the preliminary brief, or for additional court events to enable the defendant to take steps in response to the case management questions.

14.138 In large court locations like Brisbane, the arrest courts manage a defendant's initial court appearance(s), including any early pleas of guilty. If a defendant does not plead guilty in the arrest courts, the charges are usually adjourned to different court days so they can follow a particular pathway or 'stream'. This can sometimes involve appearing before multiple magistrates and having several different prosecutors or duty lawyers appearing on the matter, depending upon which stream is followed.

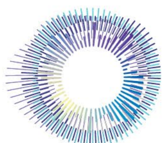
14.139 The way this operates in practice and the pathway or stream a charge follows usually depends on three things:

- the listing arrangements for the individual court location and their case management approach
- the type of charge (summary or indictable)
- how a defendant intends to deal with the charge; for example, if the charge requires case conferencing and whether it is to proceed as a summary hearing, committal proceeding, lengthy plea of guilty or in another way.

14.140 Charges will follow their respective pathway or stream with additional court events usually required to move charges through to resolution. In places like Brisbane, examples of these streams are seen in the court calendar and include 'the criminal callover', 'summary callover' and 'committal callover'.[66]

14.141 The new model will require charges to follow either a 'summary stream' or 'committal stream' until resolution or progression to the higher courts respectively. Despite there being ongoing practical differences in the way matters may be listed in court locations, the separate streams contained in the new model will set out a clear framework for each

[66] Generally, at a callover, many criminal matters are mentioned in court to advise the court about the matter's progress and list the matter for further court dates.



approach and provide clarity to all court users about the steps for how criminal charges are to proceed through courts. This is different to current practice across Queensland where each court location has their own approach to case management of criminal charges and will create consistency.

14.142 The approach will be enhanced by the recommended disclosure provisions, including the provision of a 'preliminary brief', and increased case conferencing.

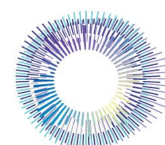
14.143 I intend for case conferencing to become a hallmark of the new model, being required to be conducted throughout the entire court and case management process. Specifically, I am of the view case conferencing should be conducted as early as possible during the court process and have a broader scope of application.

14.144 I am also of the view that the inability for the PPC (the main prosecution agency) to conference with self-represented persons is one of the greatest impediments to resolving matters in Magistrates Courts in a timely way. This will be explicitly recognised and permitted in the new model.

14.145 The key changes to case conferencing I recommend include:

- application to all adult criminal charges, whether they are to be finalised in the Magistrates Courts or committed to a higher court
- a mandatory case conferencing step for all matters (unless otherwise ordered). The mandatory case conferencing is intended to narrow the issues in dispute and be a genuine attempt by the parties to resolve the matter before seeking a summary or committal hearing
- making clear that it may be undertaken through a variety of mediums including verbal submissions, written submissions and in-person conferencing (including remotely)
- to include conferences with self-represented defendants, with safeguards for fairness such as:
    - putting the circumstances of the case conference and outcomes on the court record
    - recording the case conference
    - handing the court a certificate signed by the parties confirming a case conference was conducted and documenting the agreed outcomes.

14.146 It is essential case conferencing, particularly with self-represented persons, remains as efficient as possible. It is not intended for case conferencing and the recording of outcomes, as mentioned above, to impede court flow or impact the discretion of



prosecutors to make 'minor factual' amendments (particularly in high-volume courts). For example, in circumstances where there is a simple factual change (such as 'the defendant stole $200 instead of $250') the prosecutor may be able to simply advise the court a case conference has occurred, and the matter is being resolved on the factual circumstances alleged. A magistrate can confirm this with the defendant and proceed to sentence. When dealing with self-represented parties, the prosecution should use their discretion when determining which safeguards should be adopted.

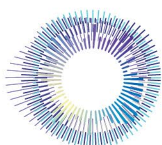
14.147 Increasing the provisions of case conferencing will ensure the earliest possible resolution of charges in Magistrates Courts. The new model will have scope for informal case conferencing throughout the entire court process combined with a mandatory or more formal case conferencing stage during each of the respective streams.

Stage 1 – Initial court appearances

14.148 A defendant's first court appearance will generally be following an arrest or in response to a notice to appear. Some matters will resolve at the first (or second) appearance, while other will progress through the subsequent stages.

14.149 To achieve a more robust and consistent approach to case management, and to make sure matters are progressed and finalised in a timely way, I recommend magistrates be required to ask case management questions at each court mention to inform how matters should progress. The magistrate may consider the circumstances of a case and exercise their discretion about which questions are asked. Generally, the standard questions may include:

- Are you going to get legal representation? Are there any applications for legal aid or ATSILS relevant to the progress of the matter?
- Can the charge be dealt with summarily (in the Magistrates Courts)?
- Can the charge be dealt with in another way (for example, by mediation, or a diversionary program)?
- If elections are required, whose election is it and can the matter be managed in the committal stream? If not, why?
- Does the defendant intend to adjourn the matter, plead guilty or not guilty? Can the parties be directed to take a specific step (for example, to engage in case conferencing before the next court date)?
- If seeking an adjournment, are there reasonable grounds or good reason for the court to grant an adjournment? (However, an exception is the first appearance, where no reason is required.)



14.150 At the first court date (court appearance 1) it is not envisaged any specific steps will be required. However, the standard case management questions should be canvassed to ensure proper management from the outset. The initial documents set out in [14.115] should be disclosed to the defendant or their lawyer at the first court appearance (subject to the exercise of the court's discretion as set out in paragraph [14.105] above).

14.151 The second court date (court appearance 2) should generally be no later than 14 days after court appearance 1. Setting a specific time frame ensures the matter will return to court and be progressed in a timely way, but the 14-day period also gives a defendant time to obtain legal advice or take other necessary steps. As always, the magistrate will have a discretion to vary this time frame if it is appropriate (for example, to give a defendant additional time to seek legal advice). Extending this time frame should only be done in limited circumstances and where appropriate to prevent perpetual adjournments and reduce the delay currently associated with progressing matters through courts. Ideally, parties should be required to 'take steps' and 'move matters forward' at each court event.

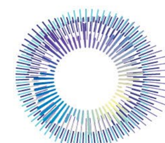
14.152 At court appearance 2 the magistrate can order the preliminary brief as set out in paragraph [14.116] above. The matter should be adjourned with the material to be made available to the defendant within 21 days. However, as explained previously, the magistrate has a discretion to vary this time frame.

14.153 Case conferencing (as discussed further in stage 2, below) can also take place before the second court appearance. However, depending on factors such as the defendant's ability to obtain legal representation or to make decisions at this early stage, case conferencing may be more informal at this time.

14.154 At court appearance 2, it is anticipated parties be required to answer the specified case management questions and progress the matter. Upon being satisfied of the above case management questions, parties (and the court) should be taking all steps to proactively move the matter forward.

14.155 Additionally, I recommend a standard notice be prepared and provided to defendants at the first court event. The purpose of this notice is to ensure consistency in the information given to defendants. The notice should be in easy-to-read language. This will assist in ensuring defendants have access to justice by increasing their understanding of how the case will progress through the Magistrates Courts, including what to expect at each stage. The notice may include information such as:

- The date, time, and location of the next court date (including the room in the courthouse if possible)
- Their right to seek legal advice if they have not already done so



- The defendant's right to enter a guilty plea at any time before the hearing, which means the defendant will proceed to sentencing as soon as possible
- Their entitlement to a preliminary brief of evidence and avenues for how to engage in case conferencing
- What to expect at the next court dates
- What might happen if they do not attend court.

14.156 Defendants should also be given a notice after each subsequent court date. It is not intended that all the information in the initial notice be repeated each time, but at a minimum it should include the date, time and location of the next court date (including the room in the courthouse if possible).

Stage 2 - Case conferencing

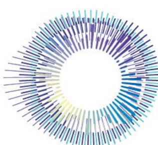
14.157 While informal case conferencing should be conducted at all stages of the court process, stage 2 will seek to implement the mandatory case conferencing step (unless ordered otherwise in accordance with a magistrate's discretion).

14.158 This will apply to all charges, even if a matter is known to be contested. In contested matters, case conferencing can still be a valuable tool for identifying and narrowing the issues in dispute, identifying the witnesses or other evidence to be called, as well as making arrangements for any summary hearing.

14.159 Given parties should have the preliminary brief at an early stage, it is intended case conferencing at this stage will require less in-court appearances (reducing those which currently relate to disclosure requests).

14.160 I recommend regular in-court appearances be limited to self-represented parties or matters where intensive case management is required. Otherwise, I am of the view particularly for represented matters, the court set a schedule for case conferencing submissions and responses by defence and prosecutions with limited or no interim court appearances. By way of example, jurisdictions like the DFV civil jurisdiction utilise practical tools such as uniform directions (as set out in PD 4 of 2022) to standardise requirements on parties to exchange material. A similar approach may assist in managing the significant number of case conferencing files in the Magistrates Courts.

14.161 An example of case conferencing directions that could be used to set a schedule for parties is provided in Diagram 14.3.



Case Conferencing Directions

1. The defendant/defendant's legal representative ____________________ will send any submission to QPS prosecutions on or before _______________(2 weeks or otherwise as indicated by defence);
2. PPC will have until _________________ (2 weeks or otherwise as indicated by PPC) to respond to the defence submission;
3. Any requests for additional time to continue conferencing shall be submitted to the relevant registry on or before ________________ and include consent from both parties;
4. The matter is listed for mention on __________________ where it is intended the parties will advise the court of how the charge/s are to proceed.

Note for Self-Represented Persons – if you do not appear at the next mention this may result in a warrant being issued for your arrest, or the matter being finalised without you.

Diagram 14.3: Example Case Conferencing Orders

14.162 Setting a schedule for case conferencing will not be mandatory. A magistrate may decide that case conferencing for some matters is better left to the management of the parties and simply set a date for the next court appearance, with case conferencing to have taken place before that date. However, a more prescribed schedule will have a place in some matters. For self-represented defendants, a schedule and standardised information about how to case conference and what will happen on the next court date may assist with progressing and resolving matters.

14.163 Whether or not the court sets a schedule for case conferencing, it is not intended to require that parties case conference matters in a specific way. Setting a schedule does not mean that case conferencing must take place through a formal exchange of written submissions. Other ways of conferencing, such as telephone conversations or a more informal exchange of written correspondence (for example, via email) must also be open to the parties.

14.164 Should parties be engaged in case conferencing and require additional time to resolve matters, applications should be made to the registry requesting extensions of time frames and administrative adjournments (by consent). In-court mentions should be avoided in circumstances where parties can continue to meaningfully progress matters.

14.165 Matters resolved via the mandatory case conferencing process can be finalised in the usual manner (for example, a plea of guilty, listed for lengthy sentence or withdrawal of

charge). Matters that could not be resolved via the mandatory case conferencing process will proceed with the full brief of evidence being ordered.

Stage 3 – Summary hearing review and committal review

14.166 If the matter remains contested after mandatory case conferencing, the court should order the full brief of evidence and list the matter for further mention.

14.167 The schedule for the provision of the brief and subsequent mention should be guided by the prosecution. The prosecution should be able to indicate how long it will take for the full brief of evidence to be prepared and served on defence, considering matters such as the complexity of the brief and the need for evidence that can be associated with lengthy wait times, such as forensic certificates.

14.168 After the full brief has been disclosed and considered by defence and the parties have engaged in further case conferencing (if appropriate), at the next mention the parties must indicate how the matter is to proceed.

14.169 For offences that are still contested and will be heard and determined in the Magistrates Courts, at this point the court will allocate dates for:

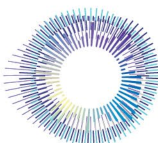
- all pre-hearing applications including any applications under the *Evidence Act 1977* for special or protected witnesses, applications for witnesses to give evidence via phone or video-link or any other pre-hearing issues to be settled
- a summary hearing review date to confirm the matter remains contested (particularly following any applications), all witnesses are available and the matter is ready to proceed. This should occur at least two weeks prior to the hearing date
- a summary hearing.

14.170 The court should use its discretion about what listings are given to a matter. For example, if a party advises that an application will be made and the outcome of that application will determine the course of the matter, then the matter should be listed only for the hearing of that application.

14.171 Except for where parties are legally represented, all parties are expected to personally appear at the summary hearing review (including by appearing remotely). Magistrates Courts may consider streamlining this process by using a 'Certificate of Readiness' completed by the parties prior to the mention (or similar type mechanism) to ensure all pre-hearing issues are resolved prior to the hearing date. The use of a certificate or similar may be addressed in relevant court rules.

14.172 Specifically, the summary hearing review should canvass:

- whether parties are legally represented



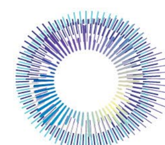
- whether disclosure obligations have been complied with
- whether there are any admissions of fact, or whether the issues in contest can be narrowed down
- which witnesses are required to give evidence or be made available for cross-examination (including all witness availability)
- if any applications for special or protected witnesses are required under the *Evidence Act 1977*, or whether special arrangements are required for witnesses (such as an application for a witness to give evidence remotely via phone or video-link)
- whether interpreters or other reasonable adjustments are required for a party or witness
- an estimate of the length of the hearing.

14.173 Given the geographical complexities of Queensland and Magistrates Courts coverage it is envisaged the summary hearing review may be conducted remotely via video link or telephone in circumstances where magistrates conduct remote circuit courts or a single magistrate attends multiple courts. The framework will have sufficient flexibility to ensure rural and remote courts are able to adopt the desired case management approach.

14.174 It is recommended hearing dates are not allocated before first ensuring the matter remains contested after the full brief of evidence is disclosed. It is intended that this approach, in combination with the set schedule of court events, will reduce the number of contested matters 'falling over' on the date of hearing and the costs associated with resourcing when that occurs.

14.175 Stakeholders may be concerned about the perceived delay associated with not allocating the hearing until after the full brief of evidence and the subsequent mention. However, over time, the 'backlog' currently existing in many court diaries will be alleviated by ensuring matters are ready to proceed. Investing in review mentions and 'vetting matters' should prevent multiple matters being listed on the same date, prosecutors being responsible for several hearings on one day (and having to prepare for each unsure which one is more likely to proceed) and courts relying on hearings falling over so magistrates can be utilised elsewhere (by opening an additional court to assist other courts).

14.176 Ensuring hearings are properly vetted and ready to proceed will mean resourcing can be more targeted and reduce the substantial number of summary hearings failing to



proceed. This approach supports the proposed guiding principles for the new Act, as it will:

- focus on early resolution and moving matters forward
- reduce impacts on stakeholder resources and costs associated with wasted court time and preparation
- reduce trauma to victims of crime by providing more certainty around the court processes and hearing dates
- create fairness for defendants, victims and witnesses through a more regimented and clearly defined summary procedure
- create greater efficiency in the court process and criminal justice system benefits.

14.177 For matters progressing to a committal following case conferencing and disclosure of the full or partial brief of evidence, parties will be required to indicate to the court whether the matter is to proceed by way of:[67]

- registry committal
- court committal
- an application for a committal hearing with cross-examination
- a combination of the above processes, including where any oral submissions or calling of evidence is intended.

14.178 At that point, the court will also allocate further court dates as required — for example, for a committal to take place or for an application for cross-examination to be heard. The court may also list a matter for a further review mention if it is considered necessary in that case. Where a matter is to proceed by way of registry committal, the court should list a matter for further mention and indicate that the committal should take place before that date, or else the matter should return to court. If the matter is committed, this mention date could be administratively delisted at the same time.

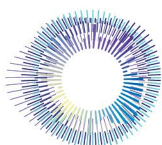
Summary hearing or committal

14.179 Once the matter has been vetted at the pre-hearing review, the summary hearing or committal hearing can be conducted, resolving the matter in the Magistrates Courts.

General power of case management

14.180 While it is intended most matters progressing through the criminal jurisdiction will comply with the above staged approach, as explained previously, the new model also

[67] In relation to committal hearings, see Chapter 17.



includes general powers of case management that can be exercised by magistrates at their discretion to cater to circumstances where the matter is not able to follow the usual path. This will enable magistrates to 'opt out' of the usual case management framework in circumstances where they are not satisfied that approach is appropriate, for example where case conferencing may be waived as a futile exercise. It is still recommended, even in circumstances where this discretion is utilised to deviate from the case management approach in some respect, that the matter should still follow the remainder of the process to reduce the risk of wasted court time and resourcing.

14.181 Given it is not uncommon for parties to request matters be mentioned before the court to ventilate issues relating to compliance, seek extended time frames or other issues which require case management by a magistrate, general powers of case management will provide for these types of applications and ensure a degree of flexibility to the desired approach.

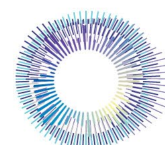
14.182 Key to the effectiveness of these general powers will be to ensure deviation from the standard staged approach remains the exception and not the norm. This will prevent consistent deviation from and erosion of the desired approach over time.

Conclusion

14.183 It is imperative the staged approach is applicable to all courts across Queensland, including those in remote and rural locations.

14.184 Creating consistent and transparent court practices for disclosure, case conferencing and case management is an important foundational step toward addressing the key concerns raised by stakeholders and ensuring access to justice for defendants, victims and court users.

14.185 It is anticipated the process will work to encourage decision making by mandating requirements. By enlivening early decision making and continuing to focus on resolving matters at the earliest opportunity, the principles of contemporary and effective justice will remain at the forefront of criminal procedure for Queensland.



Court Appearance No 1.

Initial Court documents provided to defendant

Court Appearance No 2.

Preliminary Brief ordered (disclosed within 21 days)

Informal Case Conferencing

Plea of Guilty

Lengthy Sentence

Charges contested/ Require Case Conferencing

Mandatory Case Conferencing

Mention

Full Brief of Evidence Ordered

Mention (If contested - Hearing Date allocated)

Pre-Hearing Applications

Charges Resolved

Summary Hearing Review (at least 2 weeks prior to hearing)

Summary Hearing

Guilty

Not Guilty

Diagram 14.4: Summary Process

Informal Case Conferencing

Court Appearance No 1.

Initial Court documents provided to defendant

Elections made (where possible)

Court Appearance No 2.

Preliminary Brief ordered (disclosed within 21 days)

Elections made (where possible)

Mandatory Case Conferencing

Charge/s Resolved

Mention

Full Brief of Evidence Ordered

Mention/Directions about how matter to proceed

Registry Committal

Charge Committed

Court Committal

Full Hand-Up Committal

Charge Committed

Charge Dismissed

Committal with Cross-Examination

Directions for Applications to Cross-Examine

Committal with Cross-Examination

Charge Committed

Charge Dismissed

Combination of Committal options - including oral evidence in chief

Charge Committed

Charge Dismissed

Diagram 14.5: Committal Process

Human rights considerations

14.186 This Review has a strong human rights focus. The impacts on the human rights of all court users in the criminal justice system have been considered throughout the Review.

14.187 With regards to disclosure, case conferencing and case management, these concepts directly relate to the human rights relating to fair hearing and rights in criminal proceedings.[68]

14.188 Specifically, the 'minimum guarantees' contained in section 32(2) of the *Human Rights Act 2019* directly relate to the concepts addressed in the proposed new model above. Some of the more relevant 'minimum guarantees' include:

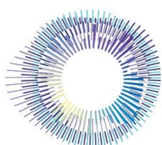
- ensuring the defendant knows the nature of the charge against them
- entitled to be tried without unreasonable delay
- be told of their right to legal assistance and legal aid
- to examine or have witnesses examined against the person
- to have the assistance of an interpreter
- not be compelled to testify against themselves, or confess guilt.

14.189 The proposed new model for disclosure, case conferencing and case management have carefully considered the defendant's rights to be presumed innocent and to a fair trial held without unreasonable delay. Those rights are balanced with the rights of complainants and witnesses who also share experience in the criminal justice process. The proposed new model, and the efficiencies it intends to create, seek to ensure defendants, victims and witnesses will have increased understanding of the Magistrates Court system, including how it works and what is required of them. The model seeks to increase fairness, reduce unnecessary delays and ensure swift access to justice.

14.190 Currently, there is a lack of structure in Queensland's criminal procedure laws which result in significant confusion and delays in resolving matters, including multiple mentions and adjournments. Consultation with magistrates and other stakeholders revealed that current provisions in the Justices Act are not currently working as intended, impacting the defendant's right to be tried without reasonable delay.

14.191 The introduction of structure for the proposed new criminal procedure legislation is intended to improve consistency in practice and prevent the current avoidable delays. The proposed model will also strengthen the existing prosecution disclosure requirements and further aid in reducing the impacts that delay in disclosure has on

[68] *Human Rights Act 2019* (Qld) ss 31–2.



defendants (including unnecessary adjournments). This will be further supported by the strengthening of sanctions and penalties for noncompliance with disclosure obligations.

14.192 The standardisation of processes and procedures, to the extent that this can be achieved noting the different geographic features of Queensland courts, and the adoption of technology will assist in taking steps toward ensuring that defendants are treated equally in Queensland's Magistrates Courts regardless of the court location.[69]

14.193 The provision of a preliminary brief is expected to have significant benefits for all parties, including defendants, by minimising the time taken in administrative tasks and court mentions. This change is therefore expected to reduce the delay associated with obtaining evidence and providing it to the defendant.

14.194 The proposed approach will actively promote the right to be brought to trial without unreasonable delay and the minimum guarantees in criminal proceedings for defendants who have been charged with a criminal offence.[70]

14.195 The new model further recommends the implementation of standard language and terminology for different types of court events, legal concepts and requirements. Accordingly, these changes will promote the defendant's right to be informed about charges in a way they understand by increasing accessibility of the criminal procedure law for all parties, including defendants. Clear and simple language will assist defendants in understanding what is happening to them at court.[71]

14.196 The new model extends the higher court requirements of a defendant to give prosecution notice of any alibi, any expert evidence that they intend to rely upon, and any evidence about a representation made by a person who is unavailable to give evidence, to Magistrates Courts proceedings.

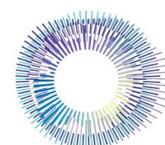
14.197 The disclosure obligations on a defendant are intended to save time for all parties and avoid surprise on the day of court, which can otherwise lead to adjournments because sufficient time has not been given to the prosecution. They do not compel the defendant to testify against themselves or to confess guilt, and therefore are not a limitation on section 32(2)(k) of the *Human Rights Act 2019*.

14.198 The proposed model and its carefully considered features promote the human rights of people in Queensland under the *Human Rights Act 2019.*

[69] *Human Rights Act 2019* (Qld) s 15.

[70] *Human Rights Act 2019* (Qld) ss 29(5), 32(2)(c).

[71] *Human Rights Act 2019* (Qld) s 32(2)(a).



Recommendations

R14.1 The new framework for criminal procedure in the Magistrates Courts will adopt a structured approach that incorporates elements of disclosure, case conferencing and case management through a series of stages that must be followed by the parties and the Court.

R14.2 At each stage of this structured approach, a magistrate will have a discretion to use general powers of case management to vary the standard approach in a way that is appropriate for a particular matter; for example, to vary standard time frames, or so that parties to a matter are not required to complete a particular step or stage or can follow a particular case management approach.

Object

R14.3 The new criminal procedure legislation should state that the object of the new laws about disclosure, case conferencing and case management is to reduce delays in criminal proceedings in the Magistrates Courts by creating a clear, structured and staged framework for how charges progress, from the beginning through to a listing for a summary hearing or a committal proceeding.

Disclosure

R14.4 It should be explicitly stated in the legislation establishing the new framework for criminal procedure that:

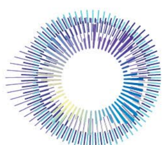
- **(a)** there are no changes to the existing disclosure obligations set out in chapter 62 of the Criminal Code, or to their application to matters dealt with in the Magistrates Courts; and
- **(b)** there are no changes to the current disclosure obligations in common law, or to their application to matters dealt with in the Magistrates Courts.

R14.5 The new framework for criminal procedure in the Magistrates Courts will adopt a **staged approach to disclosure.** The staged approach should include:

- **(a)** the provision of a 'preliminary brief', which is to be disclosed by the prosecution to the defendant no later than 21 days after the second court mention; and
- **(b)** the provision of a full brief of evidence only after the parties have engaged in mandatory case conferencing and attempted to resolve the matter.

R14.6 At the first court mention, the prosecution must make the following available to the defendant:

- **(a)** a 'Statement of Facts';
- **(b)** the defendant's criminal and traffic histories;



(c) a notice explaining the rules of the court, including the importance of legal representation, the defendant's right to access advice from LAQ, ATSILS or a community legal centre and details of how to contact them; and

(d) a list of the prosecution witnesses to be relied on (to the extent known).

R14.7 At the second court mention, a magistrate may order a 'Preliminary Brief' to be provided to the defendant in **21 days**. The preliminary brief should contain sufficient material to identify the elements of the offence, and may include the following (as determined by the magistrate and informed by the prosecution and defence):

(a) the documents contained in Recommendation 1.6(a)–(d) above**;**

(b) any evidentiary material including (but not limited to) body-worn camera footage, electronic record of interview, photographs and witness statements;

(c) any information, document or other thing that is relevant to the alleged offences, which may assist the defendant in understanding the evidence against them; and

(d) a list from a QPS officer, or another prosecuting agency officer, containing any other outstanding evidence the prosecution may seek to present in the future (for example, forensic certificates or DNA evidence).

R14.8 A preliminary brief should not be required:

(a) for traffic offences commenced under the *Transport Operations (Road Use Management) Act 1995*, including contested traffic offences commenced by way of Traffic Infringement Notice;

(b) for other offences commenced by way of an infringement notice;

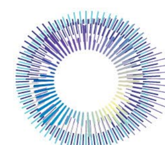
(c) for regulatory offences commenced under the *Regulatory Offences Act 1985*;

(d) where defence do not require the preliminary brief as a plea of guilty is intended from the outset;

(e) where the charges are contested, and the magistrate determines that a full brief can be ordered after being satisfied a preliminary brief is not sufficient to address the matters in contest; or

(f) in other circumstances the magistrate deems appropriate.

R14.9 Where there has been noncompliance with disclosure obligations, the court may adjourn a matter for disclosure to be rectified or an explanation provided. If the disclosure obligations are not met and the Court is not satisfied with any explanation, specifically for noncompliance with the disclosure obligations provided for by the Criminal Code, the Court may:



(a) request an affidavit or require a person to come to court to explain the noncompliance with their disclosure obligations;

(b) order costs where noncompliance is unreasonable, deliberate or unjustified;

(c) in circumstances where the noncompliance is deliberate or ongoing, the charge may be struck out and costs may be ordered. This will not be a bar to further proceedings**.**

R14.10 The new framework for criminal procedure in the Magistrates Courts should also include disclosure requirements that apply to a defendant. These should be consistent with the current requirements in the Criminal Code, and require the defendant to give the prosecution notice of any of the following matters no later than 21 days before a summary hearing (although a shorter time frame may be permitted, if appropriate):

(a) alibi evidence;

(b) expert evidence; and

(c) evidence of a representation made by a person who is not available to give evidence under section 93B of the *Evidence Act 1977*.

Case conferencing and case management

R14.11 The new framework for criminal procedure in the Magistrates Courts should adopt a structured and staged approach to case management. The approach should implement a clear framework for how charges progress through the court, including the steps required to be taken by parties at each stage of the proceedings.

R14.12 The **first stage** of the case management process will relate to the defendant's initial court appearances and should require that:

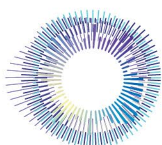
(a) at each mention, the magistrate ask the defendant an initial series of dedicated 'case management questions' relating to matters such as legal representation, how the charge might be finalised and how the defendant intends to plead to the charge, to inform how the matter will progress;

(b) the second mention take place no later than 14 days after the first mention;

(c) the preliminary brief be disclosed to the defendant after the second mention (generally within 21 days);

(d) once the case management questions are adequately answered, ideally after the second mention, the matter be progressed to the second stage.

R14.13 The defendant should be given a notice at the first mention which includes information about matters such as:



(a) the date, time and location of the next court event;

(b) their right to legal advice;

(c) the options available to them, including entering a plea of guilty, obtaining a preliminary brief and engaging in case conferencing;

(d) what to expect at the next court dates; and

(e) what might happen if they do not attend court.

R14.14 The defendant should also be given a notice after each subsequent court date that, as a minimum, includes the date, time and location of the next court event.

R14.15 Case conferencing should be encouraged at all stages of the new case management model. The **second stage** of the case management process will specifically relate to case conferencing, and will:

(a) require that case conferencing is undertaken for all adult criminal charges, whether they are to be finalised in the Magistrates Courts or committed to a higher court;

(b) state that case conferencing is a mandatory step for all matters (subject to the magistrate's discretion), and must be approached by the parties as a genuine attempt to narrow the issues in dispute or resolve the matter;

(c) make clear that case conferencing can be undertaken in a variety of ways including verbal submissions, written submissions and in-person conferencing (including remotely); and

(d) explicitly include conferences with self-represented defendants, with safeguards for fairness such as:

(i) putting the circumstances of the case conference and outcomes on the court record;

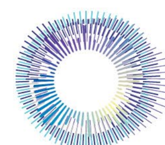
(ii) recording the case conference; or

(iii) handing the court a certificate signed by the parties confirming a case conference was conducted and documenting the agreed outcomes.

R14.16 The **third stage** of the case management process will apply after the parties have completed case conferencing, and where a full brief of evidence has been provided and the matter remains contested. In these circumstances, the parties must indicate how the matter will proceed and the Court will allocate the matter further court dates, as appropriate.

R14.17 For contested offences that will be heard and decided at a summary hearing in the Magistrates Courts, the matter may be allocated dates for:

(a) all pre-hearing applications identified in relation to the matter;



(b) a summary hearing review, which should take place approximately two weeks before the summary hearing and advise the court about matters such as:

(i) whether parties are legally represented;

(ii) whether disclosure obligations have been complied with;

(iii) whether there are any admissions of fact, or whether the issues in contest can be narrowed down;

(iv) which witnesses are required to give evidence or be made available for cross-examination (including all witness availability);

(v) if any applications for special or protected witnesses are required under the *Evidence Act 1977*, or whether other arrangements are required (such as an application for a witness to give evidence remotely via phone or video-link);

(vi) whether interpreters or other reasonable adjustments are required for a party or witness; and

(vii) an estimate of the length of the hearing;

(c) a summary hearing.

R14.18 For contested offences that will be committed to the District Court or the Supreme Court, the parties must indicate whether the matter is to proceed by way of:

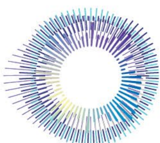
(a) registry committal;

(b) court committal;

(c) an application for a committal hearing with cross-examination; or

(d) any combination of the above where oral submissions are to be made or evidence it to be led

and the Court will allocate further court dates as required. The Court may also allocate a further review mention if it is considered necessary for that matter.



CHAPTER 15: COURT-ORDERED DIVERSION

Introduction

15.1 Diversion refers broadly to any initiatives that aim to divert an offender out of the criminal justice system. The concept of diversion has gained traction as a result of increased popularity of therapeutic jurisprudence and restorative justice concepts.[1]

15.2 As part of this Review, I have considered new ways that adults charged with some offences can be diverted out of the court system once proceedings have started, before the person formally pleads guilty or is sentenced ('court-ordered diversion').

15.3 A person who is given a court-ordered diversion would not go through a summary hearing or plead guilty, and generally would not be sentenced for any offences.

15.4 Although there are many potential diversion options that could be considered as part of sentencing, the scope of this Review specifically excludes 'consideration of sentencing options or procedures'.[2] However, these options hold significant value and should be considered outside of this Review, including the option for a magistrate to order a caution as a formal sentence.

15.5 There are also a range of diversion options before a matter proceeds to court (pre-court diversion), which I have not considered here as a matter of scope.

Background

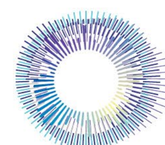
15.6 Diversion is important for many reasons. It has a number of benefits outside of reducing a person's contact with the criminal justice system, including:

- allowing for the opportunity to address issues relating to offending through appropriate therapeutic interventions, such as drug counselling
- allowing for the participation of victims in some instances, where appropriate and desired by the victim
- allowing the offender to take responsibility for their harm in a more targeted, direct and meaningful way.

15.7 Beyond providing the opportunity for tailored assistance to an offender, diversion is important to minimise contact with the criminal justice system. For the purposes of this

[1] Broadly, therapeutic jurisprudence concepts are an alternative approach to justice, which seek to go beyond the traditional adversarial system. Therapeutic jurisprudence is founded on the idea that court processes should take into account the impact that criminal justice system involvement has on the parties (defendants and victims or complainants) and prioritise therapeutic approaches that aim to minimise the negative effects on participants and maximise the opportunities for benefits. For example, sentencing a defendant to drug counselling, or making sure that participants understand the proceedings by using plain English might be part of an approach informed by therapeutic jurisprudence.

[2] Terms of reference, Appendix A.



Review, the general objective of court-ordered diversion is to reduce a person's contact with the criminal justice system as early in the proceedings as possible.

15.8 Research has repeatedly shown that contact with the criminal justice system is likely to increase a person's likelihood of offending, in and of itself.[3] Where possible, offences should be managed by the courts in a way that contributes to behaviour change and reduces the likelihood of future re-offending. Rehabilitating offenders and reducing the likelihood of reoffending also contributes to public safety, and to the maintenance of a safe, peaceful and just society.

15.9 It is important that first-time offenders who have committed lower-level or minor offences have access to diversion options, particularly when many or most of these offenders are not likely to go on to commit further serious offences.[4] For example, a 2014 Queensland study of 40,523 adult offenders came to the following conclusions:

> First, there are a large proportion of offenders who do not come into contact with the [criminal justice system] until 18 years or older. Second, for 95 per cent of these offenders, their offending career is brief and less serious. Third, in line with best practice principles of risk-needs-responsivity, it may be more appropriate to respond to these offenders using diversionary schemes like formal adult cautioning. Doing so would save the [criminal justice system] considerable resources that could be targeted towards more prolific offenders and/or used to address the social problems that lead to these forms of adult-onset offending.[5]
> If a diversionary option includes access to services, treatment or rehabilitative programs, these options can help defendants address factors that contribute to their offending. Factors that may influence offending include intergenerational trauma, poverty[6], alcohol and other substance abuse[7], some mental illnesses[8], and cognitive impairment.[9]

[3] Australian Productivity Commission, *Australia's Prison Dilemma* (Research Paper, October 2021) 15; Paula Smith, Claire Goggin and Paul Gendreau , *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Public Works and Government Services Canada, 2002); Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson 'Imprisonment and Reoffending' (2009) 38(1) *Crime and Justice* 115.

[4] Note that for offenders who commit their first crimes as an adult, research in two population-based Queensland offender cohorts identified a strong low-rate, adult-onset offender trajectory. Although a strong repeat offender cohort was noted by this research, this cohort was much smaller than the majority of adult-onset offenders who do not engage in more serious offending over time: Troy Allard, April Chrzanowski, and Anna Stewart, 'Targeting Crime Prevention to Reduce Offending: Identifying Communities that Generate Chronic and Costly Offenders' (Trends & Issues in Crime and Criminal Justice No 445, Australian Institute of Criminology, September 2012); Troy Allard et al, 'The Monetary Cost of Offender Trajectories: Findings from Queensland (Australia)' (2014) 47(1) *Australian and New Zealand Journal of Criminology* 81.

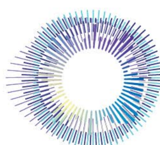
[5] Carleen Thompson et al, 'Examining Adult-Onset Offending: A Case for Adult Cautioning' (Trends & Issues in Crime and Criminal Justice No 488, Australian Institute of Criminology, October 2014) 7.

[6] Tyson Whitten et al, 'Comparing the Criminal Careers and Childhood Risk Factors of Persistent, Chronic, and Persistent-Chronic Offenders' (2019) 52(2) *Australian and New Zealand Journal of Criminology* 151, 169.

[7] Australian Institute of Health and Welfare, *Alcohol, tobacco and other drugs in Australia* (Web Page, 14 December 2022) <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/impacts/social-impacts>.

[8] Daniel Whiting, Paul Lichtenstein, and Seena Fazel, 'Violence and Mental Disorders: A Structured Review of Associations by Individual Diagnoses, Risk Factors, and Risk Assessment' (2021) 8 *The Lancet Psychiatry* 150.

[9] New South Wales Law Reform Commission, *People with Cognitive Impairment and Mental Health Impairments in the Criminal Justice System* (Final Report, June 2012).



15.10 It is also important to avoid recording a conviction where a defendant has successfully completed a diversion. This is because having a criminal history impacts a defendant's ability to engage with society in a number of ways — such as significantly restricting their ability to seek gainful employment and housing.[10]

15.11 It is desirable to reduce the use of court resources for minor matters by finalising them in an efficient way. This is especially important in the Magistrates Courts due to the high number of matters, and the fact that most criminal matters in Queensland are heard in the Magistrates Courts. For these reasons, diversion options should be considered for all individuals who may meet the initial criteria and as early in a proceeding as possible, although nothing should prevent consideration of a diversion option later in a proceeding.

15.12 The new criminal procedure legislation for the Magistrates Courts should include two in-court diversion options applying to matters that can be dealt with summarily in the Magistrates Courts: an expanded and restructured Adult Restorative Justice Conference model; and the new Summary Offences Diversion Program, which provides an opportunity for defendants to be diverted away from the criminal justice system by instead completing particular conditions in an agreed plan, after which the criminal charge can be discontinued. However, this should not preclude the possibility that other court-ordered diversion options for the Magistrates Courts are considered and implemented at a later stage, including adopting cautions as a sentencing option.

Victims

15.13 The increased popularity of restorative justice is attributable in part to a focus on the needs of victims of crime.

15.14 Restorative justice recognises that the needs of victims and defendants do not have to be in opposition to each other.[11] Instead, restorative justice views crime as revolving around a question of 'harm', and how an offender can repair the harm caused to the victim.[12] Studies have found, for example, that restorative justice can lead to positive outcomes for both victims and offenders, and that victim satisfaction is increased when victims are involved in restorative justice-based initiatives such as mediation.[13]

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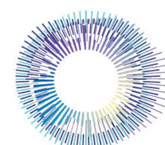
[10] Australian Human Rights Commission, *Human Rights: Discrimination in Employment on Basis of Criminal Record* (Discussion Paper, December 2004).

[11] Jacqueline Joudo Larsen, 'Restorative Justice in the Australian Criminal Justice System' (AIC Reports, Research and Public Policy Series No 127, 2014) 30–1.

[12] Centre for Innovative Justice, *It's Healing to Hear Another Person's Story and Also to Tell your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* (Final Report, October 2019) 7.

[13] Ibid 17–18; Larsen (n 11) 30–1.



15.15 Although not all the diversion options I have proposed below require victim involvement, the framework allows for the involvement of victims to the extent that they want to engage. Many victims do want to engage in dialogue with a defendant, and to have the opportunity to communicate the effects of an offence. These opportunities may be limited in the current justice system. It is important to listen to and respect the needs of victims. Of the options I have proposed, mediation cannot proceed unless a victim is willing to engage with the defendant. The Summary Offences Diversion Program can involve a victim but it is not a requirement for a victim to engage.

15.16 It is also important to note that not all crimes heard in the Magistrates Courts involve a victim, particularly many public order offences. In such cases, diversion may still be appropriate.

The current position

15.17 In Queensland, there are opportunities for adults charged with an offence to be diverted out of the traditional criminal justice system at various stages. Pre-court diversion is principally the responsibility of QPS and applies before an individual appears in court charged with an offence.

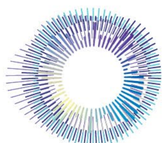
15.18 One of the primary ways in which QPS can divert a person is through a police caution, which is a formal warning given to a person by the QPS instead of charging the person with an offence.[14] I have provided further information on this below.

15.19 The QPS also use a number of other pre-court diversion options. Specifically, the QPS OPMs outline a priority order of diversionary options that investigating officers are expected to consider before deciding to start proceedings against a person. These are:[15]

- take no formal action
- administer a caution
- refer the offence for a restorative justice conference (mediation)
- if the offence is a minor drug offence and the person is eligible, offer the person an opportunity to participate in a drug diversion assessment program
- if the person is intoxicated in a public place, take the person to a place of safety
- if the offence is an infringement notice offence and a caution is not appropriate, issue an infringement notice

[14] Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) [3.2.1]

[15] Ibid [3.1.1].



- if another appropriate alternative to commencing a proceeding is available, utilise that alternative.

15.20 It is difficult to determine how many offenders are diverted out of the criminal justice system by QPS using these options. The 2020–21 Queensland Police Service annual report provides a figure of 10.9% of all offenders (including youths and adults) were diverted out of the criminal justice system as a 'proportion of all offenders proceeded against by police'. That is to say, approximately 1 in 10 offenders were diverted out of the system by QPS. The term diversion includes community conferencing, cautioning by police, intoxication diversion, drug diversion or graffiti diversion, and infringement notices (other than traffic infringement notices).[16]

15.21 In the 2021–22 Queensland Police Service annual report, it was reported that in 15.4% of proceedings against all offenders (including youths and adults), an offender was 'offered and accepted a diversion option'. The term diversion is defined similarly to the previous year, but for adult offenders only infringement notices (other than traffic infringement notices) are included in the count of diversions.[17] QPS does not publish any further detailed statistics that demonstrate what proportion of offenders are diverted using what method.

15.22 Regardless, QPS' approach to diverting offenders away from the criminal justice system when it is apparent that it is not within the public interest to pursue criminal charges against an individual for minor offences should be commended.

15.23 An internal review of the PPS in 2019 found that there were systemic factors that discouraged the uptake of diversion options by QPS:

> There appears to be an investigator culture which favours the charging and conviction of adult offenders in preference to other options. This can contribute to overcharging, failure to utilise diversionary options and inappropriate pressuring of prosecutors.[18]

15.24 The court-ordered diversion options explored within this chapter will complement any pre-court diversionary options used by QPS.

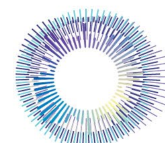
15.25 In addition to a large body of research on the efficacy of diversion,[19] a number of recent evaluations and reports into the Queensland criminal justice system have recommended

[16] Queensland Police Service, *Queensland Police Service: Annual Report 2020–2021* (2021) 28–30.

[17] Queensland Police Service, *Queensland Police Service: Annual Report 2021–2022* (2021) 26-28. In this report, the figure for 2020–21 is given as 14.8%. There was a change in the way these statistics were measured between the two reports.

[18] B Butler, *Police Prosecution Services Sustainability Review – Final Report* (December 2019) 33.

[19] See for example: Lawrence W Sherman et al, 'Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review' (2015) 31 *Journal of Quantitative Criminology* 1; Jeff Latimer, Craig Dowden and Danielle Muise 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85(2) *The Prison Journal* 127.



the adoption of various forms of therapeutic justice-based initiatives and programs, including specific diversion options.

15.26 The former QPC made a number of recommendations in their *Inquiry into Imprisonment and Recidivism* for the expansion and further introduction of diversion options across the criminal justice system. These included the expansion of adult cautioning by QPS, the introduction of a deferred prosecution scheme, and taking steps to encourage the use of diversion.[20] These diversion recommendations were primarily directed towards QPS, however also included the courts.

15.27 Further, the second Women's Safety and Justice Taskforce Report, released in July 2022, made several recommendations around the expansion of diversion options, including recommendations that built upon the previous findings made by the QPC. These recommendations include the:[21]

- introduction of a legislative framework for police adult cautioning processes, and a legislative requirement for police to consider all available and appropriate diversion options before charging an adult with an offence (Recommendation 97; noted by the Queensland Government)
- Queensland Police Service Drug Diversions Program is expanded to include possession of small amounts of illicit drugs other than cannabis (Recommendation 98; noted by the Queensland Government)
- funding and introduction of a legal advice hotline to support the use of adult diversion options, so that accused persons have access to independent legal information (Recommendation 99; supported in principle by the Queensland Government)
- Queensland Government consult with a number of stakeholders to explore the viability of conditional cautioning and deferred prosecution agreements to divert low-level offenders from the criminal justice system (Recommendation 100; supported by the Queensland Government).

15.28 In February 2023, consistent with recommendation 98 of that report, the Queensland Government introduced the Police Powers and Responsibilities and Other Legislation Amendment Bill 2023, which amends the *Drugs Misuse Act 1986* and the *Police Powers and Responsibilities Act 2000* to significantly expand the QPS drug diversion program. The changes propose a new tiered approach to minor drug possession offences (where the drug is for personal use), offering a warning for a first offence and then allowing a

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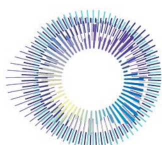
[20] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) xli-xlii.

[21] Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report No 2, July 2022) vol 2, 466; *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report two; Women and girls' experiences across the criminal justice system* (2022).



person two opportunities to participate in a drug diversion assessment program, along with other health-based responses.[22]

15.29 It was explained that:

> The Bill's focus on a health-based response for a minor drugs offence involving a small quantity of any type of dangerous drug and the non-medical use of certain pharmaceuticals better addresses the underlying causes of drug-related offending and brings Queensland into line with other jurisdictions …. This will lead to improved outcomes for both minor drug offenders and the community, better address the underlying causes of drug offending, reduce recidivism and significantly reduce the demand on the criminal justice system and allow court time to be reserved for more serious matters.[23]

15.30 In the media statement announcing the changes, the Queensland Government stated:

> According to police, diversion programs result in the majority of … individuals [diverted by the current program] never having contact with police again. …
>
> Currently police can spend around 9 working hours processing a minor drug offence case through to its conclusion in court, where the individual who has been charged may not receive the early intervention from health experts they may need.
>
> Expanding the police drug diversion program will free up police time to focus on serious drug offending such as drug supply, trafficking and manufacturing, while keeping people with a health issue out of the judicial system.
>
> It's a commonsense approach based on the evidence that if you divert people early to health and education services, they are less likely to reoffend.
>
> It's about preventing crime.[24]

15.31 The *Mental Health Act 2016* provides a magistrate with the power to dismiss or adjourn simple offences (as defined by the Justices Act) when they are satisfied the person charged with the offence was of unsound mind at the time the offence was allegedly committed or is unfit for trial.[25] In some circumstances, after the court has dismissed or adjourned a matter, the court can refer a defendant for appropriate treatment and care.[26]

15.32 Other programs and elements of the court system in Queensland are not intended to divert offenders out of the system (and therefore do not constitute diversion) but provide various forms of specialised support and assistance to offenders on the basis of therapeutic jurisprudence concepts.

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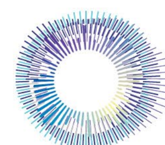
[22] Police Powers and Responsibilities and Other Legislation Amendment Bill 2023 (Qld) cl 22.

[23] Explanatory Note, Police Powers and Responsibilities and Other Legislation Amendment Bill 2023 (Qld) 3.

[24] Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, 'New Approach to Save Lives' (Media Statement, 23 February 2023) <https://statements.qld.gov.au/statements/97235>.

[25] *Mental Health Act 2016* (Qld) s 172.

[26] *Mental Health Act 2016* (Qld) s 174.



15.33 For example, Magistrates Courts operate specialist alternative courts for some defendants, such as the Queensland Drug and Alcohol Court[27] and the Murri Court.[28] Those specialist courts can be accessed by relevant defendants who are pleading guilty to an offence. However, access to services through these specialist courts is heavily limited by geographic constraints (as services are primarily offered in South-East Queensland, with access restricted in rural and remote areas).[29] The effectiveness of and access to these services is also affected by demand, which outstrips resourcing. For example, drug and alcohol rehabilitative services are oversubscribed, which has led to long wait times across the state.

15.34 Court Link is another initiative operating at nine Magistrates Courts locations.[30] It provides a support system that connects defendants with treatment and support services to address their needs, where those needs are contributors to their offending. Progress is subject to judicial monitoring, and positive engagement is considered when sentencing the defendant. However, Court Link is not a diversion option, as it does not divert people out of the criminal justice system.

15.35 In other Australian jurisdictions, there are a range of diversionary programs and options that operate at all stages of the criminal justice system. I have detailed some of the relevant models in other jurisdictions below.

Consultation

15.36 In the Consultation Paper, I asked a number of questions regarding a range of different diversion options.

15.37 All respondents to the Consultation Paper that expressed an opinion on diversion were in favour of proposed new court-ordered diversion options. Generally, respondents were highly supportive of the need to divert defendants out of the criminal justice system for a number of reasons, including to:

- meet the therapeutic needs of individual defendants
- avoid recording a criminal history
- minimise the costs of processing defendants through the Magistrates Courts in the traditional way

[27] Queensland Courts, *Queensland Drug and Alcohol Court* (Web Page, 24 March 2023) <https://www.courts.qld.gov.au/courts/drug-court>.

[28] Queensland Courts, *Murri Court* (Web Page, 22 April 2022) <https://www.courts.qld.gov.au/courts/murri-court>.

[29] For example, the Queensland Drug and Alcohol Court operates only in the Brisbane Magistrates' Court district.

[30] Namely: Brisbane, Caboolture, Cairns, Ipswich, Maroochydore, Mount Isa, Pine Rivers, Redcliffe and Southport.

- allow magistrates to focus their time and attention on more significant matters.

15.38 Stakeholders were unanimously in support of expanded and better resourced diversionary options, and in agreement that the current mediation provisions under the Justices Act are not operating as intended. However, stakeholder opinions about the operation and administration of diversion were mixed.

15.39 A point of contention across the different diversion options canvassed in the Consultation Paper was regarding whether diversion as a whole should be available only for some offences, with others legislatively exempt. Specifically, some respondents recommended that particular classes of offences *not* be made legislatively exempt from diversion, including offences involving domestic and family violence and violent offences.

15.40 Those respondents in favour of not restricting eligibility noted these categories of offences are generally broad – for example, a public nuisance offence can range in severity from interfering with the enjoyment of a public place to behaving in a violent way.[31]

15.41 Another point of contention related to the eligibility of offences involving domestic and family violence. Some respondents noted that diversion, particularly mediation, would not be appropriate in situations where there is an ongoing power imbalance, particularly for instances of coercive control. However, others noted that diversion can be appropriate in some circumstances where there is an ongoing relationship between the victim and a perpetrator (such as a family relationship), and the offending is not severe in nature. For example, the Queensland Sexual Assault Network supported mediation for some sexual offences between family members but noted that this would not be appropriate for other cases where there was a pattern of ongoing abuse.

15.42 I have detailed consultation feedback in relation to each of the new proposed models below.

A structured approach to court-ordered diversion

15.43 I recommend that the new, strengthened legislative framework for criminal procedures in the Magistrates Courts include two court-based diversion options: an expanded Adult Restorative Justice Conferencing (ARJC) scheme, and a Summary Offences Diversion Program.

15.44 Both court-based diversion options will have their own legislative framework and requirements. However, they will also have a number of preliminary matters in common, including a shared set of objects and a requirement that the defendant accept responsibility for the offence.

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[31] *Summary Offences Act 2005* (Qld) s 6(2).

15.45 I have also suggested the Queensland Government consider cautions as a sentencing option, because a recommendation to this effect is outside of my terms of reference.

Objects

15.46 In Chapter 9, I recommended that the new criminal procedure legislation for the Magistrates Courts should have objects and guiding principles to assist in its interpretation and application. As part of this Review, I also considered whether there should be any specific principles or objects in relation to court-ordered diversion.

15.47 There was positive feedback from respondents to the Consultation Paper supporting specific objects or principles about court-ordered diversion. Key themes raised by stakeholders that should be recognised by the objects include an intention to reduce the number of people in the criminal justice system and in custody, and a focus on the use of diversion options that promote rehabilitation and community safety. Stakeholders also expressed that the objects should be informed by a consideration of human rights, victims' rights,[32] cultural considerations, accessibility, and consistency of application in all matters where diversion options are appropriate.

15.48 I recommend that the new criminal procedure legislation include specific objects in the chapter relating to court-ordered diversion. The objects I have recommended are based in part on the New South Wales legislation.[33]

15.49 These objects should be located at the start of the chapter to make it clear for all court users how the legislative provisions are to be applied in practice. The objects of legislative provisions about court-ordered diversion should be:

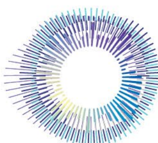
(a) To provide a framework for the recognition and operation of court-ordered diversion options for dealing with persons who have committed or are alleged to have committed an eligible offence;

(b) To recognise that diversion is an opportunity for meaningful participation in the criminal justice system by a person who has committed or is alleged to have committed an eligible offence, as well as for victims to participate to the extent they desire;

(c) To ensure that options for court-ordered diversion apply fairly to all persons who are eligible to participate in them, and that they are properly managed and administered;

[32] Although Queensland does not formally enshrine any particular rights for victims of crime in the *Human Rights Act 2019* (Qld), the Charter of Victim's Rights exists separately: *Victims of Crime Assistance Act 2009* (Qld) ss 6B–7, sch 1AA.

[33] *Criminal Procedure Act 1986* (NSW) s 345.



(d) *To reduce the likelihood of future offending behaviour by facilitating the use of and participation in court-ordered diversion options;*

(e) *To recognise the rights of victims should be protected and taken into account when considering diversion options, but not always require a victim's consent to order a diversionary option in relation to a defendant; and*

(f) *To provide a framework for the greater inclusion of cultural considerations, including the distinct cultural consideration of Aboriginal peoples and Torres Strait Islander peoples, in the resolution of eligible offences.*

Application to summary offences in appropriate circumstances

15.50 Almost all charges, even those of the most serious nature, start in the Magistrates Courts. However, not all charges will be suitable for court-ordered diversion.

15.51 As a starting point, court-ordered diversion (of the kinds suggested in this chapter, but also any other kinds implemented in the future) should be available for all charges that can be dealt with summarily in the Magistrates Courts. This will include regulatory offences, simple offences and indictable offences that can be dealt with summarily. If an indictable offence can be dealt with summarily following an election by one party, a court-ordered diversion may apply to that offence if the party elects to deal with the matter summarily.

15.52 However, this is the starting point only. Generally, when a diversion is available for an offence, it is for the magistrate to use their discretion to decide whether a court-ordered diversion is appropriate in all the circumstances, taking into account a range of considerations such as:

- the complainant's views, including whether they consent to participate or engage in a diversion option such as mediation
- whether there is an ongoing relationship between the defendant and the complainant (including whether a domestic and family violence protection order is in place)
- the nature and seriousness of the alleged offence, including whether it is an offence involving actual violence or domestic and family violence, or an offence that is sexual in nature
- whether the defendant has previously been ordered to other diversion options by the court or another agency (including whether the defendant successfully completed the

conditions, how recently another diversion order was made, and the nature of the offences[34]

- if the defendant has the ability to meaningfully participate in a court-ordered diversion
- if either the defendant or the complainant is an Aboriginal person or Torres Strait Islander person, whether any other relevant stakeholders such as a Community Justice Group member, Elder or Respected Person should be involved in the process
- any other relevant circumstances.

15.53 Legislation can also expand the types of offences for which a particular type of court-ordered diversion is available. Importantly, ARJC is currently available for any offence, not only offences that can be finalised summarily. This will not change.

15.54 During consultation, stakeholders noted that there has been proven success with restorative justice initiatives in Queensland, even for serious crimes such as assault and domestic and family violence. I also note, as above, that the recent Women's Justice and Safety Taskforce recommended the use of diversion for some defendants charged with domestic and family violence offences. As a result, I propose that these offences are not excluded from diversion.

15.55 However, as an implementation matter, I suggest that materials be issued to guide magistrates in their decision-making when determining if diversion is appropriate for a particular defendant or offence. This might, for example, expand on the considerations above and give examples of when diversion would and would not be appropriate.[35] This guidance could be given in the form of a practice direction or a Benchbook.

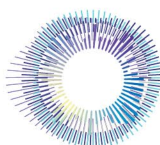
15.56 Either party may make a submission to the court that a diversion option should be ordered. A magistrate may also inquire if a diversionary option could be appropriate at any stage of the proceedings. Although parties may make submissions, it is ultimately up to the discretion of the magistrate to determine if a matter or defendant is an appropriate fit for diversion.

15.57 Due to the quantity of matters that are heard before the Magistrates Court, I have not recommended that the court be required to inquire if diversion is appropriate as a mandatory part of the case management process. However, the court may inquire as appropriate, and the parties should consider diversion as a part of case conferencing.[36]

[34] Although a magistrate does not have access to a defendant's not-for-production criminal history before an individual is sentenced, they are able to obtain information from the police prosecutor. As this information is relevant and pertinent, it is appropriate that magistrates have access to this information when making a determination as to whether a defendant should receive an order for diversion. See further information below under 'Human Rights'.

[35] See further Chapter 20.

[36] See further Chapter 14.



If the court orders diversion, it can also make other relevant and necessary orders; for example, about whether a brief of evidence should be prepared at this stage.

15.58 I note that this approach may impact defendants who are not aware that court-ordered diversion is an option, particularly self-represented defendants. In order to mitigate this risk, materials should be developed and distributed with easy-to-understand information.

15.59 Matters relating to the provision and accessibility of information for defendants, and the development of guidance for magistrates, are implementation matters. I have addressed these further in Chapter 20.

Acceptance of responsibility

15.60 I recommend that the new legislation require the defendant to 'accept responsibility' for the alleged offence, for a magistrate to order a court-based diversion. It is not appropriate to divert a person away from the criminal justice system, sometimes with conditions or requirements to be fulfilled, if that person maintains innocence or otherwise does not accept responsibility for their behaviour. For a condition that is attached to a victim's involvement, it is particularly important that a defendant accepts responsibility.

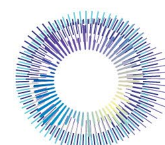
15.61 A requirement to accept responsibility is similar to the current requirements for ARJC in Queensland, and to the requirements for access to a court-ordered diversion program in Victoria.[37] It is not a defined term, but generally means that the defendant accepts that they are responsible for the offence and is not making any argument to defend or excuse their behaviour. An acceptance of responsibility is necessary for the defendant to show they are willing to acknowledge their conduct and participate in diversionary or rehabilitative programs.

15.62 The acceptance of responsibility for an offence can be done at any time (though will be available to the defendant from an early stage), allowing a defendant time to obtain legal advice and consider their options before choosing to take this course.

15.63 For admission to the Summary Offences Diversion Program, the defendant must accept responsibility for the offence, usually before any plea is entered. However, for the ARJC program, an acceptance of responsibility can co-exist with a plea of guilt, meaning mediation can be accessed after a plea of guilty. I have discussed this further below.

15.64 The law also needs to make clear that any acceptance of responsibility by the defendant is not a plea of guilty to the alleged offence and is not admissible as evidence in any later proceedings about the offence. To take any other approach would be unfair to the defendant.

[37] *Criminal Procedure Act 2009* (Vic) s 59(2).



15.65 There are some risks associated with this approach. The Women's Safety and Justice Taskforce highlighted that:

> Existing cautioning options for adults in Queensland require the admission of guilt, and are not available when people are not prepared to admit guilt to police before they have obtained legal advice. This may disadvantage First Nations women and girls, given their reluctance to admit guilt to police and concerns about over-policing. Relevantly, a lack of appropriate diversion options has been identified as a driver of increased imprisonment of First Nations women.[38]

15.66 The Women's Safety and Justice Taskforce also noted, in relation to cautioning, that '[a]dmission requirements may make it more likely that offenders will admit guilt to receive a caution rather than receive a fair hearing'.[39] However, I consider this risk is mitigated by the fact that an acceptance of responsibility is not legally equivalent to a plea of guilty. It is also the responsibility of the magistrate to ensure that a defendant is informed and understands what an admittance of responsibility entails.

Mediation – Adult Restorative Justice Conferencing

The current position

15.67 Under the Justices Act, magistrates or the clerk of the court currently have the power to order mediation in specific circumstances.

15.68 After a summons has been issued, a magistrate or clerk of the court may order the complainant to submit the matter to mediation if they consider that the matter would be better resolved by mediation than by proceeding on the summons or if the complainant consents to the order.[40]

15.69 The Justices Act also provides for the hearing of a simple offence or breach of duty (that is, the hearing of a matter that can be finalised in the Magistrates Courts) to be adjourned to allow for the charge to be the subject of a mediation session under the *Dispute Resolution Centres Act 1990.*[41]

15.70 If the mediation process resolves the matter, the criminal charge can by withdrawn by the police prosecutor or proceed to sentence. However, the current legislation does not provide any framework for how a matter is to proceed once a mediation has been conducted, or what procedures should be implemented in the event a mediation is successful or unsuccessful.

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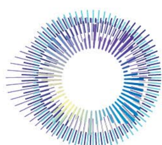
[38] Women's Safety and Justice Taskforce (n 21) vol 2, 464.

[39] Ibid.

[40] *Justices Act 1886* (Qld) s 53A(1)-(2).

[41] *Justices Act 1886* (Qld) s 88(1B).



15.71 In Queensland, this mediation process is referred to as adult restorative justice conferencing (ARJC). This is a facilitated meeting between the person who has caused harm (accused of an offence) and the people most affected by it. This option gives the victim an opportunity to tell their story and hold the accused person accountable for their actions. It also gives the accused person the opportunity to take responsibility for their actions and take steps to repair that harm.

15.72 The Dispute Resolution Branch provides the ARJC program in Queensland, and explained in their submission that:

> Referrals to ARJC are primarily made by the Queensland Police Service (QPS) prosecutions after a charge has been laid, with a purpose of diverting appropriate defendants from the criminal justice system… Less than 2% of referrals to ARJC are received as referral from the Magistrates Court. All referrals are carefully assessed against ARJC suitability criteria through a robust intake process providing a key safeguard for victim participation. Approximately 50% of referrals progress to conference.

15.73 Presently, ARJC is only provided by the Dispute Resolution Branch in four locations: Brisbane, Gold Coast, Townsville and Cairns. I have heard throughout consultation that there are limits on accessing this service due to geographical limitations, inconsistency in referral pathways, lack of understanding of eligibility by legal practitioners and police prosecutors, and staffing and resourcing issues which lead to long waitlists for matters to be mediated.

15.74 It is positive to note the Dispute Resolution Branch advised that of those matters that do proceed by way of ARJC, there is a 98% agreement rate and a 98% compliance rate.

15.75 Where a party refuses to mediate or a matter is unsuitable for mediation, or where a mediation is attempted but does not resolve the matter, the proceeding will continue according to the usual criminal procedures.

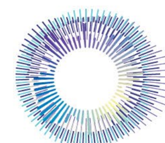
Other jurisdictions

15.76 New South Wales has a provision similar to the Justices Act which allows a summary proceeding to be adjourned before or at any stage of a proceeding to allow for mediation.[42] Similar to Queensland, the New South Wales legislation does not provide any other structure or framework for the procedures relating to court-ordered mediation.

Consultation

15.77 In practice, it appears that the orders to mediate under sections 53A or 88B(1B) of the Justices Act are not presently well-used by magistrates or clerks of the court. A number of submissions attributed the poor rates of use to factors such as demand outstripping

[42] *Criminal Procedure Act 1986* (NSW) s 203.



availability, resulting in a significant backlog of referrals to mediation, inconsistent approaches to referrals, and lack of clear procedures.

15.78 Some stakeholders noted concerns around the exclusion of certain offences, such as domestic and family violence and sexual assault, from mediation without allowing proper consideration of the circumstances of the alleged offence and of the defendant and complainant. For example, one respondent raised a case where a defendant and complainant were related to each other, lived together and would continue to have contact with each other. The complainant agreed that the offence was significant and required a response from the criminal justice system, however was distressed at the prosecution of the defendant without the complainant's consent. The complainant voiced a desire for an alternative option such as mediation, which was not available in their case.

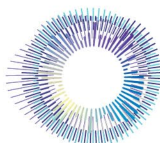
15.79 These stakeholders acknowledged that care must be taken to ensure matters are suitable for mediation where there is an ongoing relationship between a defendant and complainant, to ensure there is no coercion and that the victim's willingness to engage in mediation is genuine. However, it is also true that mediation can be appropriate and may facilitate better outcomes for both parties where there is an ongoing relationship.

15.80 A number of stakeholders provided feedback that the court should be permitted to order mediation be provided by any accredited mediation service provider. I understand that this feedback was made in the context of the current limitations on the mediation services provided by the DJAG Dispute Resolution Branch.

15.81 In responding to the questions about diversion in the Consultation Paper, the Dispute Resolution Branch stated:

> Existing criminal procedure laws about referrals to mediation are not working to their full potential. ARJC receives a minimal number of referrals from Magistrates. In 2020-2021 ARJC received 2% of overall referrals directly from Magistrates. It appears to ARJC that referral to mediation is only considered when the justice system is not meeting the needs of clients and/or there is a complex array of client intersectionality. This could be alleviated by earlier referrals to ARJC in the justice process.
>
> Magistrates may also have a more traditional view of mediation as a path for civil disputes or be unaware of the ARJC program. Clear referral pathways for criminal matters to restorative justice would support increased and timely referrals to ARJC.
>
> While resourcing of diversionary programs is outside the scope of the Criminal Procedures Review, ARJC notes that limited resources for its programs results in longer timeframes for the intake and scheduling of conferences and may also act as a deterrent to referrals.

15.82 I also heard throughout the consultation phase of this Review that there are some Community Justice Groups that provide a mediation service which is effective and culturally appropriate to Aboriginal and Torres Strait Islander peoples. However, I



understand that these types of mediations are ones referred by the police (pre-charge and before the matter goes to court) and are heavily dependent on the capacity of Community Justice Group members, Respected Persons and Elders to provide this service in their communities. In my view, this type of culturally appropriate mediation model could be adapted for court-ordered diversion, after a person has been charged.

New model

15.83 Mediation is already an important part of the criminal justice system, and an important diversionary option. Currently, parties to a criminal proceeding in the Magistrates Courts can choose to mediate a matter between themselves, with no need for a referral or other involvement from the court (except to adjourn the matter). Nothing in the new criminal procedure framework should prevent this informal process from continuing.

15.84 I have heard feedback from stakeholders that the current provisions about mediation are not widely used by magistrates. However, according to the Dispute Resolution Branch:

> [C]lient feedback shows that there is a 94% overall satisfaction with the service from victims of crime, offenders and their supports. There is potential for increased referrals from the Magistrates Court to realise the benefit of diverting suitable matters to ARJC.

15.85 Accordingly, I have concluded that the new framework should also include a clear option for court-ordered referral to ARJC. Including this option in the legislation will promote the more efficient and effective use of ARJC to resolve proceedings. The ability to make an order facilitating ARJC will also allow the court greater flexibility to refer matters to ARJC, and to adjourn them as required, in appropriate circumstances.

Referral to Adult Restorative Justice Conferencing

15.86 The new framework for criminal procedures in the Magistrates Courts should provide that a magistrate may make an order referring a matter to ARJC. There will be several requirements to be met before such an order is made. First, as explained previously, the defendant must indicate to the court that they accept responsibility for the offence.

15.87 Second, the defendant and the complainant with whom they will conference must both indicate that they consent to participating in ARJC. To be successful, ARJC requires consent and willingness to engage and participate from both the defendant and the complainant, meaning if either party refuses there is no real utility in making a referral. I also consider that it is important for the prosecuting agency (such as the QPS or DPP) to be able to indicate whether they support the referral to ARJC, but this should not be the deciding factor in whether a magistrate makes an order referring the matter to ARJC. The ability for a referral ARJC to be ordered even if the prosecution does not consent also

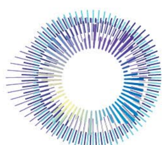
avoids any ability for the prosecution to 'veto' the use of ARJC by refusing to refer a matter themselves.

15.88 Third, as discussed above, court-ordered diversion options are generally applicable to matters that can be finalised summarily. Consistently with this, it is suitable for those offences to be referred to ARJC in appropriate circumstances, subject to the magistrate's discretion. However, in the case of ARJC, it is also appropriate for the scope of referral to be widened to all offences (again, subject to discretion). This is because, in current practice, matters that must be dealt with on indictment can already be referred to the existing ARJC program and it is not intended to interfere with that approach. Further, a referral to ARJC does not guarantee a particular outcome, meaning that an agreement reached at ARJC about an offence that will later be committed to a higher court is not excluded.

15.89 A court-ordered referral to ARJC should also be available after a plea of guilty has been entered. There are times when this would be appropriate. For example, it may be suitable where the defendant has indicated remorse and would like an opportunity to repair the harm or damage they have caused, and the complainant has consented to engage and participate in ARJC.

15.90 The new criminal procedure legislation should make clear that when a magistrate makes an order referring a matter to ARJC, the matter is formally referred to a prescribed agency able to provide accredited and free ARJC services. Currently, the Queensland Government's Dispute Resolution Branch provide such a service and I recommend it be named as a prescribed agency for these purposes. The court-ordered referral to ARJC will then also be subject to Dispute Resolution Branch's robust intake process. The matter can be adjourned in court as required to allow the intake and conferencing process to take place.

15.91 I hold significant concerns about the human rights and access to justice implications caused by the current ARJC program only being available to defendants in certain geographical locations with limited resourcing, which I have detailed further below. However, on balance, I consider it is appropriate for any referral to be to the ARJC program provided by the Dispute Resolution Branch, in the interests of establishing a new framework in the new criminal procedure legislation with no service provision delay. I note that there are other concerns about any proposal to allow the court to refer a matter to a private mediator at a defendant's expense, which will have to be addressed.



15.92 I note that the recent report by the Women and Safety Justice Taskforce considered this matter in detail and made a recommendation for the expansion of the ARJC program.[43] I agree with this recommendation and also endorse its implementation as a priority.

15.93 In the future, consideration should be given to methods to increase service delivery of ARJC across the state, including consideration of options such as increased funding to the Dispute Resolution Branch, or expanding the list of accredited providers to increase access (noting the accreditation scheme and resourcing required for such a model will need to be considered in detail). I have discussed this matter further below.

15.94 Importantly, where a defendant or complainant is an Aboriginal person or Torres Strait Islander person, consideration should be given to whether a Community Justice Group member, Respected Person or Elder is also invited to participate in the ARJC. This is a matter for the Dispute Resolution Branch to decide in the context of a referral for ARJC. As stated above, this is already happening in some Aboriginal communities and Torres Strait Islander communities in Queensland when matters are referred to community pathways by police before a person is charged. It is also an available option in youth justice conferences.[44] I understand that this will have some resourcing implications.

15.95 I also note that there are some conferencing models in other jurisdictions that involve the use of community members, Respected Persons and Elders.

Procedure following Adult Restorative Justice Conference

15.96 Currently, the Justices Act does not make clear what happens after a matter has been mediated. This should be rectified in the new framework. Specifically, the new framework should provide that, where a matter has been conferenced and an outcome or agreement between the parties has been reached:

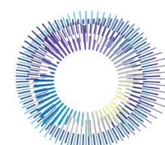
- The prosecution may, at their own discretion, choose to withdraw the charge and end the proceeding.
- If the charge is not withdrawn, then it will proceed in the usual way.
- If the charge proceeds to sentence, the fact that the defendant has participated in ARJC and reached an agreed outcome is a matter that must be taken into account on the sentence.

15.97 If an agreement is reached and the prosecution withdraw the charge, the court will formally discharge the defendant and that will be the end of the matter.[45] This is different

[43] Women's Safety and Justice Taskforce (n 21) vol 2, 385–401, Recommendation 90.

[44] *Youth Justice Act 1992* (Qld) s 34. Note that the obligation to include other parties such as Respected Persons or Elders is placed on the convenor of the conference under this section.

[45] For the meaning of the term 'discharge', see Chapter 19.



to the way participation in the Summary Offences Diversion Program can be dealt with by the court because it does not follow a decision by the court on the merits of the charge.

15.98 If an agreement is not reached, then the matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered.

15.99 An unsuccessful ARJC should not penalise a defendant. Therefore, the new legislation should make clear that any unsuccessful attempt to conference a matter cannot be used against a defendant throughout the remainder of a proceeding, particularly at sentencing.

Summary Offences Diversion Program

The current position

15.100 In the Consultation Paper, I posed questions about a deferred prosecution agreement scheme as a broad framework that allows for the imposition of specific measures for dealing with defendants as an alternative to prosecution. I note that two recent reports in Queensland have made recommendations to establish deferred prosecution schemes.

15.101 The 2019 report by the former QPC, *Inquiry into Recidivism and Imprisonment*, recommended that the Queensland Government should 'expand diversionary options by establishing … a three-tiered deferred prosecution arrangement'. The three tiers were:

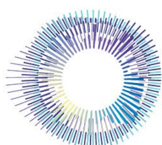
1. A simple deferred prosecution agreement which can be offered by police, in which the offender undertakes not to offend again within a specified period.
2. A deferred prosecution agreement with additional conditions or actions that relate to assessment, treatment or restoration.
3. A community deferred prosecution agreement with additional conditions or actions that relate to assessment, treatment or restoration, where the conditions are set in consultation with and monitored by a community justice group.[46]

15.102 The Queensland Government's response to this inquiry committed to 'exploring implementation of deferred prosecution agreements', however, at the time of writing it has not established a deferred prosecution agreement as recommended in the report.[47]

15.103 The QPC's findings and recommendations were built upon by Report 2 of the Women's Safety and Justice Taskforce, which recommended that the Queensland Government 'continue to explore … deferred prosecution agreement schemes as viable options for

[46] Queensland Productivity Commission (n 20) 167.

[47] *Queensland Government response to the Queensland Productivity Commission's Inquiry into Imprisonment and Recidivism* (January 2020) 11.



diverting low-level offenders from the criminal justice system'; this recommendation was also supported in full by the Queensland Government.[48]

Other jurisdictions

15.104 Deferred prosecution agreements are used in the United Kingdom in relation to organisations that have committed economic crimes, such as conspiracy to defraud, money laundering, fraud, and bribery. Under these agreements, the prosecutor agrees to suspend prosecution for a defined period provided the organisation meets certain specified conditions.[49] Deferred prosecution agreements are also used in Canada in the same way, although they are referred to as 'remediation agreements'.[50]

15.105 It is important to note that in this context, deferred prosecution agreements are used in relation to corporate offending. This model was developed in response to the challenges associated with detecting, investigating and prosecuting corporate crime given its opaque nature and complexity. These challenges are not comparable to the process of charging and prosecuting an individual offender for a summary offence.

15.106 Since 2016, there has also been significant work at the Australian Federal level to consider the establishment of a similar deferred prosecution scheme. As in the UK and Canada, this scheme was proposed to operate in the context of corporate offending, rather than individual offending.[51] However, it appears at time of writing that work to start a national deferred prosecution scheme has stalled.

15.107 Outside of this specific context, a deferred prosecution scheme is generally intended to allow a court to adjourn proceedings on a conditional basis. This arrangement is similar to options referred to more broadly in other jurisdictions as a diversion program.

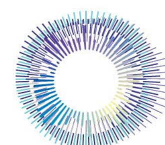
15.108 Deferred prosecution agreements also have potential to be successful for First Nations peoples. The concept is based on an agreement (rather than a court order), which is consistent with the approach to justice in Aboriginal communities. For example, in the Northern Territory, some Aboriginal communities navigate criminal matters, including punishment, with a focus on negotiation and agreement, particularly for young people. A

[48] Women's Safety and Justice Taskforce (n 21) vol 2, 466, Recommendation 100; *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report two; Women and girls' experiences across the criminal justice system* (2022).

[49] *Crime and Courts Act 2013* (UK) s 45, sch 17.

[50] *Criminal Code 1985* (Canada) pt XXII.1.

[51] Commonwealth Attorney-General's Department, *Deferred Prosecution Agreement Scheme Code of Practice* (Consultation Paper, 9 June 2018). Note the scheme was introduced in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth), which has lapsed.



deferred prosecution agreement scheme could work together with this approach and would also offer the benefit of monitoring by a court.[52]

The Victorian Criminal Justice Diversion Program

15.109 Within Australia, an illustrative example is Victoria's Criminal Justice Diversion Program (CJDP), which operates through its Magistrates Court.[53] The CJDP was first trialed as a pilot program in 1997, before being expanded across the state in 2000–02 and gaining ongoing funding in 2003.

15.110 Under Victoria's legislation, diversion is legally available for anyone who has been charged with a summary offence, but in practice the CJDP is aimed at first-time offenders who have committed low-level offences.[54] The program is designed to provide defendants with the opportunity to avoid a criminal record by undertaking specific conditions that are relevant to their offences. A large range of conditions are available to Magistrates through the CJDP, providing the flexibility to impose conditions appropriate to the situation.

15.111 The CJDP was first evaluated substantially in 2004, which found that the program had been successful in achieving its aims. The evaluation found that 94% of diversions through the CJDP had been successfully completed (including the avoidance of a criminal conviction), and re-offending rates appeared to be low.[55]

15.112 However, the Victorian model has received sustained criticism because prosecutors must consent before a defendant is permitted to enter the program.[56]

15.113 Prosecutors, including Victoria Police, hold absolute discretion in relation to whether to recommend that a defendant can enter the CJDP.[57] In the absence of legislative guidance as to how this power can be exercised, reviews of the program have demonstrated that this has led to inequitable applications and outcomes.[58]

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[52] Felicity Gerry and Danial Kelly, 'Around the Nation: Northern Territory — Is it Time for Deferred Prosecution Agreements in the Northern Territory' (2016) 90(6) *Australian Law Journal* 387, citing Nancy Williams, 'Two Laws: Managing Disputes in a Contemporary Aboriginal Community' (Australian Institute of Aboriginal Studies, 1987) 85 and George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1 *Northern Territory Law Journal* 283, 285.

[53] *Criminal Procedure Act 2009* (Vic) s 59; Magistrates' Court of Victoria, *Diversion* (Web Page, 16 March 2020) <https://www.mcv.vic.gov.au/find-support/diversion>.

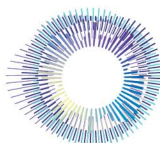
[54] Magistrates' Court of Victoria, *Diversion* (Web Page, 16 March 2020) <https://www.mcv.vic.gov.au/find-support/diversion>.

[55] Turning Point Alcohol and Drug Centre and Health Outcomes International, *Court Diversion Program Evaluation — Overview Report* (Final Report, November 2004) vol 1, 6.

[56] Liberty Victoria's Rights Advocacy Project, *Justice Diverted? Prosecutorial Discretion and the Use of Diversion Schemes in Victoria*, (Report, May 2018).

[57] *Criminal Procedure Act 2009* (Vic) s 59(2)(c).

[58] Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 24 March 2022), 220–7.



15.114 There is no right of appeal for a defendant who has not been granted prosecutorial support to enter the CJDP, and there is no power for a court to review a refusal and override the decision where they consider that a defendant would benefit from engagement in the program. Accordingly, the program lacks safeguards to ensure access is achievable for all people.

15.115 To enter the CJDP, a defendant must acknowledge responsibility for the summary offence. This is not admissible as evidence in a proceeding for the offence, and it does not constitute a plea.[59]

15.116 The defendant will be interviewed and required to complete a questionnaire to assist in deciding if the diversion is appropriate and identifying services that may address the offending behaviour. The complainant will also be consulted about whether they believe diversion is appropriate in the circumstances, and may give their views in writing or in court.[60]

15.117 A magistrate will then decide, in court, if it is appropriate for the defendant to participate in the CJDP. The court may inform itself in any way it considers appropriate (including by using the earlier questionnaire and interview). If the diversion is approved, the defendant establishes a personalised set of conditions in consultation with the magistrate, referred to as a plan.

15.118 If the offence involves a victim, the victim is consulted on the conditions, including their level of involvement in the conditions themselves. A victim can also elect to be notified of the outcome of any diversion plan if they wish.[61]

15.119 The types of conditions in a plan may vary greatly to allow for flexibility. These can include conditions like an apology to the complainant, payment of compensation, attending counselling or treatment, engaging in a voluntary work placement scheme, making a donation to charity or attending a relevant course or seminar.[62]

15.120 Under the Victorian model, prosecution is suspended when a defendant enters the CJDP for up to 12 months, while the defendant completes their conditions.

15.121 All parties return to court at a later date to determine the defendant's compliance with the conditions. The defendant must file evidence before that date to demonstrate their

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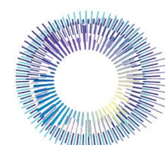
[59] *Criminal Procedure Act 2009* (Vic) s 59(2)(a), (3). In Victoria, an issue arose with the diversion program because some legal practitioners indicated their client would accept responsibility only if a diversion was permitted and otherwise would plead 'not guilty'. To address this, a practice direction states that '[d]iversion will only be considered where the offender unequivocally accepts responsibility for the matters charged and detailed in the police summary': Magistrates' Court Victoria, *Criminal Justice Diversion* (Practice Direction No 1 of 2003) 1.

[60] Magistrates' Court of Victoria, *Diversion* (Web Page, 16 March 2020) <https://www.mcv.vic.gov.au/find-support/diversion>.

[61] Ibid.

[62] Sentencing Advisory Council (Victoria), *The Criminal Justice Diversion Program in Victoria* (Statistical Profile, October 2008) 7.



compliance with the plan. If a defendant has successfully completed the conditions to the satisfaction of the magistrate, no plea to the charge will be taken and the defendant must be discharged with no finding of guilt. The matter is recorded on their criminal history in a way that is not available to the public. The defendant's participation and discharge is a defence to a later charge for the same offence, or a similar offence arising from the same circumstances.[63]

15.122 If the defendant does not complete the diversion program to the satisfaction of the court, the matter will continue in the Victorian Magistrates Court. It will be referred back to court 'as if the matter was being listed for the first time' and 'all information regarding diversion is removed from the file'.[64] If the defendant is later found guilty of the offence, the extent to which they complied with the diversion program must be taken into account on sentence.[65]

15.123 The Victorian CJDP contains some exclusions. First, it generally does not apply to offences punishable by a minimum or fixed sentence or penalty (including those affecting a driver's licence, but not including the incurring of demerit points).[66] Second, although acceptance of responsibility is not a plea, participation in the program is treated as a finding of guilt for matters such as confiscation, weapons control and other orders in addition to sentencing (for example, orders for compensation, emergency services costs recovery, and the suspension or cancellation of a licence).[67] The incurring of demerit points is also not affected by the CJDP.[68]

Consultation

15.124 Respondents to the Consultation Paper who provided comment on a deferred prosecution scheme were substantially in favour of its establishment.

15.125 Stakeholders expressed views that a deferred prosecution scheme would provide an avenue to address issues of overrepresentation, including for marginalised communities. A number of respondents noted that the use of a deferred prosecution scheme had been successful in Victoria and in other jurisdictions.

15.126 Some respondents who were in favour of a deferred prosecution scheme noted operational and legislative matters would need to be considered, including: eligibility,

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63 *Criminal Procedure Act 2009* (Vic) s 59(4).

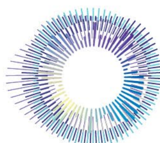
64 Magistrates' Court of Victoria, *Criminal Justice Diversion Program* (Brochure, 16 March 2020) (available under 'Publications' at <https://www.mcv.vic.gov.au/find-support/diversion>).

65 *Criminal Procedure Act 2009* (Vic) s 59(5).

66 *Criminal Procedure Act 2009* (Vic) s 59(1)(a). Some other road safety offences involving alcohol or drugs are also excluded: s 59(1)(b).

67 *Criminal Procedure Act 2009* (Vic) s 59(4)(c). As to other orders in addition to sentence, see *Sentencing Act 1991* (Vic) pt 4.

68 *Criminal Procedure Act 2009* (Vic) s 59(7).



exclusions of particular categories of offences, and how best to ensure compliance with conditions by defendants.

15.127 Some respondents held concerns regarding a victim's consent, suggesting that a lack of victim consent should be considered by a magistrate, but should not be a determinative factor in a defendant's eligibility.

New model

15.128 I recommend the new criminal procedure framework for the Magistrates Courts should include provisions for magistrates to make a court order to the effect that an adult defendant who is on bail be diverted away from the traditional criminal justice pathway and instead participate in a diversion program. To avoid any confusion between this kind of scheme and a regulatory scheme for the deferred prosecution of corporate offending, this proposed diversion program should be called the 'Summary Offences Diversion Program'.

15.129 The operation of the Summary Offences Diversion Program will give the Magistrates Courts another tool that can be used to offer help and support to offenders, without convicting them of an offence. In this regard, it may be seen as filling a 'gap' between those defendants who are suitable for diversion or cautioning by the police, and those defendants whom the court considers can benefit from participation in the Court Link program but should still go on to be sentenced.

15.130 The scheme proposed here is, in most respects, modelled on Victoria's CJDP. However, I recommend some changes are made from the Victorian model, primarily to account for the issues raised by the prosecution consent mechanism in that jurisdiction.

Application of the scheme

15.131 As discussed earlier in the chapter, a defendant must accept responsibility for an offence to be eligible for participation in the Summary Offences Diversion Program.

15.132 As also discussed earlier, the program should apply to offences that can be finalised summarily, and that are considered appropriate for diversion by a magistrate in all the circumstances. However, there should also be some other particular exclusions applicable to this program.

15.133 The Victorian CJDP does not apply to offences punishable by a mandatory minimum or fixed sentence or penalty, including penalties affecting a licence (such as cancellation, suspension or disqualification). However, the Victorian CJDP does not automatically exclude offences that mandatorily incur demerit points.[69]

[69] *Criminal Procedure Act 2009* (Vic) s 59(1)(a).

15.134 I propose to take a similar approach with the Summary Offences Diversion Program. This is primarily to account for offences where Parliament has decided a particular sentence must be imposed for an offence. The operation of this scheme should not affect that decision.

15.135 Any offences that mandatorily incur demerit points should be eligible for the Summary Offences Diversion Program if that is the only mandatory penalty or sentence attached to that offence. This is because demerit points are not intended to be a mandatory *criminal* sentence and it is important not to exclude minor offences that could be appropriate for diversion. If the defendant successfully completes the Summary Offences Diversion Program, the matter will end without a conviction. However, as in Victoria, demerit points will still be incurred by the defendant even if a diversion is successfully completed because that process relates to matters of administration, licensing and public safety and should not be interfered with.

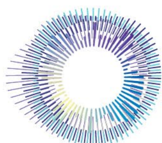
15.136 Further, an offence should not be eligible for the Summary Offences Diversion Program if the defendant was issued an infringement notice and elected for the matter to be heard in court. By making that election, the defendant has indicated that the matter is contested. In those circumstances, it would be inappropriate to subsequently allow the defendant to participate in a program which requires that they accept responsibility for the offence.

Prosecutorial consent

15.137 Unlike the Victorian CJDP, in Queensland there should be no requirement for the prosecution to consent to an order that the defendant participate in the Summary Offences Diversion Program. Although it is important to take into account prosecutorial support for a defendant’s admission into the program, a lack of support should not be the determining factor for a defendant’s eligibility. It is inappropriate for a prosecutor to have a ‘veto’ over a court order.

15.138 It is also important to consider the lessons from the Victorian model, including the findings from evaluations that allowing this ‘veto’ power can lead to inequitable outcomes in relation to who can access and benefit from entry into diversion, leading to the underrepresentation of marginalised communities, particularly those who would most benefit from such orders.[70] A recent review by the Victorian Legislative Council made a finding that the prosecutorial consent for its CJDP resulted in an unacceptable variance of eligibility for diversion across offences and courts. The review recommended that Victoria review its prosecutorial consent mechanism for diversion and consider replacing it with the magistrate’s discretion as the final determinant, taking into account the

[70] Liberty Victoria’s Rights Advocacy Project (n 56).



prosecution's recommendation about diversion and any reply to that recommendation by the accused person.[71]

15.139 However, it is appropriate for a prosecutor to make submissions regarding whether they believe participation in the program is suitable for an offender, as well as a victim. This could include, for example, information about the victim's views on how the matter should be dealt with and how the prosecution has managed the case to date, including any other steps taken before prosecution. Equally, it is appropriate for a defendant to make submissions about their participation in the scheme, and to permit submissions by a Community Justice Group, Respected Person or Elder where the defendant is a First Nations person. The magistrate will take these into account, along with any other factors, when determining if it is appropriate to order a defendant participate in the scheme.

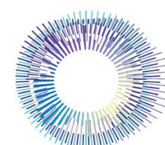
Conditions of an agreement

15.140 I recommend, similar to the Victorian model, that if a magistrate makes an order for a defendant to enter the Summary Offences Diversion Program, then the defendant will enter into an agreement (or plan), with conditions to be approved by the magistrate. The defendant must consent to the plan and all its conditions.

15.141 The possible contents of an agreed plan should be broad and flexible. Generally, it should be able to include any conditions that the magistrate thinks are reasonable and proportionate to the harm caused. Some examples of conditions may include (but should not be restricted to):

- An apology to a victim.
- Compensation paid to the victim.
- A donation to a relevant charity, not-for-profit organisation or community organization.
- Successful participation in mediation, if suitable and available.
- Participation in a relevant substance abuse treatment program.
- An agreement to refrain from taking drugs during the period of the agreement.
- Completion of an anger management course.
- Completion of an education program or seminar.
- Completion of a set number of hours at a relevant not-for-profit or community organization.

[71] Legislative Council Legal and Social Issues Committee (n 58) 218–27, Recommendation 24.



- If in relation to a traffic offence, an agreement to undertake a Queensland Government-endorsed road safety education program (such as *Plan.Drive.Survive*).
- If the defendant is a First Nations person, an agreement to engage with the Community Justice Group, Respected Person or Elder.

15.142 The above set of conditions are illustrative examples of conditions that could be in place, at minimal to no cost to the defendant. I recommend that magistrates be permitted to make any relevant condition as they see fit, however magistrates must have regard to the appropriateness of a condition and its accessibility.

15.143 I also recommend that the new legislation contain a specific clause requiring that a magistrate must be satisfied a defendant has the capacity and capability to reasonably meet the conditions.

Fairness of conditions

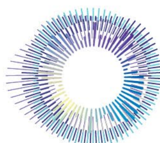
15.144 For the diversion to be useful and effective, it is critically important that the conditions are fair, appropriate to the circumstances of the offender and the offence, and reasonably able to be met by the defendant within the time frame of the order.

15.145 Consistent with the former QPC's *Inquiry into Imprisonment and Recidivism*, I note that there is a legitimate concern about 'net-widening' in relation to diversionary options. This refers to 'when the lower-level sanctions of a diversion scheme are applied to individuals who would otherwise have escaped any sanction, pulling them into contact with the criminal justice system and causing "contact harms"'.[72] In relation to the proposed Summary Offences Diversion program, this risk is mitigated by the fact that the defendant must accept responsibility before they can enter the program, and must consent to the conditions in any agreed plan. Further, any failure to meet the conditions in a plan cannot be used as an aggravating factor if a defendant is later sentenced for the offence.

15.146 With respect to the proposed Summary Offences Diversion Program, there is also a risk of the imposition of conditions that are too difficult to be reasonably achievable for a defendant. This can lead to a situation where a defendant is subject to an onerous plan that they are unable to meet, resulting in the failure of the agreement and the continuation of criminal proceedings against them, significantly prolonging their engagement with the criminal justice system.

15.147 It is critical that magistrates take steps to ensure that conditions are reasonable and proportionate to the level of offending. I recommend that this is included in the new legislation.

[72] Queensland Productivity Commission (n 20) 158.



15.148 For instance, it would be inappropriate for a defendant charged with a minor shoplifting offence to be subject to a plan that requires them to undertake ten different time-intensive conditions that they are unable to meet, which ultimately results in their being prosecuted as usual. In that case, none of the benefits of diversion would have been realised. and there would be a significant risk of further harm from prolonged contact with the criminal justice system that diversion options are explicitly intended to protect against.

15.149 In that example, it might be appropriate for the defendant to undertake a plan with a few suitable conditions such as making a written apology to the victim and compensating the victim for the stolen items.

15.150 In Victoria, the average plan under the CJDP has approximately two to three conditions attached. Most of these conditions are easy for a defendant to meet, but are still effective as a diversion option. In Victoria, the most common conditions imposed on a CJDP plan were a donation (71.7%), an apology to a victim (33.1%), and a letter of gratitude to an informant[73] (24%).[74]

15.151 As there is a need for flexibility with conditions, I recommend that magistrates have discretion in relation to the number of conditions set in an agreed plan.

Monitoring of conditions and concluding proceedings

15.152 Under the Summary Offences Diversion Program, once a plan has been established and agreed to by the magistrate and defendant, an order must be made to adjourn the matter for the shortest possible reasonable time to allow for compliance with the conditions. The maximum length of time for which a matter can be adjourned at this stage is six months.

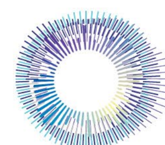
15.153 My proposal differs from the Victorian CJDP, which allows for the adjournment of a proceeding for up to 12 months while a defendant undertakes the agreed conditions. This is because there is evidence in Victoria that most defendants take an average of two to three months to successfully complete the conditions in their plan.[75] In addition, a shorter period of time is consistent with the overall intent to finalise matters in the Magistrates Courts in a quick and efficient manner. Further, I note that automatically adjourning a matter for 12 months would adversely affect courts' key performance indicators.

15.154 It is likely that some plans will take longer than six months for a defendant to complete, particularly if there are circumstances beyond a defendant's control that interfere with their ability to complete all the conditions (for example, availability of a program).

[73] In the *Criminal Procedure Act 2009* (Vic), Victoria uses the term 'informant' to refer to a person who commences a criminal proceeding in the Victorian Magistrates' Court. This differs notably to the way in which Queensland uses the term.

[74] Sentencing Advisory Council (Victoria) (n 62) 7.

[75] Ibid 6.



Accordingly, a magistrate should be able to extend the adjournment for a period of up to 12 months in total, where appropriate.

15.155 The magistrate can, at their discretion, list a matter for mention earlier than the expiration of the order as a way of 'checking' on the defendant's progress. More generally, at any point during an adjournment, the matter can be brought back before the court. For example, the prosecution may take this course if it is apparent the defendant is not complying with the plan. The defendant may also do so if they need to vary the plan, if they have completed the plan earlier than expected, or if they no longer want to complete the plan.

15.156 After carrying out the conditions in the plan, the defendant must submit evidence of their compliance to the court as appropriate (for example, certificates of completion for participation in programs or a copy of an apology letter sent to a victim). A regular ongoing monitoring process is not proposed at this stage as this is likely to be too resource-intensive without specific funding attached.

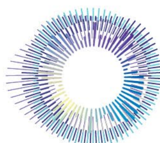
15.157 If a magistrate reviews the evidence and determines that the defendant has successfully completed the agreed plan, no plea to the charge will be taken. The charge must be dismissed[76] without any finding of guilt. The defendant's participation and the dismissal will be a defence to a later charge for the same offence, or a similar offence arising from the same circumstances.

15.158 There may be some circumstances in which a defendant, through no fault of their own, is unable to meet all the conditions of their diversion order. For example, a defendant may not be able to access a substance abuse rehabilitation program that they agreed to due to service demand leading to wait times. It is also reasonable to expect that at times a defendant may be unable to meet all their conditions due to adverse life events beyond their control, such as becoming seriously ill.

15.159 Magistrates should have discretion to consider whether a defendant has made a meaningful effort to comply with the conditions of the agreement when determining if the defendant has successfully complied with the Summary Offences Diversion Program. That is, a magistrate should be able to determine, in appropriate circumstances, that a defendant has *substantively* completed the conditions of their agreement for the purposes of dismissing the charges.

15.160 If a defendant does not comply with the conditions of their agreement to the satisfaction of the Magistrates Court, the proceedings continue in the usual way as if no plea had been entered. If the defendant is subsequently found guilty of the charge, the court must

[76] For the meaning of the term 'dismiss', see Chapter 19.



take into account the extent to which the person complied with the scheme during sentencing. However, this cannot be used as an aggravating factor against the defendant. For example, if a defendant has made a sincere effort to achieve three out of four of the conditions of their diversion order, this should be considered a positive factor on sentence.

15.161 As in Victoria, the program should not prevent the operation of other laws related to matters such as confiscation, firearms and weapons control. For those kinds of purposes, but not otherwise, a person participating in the diversion program should be treated in the same way as if they had been convicted of the offence. This is necessary to ensure that the important public safety functions provided for in those laws are able to continue.

15.162 However, matters such as restitution and compensation should not be treated like orders made at the time of sentence. This is not in the spirit of a conditional agreement made with the defendant's consent, and it is more appropriate that those kinds of matters are included as conditions of an agreement rather than as separate orders, if the magistrate is satisfied that a defendant is able to comply.

The outcomes of a successful diversion

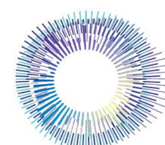
15.163 In relation to each type of diversion, an outcome will need to be reached and recorded for the matter. These have been addressed above but are summarised here for ease of reference.

15.164 Engagement in the proposed Summary Offences Diversion Program does not require a plea of guilty, and it is not a sentencing outcome. However, it must be made clear in law that once those matters are complete, the charge is dismissed and the defendant will have a defence to any later prosecution for that offence (or another similar offence). As part of this, the Magistrates Courts can give the defendant a certificate of dismissal.[77] This approach is consistent with the Victorian CJDP.

15.165 This is different to matters that have been referred to ARJC, where there is no set outcome following completion of a conference. If the parties reach an agreement, a charge may (but does not have to) be withdrawn by the prosecution, in which case the defendant is formally discharged by the court. If the charge is not withdrawn, the matter will proceed in the usual way to a hearing or sentence.

15.166 Generally, if a matter proceeds after a successful or attempted in-court diversion, a defendant's participation is a matter that must be taken into account on sentence.

[77] See further, as to certificates of dismissal, the discussion of the meaning of the term 'dismissal' in Chapter 19.



However, any unsuccessful attempt cannot be used against the defendant as an aggravating factor on sentence.

15.167 It is also important to have a record of the fact that a defendant was charged with those offences, and the fact that they were successfully diverted by the Magistrates Courts. However, this should not be included on a defendant's disclosable criminal history, which can be produced in court and when a criminal history check is conducted. Rather, like police cautions, any charges that are successfully diverted by referral to ARJC or participation in the Summary Offences Diversion Program should be formally recorded on an adult's not-for-production criminal history.[78]

15.168 It is important that a magistrate, when considering whether to use their discretion to make an order for in-court diversion, be informed of any previous diversions. This includes diversion ordered by the court or provided by other agencies, such as police. Although an adult's not-for-production history cannot be disclosed to the court, in the interests of procedural fairness and natural justice, I recommend that the new procedure legislation allow the court to be informed of a person's diversion history by way of submissions from the parties.

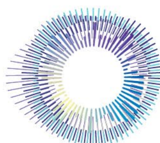
15.169 Because a defendant who successfully completes an in-court diversion is not convicted of the offence for which they were diverted, those defendants will not be required to pay the offender levy or other administrative fees. Further, because the proceeding ends via in-court diversion, neither party will be eligible to seek costs. Given that the intent of diversion is to move the person away from the criminal justice system, it is appropriate that these final fees or orders are not available for matters ending in this way. It is also appropriate to ensure that any disadvantage being experienced by the defendant, which diversion may have intended to improve, is not made worse by imposing monetary orders that a defendant may be unable to pay.

Resourcing

15.170 During consultation, stakeholders consistently reported the impact of limited resourcing on the availability of therapeutic services. Although it is outside of the scope of this Review to make recommendations about resourcing, and I have excluded some options on the basis that they would require specific dedicated funding, it would be remiss to make recommendations regarding the proposed diversion options without discussing resourcing.

15.171 I have limited my proposals within this chapter to court-ordered diversion options that can be implemented in the courts in a cost-neutral or relatively cost-efficient manner.

[78] This will not change any existing legal requirements for a person to disclose an offence with which they have previously been charged, or any court orders other than conviction made against them.



However, for these options to operate as intended, resourcing will need to be considered throughout the implementation process.

15.172 Public discussions on the financial costs of the criminal justice system predominantly focus on the costs of imprisonment. However, there are numerous other costs associated with all aspects of charging and prosecuting an individual through the criminal justice system, including the costs of operating Magistrates Courts.

15.173 There may be an upfront cost to implementing the recommendations I have proposed. However, it is highly likely that the use of the above options will provide a significant cost savings to the Queensland Government for a few reasons.

15.174 Firstly, the time-efficient resolution of matters through the Magistrates Courts, particularly for lower-level offences, will enable magistrates to focus their time on more serious and complex offences, thereby increasing the overall efficiency of the Magistrates Courts.

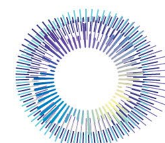
15.175 Secondly, although the Summary Offences Diversion Program and the court-ordered mediation may require additional court appearances beyond when the court order is first made, they are highly likely to result in the overall reduction of hearings for a particular matter if successful. This will also reduce the costs associated with having all parties present for a hearing.

15.176 Thirdly, as discussed above, diversion has an emphasis on limiting the exposure of an individual to the criminal justice system where possible and where it is in the public interest to do so. For instance, a 2014 Queensland study examined 40,523 offenders, classifying 93.4% of these as non-serious offenders. The study found that if first time, low-rate, less serious, adult-onset offenders were formally cautioned, it would have saved $32.5 million in police and court costs.[79] The cost savings of diversion has been the basis of significant academic and public attention through the increased popularity of concepts such as justice reinvestment, whereby the monies saved by reducing imprisonment are intended to be recaptured and directed to addressing the socioeconomic factors that are associated with offending.

15.177 Lastly, academic research indicates that the increased use of diversion options is likely to reduce recidivism overall, significantly contributing to public safety.[80] If this benefit is realised through the proper implementation of an established diversion framework, it is likely to contribute to the reduction of crime rates across Queensland over time.

[79] Thompson et al (n 5) 5.

[80] Although it is difficult to quantify prevented crime, there is some research around this, including in Victoria: See David Cowan et al, 'Reducing Repeat Offending Through Less Prosecution in Victoria, Australia: Opportunities for Increased Diversion of Offenders' (2019), 3 *Cambridge Journal of Evidence-Based Policing* 109.



15.178 It is difficult to estimate the cost of implementing the above options, and it is outside of my remit to do so. However, it is important to note that in many cases, an order for diversion will be cost-minimal. For example, the flexibility of the Summary Offences Diversion Program will allow for the use of many low-cost conditions in an agreed plan, such as an apology to a victim or an agreement to pay compensation.

15.179 However, it is undeniable that for diversion to be realised as intended, there will be initial costs for implementation. Significantly, I note that if adopted, it is likely that the increased demand for ARJC services through the Dispute Resolution Branch and potentially access to particular rehabilitative services (such as alcohol and other substance abuse programs) will require investment.

Therapeutic conferencing

15.180 During the Review, I also considered panel-based therapeutic conferencing, which has had success in a number of jurisdictions, including for youth justice matters in Queensland.

15.181 This model could also have significant benefits in an adult context and should be further explored.

Use of therapeutic conferencing in Queensland and other jurisdictions

15.182 The *Youth Justice Act 1992* contains a legislative model for more intensive conferencing with a defendant.[81] Section 34 of the legislation allows for a conference involving numerous different types of participants, including a representative of the police and the victim, members of advocacy organisations or other organisations and, for an Aboriginal or Torres Strait Islander child, a respected person or representative of a community justice group.

15.183 This model differs from the current and proposed ARJC program, which is centred around a more traditional form of mediation with a victim only.

15.184 Evidence shows that the therapeutic conferencing model has seen positive outcomes in relation to juvenile offenders in Queensland. A 2018 evaluation found that 77% of young people who participated in restorative justice conferencing either did not re-offend or showed a decrease in their offending after participation. The same evaluation found that victims also reported positive results from engagement in the restorative justice

[81] *Youth Justice Act 1992* (Qld) s 34.

conferencing, with 89% reporting that they were satisfied with the outcome of the conference.[82]

15.185 Other jurisdictions in Australia also have similar conferencing models, although primarily in a youth justice context, as in Queensland.[83]

15.186 However, there is evidence that this conferencing model would also be appropriate for adult offenders. For example, New Zealand has an initiative called the Te Pae Oranga Iwi Community Panels.[84]

15.187 Although the Tae Pae Oranga Iwi Community Panels are based on Māori and restorative justice practices, the New Zealand Government websites advise that they are available for people of all ethnicities:

> Te Pae Oranga is mainly for people who have underlying issues and need help to get their lives back on track. This includes helping them overcome problems like addiction, abuse, financial stress and difficulties getting employment or education. It's available to people of all ethnicities, from all walks of life. Victims are encouraged to take part too.[85]

15.188 The Tae Pae Oranga panels centre around the involvement of local community leaders, who support participants to make a plan with conditions, similar to the proposed Summary Offences Diversion Program. The panels also seek to connect defendants with support services.[86]

15.189 There is evidence from evaluations that the Tae Pae Oranga panels have had success in reducing the harms caused by re-offending, or the seriousness of re-offending, among offenders who have participated in the panels.[87]

Implementing therapeutic conferencing

15.190 I have excluded an expansion of therapeutic conferencing from my recommendations as it would require a significant investment in Queensland Government resourcing as a pre-requisite for success, and is beyond the scope of this current Review. However, I find that these options have significant merit and should be considered by the Queensland Government.

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[82] Department of Child Safety, Youth and Women, *Restorative Justice Project: 12-Month Program Evaluation* (Report, 20 May 2018) 47, 54. See also Department of Children, Youth Justice and Multicultural Affairs, *Restorative justice conferencing program evaluation* (Web Page, 2 November 2022) <https://www.cyjma.qld.gov.au/about-us/performance-evaluations/restorative-justice-conferencing-program-evaluation>.

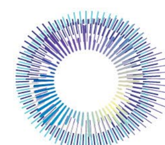
[83] Larsen (n 11) 6.

[84] Darren Walton, Samara Martin and Judy Li, 'Iwi Community Justice Panels Reduce Harm from Re-offending' (2020), 15(1) *Kōtuitui: New Zealand Journal of Social Sciences Online* 75.

[85] New Zealand Police, *Te Pae Oranga Iwi Community Panels* (Web Page, 2022) <https://www.police.govt.nz/about-us/maori-police/te-pae-oranga-iwi-community-panels>.

[86] Ibid.

[87] Walton, Martin and Li (n 84).



15.191 A conferencing model could permit the engagement of a defendant in a tailored program even in cases where there is no direct victim, or if the victim is supportive of a defendant's diversion prospects but does not wish to engage substantively in the process. In such cases, there should be some form of victim participation representation, for example, through a community representative or an advocacy organisation. In exploring this concept, the Queensland Government should consult with victims, to ensure that their interests are represented in the development of a model.

15.192 For example, a conferencing model could be used to educate a defendant who has engaged in lower-level traffic offences (that have not directly resulted in a crash) on the ramifications of road trauma, such as through engagement with the QPS Forensic Crash Unit, or a Queensland Government-funded program such as the Royal Brisbane and Women's Hospital's Jamieson Trauma Institute.

15.193 This model would also hold significant utility for Aboriginal persons and Torres Strait Islander persons, who would benefit from culturally appropriate engagement with Respected Persons and Elders in their communities. I anticipate that such a model could complement existing initiatives such as the Murri Courts and the Community Justice Group Program[88] in providing culturally safe and appropriate ways of engaging with Aboriginal and Torres Strait Islander defendants. This kind of conferencing model could be used as either an extension of the proposed ARJC program, or as an option for defendants in a diversion plan under the proposed Summary Offences Diversion Program.

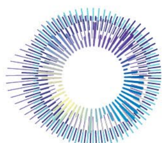
Cautions

15.194 In the Consultation Paper, I asked whether cautions might be an appropriate form of diversion in the Magistrates Courts. A number of respondents and other stakeholders were in favour of cautions being implemented as a diversion option.

15.195 However, after significant consideration, I have not recommended that cautions are included as an in-court diversion option in the new legislative framework. Cautions are usually considered a sentencing option[89] and sentencing is not within the scope of my terms of reference. Accordingly, I am unable to recommend cautions be included in the new criminal justice procedure framework.

[88] Community Justice Group Programs are non-governmental programs that provide support to Aboriginal and Torres Strait Islander people coming into contact with Queensland's justice system. They currently operate in over 41 communities across Queensland. For further information, including a recent evaluation, see: Queensland Courts, *Community Justice Group Program* (Web Page, 15 September 2022) <https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>.

[89] As in the *Youth Justice Act 1992* (Qld) s 21. Similarly, Scotland allows a court to make a determination of 'absolute discharge' in summary matters, which does not result in a conviction and is more akin to a diversion option: see further [15.217].



15.196 However, I find that cautions are a valuable sentencing option, and should be made available as a sentencing option for adults appearing in the Magistrates Courts.

Current use of cautions in Queensland

Police cautions

15.197 For adults, the QPS has discretion to issue cautions for 'lower-end, non-habitual offending'. Although there is no legislative basis for police to issue a caution, it is a 'formal warning' and is used as a means of dealing with this type of offending without starting criminal proceedings.[90]

15.198 These cautions are distinct from minor incidents where police officers verbally warn people about their general behaviour and from other instances where an individual is not charged, such as when police use move-on powers.[91] The adult caution process is relevant where an offence has been established and there is sufficient evidence, and 'it is in the public interest for a formal outcome to be recorded in resolving the matter'.[92]

15.199 Under current QPS procedures, police cautions for adults can only be issued for offences that can be dealt with summarily — excluding any offences (even if they can be dealt with summarily) that involve domestic and family violence; involve drink or drug driving; are against the *Drugs Misuse Act 1986*; or where a victim is alleged to have suffered 'bodily harm' or a more serious injury, or has experienced an outstanding financial loss.[93]

15.200 To be eligible for a police caution, the person must not deny committing the offence and must provide informed consent to the caution. In deciding if a caution is appropriate, police have regard to the person's characteristics and criminal history, any recent cautions for a similar offence, the seriousness of the offence, and the person's willingness to consent to a referral to an available support service.[94]

15.201 If a police caution is administered, it will be recorded in the individual's police records (in their not-for-production criminal history) but not in their disclosable criminal history. After the caution is administered, the matter is finalised.[95]

15.202 Cautions can also be issued for 'minor traffic offences where the lives of persons are not endangered', if police believe it is appropriate, taking into account 'the severity of the

[90] Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) [3.2.1].

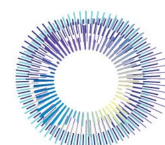
[91] Move-on powers refer to the powers that police have to issue a direction to an individual or group of people to leave a public place: *Police Powers and Responsibilities Act 2000 (Qld)* ch 1, pt 5.

[92] Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) [3.2].

[93] Ibid [3.2.2].

[94] Ibid [3.2.3]. The OPMs also explain how to obtain informed consent, which includes providing the details of the offence committed and the implications of being cautioned, including how the caution will be recorded.

[95] Ibid.



offence, consistency of approach, and the ultimate aim of deterring a repetition of the offence'.[96]

15.203 The discretion of police to issue cautions is an important mechanism that diverts low-risk offenders from the criminal justice system, saving critical resources for more important matters. Relevantly, the OPMs state the purpose of adult cautioning is to:[97]

(i) manage lower-end offending in a manner that positively contributes to behaviour change and reduced recidivism;

(ii) divert appropriate offenders from the criminal justice system; and

(iii) reduce the disproportionate use of prosecution resources for minor matters by finalising matters in an efficient and effective manner.

15.204 However, this discretion has been criticised in Queensland and other states for replicating existing biases and power imbalances by underutilising cautions for vulnerable groups such as First Nations peoples, and other marginalised communities. For example, research in Queensland found that Aboriginal and Torres Strait Islander peoples are more likely than non-indigenous offenders to be arrested than to be dealt with by police using another process; this was also true for Aboriginal children and Torres Strait Islander youth. Research also showed that those young people are referred to conferencing at a lower rate and are less likely to be cautioned than non-indigenous youth.[98] This means that cautions are less likely to be applied to the communities who would most benefit from reduced contact with the criminal justice system.

15.205 In Victoria, where police cautions are broadly used at the discretion of police in a similar manner to Queensland,[99] the recent *Inquiry into the Victorian Criminal Justice System* made a formal finding that Victoria Police's use of cautions were 'inconsistent across the community', with 'young Aboriginal people and young people in lower socio-economic communities' much less likely to receive a caution and more likely to be charged for an offence than other Victorians.[100]

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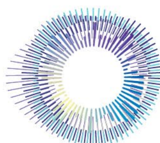
[96] Queensland Police Service, Traffic Manual (Public Edition, Issue 65, 9 December 2022) [8.8].

[97] Queensland Police Service, *Operational Procedures Manual* (Public Edition, Issue 92.4, 14 April 2023) [3.2.1].

[98] Chris Cunneen, Neva Collings and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement* (Report, November 2005) xxii–xxv; Simon Little et al, *Diverting Young Indigenous People from the Queensland Youth Justice System: The Use and Impact of Police Diversionary Practices and Alternatives for Reducing Indigenous Over-representation* (Justice Modelling @ Griffith, February 2011).

[99] However, in Victoria, there is no legislative basis for Victoria Police to issue cautions, and the Victorian Police Manual is not publicly available. As a result, it is difficult to obtain publicly available information on how Victoria Police issue cautions, and on what basis. See also: Legislative Council Legal and Social Issues Committee (n 58), which notes that at least one of the Victoria Police cautioning programs (the Youth Disability Cautioning Program) does not appear to have commenced. However, information provided by Victoria Police Service to that inquiry indicates that operationally, cautions are utilised in a similar manner to in Queensland.

[100] Legislative Council Legal and Social Issues Committee (n 58) 181.



15.206 It is also important to note that there are cases where a matter may have been suitable or appropriate for a police caution, or even where an adult was offered a police caution, but that option could not be taken because the person denied the offence or did not consent to a caution. In those circumstances, the matter would have to proceed to a formal charge to be dealt with by the court.

Cautions for children

15.207 In a youth justice context, in Queensland, a child can be diverted from the courts' criminal justice system by cautioning in two ways:

(a) Police Caution — only if the child admits committing the offence and consents to being cautioned with an adult present. Steps must be taken to make sure the purpose, nature and effect of the caution is understood.[101]

(b) Cautioned by the Childrens Court – only if a child pleads guilty to a charge made by a police officer. The court may dismiss the charge instead of accepting the plea of guilty, if satisfied that the child should have been cautioned instead of being charged or that no action should have been taken against the child. If the court dismisses a charge because the child should have been cautioned, then it may administer a caution to the child or direct a police officer to do so.[102]

15.208 A caution for a child is not part of the child's criminal history.[103]

Other orders

15.209 The *Penalties and Sentences Act 1992* provides that a court may make an order 'releasing the defendant absolutely'. This does not operate in the same way as a caution, but it does provide a means for a court to release a defendant without conviction or sentence.[104]

Implementing cautions as sentencing option

15.210 Feedback from consultation strongly supported the Magistrates Courts being able to issue a caution, including if a magistrate is of the view a police officer should have cautioned an adult in appropriate circumstances.

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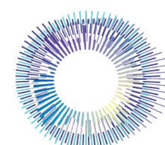
[101] *Youth Justice Act 1992* (Qld) ss 14–20.

[102] *Youth Justice Act 1992* (Qld) s 21.

[103] *Youth Justice Act 1992* (Qld) ss 15(3), 21(4).

[104] *Penalties and Sentences Act 1992* (Qld) s 19(1). Even where a defendant is released absolutely, an order for payment of compensation or restitution may also be made: s 19(3).



15.211 There was strong support by stakeholders who made a submission in relation to adult cautions to allow for a charge to be dismissed by way of a caution without the requirement for the court to accept a formal plea of guilty.

15.212 Stakeholders did highlight the need for the legislation to outline the criteria or considerations to take into account when the court is exercising its discretion to order an adult caution, such as mandatory penalties or disqualifications and victim-related considerations. These matters should be considered if cautions are implemented at a later date as a sentencing option.

15.213 I also note that stakeholders strongly expressed the view that cautions should be recorded on a defendant's not-for-production criminal history, but not be recorded on a defendant's for-production criminal history. I also support this view.

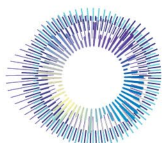
15.214 After significant consideration, I have determined that I am unable to recommend the new criminal procedure framework include cautions as a court-ordered diversion option. On balance, for the reasons given below, I consider that providing for a caution as a sentencing option would be the preferable approach.

15.215 Accordingly, I have not made a formal recommendation that the new criminal procedure laws include cautions as an in-court diversion option. However, the Queensland Government should consider including cautions as a formal sentencing option for adults. If implemented, this should be included in legislation and modelled on the approach used in the Queensland Childrens Court.

15.216 Implementing cautions as a sentencing option in a way that is consistent with the Childrens Court would allow magistrates to caution an adult defendant for a summary offence where the defendant has entered a plea of guilty, but the magistrate is satisfied that it is appropriate to set that plea aside and instead caution the person for the offence. I believe there is significant benefit in the adoption of the Childrens Court model, including the setting aside of the plea. This has the benefit of ensuring that the use of a caution is properly considered alongside other sentencing options and in the context of the defendant's offending and plea of guilty, whilst also allowing the court to proceed in a way that does not carry all the usual ramifications of a criminal sentence.

15.217 Another example of a jurisdiction that allows cautions for adult offenders as a formal sentencing option is Scotland, which provides for the admonishment of a defendant (a formal warning not to offend again). This is recorded on the defendant's criminal history.[105] The Court also has the option to make an order of 'absolute discharge' taking into account the nature of the offence and the defendant's character, which is not

[105] *Criminal Procedure (Scotland) Act 1995* s 246(1); Scottish Sentencing Council, *Sentences and Appeals* (Web Page) <https://www.scottishsentencingcouncil.org.uk/about-sentencing/sentences-and-appeals>.



recorded as a conviction.[106] Queensland should consider this model of cautions as a sentencing option.

15.218 Allowing the Magistrates Courts to caution a defendant in appropriate circumstances as a sentence has significant benefits. The important role that police cautions already play in diverting offenders from the criminal justice system has been documented. However, as detailed above, a number of evaluations and reviews that have found that these options are not always utilised as often or equitably as they should be.

15.219 Having cautions as a sentencing option would also provide an avenue to address any scenarios where a caution was not available at the time a defendant was charged by police (for example, if a person refused to admit responsibility to police when charged). It would also allow the court to caution a defendant for an offence that was not started or prosecuted by the police.

15.220 Stakeholders expressed views that implementing cautions would have a positive educative effect, encouraging police to consider issuing cautions in the first instance where it is not in the public interest to prosecute an offender. The intention of an educative effect is consistent with the recommendations in the 2019 former QPC report and the 2022 Women's Safety and Justice Taskforce reports. Over time, this should result in fewer minor matters proceeding to the Magistrates Courts.

15.221 The use of cautions as a sentencing option would provide significant benefits, including minimising the time spent in court and afterward on minor matters that are not within the public interest to pursue, especially where a defendant enters a plea of guilty.

Human rights considerations

15.222 The use of diversion options by the courts engages a number of protected rights under the *Human Rights Act 2019*.

Right to be tried without unreasonable delay

15.223 Section 32 of the Human Rights Act protects a number of rights in criminal proceedings, including a set of minimum guarantees for people charged with a criminal offence. One of the minimum guarantees, under section 32(2)(c) is to be tried 'without unreasonable delay', which reflects the common law principle.

15.224 The current resourcing pressures on the Magistrates Courts is outside the scope of this Review. However, these pressures contribute to the delays in court matters of even simple summary offences.

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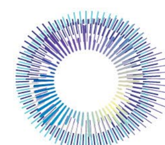
[106] *Criminal Procedure (Scotland) Act 1995* s 246(2)–(3); Scottish Sentencing Council, Sentences and Appeals (Web Page) <https://www.scottishsentencingcouncil.org.uk/about-sentencing/sentences-and-appeals>.



15.225 What constitutes 'unreasonable delay' is not specifically defined in the Human Rights Act. However, there is relevant case law in other Australian jurisdictions that holds that the assessment of whether a delay is 'unreasonable' depends on the circumstances and complexity of the case.[107] Broadly, this means that minor offences that are not particularly complex should be progressed through the Courts quickly and efficiently.

15.226 It is anticipated that the use of in-court diversion will allow for more minor matters to be resolved primarily 'out of the courts', freeing up time for magistrates and other court staff to dedicate to more serious matters. As such, the adoption of in-court diversion options is likely to improve the resourcing delays currently experienced by the Courts at the system level, and therefore will promote the right to be tried without unreasonable delay for defendants overall.

15.227 This effect is likely to be felt across the whole criminal justice system but will not always apply individually to a case that is diverted. For example, if an individual agrees to undertake a more time-intensive diversion option, such as participation in the Summary Offences Diversion Program, it is likely at the individual level that this may take more time to progress and close the matter than if it were to proceed to sentence as usual.

15.228 However, although I anticipate that the recommendations made in this Report will reduce inefficiencies across the whole system, it is reasonable to expect there may be some time between the commencement of the new legislation and these efficiencies being realised in practice.

Right to privacy and reputation

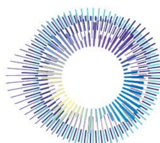
15.229 Section 25 of the Human Rights Act protects an individual's right to privacy and from having their reputation 'arbitrarily interfered with'. This right is a broad and complex right, with significant case law.[108]

15.230 As noted above, all diversion options will be recorded on an individual's not-for-production criminal history record, which will engage the right to privacy and reputation when disclosed. Although it is my desire to minimise the impact of a diverted charge for individuals, it is beyond the remit of this Review to recommend that a diverted charge be removed from the not-for-production criminal history.

15.231 It is important to note that even if a charge is successfully diverted out of the court system, a defendant may still be impacted in the future for simply being charged with an offence,

[107] See *R v Kara Lesley Mills* [2011] ACTSC 109, [25]; *Re Application for Bail by Dickson* [2008] VSC 516, [13]; Human Rights Committee, *General Comment No 35: Liberty and security of person (Article 9 of the International Covenant on Civil and Political Rights)*, 112th sess (16 December 2014) [37].

[108] Queensland Human Rights Commission, 'Fact Sheet: Right to Privacy and Reputation' (Web Page, July 2019) <https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-privacy-and-reputation>.



as it will appear on their not-for-production criminal history. For example, a defendant may still be required to declare that they have been charged with an offence for a number of reasons, including for employment purposes when conducting a criminal history search; applying for a Working With Children Check (Blue Card) when working or volunteering with children; applying for a government job; travelling overseas; and when applying to visit a correctional centre.

15.232 Within the courts, it is appropriate that a magistrate has access to information about a defendant's criminal history, including any previous history of diversion, to inform any further decisions about whether a defendant is a suitable candidate for diversion or another outcome.

15.233 Further, though it is broadly desirable that a defendant whose offending is considered out-of-character and who has made significant and meaningful efforts to avoid re-offending is not unduly punished for their criminal history outside of a criminal justice system context, there are some circumstances in which it may be appropriate for this information to be known, even though it is likely to impact a defendant's rights in the future.

15.234 This is a complex matter that involves weighing up a defendant's rights with the rights of other individuals and the public.

15.235 A certificate of dismissal is likely to assist a defendant when they are required to declare that they have been charged with an offence in the past in some circumstances.

Right to recognition and equality before the law

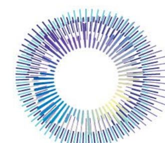
15.236 Section 15(3) of the Human Rights Act protects each individual's right to equality before the law. This has generally been interpreted to mean that all laws and policies must be applied equally to all people.

15.237 The right to equality before the law is engaged by the overrepresentation of Aboriginal and Torres Strait Islander peoples in all stages of the criminal justice system in Queensland, as well as the disparity in service access and provision across the state.

Overrepresentation of Aboriginal and Torres Strait Islander peoples

15.238 In Queensland, as in other Australian jurisdictions, Aboriginal and Torres Strait Islander peoples are vastly overrepresented at all stages of the criminal justice system.

15.239 Despite a multitude of efforts to decrease this trend, there is significant evidence that it continues. Within Queensland, from 2005–06 to 2018–19, the number of Aboriginal and Torres Strait Islander unique offenders sentenced in Queensland courts decreased, from 88.7 offenders per 1,000 population in 2005–06 down to 78.2 offenders per 1,000



population in 2018–19. However, during this same period, the number of sentenced cases involving Aboriginal and Torres Strait Islander offenders increased by 16.2 per cent.[109]

15.240 The factors that result in this overrepresentation are myriad and complex. There is evidence that Aboriginal and Torres Strait Islander peoples are more likely to be 'overpoliced', and charged as a result of trivial offences, including 'victimless' offences such as public nuisance crimes such as using offensive language in public, public urination and public intoxication.[110]

15.241 There is also evidence, in Queensland and in other states, that Aboriginal and Torres Strait Islander peoples are less likely to receive a caution than non-indigenous peoples.[111]

Geographic-based access issues across the state

15.242 Consultation for this Review revealed that there are significant issues with equitable access to services across Queensland, resulting in a much higher service provision within South-East Queensland generally, and an overall paucity of access to services in rural and remote Queensland.

15.243 The uptake of the proposed diversion offences will almost certainly result in increased use of therapeutic and rehabilitation services if they operate as intended. Although the increased use of these services is appropriate, it is likely to exacerbate existing service delivery issues, particularly in rural and remote areas where the services are already oversubscribed.

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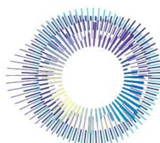
[109] Queensland Sentencing Advisory Council, *Connecting the Dots: The Sentencing of Aboriginal and Torres Strait Islander peoples in Queensland* (Sentencing Profile Series No 1, March 2021) iii.

[110] Tamara Walsh, 'Public Nuisance, Race and Gender' (2018) 26(3) *Griffith Law Review* 334; Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (Final Report, May 2008) 9; Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, March 2018).

[111] Lucy Snowball, 'Diversion of Indigenous Juvenile Offenders' (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, June 2008); Crime and Misconduct Commission (n 110) 92.



Recommendations

Court-ordered diversion

R15.1 The new criminal procedure legislation applying to Queensland's Magistrates Courts should provide a framework for a structured approach to two court-ordered diversion options for adult defendants who are on bail, namely:

(a) Adult Restorative Justice Conferencing

(b) The Summary Offences Diversion Program.

Objects of court-ordered diversion

R15.2 The court-ordered diversion chapter in the new criminal procedure laws should include specific objects, namely:

(a) to provide a framework for the recognition and operation of court-ordered diversion options for dealing with persons who have committed a summary offence or are alleged to have committed an eligible offence

(b) to recognise that diversion is an opportunity for meaningful participation in the criminal justice system by a person who has committed or is alleged to have committed an eligible offence, as well as for victims to participate to the extent they desire

(c) to ensure that options for court-ordered diversion apply fairly to all persons who are eligible to participate in them, and that they are properly managed and administered

(d) to reduce the likelihood of future offending behaviour by facilitating the use of and participation in court-ordered diversion options

(e) to recognise the rights of victims should be protected and taken into account when considering diversionary options, but not always require a victim's consent to order a diversionary option in relation to a defendant

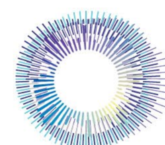
(f) to provide a framework for the greater inclusion of cultural considerations, including the distinct cultural consideration of Aboriginal peoples and Torres Strait Islander peoples, in the resolution of summary offences.

Application to summary offences

R15.3 Generally, court-ordered diversion should be available for all charges that can be finalised in the Magistrates Courts; that is, for all summary offences.

Note: *The use of adult restorative justice conferencing is already provided for under other legislation and is not presently limited to any particular types of offences. That position will not be affected by this Review.*

Note: *There are further limits on the availability of the Summary Offences Diversion Program for some types of offences, as set out at Recommendation 15.18.*



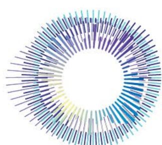
R15.4 If an indictable offence can be finalised in the Magistrates Courts following an election by one party, a court-ordered diversion may apply to that offence if the party elects to deal with the matter in the Magistrates Courts.

Magistrate's discretion

R15.5 Despite a court-ordered diversion being available for an offence, for each charge, a magistrate should have the discretion to decide whether a court-ordered diversion is appropriate in all the circumstances taking into account a range of considerations, including:

- **(a)** the complainant's views, including whether they consent to participate or engage in a diversion option such as mediation
- **(b)** whether there is an ongoing relationship between the defendant and the complainant (including whether a domestic and family violence protection order is in place)
- **(c)** the nature and seriousness of the alleged offence, including whether it is an offence involving actual violence or domestic and family violence, or an offence that is sexual in nature, or any offence that carries a mandatory penalty or disqualification
- **(d)** whether the defendant has previously been ordered to other diversion options by the court or another agency (including whether the defendant successfully completed the conditions, how recently another diversion order was made, and the nature of the offences that a diversion option was granted for)
- **(e)** if the defendant has the ability to meaningfully participate in a court-ordered diversion
- **(f)** if either the defendant or complainant is an Aboriginal person or a Torres Strait Islander person, whether any other relevant stakeholders such as a Community Justice Group member, Elder or Respected Person should be involved in the process
- **(g)** the appropriateness of the diversion option, taking into account all other relevant circumstances.

R15.6 A party to a proceeding may apply to the Magistrates Court for an order relating to a diversion option, or for a diversion option to be the outcome in a proceeding, however it is ultimately at the magistrate's discretion. Parties may make submissions about whether a matter is suitable for court-ordered diversion for consideration.



Acceptance of responsibility

R15.7 It should be a requirement that, before a magistrate makes an order for a court-ordered diversion, a defendant must 'accept responsibility' for the alleged offence.

R15.8 Any acceptance of responsibility for an offence by a defendant is inadmissible as evidence in any proceeding for that offence and does not constitute a plea of guilty to the offence.

Court-ordered referrals to Adult Restorative Justice Conferencing

R15.9 The new criminal procedure legislation should, instead of the current powers to order or adjourn a matter for mediation, provide a framework for procedures that allow magistrates to make an order referring an eligible offence to Adult Restorative Justice Conferencing (ARJC), subject to the magistrate's discretion (Recommendation 15.5).

R15.10 In addition to the requirement for the defendant to accept responsibility (Recommendation 15.7), a referral to ARJC should require that the defendant and complainant (victim) consent to the referral.

R15.11 Despite Recommendation 15.10, a court-ordered referral to ARJC should not require consent from the prosecutor. However, the parties to the matter must be given an opportunity to make submissions to the court about why a referral is or is not appropriate.

R15.12 A court-ordered referral to ARJC should be available at any stage of a proceeding, including after a plea of guilty has been entered.

R15.13 The new criminal procedure legislation should provide that when a court-ordered referral to ARJC is made, the matter is formally referred to a 'prescribed agency' able to provide accredited and free ARJC services. The Queensland Government's Dispute Resolution Branch should be named as a prescribed agency.

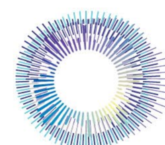
Procedure following Adult Restorative Justice Conference

R15.14 The new legislative framework should outline the procedures following ARJC. Specifically, where an outcome or agreement between the parties has been reached:

(a) the prosecutor may, at their own discretion, choose to withdraw the charge and end the proceeding

(b) if the charge is not withdrawn, then it will proceed in the usual way

(c) if the charge proceeds to sentence, the fact that the defendant has participated in an ARJC and has reached an agreed outcome is a matter that must be taken into account at sentence.



R15.15 In circumstances where a matter is referred to ARJC, but a conference is not conducted or an agreed outcome is not reached:

(a) the matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered

(b) any unsuccessful attempt to have a matter undergo ARJC cannot be used against a defendant throughout the remainder of a proceeding, particularly at sentence.

R15.16 For clarity, the new criminal procedure legislation should explicitly state that the provisions about referral of a charge or charges to ARJC do not affect, and are in addition to, any other pathways open for referral to ARJC.

Summary offences diversion program

R15.17 The new criminal procedure legislation should establish the Summary Offences Diversion Program. The program should be based on Victoria's Criminal Justice Diversion Program (CJDP) and should have many (but not all) of the same general features.

Application of the scheme

R15.18 Generally, the Summary Offences Diversion Program should provide that a magistrate may make an order for a matter to proceed through the Summary Offences Diversion Program:

(a) in circumstances where the defendant has accepted responsibility for the offence (Recommendation 15.7)

(b) for an offence that can be finalised summarily (subject to the magistrate's discretion in Recommendation 15.5), excluding the following offences:

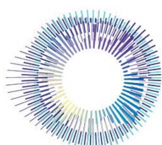
(i) a summary offence punishable by a mandatory minimum or fixed sentence or penalty, including a penalty affecting a licence (such as cancellation, suspension or disqualification)

(ii) an offence for which a defendant was issued an infringement notice and elected for the matter to be heard in court.

R15.19 For clarity, a summary offence where the only mandatory penalty is the incurring of demerit points is eligible for the Summary Offences Diversion Program. However, any demerit points will still be incurred, regardless of participation by a defendant in the Summary Offences Diversion Program.

Prosecutorial consent

R15.20 When an application for a matter to proceed through the Summary Offences Diversion Program is made, the prosecutor, defendant and victim must have the opportunity to make submissions about whether the order is appropriate in all the circumstances. However, there is no requirement for the prosecution to consent



to the order, and no power in the prosecutor to veto or refuse the making of the order.

Conditions of an agreement

R15.21 If an order is made for the defendant to enter the Summary Offences Diversion Program, then the defendant will enter an 'agreed plan' with a number of conditions, which is approved by the magistrate. The defendant must consent to the plan and its conditions.

R15.22 The magistrate must be reasonably satisfied that a defendant has the capacity and capability to meet the 'agreed plan' under the Summary Offences Diversion Program.

R15.23 The new criminal procedure legislation should not prescribe the number or types of conditions that can be included in a plan, to allow for adequate flexibility. However, the legislation should contain a clause that any condition:

(a) must be fair, reasonable, appropriate in the circumstances, accessible and proportionate to the charges

(b) must be achievable within the time frame of the order

(c) must not be overly onerous for the defendant.

Monitoring of conditions and concluding proceedings

R15.24 Once the defendant has entered an agreed plan, proceedings may be adjourned for the shortest reasonable time to allow the defendant to complete the conditions, but for no longer than six months.

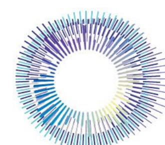
R15.25 The adjournment may be extended for a further six months, so that the matter is adjourned for up to 12 months in total, if appropriate. A magistrate may also list a matter for additional mentions as appropriate, to review the defendant's compliance to date with the agreed plan.

R15.26 The defendant must submit evidence of their compliance with the agreed plan to the court. When the matter returns to the court the magistrate will review this evidence to determine whether the defendant has completed the requirements of the program. If appropriate in the circumstances, the magistrate may exercise a discretion to decide that the defendant has substantively completed those requirements.

R15.27 If a defendant has completed or is found to have substantively completed the requirements of the program:

(a) no plea to the charge will be taken

(b) the charge must be dismissed, and the defendant must be discharged without any finding of guilt



(c) the fact of participation and the dismissal of the charge is a defence to a later charge for the same offence, or for a similar offence arising from the same circumstances.

R15.28 If a defendant has not complied with the requirements of the program:

(a) the matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered

(b) if the charge proceeds to sentence, the extent to which the defendant complied with the scheme must be taken into account at sentence, but lack of compliance cannot be used against the defendant as an aggravating factor.

R15.29 Participation in the Summary Offences Diversion Program should not be treated as a finding of guilt, except for the purposes of:

(a) laws relating to confiscation, firearms, weapons control and other similar matters

(b) the incurring of any demerit points.

Procedures following court-ordered diversion options

R15.30 It should be made clear that any charges that are successfully diverted by way of referral to ARJC or participation in the Summary Offences Diversion Program should be formally recorded on an adult's not-for-production criminal history, and that the parties will not be required to pay court costs, levies or fees.

CHAPTER 16: HEARINGS, PLEAS AND MATTERS FINALISED IN A PARTY'S ABSENCE

Introduction

16.1 This chapter applies only to offences where a magistrate has jurisdiction to finalise the matter following a summary hearing or a plea of guilty.[1] It does not apply to offences that are to be committed to a higher court. Asking a defendant if they plead guilty or not guilty is a fundamental part of determining criminal charges in courts across Australia.

16.2 In the Magistrates Courts, if a defendant pleads guilty the matter moves to sentence and the court decides the appropriate penalty. If the defendant pleads not guilty, the prosecutor must prove the charge (or charges) beyond reasonable doubt and the court decides if the defendant is guilty or not guilty. This is called a summary hearing. A high-level overview of this process is set out in Diagram 16.1, below.

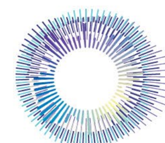
16.3 There are some differences between how matters are determined in the Magistrates Courts and higher courts, to accommodate the Magistrates Courts dealing with less serious offences. For example, a defendant can write to the court and plead guilty rather than coming to court. Sometimes if the defendant does not attend court and has not entered a plea at all, the matter can still be finalised without them. This is called proceeding 'ex parte'.[2]

16.4 I will consider how hearings, pleas and ex parte matters will be dealt with in the new criminal procedure framework for the Magistrates Courts. As set out in the terms of reference for the Review,[3] I am not changing the sentence orders that are available in the Magistrates Courts.

[1] See Chapter 17 for further discussion about committal proceedings for offences that cannot be finalised by the Magistrates Courts.

[2] The Encyclopaedic Australian Legal Dictionary defines 'ex parte' as a Latin term meaning 'in the absence of the other side': *Encyclopaedic Australian Legal Dictionary* (online at 14 April 2023) 'ex parte' (def 1).

[3] The terms of reference are set out in Appendix A.



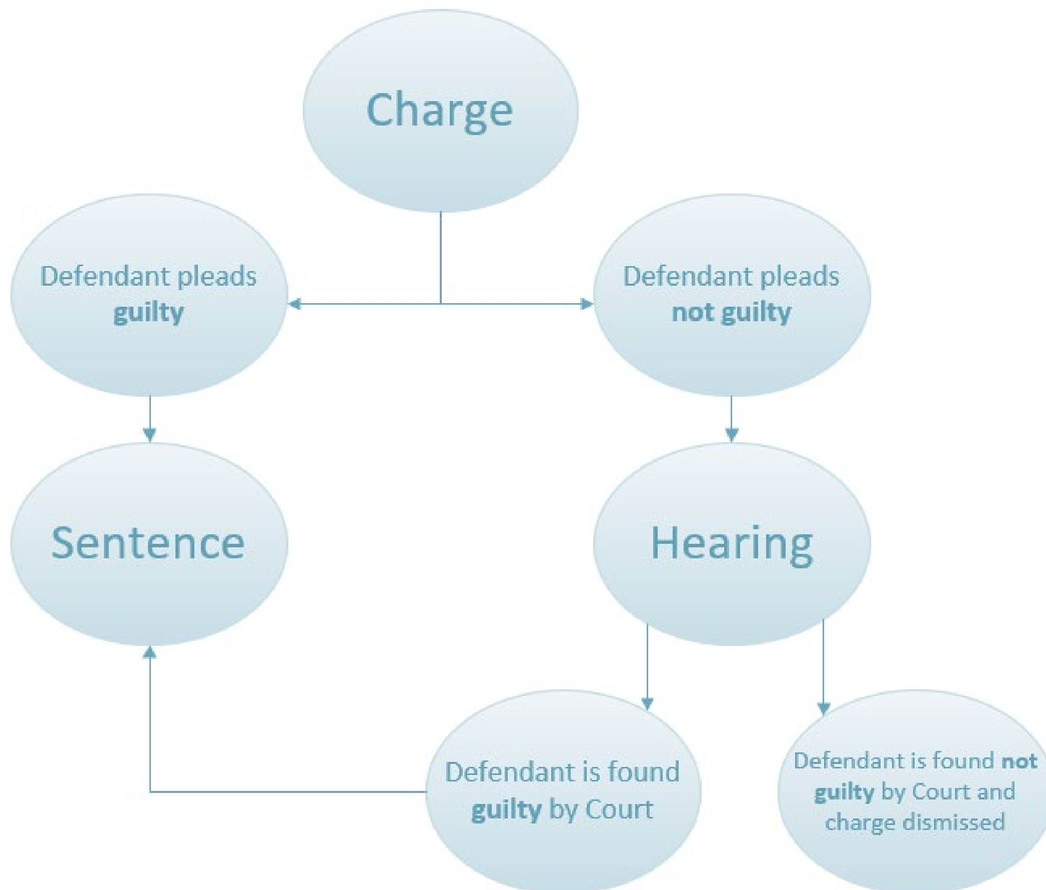


Diagram 16.1: The process for pleading guilty or not guilty in the Queensland Magistrates Courts. This simple overview does not include all steps or possible outcomes.

Entering a Plea

Current position

16.5 Most criminal matters end in a plea of guilty.[4] If the defendant pleads guilty the court convicts the defendant and deals with them according to law. Entering a plea of guilty is serious as it is taken as an admission of all the elements of the offence. Pleading guilty and the timing of entering the plea is considered on sentence.[5] The cost and efficiency benefits of early guilty pleas are well known, especially the affect in reducing anxiety and the potential to retraumatise victims and witnesses.

[4] Based on anecdotal feedback and experience. Court Services Queensland are unable to provide exact figures on defendants pleading guilty as opposed to being found guilty by the court, due to data limitations: Information provided by Court Services Queensland, 13 October 2022.

[5] *Penalties and Sentences Act 1992* (Qld) s 13.

Guilty in person

16.6 Currently, a defendant may plead guilty in person (which includes by phone or video-link)[6] or through their lawyer in limited circumstances.[7] No one else may enter a plea on behalf of the defendant.

Guilty in writing

16.7 The Justices Act also allows a defendant (personally or through their lawyer) to plead guilty in writing[8] to an offence other than an indictable offence[9] and have the matter dealt with in their absence (discussed further below).

16.8 At the next court date, the court must consider the defendant's written plea, any accompanying submissions relevant to penalty, and the facts of the offence, and may then accept the plea and convict the defendant in their absence. The defendant may withdraw their written plea any time before their matter is heard.[10] There are detailed provisions about adjournments and notice requirements and the effect of subsequent non-appearance.

16.9 The Queensland Courts website has a page allowing defendants to plead guilty online, however this is only available where the QPS is the prosecutor and for a 'minor offence'.[11] The term 'minor offence' is not defined, but public nuisance and speeding are included as examples. It also states offences that could result in driver license disqualification are excluded from this scheme. Once the guilty plea has been submitted online, the magistrate may sentence the defendant without the defendant being present in court. This form must be submitted at least two business days before the scheduled court date.

16.10 It is not mandatory to use the online form, and in practice many defendants will submit a written guilty plea to the court by emailing the registry and stating they wish to plead guilty. This email is placed on the court file for the magistrate to read and consider at the next court event.

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[6] *Justices Act 1886* (Qld) s 178C and *Penalties and Sentences Act 1992* (Qld) s 15A contain provisions allowing for the use of video and audio-link in court proceedings and sentences.

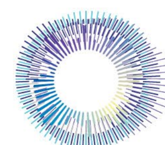
[7] *Commissioner of Police v Warcon* [2011] QDC 28, [22]–[25]. Specifically, the lawyer must be instructed by the defendant to enter a guilty plea on their behalf, the defendant must be present in court and there must be no objection to this by the prosecutor or the defendant.

[8] A defendant's plea notification in writing includes a notification received electronically: *Justices Act 1886* (Qld) s 146A(3C).

[9] *Justices Act 1886* (Qld) s 146A(1)(a), (2). An offence is also excluded if it is prescribed by regulation (no offences are currently prescribed), or if another law requires the court to proceed in a different way: s 146A(1)(c)–(d).

[10] *Justices Act 1886* (Qld) s 146A(2)–(2A)..

[11] Queensland Courts, *Plead Guilty Online* (Web Page, 13 December 2021) <https://www.courts.qld.gov.au/going-to-court/plead-guilty-online>.



Pleas other than guilty

16.11 When a defendant pleads not guilty to an offence that can be finalised in the Magistrates Court, the court proceeds to a hearing where both the prosecution and defendant can present their evidence and witnesses. The magistrate then decides if the defendant is guilty or not guilty of the offence.[12]

16.12 In the District or Supreme Court, the Criminal Code[13] sets out the process for entering a plea and covers a range of other pleas besides guilty or not guilty. These other pleas may be used when challenging the jurisdiction of the court or arguing the defendant has already been dealt with for the offence.

Bulk pleas

16.13 In cases where a defendant has multiple charges, they may decide to enter the same plea to all their charges at once. This is known as a bulk plea.

16.14 When dealing with simple offences in the Magistrates Court, section 145(1) of the Justices Act requires the magistrate to read out each charge to the defendant for them to enter a plea. This can be a time-consuming process if a defendant has many charges before the court. In graffiti cases for example, it is common for a defendant to be charged with over 100 graffiti (wilful damage) offences, one for each piece of graffiti.

16.15 In 2017, this law was updated to allow a defendant represented by a lawyer to enter a plea to one charge and for that to be taken to be a plea to multiple charges, which means the other charges are not read out in court. The defendant can only do this if they consent, and if the court is satisfied the defendant has received legal advice about each of the charges and is aware of the substance of each charge.[14] This option is not available to unrepresented defendants.

16.16 When a defendant is charged with an indictable offence, a similar law allowing for a bulk plea exists in the Criminal Code.[15] For indictable offences that can only be finalised in the higher courts this can occur where the defendant consents, whether they are legally represented or not. For Criminal Code indictable offences that must be heard and decided in the Magistrates Courts unless the defendant elects otherwise, if the defendant is represented by a lawyer and is aware of the substance of each of the charges, they can enter one plea for multiple charges.[16]

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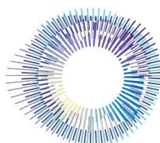
[12] *Justices Act 1886* (Qld) ss 144, 146, 148.

[13] Criminal Code (Qld) ch 62 div 9.

[14] *Justices Act 1886* (Qld) s 145(2)–(3).

[15] Criminal Code (Qld) s 552I for proceedings in the Magistrates Courts, s 597C(2) for proceedings in the higher courts.

[16] Criminal Code (Qld) ss 552B, 552I(4).



16.17 To summarise, the laws relating to bulk pleas are currently included in the Justices Act and the Criminal Code. The laws permit bulk pleas for offences that can be finalised in the Magistrates Court, but only apply to defendants represented by a lawyer and with the consent of the defendant.

Consultation

16.18 The Consultation Paper asked if the procedures relating to summary hearings and pleas of guilty were working in practice, and how these could be improved.

16.19 Regarding entering pleas of guilty, it was reported that many self-represented defendants do not know they have the option to plead guilty in writing, or if they do, they do not do it properly. This results in written pleas not being accepted by the court and the defendant needing to go to court anyway, defeating the purpose of pleading guilty in writing.

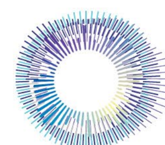
16.20 Consultation suggested the current written plea of guilty system could be improved by expanding what charges can be finalised by this method, and for this to be better communicated to defendants. It was also suggested parties should be able to submit their sentencing submissions online, allowing the court to sentence the defendant in their absence while still having all relevant information.

16.21 While the current Justices Act provisions contemplate the defendant providing written submissions to be considered by the magistrate,[17] the current online form for pleading guilty does not allow defendants to attach any documents. This is a barrier to using the form because there may be relevant sentencing information, such as letters of support or medical reports, the defendant wants to submit for the magistrate to read before sentence. Allowing for written submissions about sentencing would also assist self-represented defendants who find it intimidating to speak for themselves in court, or people with disabilities or other circumstances that make it difficult for them to physically attend a courthouse.

16.22 Numerous people in correctional centres reported delays getting to a hearing being a barrier to them contesting the matter, because they will spend longer on remand.

I also feel the court matters should be dealt with a lot earlier as people are put in a position where they are pleading guilty to matters they are not guilty to, just to get out of prison earlier. Not much of a justice system.
— Prisoner

[17] *Justices Act 1886* (Qld) s146(2A)(b)(i)(A).



16.23 When asked about pleading guilty in writing or online, none of the correctional centre prisoners we met with were aware of this option. They recognised the ability to plead guilty in advance could have meant the matter could be finalised in their absence earlier and minimised disruption to work and carer arrangements.

16.24 One prisoner spoke to the CPRT about when they were in the community and had a minor charge before the court:

> I support the matter being dealt with in my absence, I would much rather just get an email with my penalty so it doesn't get adjourned multiple times. I got charged with wilful damage for breaking a light, and I didn't know my court date and I wasn't on the court list, so I missed court. Then I got charged with failure to appear. The wilful damage charge got dismissed because the owner wasn't seeking any restitution and it was minor, but then I was still looking at a 6-month prison sentence for the failure to appear charge, which was still going. This could have been avoided if they just finished the original charge without me and told me what happened. It is not fair when you are charged with a minor offence that will only get you a fine, but then if you miss court you are looking at multiple fail to appear charges and suddenly have 6 months in jail, over an original offence that would only get you a fine.

Other jurisdictions

16.25 Other Australia jurisdictions have similar laws about entering a plea to a criminal charge. For example, in Victoria, the court must read or explain the charge to the defendant before they are asked to enter a plea. However, if the defendant has a lawyer, then the charge does not need to be read out and the lawyer can enter a plea on behalf of their client.[18] Similar to Queensland, Victoria also has an online form[19] for defendants to plead guilty which must be received by the court three business days before the scheduled court date. The form allows the defendant to tell the court information about themselves, the offence or anything that that they would like taken into account during sentencing, such as their financial situation, personal circumstances and general character.

16.26 All Australian jurisdictions allow for guilty pleas to be made in writing to the court, but there are various limitations on which offences can be dealt with in this way.

16.27 Multiple jurisdictions in Australia have a section in their court attendance notices for advising defendants about their option to plead guilty in writing.[20] When a defendant is given the notice they are being charged with an offence and must attend court on a certain date, the defendant can instead complete the section of the notice which says they plead guilty to this offence and consent to being sentenced in their absence. The defendant

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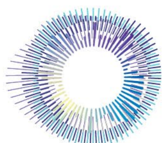
[18] *Criminal Procedure Act 2009* (Vic) ss 62–3.

[19] Magistrates' Court of Victoria, *Guilty Plea Form* (Web Page) <https://www.mcv.vic.gov.au/guilty-plea-form>.

[20] *Magistrates Court Act 1930* (ACT) ss 116B(2), 116D; *Local Court (Criminal Procedure) Act 1928* (NT) s 57A; *Criminal Procedure Act 2004* (WA) s 33(2).



must give the notice and written guilty plea to the court, so the court is aware of exactly which offence the defendant is pleading guilty to.

16.28 Only the Northern Territory and South Australia require written pleas to be sworn in front of a justice of the peace, lawyer or police officer.[21]

16.29 There are protections in place to ensure no one submits a guilty plea on behalf of the defendant, usually by making it a criminal offence. For example, in Western Australia anyone who signs or authenticates a court document knowing they are not authorised to do so commits an offence and could be sentenced to 12 months imprisonment or a fine of up to $12,000.[22] In Victoria, the guilty plea form requires an acknowledgement that the person's identity is as stated on the form, 'understanding that identity fraud is a crime'.[23]

New model

Types of pleas

16.30 Under the new criminal procedure framework for the Magistrates Courts, defendants will still be able to plead guilty or not guilty. This will not change.

16.31 I considered introducing the additional pleas that are in the Criminal Code and used in the higher courts, which relate to matters such as the court not having jurisdiction or the defendant already being convicted of the offence.[24] Ultimately, these matters are better raised early in the proceeding during the case management process or as directions hearings and, if necessary, dealt with by way of an application to the court.[25] If these matters are not raised until the defendant enters a plea, multiple unnecessary court events may have already occurred.

16.32 If a defendant refuses to respond when they are required to enter a plea, this is considered 'standing mute'[26] and a plea of not guilty can be entered on the defendant's behalf. This is the current law in the higher courts and it should be the same in the Magistrates Courts. When a defendant is asked if they want to enter a plea but is not required to do so at that stage, failing to enter a plea will not be considered standing mute, because they are not *required* to enter a plea.

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[21] *Local Court (Criminal Procedure) Act 1928* (NT) s 57A(1)(b); *Criminal Procedure Act 1921* (SA) s 57A; *Joint Criminal Rules 2022* (SA) r 70.2(3).

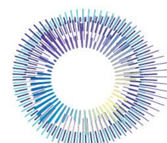
[22] *Criminal Procedure Act 2004* (WA) s 173.

[23] Magistrates' Court of Victoria, *Guilty Plea Form* (Web Page) <https://www.mcv.vic.gov.au/guilty-plea-form>.

[24] Discussed at paragraph [16.12].

[25] See Chapter 14 for further discussion on case management and when such issues should be raised, and Chapter 19 for a discussion of applications made in the Magistrates Courts.

[26] See Criminal Code (Qld) s 601.



Entering a plea

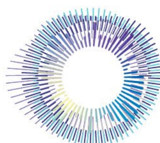
16.33 The options for entering a plea in the Magistrates Court will be clearly defined. If a person is charged with any offence that can be dealt with in the Magistrates Courts, the defendant may enter their plea by:

- Verbally stating their plea to the court. This also includes a defendant attending court by video-link or by phone, where their personal presence in the courtroom is not required.
- Writing to the court to advise of their plea (for guilty pleas only), however the defendant may still be required to attend court for sentencing.
- Using an interpreter or communication aid. This is intended to remove any doubt that a person speaking a language other than English or requiring assistance to communicate is still able to enter a plea in a way that meets their needs.
- Instructing their lawyer to enter a plea on their behalf, however the defendant must still be present at the court event (including remotely) to allow the opportunity to object to the plea being entered on their behalf.
- Any other way as permitted under the rules of the court. This will allow for future mechanisms of pleading (perhaps using technological advances that do not yet exist) to also be used by the court.

16.34 When a defendant is entering a plea and they are unrepresented, the magistrate must ask the defendant a series of questions to confirm their plea. These are consistent with the Supreme and District Court process for arraignments and require confirmation that the defendant:

- is aware of their right to get legal advice
- understands each of the charges against them
- understands that by pleading guilty they are admitting to the offence and can be sentenced for it
- has not been subject to any threat, promise or inducement to enter the plea.

16.35 Defendants, whether they are represented or not, can enter a single plea to multiple charges by entering a bulk plea. I have decided to widen the current option for bulk pleas to include self-represented defendants in the interests of efficiency and consistency in the Magistrates Courts. This approach is reasonable because self-represented defendants must, as part of the new procedures, be given information about the court process and will therefore be in a position to understand and choose to take (or not to take) this course of action.



16.36 To ensure all defendants understand the bulk plea process, whether they are represented or not, the magistrate must confirm the defendant:

- intends to enter the same plea to each charge, by way of bulk arraignment
- understands that by entering a bulk plea, this means their plea will be applied as if it is a plea to all charges before the court.

16.37 This mirrors the process in the higher court where all defendants must indicate they understand the same plea is being entered for all charges before the court.

16.38 If the magistrate is satisfied the defendant understands the plea being entered, the plea will generally be accepted. The magistrate must state in court, on the record, that the plea has been accepted and formally convict the defendant, to avoid any confusion about when this occurs. Particularly for written guilty pleas, there may be cases where a defendant indicates the plea on one date, it is received by the court on another date and the court event is a third date. For guilty pleas, the magistrate must also record that the defendant is convicted of the offence at the time the plea is accepted. This is a simpler version of the process that already occurs in the higher courts when a person is found guilty and convicted of an offence.[27] It is not to be confused with recording a conviction against the defendant, which is a penalty option under the *Penalties and Sentences Act 1992*.[28]

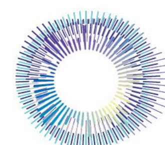
Written pleas of guilty

16.39 A defendant may choose to enter a plea of guilty in writing to any offence that can be finalised in the Magistrates Courts, unless another Act or a regulation specifically forbids written guilty pleas for that offence. This includes indictable offences that can be finalised in this court. This approach widens the offences that can currently be dealt with by written guilty plea and is intended to offer greater flexibility for defendants. The plea may be accompanied by submissions the defendant wants to make about their sentence.

16.40 All written pleas must be signed or acknowledged by the defendant, and this can be done electronically. A lawyer cannot sign a written guilty plea on behalf of a client but can assist clients with the process or submit a plea signed or acknowledged by their client. Similarly, another person cannot sign a written plea on behalf of a defendant, but can support a defendant with completing a written form, if the defendant completes the acknowledgement.

[27] This process is sometimes referred to as 'administering the allocutus' and is required under section 648 of the Criminal Code (Qld) and rule 51 of the *Criminal Practice Rules 1999*.

[28] *Penalties and Sentences Act 1992* (Qld) s 12.



16.41 The requirement for the defendant to sign or acknowledge the plea is an added protection against pleas being made by other people, even if they believe they are doing what the defendant wants. It is essentially a confirmation of the defendant being directly aware of the guilty plea and consenting to it occurring. An acknowledgement would be used in cases where the defendant cannot sign the plea for any reason and can instead acknowledge they are the defendant making the plea. This allows defendants to use technology (such as online forms) and acknowledge they are the defendant, without the need for a physical signature. As technology progresses there may be an alternative method to confirm the defendant's consent, that can be explored in the future.

16.42 The written guilty plea does not need to be sworn in front of a solicitor or justice of the peace and can be submitted to the court electronically by the defendant or their lawyer. This will allow for further online processes to be implemented in the future.

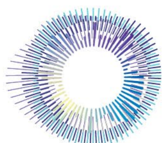
16.43 To improve awareness of the option to plead guilty in writing, it is recommended the new approved form for Court Attendance Notices contain advice about the various ways the defendant may plead guilty.

16.44 Once the court receives a written plea of guilty, it must provide a copy of the plea and any other documents received to the prosecutor. This will allow the prosecutor to prepare any sentencing submissions and to notify the victim that the matter will likely finish at the next court event. The prosecution notification can occur any way the court sees fit, including electronically. If the court does not notify the prosecutor of the written guilty plea, the matter may still proceed to sentence on the day of the court event if the magistrate decides it is appropriate.

16.45 Written pleas of guilty should be in an approved form and contain certain information to assist the court to deal with the matter. However, the magistrate will maintain discretion to accept a written guilty plea that is not in the approved form, as in New South Wales.[29] Template guilty pleas can be created to assist defendants to provide relevant information. For the court to accept the written plea, it should contain the following:

- The defendant's full name, date of birth and contact information. If the defendant has a lawyer, the lawyer's contact information should also be included.
- The charge(s) being pleaded to (by reference to the unique number on the Charge Sheet, if known).
- An acknowledgment that the defendant:
  - is aware of their right to seek legal advice and has done so if they wish; and

[29] *Criminal Procedure Act 1986* (NSW) s 182(2A).



  - enters this plea of their own free will and has not been made any promise or threatened in order to force a guilty plea.

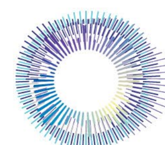
- An acknowledgment that once the court receives the written guilty plea:
  - the matter may proceed to sentence in the defendant's absence;
  - any penalty may (if applicable) include cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority; and
  - any penalties or license disqualification periods will commence from the date of sentence.
- If the defendant wants to provide them, submissions to the court for consideration during sentencing. This is not for the defendant to dispute the facts of the charge, but to share information they believe is relevant to the magistrate deciding the sentence. For example, their work history, family circumstances, any expressions of remorse and potential impacts of certain sentences. The defendant may also attach other relevant documents such as medical reports or character references.
- Any other information required under the rules of court.

16.46 The plea must be received by the court two clear business days before the scheduled court event, to allow the prosecutor to be notified. For example, a person scheduled to attend court on Thursday must submit their written guilty plea on or before Monday that week. However, the magistrate may decide to accept written guilty pleas made closer to the court event if it is in the interests of justice to do so. This requirement will be included in the rules of the court rather than in legislation, so it can be more easily changed if needed.

16.47 The requirement for the defendant to state the charge they are pleading to can be done in any way that makes it clear to the court. This can be done by marking the charges on the Court Attendance Notice or using the unique identifying number for each charge on the charge sheet. If it is not clear to the magistrate which charges are being pleaded to, then the plea will not be accepted.

16.48 The defendant will be notified of any sentence orders via the contact information provided in the written plea of guilty. If inadequate contact information is provided and the court is not satisfied the defendant can be notified of the outcome, the court may refuse to deal with the matter in the defendant's absence.

16.49 The court may also decline to accept the written guilty plea for other reasons. These will not be limited by the legislation, but include, for example, concerns the defendant did not enter the plea themselves or did not understand the consequences of what they were



doing, or circumstances where the defendant raises a lawful excuse or defence in their written sentencing submissions. There may also be other reasons why a magistrate requires the defendant to attend court to plead guilty and be sentenced.

16.50 The court may accept a guilty plea in writing, but still require the defendant to attend court for sentencing. Deciding whether to sentence the defendant in their absence is discussed further below in paragraphs [16.97]–[16.112].

16.51 It is a criminal offence for anyone to sign or acknowledge a written plea of guilty if they are not the defendant. Anyone who does this could be charged with fraud or forgery under the Criminal Code.

Withdrawing a written guilty plea

16.52 Currently, a written plea of guilty can be withdrawn by the defendant before it has been accepted by the magistrate.[30] This applies if there is an 'intimation in writing' that appears to be by or on behalf of the defendant indicating that the plea is withdrawn. I intend to maintain this approach.

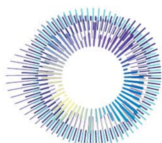
16.53 A written plea may be withdrawn by any kind of written notice signed or acknowledged by the defendant and given to the court before the plea is accepted by the magistrate in court, or by the defendant attending the next court event and advising the magistrate before they accept the plea. The defendant does not need to give any reason for why the plea is being withdrawn, and the magistrate is to disregard the written guilty plea and its contents as if it was never submitted. The written notice to withdraw the plea may be given to the court by the defendant's lawyer but must still be signed or acknowledged by the defendant.

16.54 As with the original written guilty plea, the signature or acknowledgement requirement is to ensure the defendant's awareness and consent to the withdrawal. As technology progresses, there may be other ways to ensure the defendant's awareness and consent, which should be explored.

16.55 Where the written guilty plea has already been accepted by the magistrate and therefore the defendant has been convicted of the offence, the defendant may make an application to the court to have the written guilty plea withdrawn before sentence. There is substantial case law about when a plea may be withdrawn, and it should be applied in cases such as this.[31] I do not plan to make any changes to the accepted common law for withdrawing a plea.

[30] *Justices Act 1886* (Qld) s 146A(2A).

[31] For further discussion on how to make an application during a proceeding, see Chapter 19. In practice, the application will be like the pre-trial applications made in the higher court under section 590AA Criminal Code.



Recommendations

Entering a plea

R16.1 A defendant charged with an offence that can be finalised in the Magistrates Court may give their plea to the court:

- **(a)** verbally;
- **(b)** in writing (for guilty pleas only);
- **(c)** electronically;
- **(d)** using an interpreter or communication aid;
- **(e)** by instructing their lawyer to enter a plea on their behalf (but the defendant must still be present at the court event); or
- **(f)** in another way permitted by the rules of the court.

R16.2 Where a matter contains multiple charges that can be finalised in the Magistrates Courts, a defendant can enter a 'bulk plea' to those charges.

R16.3 Before accepting a plea, a magistrate must ask an unrepresented defendant a series of 'plea confirmation questions' to confirm that the defendant:

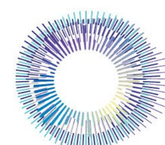
- **(a)** is aware of their right to get legal advice;
- **(b)** understands each of the charges against them;
- **(c)** understands that by pleading guilty they are admitting to the offence and can be sentenced for it; and
- **(d)** has not been subject to any threat, promise or inducement to enter the plea.

R16.4 For any defendant entering a bulk plea, whether unrepresented or not, the magistrate must confirm the defendant:

- **(a)** intends to enter the same plea to each charge, by way of bulk arraignment; and
- **(b)** understands that by entering a bulk plea, this means their plea will be applied as if it is a plea to all charges before the court.

R16.5 If the magistrate is satisfied the defendant understands the plea being entered, the magistrate must state in court, on the record, that the plea has been accepted. For guilty pleas, the magistrate must also state that the defendant is convicted of the offence on the record and in open court.

R16.6 If a defendant is required to enter a plea in court but will not plead or answer directly to the charge, the court may, if it thinks fit, enter a plea of not guilty on the defendant's behalf.



Written pleas of guilty

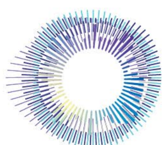
R16.7 A written plea of guilty may be entered for any offence that can be finalised in the Magistrates Courts unless prohibited by another Act. It must contain:

- **(a)** The defendant's full name, date of birth and contact information. If the defendant has a lawyer, the lawyer's contact information should also be included.
- **(b)** The charge(s) being pleaded to (by reference to the unique number on the Charge Sheet, if known).
- **(c)** An acknowledgment that the defendant is aware of their right to seek legal advice and has done so if they wish.
- **(d)** A signature or an acknowledgment from the defendant that they are the defendant charged with the offence, and that they are entering the plea voluntarily and of their own free will.
- **(e)** An acknowledgment that once the court receives the written guilty plea:
  - **(i)** the matter may proceed to sentence in the defendant's absence;
  - **(ii)** any penalty may (if applicable) include cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority; and
  - **(iii)** any penalties or license disqualification periods will commence from the date of sentence.
- **(f)** If the defendant wants to provide them, written statements to the court for consideration during sentencing. This is not for the defendant to dispute the facts of the charge, but to share any information they believe is relevant to the magistrate deciding the sentence. For example, their work history, family circumstances, any expressions of remorse and potential impacts of certain sentences. The defendant may also attach other relevant documents such as medical reports or character references.
- **(g)** Any other information required under the rules of court.

R16.8 A written plea of guilty must be received by the Magistrates Courts no later than two clear business days before the next scheduled court event. However, the magistrate may decide to accept written guilty pleas made closer to the court event if it is in the interests of justice to do so. The time frames for written pleas of guilty will be included in the rules of the court.

R16.9 Once the court receives a written plea of guilty, the court must provide the prosecutor with a copy of the plea and other documents received. However, failing to do so will not be a bar to the matter proceeding at the next court event.

R16.10 When a written plea of guilty is received by the court, the magistrate will consider whether to accept the plea at the next court event. A magistrate may decline to



accept a written plea of guilty if it does not satisfy these requirements or for another reason. The other reasons will not be limited by legislation, but may include circumstances where information provided in the written plea or at the next court event indicates that:

(a) the defendant did not enter the plea themselves;

(b) the defendant did not understand the consequences of the plea;

(c) the defendant may have a lawful excuse or defence; or

(d) the magistrate otherwise requires them to attend court.

Withdrawing a written guilty plea

R16.11 A guilty plea made in writing can be withdrawn before it is accepted by the magistrate, by any kind of written notice signed or acknowledged by the defendant and for any reason. The defendant may also attend the next court event and verbally advise the court they wish to withdraw the written plea before it is accepted by the magistrate.

Hearings

Current position

16.56 As discussed in Chapter 14, under the Justices Act, a ‘hearing’ refers to any time the matter comes before the court.[32] This means every court event, including mentions, are hearings under the Justices Act. However, in practice a hearing refers to the final determination of a matter. This section uses the term hearing as it applies to final determination of matters, which I will refer to as summary hearings.

16.57 At a summary hearing, the prosecutor must prove that the defendant is guilty of the offence charged. The defendant has an opportunity to present evidence and defend themselves against the charge. The magistrate’s role is to listen to the evidence presented by both prosecution and defence and decide whether the charge has been proven or not.

16.58 The prosecutor must prove the offence *beyond reasonable doubt*. This is known as the ‘standard of proof’ in criminal cases.

16.59 The current laws relating to hearing and deciding criminal offences in the Magistrates Court are set out in part 6, division 3 of the Justices Act. If both parties attend the summary hearing personally or their lawyers do, then the hearing can proceed and be

[32] *Shield v Topliner P/L Shield v Eaton* [2005]1 Qd R 551.

decided.[33] Generally, the Justices Act states that a hearing proceeds by having the prosecution present their evidence followed by the defendant, after which the magistrate reaches a decision.[34] It also states that, in relation to the examination and cross examination of witnesses and the order in which the parties address the magistrate about their case, the court's practice should be consistent with the approach taken in the Supreme Court.[35]

16.60 I requested data from CSQ on the number of summary hearings that take place every year. I was advised that data in relation to whether or not summary trials proceeded, and the outcomes of summary trials is not able to be reliably extracted from the courts' case management system.[36]

16.61 Anecdotal feedback from court users suggests hearings are a rare occurrence in the Magistrates Courts criminal jurisdiction, with most defendants pleading guilty at some point in the process. When matters are listed for hearing, feedback suggests that many fail to proceed on the day, either because the defendant has decided to plead guilty, or the prosecutor has decided to reduce or withdraw the charges on the morning of the hearing. However, given the large volume of charges that are filed in the Magistrates Courts, even a small percentage going to summary hearing is still thousands of hearings every year.[37]

Consultation

16.62 Feedback on the current summary hearings process suggested procedures are not working for self-represented defendants. Finalising a matter can be delayed for reasons outside the control of the defendant, especially in rural and remote jurisdictions. This is detrimental to defendants who are in custody waiting for their hearing, or defendants who have strict bail conditions. When a defendant is on remand, any delay can put them at risk of serving more time on remand than the sentence imposed if found guilty. When a defendant has bail conditions, a longer period on bail increases the chance of breaching the bail conditions (either accidentally or otherwise). Other issues include:

- Defendants do not understand their options and rights. If they are self-represented, it falls to the magistrate in court to explain this to the defendant.

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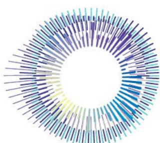
33 The hearing process is set out in *Justices Act 1886* s 146.

34 *Justices Act 1886* (Qld) s 146(1)(a). The Justices Act also states that, following the defence, the court may hear the complainant and complainant's witnesses in reply if the defendant gave evidence other than evidence about their general character.

35 *Justices Act 1886* (Qld) s 148.

36 Information provided by Court Services Queensland, 9 August 2022.

37 In the 2021–22 financial year, 359 081 charges were filed in the Magistrates Court. Up to 349 562 of those charges could be dealt with in the Magistrates Court, subject to any election: Information provided by Court Services Queensland, 9 August 2022.



- Inconsistent access to interpreters (particularly for First Nations languages). If the defendant does not speak English well enough to understand the proceedings, there should be an interpreter at every court event to facilitate a defendant's participation and understanding.
- Late disclosure of evidence, not leaving enough time for the material to be properly considered and for any issues to be identified.
- The prosecutor only receiving the case the day before or day of the summary hearing. This results in delays because issues with prosecution witnesses are not identified until the day of the summary hearing. The prosecutor may also decide to withdraw the charges on the day of the hearing, by which time the defendant will have gone to considerable expense and effort to prepare their defence and attend the hearing. This also causes inconvenience to prosecution witnesses who have attended court for the hearing.

16.63 Submissions from people in correctional centres confirmed the lack of information that is currently being provided to defendants about court processes and requested making information available to defendants easier to understand.

> *A first timer is totally bewildered as to what is actually going on at a Magistrates hearing and has no legal advice as to events or understanding of it.*
> — Prisoner

Other jurisdictions

16.64 The process for running a summary hearing in other jurisdictions is very similar to Queensland. The magistrate considers all the evidence before them and ultimately decides if the defendant is guilty or not guilty.

16.65 Where other jurisdictions differ is how they explain this process to defendants, especially unrepresented defendants. In Victoria for example, the law specifically sets out everything that is to happen in a hearing,[38] including opening statements, prosecution witnesses, defence witnesses and closing statements. In contrast, Western Australia merely states that the trial process will mirror that of a criminal trial in the Supreme Court without a jury, unless otherwise stated in the Act.[39]

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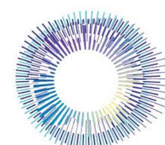
[38] *Criminal Procedure Act 2009* (Vic) pt 3.3 divs 5–7.

[39] *Criminal Procedure Act 2004* (WA) s 65.



New model

16.66 For simplicity and clarity, the final hearing to determine a matter will be known in the legislation as a 'summary hearing'.

16.67 The procedure for running a summary hearing in the Magistrates Court will generally adopt the same procedures as in the Supreme Court as per the Criminal Code and Criminal Practice Rules.[40] This is consistent with the current approach in the Justices Act and achieves consistency of process with the higher courts.

16.68 I do not intend to repeat these procedures in the new legislation. I prefer the simple drafting style of the Western Australia legislation and recommend a similar style be adopted. Therefore, the new legislation should include a provision stating the procedure to be followed in a summary hearing in the Magistrates Courts is to be the same as the procedure followed in criminal trials in the Supreme Court, except where otherwise specified in the new Act. The procedures in the Supreme Court are extensive and cover a variety of scenarios. Relevant procedures include (but are not limited to):

- the order in which the parties present their cases; and
- the examination, cross-examination and re-examination of witnesses; and
- the admission of evidence; and
- any submission that there is no case to answer.

16.69 Other related procedures in the Justices Act will be maintained. Importantly, as is currently provided for in section 148A, parties will still be able to make admissions of fact during a hearing. Other provisions allowing Magistrates to adjourn hearings or transfer a matter to a different court location will be maintained in the new criminal procedures framework but will be simplified.[41]

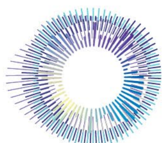
16.70 A defendant should attend the hearing of the offence with which they are charged. This is fundamental to their rights to participate in and understand the criminal charges against them, and to defend themselves against a charge. I recommend the law should clearly state that the defendant must attend a summary hearing.[42] When I say 'attend', this includes by phone or video-link.

16.71 At the conclusion of a summary hearing, the magistrate will be required to decide whether the defendant is guilty and convict the defendant of the offence or dismiss the matter (that

[40] The Criminal Practice Rules as they relate to the Queensland Magistrates Courts are also being reviewed as part of the Criminal Procedure Review in the Magistrates Courts: See Terms of reference, Appendix A.

[41] See Chapter 19 for further discussion.

[42] See for example *Criminal Procedure Act 2011* (NZ) ss 117–18.



is, find the defendant not guilty). The magistrate must state this finding in court and on the record and give reasons for this decision. The magistrate will then consider costs, if appropriate.[43]

16.72 Consistent with the guiding principles for the new legislation,[44] I recommend each of the steps in a summary hearing be able to be conducted electronically if that is approved by the magistrate in the interests of justice, and subject to rules of evidence set out in the *Evidence Act 1977*. I have discussed the use of technology in hearings further in Chapter 10.

16.73 The way hearing procedures are communicated to court users must be improved. When a self-represented defendant wants to defend the charge, there should be simple information available about how to participate in a hearing. I suggest simple factsheets should be produced to assist understanding, available in multiple languages and formats.

16.74 I acknowledge the many court users who feel the process to get to hearing takes too long and is a barrier to accessing justice, and I don't disagree with them. I have discussed in Chapter 14 my recommendations for addressing case delays.

Recommendations

R16.12 The final hearing to determine a criminal matter in the Magistrates Courts should be called a 'summary hearing'.

R16.13 The new framework for criminal procedure laws applying in Queensland's Magistrates Courts should state that the procedure to be followed in a summary hearing in the Magistrates Courts is to be the same as the procedure followed in criminal trials in the Supreme Court. This will include (but is not limited to) procedures about:

- **(a)** the order in which the parties present their cases; and
- **(b)** the examination, cross-examination and re-examination of witnesses; and
- **(c)** the admission of evidence; and
- **(d)** any submission that there is no case to answer.

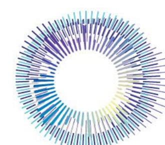
R16.14 Current provisions for admissions of fact at a summary hearing should be maintained.

R16.15 A defendant must attend a summary hearing in person (including remotely).

R16.16 All parts of a summary hearing may be conducted electronically if a magistrate approves this in the interests of justice, subject to evidentiary laws already set out in the *Evidence Act 1977*.

[43] Costs are discussed in Chapter 18.

[44] See Chapter 9 for further discussion.



R16.17 At the conclusion of the hearing, the magistrate must find the defendant guilty and convict the defendant of the offence or dismiss the offence (by finding the defendant not guilty), state that finding on the record in court and give reasons for the decision.

Procedure in absence of one or more parties

Current position

16.75 When a criminal offence can be finalised in the Magistrates Court, it can sometimes be dealt with in the absence of one or both parties. This does not apply to matters that must be committed to a higher court. The Justices Act already covers what may happen if the prosecutor or defendant does not attend a court event.[45] I intend to cover these scenarios in the new legislation as well, to ensure matters are not languishing in the Magistrates Courts. Any victims or persons affected by the offences must see justice done as effectively and efficiently as possible.

16.76 Currently if the prosecutor does not attend court for a simple offence but was aware of the court date, and the defendant does attend court, then the court shall dismiss the charge unless it is proper to adjourn the matter to another date.[46]

- If the defendant does not attend court and was aware of the court date, the court has four options:
- Proceed to hear and decide the case without the defendant present.
- If satisfied the complaint is substantiated on sworn evidence, issue a warrant for the defendant to be brought before the court and adjourn the hearing until the defendant is before the court.
- If the defendant has already pleaded guilty in writing, proceed to sentence under the written plea provisions in section 146A of the Justices Act.
- Adjourn the hearing to another date.[47]

16.77 In cases where the prosecutor is a police officer or public officer and the charge is a simple offence, section 142A permits a magistrate to deal with the matter in the defendant's absence by proceeding on the facts and particulars as they are provided by the prosecutor (in the original complaint or stated in court), rather than calling witnesses to give evidence under oath. The magistrate will make a decision based on the information before the court, which can also include relevant information brought to its

[45] *Justices Act 1886* (Qld) pt 6 divs 2–3.

[46] *Justices Act 1886* (Qld) s 141.

[47] *Justices Act 1886* (Qld) ss 142(1), 142A(4), (15), 143, 147.

notice by the complainant or defendant about the circumstances of the matter or any penalty.[48]

16.78 A defendant cannot be sentenced in their absence if the court considers the defendant should be sentenced to imprisonment or subject to any licence, registration, certificate, permit or other authority being cancelled, suspended or disqualified. The court must first adjourn the hearing to allow the defendant to attend court and make submissions about the appropriate sentence. A notice of adjournment must be given to the defendant in person, by post, or electronically. If the defendant does not appear at the next court date as set out in the notice, then the magistrate may proceed to sentence. There are no limits on the sentence that can be imposed following an adjournment.[49]

16.79 I have viewed this adjournment notice in its current state and find it defective.[50] It does not tell the defendant that their driver's licence may be disqualified if they do not attend court and that the disqualification will run from the following court date, meaning the defendant could be unknowingly driving on a disqualified licence after the adjourned court date.

16.80 The defendant must be notified of any orders made in the defendant's absence (including a sentence) by the court registry either in person, by post or by email.[51]

Consultation

16.81 The Consultation Paper asked if court matters should ever be dealt with in the defendant's absence and if there should be any limitations on sentences handed down without the defendant being present.

16.82 The overwhelming feedback from respondents was that there are times when proceeding without the defendant is appropriate, particularly if the defendant is aware of the court event and fails to attend, has a lawyer acting on their behalf or has already pleaded guilty in writing and is willing to accept the penalty of the court. Given the costs associated with prosecutions and court proceedings, drawing out proceedings for relatively minor offences is not in the public interest.

16.83 There was also support for allowing defendants who are legally represented to be excused from attending court events where possible, as the lawyer is acting on instructions from the defendant and ensures the defendant is fully aware of what is happening.

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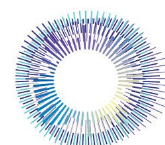
[48] *Justices Act 1886* (Qld) s 142A(1)–(5), (13).

[49] *Justices Act 1886* (Qld) ss 142(2)–(5B), 142A(6)–(9B).

[50] This form is not publicly available and is used by Magistrates Courts staff.

[51] *Justices Act 1886* (Qld) ss 142A(10)–(10A), 146A(3F), 150(3).



16.84 The consensus among respondents was that the matter should be able to be finalised without the defendant if the defendant was made aware of the court event and the consequences of not attending, and the offence is relatively minor. Serious offences should still require the defendant to attend court.

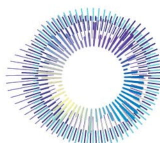
16.85 It was also submitted that defendants should not be sentenced to imprisonment or a significant penalty (such as licence disqualification, probation, or large fines) in their absence or where they are not properly notified of the court event. In such cases, it was suggested the magistrate should adjourn the sentencing for the defendant to be brought before the court, either willingly or by issuing a warrant. Multiple respondents supported the approach currently adopted in Tasmania and Victoria as something that should be implemented in Queensland (discussed further in the next section).

Other jurisdictions

16.86 Every summary jurisdiction in Australia has procedures to be followed if the prosecutor or defendant does not attend court. The procedures are like Queensland in their effect but in some jurisdictions, such as Western Australia, the relevant laws are written in a simpler and more straightforward way.

16.87 However, the laws throughout Australia vary when it comes to the limitations on sentence orders that can be made without the defendant. The limitations on sentence are set out in the table below.

State/Territory	Sentence limits on absent defendants
Victoria *Criminal Procedure Act 2009* s 87	- No imprisonment - No individual fine exceeding 20 penalty units or total fines exceeding 50 penalty units - Total orders for restitution or compensation must not exceed $2,000
New South Wales *Crimes (Sentencing Procedure) Act 1999* s 25	- No imprisonment - No intensive correction order, community correction order, conditional release order, non-association or place restriction order or intervention program order
South Australia *Criminal Procedure Act 1921* s 62C	- No licence disqualification - No imprisonment Unless the court has first adjourned the hearing to allow the defendant to attend and make submissions on the penalty.

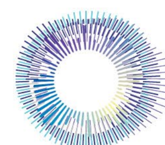


Tasmania *Magistrates Court (Criminal and General Division) Act 2019* s 28 (not in force)	Under the new 2019 Act, the court may only make the following orders: - Fine, with or without recording a conviction - Conviction recorded and discharged - Dismissal of charge without recording a conviction
Australian Capital Territory *Magistrates Court Act 1930* s 110(7)	- No imprisonment
Northern Territory *Local Court (Criminal Procedure) Act 1928* s 57B	Where the defendant has not attended because they pleaded guilty in writing, the court may not: - Impose a sentence of imprisonment - Cancel or suspend a licence held by the defendant or otherwise disqualify him from holding a licence - Treat the offence as other than a first offence unless the Court is satisfied upon evidence that the defendant has been previously found guilty of an offence - Fail to allow a reasonable time for payment of money - Order the defendant to pay witness costs.
Western Australia *Criminal Procedure Act 2004* s 56	No licence disqualifications unless: - It is a mandatory penalty; or - The defendant already has a disqualified licence; or - The disqualification period does not start for 7 days after the date of the sentence; or - The defendant is compelled to attend court so the order can be made in their presence.

New model

16.88 The following new model will apply to all offences that can be finalised in the Magistrates Courts, unless the defendant has a right of election which has not yet been exercised.[52] The magistrate may use these provisions at any court event — that is, the matter does

[52] Some charges allow the defendant to elect between having their charge finalised in the Magistrates Court or the higher courts. Until that choice is made, the Magistrates Court may not have jurisdiction to finalise the matter.



not need to be listed for a summary hearing, and the provisions will also apply to mentions or other court events that are not attended by the parties. I recommend the style of the Western Australian legislation be followed, due to its simplicity.[53]

Procedure for where the prosecutor does not attend court

16.89 I recommend that where a prosecutor does not attend court for a matter that can be finalised in the Magistrates Courts, and the court is satisfied the prosecutor was given adequate notice of the event, the magistrate maintain their current power to either adjourn the matter to another date (and notify the parties) or strike out the charge.[54] The court will maintain the power to order costs against a prosecutor who fails to appear.[55]

16.90 If the case is adjourned and the prosecutor fails to attend at the next court date, then the magistrate must strike out the charge unless there is good cause not to do so.

Procedure for where the defendant does not attend court

16.91 If the court is satisfied that a defendant has been given notice of a court event and the defendant does not attend, the magistrate will have the following options:

- Proceed to hear and decide the case without the defendant present.[56]
- Issue a warrant for the defendant to be arrested and brought before the court. The current requirement for the magistrate to be satisfied the charge has been substantiated on sworn evidence will be removed, and a warrant may be issued on the basis that the defendant did not attend court, if properly served or otherwise aware of the court date. The requirements for warrants generally are discussed further in Chapter 19.
- If the defendant has already pleaded guilty, proceed to sentence.
- Adjourn the case to another date without issuing a warrant. The magistrate may enlarge the defendant's bail, enlarge the court attendance notice or allow the defendant to go at large, depending on the circumstances. A notice must be sent to the defendant notifying them of the requirement to appear at the next court event and the consequences for failing to do so.

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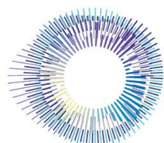
53 *Criminal Procedure Act 2004* (WA) ss 52–6.

54 See further Chapter 19 as to the effect of striking out proceedings.

55 As per current section 147 *Justices Act 1886* (Qld). See Chapter 18 as to costs.

56 As per current section 142A *Justices Act 1886* (Qld).



16.92 These options will also apply if the defendant was present at the beginning of the hearing but has voluntarily left the hearing or otherwise been removed for disrupting the proceedings.[57]

16.93 There will be provisions for how the magistrate may be satisfied the prosecutor or defendant is aware of the court event, which will include accepting proof of service of a court attendance notice or police notice to appear, accepting submissions from the parties or reviewing the court file to see what actions the court registry has taken (in cases where the registry is required to send out notices).

16.94 The new model will maintain the approach taken in section 142A of the Justices Act, which allows for public officers and police officers to present their case without having to call witnesses. However, this should be expanded to include all prosecutors, public and private. This approach gives the court the ability to deal with a matter as efficiently as possible. This may be appropriate for some private prosecutions, given they will have been through an initial review by a magistrate.[58] However, the magistrate will maintain a discretion about whether this is appropriate, which is decided based on the circumstances of each individual case.

16.95 It is critical defendants are fully informed about the court process and their rights, so they may participate meaningfully. This includes being informed about upcoming court dates and what will happen, and being able to attend and participate on that date. The court should not hear a matter where the defendant has not been made aware of the court date. However, it is also important that the court be able to finalise criminal matters efficiently, especially where they are about less serious offences or result in less serious penalties. Sometimes, when a defendant does not appear, it is more appropriate for a court to adjourn the matter or issue a warrant for the defendant's arrest. However, on other occasions, it is appropriate that the court proceeds to finalise the matter in the defendant's absence. These provisions, combined with the limitations on sentencing discussed below, strike an appropriate balance.

Procedure for hearing matter in absence of both the prosecutor and defendant

16.96 Very rarely in the Magistrates Courts, there are occasions when neither prosecutor nor defendant attends the court event, without prior explanation. In such cases, the provisions for proceeding in the absence of the prosecutor are to take effect first. The matter will either be struck out that day or adjourned, and if adjourned then the prosecutor and defendant notified of the next court date. Given the prosecutor is the one bringing the charges, the onus is on them to attend court and progress the matter. If the prosecutor

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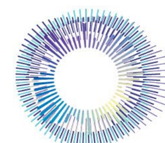
[57] The powers of a magistrate to exclude people from proceedings are discussed further in Chapter 19.

[58] See Chapter 13 for further information on private prosecutions.



attends the next court event but the defendant does not, the matter proceeds under the provisions covering the defendant's absence, discussed in paragraph [16.91] above.

Sentencing in a defendant's absence

16.97 The scope of this Review does not extend to sentence orders. However, the method of the defendant appearing at court for their sentence is within scope.

16.98 The question of sentencing a person in their absence is different to running a hearing in their absence. A court may hear and decide a matter without the defendant being present. However, after hearing the evidence, the magistrate may decide the defendant should be present in court for sentencing (for example, because they are facing a significant penalty). Currently, a penalty of imprisonment or that affects a person's licence cannot be imposed until the defendant has been given an opportunity to appear.

16.99 The starting point in the Magistrates Courts (and other courts) is that a defendant should be present when they are sentenced. This can have a deterrent effect. However, it is also reasonable to empower the court to operate efficiently and finalise appropriate matters in a defendant's absence. For example, this can be suitable for less serious charges or for offences resulting in a lesser penalty, such as a fine.

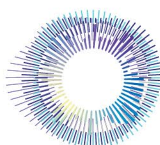
16.100 It is appropriate to limit the sentences that can be imposed in a defendant's absence. In particular, a sentence of imprisonment is a significant penalty. Procedural fairness to the defendant requires any significant penalty to be imposed in the defendant's presence so they have the opportunity to make submissions to the court, and so they are aware of the penalty, what it relates to and the magistrate's reasons for imposing it.[59]

16.101 Accordingly, I recommend Magistrates not be allowed to sentence a defendant absent from court to:

- Imprisonment, including suspended sentences and Intensive Corrections Orders.
- Orders relating to the cancellation, suspension or disqualification of a licence, registration, certificate, permit or other authority, unless the defendant has been given notice this can occur if they do not attend court.

16.102 Where a matter is dealt with in a defendant's absence and it becomes apparent that there is the possibility of the defendant being sentenced to imprisonment or an order relating to a licence or similar, the matter must be adjourned, and the defendant must be sent a notice requiring them to attend the next court date. The notice must explain why the defendant is required to attend and explicitly state the risks of not attending, including that orders about a licence or similar may be made in their absence and that a warrant

[59] See Chapter 19 for further discussion of appeals and time frames.



may be issued for their arrest. It will be for the magistrate to identify which penalty the defendant is at risk of, to ensure defendants are receiving targeted notices about the penalty they are facing which requires attendance at court. In particular, the notice should not be generic to avoid any misunderstanding about when a defendant is at risk of being sentenced to imprisonment.

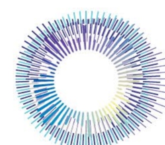
16.103 Notices can also be used where the magistrate is considering making a compensation or forfeiture order but requires the defendant's attendance at court before making the order. However, notices are not *required* for these orders to be made ex parte. Among other things, these orders do not require an assessment of a defendant's ability to pay or comply with the order and are already subject to general requirements that they be reasonable in the circumstances. Further, some forfeiture orders are made automatically after a conviction. However, it would be reasonable for information about these types of orders to be provided on other material available to a defendant, such as the form used for submitting a written plea of guilty.

16.104 If the defendant fails to attend the next court event, the magistrate may proceed to sentence in their absence. The magistrate may now impose a sentence relating to a licence, registration, certificate, permit or other authority, but still may not impose a sentence of imprisonment. Where the appropriate sentence is imprisonment, a defendant cannot be sentenced in their absence and a warrant must be issued. However, the magistrate will also retain a discretion to adjourn the matter further if it is appropriate in the circumstances.

16.105 Where the prosecutor can demonstrate to the magistrate that the defendant has already been made aware that their license (or similar) may be restricted on the court date if they do not attend, the magistrate can dispense with the notice requirement in the previous paragraph and proceed immediately to sentence. This will encourage prosecutorial authorities to give proper notice to defendants in advance and limit the adjournments in a matter. For example, it may be an option for this information to be included on a court attendance notice. A defendant can also acknowledge they are aware of this in a written plea of guilty.

16.106 I was initially inclined to adopt a similar provision to Western Australia, which allows the court to sentence a defendant to a license penalty without first adjourning and sending a notice. There, the defendant is notified of a disqualification or restriction after it is imposed by the court, but it will not take effect until 7 days after the date of sentence.[60] This allows time for the defendant to be notified of the penalty and lodge an appeal if they choose. It also addresses the risk of defendants driving on a disqualified license in the period

[60] *Criminal Procedure Act 2004* (WA) s 56(2)(b)(i).



between when the court orders the disqualification and when the defendant is notified. In Queensland, if the defendant is caught driving before they receive the notice of disqualification, they are still liable for further criminal charges for driving unlicensed, regardless of whether they knew their license was disqualified or not.

16.107 However, I have concluded that delaying a sentence order from taking effect is not criminal procedure and is more appropriately a sentencing provision, meaning I cannot make this recommendation as part of this Review. However, if in the future certain sentence orders are able to be given a delayed start date, I suggest penalties relating to licenses made in the absence of a defendant would be a suitable option.

16.108 The method for notifying defendants of their license status is an area suitable for technological innovation to make sure notifications are received quickly.

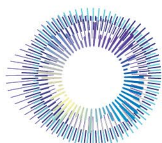
16.109 If the magistrate sentences a defendant to a fine in the defendant's absence, there should not be any limits on the fine that could be imposed. The *Penalties and Sentences Act 1992* puts financial limitations on Magistrates and requires Magistrates to consider the financial circumstances of the defendant before issuing a fine. [61] Additionally, there should not be any limits on recording a conviction in a person's absence. This is a common component of sentencing and limiting this would significantly limit the matters that could be dealt with in a defendant's absence.

16.110 Where a magistrate has sentenced a defendant to pay a monetary order (including a fine, compensation, restitution or costs order) in their absence, the order must be immediately referred to the State Penalties Enforcement Registry (SPER). However, a defendant sentenced in their absence must be given time to pay before any enforcement action can be taken against them. This is to provide time for a defendant to be notified of the penalty and to take any action, including filing an appeal or applying for a rehearing. The enforcement of monetary orders is discussed further in Chapter 18.

16.111 By imposing sentencing limitations, I am aware this limits the number of offences that can be sentenced without the defendant being present. However, I believe this limitation is appropriate. Where possible a defendant should be present for their sentence, especially for more serious offences. However, in cases where a defendant is charged with an offence that can be finalised in the Magistrates Courts and the penalty is one that is appropriate to impose in their absence, the case should not languish further in the Magistrates Courts.

16.112 After sentencing has occurred, the court registry must give notice of the sentence to the defendant, including whether any monetary orders payable have been referred to SPER.

[61] *Penalties and Sentences Act 1992* (Qld) ss 46, 48.



This notice is necessary to make sure that the defendant is aware of how the matter was dealt with in their absence.

Recommendations

R16.18 A matter will be able to proceed in the absence of one or more parties where the offence (or offences) can be finalised in the Magistrates Courts, unless the defendant has a right of election which has not yet been exercised.

R16.19 If a prosecutor does not attend a court event, and the court is satisfied the prosecutor was given adequate notice of the court event:

- **(a)** the magistrate may adjourn the matter to another court date and notify the parties, or strike out the charge and order costs; and
- **(b)** if the matter is adjourned and the prosecutor does not appear at the adjourned court date, the magistrate must strike out the charge unless there is good cause not to do so.

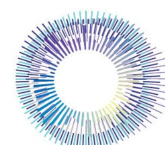
R16.20 If a defendant does not attend a court event, and the court is satisfied the defendant has been given adequate notice of the date, the court may:

- **(a)** proceed to hear and decide the case without the defendant present;
- **(b)** issue a warrant for the defendant to be arrested and brought before the court;
- **(c)** if the defendant has already pleaded guilty, proceed to sentence; or
- **(d)** adjourn the case to another date without issuing a warrant and send the defendant a notice about the requirement to appear at the next court event and the consequences for failing to do so.

R16.21 Information about whether a party was aware of a court date may include:

- **(a)** proof of service of a court attendance notice or police notice to appear;
- **(b)** submissions from the parties;
- **(c)** information on the court file about actions taken by the registry, such as sending a notice about the court event.

R16.22 When a defendant does not attend court and the magistrate proceeds to hear and decide the case in the defendant's absence, a hearing may be conducted based on the facts and particulars provided by the prosecutor in the original notice, stated in court or provided in other material presented to the court, rather than by calling witnesses to give evidence. The magistrate has a discretion about whether it is appropriate to proceed on this basis, which is decided based on the circumstances of each case. This may apply to all prosecutors, not only public and police officers.



R16.23 If neither party attends a court event, the provisions for proceeding in the absence of the prosecutor are to take effect first.

Sentencing in the defendant's absence

R16.24 Where a defendant has been found guilty or has pleaded guilty to an offence that can be finalised in the Magistrates Courts but is absent from court at the time of sentencing, the court may proceed to sentence the defendant in their absence.

R16.25 A defendant absent from court may not be sentenced to:

(a) imprisonment, including a suspended sentence or intensive correction order; or

(b) an order cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority.

R16.26 If the court considers that a sentence of imprisonment or an order relating to a licence or similar (described in Recommendation 16.25) may or must be given:

(a) the matter must be adjourned to a later date; and

(b) the defendant must be sent a notice requiring them to attend court on the adjourned date. The notice must explain the reason their attendance is required and the possible outcomes if they do not attend on the day.

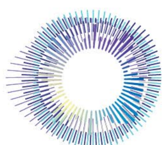
R16.27 If a matter has been adjourned in accordance with Recommendation 16.26 and the defendant does not attend at the next court date:

(a) a sentence of imprisonment may not be imposed in the defendant's absence and a warrant will be issued for the defendant's arrest unless the magistrate considers that it is appropriate to adjourn the matter further;

(b) an order cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority may be imposed in the defendant's absence.

R16.28 The notice requirements in Recommendation 16.26 as they relate to orders about licenses or similar may be dispensed with at the magistrate's discretion, if the prosecutor can show the defendant has already been notified such an order may be made in their absence or has already consented to this in a written plea of guilty.

R16.29 If a defendant is sentenced in their absence, they must be notified by the court that sentencing has taken place and given information about the sentence imposed.



Rehearing a matter decided in a party's absence

Current position

16.113 When a matter has been heard and decided without the defendant being present (but not following a written plea of guilty), the clerk of the court, complainant or defendant can apply to the Magistrates Court within two months for a rehearing. The magistrate may grant the application to rehear 'for such reason as it thinks proper', which is not further defined.[62]

16.114 Where a matter has been dismissed because the prosecutor was not present, the prosecutor has no right to apply to rehear the matter.[63] In practice, the prosecutor will usually commence new proceedings if they wish to continue the prosecution. This can be problematic if the time limit for commencing a proceeding has passed, meaning the prosecutor cannot start new proceedings.

16.115 The District Court has considered how well the current rehearing provisions are working, with Judge Magill stating the following about section 142A of the Justices Act:

> Subsection (12) is quite limited; there is a relatively short period of 28 days within which an application for a rehearing can be made, and so far as I can see no power in anyone to extend that period, for whatever reason. Further, it runs from the date of determination of the complaint by the court, not the date upon which notice of it is actually received by the defendant. Accordingly the time for applying for a rehearing could easily expire before the need to apply even came to the attention of a defendant. Because of the absence of any provision for an extension of the 28 day period, the subsection appears to me to have a capacity to work an injustice in particular cases, perhaps unusual cases but obviously cases which will be met with from time to time. Nevertheless, this is a matter for parliament; there is nothing I can do about it.[64]

16.116 Since the above decision was handed down in 2006, sections 142 and 142A JA were amended in 2008[65] to extend the time frame from 28 days to two months. This did not change the inability to extend that time frame further if appropriate.

16.117 When a rehearing is granted, the original conviction or order will no longer have effect. On rehearing a matter, the court has the same powers and follows the same procedures as for an original hearing. If the party seeking the rehearing does not attend the rehearing date, then the original order that was made in the defendant's absence can be reinstated.[66]

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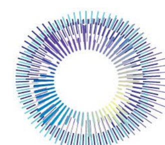
[62] *Justices Act 1886* (Qld) ss 142(6), 142A(12).

[63] *Justices Act 1886* (Qld) s 141.

[64] *Guy v McLoughlin* [2006] QDC 17, [14].

[65] *Justice and Other Legislation Amendment Act 2008* (Qld) ss 71–2.

[66] *Justices Act 1886* ss 142(7)–(8), 142A(12A)–(12B).



Other jurisdictions

16.118 Most jurisdictions allow defendants to apply to rehear matters that were finalised in their absence, for example where the defendant can show they did not know about their court date or had a good reason for failing to attend.[67] This reflects basic procedural fairness.

16.119 Where the prosecutor does not attend court, the Northern Territory[68] and Western Australia[69] allow prosecutors to apply to rehear a proceeding which was struck out in their absence.

New model

16.120 I recommend the new criminal procedure laws provide that any party to a charge finalised in their absence have the right to apply to the Magistrates Court for a rehearing. In terms of drafting, I prefer the simple style of the rehearing provisions in Western Australia,[70] and recommend a similar style be adopted in Queensland.

16.121 If a party makes a rehearing application, they must give a copy of the application to the other party after it has been filed with the court. The application must be decided in open court so both parties have the option to attend and be heard before the magistrate makes a decision.

16.122 The defendant's current right to apply within two months of the charge being finalised will be maintained, and the prosecutor will have one month to apply for a rehearing where the charge was dealt with in their absence. The prosecutor has a shorter time frame because of their role in court proceedings and general obligation to attend court and progress charges.

16.123 The time frames to apply for a rehearing will be in the legislation. The magistrate will also have discretion to allow rehearing applications out of time, for any reason they think appropriate.

16.124 The application must establish the grounds for rehearing. It will be at the discretion of the magistrate to grant the rehearing application. Grounds may include that the applicant:

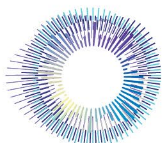
- did not receive notice of the court date where the matter was decided in their absence
- did not receive sufficient notice of the court date to be able to attend

[67] Eg *Criminal Procedure Act 2004* (WA) s 71(2); *Criminal Procedure Act 2009* (Vic) pt 3.4; *Criminal Procedure Act 1921* (SA) s 76A.

[68] *Local Court (Criminal Procedure) Act* 1928 (NT) s 63A(1A).

[69] *Criminal Procedure Act 2004* (WA) s 71(1).

[70] *Criminal Procedure Act 2004* (WA) ss 70–2.



- did receive notice of the court date but failed to attend for a good reason, which is to be detailed in the rehearing application
- has another good reason.

16.125 If the court is the one to identify there is a need for a rehearing, there is a current ability for the clerk of the court (the registrar) to apply to the magistrate for a rehearing and attend the rehearing.[71] It is unnecessary to maintain this in the new criminal procedure legislation because such matters will be better dealt with by the power of the court to reopen finalised matters, discussed further in Chapter 19.

16.126 As is currently the case, where a rehearing application has been granted the original convictions or orders will no longer have effect, and at the rehearing the court will have the same powers and procedures as at the original hearing. If the matter is listed for rehearing and the applicant fails to attend again, the magistrate may uphold the original convictions or orders. All parties must be notified of the rehearing outcome.

16.127 A party cannot apply for a rehearing of a matter that has already been the subject of a decided appeal by that party to the District Court. Similarly, if there are simultaneous applications for a rehearing and an appeal to the District Court, the appeal cannot be decided until the rehearing application has been finalised. In practice, which approach is taken will be a matter for the parties.

Recommendations

R16.30 Where a matter was finalised in a party's absence, that party may apply to the Magistrates Court for a rehearing. The application may be granted at the magistrate's discretion, and the grounds for granting the application may include that the party:

(a) did not receive notice of the court date where the matter was decided in their absence; or

(b) did not receive sufficient notice of the court date to be able to attend; or

(c) did receive notice of the court date but failed to attend for a good reason, which is to be detailed in the rehearing application; or

(d) other reasons in the interests of justice.

R16.31 An application for a rehearing must be:

[71] *Justices Act 1886* (Qld) ss 142(6), (8), 142A(12), (12B).

(a) made within two months of the matter being finalised for the defendant or one month for the prosecutor, but in either case can be allowed at a later time if a magistrate considers it appropriate;

(b) filed with the court, and a copy must be given to the other party;

(c) heard in open court and with the parties permitted to attend and make submissions; and

(d) granted at the discretion of the magistrate.

R16.32 If an application for rehearing is granted, the original convictions and order will no longer have effect, and at the rehearing the court will have the same powers and procedures as at the original hearing. If the applicant does not attend the rehearing, the original convictions or orders may remain in place.

R16.33 All parties must be notified of the outcome of the rehearing application.

R16.34 If an application for a rehearing and an appeal to the District Court are ongoing at the same time, the appeal cannot be decided until the application for rehearing has been finalised.

R16.35 A party cannot apply for a rehearing of a matter that has already been the subject of a decided appeal by that party to the District Court.

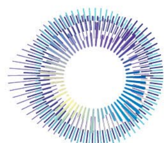
Human rights considerations

Pleas

16.128 Ensuring defendants can enter a plea of their own free will is one of the most basic rights in the criminal proceeding. The criminal procedures for entering a plea must ensure the defendant understands the nature of the plea and the consequences of entering that plea. Where the defendant is not represented by a lawyer, this obligation to ensure understanding is particularly crucial and falls to the court.

16.129 This naturally includes the magistrate accepting the plea; however, it can also include improving the information provided to defendants before their arrival at court, including other ways they can finalise the charge without attending court. Whilst the ability to enter a plea has not changed, expanding the ways a defendant can submit their plea will meet the specific needs of court users and ensure matters progress as efficiently as possible. This is consistent with their right to be tried without unreasonable delay, which is in the interests of all parties, victims and the community at large.

16.130 The proposed new model makes a number of changes aimed at facilitating a plea of guilty where appropriate (noting that the majority of matters in the Magistrates Court are finalised with a plea of guilty). This is desirable because if a defendant intends to plead guilty to an offence, it is often in their interests to have the matter finalised as soon as possible for a number of reasons (for example, to minimise the time spent on remand).



16.131 The proposed changes will therefore allow a defendant to submit a plea with ease, but also with appropriate safeguards to ensure the plea is not being submitted without their consent understanding.

Hearings

16.132 For the defendant to participate meaningfully in the criminal process, they must understand the process along with their rights and choices. I have recommended the summary hearing process be clearly set out and communicated to defendants in a way they can understand, precisely so defendants can make informed decisions about how they want to be involved in the process.

16.133 A number of the proposals protect the human right to a fair hearing, recognised in section 31 of the Human Rights Act. The right is engaged in the criminal context as soon as a person has been charged with a criminal offence.

16.134 This right is broad and is modelled on the Victorian *Charter of Human Rights and Responsibilities Act 2006*.[72]

16.135 One requirement for a fair hearing is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system is operating in a predictable way for the defendant. The provisions of the new proposed model that are aimed at simplifying the legislation promote the right to a fair hearing by ensuring that this predictability is enhanced to the greatest extent possible.

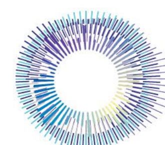
16.136 In particular, the current proposals are aimed at ensuring:

- defendants understand their rights and options
- magistrates support a defendant's understanding of their rights and options, particularly when they are self-represented
- criminal procedure promotes consistency and predictability for court users.

16.137 The recommendations to improve the communication of hearing procedures increases accessibility for self-represented defendants. A defendant has the right to defend themselves personally if they wish, and to have free assistance of interpreter and communication tools which meet their needs. The new procedures will support people who exercise those rights.[73]

[72] *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 24.

[73] *Human Rights Act 2019* ss 32(2)(d), (j), (k).



16.138 While deciding a matter in the defendant's absence should naturally raise procedural fairness questions, this is addressed by only proceeding where the court is satisfied the defendant is aware the court event is scheduled to take place that day.

16.139 Where the matter was decided without the defendant, the power to rehear matters ensures that where a defendant was not aware of the hearing date (but the court thought they were), they have the option to apply to the court to have the matter considered again with the defendant participating, in accordance with their rights.

16.140 The limitation on sentences that can be imposed without the defendant being present ensures the defendant must be present for penalties that will have a significant impact on their rights, particularly freedom of movement and right to liberty and security of person. There are some criminal sentences which limit these rights; therefore, it is appropriate for the defendant to be present to make submissions and hear the reasons for these sentences when the magistrate makes their decision.

16.141 If the defendant still feels the magistrate has not made a procedurally fair decision, the defendant has the right to appeal the magistrate's decision to the District Court, which is discussed further in Chapter 19. This is consistent with their rights under the *Human Rights Act 2019*, which entitles defendants to an appeal process to a higher court.[74]

[74] *Human Rights Act 2019* (Qld) s 32(4).

CHAPTER 17: COMMITTAL PROCEEDINGS

Introduction

17.1 Each court has its own jurisdiction which sets out the offences it can hear and decide.[1] Some offences are too serious to be finalised in the Magistrates Courts. When this happens, a committal proceeding is required to transfer the charge from a Magistrates Court to a higher court to be dealt with and finalised.

17.2 The term 'committal' generally describes the administrative process used by the Magistrates Courts to consider if there is sufficient evidence to move the charge (an 'indictable offence') to either the District or Supreme Court of Queensland.

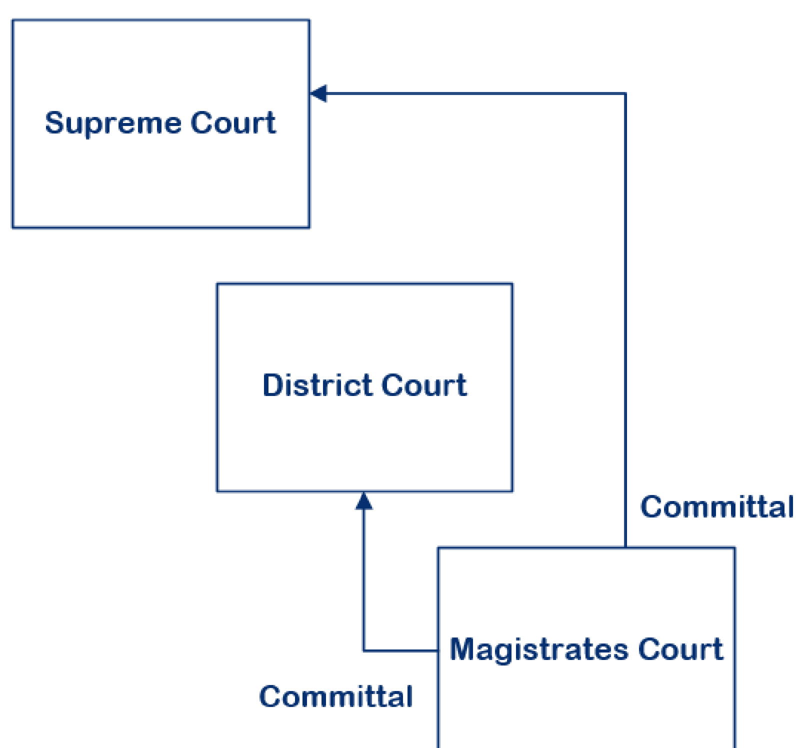


Diagram 17.1: The court hierarchy and committal process

17.3 While part of the criminal justice process, committal proceedings are administrative, rather than judicial in nature. The High Court stated '[i]t has consistently been held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function'.[2]

[1] Jurisdiction of the court is discussed further in Chapters 2 and 11.

[2] *Grassby v The Queen* (1989) 168 CLR 1, 11 (Dawson J).

17.4 Traditionally, committal proceedings involved hearing some or all the evidence in a matter by examining and cross-examining witnesses. The purpose of a committal proceeding was to determine whether there was sufficient evidence to proceed against a defendant for an indictable offence, and to inform the defendant of the prosecution case. Among other things, the committal presented an opportunity to test or refute evidence, filter out weak cases and clarify issues before trial.[3]

17.5 The committals process was significantly reformed in 2010 with the Moynihan Report and subsequent passing of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (CCJRMA Act). Those reforms were designed to streamline and consolidate criminal justice practice and procedure, including the way committal proceedings were conducted. Among other things, it was intended that committals should generally take place administratively and based on written statements by witnesses, with a witness called to give evidence or be cross-examined only when justified.[4]

17.6 In streamlining the committals process, the CCJRMA Act introduced two key amendments. The first was greater restrictions on when a prosecution witness can be cross-examined, and the second was the creation of an entirely administrative process for committing charges, known as the 'registry committal'. Today, most committals take place as a registry committal.

17.7 This Review will not be removing or significantly changing the committals system or undoing the amendments made by the CCJRMA Act. The terms of reference for this Report exclude an evaluation of the CCJRMA Act, but do allow for consideration of any process or procedural changes that may improve committals in Queensland.

17.8 The transitional provisions of the CCJRMA Act, which meant the amendments did not apply to a proceeding started before 1 November 2010, will also be maintained.[5]

The current position

Committals in Queensland

17.9 In Queensland, proceedings relating to committals are governed predominantly by part 5, divisions 5 through 9 of the Justices Act.

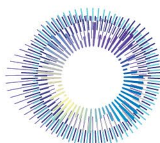
17.10 There are generally three ways a charge can be committed:

- registry committal

[3] Martin Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 183.

[4] Ibid 183–4; Explanatory Note, Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010, 4–8.

[5] *Justices Act 1886* (Qld) s 277.



- full hand-up committal
- hand-up committal with cross-examination.

17.11 Each of these committal types have unique features and can have variations in how they operate. For the purposes of this Report, I discuss the more traditional practices and procedures relating to each in further detail below.

17.12 The Justices Act includes a test for determining whether a charge should be committed, which was maintained by the CCJRMA and is commonly referred to as the 'committal test'. Specifically, section 104 of the Justices Act requires a magistrate to consider if the evidence is sufficient to put the defendant on trial for an indictable offence.[6] This has been interpreted to require that 'a reasonable jury properly directed according to law could convict the accused of the offence charged'.[7] This is also sometimes referred to simply as a 'prima facie' case.

17.13 While a committal magistrate is not exercising a judicial function and not making a judicial decision, the magistrate is nevertheless bound to act justly and fairly.[8]

17.14 If the magistrate does not consider there is sufficient evidence to put the defendant on trial, then the defendant must be discharged.[9] If a magistrate decides to commit a matter, the magistrate may call upon the defendant to enter a plea (should they wish) and warn the defendant about alibi evidence in accordance with section 590A of the Criminal Code.[10]

17.15 The changes created by the CCJRMA Act intended for the registry or full hand-up committal to be the default approach, with a 'committal hearing' including examination of witnesses to only occur when justified.

17.16 Both the registry and full hand-up committal rely primarily on the use of 'written statements'. While there is no definition of a 'written statement' in the Justices Act, there are requirements set out in section 110A about what a written statement must include.[11] The use of the term 'written statement' suggests that statements must be limited to writing. However, more recently video-recorded statements are also used to take evidence from some witnesses in particular circumstances. Examples include charges

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[6] The use of the term 'any indictable offence' or 'an indictable offence' in section 104 has the effect that the evidence in a case does not necessarily need to support the indictable offence originally charged. If the evidence does not support the offence charged but does support a charge of a different indictable offence, the defendant may be committed to a higher court on a charge of that different offence.

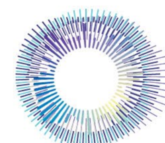
[7] *Grassby v The Queen* (1989) 168 CLR 1, 8–9 (Dawson J).

[8] *Grassby v The Queen* (1989) 168 CLR 1, 15 (Dawson J).

[9] *Justices Act 1886* (Qld) ss 104(2), 108(1), 110A(7), (9), (10). This is not a bar to further proceedings on that charge.

[10] *Justices Act 1886* (Qld) s 104(5).

[11] *Justices Act 1886* (Qld) s 110A(6C).



where victims or witnesses are children[12] or have particular vulnerabilities, including victims of domestic and family violence.

17.17 For committal proceedings, section 104 of the Justices Act requires an examination of all the evidence offered by the prosecution and section 110A provides more broadly for all documents or objects referred to as exhibits in a statement to be treated as if they had been produced as an exhibit in the proceedings.[13] This is how video-recorded statements currently form part of the committal process.

17.18 The CCJRMA Act also introduced restrictions on when the cross-examination of prosecution witnesses at a committal hearing could occur. These include:

- only in circumstances where both the prosecution and defence consent;[14] or
- if a magistrate is satisfied at a direction hearing that there are 'substantial reasons why, in the interests of justice', the witness should attend court to give oral evidence or be cross-examined on their written statement.[15]

17.19 There is a fourth type of committal, available for those proceedings to which the CCRJMA amendments do not apply. Commonly referred to as a 'full committal', these proceedings allow the defendant to require the prosecution witnesses be called to give evidence and be cross examined (with little or no restrictions). Given this type of committal is all but extinct, it is not further canvassed in this chapter as it was a transitional provision during the 2010 legislative amendments.[16]

Types of committals currently in Queensland

17.20 In the 2021–22 financial year, 6,372 committals took place in Queensland's Magistrates Courts and 5,087 (80%) of those were registry committals.[17] The different types of committals and their usage in practice is represented in Diagram 17.2.

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[12] For example, evidence given by a child may be recorded under section 93A of the *Evidence Act 1977* (Qld).

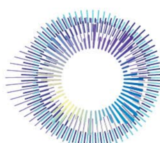
[13] *Justices Act 1886* (Qld) s 110A(15). Sometimes when a video-recorded statement has been taken, the police officer who took the statement will provide a written statement to that effect and produce a copy of the recording as an exhibit.

[14] *Justices Act 1886* (Qld) s 110A(5).

[15] *Justices Act 1886* (Qld) s 110B(1).

[16] *Justices Act 1886* (Qld) s 277.

[17] Information provided by Court Services Queensland, 9 August 2022.



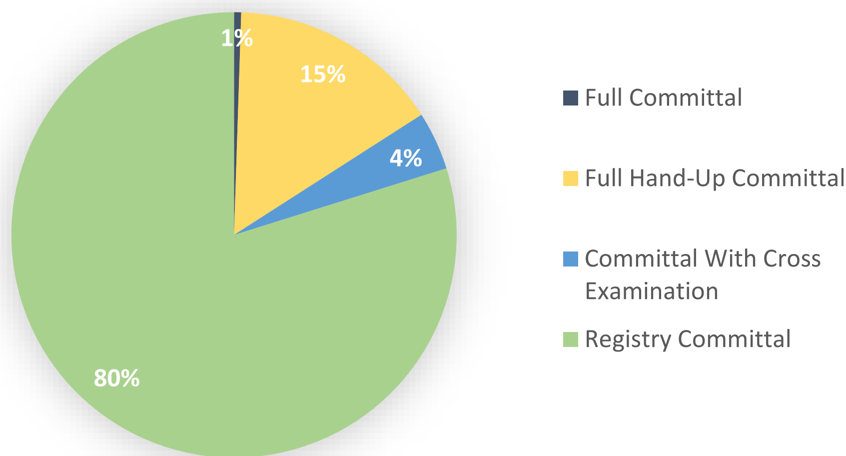


Diagram 17.2: Committals by type in 2021–22

Registry committals

17.21 A 'registry committal' is a committal that is completed by the registrar[18] and registry staff in a Magistrates Court (not by a magistrate). It is an administrative process that relies entirely on written witness statements. Importantly, it does not include any consideration of the committal test – that is, there is no consideration of whether the evidence is sufficient to put the defendant on trial for an indictable offence.[19]

17.22 As shown by the data in Diagram 17.2, registry committals are the most common committal type in Queensland.

17.23 The processes relating to registry committals is set out in part 5, division 7A of the Justices Act. Specifically, section 114 contains the requirements for completing a registry committal.[20] Among other things, a registry committal can only take place if a defendant is legally represented and both the prosecution and defence consent to the charges being committed.

17.24 In practice, after the prosecution has complied with their disclosure obligations,[21] the defendant's lawyer will give written notice (usually a form sent via email) to the court registry:[22]

- identifying the charge(s) they want to be committed;[23]

[18] The registrar is referred to as the clerk of the court in the *Justices Act 1886*.

[19] *Justices Act 1886* (Qld) s 4 (definition of 'registry committal'), pt 5 div 7A.

[20] *Justices Act 1886* (Qld) s 114.

[21] Disclosure is discussed further in Chapter 14.

[22] *Justices Act 1886* (Qld) s 114(1), (6). Application forms for a registry committal are located at: Queensland Courts, *Registry Committals* (20 February 2023) <https://www.courts.qld.gov.au/services/do-it-online/registry-committals>. For matters in the Brisbane Magistrates Court, the form can be completed online. In other locations, the form must be filed with the relevant Magistrates Court. The section of the form relevant to the prosecution must be completed by the prosecutor.

[23] This can include charges that are being amended or substituted with consent of the prosecution.

- confirming that all evidence by witnesses is to be given by written statements, which have been filed in court with copies given to defence (or waiving this requirement);
- stating that the defendant does not intend to give evidence or call any witnesses in the committal;
- acknowledging the registrar will not be considering the sufficiency of the evidence against the defendant;
- stating whether the defendant wishes to be committed for trial or sentence; and
- confirming the prosecution consent to commit the charge(s).

17.25 In accordance with section 114(2), if the defendant wishes to be committed for sentence, the defendant's lawyer must also file a written statement signed by the defendant stating:

> that the defendant pleads guilty to the offence and that the defendant acknowledges that the defendant is not obliged to enter any plea and has nothing to hope from any promise, and nothing to fear from any threat, that may have been held out to induce the defendant to make any admission or confession of guilt.

17.26 Registry committals are not available to defendants who:[24]

- do not have a lawyer
- are not in custody but have a breach of bail charge before the court
- do not comply with all requirements set out in the Justices Act.

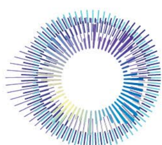
17.27 While the prosecution can object to a registry committal, in practice this rarely occurs, as a registry committal provides efficiencies to the prosecution, saving time and resources.

17.28 There are currently no time frames for the registry committal process. There is no requirement about when defence must file a registry committal request (including from the time they indicate the matter is to proceed via registry committal) nor is there any requirement for the prosecution to consider the request and provide consent within a particular time, or more generally in a timely way. This can in practice cause substantial delays in the process.

17.29 Once the registry committal has been accepted, the clerk of the court will process the committal and transfer the charges to the higher court.[25] The parties do not need to attend court for this and any future court dates in the Magistrates Court are vacated.

[24] *Justices Act 1886* (Qld) s 114.

[25] As to the process for a registry committal, see *Justices Act 1886* (Qld) ss 115–16.



17.30 I am concerned that, for registry committals, the Justices Act allows the defence to waive the filing of witness statements with the registry.[26] During consultation, I heard that this is a common practice, with the consequence that written statements are not often filed for registry committals. I understand that an index of statements (and exhibits) may be used instead. In these circumstances, I am of the view that no depositions will be generated for the purpose of section 111 of the Justices Act. This brings into question whether any statements provided in disclosure or otherwise obtained could be used at any trial in the higher courts, in circumstances such as a witness' death or absence. If the statements are not filed in the registry committal proceeding, there may be no depositions able to be relied on.[27]

17.31 During the Review process, CSQ advised they were creating an online portal to allow lawyers to submit applications for registry committals digitally. This online form is to be trialled in Brisbane for a period in 2023 with the links to be available on the Queensland Courts website. As consultation was completed before this date, all feedback about the registry committal process should be taken to refer to the process before the online form was trialled.

Hand-up committals

17.32 Full hand-up committals are the second most common type of committal, with 982 occurring in 2021–22.[28]

17.33 These committals are called a 'full hand-up' because the prosecutor physically hands the magistrate the evidence for a case, including the written witness statements and a list of evidentiary exhibits. The magistrate is then required to review the material and apply the committal test to decide if there is sufficient evidence to commit the matter or commit the matter if the defendant consents to waive the committal test.[29]

17.34 Given registry committals are not available to self-represented persons, many unrepresented defendants have matters committed by way of a full hand-up committal.

17.35 The hand-up process is fundamental to the Moynihan reforms. It relies on written witness statements and does not require oral evidence from witnesses unless the parties consent or the court has ordered the witness to attend for cross-examination.[30] Specifically,

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[26] *Justices Act 1886* (Qld) s 114(6)(a). The defence may also waive the requirement for written statements to be given to the defendant before committal: s 114(6)(b).

[27] See further [17.21] ff.

[28] Information provided by Court Services Queensland, 9 August 2022.

[29] *Justices Act 1886* (Qld) ss 104, 110A(6D)–(6F).

[30] *Justices Act 1886* (Qld) ss 83A(5AA), 110B.

recommendation 43 of the Moynihan Report recommends that prosecution evidence should be given in statement form.[31]

17.36 Hand-up proceedings have several advantages, especially for the prosecution. Primarily, full hand-ups are time effective and less resource intensive than proceedings where witnesses are required to be called and give evidence.

17.37 Hand-up proceedings are regulated by section 110A of the Justices Act. Subsection 110A(1) sets the relevant scope of the section, being that it applies 'if justices are conducting a proceeding with a view to determining whether a defendant should be committed for trial or sentence for an indictable offence'.

17.38 Section 110A is complicated. It has a multitude of subsections and there is often confusion about their operation. This chapter is intended only as a general overview of some of the more relevant concepts included in this section.

17.39 In accordance with section 110A(3), if a written statement is tendered by the prosecution, a magistrate must admit the statement as evidence[32] and must not require the witness to be called to give evidence, unless that is required by the prosecution because a direction has been issued by the court.[33] The defendant may also tender written statements and have those admitted as evidence without the witness appearing in court, subject to prosecution's agreement.[34]

17.40 Where a defendant is self-represented, section 110A(3) does not apply unless the magistrate is satisfied that the defendant:

- understands what the proceeding is about and the possible consequences of the proceeding
- is aware that they are entitled to be legally represented or may apply for legal assistance
- has been made aware they have the right to apply for a witness to be required to attend and give oral evidence and has been given an explanation of the requirements for making this application.[35]

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[31] Moynihan (n 3) 215, Rec 43.

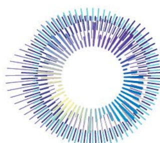
[32] Subject to the other provisions of section 110A being satisfied.

[33] As to a direction, see *Justices Act 1886* (Qld) s 83A(5AA) and [17.55] ff below.

[34] *Justices Act 1886* (Qld) s 110A(2), (6B). A written statement admitted in this way is taken to be evidence given or a statement made under section 104 and is admissible as evidence to the same extent it would be if the person making the statement had given oral evidence about its contents: s 110A(6A).

A written statement must also be disclosed to the other party with advice that it is to be tendered under section 110A and must be signed and contain a declaration or written acknowledgement: s 110A(6C).

[35] *Justices Act 1886* (Qld) s 110A(4).



17.41 The admission of statements under section 110A(2) and (3) does not automatically lead to a defendant being committed because the committal test discussed earlier is still applicable here.

17.42 Where all the evidence before a magistrate (other than exhibits) is made up of written statements, a legally represented defendant may consent to the matter being committed to a higher court without the evidence being considered — that is, they may waive the committal test.[36] Where a defendant is self-represented or does not consent to committal then the magistrate must, after hearing any submissions, apply the committal test and make an order committing the charge to a higher court or discharging the defendant.[37]

17.43 A full hand-up committal can also include oral submissions. For example, defence may make a submission indicating that the prosecution has preferred the wrong charge or that there is insufficient evidence to commit the matter based on the evidence before the court.

17.44 There are also circumstances where a 'mixed approach' may be adopted, with parties proceeding by way of hand-up as well as requiring a witness to give oral evidence. The circumstances in which this occurs and the procedure surrounding it can be confusing because of the wording of section 110A.

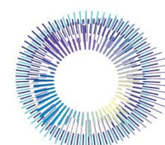
17.45 The operation and interpretation of section 110A and the committals process more generally means it is unclear whether the prosecution are required to give their evidence by statement only (as was intended by recommendation 43 of the Moynihan Report). There may be circumstances where the prosecution needs to call a witness to give oral evidence and a statement has not been obtained, or where the prosecution calls a witness to give evidence to supplement their statement.

17.46 The wording of section 110A(3) is limited. It states that it is only *if* the prosecution tenders a written statement that the witness must not be required to appear to give evidence, unless required because of a direction under section 83A(5AA). This does not appear to prevent the prosecution from calling a witness to give oral evidence without such a direction.

17.47 Additionally, the prosecution and defence can agree under section 110A(5) that a witness will be present to be cross-examined.

[36] *Justices Act 1886* (Qld) s 110A(6D)–(6F).

[37] *Justices Act 1886* (Qld) s 110A(10).



17.48 The Moynihan report specifically recommended that a witness should only be called to give evidence at a committal hearing:

- by the prosecution[38]
- with prosecution consent
- by leave of a magistrate on application of the accused
- on a magistrate's own motion.[39]

17.49 Despite the above, a practice has developed where the prosecution seeks a direction under section 83A(5AA) if they wish to lead full oral evidence in chief or supplement a written statement by further oral evidence.

17.50 My own view of the present law is that the prosecution has the right to call evidence and present their case in whatever fashion they deem appropriate, including by calling a witness to give oral evidence.

17.51 In circumstances where a prosecution witness is called to give oral evidence, defence have the right to cross-examine the witness about that oral evidence. If the witness gives oral evidence to supplement a written statement, then defence may cross-examine only on the oral evidence given and must either obtain prosecution consent or apply for leave of the court to cross-examine the witness (under section 83A(5AA)) on their written statement.

17.52 The defence may choose whether they call a witness to give evidence or tender a witness statement with agreement. However, a statement may be tendered subject to an agreement that the person will be available for cross-examination, and even where a statement is admitted the witness may still be required by the magistrate to give evidence.[40]

17.53 When evidence is given in court, the written statements and any oral evidence must all be considered by the magistrate in applying the committal test.[41]

17.54 My recommendations will seek to simply and clarify this approach.

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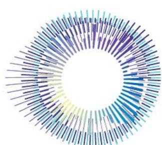
[38] On this point, the Moynihan Report stated 'If the prosecution wishes to call a witness at committal hearing, it should be able to do so. This would normally be for an opportunity to test the evidence of a prosecution witness which is in the interests of both parties and the public': Moynihan (n 3) 193.

[39] Moynihan (n 3) 215, Rec 45. It was also recommended that before granting leave or acting on his or her own motion, a magistrate must be satisfied that there are substantial reasons why in the interests of justice the witness should attend the committal hearing to give oral evidence or be available for cross-examination on their written statement: see further [17.58] below.

[40] *Justices Act 1886* (Qld) s 110A(2), (6B), (8), (9).

[41] *Justices Act 1886* (Qld) ss 108, 110A((6), (7)–(9).



Committals with cross-examination

17.55 Committals with cross-examination are uncommon in Queensland, with 270 occurring in 2021–22.[42] In these matters, the committal will usually proceed by hand-up with written witness statements and a list of exhibits being physically handed to the magistrate by the prosecution, but in addition one or more witnesses will be called for cross-examination by the defence.

17.56 Before defence can cross-examine a witness in a committal proceeding, they must first write to the prosecution requesting to cross-examine the witness.[43] This request must include the issues relevant to making the application and the reasons to be relied on for justifying the calling of the witness to give evidence.[44] If prosecution do not consent to the request, defence must apply to the court for a direction hearing and get permission from the magistrate.[45]

17.57 With the introduction of these requirements, the Chief Magistrate issued Practice Direction 12 of 2010 to provide additional guidance about the mechanics of how a witness may be called to give evidence. The practice direction sets out clear time frames for defence applications to the prosecution when seeking to cross-examine and the prosecution response, as well as the process for applying to the court for a direction hearing so a magistrate can consider the issues.[46]

17.58 At a direction hearing under section 83A(5AA) a magistrate can only direct that a witness attend court to give evidence or be made available for cross-examination if they are satisfied there are ‘substantial reasons why, in the interests of justice’, the witness should attend court to give oral evidence or be cross-examined on their written statement.[47] The magistrate must give reasons for their decision.[48]

17.59 This test was recommended in the Moynihan Report[49] and introduced by the CCJRMA Act. It sought to address concerns that contested committals were too often used by defence as a ‘fishing exercise’ or to bully the witness and was open to misuse by both sides with lengthy, unnecessary, and unproductive cross-examination of witnesses.[50]

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[42] Information provided by Court Services Queensland, 9 August 2022.

[43] *Justices Act 1886* (Qld) s 110B(3)(a).

[44] *Justices Act 1886* (Qld) s 110B(3)(a)(ii)–(iii).

[45] *Justices Act 1886* (Qld) s 83A(5AA).

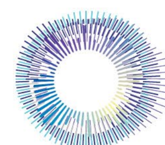
[46] Magistrates Courts (Qld), *Witnesses giving evidence in committal proceedings* (Practice Direction No 12 of 2010).

[47] *Justices Act 1886* (Qld) ss 83A(5AB)(a), 110B(1).

[48] *Justices Act 1886* (Qld) s 110B(6).

[49] Moynihan (n 3) 215, Rec 45.

[50] Ibid 191.



17.60 The test set out in s110B(1) and the term 'substantial reasons why, in the interests of justice' is not defined in the Justices Act and as a result, there have been many cases that consider the meaning of the term.[51] While there have been multiple cases both in Queensland and New South Wales, in the case of *DPP v DSM*, Magistrate Magee distilled the decisions about what could amount to substantial reasons and listed examples for application in Queensland.[52]

17.61 Limitations on any permitted cross-examination are set out in section 110C of the Justices Act. Specifically, it is limited to the following circumstances:

- if a witness gives evidence because of a direction made under section 83A(5AA), the magistrate must not allow the witness to be cross-examined about an issue that is not relevant to reasons given by the magistrate for requiring the person to attend[53]
- the magistrate may allow cross-examination about additional issues only if satisfied there are substantial interests why, in the interests of justice, it should be allowed
- the prosecution may re-examine a witness who is cross-examined.

17.62 As explained earlier, the written statements and oral evidence given in court must all be considered by the magistrate in applying the committal test.[54]

Other jurisdictions

17.63 The Victorian Law Reform Commission has recently completed an extensive review of the committal process in Victoria and other Australian jurisdictions,[55] which I have found most helpful. The report also includes recommendations for modernising the committal process. I see no need to repeat their extensive research when their report is easily accessible online, but I will include the below quote which succinctly sums up the current state of committals in Australia:

> In all states and territories, an indictable criminal case commences in the lower courts. In some instances, these cases are moved quickly into the higher courts

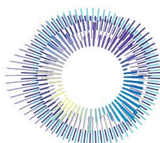
[51] See generally *Blacklidge v Police* [2011] QMC 7; Lexis Advance, *Carter's Criminal Law of Queensland* (online at 14 April 2023) [391,490.20]. See also Director of Public Prosecutions (Qld), *Director's Guidelines as at 30 June 2016* (under review), [16]. See also, for further information and examples of 'substantial reasons', *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) [3.143]–[3.144].

[52] *DPP v DSM* [2013] QMC 20.

[53] The Practice Direction explains that when a magistrate makes a direction under section 83A(5AA), they must make an order that sets out the name of the witness(es) required to attend to give evidence or be made available for cross-examination and the relevant issue(s) for cross-examination: Magistrates Courts (Qld), *Witnesses giving evidence in committal proceedings* (Practice Direction No 12 of 2010) [8].

[54] *Justices Act 1886* (Qld) ss 108, 110A(6), (7).

[55] Victorian Law Reform Commission, *Committals* (Report No 41, March 2020). Information about this review and the final report is located on the Commission's website: Victorian Law Reform Commission, *Committals* (Web Page) <https://www.lawreform.vic.gov.au/project/committals/>.



> while in others they go through a more involved process in the lower courts before being transferred to the higher courts.
>
> Some jurisdictions require a magistrate to consider the evidence in a case before committing the accused to a higher court while in other jurisdictions the test for committal has been abolished.
>
> The availability of cross-examination during committal proceedings also varies between jurisdictions. Some have abolished or severely restricted it while in others it is available but is not often requested or permitted.[56]

17.64 The prosecution position in Queensland is different to other Australian jurisdictions, as we have a hybrid model where committals are conducted by either the complainant (prosecutor) or the ODPP. In practice, most committal proceedings are conducted by police prosecutions, after which the matter is transferred to the ODPP. This hybrid model will not change, meaning it must be accommodated within Queensland's committals process.

17.65 As the terms of reference for this Review limit the changes I can make to committals, there is little utility in considering other jurisdictional models in great detail because I am unable to recommend their adoption.

Consultation

General

17.66 I received extensive feedback on the committals process from prosecutors, defence lawyers and those who have participated in the committals process as defendants, victims or witnesses.

17.67 Multiple submissions support increased use of electronic processes for committals, removing the need for signed documents and paper copies. Sections 110A(6)(c) and 110A(11) of the Justices Act are examples of how detailed and specific the Act is regarding the requirements of signed statements.

17.68 People also raised the greater need for mechanisms to deal with circumstances where defendants are disruptive and excluded from court or fail to appear in committal proceedings (including absconding from the jurisdiction). Stakeholders saw value in ensuring there was power to continue to hear a committal in these circumstances.

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[56] Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 4 (notes omitted).

Registry committals

17.69 When it came to registry committals, general feedback supported the current process but noted it could operate more efficiently with increased use of technological solutions (such as an online portal).

17.70 Stakeholders raised several practical concerns including that registry committals can take a significantly long period of time to finalise, including sometimes taking longer than a full-hand up committal.

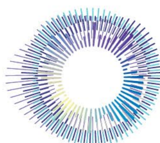
17.71 Other primary concerns related to the following:

- the requirement for prosecution consent to a registry committal and the fact there are no time frames for when the prosecution must respond to a request to proceed via registry committal. It was reported some prosecution offices can take a significant period to respond to requests
- if lawyers make errors in the request to proceed via registry committal, delays were compounded by multiple emails between the lawyer and court registry to rectify mistakes
- the requirement for defendants to provide a 'signed written statement' if seeking to be committed for sentence. This can be particularly challenging when the defendant is in custody
- self- represented defendants not being eligible for registry committals, despite full hand-up committals being reported as 'confusing and not easily understood
- breach of bail charges preventing registry committals. There was unanimous support for a defendant to be able to proceed with a registry committal even if they have a breach of bail charge outstanding.

17.72 In their submission, LAQ suggested the requirement for prosecution consent be removed. It was suggested there is no real reason for the prosecution to object to a committal in any event, as the defendant is accepting there is sufficient evidence to proceed to the higher courts.

17.73 With respect to self-represented persons being barred from registry committals, stakeholders advised the full hand-up committal process was no easier to understand and submitted that eligibility for registry committals should be extended to self-represented persons. Currently, the onus falls on the magistrate to explain the committal process in court as the defendant does not have a lawyer to help them.[57] Duty lawyer services are also unable to assist defendants to conduct a full hand-up committal,

[57] *Justices Act 1886* (Qld) s 110A(4).



so there are limited avenues for assistance for unrepresented defendants. The registry committal process, with appropriate safeguards and explanations, may be a viable avenue for self-represented defendants to progress their charges.

17.74 Consultation meetings with courthouse staff responsible for completing the registry committals outlined a number of practical deficiencies they had experienced, such as legal practitioners submitting incorrect paperwork, listing incorrect charges or seeking to commit charges that cannot be committed, and that the prosecution is not always providing timely consent. This results in numerous emails between the registry and lawyers to have them re-submit their application with the proper information and in the correct form. This extra correspondence creates additional burdens for registry staff and contributes to delays in completing the registry committal.

Hand-up committals

17.75 During consultation it was observed that there is an inconsistency between the 'sufficiency of evidence' test applied by magistrates at committal and the test applied by the DPP (Qld) when they decide whether to proceed with a matter in the higher courts. The DPP (Qld) use a two-tiered test that asks whether there is sufficient evidence to prosecute and if it is in the public interest to do so. In relation to the question of sufficient evidence, the DPP (Qld) Guidelines state that a prima facie case is not enough and that '[a] prosecution should not proceed if there is no reasonable prospect of conviction before a reasonable jury (or magistrate)'.[58] The committal test that magistrates apply is whether there is sufficient evidence to put the defendant on trial for an indictable offence.[59] However, for reasons previously explained, changes to the committal test are not within the scope of this Review.

17.76 Legal practitioners noted there is a strong preference amongst some magistrates to encourage parties to proceed via registry committal. However, this can sometimes occur even when parties could proceed by full hand-up committal in court on the day. A matter adjourned for a registry committal in this circumstance could add weeks to the actual date of committal and delay the start of the six-month time frame for the presentation of the indictment, impeding the timely finalisation for all parties.

17.77 Feedback from correctional centre prisoners also confirm long wait times for hand-up committals.

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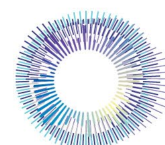
[58] Director of Public Prosecutions (Qld), *Director's Guidelines as at 30 June 2016* (under review) [4].

[59] *Justices Act 1886* (Qld) s 104(2).



The time spent awaiting a hand up is inconceivably long, often taking between a year or more to see a higher court. This is causing people to plead guilty to charges they are innocent of to get out of remand jail.

— Prisoner

17.78 Practice concerns were raised relating to the words magistrates use to address defendants during hand-up committals. When a magistrate is satisfied there is sufficient evidence against the defendant to commit the charge, the magistrate must address the defendant about particular matters.[60] In practice, it was reported magistrates are quoting this information verbatim and it is often not able to be understood, particularly by self-represented defendants. The required address is the following words or words to like effect:

> You will have an opportunity to give evidence on oath before us and to call witnesses for the defence. But first I am going to ask you whether you wish to say anything in answer to the charge. You need not say anything unless you wish to do so and you are not obliged to enter any plea; and you have nothing to hope from any promise, and nothing to fear from any threat that may have been held out to induce you to make any admission or confession of guilt. Anything you say will be taken down and may be given in evidence at your trial. Do you wish to say anything in answer to the charge or enter any plea?

Committals with cross-examination

17.79 Feedback received by the Review indicated there is a perception among defence lawyers that prosecutions rarely consent to cross-examination of a witness, therefore making the request process seem obsolete. Some stated they would prefer the decision be referred directly to a magistrate for determination.

17.80 Some magistrates also told the CPRT they wanted greater ability to case manage committal matters. with the sole authority to decide applications for cross-examination. Magistrates cited circumstances where prosecution and defence consented to applications for cross-examination and the court then had to find court time for potentially lengthy committal hearings in circumstances where the magistrate may not have granted an application for cross-examination. Some magistrates suggested it is more efficient if matters such as limiting cross-examination can be dealt with at the same time the matter is listed for committal, to ensure adequate court resources can be allocated.

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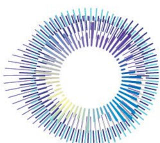
[60] *Justices Act 1886* (Qld) s 104(2)(b).



17.81 The DPP (Cth) raised for consideration the question of whether the prosecution can call a witness at committal without having to seek the leave of the court. As mentioned above, this is an issue I have also identified and will clarify in the proposed new model.

17.82 The Consultation Paper asked whether the test for permitting cross-examination (that is, 'substantial reasons why, in the interests of justice') should be defined in the new legislation.

17.83 Generally, stakeholders were supportive of the new model providing guidance about what should be considered when deciding whether a witness should be cross-examined. However, many stated it must not be an exhaustive list and the paramount consideration should always be a fair trial for the accused.

17.84 On the other hand, some stakeholders held concerns that defining what 'in the interests of justice' may include could unnecessarily restrict a magistrate's discretion and submitted that this should be avoided.

Compulsory directions hearing before committal

17.85 The Consultation Paper asked if there should be a compulsory direction hearing before a committal takes place.

17.86 There was general support for this, however some respondents said there must be the ability to waive the requirement where it would serve no purpose. Multiple submissions were concerned that having a mandatory court event could increase delays in the committal process given parties already have the power to seek directions.

17.87 LAQ suggested the ability to waive the directions hearing should be simple and easy, potentially involving parties submitting a notice online, verbally advising the magistrate in court or in an additional section to the registry committal paperwork.

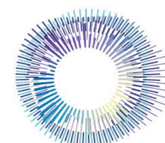
17.88 ATSILS submitted there is a need to legislatively enshrine the current practice directions together with the practice directions dealing with disclosure, which would result in consequences for failing to comply (like those contained in the Criminal Code).

17.89 Some submitted that where directions are not complied with, the magistrate must have the power to dismiss charges. Respondents stated there is an ongoing issue with prosecutors not complying with disclosure deadlines and delaying court matters.[61]

Other issues raised during the consultation

17.90 I also received feedback which I am unable to address because it is out of scope of the Review.

[61] Disclosure is discussed in Chapter 14.



17.91 I have set out below some of the issues raised by stakeholders which are worthy of further consideration. As I cannot substantially amend the Criminal Code or other Acts (which some of the following issues require), I provide some discussion for ongoing consideration in any future legislative amendments or practice improvements.

17.92 First, some stakeholders provided feedback about matters that relate to criminal proceedings in the higher courts. These included:

- there is currently limited use of ex-officio indictments (indictments that are presented to a higher court without a matter first being committed) as a substitute for committal proceedings[62]
- the procedure for the transfer of summary matters to a higher court under section 651 of the Criminal Code, so those offences can be dealt with at the same time as an indictable offence, operates inefficiently
- the six-month period between a committal proceeding and the presentation of an indictment to a higher court is too long.

17.93 There were also some concerns raised about access to a registry committal for the offence of contravening a domestic violence order under section 177(2)(a) of the *Domestic and Family Violence Protection Act 2012* (DFVPA). The starting point for this offence is that it must be heard and decided summarily. If the offence is to be dealt with on indictment, then a Magistrates Court must expressly abstain from hearing the matter summarily and conduct the proceeding as a committal proceeding in compliance with section 104 of the Justices Act, which would require a court committal.[63]

17.94 This is consistent with the position in other Acts. For example, the Criminal Code contains many indictable offences that must be heard and decided summarily. These can only be committed to a higher court if a Magistrates Court abstains from dealing with the offence summarily. In those circumstances, the Code specifies that the proceeding must then be conducted as a committal proceeding, although it does not expressly require compliance with section 104 of the Justices Act.[64]

17.95 To change this process under the DFVPA would require legislative amendment of that Act, which is not within the scope of this Review. Further, any such amendment may be more appropriately considered in the context of other reforms to the domestic and family violence laws.

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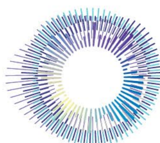
[62] Criminal Code (Qld) s 561.

[63] *Domestic and Family Violence Protection Act 2012* (Qld) s 181(4), (6)–(7). See also *R v SC* [2021] QDCPR 4.

[64] Criminal Code (Qld) ss 552BA, 552D.



New model

Language and simplicity

17.96 As explained earlier in this chapter, this Review will not remove or significantly change the current committals process, nor will it evaluate or undo the amendments made by the CCJRMA Act. The focus of my recommendations in drafting this new model is on process or procedural changes that can improve the current committals process.

17.97 Consistent with my overarching principles in this Review, the first step in improving the committals process is to make it easier to understand. To achieve this goal, part 5 division 5 of the Justices Act relating to committals requires a complete redraft. While the general concepts and processes it contains about committals are to be retained, there will be significant benefit obtained from ensuring the sections are simplified and written in plain English.

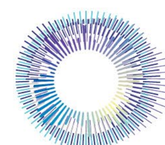
17.98 In addition, as I have explored in other chapters, it is necessary to use consistent terminology when referring to criminal procedure in Magistrates Courts.

17.99 Currently, there are many variations in the terms used to describe the committal processes, including outdated descriptions of practices in the Justices Act. The Justices Act originally referred to a committal as an 'examination of witnesses in relation to an indictable offence' and still uses that terminology in places. For example, section 104 of the Justices Act is titled 'Proceedings upon an examination of witnesses in relation to an indictable offence'. This does not accurately reflect the contents of that section.

17.100 The new criminal procedure framework for committal proceedings in the Magistrates Courts will use the following categories and terms:

- *Committal proceeding* - this term will be defined to include all types of committals
- *Registry committal* – this term will be defined to include committals conducted by the registrar and the legislation will (as in the current Justices Act) set out the processes and procedures related to these committals
- *Court committal* – this term will be defined to include any type of committal occurring in court, including both a 'hand-up committal' that relies entirely on witness statements and a committal involving any form of oral evidence (as well as any combination of the two). These court committals will have clearly defined requirements and processes set out in the new legislation.

17.101 Much of the feedback regarding the committals process (and much of the criminal justice system processes) was about a desire to move towards a greater use of technology. As discussed in Chapter 10, the new criminal procedure laws will facilitate the use of



technology at all stages of a criminal proceeding. Specifically in relation to committal proceedings, the new legislation should be drafted to enable the filing and exchange of documents electronically, support electronic lodgment of committal paperwork and reduce the current impacts associated with providing ‘signed statements’ in committal proceedings.

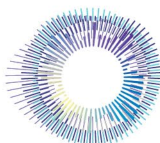
17.102 Additionally, I propose to remove the word ‘written’ with respect to ‘written statements’ for the committal process. I note this suggests a statement must be limited to one that is 'in writing’, however statements may be given in various forms, including via video recording (particularly for witness who may be vulnerable). The more general term ‘statement’ will have a broader application and cater for the use of technology in obtaining witness statements.

17.103 Further to this, section 110A(6C)(c) currently requires a written statement to contain a declaration under the *Oaths Act 1867* or a written acknowledgement that the contents are true to the best of the person’s knowledge or belief, and the person is aware they are liable to prosecution for stating anything they knew to be false. I intend to remove the *Oaths Act* requirement and simply retain the requirement for the person to acknowledge or declare the contents of their statement are true and correct to the best of the person’s knowledge and belief, and they are aware they are liable to prosecution if they make a false statement. The offence provisions contained in sections 193 and 194 of the Criminal Code are sufficient to cover the circumstances where a person gives false information in a statement.

17.104 During consultation it was raised that given committals are an administrative process they are not subject to an appeal or a stay of proceedings. Defendants are often confused by this, despite there being substantial case law on this point. Suggestions were made that the new procedure laws should clearly state the administrative nature of committals and that they are not subject to an appeal or stay of proceedings. I have given this issue consideration and see no barrier to doing so, as it will ensure clarity for court users about the nature and purpose of committal proceedings.

17.105 Finally, as explained in the earlier chapter about disclosure, case management and case conferencing, committals proceedings will also follow the case management process established for the Magistrates Courts. This includes the recommendations about disclosure, case conferencing and attendance at directions hearings, with the overall goal of making sure proceedings are simple, efficient and easily understood.[65]

[65] See further Chapter 14.



Registry committals

17.106 Generally, the processes and procedures for registry committals will remain the same as in the current Justices Act. However, there are particular changes that should be made to increase efficiency.

Self-represented defendants

17.107 First, the eligibility for a registry committal should be broadened to include self-represented defendants.

17.108 With improvements to practices and increased technological solutions (including unique charge numbers[66] and the development of methods for online applications or electronic lodgements) a self-represented person may be willing and able to navigate the registry committal process. Allowing for this will mean that some committals which would otherwise have had to proceed as a full hand-up can be efficiently dealt with by the registry, creating greater efficiencies for the Magistrates Courts overall.

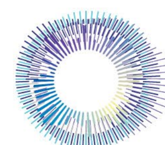
17.109 Appropriate safeguards will be required to ensure a defendant understands what is required of them and what they are doing by consenting to a registry committal. These will be further developed during implementation but could include giving defendants simple information about the registry committal process at an early stage, providing clear and simple instructions for completing the process and requiring declarations (which can be provided in online or electronic forms) about relevant legal matters. For example, I envisage the use of aides such as easy English factsheets or videos about how to complete a registry committal and ensuring the availability of instructions in diverse languages. A defendant should also be given adequate notice about matters such as time frames for a registry committal (discussed further below) and the next steps in a matter after committal.

17.110 The necessary declarations for a self-represented defendant would reflect the current requirements of sections 114(1)–(2), importantly:

- confirming that all evidence by witnesses is to be given via written statements, which have been filed in court with copies given to the defendant;[67]
- confirming that the defendant does not intend to give evidence or call any witness in relation to the defendant's committal for the indictable offence;

[66] See paragraph [812.102] and Recommendation 12.26 in Chapter 12 about starting proceedings.

[67] Discussed further in [17.121] ff.



- acknowledging that the functions of the registrar for a registry committal do not include considering or deciding whether the evidence before the clerk of the court is sufficient to put the defendant on trial for the indictable offence;
- stating whether the defendant wishes to be committed for trial or sentence; and
- if the defendant wishes to be committed for sentence, a signed statement that the defendant pleads guilty to the offence and that the defendant acknowledges that the defendant is not obliged to enter any plea and has nothing to hope from any promise, and nothing to fear from any threat, that may have been held out to induce the defendant to make any admission or confession of guilt.

17.111 I understand there may be concerns, particularly from court registries, about circumstances where registry committals are lodged incorrectly or contain errors. I do not suggest that it should be the role of registry staff to assist self-represented defendants in completing forms. However, I am hopeful that the provision of information and technological solutions will cater to this type of user experience, and lawyers and defendants will be more easily able to manage the registry committal process.

Outstanding breach of bail charges

17.112 Many stakeholders raised the issue of registry committals not being able to be performed where the defendant is not in custody but has an outstanding breach of bail offence.

17.113 It is unclear why this limitation is in place, but it is likely to be connected to the fact the registrar's functions do not include remanding a defendant in custody or performing any function related to bail.[68] Therefore, in circumstances where a defendant is in breach of, or is noncompliant with, a bail undertaking, the registry does not have the power to revoke or amend that bail undertaking.

17.114 Unfortunately, the practical impact of this requirement has meant anyone with an outstanding breach of bail offence is barred from proceeding via a registry committal, no matter the currency or seriousness of the breach, or whether it is even connected to the bail undertaking to which the committal proceedings relate.

17.115 In principle, I agree that a registry committal should not take place if at that time a defendant is noncompliant with their bail undertaking for those offences. Plainly, a bail undertaking should not be extended in those circumstances. However, I find the current prohibition unnecessarily broad. There are circumstances where a defendant may have one outstanding breach, compared with a defendant who is continually noncompliant with their bail obligations, but both are prohibited from a registry committal.

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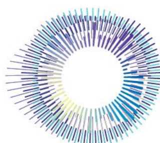
[68] *Justices Act 1886* (Qld) s 115(10). A defendant's remand or bail is automatically continued after a registry committal: *Justices Act 1886* (Qld) s 88B; *Bail Act 1980* (Qld) s 34BA.



17.116 Given, the prosecution must provide their consent to a registry committal, should there be current concerns about a defendant's compliance with bail or should bail need to be varied (by either prosecution or defence), the matter can be brought before the court for bail to be considered. The registry committal process should not be used as a means of 'monitoring' a defendant's bail compliance, and for efficiency access should not be unnecessarily impeded.

17.117 Further, this limitation does not operate as a bar to any other committal proceeding, including a full hand-up committal. For consistency, and to increase efficiency by expanding the availability of registry committals, I recommend the removal of this constraint.

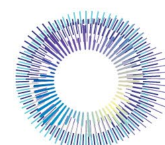
Prosecution consent and time frames for registry committals

17.118 Suggestions were made by some stakeholders to remove the requirement for prosecution consent from the registry committal process. I do not agree with this view. Given that a range of indictable offences require the prosecution to elect whether to deal with a matter summarily or on indictment, it is appropriate the prosecution consent to a registry committal for those offences. Additionally, the requirement for prosecution consent adds safeguards to the process, such as ensuring that the correct charges are being committed and that disclosure has been complied with.

17.119 To rectify current concerns relating to the delay associated with obtaining prosecution consent, I recommend the introduction of time frames for the prosecution to respond to a request for a registry committal made by a defendant or their lawyer. These time frames should be included in the Rules as follows:

- defence have 14 days from the date they advise the court the matter is ready to proceed via registry committal to complete their paperwork and provide it to prosecution for consideration
- prosecution should, as soon as practical but not later than 14 days, consider and respond to the application
- after the prosecution response is received by the registry, the application should be progressed as soon as practical.

17.120 The Rules should allow for the parties to apply administratively to the registrar for extensions of time frames to conduct the registry committal. The registrar should have sufficient discretion to grant extensions and adjourn the matter to allow and encourage the registry committal process to be completed. In the event the parties seem to be unable to resolve any issues or progress the registry committal within a suitable time frame, the



registrar should arrange for the matter to be brought before a magistrate for further case management.

Disclosing and filing written witness statements

17.121 Generally, for a registry committal to take place, the prosecution must give copies of the written witness statement to the defendant and must have filed the statements in court. However, this is not necessary if the defendant's lawyer consents to the written statements not being given to them or not being filed (or both).[69]

17.122 Although I accept that this may sometimes make a committal proceeding more efficient, I am not in favour of this practice. It is very important that both parties agree on what statements form the basis of a case. This means firstly that it is important that all statements are in the possession of the defendant. It also means it is important that both parties agree that those are the statements on which the matter is to be committed.

17.123 It is particularly important that statements are disclosed in matters where the defendant is self-represented and is proceeding by way of a registry committal. This will assist in making sure the defendant has information about the matter and can understand the case against them.

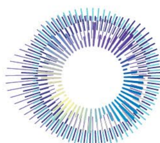
17.124 Accordingly, the ability of a defendant (or their lawyer) to consent to the written statements not being given to them or not being filed for the purposes of a registry committal should not be recreated in the new criminal procedure framework.

17.125 For the reasons given, the new criminal procedure framework should require that the statements being relied on in a matter must always be disclosed to the defendant. This will have the effect that the defendant will not be able to waive the disclosure of the statements.

17.126 I recommend that under the new laws, for efficiency and convenience, the defendant should still be able to waive the filing of the statements for a registry committal. However, this should only be permitted if, instead of filing the statements in court, the parties file an agreed 'List of Witness Statements' (or index) setting out the statements to be relied upon to support the charge.

17.127 Consistent with the current process, this should occur only with the defendant's consent. The statements contained in that list will form the witness depositions. Depositions can be an important part of any trial in the higher court, particularly if a witness is deceased

[69] *Justices Act 1886* (Qld) s 114(1)(c), (6).



or unable to give evidence and the prosecution instead need to rely on their written statement.[70]

17.128 I understand the significant impost on both the parties and the registry should it become mandatory to file the written statements in a registry committal proceeding (even where technology supports such a process). Given this, the List of Statements identifying the statements to be relied upon by the prosecution will be sufficient to form the depositions. The list must include the name of each witnesses providing a statement and the date on which the statement was declared.

17.129 If the statements are not filed with the court, the obligation will be on the party holding them to transfer or provide them to the prosecution agency in the higher courts.

17.130 Including this option provides flexibility for the parties and allows matters to be committed in a way that is simple and efficient. However, to be clear, the inclusion of this option still requires the defendant's consent. It does not prevent statements from being filed in court as part of a registry committal, if that is the preferred course.

Court committals

17.131 As recommended earlier, part 5 division 5 of the Justices Act about committal proceedings will be redrafted in simple terms and using plain English. More specifically, sections 104, 108 and 110A are the key sections requiring amendment.

17.132 Sections 104 and 108 together set out the general process for the steps in a committal hearing. I recommend that these sections be combined, simplified and expressed in a way that sets out the general steps in the committal process. Generally, this should flow in the following manner:

- The purpose of committal proceedings is for the magistrate to consider all the evidence before the court and decide whether the evidence is sufficient to commit the defendant for trial for an indictable offence.
- At the close of the prosecution case, if the magistrate is not satisfied the evidence meets the test for committal, the defendant must be discharged.
- If the magistrate is satisfied there is sufficient evidence, they must call on the defendant about whether they wish to call any evidence or make a submission about the sufficiency of the case.
- If the defendant makes a submission or offers evidence then the magistrate must again consider the sufficiency and decide, after any defence evidence is heard,

[70] *Justices Act 1886* (Qld) ss 110A(12)–(15), 111, 116(2). As to depositions, see further [17.163] ff.

whether the matter is to be committed to a higher court on a consideration of all the evidence.

- If the matter is to proceed, the magistrate must ask if the defendant wishes to say anything in answer to the charge or enter any plea.
- Following any statement or plea, the magistrate must commit the matter to a higher court for sentence or trial and, if the defendant is committed for trial, the magistrate must also give a warning about alibi evidence in accordance with section 590A of the Criminal Code.

Hand-up committals

17.133 Section 110A of the Justices Act sets out the provisions for hand-up committals.

17.134 The hand-up process was fundamental to the 2010 reforms recommended by the Moynihan Report and included in the CCRJMA. It was intended for this process and the registry committal to be the primary means for committing charges, reducing the circumstances in which oral evidence was permitted.[71]

17.135 The committals framework in the new criminal procedure laws will maintain the hand-up committal process for Queensland. However, in my view, the effect and interpretation of section 110A does not give proper realisation to the intent of the Moynihan Report and requires redrafting to clarify the important concepts.

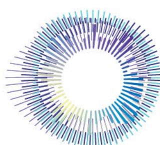
17.136 I find section 110A unnecessarily over-complicated and confusing. The section contains 23 subsections, many of which are unnecessary, repetitious, and more relevant to trials. For example, section 110A(12) relates to depositions and how written statements can be used at trial in the higher courts.

17.137 What I am seeking to achieve in redrafting this section is to provide for a clear and consistent approach to the way in which the prosecution and defence can give and call evidence during committal proceedings. It is still the intention that a hand-up committal will be the 'default' way for a committal proceeding to take place in court.

17.138 The new framework should divide the contents of this section into three separate parts, namely:

- General provisions
- Prosecution provision
- Defence provisions.

[71] See also, as to oral evidence via cross-examination, sections 83A(5AA) and 110B.



General provisions

17.139 The general provisions will relate to the following:

- prosecution evidence *should be* in statement form (unless the prosecution chooses otherwise),[72] but there must still be a process for ensuring the defendant understands the process and their entitlements and rights;
- the requirement for a statement to contain a declaration under the *Oaths Act 1867* should be removed. It is outdated and places increased burden on QPS and prosecution authorities to ensure statements comply. A signed acknowledgement or declaration as to the truth of the contents without the *Oaths Act 1867* requirement will be sufficient;
- the prosecution and defence can agree to the cross-examination of a witness; and
- the magistrate must generally be required to consider whether all the evidence is sufficient to commit the defendant to a higher court for an indictable offence, however a defendant (including a self-represented defendant) can waive the application of the committal test.

17.140 In particular, I recommend it be made clear that any defendant, both legally represented and self-represented, should be able to waive the application of the committal test. In addition, this should apply regardless of how evidence is presented, including when there is a combination of tendered witness statements and oral evidence.

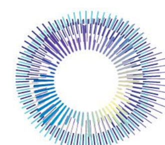
17.141 When a self-represented defendant seeks to waive the application of the committal test, the magistrate will be required to ensure the defendant understands what they are doing and the consequences of doing so. This will include explaining the process to the defendant and asking questions to confirm their understanding.

Prosecution provisions

17.142 The prosecution provisions will clearly set out the ways in which the prosecution can give and call evidence in committal proceedings.

17.143 Although the 'default' position will be that the prosecution should give evidence by way of statements (which could be written or recorded in another lawful way), the prosecution should also have the right to call oral evidence if they choose. This could be either to supplement a written statement, or to have a witness give full oral evidence. There should be no requirement for the prosecution to first obtain leave of the court.

[72] See further [17.143].



17.144 This approach is consistent with the Moynihan Report, which recommended that the prosecution be able to call a witness to give evidence at a committal hearing. The Report stated:[73]

> If the prosecution wishes to call a witness at committal hearing, it should be able to do so. This would normally be for an opportunity to test the evidence of a prosecution witness which is in the interests of both parties and the public.

17.145 In circumstances where the prosecution has called oral evidence, to ensure procedural fairness the defendant must have the right to cross-examine the witness about that oral evidence. If the evidence supplements a written statement by that witness, cross-examination as of right will be limited to the additional oral evidence. Defence will have to seek either prosecution consent or a direction under 83A(5AA) if they want to cross-examine the witness on their written statement.[74]

Defence provisions

17.146 These provisions will clearly set out how and when defence can give or call evidence.

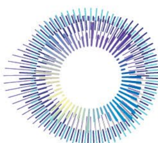
17.147 Sections 110A(2), (6B), (8) and (9) are largely related to evidence tendered or called by the defendant, and all need simplification. Generally, the intent of these provisions will be maintained, to the effect that:

- a defendant may call a witness to give oral evidence in a committal proceeding, after which the prosecution will have the right to cross-examine the witness;
- a defendant may tender a written statement for admission as evidence if the prosecution agrees to its admission, and that agreement may be subject to the person being present for cross-examination; and
- the magistrate has the discretion to require that a witness for the defendant appear at a committal hearing to give evidence, even in circumstances where a written statement of that witness has been or could be admitted as evidence.

17.148 It is appropriate that there are different limitations on when the prosecution and defence may give or call evidence, and that witnesses for the prosecution and defence are treated differently. At a committal hearing there is no obligation on the defendant to prove anything, unlike the prosecution who must meet the committal test. As such, any decision by a defendant to call evidence is a choice and a consequence of that choice is that the witnesses may be required to come to court and may be cross-examined by the prosecution.

[73] Moynihan (n 3) 193, 215, Rec 45.

[74] The Magistrates Court may grant an adjournment in circumstances where oral evidence is led and parties need the opportunity to consider the evidence presented: See Chapter 19.



Cross-examination of witnesses

17.149 Much of the feedback about committals with cross-examination of witnesses related to the lack of guidance about what is meant by 'substantial reasons why, in the interests of justice' and the process for seeking prosecution consent to cross-examine a witness under sections 83A(5AA) and 110B of the Justices Act.

17.150 To address these concerns, the proposed new committals framework will include guidance about what is meant by 'substantial reasons why, in the interests of justice', by setting out a non-exhaustive list of circumstances in which such reasons might exist. These circumstances are drawn from relevant case law[75] on the matter and will include:

- to clarify the evidence proposed to be called, to avoid a defendant being taken by surprise at trial
- to gain a proper understanding of the case being advanced against the defendant
- to narrow the issues in dispute
- where cross-examination might substantially undermine the credit of a significant prosecution witness
- where a critical witness, including a complainant, has made inconsistent statements
- to avoid the need for a *voir dire* or pre-trial hearing in the higher court (commonly referred to as a 'Basha inquiry')[76]
- where the matters of cross-examination may found a legal ruling on admissibility or the exercise of a discretion to exclude evidence
- to enable the defendant to make a submission on the evidence
- where cross-examination would be likely to result in discharge of the defendant
- where there is a likelihood that cross-examination will demonstrate grounds for the exercise of the prosecution discretion not to proceed with the charge.

17.151 A magistrate should still be required to give reasons for any decision to allow cross-examination, which should set out the witnesses to be cross-examined and the issues for cross-examination.

17.152 The process for defence to seek to cross-examine a prosecution witness should remain the same. That is, the defence should seek the prosecution's consent prior to applying for a direction from the Court. However, the law (or associated Rules or Regulations)

[75] See for example *DPP v DSM* [2013] QMC 20. In this decision, the magistrate has listed multiple cases for reference. See also *Criminal Procedure Review – Magistrates Courts: Consultation Paper* (April 2022) [3.143]–[3.144].

[76] *R v Basha* (1989) 39 A Crim R 337.

should clearly set out the steps in the process and assign clear time frames to each step to ensure better case management.

17.153 These time frames will form part of the case management of committal matters in the Magistrates Courts.[77]

17.154 The proposed case management model for committals includes a mandatory direction hearing (unless the court orders otherwise or parties are excused from that step). This will also assist in addressing the need for greater oversight of applications for cross-examination, including timely and appropriate responses.

17.155 More generally, increased disclosure provisions and case conferencing requirements should assist parties to make their elections, narrow the issues in dispute, identify any requirements to call witness or make applications, and have matters committed as soon as practical.

17.156 An overview of the recommended process for a court committal under the new criminal procedure legislation is set out in Diagram 17.3.

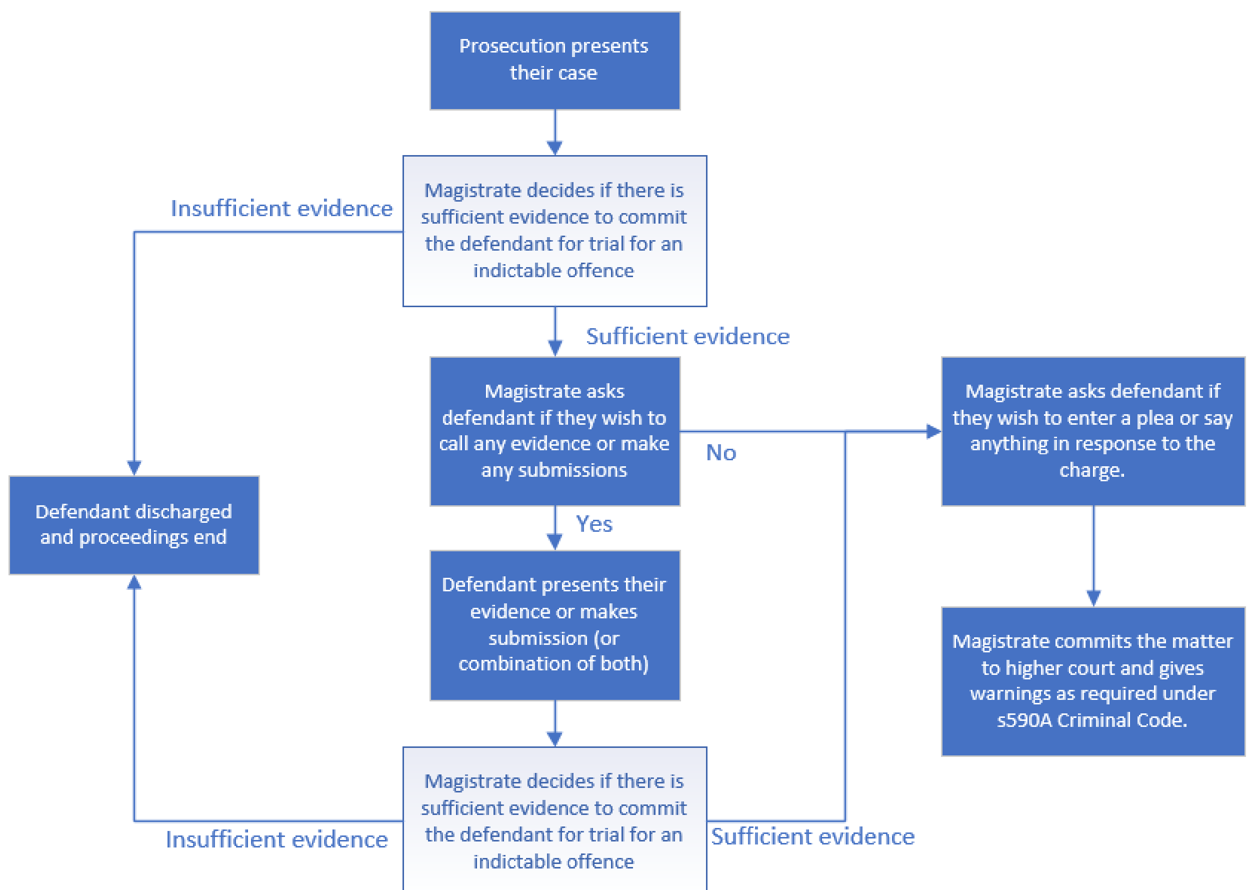


Diagram 17.3: Overview of recommended court committal process

[77] See further Chapter 14.

Other matters

Where matters have commenced in the summary jurisdiction

17.157 During the Review, some concerns were raised about circumstances in which a charge proceeded summarily but after evidence was presented, the magistrate formed the view that the matter was too serious to be dealt with in the Magistrates Court.

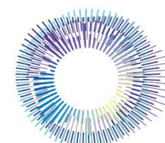
17.158 The procedures to be followed in these circumstances are not always clear. To rectify any confusion about this process, I recommend the new committals framework should include a provision to the same effect as section 118 of the *Drugs Misuse Act 1986* (and similar provisions in other Acts[78]), which states:

> (4) Where proceedings are taken with a view to summary conviction of a defendant and the magistrate forms the opinion that the charge ought to be prosecuted on indictment, the magistrate shall abstain from determining the charge summarily and shall instead deal with the proceedings as proceedings with a view to the committal of the defendant for trial or sentence.
>
> (5) Where, pursuant to subsection (4) , the magistrate abstains from determining summarily proceedings in respect of a charge—
>
> (a) the plea of the defendant taken at the outset of the hearing shall be disregarded; and
>
> (b) the evidence adduced in the proceedings before the magistrate's decision to abstain shall be deemed to be evidence in the proceedings with a view to the committal of the defendant for trial or sentence; and
>
> (c) before committing the defendant for trial or sentence the magistrate shall address the defendant in accordance with the *Justices Act 1886*, section 104.

17.159 This type of provision will clarify the steps to be followed by magistrates when they have started a proceeding but form the view a charge is too serious to be dealt with summarily and should proceed on indictment. Given that evidence has been heard by the court, these matters should proceed as a court committal.

17.160 This was also discussed earlier in Chapter 11. In that chapter, I recommended that (unless another more specific Act applies) this type of process should be followed when a magistrate abstains from dealing with an offence summarily. I also recommended that if the magistrate abstains after the defendant had been found guilty and convicted at a summary trial, then the matter should be committed for sentence.

[78] See also, for example, *Fisheries Act 1994* (Qld) s 220B, *Adoption Act 2009* (Qld) s 309, *Domestic & Family Violence Protection Act* (Qld) s 181.



Costs on committal and appeals

17.161 Currently, if an offence is discharged at committal, a defendant cannot seek costs. I do not propose to introduce a costs regime for the committal process. There is sufficient rationale for not having costs available in circumstances where the charges are serious in nature, and it is well established there is no common law right to costs on a committal. For further discussion on costs, see Chapter 18.

17.162 Despite receiving feedback and commentary raising concerns about the lack of appeal process for committals, I have decided this is not something I recommend including in the new legislative framework (as well as it being outside the scope of my terms of reference). I maintain the view that committals are an administrative function, not judicial. Further, once a matter is finalised in the higher courts, that outcome is subject to the usual appeals processes.

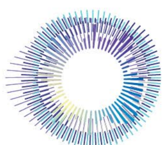
Documentation after a committal

17.163 Although not raised in the Consultation Paper, I have also identified the need to maintain but simplify the provisions relating to depositions, particularly sections 110A(12), (13) and (13A), and section 111 of the Justices Act.

17.164 Generally, depositions are made up of the evidence given by a witness in a committal proceeding, including both written statements and oral evidence. Depositions are important because they are provided to the higher court and are relied upon by the higher courts, particularly at trial if a witness who previously gave a statement is unavailable or deceased.

17.165 It is clearly important that the provisions about depositions are maintained. However, their current form is unnecessarily complicated, and they are difficult to understand. They also include unnecessary requirements, such as the depositions being signed by the magistrate. Consideration might also be given to where provisions about the later use of depositions are best located, given that this is a matter relating to trials held in the higher courts.

17.166 Section 111 refers to the *Criminal Law Amendment Act 1892*, an Act which currently contains only one section because all other provisions have been repealed. The remaining provision relates to a defendant indicating at committal whether they require the prosecution witnesses to attend the trial to give evidence, or if the witness' statement can be accepted as is. This does not occur in practice and is not required, making the provision obsolete. Simplification of the law about depositions will replace this 1892 provision, and consequently I recommend the Act be repealed.



17.167 As discussed earlier, a defendant's ability to waive receipt of statements for registry committals[79] will be removed. It will be a requirement that all statements must be given to the defendant prior to committal and either filed with the court or, in the alternative, identified on an agreed and filed 'List of Witness Statements'. This is necessary to make sure these statements are included as the depositions.[80]

17.168 Similarly, the required steps relating to documentation after a committal has been conducted, such as the transmission of bail under section 121 and transmission of depositions under section 126, should also be maintained, but consolidated and simplified. Technological means of transmitting documents and material will also be permitted, removing any requirements for original documents or for documents to be signed by the magistrate or defendant prior to committal.

Committals in absence of defendant

17.169 A defendant may sometimes abscond from court partway through a committal. There is a view that the committal should still be able to proceed in the defendant's absence to avoid delay and make sure that a victim or other witnesses are not required to give evidence again.

17.170 Although those are important and valid reasons, I am of the view that where a defendant absconds partway through a committal the matter should not be committed. To proceed would present practical problems in the higher courts. Instead, a warrant should be issued for the defendant's arrest.

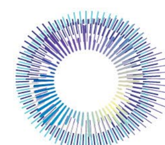
17.171 However, in circumstances where evidence in a committal was heard before a defendant absconded and the defendant is later located and arrested, the committal should continue on the evidence already before the court. The defendant should not be entitled to 'start over' the committal process.

17.172 Accordingly, like when a matter is commenced as a summary proceeding but is too serious to continue that way, where the court has commenced hearing evidence and the defendant absconds, the evidence already heard should be deemed to be evidence in any later committal proceedings. These later proceedings will be required to take place in court (as opposed to by registry committal) because the committal is already in progress.

17.173 This approach will not prevent a defendant from raising new information or issues that have become known in the intervening period and dealing with those as part of the continuing committal proceeding. If a committal had commenced but later there is no

79 *Justices Act 1886* (Qld) s 114(6).

80 See [17.121] ff.



evidence before the court (for example, because any transcript is lost) this provision will not prevent a committal from being restarted in those circumstances.

17.174 There may be circumstances where the time passed between the defendant absconding and being brought before the court has meant the original magistrate is no longer available. In those circumstances, it is prudent for another magistrate to conduct the proceedings.[81]

Human rights considerations

17.175 The terms of reference for this Review prevent any significant changes to the existing committal process. Therefore, the human rights implications of committals in general are not being considered, but rather the human rights impact of the changes being recommended.

Allowing self-represented people to participate in registry committals or otherwise waive the committal test

17.176 The purpose of this amendment is to allow defendants to make fully informed decisions about their criminal proceedings, which will allow them to efficiently commit the matter to the higher courts for trial or sentence.

17.177 By waiving the requirement for magistrates to apply the committal test,[82] the process to commit the charge can be expedited. This is protective of the right to be tried without unreasonable delay, which is one of the minimum guarantees protected for people charged with criminal offences under the *Human Rights Act 2019*.[83] Feedback received from people who had personally experienced the committals process, either as a defendant, victim or witness, suggested the committal process was protracted and not necessarily adding any benefit, given a committal is not the final determination of the charge.

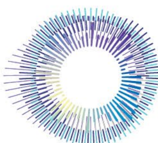
17.178 It is not only in the defendant's interest to be able to commit matters sooner, where this is what they want, but also for the benefit of witnesses who will no longer need to give evidence in committals because the defendant has accepted the case should be committed to the higher courts for trial or sentence.

17.179 The current requirement for all self-represented defendants to participate in court committals was intended to be a safeguard to ensure every defendant either had legal advice on their case (before proceeding to waive the requirement for a magistrate to conduct the committal) or otherwise the magistrate reviewed the case before committing.

[81] For further discussion about when a magistrate is 'seized of a matter' see Chapter 19.

[82] Whether the evidence is sufficient to put the defendant upon trial for an indictable offence.

[83] *Human Rights Act 2019* (Qld) s 32(2)(c).



In practice, limited court availability has resulted in delayed committals, even when all parties agree to commit the matter to the higher court.

17.180 The new provisions will still require a safeguard, namely that the magistrate must ensure the defendant understands what they are doing when they waive the committal test, but it will offer an option for fully informed self-represented defendants to access the same efficiencies that those with lawyers can.

Removing requirement for justices and defendants to sign statements in committals

17.181 There is a current requirement for written statements admitted at committal to be signed by the magistrate,[84] and for defendants to sign a statement at committal in some circumstances.[85] The removal of the current requirement for justices and defendants to sign statements used in committals will not limit any human rights.

17.182 The defendant will still be provided with the statements, allowing them to be fully informed of the evidence against them[86] and they will continue to have the right to seek to cross examine witnesses, if they wish to challenge the contents of the statements.[87]

17.183 The requirement for a signature is not focused on the needs of the defendant, who may not always be able to read the statement before them or physically sign their name, which is why other methods of ensuring understanding will be adopted. The proposed change will ensure defendants are communicated with in a way they can understand. This proposal is protective the rights in section 32(2) of the *Human Rights Act 2019*, which establishes a number of minimum guarantees ensuring that people charged with criminal offences understand and are communicated with in a way that they understand.[88]

17.184 The requirement to sign statements may also limit future technological efficiencies being introduced, and therefore removing these barriers supports progressing matters as efficiently as possible. This change will also protect the right to be tried without unreasonable delay.[89]

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[84] *Justices Act 1886* (Qld) s 110A(11).

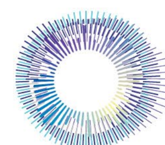
[85] *Criminal Law Amendment Act 1892* (Qld) s 4.

[86] *Human Rights Act 2019* (Qld) s 32(2)(a).

[87] *Human Rights Act 2019* (Qld) s 32(2)(g).

[88] *Human Rights Act 2019* (Qld) s 32.

[89] *Human Rights Act 2019* (Qld) s 32(2)(c).



Recommendations

Language and simplicity

R17.1 In the new criminal procedure laws for the Magistrates Courts, part 5 division 5 of the Justices Act will be redrafted in simple language and set out a clear framework for committals in Queensland. The general concepts and processes currently contained in part 5 division 5 and other committal divisions will be retained.

R17.2 The new committals framework should use the following terminology:

(a) **Committal proceeding:** this term will be defined to include all types of committals;

(b) **Registry committal:** this term will be defined to include committals conducted by the registrar and the legislation will (as in the current Justices Act) set out the processes and procedures related to these committals;

(c) **Court committal:** this term will be defined to include any type of committal occurring in court, including both a 'hand-up committal' that relies entirely on witness statements and a committal involving any form of oral evidence (as well as any combination of the two). These court committals will have clearly defined requirements and processes set out in the new legislation;

(d) **Statement:** this term will replace the current term 'written statement' and is intended to include statements provided in various forms, such as one that is in writing or made as an audio-visual recording. A written statement must contain an acknowledgement or declaration that the contents are true and that the maker is aware of the consequences of making a false statement, but this need not refer to the *Oaths Act 1867*.

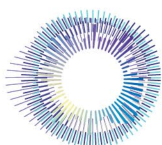
R17.3 The provisions of the new criminal procedure framework that permit the use of technology should, among other things, provide for the greater use of technology in committal proceedings, particularly administrative aspects such as the electronic lodgement and exchange of documents and electronic statements.

R17.4 The new committals framework should explicitly acknowledge that committals are an administrative process and are not subject to an appeal or stay of proceedings.

Registry committals

R17.5 The new committals framework should extend eligibility for registry committals to self-represented defendants with the same general conditions as are currently provided for in section 114 of the Justices Act.

R17.6 To facilitate the use of registry committals by self-represented defendants and provide appropriate protections, safeguards must be put into place to ensure the



defendant understands what is required of them and what they are doing, including:

(a) giving defendants simple information about the registry committal process at an early stage of proceedings;

(b) providing plain English instructions for completing the registry committal process; and

(c) requiring a defendant to make a declaration about relevant legal matters (for example, that the defendant will not give evidence or call witnesses and acknowledges that the sufficiency of the evidence will not be considered).

R17.7 The requirement that a defendant who is not in custody must not be in breach of any condition on their bail undertaking should be removed as a condition of registry committal eligibility.

R17.8 Time frames for progressing a registry committal should be introduced into the Rules. The rules should include:

(a) defence have 14 days from the date they indicate to the court the matter is ready to proceed via registry committal, to prepare their application and send to the prosecution for consideration;

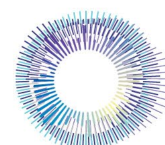
(b) prosecution should, as soon as practical but no later than 14 days, respond to the defence application to proceed via registry committal;

(c) upon receiving the prosecution response, the registry should progress the application as soon as practical; and

(d) parties may apply to the registrar for an extension of the time frames, and the registrar must have sufficient discretion to case manage the registry committal process or bring the file back before a magistrate for ongoing case management.

R17.9 Before a registry committal can take place, the witness statements must have been disclosed to the defendant. The defendant may consent to a registry committal taking place without the witness statements being filed in court, but an agreed list of witness statements must be filed instead. The defendant (or their lawyer) must not be able to waive these requirements, meaning the defendant cannot consent to the statements not being disclosed to them, or to the statements or the list of statements not being filed in court for the purposes of a registry committal.

R17.10 A list of witness statements must include the full name of each witness giving a statement and the date on which their statement was declared. The contents of the list must be agreed to by the prosecution and the defendant.



R17.11 The statements listed in a list of witness statements will form the depositions for a matter. Following a registry committal, the party in possession of the listed statements must transfer or provide them to the prosecuting agency.

Court committals

R17.12 Consistent with Recommendation 17.1, the concepts in sections 104 and 108 of the Justices Act should be combined, simplified and expressed in way that sets out the general steps in a committal hearing, including by providing:

(a) The purpose of committal proceedings is for the magistrate to consider all the evidence before the court and decide whether the evidence is sufficient to commit the defendant for trial for an indictable offence;

(b) At the close of the prosecution case, if the magistrate is not satisfied the evidence meets the test for committal, the defendant must be discharged;

(c) If the magistrate is satisfied there is sufficient evidence, they must call on the defendant about whether they wish to call any evidence or make a submission about the sufficiency of the case;

(d) If the defendant makes a submission or offers any evidence, then the magistrate must again consider the sufficiency and decide, after any defence evidence is heard, whether the matter is to be committed to a higher court on a consideration of all the evidence; and

(e) If the matter is to proceed, the magistrate must ask if the defendant wishes to say anything in answer to the charge or enter any plea; and

(f) Following any statement or plea, the magistrate must commit the matter to a higher court and, if the matter is committed for trial, give warnings about alibi evidence in accordance with section 590A of the Criminal Code.

Hand-up committals

R17.13 Consistent with Recommendation R17.1, section 110A should be redrafted to provide a clear and consistent approach to the way in which the prosecution and defence can give and call evidence during a committal proceeding.

R17.14 The redrafted law should contain three parts relating to:

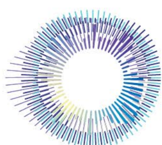
(a) General Provisions:

(b) Prosecution Provisions; and

(c) Defence Provisions.

R17.15 The **General Provisions** should contain the following concepts:

(a) prosecution evidence should be in statement form (unless the prosecution chooses otherwise), but there must still be a process for ensuring the defendant understands the process and their entitlements and rights;



(b) a statement should not be required to contain a declaration under the *Oaths Act 1867*, but should be required to include a signed acknowledgement or declaration relating to the truth of the statement and the consequences of making a false statement;

(c) the prosecution and defence can agree to the cross-examination of a witness; and

(d) the magistrate must generally be required to consider whether all the evidence is sufficient to commit the defendant to a higher court for an indictable offence, however a defendant (including a self-represented defendant) can waive the application of that test.

R17.16 In relation to Recommendation 17.15(d), specifically:

(a) a defendant can waive the application of the committal test regardless of how the committal proceeded, including where all evidence is in statement form and where there is a combination of written and oral evidence; and

(b) if the test is waived by a self-represented defendant, the magistrate must take steps to ensure the defendant understands what they are doing and the consequences of doing so, including by explaining the process to the defendant and asking questions to confirm their understanding.

R17.17 The **Prosecution Provisions** should contain the following concepts:

(a) although the prosecution evidence should generally be in statement form, the prosecution has the right to call a witness to give oral evidence, either to supplement a written statement or to give full oral evidence, without any requirement to first obtain leave of the court; and

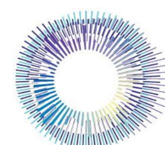
(b) where the prosecution calls oral evidence, defence must have the right to cross-examine the witness about that oral evidence (but where the evidence supplements a written statement, must still obtain prosecution consent or a direction from a magistrate to cross-examine the witness about their written statement).

R17.18 The **Defence Provisions** should contain the following concepts:

(a) a defendant may call a witness to give oral evidence in a committal proceeding, after which the prosecution will have the right to cross-examine the witness;

(b) a defendant may tender a written statement for admission as evidence if the prosecution agrees to its admission, and that agreement may be subject to the person being present for cross-examination;

(c) the magistrate has the discretion to require that a witness for the defendant appear at a committal hearing to give evidence, even in circumstances



where a written statement of that witness has been or could be admitted as evidence.

Committals with cross-examination

R17.19 The committals framework in the new criminal procedure legislation should provide guidance about what is meant by the phrase 'substantial reasons why, in the interests of justice', by setting out a non-exhaustive list of circumstances in which such reasons might exist. These circumstances will include:

(a) to clarify the evidence proposed to be called, to avoid a defendant being taken by surprise at trial;

(b) to gain a proper understanding of the case being advanced against the defendant;

(c) to narrow the issues in dispute;

(d) where cross-examination might substantially undermine the credit of a significant prosecution witness;

(e) where a critical witness, including a complainant, has made inconsistent statements;

(f) to avoid the need for a *voir dire* or pre-trial hearing in the higher court (commonly referred to as a 'Basha inquiry');[90]

(g) where the matters of cross-examination may found a legal ruling on admissibility or the exercise of a discretion to exclude evidence;

(h) to enable the defendant to make a submission on the evidence;

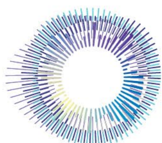
(i) where cross-examination would be likely to result in discharge of the defendant; and

(j) where there is a likelihood that cross-examination will demonstrate grounds for the exercise of the prosecution discretion not to proceed with the charge.

R17.20 Where a magistrate permits cross-examination of a witness, the magistrate must give reasons for their decision which set out the witnesses to be cross-examined and the issues for cross-examination.

R17.21 The procedure for the defence to make a request for cross-examination of a prosecution witness should not change. However, the law (or associated Rules or Regulations) should clearly set out the steps in the process and assign clear time frames to each step.

[90] *R v Basha* (1989) 39 A Crim R 337.



Other matters

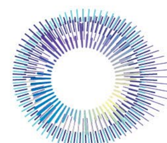
R17.22 The committals framework should include a clear process for the steps to be taken when a charge proceeded summarily, but after evidence was presented the magistrate formed the view that the matter was too serious to be dealt with in the Magistrates Court. The law should be to the same effect as other laws about these circumstances, such as section 118 of the *Drugs Misuse Act 1986*.

R17.23 The current provisions in the Justices Act relating to depositions, and to the required steps for transmission of documentation after a committal has been conducted, should be maintained but simplified. Consequently, the *Criminal Law Amendment Act 1892* should be repealed.

R17.24 The committals framework should contain clear provisions applying when a defendant absconds partway through a committal proceeding, to the effect that:

(a) the committal proceeding must not continue, and a warrant must be issued for the defendant's arrest; and

(b) if the defendant is later located and arrested, any evidence already heard in the committal proceeding before the defendant absconded is deemed to be evidence in any later committal proceeding.



CHAPTER 18: COSTS AND ENFORCEMENT

Introduction

18.1 Generally, the term 'costs' can include court filing fees, lawyer's fees, postage costs, witness expenses (including preparing reports), travel costs to attend court and costs of taking time off work to attend court. The term 'professional legal costs' is often used to refer to the costs of hiring a lawyer to represent a party in court.

18.2 In the Magistrates Courts, costs are sometimes available in criminal proceedings. Generally, costs are available for offences that can be finalised in the Magistrates Courts, and only within the parameters set by the Justices Act. Costs are not available for committal proceedings. Costs are generally not available in relation to criminal proceedings in the higher courts.

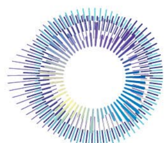
18.3 This chapter will set out the current law on costs and consider how that should be maintained or changed in the new criminal procedure laws for the Magistrates Courts. However, the current laws relating to costs for private prosecutions are discussed separately in Chapter 13 about private prosecutions.

The current position

18.4 The Magistrates Courts are a 'costs jurisdiction'. This means that a magistrate can sometimes order one party to pay the other party's costs of the legal proceeding. Generally, the purpose of ordering costs is to compensate a party for some of the expenses they incurred by coming to court, particularly if the other party behaved in a way that unnecessarily drew out proceedings or caused excess costs to be incurred.

18.5 Costs in the criminal jurisdiction are not automatically ordered — that is, they do not automatically 'follow the event'. It is a matter for each party if they want to apply for costs. Some agencies in Queensland have a policy of not seeking costs orders, particularly if they are funded by the state and their clients have not incurred financial costs during the court proceeding.

18.6 The costs that can be awarded in the Magistrates Courts are governed by the Justices Act. Generally, costs are only available for matters finalised in the Magistrates Courts, and there are sometimes limitations on the costs that can be awarded. For example, there is a scale that limits the amount of costs that can be awarded at the end of a proceeding, and there are additional steps that must be taken before costs can be ordered against a police officer or a public officer. It is said the fact costs orders can be made against



police 'no doubt provides some incentive not to inappropriately prosecute with insufficient evidence'.[1]

Costs on adjournment

18.7 Magistrates have the power to order costs on adjournment of a matter that may be finalised in the Magistrates Courts. Specifically, one party can be ordered to pay the costs 'of and occasioned by the adjournment' to the other party as 'may appear just'.[2]

18.8 This also extends to costs for an adjournment completed by a clerk of the court (as opposed to a magistrate). This generally occurs where a defendant has been summoned to attend court on a day that the matter is unlikely to proceed, or it is otherwise convenient for the matter to be adjourned.[3] Although the clerk of the court completes the adjournment, only a magistrate can order costs are payable after an application from a party.

18.9 Costs may not be available for every adjournment. In practice, a party may apply for costs incurred if they attended court and their matter could not proceed through no fault of their own.

Costs for failing to comply with disclosure

18.10 During the course of proceedings, a magistrate may issue a direction for the disclosure of evidence or other material to the defendant in accordance with disclosure obligations under the Criminal Code.[4] If a person fails to comply with this direction, the court can order the person to give evidence (either in writing or orally) about why they have failed to comply.[5] After considering the evidence, if the magistrate is satisfied the noncompliance was unjustified, unreasonable or deliberate, then the magistrate may order the defendant be paid an amount of costs that is considered 'just and reasonable'.[6]

18.11 The costs are limited to any adjournments for the person to comply with the order for disclosure and for the defendant to consider anything disclosed. Therefore, the defendant is only able to recover the costs 'thrown away' by the adjournment. The defendant can seek these costs at the time of adjournment, regardless of the ultimate outcome of the proceeding. Costs awarded in these circumstances do not appear to be limited to matters that are finalised, or could be finalised, in the Magistrates Courts.

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[1] Heather Douglas and Sue Harbidge, *Criminal Process in Queensland* (Lawbook Co, 2008) 87.

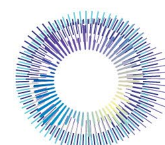
[2] *Justices Act 1886* (Qld) s 88(3).

[3] *Justices Act 1886* (Qld) s 23D(1)(b), (6).

[4] *Justices Act 1886* (Qld) s 83A(5)(aa); Criminal Code (Qld) ch 62 div 3. See further, as to disclosure, Chapter 14.

[5] *Justices Act 1886* (Qld) s 83B(1).

[6] *Justices Act 1886* (Qld) s 83B(4)(b).



Costs on conviction or dismissal

18.12 In the Justices Act, part 6 division 8 allows a magistrate to order a defendant to pay the prosecutor's costs if they are convicted summarily, and to order a prosecutor to pay the defendant's costs if the charge is dismissed or struck out because the court does not have jurisdiction. The costs awarded to either party must be the costs that, to the magistrate, 'seem just and reasonable'.[7]

18.13 The phrase 'just and reasonable' is not defined in the Justices Act. However, it has been described as wide and as involving 'common sense'.[8]

18.14 If the prosecutor is a police officer or public officer,[9] there are further limits on when a magistrate may make a costs order against them. The magistrate must also be 'satisfied that it is proper' for the costs order to be made following a consideration of all relevant circumstances. A list of examples is provided in the Act, which includes:

- whether the proceeding was brought and continued in good faith
- whether the investigation was appropriate
- the defendant's actions in the proceeding, including whether the defendant brought suspicion on themselves, unreasonably declined opportunities to explain or provide evidence, or unreasonably prolonged proceedings
- any failure to comply with a direction
- the reasons for a dismissal, particularly whether it was technical or based on a lack of evidence
- whether the defendant was acquitted of a charge but convicted of another.[10]

18.15 In deciding costs that are just and reasonable in these circumstances, the court can generally only order costs for items listed in the scale of costs and only up to an amount allowed for in that scale.[11] The scale further limits the amounts of costs that can be awarded by providing that costs are only payable to the extent to which 'incurring the cost was necessary or proper to achieve justice or to defend the rights of the party' or 'the cost was not incurred by over-caution, negligence, mistake or merely at the wish of a party'.[12]

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[7] *Justices Act 1886* (Qld) ss 157–58.

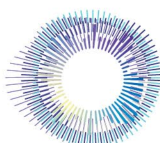
[8] See Westlaw AU, *Summary Offences Qld* (4 October 2021) [JA.157.60] and the cases cited there.

[9] In this section, the term 'public officer' does not include 'an officer or employee of the public service of the Commonwealth, an officer or employee of a statutory body that represents the Crown in right of the Commonwealth, or an officer or employee of a local government': *Justices Act 1886* (Qld) s 158A(6).

[10] *Justices Act 1886* (Qld) s 158A.

[11] *Justices Act 1886* (Qld) s 158B; *Justices Regulation 2014* (Qld) sch 2.

[12] *Justices Regulation 2014* (Qld) sch 2 reg 3.



18.16 The scale of costs lists legal professional work and other disbursements that can be claimed, and how much can be claimed for each. This scale is currently located in the *Justices Regulation 2014*[13] and originally came into force in July 1999.[14] The dollar amounts in the scale have never been updated since that time, so are over 20 years old.

18.17 The maximum costs payable for legal professional work are:[15]

Task	Maximum amount payable
Instructions and preparation for the hearing, including attendance on day 1 of the hearing	$1,500.00
Attending hearing after day 1	$875.00
Court attendance, other than for a hearing	$250.00
District Court appeals under section 222 of the Justices Act	Same as above, increased by 20%

18.18 The scale of costs also provides for disbursements to witnesses for attending court, and for disbursements related to court fees or other fees and payments (such as an allowance payable to an interpreter).[16]

18.19 If a party wants to recover an amount above the scale of costs, the magistrate must be satisfied a higher amount is 'just and reasonable having regard to the special difficulty, complexity or importance of the case'.[17] This is an objective legal test, which means the case must be especially difficult, special or complex compared to what is ordinarily encountered, not just especially difficult or complex for the particular parties.[18]

18.20 An overview of the current law related to seeking costs following a conviction or dismissal in a criminal matter in the Magistrates Courts is set out in Diagram 18.1.

[13] *Justices Regulation 2014* (Qld) sch 2.

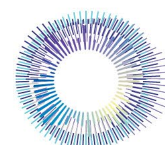
[14] *Justices Regulation 1993* (Qld) sch 2 (repealed on 27 August 2004).

[15] *Justices Regulation 2014* (Qld) sch 2 reg 4, pt 2.

[16] *Justices Regulation 2014* (Qld) sch 2 pt 3.

[17] *Justices Act 1886* (Qld) s 158B(2).

[18] *Allison v Channel Seven Queensland Pty Ltd* [2015] QDC 111, [24].



Charge before the court

Guilty

Complainant has the right to seek costs

Just and reasonable test

The court may order the defendant to pay the complainant costs that seem "just and reasonable"
Section 157 JA

Dismissed
OR
Charge is struck out because the court does not have jurisdiction

Defendant has the right to seek costs

The court may order the complainant to pay the defendant costs that seem "just and reasonable"
Section 158 JA

Just and reasonable test

Is complainant a police or public officer?

No

Yes

Costs may only be awarded for an item allowed under the scale of costs and an amount under the scale
Section 158B(1) JA

Scale test

If seeking costs above the scale, the court must be satisfied the higher amount is "just and reasonable" having regard to the special difficulty, complexity or importance of the case.
Section 158B(2) JA

The court must also be satisfied it is "proper" that the costs order be made
Section 158A JA

Proper test

Diagram 18.1: The current law relating to seeking costs on conviction or dismissal

18.21 In the 2021–22 financial year, the Magistrates Courts' criminal jurisdiction made almost 2500 costs orders, totalling over $1.2 million. As a proportion of all defendants lodged in the Magistrates Courts that year, that is 1.43%.[19] The types of costs orders are broken down into: costs of court, fees, investigation costs, postage fees, professional costs, witness expenses and miscellaneous. The 2021–22 data (below) is provided by CSQ:[20]

[19] Based on 174,767 adult defendants in 2021-22: Information provided by Court Services Queensland, 9 August 2022.

[20] Data has been extracted from the court case management system and is subject to change as court records are updated. The order types are set by the courts and are not further defined. Information provided by Court Services Queensland, 9 August 2022.

Order Type	Number	Total Value	Average order amount
Costs of Court	1,953	$475,595.52	$243.52
Fees	41	$101,903.24	$2,485.44
Investigation Costs	1	$2,166.98	$2,166.98
Postage Fees	12	$56.65	$4.72
Professional Costs	401	$462,743.83	$1,153.97
Witness Expenses	17	$24,471.15	$1,439.48
Miscellaneous	79	$240,988.40	$3,050.49
TOTAL	**2,504**	**$1,307,925.77**	**$522.33**

18.22 As can be seen from the above table, most of the orders relate to the costs of court, which includes filing fees. Professional legal costs are the next most common type of order, however the average amount awarded is approximately $1,100.00. In many cases, this is likely to be less than the full amount of legal costs.

18.23 Under the *Drugs Misuse Act 1986*, no costs can be awarded for any proceeding under that Act,[21] except in relation to a failure by a party to comply with a court direction about disclosure.[22] The exception about not complying with disclosure was added in 2010 during the Moynihan reforms,[23] but the main provision is from the original Act as it was passed in 1986. The purpose of the 1986 legislation was to address drug trafficking in Queensland,[24] and the section relating to costs was introduced with the intention of treating every offence under the Act as if it were an indictable offence, meaning no costs would be available.[25] Offences could still be dealt with summarily in the Magistrates Courts, but no costs would be available for either the prosecution or defence.

Appeals

18.24 There are separate costs provisions relating to appeals under the Justices Act. A District Court judge can make orders for costs to be paid by either party 'as the judge may think just'.[26] However, costs are still limited to the items and amounts prescribed in the scale of costs, unless the judge is satisfied a higher amount is just, having regard to the special difficulty, importance or complexity of the appeal.[27]

[21] *Drugs Misuse Act 1986* (Qld) s 127(1).

[22] *Drugs Misuse Act 1986* (Qld) s 127(2). Specifically, a direction must be made under the Criminal Code (Qld) s 590AAA or the *Justices Act 1886* (Qld) s 83B.

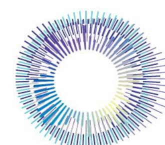
[23] *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) s 63.

[24] Queensland, *Parliamentary Debates*, Legislative Assembly, 10 December 1985, 3473 (WH Glasson, Minister for Lands, Forestry and Police).

[25] Queensland, *Parliamentary Debates*, Legislative Assembly, 10 December 1985, 3481 (WH Glasson, Minister for Lands, Forestry and Police).

[26] *Justices Act 1886* (Qld) s 226.

[27] *Justices Act 1886* (Qld) s 232A.



18.25 No costs orders can be made for appeals relating to indictable matters dealt with summarily in the Magistrates Courts.[28] This exception was inserted in 1997,[29] as part of the court reforms at the time. Parties can still be awarded their original costs for indictable charges dealt with summarily in the Magistrates Court, but if they appeal to the District Court, then they will not be eligible for any costs related to their District Court appeal, no matter if the appeal is successful or not.

18.26 If a District Court judge orders a party to pay the other party's costs, the money must be paid to the court registrar and the registrar will forward the money to the receiving party. If the party does not pay in the time frame they are given, then the registrar gives the receiving party a certificate saying the costs were not received, and the receiving party can enforce the costs under division 9 of the Justices Act, like any other monetary order.[30]

Enforcement of orders

18.27 There are provisions in part 6 division 9 of the Justices Act about how to enforce orders by a magistrate for payment of money. This can include costs orders, but also includes court orders to pay a fine, compensation or restitution. Once a magistrate has ordered someone to pay money, division 9 addresses how that money should be paid. This usually requires the party to pay the money to the clerk of the court where the order was made.

18.28 These provisions are complex and antiquated, permitting the issue of a 'warrant of execution' when money is unpaid, which allows a police officer to take possession of and sell items belonging to the person who owes money. If selling those items fails to cover the total amount owing, the person may be taken to prison for a period of time determined by how much money is owed. This practice of recovering funds by selling items resulted in many monetary orders going unpaid.

18.29 To address this, a new scheme was created in 1999 to recover any money that was not paid to the clerk of the court, the State Penalties Enforcement Registry (SPER).[31] It was introduced in response to the large number of fines that were going unpaid, and the time-consuming process under the Justices Act to recover money.[32]

18.30 The Justices Act specifically recognises that, instead of a warrant of execution, particulars of any amount to be paid can be referred to SPER for management and recovery.[33] As

[28] *Justices Act 1886* (Qld) s 232(4).

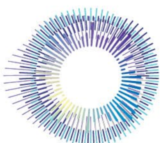
[29] *Courts Reform Amendment Act 1997* (Qld) s 65.

[30] *Justices Act 1886* (Qld) s 232(1)–(3).

[31] See generally, *State Penalties Enforcement Act 1999* (Qld) pt 2.

[32] Explanatory Notes, State Penalties Enforcement Bill 1999 (Qld), 2–3.

[33] *Justices Act 1886* (Qld) ss 161, 161A.



such, many if not all those enforcement provisions are no longer relevant, as SPER is now responsible for recovering unpaid fines and orders of the court through their powers in the *State Penalties Enforcement Act 1999*. The functions, powers and operation of SPER are not within the scope of this Review.

Other jurisdictions

18.31 Across Australia, the approaches to orderings costs in criminal proceedings are generally similar. The successful party is usually able to make an application for costs, with a particular focus on the conduct of the parties during the proceeding.

18.32 For example, in Western Australia there is an Act dedicated to the accused person's right to recover costs in summary criminal proceedings, the *Official Prosecutions (Accused's Costs) Act 1973* (WA), and prosecutors are able to recover costs under the general criminal procedures.[34] When determining the amount of costs, the court is not limited by a scale, like in Queensland.[35] Courts may adjourn applications for costs orders and these applications may be dealt with in chambers, removing the need for parties to return to court at a later date.[36]

18.33 In Victoria, the court has full discretion to decide if costs are payable, the amount payable, and who pays and receives those costs.[37] The court must not make a costs order against a person without giving them a reasonable opportunity to be heard, except where a matter is determined in the absence of the accused.[38]

18.34 In New South Wales, costs provisions are similar to Queensland, permitting an accused person to seek costs if a summary matter is dismissed or withdrawn,[39] and the prosecutor to seek costs on conviction.[40] The magistrate orders an amount be paid that is 'just and reasonable', the same as in Queensland.[41] In addition, New South Wales also has a similar limit on when prosecutors acting in a public capacity may be ordered to pay costs.[42]

[34] *Criminal Procedures Act 2004* (WA) s 67.

[35] *Criminal Procedures Act 2004* (WA) s 67(3). The *Legal Profession Uniform Law Application Act 2022* (WA) creates a scale of costs, but it is not binding on a magistrate making a costs order.

[36] *Criminal Procedures Act 2004* (WA) s 67(5)–(6).

[37] *Criminal Procedure Act 2009* (Vic) s 401.

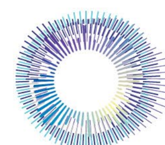
[38] *Criminal Procedure Act 2009* (Vic) s 400.

[39] *Criminal Procedure Act 1986* (NSW) s 213.

[40] *Criminal Procedure Act 1986* (NSW) s 215.

[41] *Criminal Procedure Act 1986* (NSW) ss 213(2), 215(1)(a),

[42] *Criminal Procedure Act 1986* (NSW) s 214. There are separate costs provisions for matters dealt with in the summary jurisdiction of the Supreme Court. These have some differences from costs provisions for summary matters but include the same limit on costs awards against a prosecutor acting in a public capacity: pt 5 div 4.



18.35 One variation from Queensland is that in New South Wales, an accused person may be entitled to costs at the end of committal proceedings if the accused was discharged on committal or was committed for a different offence than the one originally stated on the court attendance notice. Again, limits apply to costs awarded against a public officer.[43] This provision does not exist in Queensland.

18.36 From the above examples, all three states specifically allow the court to consider the conduct of the parties, and if such conduct was unreasonable or has unreasonably delayed proceedings, when deciding whether making a costs order is appropriate and the amount of any order.[44]

Consultation

18.37 The Consultation Paper asked if the current costs provisions of the Justices Act were working and if they could be improved. A few respondents, including the Brisbane City Council and DPP (Cth), submitted the provisions are adequate or working well.

18.38 However, most respondents who considered this issue said the provisions were not working well. Generally, respondents submitted that the current legislation makes it too difficult to be awarded an order for costs. Further, even if costs are awarded, the out-of-date scale of costs means the amounts are inadequate to compensate for the costs of coming to court.

18.39 The Australian Health Practitioner Regulation Agency (AHPRA) and the Strata Community Association (Qld) (SCA (Qld)) made submissions from the perspective of agencies who are not state funded but must commence prosecutions in the Magistrates Courts.[45] These costs are paid for by the members of the agency, who have not done anything wrong but must cover the costs of prosecuting a person breaking the law. This can often impact on the initial decision to prosecute.

18.40 These agencies submitted that there is a high likelihood costs of prosecution will not be fully recovered even if successful, due to the current scale and the fact that costs in excess of the scale are not often awarded. These agencies submitted the current scale should be updated, or otherwise that the law should broaden when a magistrate can order costs above the scale so standard prosecutions that simply cost more can still be covered.

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[43] *Criminal Procedure Act 1986* (NSW) ch 3 pt 2 div 11.

[44] *Criminal Procedure Act 2009* (Vic) s 401(2); *Criminal Procedures Act 2004* (WA) s 67(4); *Criminal Procedure Act 1986* (NSW) ss 118(2), 214, 216(2). In New South Wales, considerations about unreasonable conduct are included in the limits on costs orders against prosecutors acting in a public capacity, and in separate provisions about costs available on adjournment which apply to both parties.

[45] One respondent also suggested, instead of the scale, a wide discretion to award costs.

18.41 From a defence perspective, it was submitted that when a defendant's charges are dismissed, the defendant faces the same difficulties as non-state funded prosecutors in arguing costs are appropriate and getting costs above the current scale. Defendants also face increased legal costs when the prosecutor is not yet ready to proceed to hearing or has otherwise requested adjournments to disclose evidence or consider submissions.

18.42 The QLS and Sisters Inside Inc. submitted that defendants should have access to costs in broader circumstances, and that the amount of costs available should increase. The QLS suggested there should be specific criteria for awarding costs against prosecuting authorities that do not make timely disclosures or delay proceedings. The QLS submitted these measures would increase efficiency and have a deterrent effect, encouraging prosecuting authorities to assess the merits of a charge and provide prompt disclosure.

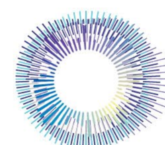
Our members report the recovery of costs is an ongoing issue and often a substantial barrier for vulnerable defendants. This is, in part, due to the operation of s 158 of the Justices Act which does not automatically entitle a successful defendant to costs.

The inability for a client to recover costs at the successful resolution of their criminal matter creates significant hardship to defendants.
— Queensland Law Society

18.43 Overall, the submissions requested the costs scheme be broadened, to better protect and compensate parties to criminal proceedings. Respondents were clear in stating the scale of costs must be increased or abolished, as it is outdated and does not reflect the current costs of legal representation. Respondents submitted that its limitations are preventing parties from recovering an adequate amount of costs.

18.44 The Consultation Paper asked whether the law should be changed so that costs can also be awarded in relation to offences under the *Drugs Misuse Act 1986*. Four respondents, including the QLS and the BAQ, responded to this question and confirmed their support for this approach. Those respondents could not identify any logical reason for why offences under this Act are excluded from current costs provisions, and their preference was for consistency with other Magistrates Court proceedings. The QLS also stated that this would be an important safeguard for defendants.

18.45 It was also raised by the Department of Transport and Main Roads that defendants who are convicted must pay the filing fee under section 21(2) of the *Justices Regulation 2014*. However, where the prosecutor is a state-related complainant, that complainant is not charged a filing fee. It was submitted that it 'appears unfair' for the defendant to pay the



fee in those circumstances, noting also that the offender levy will apply. However, where a defendant requests a matter be dealt with in court (rather than via an infringement notice) but does not appear, and the matter proceeds in their absence, there should be a fee to cover the associated administrative costs. This feedback relates to court filing fees, which are different to legal costs, however it is worth mentioning in the context of costs as an additional amount that defendants may be required to pay upon conviction.

New model

18.46 Costs are an important part of the Magistrates Courts' jurisdiction, and I do not intend to change that overall position in this Review. However, in considering how these provisions currently work and how they should be updated, I have been aware of the significant costs associated with a properly prosecuted or defended matter.

18.47 I recognise that many defendants who come before the Magistrates Courts will not have the financial means to pay for their own defence (if applicable), the prosecution's costs and any fines or compensation a court may order them to pay. Some defendants who come to court already have significant SPER debts and adding legal fees to that debt will only entrench their social disadvantage and further reduce their chances of repaying the amount.

18.48 I also recognise that when a prosecution is unsuccessful, it does not necessarily mean the charge was not fairly brought in the circumstances at the time. I do not want to discourage agencies progressing charges where appropriate, which may occur if every unsuccessful prosecution results in a costs order.

18.49 My guiding principles in this Review require an approach that is fair, consistent and efficient. It is reasonable for a prosecution to be fairly brought against a defendant, just as it is reasonable for a defendant to exercise their rights to hear the evidence against them and have their case decided by a magistrate. For fairness and consistency, costs should be open to either party in appropriate circumstances and on similar grounds. In particular, if a party has acted unfairly or inefficiently, this may be grounds for a costs order to be made.

18.50 Costs orders are not a sentence. Generally, they are awarded for compensation to the 'successful' party to offset the expenses associated with the legal proceeding. They are not awarded to 'punish' an unsuccessful party.[46]

[46] *Palmgrove Holdings Pty Ltd v Sunshine Coast Regional Council* [2014] QDC 77, [80] (Long SC DCJ). See also, as to whether the discretion not to award costs can be used to 'sanction' a party, *Smith v Ash* [2011] 2 Qd R 175.

Application and timing of costs orders

18.51 A magistrate will have the authority to order costs on an application from either party, as available. Where a costs order is available for an event occurring partway through a matter, such as an adjournment, the application for costs may be made at the time of the event or at a later time.

18.52 In addition, after a proceeding has been finalised, a magistrate will maintain jurisdiction to decide costs in the matter until those costs are settled. This was to be a change from the current position, until the recent Court of Appeal case[47] which conveniently aligns with the position of this Review.

18.53 In my view, it is appropriate to allow a matter to be adjourned for consideration of costs, even though a charge has been dismissed or finalised. This will allow each party to review any costs being sought and make informed submissions about those costs. If a party does not attend court on this occasion, costs orders may still be made in their absence. Absent parties must be notified of the costs order in the same way absent parties will be notified of other court orders, which is discussed further in Chapter 16.

Costs orders and types of offences

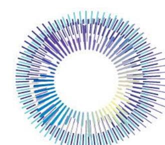
18.54 Except in relation to disclosure orders, the costs provisions in the Justices Act currently apply to matters that are finalised in the Magistrates Courts. This includes regulatory offences, simple offences and indictable offences that are dealt with summarily. The new criminal procedure laws will maintain this approach.

18.55 In addition, for fairness and consistency, I recommend that costs orders be available for any offences under the *Drugs Misuse Act 1986* finalised in the Magistrates Courts. This will require repealing section 127 of the *Drugs Misuse Act 1986*.

18.56 In my view, maintaining the position that costs are not available for any offences under this Act is not contemporary or consistent with the guiding principles of this Review or those proposed in the new criminal procedure laws.[48] Drug-related offences should be subject to the same risks of costs orders against parties as any other summary matter. Presently, the effect of section 127 is that many proceedings in the Magistrates Courts are exempt from costs orders. However, the defendants charged in those proceedings face the same legal fees and other expenses as any other defendant, so should reasonably have the same ability to recover those costs in appropriate circumstances.

[47] *Madden v Commissioner of Police* [2023] QCA 31.

[48] See Chapter 9 for further discussion of the legislative guiding principles.



18.57 To recommend that costs be available for offences under the *Drugs Misuse Act 1986* is, in my view, a matter of criminal procedure. Generally, laws about costs are part of criminal procedure laws, and this recommendation will standardise the approach to costs in a way that reflects the current Justices Act, making them available for summary (but not committal) matters. This aligns with my principle of consistency.

18.58 The initial decision to disallow costs for any drug-related offences was made in the context of events occurring at that time. However, since that time, there have been other significant changes to criminal procedure in the Magistrates Courts. Many more offences are now able to be dealt with summarily and those offences are perceived as much more serious. Costs are not refused for those serious matters, and to permit costs for drug-related offences dealt with summarily is consistent with that current approach.

18.59 Although costs are not allowed, many drug offences are also able to be dealt with summarily; are given low penalties (where appropriate); and can sometimes be dealt with by way of diversion. As such, it is appropriate for Magistrates to have the same level of discretion to order costs for these matters as they have in relation to any other summary matter.

18.60 In relation to orders made where a person has not complied with a direction about disclosure, costs are available regardless of the offence charged. That is, for those orders, costs are also available in relation to an offence that must be dealt with on indictment. This will not change in the new criminal procedure laws.

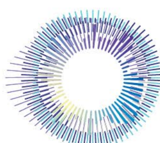
Costs on adjournment and non-disclosure

18.61 I recommend magistrates maintain the power to order costs on adjournment for matters dealt with summarily,[49] whether the adjournment takes place in court or administratively. A magistrate may order the costs of and connected with an adjournment for an amount that is considered 'just and reasonable'. This maintains the current approach but adopts the same test as applied to costs on final orders, so the test is consistently worded throughout the proceeding and the law. However, unlike costs at the finalisation of a matter but consistently with the current law, costs on adjournment will not be limited by the scale of costs.

18.62 The current provisions allowing for costs in relation to an adjournment where the prosecutor has failed to comply with a direction given about disclosure obligations under the Criminal Code will be maintained and simplified.[50] Noncompliance with those

[49] This is consistent with the current position, which allows costs to be ordered for a simple offence (meaning any offence, whether or not indictable, punishable on conviction before a Magistrates Court) : s 4 (definition of 'simple offence'), 88(3). This will not apply to matters that must be committed to a higher court.

[50] *Justices Act 1886* (Qld) ss 83A(5)(aa), 83B.



disclosure requirements is a significant contributing factor to extended court proceedings and therefore increased costs, and prosecutorial agencies should be held to account in appropriate circumstances.

18.63 Generally, where noncompliance is not satisfactorily explained and a proceeding is adjourned, and the court is satisfied that the noncompliance was unjustified, unreasonable or deliberate, the court may order the prosecution to pay the defendant's costs in relation to the adjournment, in an amount the court considers just and reasonable. These costs are also not limited by the scale of costs.

18.64 Elsewhere in this Report, I have also recommended that where a direction is given about disclosure obligations under the Criminal Code and there is deliberate or ongoing noncompliance with the direction, the magistrate may strike out the charge. Costs may also be ordered in those circumstances, in an amount that is just and reasonable and not limited by the scale of costs.

18.65 Disclosure obligations under the Criminal Code apply to only some offences. Where they do not apply to an offence, the prosecution is still subject to other existing disclosure requirements under the common law. A magistrate may also give a direction about those other disclosure requirements, but the specific regime for noncompliance described in the previous paragraphs is limited to disclosure obligations under the Criminal Code, so it will not apply to those directions.[51]

18.66 However, if a direction about disclosure (other than under the Criminal Code) was given and not complied with, resulting in the matter needing to be adjourned, the defendant could apply more generally for the costs of and connected with the adjournment (as described in [18.61]). This achieves the same end result of ensuring prosecution agencies are accountable for disclosure, and ensuring the defendant is compensated for costs caused by failure to comply with a direction about disclosure.[52]

Costs when a matter is finalised in the Magistrates Courts

18.67 Generally, I recommend that the new criminal procedure laws maintain the current position about costs that can be ordered at the end of a proceeding. Prosecutors who successfully prosecute a matter to conviction should maintain their ability to apply to the Magistrates Court for costs, and defendants who have had charges dismissed should be able to seek the costs incurred to defend the charge. However, the terminology used in the law should be made clearer.

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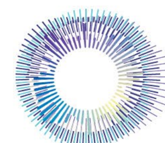
[51] As to disclosure requirements, see Chapter 14. As to directions about disclosure and other matters, see Chapter 19.

[52] A direction can also be given about matters other than disclosure (see currently *Justices Act 1886* (Qld) s 83A). This method of obtaining costs on an adjournment where a direction is not complied with may also apply in relation to a direction about another matter.



18.68 For prosecutors seeking costs, these are currently available 'in all cases of summary convictions and orders' (and a 'summary conviction' is defined as a conviction for an offence that can be finalised in a Magistrates Court).[53] I recommend costs continue to be available following a conviction. I note there is a difference between a conviction as defined in the Justices Act[54] and ordering a conviction be recorded against a defendant, which can sometimes be confusing. I want to make it clear that when I say conviction in this context, I am stating anyone who pleads guilty to, or is found guilty of, a summary offence or indictable offence dealt with summarily may be subject to paying the prosecutor's costs if the criteria in the previous paragraph is met. Costs should also continue to be available for orders made at the end of summary proceedings.

18.69 For defendants, costs are currently available when (instead of convicting or making an order) the magistrate dismisses a charge, or when a charge is struck out because the court does not have jurisdiction to hear it. The term 'dismiss' is not defined and can sometimes be unclear, given it is used in different ways in different parts of the Justices Act.[55] Further, there is case law to suggest that costs would not be able to be ordered when a charge is withdrawn as opposed to being dismissed.[56]

18.70 To clarify the position here, I recommend that costs be available to a defendant when a charge that was able to be dealt with summarily is dismissed or struck out, including but not limited to the following reasons:

- want of jurisdiction (meaning the court does not have jurisdiction to deal with the offence)
- the prosecutor has not attended court[57]
- the charge has been withdrawn by the prosecution
- the prosecution offers no evidence.

18.71 Any of those circumstances could involve a situation where a defendant has incurred costs that are just and reasonable to recover. However, this will not apply to any discharge following a committal proceeding or to the ending of a proceeding in another way not listed here, such as by cash bail or dismissal following in-court diversion.

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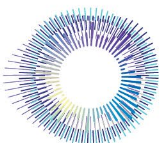
[53] *Justices Act 1886* (Qld) ss 4 (definitions of 'simple offence', 'summary conviction'), 232(4).

[54] Section 4 of the Justices Act states that 'summary conviction' or 'conviction' means a conviction by a Magistrates Court for a simple offence.

[55] See further discussion of the meaning of the term 'dismiss' in Chapter 19.

[56] *Turner v Randall* [1988]) 1 Qd R 726, 728; *Besgrove v Larson* [2001] QDC 144, [14]–[17] (McGill DCJ).

[57] This maintains the current powers in section 147 of the *Justices Act 1886* (Qld). See also, as to strike out following non-attendance, Chapter 16.



Costs on appeal

18.72 In the new criminal procedure legislation, the costs available on appeal will remain the same as the current provisions in the Justices Act.

18.73 Generally, for offences that are not indictable, costs are available if a matter is dealt with summarily and are also available if that matter is appealed to the District Court. Currently, indictable matters dealt with summarily in the Magistrates Courts are eligible for costs. However, if that matter is appealed to the District Court, the District Court judge is not able to order costs for the hearing and determination of the appeal, or any proceedings preliminary or incidental to that appeal.[58]

18.74 I recognise there is an anomaly in this approach. I have considered whether costs should be allowed on appeal and have decided to leave the current position unchanged.

18.75 The basis for my conclusion is the accepted principle that parties are not able to seek costs for indictable offences in the higher courts. Costs are available for indictable offences dealt with summarily because they are being finalised in the Magistrates Courts as if they were summary offences, and the Magistrates Courts jurisdiction and sentencing limits will apply. However, once the matter is taken to the District Court and decided on appeal, it is no longer in the summary jurisdiction and the principle of no costs being awarded for indictable offences should apply. If an indictable offence was committed to the District Court for trial or sentence, the District Court judge would be unable to order costs on finalisation of the matter. Therefore, it should follow that where a District Court judge decides an appeal for that same offence after it was dealt with summarily then, for consistency, costs should be unavailable.

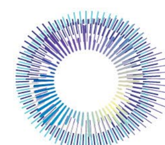
18.76 I appreciate the extensive time and costs that can go into a well-prepared appeal. However, changing the law in this respect would have impacts beyond the scope of criminal procedures in the Magistrates Courts and is outside the scope of this Review.

The test for ordering costs

18.77 The current two-tier test for ordering costs — that a party can be ordered to pay costs that seem 'just and reasonable' in accordance with the scale, but higher amounts may be ordered if the magistrate is satisfied the amount is 'just and reasonable having regard to the special difficulty, complexity or importance of the case' — will be retained in the new criminal procedure laws.[59]

[58] *Justices Act 1886* (Qld) s 232(4).

[59] *Justices Act 1886* (Qld) ss 157–8, 158B.



18.78 However, the 'just and reasonable' test is subject to two additional tests or considerations. First, the scale of costs states that only 'necessary or proper' costs may be allowed. This means a cost is allowed only to the extent to which:[60]

- incurring it was necessary or proper to achieve justice or defend a party's rights; or
- it was not incurred by over-caution, negligence, mistake or merely at the wish of a party.

18.79 This provision is an important clarification about costs that might, in the circumstances of a case, seem just and reasonable. Given this, my view is that it should not remain as part of the regulations and should instead be included in criminal procedure legislation.

18.80 Second, there is an additional test set out in section 158A, to the effect that costs may be ordered against a prosecutor who is a police officer or a public officer[61] only if a magistrate is also satisfied that it is 'proper' for the costs order to be made.

18.81 This additional test was originally introduced to clarify the circumstances in which a defendant might be entitled to a costs order. It was explained that:

> The proposed section 158A is required following the majority decision of the High Court in *Latoudis v Casey* (1990) 170 CLR 534, which held that ordinarily a court of summary jurisdiction, in exercising a statutory discretion to award costs in criminal proceedings, will make an order for costs in favour of a successful defendant. The High Court also held that a court, in exercising its discretion to award costs, should not be influenced by arguments, inter alia, that police and public officers will be deterred from prosecuting cases for fear of incurring costs.
>
> The intention of the new section is to ensure that justices have a discretion to award costs in favour of defendants when dismissing complaints made by police officers or public officers where it is proper that an award of costs should be made. In short, the intention of the section is to ensure that there is not a presumption either in favour of awarding costs or not awarding costs in cases where complaints are made by police officers or public officers, but that justices take into account all relevant circumstances and award costs only on the basis that it is proper for an award to be made.[62]

18.82 On reading the Justices Act, this additional test narrows the circumstances in which some prosecutors can be ordered to pay costs in ways that are potentially significant. No similar limits are explicitly placed on the circumstances in which another prosecutor or a defendant can be ordered to pay costs, but arguably there are circumstances where it would be reasonable for such limits to apply. Some of these circumstances have already been identified generally in the 'necessary and proper' clarification provided by the scale of costs.

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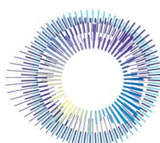
[60] *Justices Regulation 2014* (Qld) sch 2 reg 3.

[61] With the exceptions of officers or employees of the Commonwealth or a local government: see [18.14] and n 9.

[62] Explanatory Notes, Justice Legislation (Miscellaneous Provisions) Bill 1992 (Qld), 7.



18.83 There is no good reason why costs ordered against another prosecutor or a defendant should not also start from the premise that there should be no presumption in favour of awarding or not awarding costs, and that any decision should take into account all relevant circumstances. That the law does not already operate this way appears, in my view, to be inconsistent and to create an unfairness.

18.84 To address this unfairness in a way that still retains the clarifications sought to be made by section 158A, that section should be redrafted. Rather than an additional test relating to whether the order is 'proper', the relevant circumstances listed in this section should simply be circumstances that are taken into account in determining what is 'just and reasonable'. Further, these circumstances should be taken into account (with appropriate variations) to a costs order made against either party. To be clear, this means that these circumstances will be taken into account for any prosecutor (including a police officer, public officer, private prosecutor or another person) and for the defendant.

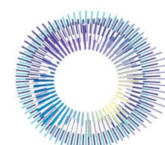
18.85 This change is appropriate for several reasons. First, the new criminal procedure laws establish a different way of managing private prosecutions which has the effect that, after being approved by a magistrate, these will proceed in the same way as any other prosecution. Accordingly, it is appropriate that these prosecutors are treated in the same way as any other prosecutor.

18.86 Second, some of the types of circumstances listed in section 158A could also apply to the prosecution. For example, there may be circumstances where the prosecution conducts its case in a way that unreasonably prolongs a proceeding. Within the new criminal procedure laws there may also be other relevant circumstances that could apply to either party, such as a failure to genuinely engage in case conferencing or to comply with case management procedures.

18.87 Third, this approach is consistent with the fact that the consideration of what is 'necessary or proper' required by the scale of costs applies to both parties. Further, the matters referred to in the scale, including whether a cost was 'proper' to achieve justice and whether it results from negligence or mistake by either party, are consistent with the types of circumstances referred to in section 158A.

18.88 Fourth, this approach accords with the principles of fairness and consistency that underpin my Review, and that will underpin the new criminal procedure laws.

18.89 Accordingly, the new criminal procedure legislation should maintain the current position that either party may be awarded costs that are 'just and reasonable'. What amounts to 'just and reasonable' will require a magistrate to take into account all relevant circumstances, and the new legislation will provide a non-exhaustive list of examples. The examples of what to consider will not be definitive and will still allow Magistrates to



consider any matters deemed relevant. The examples should be drawn from the 'proper' test currently in section 158A and the 'necessary or proper' considerations in the scale of costs. They should include:

- whether the participants have acted in good faith during the proceedings, including whether the costs were necessary for the prosecution to achieve justice or for the defendant to defend themselves
- whether there has been a failure by a party to comply with the objects or principles of the criminal procedure legislation, or an order of the court
- the conduct of the parties during any criminal investigation. For example, whether the investigation was conducted appropriately and according to law, and whether the defendant behaved in a way that a reasonable person would believe suspicious
- the conduct of the parties during court proceedings. For example, if the parties genuinely engaged in case conferencing and complied with any disclosure and case management requirements throughout the proceeding, and if any costs were incurred due to over-caution, negligence, mistake or merely the wishes of a party
- the circumstances of the outcome. For example, if a matter was dismissed on technical grounds rather than due to lack of evidence, when a matter was withdrawn, and if a defendant was acquitted of a charge but convicted of a different charge
- any other matter the magistrate considers relevant.

18.90 An overview of the application of the test for ordering costs after a summary proceeding has ended, including the application of the scale of costs (discussed further below), is set out in Diagram 18.2.

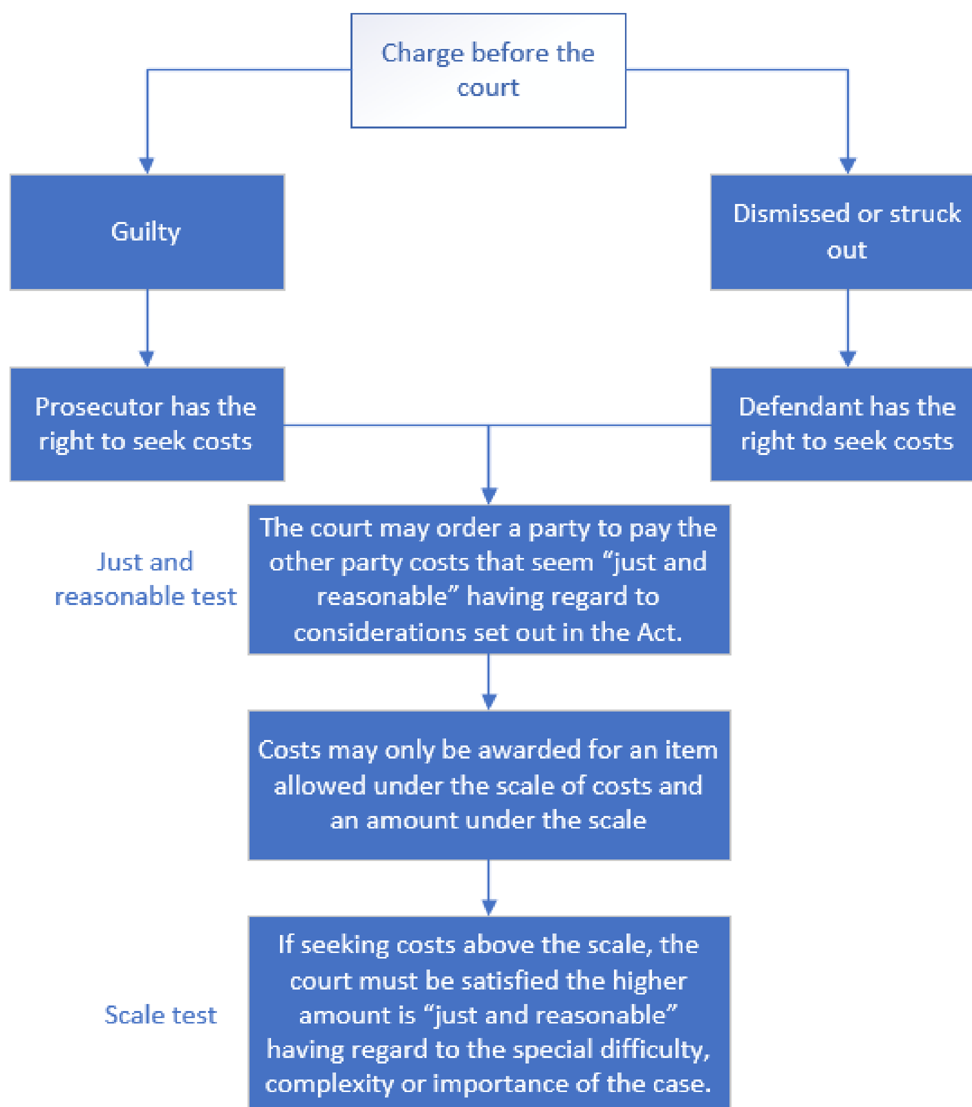


Diagram 18.2: New model of costs at the end of a summary proceeding

Scale of costs

18.91 During consultation, feedback was unanimous that the scale of costs in schedule 2 of the *Justices Regulation 2014* is badly in need of updating, and I agree. As part of this Review and implementation of new criminal procedure legislation, one of my first recommendations is to repeal the *Justices Act 1886*. As a consequence, the *Justices Regulation 2014* will be automatically repealed. As part of the implementation work new regulations will be created[63] and this presents an opportunity to update the scale of costs to reflect modern costs.

18.92 I recommend the new criminal procedure laws still include a scale applying where matters are finalised summarily because of the high volume of cases in the Magistrates Courts. Arguments about costs orders and seeking time-consuming costs assessment orders

[63] The implementation process is discussed further in Chapter 20.

should be avoided to allow parties to settle the question of costs efficiently, and ideally the same day the proceedings are finalised.

18.93 The current scale was calculated by applying the costs of a Queensland Government senior legal officer to complete said task, at a rate of $135 per hour.[64]

18.94 For item one, it was assumed preparing for and attending the hearing of an ordinary matter would be approximately 11 hours of work, which is how that amount was calculated. For item two, attendance at subsequent hearing days, the amount was based on the civil scale of costs, with a slight increase to accommodate the capped price of day one in item one. Item three was calculated based on the assumption that attendance would usually take no more than two hours and was rounded down to $250.[65]

18.95 There are many methods that could be used to calculate an appropriate increase to the scale, including by rate of inflation, current rate of government legal officer fees or wide consultation with the legal profession to settle a standard hourly rate of work and a standard number of hours that should be applied for each item in the scale.

18.96 I am of the view that the previous method of calculating the scale is complex and not suited to the summary criminal jurisdiction, and it should not be continued. It is preferable for the figures to simply be updated in line with inflation since 1999, which removes the need for subjective and potentially controversial methods of updating the figures.

18.97 The exact amounts in the updated scale should be decided during the drafting process for any new regulations. However, if the inflation rate was applied, the new figures would be similar to the following:

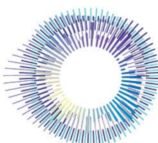
Item	Task	Current	Updated figures per rate of inflation[66]
1	Instructions and preparation for the hearing, including attendance on day 1 of the hearing	$1,500.00	$2,790.65
2	Attending hearing after day 1	$875.00	$1,627.88
3	Court attendance, other than for a hearing	$250.00	$465.11

18.98 After any new scale is in force, I recommend there be an ongoing mechanism for the scale to be regularly reviewed and updated. The amount of a penalty unit is updated

[64] Department of Justice and Attorney-General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 23.

[65] Ibid.

[66] Reserve Bank of Australia, *Inflation Calculator* (Web Page, 2023) <https://www.rba.gov.au/calculator/annualDecimal.html>.



every year to allow for inflation,[67] and I see no reason the same process cannot be applied to this scale.

18.99 Currently, where a party seeks costs that are above the scale, these may be allowed if the magistrate is satisfied it is 'just and reasonable having regard to the special difficulty, complexity or importance of the case', as per the current wording of section 158B(2).[68] This test has already been defined in case law, and I do not intend to change the meaning.

18.100 During consultation, it was raised that including the word 'special' in the test of 'special difficulty, complexity or importance' has created an extra barrier in obtaining a costs order above the scale of costs. I accept the case law on the meaning of 'special' has had a restrictive impact on parties successfully arguing for costs above the scale. However, I am not convinced that changing this test and therefore overturning the case law is in the interests of justice.

18.101 Changing this test could require the meaning of the test to be freshly decided, which is a lengthy and costly process for courts and parties. It may lead to delays in finalising matters and create inconsistency across the Magistrates Courts as individual magistrates apply their own understanding of the law without settled case law to guide their decisions. The procedures in this Review only apply to Magistrates Courts' criminal matters, which by their nature should be relatively minor. Changing the test with these consequences is, in my view, not of such a significant benefit as to justify the protracted proceedings and uncertainty that could result.

18.102 The intent of these costs provisions and the use of the scale of costs is to ensure the question of costs can generally be settled quickly and easily, without the extensive litigation and arguments seen in the civil jurisdiction. In that context, it is appropriate that provisions for exceeding the scale of costs apply in only limited circumstances.

18.103 With the updated figures in the scale of costs, it is anticipated there should be fewer cases seeking costs above the scale in any event, given the scale should address a greater proportion of standard costs in most cases.

After the issuing of costs orders

18.104 Where an order for costs is made by a magistrate, the costs order must be automatically referred to SPER by either the magistrate or the proper officer of the court. This will allow the courts to refer all costs orders to SPER as soon as they are made, consistent with

[67] *Penalties and Sentences Regulation 2015* (Qld) reg 3.

[68] The meaning of 'special difficulty, complexity or importance' has been considered in a number of cases including *Cullinan v McCahon* [2014] QDC 120; *Whitby v Stockair Pty Ltd* [2015] QDC 79; *Allison v Channel Seven Queensland Pty Ltd* [2015] QDC 111; and *Baker v Smith (No 2)* [2019] QDC 242.

both the current and proposed new approach to other monetary orders.[69] Referring a costs order to SPER is not in itself enforcement action, and it will be a matter for SPER to take any enforcement action appropriate as permitted under the *State Penalties Enforcement Act 1999*.

18.105 I understand that where an order is referred to SPER, then SPER will provide appropriate notices with details about the order.

18.106 Consistent with the enforcement of other monetary orders made when a matter is decided in a party's absence, there must be a period of time before SPER may commence enforcement action, to allow time for the party to be notified of the order and make payment or apply to the Magistrates Court for a rehearing.[70]

18.107 Overall, the effect is that costs orders and any other monetary orders (such as order for fines, compensation or restitution) will all be referred to SPER for enforcement. Court registries will no longer have enforcement powers. This single pathway for unpaid amounts will provide for consistency in how orders and debts payable are managed and enforced, and for early access to payment options that might assist a person.[71] The referral to SPER may be done electronically. This will reduce the workload of the court registry by ensuring all enforcement action is taken by SPER rather than court registries.

18.108 While costs orders will be referred to SPER for enforcement, the person owing money must not be subject to imprisonment for defaulting on any payments. This is to align with existing provisions in the *State Penalties Enforcement Act 1999* which prevent an order being referred to SPER if the original order did not allow for default imprisonment.[72] A similar provision already exists for the payment of offender levies,[73] which I recommend be replicated for costs orders. In effect, this will mean costs orders can be referred to SPER, but debtors will not be subject to imprisonment if they default on their payments.

18.109 Costs orders made against public officers cannot be referred to SPER because those officers are fulfilling a public function, usually on behalf of a government department or other statutory agency. Methods of enforcement used by SPER would not be effective against police officers, public officers or government agencies. It is expected publicly funded agencies, as model litigants, will comply with all orders of the court within the time frame ordered. However, for any matters where enforcement is required, it should be

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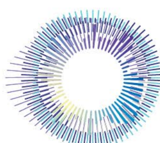
[69] See further [16.110].

[70] See Chapter 16 for further discussion on dealing with matters in the absence of one or more parties.

[71] This is consistent with the broader intended approach of referral to SPER, which was to enable early registration of debts with SPER, before any time to pay has expired, so that debtors could access the 'customer focused and flexible' options offered by SPER: Explanatory Notes, State Penalties Enforcement and Other Legislation Amendment Bill 2006 (Qld) 8, 17.

[72] *State Penalties Enforcement Act 1999* (Qld) s 34(2B).

[73] *Penalties and Sentences Act 1992* (Qld) s 179F.



made clear that these costs ordered will constitute a civil debt that can be recovered in court.

18.110 As in the current Justices Act, if there is an appeal against a costs order then payment of those costs will be stayed until the appeal is decided and will be later paid in the amount order or confirmed by a further order made in the appeal.[74]

Enforcement of monetary court orders in the criminal jurisdiction

18.111 The enforcement of monetary orders is not a criminal proceeding, and therefore not within scope of this Review. A criminal proceeding has concluded once a defendant has been sentenced or otherwise dealt with, which could include having the charge dismissed or ended in a way other than by a conviction.

18.112 As previously identified, there is a current legislative scheme in place for the recovery of money payable after a court order is made, under SPER. If a party does not pay a fine, compensation, restitution or costs, SPER has enforcement powers under the *State Penalties Enforcement Act 1999*.

18.113 When SPER was introduced, the Justices Act was amended to permit the early registration of a matter with SPER, without any requirement to first attempt to use the enforcement provisions under the Justices Act. It was explained that:

> The early registration of the matter with SPER will allow the associated benefits including increasing access to all debtors to the customer focused and flexible payment options offered by SPER. Further, this amendment will provide for one streamlined single and consistent fine collection system and allow court registries to focus on providing more court related services.75

18.114 The enforcement provisions in the Justices Act therefore do not appear to be used. Further, their application is not appropriate in a modern society. To recognise the intent and operation of the SPER scheme, I recommend that the new criminal procedure legislation include a mechanism for Magistrates Court registries to refer monetary orders to SPER for enforcement, like the one included in section 161A of the Justices Act. This will include costs orders, as well as other orders for the payment of money. However, consistent with the explanation in [18.108], imprisonment will not be available as an enforcement option in relation to these matters unless that is provided for in another Act.

18.115 An overview of the simplified model for the enforcement of monetary orders made in the Magistrates Courts is set out in Diagram 18.3.

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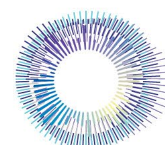
[74] *Justices Act 1886* (Qld) s 158A(5).

[75] Explanatory Notes, State Penalties Enforcement and Other Legislation Amendment Bill 2006 (Qld) 17.



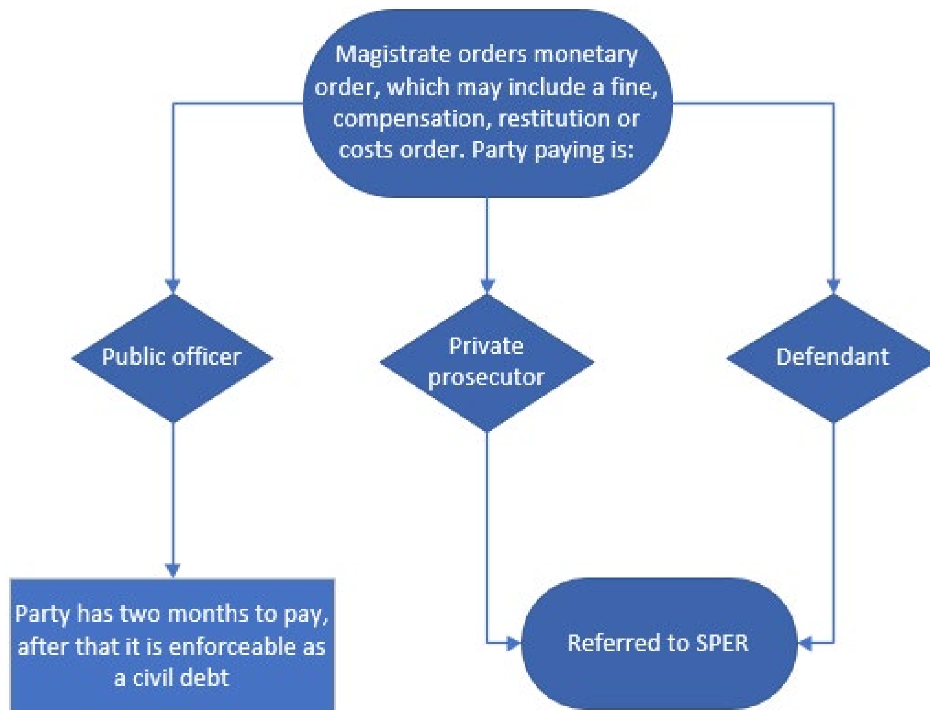


Diagram 18.3: New model for enforcement of monetary court orders

18.116 The new criminal procedure legislation should not provide for a 'warrant of execution'. As explained, these warrants are no longer used or appropriate, and any enforcement actions required to recover money from individuals and corporations should be managed by the dedicated SPER scheme. However, a warrant of execution is still provided for in some other legislation, such as the *Tow Truck Act 1973*,[76] which I am unable to change in this Review. Where that is the case, as is presently provided for in section 161A of the Justices Act, those matters should be able to be referred to SPER instead of a warrant of execution being issued.

Other matters

Costs on committal

18.117 I have considered whether costs should be payable on dismissal at the committal stage. This was raised by the Queensland Law Society, which suggested costs be payable to defendants who are discharged at committal.

18.118 To avoid any doubt, I will not be changing the law in this area, which is that costs are not available for indictable offences dealt with in the higher courts. This is because matters dealt with on indictment are generally more serious and prosecutors should not be discouraged from bringing these offences to court. To ensure consistency, it therefore

[76] *Tow Truck Act 1973* (Qld) s 27(3A).

follows that a defendant also should not be able to seek costs if a charge was dismissed before or at committal.

18.119 Further, a committal is an administrative procedure to transfer a charge from the Magistrates Courts to the higher courts and is not a final determination of the charge. This is different to an indictable charge dealt with summarily in the Magistrates Courts, which is a final determination of the charge after which it is appropriate that costs orders are available in the Magistrates Courts.

Filing fees

18.120 I want to briefly address the concerns raised during consultation about defendants paying filing fees when a complaint is made on behalf of the state and an order is made against the defendant, despite state agencies not paying the filing fee to begin with.[77]

18.121 Filing fees are intended to cover the costs of the court registry processing the complaint. state-funded agencies are exempt from paying this fee because it is paying public money from one government department to another, which is not in the public interest. However, the court has still had to process the prosecution and manage the court file. As such, even if filing fees are not paid by state agencies to begin with, it is still appropriate that the filing fee should be payable to the court.

Human rights considerations

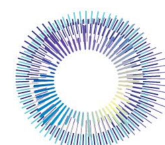
18.122 The right to a fair hearing is ingrained throughout this Report and in other chapters discussing pre-hearing and hearing procedures. The question of costs arises if a party has incurred financial costs due to court proceedings, and costs are a way to rectify any financial loss that may be suffered. The awarding of costs where the opposing party has failed to comply with any legislative or fairness requirements is reasonable, particularly as breaching a person's rights under the *Human Rights Act 2019* will not directly allow for financial compensation by itself.[78]

18.123 Repealing section 127 of the *Drugs Misuse Act 1986* is intended to protect a defendant's human rights, particularly their right to property.[79] In this aspect, property includes money, which the defendant has spent in a criminal proceeding which was ultimately dismissed, thereby depriving them of that money with no recourse to seek repayment of those costs from the agencies responsible. Allowing the option for defendants to seek costs supports their right to recover their property.

[77] *Justices Regulation 2014* (Qld) reg 21.

[78] *Human Rights Act 2019* (Qld) s 54.

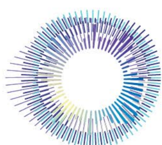
[79] *Human Rights Act 2019* (Qld) s 24.



18.124 The proposals to allow for costs to be awarded and for a charge to be struck out where a magistrate is satisfied that prosecutorial noncompliance with an order for disclosure is deliberate or ongoing act as a balance to any efforts to prosecute that are not undertaken in good faith. They are therefore protective of the minimum set of guarantees for defendants under section 32 of the *Human Rights Act 2019*.

18.125 Allowing defendants to seek and be awarded costs during the course of a proceeding allows a defendant the opportunity to continue their defence with legal representation in cases where they may otherwise have insufficient money, which also promotes the protected rights of defendants.

18.126 The set of factors that may be considered relevant and should be taken into consideration when costs are awarded are also intended to balance the rights of the defendant against other parties in the criminal justice system.



Recommendations

R18.1 The new criminal procedure legislation should include provisions about costs orders for either party that can apply:

- **(a)** when a matter being dealt with summarily is adjourned (Recommendation 18.5);
- **(b)** following noncompliance with a disclosure order (Recommendation 18.6);
- **(c)** at the conclusion of a matter dealt with summarily (Recommendations 18.7-18.11);
- **(d)** on appeal, as is currently provided for in the *Justices Act 1886*.

Application and timing of costs orders

R18.2 An application for costs:

- **(a)** may be made at the time that the event for which the party is seeking costs takes place, or later in the proceeding; and
- **(b)** may be adjourned for later consideration of any application for costs, even if a charge has been dismissed or finalised in another way; and
- **(c)** can be decided in a party's absence, although notification of the outcome and any order made must be sent to that party.

Costs orders for summary offences

R18.3 In the Magistrates Courts, a costs order should be available for:

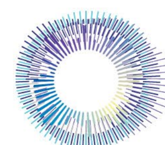
- **(a)** any offence that is dealt with summarily in the Magistrates Courts, including indictable offences that are (or are being) dealt with summarily; and
- **(b)** in relation to a costs order following noncompliance with an order about disclosure in accordance with the Criminal Code, any offence whether or not it can be dealt with summarily.

R18.4 To achieve Recommendation 18.3(a), section 127 of the *Drugs Misuse Act 1986* should be repealed.

Costs on adjournment and non-disclosure

R18.5 Where a matter being dealt with summarily is adjourned, the court may order the costs of and connected with the adjournment to be paid by either party to the other for an amount the court considers is just and reasonable.

R18.6 The current law about costs following noncompliance with an order for disclosure in accordance with the Criminal Code in section 83B of the *Justices Act 1886* should be maintained. Generally, the new law should provide that:



(a) where noncompliance is not satisfactorily explained and a proceeding is adjourned, and the court is satisfied that the noncompliance was unjustified, unreasonable or deliberate, the court may order the prosecution to pay the defendant's costs in relation to the adjournment, in an amount the court considered just and reasonable; and

(b) where the court is satisfied there is deliberate or ongoing noncompliance with the direction, the court may strike out the charge and order the prosecution to pay the defendant's costs in an amount the court considers is just and reasonable.

Costs when a matter is finalised summarily

R18.7 At the conclusion of a matter dealt with summarily, costs will be available:

(a) to the prosecution in matters where there is a conviction or when an order is made;

(b) to the defendant in circumstances where the charge is dismissed or struck out, including but not limited to the following reasons:

(i) want of jurisdiction;

(ii) the prosecutor has not attended court;

(iii) the charge has been withdrawn by the prosecution; or

(iv) the prosecution offers no evidence.

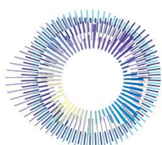
R18.8 Where costs are awarded in the circumstance set out in Recommendation 18.7, a party may be awarded the costs that are just and reasonable taking into account all relevant circumstances, including, for example:

(a) whether the participants have acted in good faith during the proceedings, including whether the costs were necessary for the prosecution to achieve justice or for the defendant to defend themselves;

(b) whether there has been a failure by a party to comply with the objects or principles of the criminal procedure legislation, or an order of the court;

(c) the conduct of the parties during any criminal investigation. For example, whether the investigation was conducted appropriately and according to law, and whether the defendant behaved in a way that a reasonable person would believe suspicious;

(d) the conduct of the parties during court proceedings. For example, if the parties genuinely engaged in case conferencing and complied with any disclosure and case management requirements throughout the proceeding, and if any costs were incurred due to over-caution, negligence, mistake or merely the wishes of a party;



(e) the circumstances of the outcome. For example, if a matter was dismissed on technical grounds rather than due to lack of evidence, when a matter was withdrawn, and if a defendant was acquitted of a charge but convicted of a different charge;

(f) any other matter the magistrate considers relevant.

R18.9 Consistently with the current law, in deciding the costs that are just and reasonable to be paid at the conclusion of a matter in accordance with Recommendation 18.7, a magistrate may award costs only:

(a) for an item allowed under a scale of costs prescribed under a regulation; and

(b) up to the amount allowed for the item under the scale.

R18.10 Despite Recommendation 18.9, as in the current law, a magistrate may award a higher amount for costs if satisfied the amount is just and reasonable having regard to the special difficulty, complexity or importance of the case.

R18.11 The scale of costs currently in schedule 2 of the *Justices Regulation 2014* should be revised and updated to reflect contemporary legal professional costs, in accordance with yearly inflation rates. There should also be a mechanism by which the scale is regularly reviewed and updated in accordance with inflation rates.

After the issuing of costs orders

R18.12 When a costs order is made in the Magistrates Courts, it must be immediately referred to SPER.

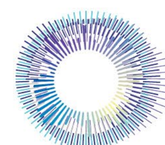
R18.13 When a matter is decided in a party's absence, an order for the payment of costs must still be immediately referred to SPER, however there must be a period of time before SPER may commence any enforcement action, to allow the defendant to be notified of the order and to pay the amount or apply for a rehearing.

R18.14 For any costs order:

(a) the person against whom the costs order is made cannot be subject to default imprisonment if the debt is unpaid; and

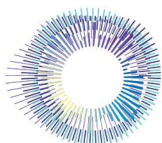
(b) if the order is appealed to the District Court, payment will be stayed until the appeal is decided and then required in any amount ordered or confirmed on the appeal.

R18.15 Where a costs order is made against a police officer, public officer or government agency, this will constitute a civil debt that can be recovered in court.



Enforcement of monetary orders

R18.16 The new criminal procedure legislation should replicate the effect of section 161A of the *Justices Act 1886* and provide that a monetary order made in connection with a criminal proceeding in the Magistrates Courts, other than an order for costs, can be immediately referred to SPER.



CHAPTER 19: OTHER MATTERS

Introduction

19.1 As outlined in this Report so far, there are many criminal procedure laws in the Magistrates Courts and there are numerous procedural laws that are uncontroversial in nature.

19.2 This chapter outlines some of the important matters to be included in the new criminal procedure laws. It is not an exhaustive list, and these matters are not extensively analysed.

19.3 A more comprehensive analysis of the matters raised in this chapter (as well as other matters not discussed) is included in the drafting instructions in Appendix C.

Standard court procedures

19.4 There are a number of important, yet uncontroversial procedures used in Magistrates Courts criminal procedures that have not been discussed in this Report. This is because I have not made any recommendations to significantly change how these procedures work in practice. Some of these procedures are:

- the way a court is formally opened or closed
- the order of proceedings
- an application for an adjournment
- how evidence is to be taken
- views and inspections
- the transfer of proceedings.

19.5 These procedures do not need to be critically analysed for the purposes of this Review. They are standard court practices during the usual course of a criminal proceeding. As such, they will be maintained in the new criminal procedure legislation.

Service

19.6 The rules of service have an important procedural role in the criminal justice system. One example of service is the process of formally notifying a defendant of a charge alleged against them by serving the person paperwork with details (particulars) of the charge and the requirement to attend court on a specific date.

19.7 Currently, the provisions relating to the service of complaint and summons are in sections 56 and 56A of the Justices Act. I have recommended the new criminal procedure legislation

be adapted to instead provide that a Court Attendance Notice must be personally served on a defendant, except where otherwise authorised by another Act or law.[1] This will include procedures for substituted service when a defendant is unable to be personally served (for example, by way of registered post, leaving the notice with another person or any other authorised method) and provide a right of entry to serve a Court Attendance Notice for an authorised person who is a public officer (not a police officer[2]), or a person aiding them.

19.8 It is a fundamental rule of fairness that the new criminal procedure legislation outlines requirements for proof of service. The court should have confirmation of service to proceed with a matter in a particular way, especially in the absence of the defendant. In Chapter 12, I recommended[3] there be a requirement for a declaration of service document providing written information as to how and when a person was formally served. This document should also allow for information to be included when reasonable attempts to serve have been made and why service has not been carried out.

19.9 The rules of service should also apply to other court notices, such as service of a Witness Attendance Notice and a notice about the outcome of a matter heard in a defendant's absence.

Appearance and attendance

19.10 The Justices Act currently allows for parties to conduct their own case or to have a lawyer appear on their behalf.[4] This is an important legislative procedure in criminal proceedings. The District Court and the Supreme Court of Queensland have this legislative authority in each of the respective higher court Acts.[5]

19.11 I recommend that the current provision in the Justices Act relating to right of appearance should be in the *Magistrates Court Act 1921* so that this aligns with the higher court legislative provisions. Having said that, court attendance should be consistent with the recommendations I have made in Chapter 12,[6] to the effect that a defendant must appear personally (which can include remotely)[7] at the first court date and at a hearing.

19.12 There must be a power in the new criminal procedure legislation to exclude the defendant from the courtroom, if necessary, in all summary and committal matters, and to continue a matter in the defendant's absence. This may apply, for example, if the defendant is

[1] See further Chapter 12, Recommendations 12.11–12.12.

[2] Police officers already have this power under *Police Powers and Responsibilities Act 2000* (Qld) s 19.

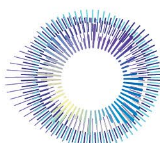
[3] See further Chapter 12, Recommendation 12.13.

[4] *Justices Act 1886* (Qld) s 72; *Magistrates Courts Act 1921* (Qld) s 18.

[5] *District Court of Queensland Act 1967* (Qld) s 52; *Supreme Court of Queensland Act 1991* (Qld) s 90.

[6] See further Chapter 12, Recommendation 12.31.

[7] See further, as to remote court appearances, Chapter 10.



disruptive. This power would be similar to the provisions in section 617 of the Criminal Code.

19.13 I have also discussed below in [19.157] court appearances relating to corporations.

Reasonable adjustments

19.14 Reasonable adjustments (also called 'reasonable accommodations') refers to making adjustments for people who may not be able to access the courts easily or in the same manner as other people, including people with disabilities and other vulnerabilities. The term is broad and can include all kinds of adjustments by the courts to enable access.[8] This definition goes beyond physical access (for example, to courtrooms), and includes other kinds of adjustments to increase participation.

19.15 Reasonable adjustments are important for all court users, to ensure the fair and consistent administration of justice to the greatest possible extent. It is important to provide access to witnesses and victims, along with other court users. However, there are specific requirements that must be met for people charged with a crime. If a court fails to provide an adjustment for a defendant that is considered to be reasonable, it is likely to impinge upon the defendant's right to a fair trial.[9]

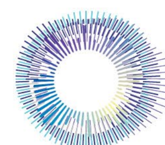
19.16 It is important for all participants in the system (including, but not restricted to, magistrates, registry staff, and other professional legal staff) to keep the new and inexperienced court user in mind. Inexperienced users must navigate a system that is complex and difficult. For defendants, this bar is considerably higher: noncompliance brings about significant difficulties.

19.17 An exhaustive examination of the types of reasonable adjustments that courts should provide could constitute its own report. However, there are basic reasonable adjustments that the courts are, and should be expected to provide, including:

- access to translators and interpreters for people who have difficulty understanding or communicating in English
- accommodations for people who are hard of hearing or Deaf, including interpreters
- accommodations for people who have cognitive impairments
- the ability to take guide, hearing and service dogs into courthouses

[8] The term 'reasonable adjustments' is used interchangeably with the term 'reasonable accommodations'. These terms are consistent with contemporaneous standards and are preferred over the use of terms such as 'special facilities and services'.

[9] For example, *Ebataninja v Deland* (1998) 194 CLR 444 established that if a defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. I have discussed language, including interpreters, further below at [19.24] ff.



- the provision of critical information in a language, or in a way, that is accessible to a person
- a support person.

19.18 It is critical to the administration of justice according to law that all persons who come before the courts, whether as parties or witnesses, be treated fairly and consistently, and that they be able to understand and play an active part in proceedings. These are common law principles, and basic expectations of any modern criminal justice system.

19.19 Queensland Courts have obligations under a number of legislative schemes. For example, Queensland Courts must allow guide, hearing or assistance dogs that are trained and registered in accordance with the provisions in the *Guide, Hearing and Assistance Dogs Act 2009* (Qld), as well as animals that meet the requirements of the federal *Disability Discrimination Act 1992* (Cth).[10]

19.20 Queensland Courts provide a range of reasonable adjustments. The courts provide information online about the following accommodations that court users can request:

- access to translation services[11]
- the ability to communicate to the registry for Deaf and hard of hearing people as well as people with speech impairments through a text telephone machine via the National Relay Service.[12]

19.21 The Queensland Courts website also provides information about support services for victims and witnesses, and some information about vulnerable witnesses.[13]

19.22 Although I acknowledge that some information about reasonable adjustments is publicly available, I am of the view the current information on the Queensland Courts website is lacking in comparison to some other Australian jurisdictions. The New South Wales Courts website has a more streamlined approach for court users seeking reasonable adjustments and is more comprehensive in its scope and service delivery.[14] It also provides a single point of contact for court users requesting any reasonable adjustment, through a few different formats. This approach is valuable and should be adopted by Queensland.

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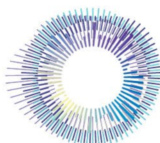
[10] There are provisions under both Acts that allow for exceptions in some cases.

[11] Queensland Courts, *Getting an Interpreter* (Web Page, 17 October 2022) <https://www.courts.qld.gov.au/services/getting-an-interpreter>.

[12] Ibid.

[13] Queensland Courts, *Witnesses* (Web Page, 9 November 2022) <https://www.courts.qld.gov.au/court-users/witnesses>; Queensland Courts, *Support Services* (Web Page, 1 June 2022) <https://www.courts.qld.gov.au/going-to-court/domestic-violence/support-services>.

[14] Courts NSW, *Access for People with Disability* (Web Page, 6 March 2023) <https://courts.nsw.gov.au/help-and-support/access-for-people-with-disability.html>.



19.23 What constitutes 'reasonable' is informed by international human rights instruments[15] as well as the common law. This is a complex question; however, the law generally seeks to balance the impost to the provider with the impact to the person with a disability. I understand in some rural and remote areas that particular accommodations may be difficult. However, the Queensland Government should make every possible effort to make reasonable adjustments to enable access to justice. This commitment will be reflected in the guiding principles of the new criminal procedure legislation.[16]

Language

19.24 Human rights and common law have established that it is an integral right of a person charged with a criminal offence to be subject to proceedings in a way that is understandable. It is fundamental to justice and the rule of law for a person to be able to understand the proceedings that they are subjected to.

19.25 The right to be communicated with in a language that the defendant understands is a protected right in multiple provisions under the *Human Rights Act 2019*.[17]

19.26 As mentioned above, the courts currently facilitate access where possible when a person has difficulty understanding or communicating in English by providing an interpreter.[18] In *Ebataninja v Deland*,[19] the High Court affirmed that access to language is an integral part of fairness when a defendant is on trial. This case established that a failure to provide an interpreter infringes upon a defendant's right to a fair trial.

19.27 Courts in Queensland comply with standards in this area — for example the Judicial Council on Diversity and Inclusion has issued the Recommended National Standards for Working with Interpreters in Courts and Tribunals.[20] These standards are given effect in Queensland Courts through the issuing of a Guideline on Working with Interpreters in Queensland Courts and Tribunals, which was issued in September 2022.[21]

19.28 The Magistrates Courts also has Practice Directions that guide the use of interpreters.[22]

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[15] See further 15.95] ff.

[16] See further Chapter 9.

[17] *Human Rights Act 2019* (Qld) s 32(2)(a), (i), (j).

[18] *Evidence Act 1977* (Qld) s 131A.

[19] *Ebataninja v Deland* (1998) 194 CLR 444.

[20] Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2nd ed, 2022) (available at <https://jcdi.org.au/publications/>).

[21] Queensland Courts, *Guideline – Working with Interpreters in Queensland Courts and Tribunals* (14 September 2022) (available at <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/618384/guideline-working-with-interpreters-in-courts-and-tribunals.pdf>).

[22] Magistrates Courts (Qld), *Interpreters – Magistrates Court Criminal Proceedings* (Practice Direction No 7 of 2010); Magistrates Courts (Qld), *Engaging Interpreters for domestic and family violence civil proceedings in Magistrates Court* (Practice Direction No 6. of 2017) (located at: Queensland Courts, *Practice directions – Magistrates Court* (22 April 2022) <https://www.courts.qld.gov.au/courts/magistrates-court/practice-directions>).

19.29 Critically, it is important that accommodations are also made for people who do speak English as a first or only language, but have cognitive impairments, hearing impairments, or any other condition that presents difficulties in communication or understanding of court proceedings. This includes a general commitment to the provision of information in plain English and in multiple formats.

19.30 The courts, and the profession of law more generally, revolve around formality. These traditions are important. However, they should not come at the expense of understanding for court users, including for those charged with an offence.

19.31 Although the new criminal procedure laws will not contain specific provisions around accessibility, including language, this commitment is reflected in the Guiding Principles.[23]

Administrative adjournments

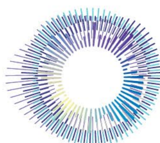
19.32 As discussed at the beginning of this chapter, an application for an adjournment is an important but uncontroversial procedure in court proceedings. However, in-court mentions should be avoided when the personal appearance of a party will not progress a matter forward. Some examples might be if a defendant is ill (with a medical certificate) and cannot come to court or instruct a lawyer, or the parties require further time to case conference a matter. In such circumstances, an application should be made to the registry requesting an administrative adjournment by consent.[24]

19.33 The ability for a registrar to administratively adjourn a matter should be maintained. To ensure that the matter is still progressed and is before the court within a reasonable time frame, there should be no more than three administrative adjournments for a particular matter, and an administrative adjournment should generally be no longer than three weeks in duration, subject to the court's schedule.

19.34 To be clear, the registrar can still refuse an application for an administrative adjournment even if the application is made by consent of the parties. The matter would then proceed to the listed court date to be heard before a magistrate.

[23] See further Chapter 9.

[24] See also information about the role of the registrar and clerk of the court, at [19.61] ff.



Joinder of charges

19.35 Section 43(1) of the Justices Act creates a general rule that limits a complaint to containing one charge only. Generally, separate complaints are required for the different types of offences.[25]

19.36 There are exceptions to this rule for practical reasons relating to the efficient administration of justice. It has been said in relation to indictable offences:

> provisions relating to joinder (of offences as well as offenders) on the one indictment minimise the need for a multiplicity of trials with the same or similar evidence being led, with consequential waste of time, expense and personal hardship to the defendant/accused as well as the prospect of different juries returning inconsistent verdicts on same evidence. However, to guard against unfairness to the persons charged there is a discretion in the court to direct the separate trial of charges and for the separate trial of any persons jointly charged.[26]

19.37 The joinder of charges (multiple charges) is currently allowed in certain express circumstances:[27]

(1) for **indictable offences** as outlined in section 567[28] of the Criminal Code;[29]

(2) for cases **other than indictable offences** – if the matters are:

(a) alleged to be constituted by the same act or omission on the part of the defendant (this ground does not appear in the Criminal Code for indictable offences); or

(b) alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or

(c) founded on substantially the same facts; or

(d) or form part of, a series of offences or matters of complaint of the same or a similar character; or

(3) when otherwise expressly provided.[30]

19.38 Chapter 61 of the Criminal Code also contains provisions dealing with true (natural) alternatives to charges. These provisions enable a person to be convicted, in the alternative, of an offence other than that named in the complaint without that alternative

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[25] *Justices Act 1886* (Qld) s 43(1)(a)–(b).

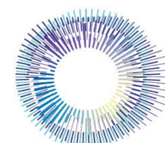
[26] John Devereux and Meredith Blake, *Criminal Law in Queensland and Western Australia* (LexisNexis, 9th ed, 2016) 87.

[27] *Justices Act 1886* (Qld) s 43(1)(a)–(c).

[28] Section 567 of the Criminal Codes allows joinder of charges in certain circumstances, such as where the charges are founded on the same facts or are part of a series of offences.

[29] Section 574 of the Criminal Code applies this to indictable offences dealt with summarily.

[30] See also *Penalties and Sentences Act 1992* (Qld) s 138, which contains provisions about joinder for breach proceedings.



offence being charged against the person. These provisions are not considered in the context of this discussion about joinder.

Proposed approach to joinder

19.39 I recommend the new criminal procedure legislation set out a clear framework for joinder of charges and/or defendants, with specific exceptions and consequences for noncompliance.

General rules

19.40 Specifically, I recommend the following:

(1) A Charge Sheet must allege **one offence only** unless the new criminal procedure laws or another Act expressly provides otherwise.[31]

(2) A Charge Sheet must relate to **one person (defendant) only** unless the new criminal procedure laws, or another Act expressly provides otherwise.[32]

(3) If a Charge Sheet contains more than one charge, each charge must be in separate and consecutively numbered paragraphs (replicating section 43(2) of the Justices Act).

Exceptions under the proposed legislation

19.41 I recommend the new procedure legislation contain a series of exceptions to the general rules above. Those exceptions should include:

(1) **Multiple charges** can occur in circumstances where a Charge Sheet may charge two or more offences (two or more simple offences, as defined by the Criminal Code, or simple and indictable offences may be joined in the same charge sheet) **against the same person** if the offences the subject of the charge—

a) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or

b) are founded on substantially the same facts; or

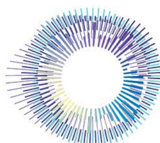
c) are, or form part of, a series of offences of the same or a similar character.

(2) **Multiple defendants** can be named on the same charge sheet but extend the Criminal Code provisions[33] to offences other than indictable offences, or where otherwise

[31] The Criminal Code allows multiple offences to be charged in an indictment as one charge in some cases, such as section 568(1)-(5A), (10A).

[32] For example, the Criminal Code contains exceptions in sections 568(11), (12) and 569. Currently, these provisions only apply to indictable offences. The new criminal procedure legislation will extend the application of these provisions to offences other than indictable offences, noting the operation of section 574 of the Criminal Code.

[33] *Criminal Code Act 1899* (Qld) ss 568(11), (12), 569.



expressly provided. This enables two or more defendants charged with simple offences as defined by the Criminal Code to be charged together.

(3) **Certain specific offences** can be included on the same Charge Sheet in certain circumstances as consistent with the Criminal Code.[34]

Effect of joinder

19.42 If a Charge Sheet contains two or more charges, the charges must be tried together unless the court makes an order for a separate hearing.

19.43 If one Charge Sheet charges two or more defendants, the defendants must be heard together *unless* the court makes an order for separate hearing.

Noncompliance with joinder rules about multiple charges

19.44 Improper joinder is not a defect in substance and form, meaning that the Charge Sheet cannot be amended. This maintains the current position in sections 43(3) and 48(1) of the Justices Act. Noncompliance will not invalidate proceedings.[35] It does not lend itself to the rules of amendment, but may be subject to orders for separation.[36]

19.45 The procedure on the separate hearing of a charge is the same in all respects as if the charge had been set out in a separate Charge Sheet. If the Magistrates Court makes an order for a separate hearing, the court may make any orders including for or in relation to the defendant's bail the court considers appropriate.

Amend or substitute a charge

19.46 The correction of a defect in a complaint by amending a Charge Sheet is a part of the power contained in section 48 of the Justices Act. It is important because amending court documents (such as a complaint, summons or warrant) or Bench Charge Sheets is common in Magistrates Courts proceedings.

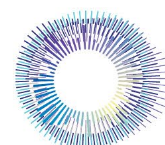
19.47 Section 42(1A) of the Justices Act currently provides that where a defendant is present at a proceeding and does not object, an amended charge may be made against the defendant.

19.48 The Criminal Code also allows for amendment but qualifies this by the court having an obligation to consider whether allowing the amendment is in the interests of justice. If the court is satisfied no injustice will be done by amending the charge, the court may make

[34] *Criminal Code Act 1899* (Qld) s 568(1)–(6), (10A).

[35] *Justices Act 1886* (Qld) s 43(3)(b).

[36] See further, as to amending or substituting a charge, [19.46] ff.



the order allowing the amendment at any stage of the proceeding.[37] A court may refuse the amendment if it cannot be made without injustice to the defendant. It can also make an order to correct the injustice, for example, by ordering an adjournment of the matter.

19.49 Whether the amendment gives rise to injustice depends upon the circumstances of the case. The court may consider whether the amendment is material to the merits of the case or would prejudice the defendant if the amendment is allowed.[38]

19.50 Failure to disclose an offence or matter of complaint falls within the phrase 'defect of substance or in form'. This means a charge sheet that fails to disclose an offence is capable of correction or amendment under section 48 of the Justices Act, unless the required amendment cannot be made without injustice to the defendant.[39]

19.51 Currently, the amendment of a complaint can be made at any time before the determination of the charge by judgement (finding of guilty or not guilty), and the powers can be exercised by the court on its own initiative or on application of the prosecutor or defendant.

19.52 In accordance with section 48, at the hearing of a complaint, there are certain circumstances in which a magistrate may amend a complaint. When doing so, the magistrate must make an order for amendment, as appears 'necessary or desirable in the interests of justice'.

19.53 I recommend the current section 48 be retained in the new criminal procedure legislation, with the provision widened to include the power to:

- correct any defect in substance or in form (not relating to noncompliance about joinder)[40]
- correct any variance between the charge and the evidence led by the prosecution at summary hearing[41]
- correct any omission of words in a charge that should have been included, correct any inclusion of words that should have been omitted, or include any charge that should have been included (but was omitted)
- order that the Charge Sheet be amended to state the offence is also a 'domestic violence offence'

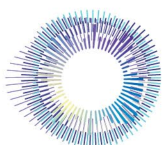
[37] Criminal Code (Qld) s 572(3).

[38] Criminal Code (Qld) s 572(1).

[39] *J Hutchinson Pty Ltd v Guilfoyle* [2022] QCA 186.

[40] *Justices Act 1886* (Qld) s 48(1)(a).

[41] *Justices Act 1886* (Qld) s 48(1)(c).



- add a further charge.

19.54 I recommend replicating the requirement that the order for amendment may be made in the following circumstances:

- if it is in the interests of justice
- the variance, omission or insertion is not material to the merits of the case
- the defendant would not be prejudiced in their defence.

19.55 In circumstances where the court makes the amendment, the matter may then be adjourned with all necessary orders (including those relating to the *Bail Act 1980*). Such an adjournment may overcome any prejudice to the defendant. Each party to the proceeding will be entitled to a copy of the amended Charge Sheet. This incorporates the current powers contained in sections 49 and 50 of the Justices Act.

19.56 The new provision should also allow for the amendment of the Charge Sheet if the accused is incorrectly named and the court is satisfied of the error. This replicates section 597 of the Criminal Code and does not make the charge invalid.

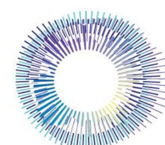
19.57 In summary, I recommend the new criminal procedure legislation retain a general power of amendment as set out in section 42(1A) of the Justices Act, which permits amendment where the defendant is present and does not object. The new legislation should also, in relation to the amendment of charges, adopt the concepts in the Criminal Code of the interests of justice, the merits of the case and material prejudice, which are also recognised in recent case law.[42]

19.58 To be clear, I do not intend to change the current powers of amendment or the case law, or to reignite any further disputes as to the meaning of the power to amend. The new legislation should be simplified to allow a charge to be amended in certain circumstances.

Transfers of proceedings

19.59 In Chapter 12, I recommended a Court Attendance Notice and declaration of service should be filed with the registry of the Magistrates Court closest to where the offence is alleged to have occurred. However, I also recommended that if it is not filed in the 'correct'

[42] See *J Hutchinson Pty Ltd v Guilfoyle [2022] QCA 186.*



court registry, then the proceedings should not be invalid.[43] In that case, an application could simply be made to transfer the matter to a different court.

19.60 The new criminal procedure legislation will also allow for a party to apply to transfer a matter to another court at any time during a proceeding. This process will be easier if the recommendation to change to a single court structure is adopted.[44]

Registrar and clerk of the court

19.61 Historically, the term 'registrar' related to civil matters and the term 'clerk of the court' related to criminal matters. Over the years, these terms have been intertwined and used interchangeably. Both terms are used throughout the Justices Act and the provisions relating to these roles are confusing.

19.62 The term 'clerk of the court' is outdated. The roles of the registrar and the clerk of the court are in effect the same and are often performed by the same person. Therefore, the new criminal procedure legislation will clarify this and only refer to the role of the registrar.

19.63 The powers and functions of the registrar in the Justices Act should be maintained. In particular, it is necessary to maintain the power of the registrar to adjourn hearings in appropriate circumstances without a requirement for an in-court mention of the matter.[45] This includes maintaining the power to adjourn matters upon application of all parties by consent, by noting the adjournment on the court file or filing a consent in the approved form.[46]

19.64 The new criminal procedure legislation will also preserve the power of the registrar to adjourn a matter within or outside a court district.[47]

19.65 Under the *Magistrates Courts Act 1921*, registrars have the authority to delegate their powers to an appropriately qualified person who is a public service employee in a Magistrates Court registry.[48] In practice, this allows multiple staff members of a Magistrates Court registry to perform the functions of registrar, including adjourning matters and sending notices to parties. In a busy registry, such delegations are necessary to manage the workload and ensure continuity of service delivery if an individual registrar is unavailable.

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[43] See further Recommendation 12.22.

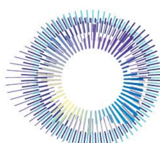
[44] See further Chapter 7.

[45] *Justices Act 1886* (Qld) s 23D.

[46] *Justices Act 1886* (Qld) s 23DA. See also [19.32] ff.

[47] Justices Act 1886 (Qld) s 23E.

[48] *Magistrates Courts Act 1921* (Qld) s 3B.



19.66 This delegation power will be maintained, with any reference in the new legislation to the registrar to also include the registrar's delegates.

Warrants

19.67 Warrants are a mechanism that empower the enforcement of court orders. For example, if a magistrate issues an arrest warrant to bring the defendant before the court, the QPS are empowered to enter premises, locate the defendant, arrest them, and bring them before the court.

19.68 'Computer warrants' are already permitted under the Justices Act. This allows for a range of warrants to be made and transmitted electronically, without the need for the warrant to be printed, signed by a magistrate, and physically handed to QPS to execute the warrant.[49]

19.69 I am not changing the issuing and execution of warrants, but I will be simplifying the warrant provisions, as there are many different warrants which essentially all provide for an arrest function. In the Justices Act, there are warrants in the first instance, which is when a warrant is issued at the time the complaint against the defendant is made, instead of a summons,[50] or for where a witness has not answered a summons.[51] There are also warrants for the arrest of persons in relation to an indictable offence.[52]

19.70 Having multiple types of warrants does not seem to be serving any benefit. I recommend these multiple warrant types be replaced. Instead, the court should have a general power to issue arrest warrants. This is a simple terminology change where the existing general term is already understood by court users, and adding further complexity is not needed (or warranted, some may say).

19.71 When the court orders the defendant to be remanded in custody, they may issue a warrant of commitment.[53] In practice these warrants of commitment are not used anymore, because a Verdict and Judgment Record (VJR) is used as the legal authority to convey the defendant to a correctional centre and remand them in custody.[54] The VJR is issued by the court and contains an order to remand the defendant in custody, making an additional warrant of commitment unnecessary. I recommend, consistent with current

[49] *Justices Act 1886* (Qld) pt 4 divs 6A, 6B.

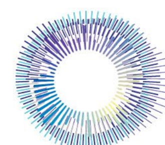
[50] *Justices Act 1886* (Qld) s 59.

[51] *Justices Act 1886* (Qld) s 81.

[52] *Justices Act 1886* (Qld) s 57.

[53] *Justices Act 1886* (Qld) s 97.

[54] *Corrective Services Act 2006* (Qld) s 9.



practice, that warrants of commitment not be recreated and the VJR be used to give effect to a court order to remand a person in custody.

19.72 Warrants of execution are also contained in the Justices Act, which relate to the enforcement of monetary orders and forcibly selling a person's property. These provisions are antiquated and no longer used, as the enforcement of monetary orders is now managed by SPER. See Chapter 18, on costs and enforcement, for further discussion of warrants of enforcement and why they will not be recreated.

Magistrate seized of a matter

19.73 A magistrate is said to be 'seized' of a matter when they have begun to hear a matter and, given they have heard part of the evidence, it is considered appropriate they retain the matter until it is concluded. This application of the concept is broader than a final hearing of a matter; it could also apply to part-heard applications (for example, bail) and part-heard sentences. However, the hearing of one application in a matter does not mean a magistrate would then become 'seized' of hearing the entire matter to final determination.

19.74 There is no definition of when a magistrate becomes 'seized' of a matter, and no guidance about how to proceed if the 'seized magistrate' is no longer able to hear a matter to final determination. There are very limited legislative procedures in relation to these court practices in the Magistrates Courts (or similar) throughout Australia. In Victoria, there are provisions that

> any power, duty or act which might have been exercised performed by the Court constituted by a magistrate may be exercised or performed by the Court constituted by any other magistrate if the Court cannot for any reason be constituted by that first mentioned magistrate.[55]

19.75 The District and Supreme Court of Queensland both have legislative procedures for circumstances where a judge starts a hearing and is unable to personally hear the matter to final determination; such as in the event of death, resignation, or being certified as incapable of sitting.[56] The higher courts legislation also outlines procedures in the event a judge has started the hearing of a proceeding which is not finalised before the mandatory retirement age of judges.[57]

19.76 I recommend provisions should clearly set out when a magistrate is 'seized' of a matter. These provisions should be contained in the *Magistrates Courts Act 1921* dealing with the criminal jurisdiction of the court.

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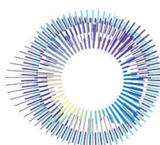
[55] *Magistrates' Court Act 1989* (Vic) s 16AB(1).

[56] *District Court of Queensland Act 1967* (Qld) ss 25, 27; *Supreme Court of Queensland Act 1991* (Qld) s 47.

[57] *District Court of Queensland Act 1967* (Qld) s 14; *Supreme Court of Queensland Act 1991* (Qld) s 21.



19.77 The provisions should outline that generally, a magistrate (except where otherwise provided) is 'seized' of a matter when a hearing has commenced or evidence has been called, and should remain seized of the matter until it has been finally determined. These provisions should expressly state that the hearing of an application in a matter would only 'seize' the magistrate to determine that application, and not necessarily the entire matter to a final determination. I also recommend adopting a procedure that considers when a magistrate is no longer able to personally hear a matter of which they have become 'seized' to final determination, similar but not necessarily limited to the types of criteria in the District and Supreme Court legislation.

Applications and directions hearings

19.78 The parties to a criminal proceeding can currently make an application to the court for specific orders or for certain things to occur during that proceeding. This is generally called a 'direction hearing'. The power to hold a direction hearing is currently found in section 83A of the Justices Act.

19.79 Section 83A allows a direction hearing to be held for an offence, which can be initiated in the following ways:

- on a magistrate's own initiative[58]
- on application by a party to the proceedings, having filed an application on each other party at least two clear days before the day nominated for the direction hearing (unless the court directs otherwise).[59]

19.80 Direction hearings can be used for various reasons during a proceeding, with a magistrate having a broad power to give a direction they are entitled to make at law about any aspect of the conduct of the proceedings.[60]

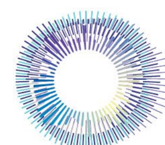
19.81 In addition to this broad power, section 83A contains some more specific examples of issues which may be dealt with at a direction hearing. Some of the more common of these include applications for:

- cross-examination at a committal hearing
- directions about disclosure (including under chapter 62, division 3 of the Criminal Code)
- joining or severing complaints

[58] *Justices Act 1886* (Qld) s 83A(2).

[59] *Justices Act 1886* (Qld) s 83A(3).

[60] *Justices Act 1886* (Qld) s 83A(5).



- evidence to be heard via video, telephone link or other communication
- the way in which a person gives evidence, including any special or extra measures to be adopted
- transfer of matters.

19.82 Section 83A(5AA) is a key provision for committal proceedings and is discussed in substantial detail in Chapter 17, in the context of committal proceedings.[61] This section effectively enables a magistrate to order the maker of a statement tendered or to be tendered by the prosecution at a committal proceed under section 110A(3) —

(a) to attend before the court as a witness to give oral evidence; or

(b) to be made available for cross-examination on the written statement.

19.83 It is clear from section 83A(6) that a direction given by a magistrate is binding, with the section stating ‘a direction is binding unless a magistrate, for special reason, gives leave to reopen the direction’.

19.84 Recommendations in both the ‘Disclosure, Case Conferencing and Case Management’ and ‘Committals’ chapters[62] are aimed at increasing the frequency of the Magistrates Courts’ use of directions hearings, including using them as one of the case management tools to ensure matters progress through the courts efficiently.

19.85 Directions hearings are a useful opportunity for the court to make orders about how a matter is to progress, including by creating obligations on parties to ensure disclosure is complied with and case conferencing is conducted. These are the types of issues to be ventilated at a direction hearing, particularly in circumstances where the parties are unable to resolve issues between themselves.

19.86 The new legislation should simplify and clarify the section about direction hearings, ensuring it is easily understood and, in particular, can be relied on to give effect to the proposed new case management approach for both summary matters and committal proceedings.

19.87 I also recommend section 83A(6) be amended to clarify that the court, as a result of a direction hearing, makes ‘orders’ about the matters in relation to which the direction hearing is held. While I am of the view there is minimal distinction between a ‘direction’ or ‘order’ and both are enforceable at law, for consistency, I propose the section use the term ‘order’.[63] Making this an ‘order’ will ensure any compliance provisions are enlivened,

[61] See further Chapter 17.

[62] See, respectively, Chapters 14 and 17.

[63] See *Criminal Practice Rules 1999* (Qld) r 8 for the use of the terms ‘direction’ and ‘order’.

including those recommended in Chapter 14, relating to disclosure, case conferencing and case management.

Witnesses, subpoenas and summonses

19.88 The way in which evidence is obtained and given during criminal proceedings is a key component of the justice system and criminal procedure.

19.89 Part 4, division 10 of the Justices Act contains procedural laws relating to witnesses attending court. These sections provide for the power to have a witness brought before a court to give evidence (via summons), what happens if a witness does not attend or refuses to give evidence, and the circumstances in which a witness is required to produce certain documents. Witness attendance can also be voluntary.

19.90 In addition to these sections, the *Criminal Practice Rules 1999* contain provisions about how evidence can be produced to the court via subpoena. Rules 30 through 34 apply to Magistrates Courts proceedings and provide guidance about how medical, hospital or government records are to be produced to the court.

19.91 The overlap between the Justices Act and the Criminal Practice Rules tends to create confusion in the Magistrates Courts about the processes for summonsing witnesses to attend court and give evidence, and for issuing subpoenas to produce documents. Additionally, in practice, the process of issuing a summons or subpoena is unnecessarily complicated and time consuming, especially for the QPS.

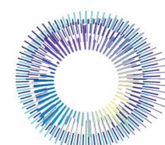
19.92 I recommend streamlining the witness summonses and subpoena provisions currently in the Justices Act and the Rules to create one simplified scheme for the Magistrates Courts, like that contained in the *Uniform Civil Procedure Rules 1999.*[64] As discussed in Chapter 12, I am of the view that the use of the term summonses is outdated, and I do not see the need for these documents to be sworn before a Justice of the Peace.

19.93 Instead of using a combination of summonses and subpoenas, the new model should be 'notice based' and give the court the power to issue a:

- Witness Attendance Notice to attend and give evidence
- Witness Production Notice to produce a document
- Witness Attendance and Production Notice to produce a document and attend court to give evidence.

19.94 Section 91 of the Justices Act allows the clerk of the court to give any witness or person sought to be made a witness a notice in the prescribed form requiring the person to attend

[64] *Uniform Civil Procedure Rules 1999* (Qld) r 414.



the court at the time(s) and place(s) set out to in the notice. The notice may be served personally or sent to the person's last known address and is intended to have the same effect as a summons. The new criminal procedure legislation for proceedings dealt with summarily should include similar kinds of provisions about the role of the registrar and the service of a notice.

19.95 There should be specific rules about how to serve witnesses. For example, the Justices Act currently has provisions relating to how to serve a summons on a doctor by leaving a copy of the summons at a place where the doctor practices.[65] This procedure should be maintained, however it would be best placed in the Rules.

19.96 Proof of service of the notice will continue to be required in order to give rise to any consequences for noncompliance. It will be necessary to maintain a power like that in section 79 of the Justices Act, for circumstances where a witness neglects or refuses to comply with a notice without 'just excuse'. Section 79 gives the court power to:

- impose a penalty upon the witness (including in their absence) not exceeding two penalty units ($287.50)
- issue a warrant to bring the person before the court to give evidence.

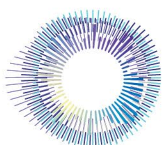
19.97 Section 82 also gives the court power to imprison a witness in relation to an indictable offence (who refuses to be examined upon oath concerning a matter, or take an oath, or to answer questions without any just excuse (for a period of not more than seven days). This provision should be repealed as it can be dealt with as a contempt of court, like in the higher courts.

19.98 While the new criminal procedure legislation should maintain the overarching power to issue the types of notices mentioned above, I am of the view the Criminal Practice Rules should provide the practical guidance about the following matters:

- what is to occur when documents are produced, including how they are kept by registries and returned after proceedings
- how parties may make an application to inspect and/or copy documents including the process for objecting to such applications
- setting aside and narrowing of notices to produce documents.

19.99 The creation of one simplified scheme will ensure clarity around how a witness may be called to give evidence or produce documents in Magistrates Courts proceedings.

[65] *Justices Act 1886* (Qld) s 78(4).



19.100 The new legislation should also include an explicit power of the court to make witnesses leave the courtroom until called upon. This will allow for further consistency with the practices of the higher courts.[66]

Proof of negative

19.101 As a general principle, in criminal proceedings the legal onus of proof lies with the prosecution. This is a basic and fundamental principle of the criminal justice system. In criminal proceedings, this means that the prosecution must prove all elements of an offence beyond reasonable doubt.

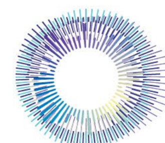
19.102 What the onus of proof entails depends on if there is a legal onus of proof, or an evidential onus of proof in relation to a matter. The party that bears the legal onus of proof in a criminal proceeding must persuade the decider of fact. For summary offences, or indictable offences heard summarily, this means that the prosecution must convince the magistrate that an offence has been committed. In contrast, bearing the evidential onus of proof means that the party is required to show a prima facie case, which is to say that there is sufficient evidence of a matter to enable it to be raised as an issue before the decider of fact (the magistrate, for any offence being heard summarily). The question of whether the evidential onus has been discharged is a question of law, while the discharge of the legal onus of proof to the relevant standard is a matter for the decider of fact.

19.103 The general principle is the prosecution bears both the evidential onus and legal onus of proving each element of an offence. Section 76 of the Justices Act reverses this general principle in some circumstances.

19.104 It is an established rule of statutory construction that where a legislative provision states grounds for liability and provides for a distinct exception or proviso to that liability, the onus of proving the exception on the balance of probabilities lies with the person seeking to rely on it (usually, the defendant), unless it is an element of the offence.

19.105 Section 76 of the Justices Act establishes that if the offence charged the absence of any exemption, exception, proviso or condition contained in the provision which created the offence (referred to as 'exemptions'), the onus is on the defendant to prove the affirmative in the defendant's defence. This is to say, the legal onus of proof is on an accused person to prove that an exception applies in relation to an alleged simple offence (as defined by the Justices Act) or breach of duty.

[66] Supreme and District Courts Criminal Directions Benchbook, *Trial Procedure* (No 4.6, 36) (available at <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>.



19.106 Section 76 is a complex and technical provision. It is relevant to offences containing language such as ‘without reasonable cause or excuse’, or ‘without a permit or licence’. In such cases, the legal burden of proof shifts to the defendant.

19.107 If the legal onus of proof is on the defendant, then they must prove it on the balance of probabilities. In Queensland, as stated in the Justices Act, section 76 places a legal burden of proof on the defendant to prove, on the balance of probabilities, that an exemption applies.

19.108 However, a distinction can be made in circumstances where an ‘exception’ is contained within, or is an essential ingredient of, the grounds for liability. In that situation, the exception effectively forms a ‘negative element’ of the offence and the onus of disproving the exception beyond reasonable doubt remains with the prosecution. As such, there may be confusion regarding where the onus of proof lies.[67]

19.109 This reversal of the onus of proof contained in section 76 is restricted to simple offences (as defined by the Justices Act) and breaches of duty. It can be applied to any indictable offences which are dealt with summarily.

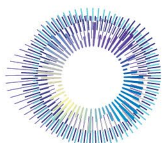
19.110 The case law on section 76 and on the common law rule from which it is derived requires a court to undertake statutory interpretation to determine whether an alleged exemption is truly an exemption, and therefore if it is actually for the defendant to legally prove, or if it is an element of the offence for the prosecution to legally prove.

19.111 As a part of the Review, I have considered this provision and concluded it is important that it is replicated in the new criminal procedure legislation. I have also considered other options, including shifting the legal burden of proof to the evidentiary burden, as occurs in Victoria and in the Commonwealth. However, I have determined that the provision must be replicated with no significant changes.

19.112 In part, this is because across Queensland’s statute book, a multitude of offences have been drafted on the basis of section 76 of the Justices Act. This means that offences which provide an exemption from liability where a reasonable excuse exists have been drafted with the intention that section 76 would be in effect. It would be a substantial amount of work across the statute book to reconsider all offences that have been drafted on the notion that section 76 applied, if section 76 was to be substantively changed.

19.113 There are also human rights implications for any provision which reverses the onus of proof. The Commonwealth’s Parliamentary Joint Committee on Human Rights has, for example, observed that ‘an offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because

[67] A recent example of this is in the case of *Queensland Police Service v Ahmed* [2023] QMC 2.



a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt'.[68]

19.114 However, the replicated section 76 must be clearly drafted in the new legislation, to aid in clarifying its intention.

Dismissal, discharge and strike out

19.115 The language used by court users when a matter is finalised is inconsistent and confusing. The terms used to describe the finalisation of a criminal proceeding by way of a 'dismissal', 'discharge' or being 'struck out' are often used interchangeably and inappropriately.

19.116 To improve understanding of court procedures, I recommend the language relating to the different ways a criminal matter can end be defined in the new criminal procedure law. This should be done in a way that makes clear for all court users when and how any proceeding has been finalised.[69]

Dismissal

19.117 The terms 'dismissed' or 'dismissal' are commonly used in the Magistrates Courts when a matter has come to an end. However, these terms should only apply when a magistrate has considered the evidence alleged against the defendant and made a decision on the merits to dismiss the charge.

19.118 Section 149 of the Justices Act and section 700 of the Criminal Code both allow for a certificate of dismissal which may be issued by a magistrate 'if required and if they think fit'. Such a certificate would be (respectively) proof of a bar to 'any subsequent complaint for the same matter against the same person'[70] or 'any further prosecution of the accused person for the same cause'.[71]

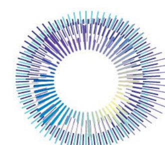
19.119 A magistrate should still have a discretion to issue a certificate of dismissal in certain circumstances, and this should be incorporated into the new criminal procedure legislation. The order of the dismissal is a bar to further proceedings in relation to the

[68] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* (Fourteenth Report of the 44th Parliament, October 2014) 37.

[69] See also Chapter 18 in relation to costs and enforcement. The way a proceeding ends will have implications for whether costs can be sought.

[70] *Justices Act 1886* (Qld) s 149.

[71] Criminal Code (Qld) s 700.



specific charge(s) alleged against the defendant based on those specific alleged facts. The issuing of a certificate of dismissal is proof of the dismissal.

Discharge

19.120 The term 'discharge' or 'discharged' is often confused with the term 'dismissal', however there is distinct difference between these terms. A discharge is not a decision on the merits of the case. There is no bar to further proceedings and the prosecutor can re-charge the defendant in these circumstances.

19.121 For example, in a case where a prosecutor formally offers no evidence to a charge (commonly known as a 'NETO' – no evidence to offer) the charge is formally withdrawn by the prosecution and the court discharges the defendant from the charge. However, this is not a bar to further proceedings on that charge.

19.122 Similarly, with indictable offences that progress to a committal proceeding. A committal proceeding is not a judicial proceeding, it is an administrative process used by the Magistrates Courts to consider if there is sufficient evidence to move the charge (an 'indicatable offence') to either the District Court or Supreme Court of Queensland.[72] However, if the magistrate does not consider there is sufficient evidence to put the defendant on trial, then the defendant must be discharged.[73] This is not a bar to further proceedings on that charge.

Strike out

19.123 When the court 'strikes out' a charge, the court is making an order to end the matter, but this is not necessarily a bar to further proceedings.

19.124 An example of a matter being 'struck out' by the court would be where a prosecutor does not appear in court to prosecute a charge and the court 'strikes out' that charge.

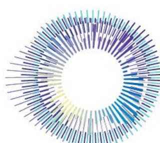
19.125 Other matters could be struck out due to time limitations on bringing a proceeding. If a proceeding is brought out of time, the court will have no jurisdiction to hear the matter.

Summary of Proposed Terms

Outcome	Decided on the merits of the case?	Bar to further prosecution?
Dismissed	Yes	Yes
Discharged	No	No
Struck out	No	No

[72] See further Chapter 17.

[73] *Justices Act 1886* (Qld) ss 104, 108, 110A(7), (9), (10).



Cash bail

19.126 In some cases, a defendant may have been arrested by police and released on cash bail, meaning the defendant paid money as a security to ensure they attended their court date. If a defendant on cash bail fails to attend court, or their lawyer attends on their behalf to ask for an adjournment, the magistrate may instead 'end' the charge and take no further action.[74] Generally, this power should be maintained in the new criminal procedure legislation, however it should be modified so that when making such an order the magistrate should formally 'dismiss' the charge. This will ensure the language and meaning of terms are consistent in the new criminal procedure legislation.

19.127 Given that the bail is forfeited and thus a punishment is imposed, this type of procedure to end a matter should be a bar to further proceedings in relation to the defendant on the specific charge arising from the circumstances.

Copies of records and access to court files

19.128 There are currently two schemes in operation relating to copies of court records and access to court files. These schemes are found in the Justices Act and the Criminal Practice Rules. The two schemes appear to be confusing in practice for both applicants (such as the media) seeking copies or access to court documents and court registry staff.

19.129 Currently, section 154 of the Justices Act sets out the requirements for how a person can obtain copies of a court record, what forms part of the record and the limitations on what material can be provided. This section is difficult to understand.

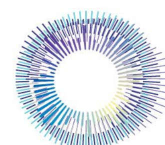
19.130 Chapter 12 of the Criminal Practice Rules also applies to Magistrates Courts proceedings and sets out a similar scheme for accessing 'court files'.

19.131 Rule 57 gives guidance about what types of documents are included in a 'court file' (and those which are not), how a person may apply for a copy or certified copy of, or inspect all or part of, a document, and further sets out limitations on when court files may be accessed (or copies provided).

19.132 Both rule 57 and section 154 provide limitations on when a court file (or document in the file) can be accessed, or when copies of documents can be provided. By way of example, limitations include circumstances such as:

- Childrens Court proceedings in the Magistrates Courts
- where information may be confidential or sensitive

[74] *Justices Act 1886* (Qld) s 150A.The Magistrate may also end the charge if the defendant does attend court.



- where the court has made an order closing the court or prohibiting access, disclosure or publication of the record (or part of the record)
- where the disclosure of information would risk a person's safety or wellbeing.

19.133 Unfortunately, the overlap in these provisions, including the differences in what constitutes a 'court record' compared with what is a 'court file', has created confusion for people applying to obtain or access documents, and court registries in trying to correctly administer the provisions.

19.134 Clearly, it is necessary to retain provisions of this nature. However, there is also a clear need for a more easily understood and coherent approach to accessing court files or copies of a court record.

19.135 I recommend the scheme set out in Chapter 12 of the Criminal Practice Rules be the only approach applying to copies of records and access to files in the Magistrates Courts. Any confusion or gaps about the definition of what is a file or a record should be more appropriately addressed in the Rules.

19.136 Section 98A of the Justices Act places an onus on the registrar to keep all records and proceedings of every court matter. This provision will be maintained in the new criminal procedure legislation.

Verdict and Judgment Records

19.137 Verdict and Judgment Records (known as VJRs) are documents produced by the court registry, containing orders made by the court. These forms are used across all criminal jurisdictions in Queensland and the requirements of a VJR are set out in the Criminal Practice Rules.[75] The requirements include the defendant's name, the charges before the court, whether the defendant is on bail or remanded in custody for the charges, and any sentence or next court date.

19.138 Section 88A of the Justices Act allows for the use of a VJR for the remand of a defendant into custody.[76]

19.139 In practice, VJRs are used as a written record of the court order for those who may not have been present in court at the time the order was made. For example, VJRs are used by the QPS and QCS as the legal authority to detain someone in custody, since officers detaining the defendant will usually not be in court to hear the orders made. If the VJR sent to QPS or QCS states the defendant is to be remanded in custody until the next court date, or is sentenced to imprisonment, then the VJR is used as the legal authority

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[75] *Criminal Practice Rules 1999* (Qld) r 62.

[76] The Justices Act has various ways for a court to order a person to remain in custody. For example, a remand or a warrant of commitment which is also known as the committal of a defendant into custody: see [19.71].

to detain the defendant. VJRs are also used by legal representatives and court users as proof of a court outcome.

19.140 I recommend that the new criminal procedure legislation adopt a similar provision to section 88A in the Justices Act, however it should be widened to also allow for all sentences imposed and court outcomes.

Reopening finalised matters

19.141 Currently, in cases where the Magistrates Court has recorded a conviction or made an order that is based on or contains an error of fact, it can reopen a proceeding and, after giving the parties an opportunity to be heard, set aside a conviction, or vary or vacate (cancel) orders.[77] This power can apply (but is not limited to) circumstances where a magistrate is satisfied that:

- a conviction or order was recorded or made against the wrong person
- the defendant did not know about the original summons to court
- the defendant was previously convicted of the same offence
- a conviction or order is based on someone's deceit.

19.142 This power does not apply to an error in sentence, or an error that is a failure to impose a sentence. For those errors, the court may reopen a proceeding under section 188 of the *Penalties and Sentences Act 1992*.

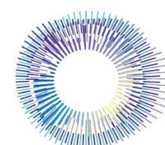
19.143 A reopening is different to a rehearing, as the matter is not being decided fresh, but rather is being reopened to correct the error. An application may be made by a party within 28 days of the conviction or order, but a longer period can be allowed. In addition, the court can reopen matters on its own motion.

19.144 This power is currently set out in the Justices Act and will be expanded in the new criminal procedure legislation to include reopening orders made based on an error of law as well as fact. It will also include the power to reopen and recommit a matter to a higher court (or to take some other action) where there has been an error, following any type of committal proceeding.[78] Essentially any order made in error can be reopened for the purposes of correcting the error.

19.145 The new legislation will allow a party or someone else on their behalf to apply to the court for a reopening. In addition, the registry may inform the court of an issue that could require reopening of a matter, and the court may choose to reopen a matter of its own motion if it becomes aware of or is informed about an error.

[77] *Justices Act 1886* (Qld) s 147A.

[78] Currently, see *Justices Act 1886* (Qld) s 129 for recommittal in cases of error.



19.146 Other jurisdictions also provide for reopening of convictions or orders. For example, in South Australia the law simply states that '[t]he Magistrates Court may, on its own initiative or on the application of any party, correct an error in a conviction or order'.[79]

19.147 I recommend a simple wording style like the South Australia legislation be adopted in Queensland.

Appeals

19.148 The right to appeal a court's decision to a higher court is a fundamental legal and human right.[80] Currently, the right to appeal a decision of the Magistrates Court is generally covered under part 9 of the Justices Act. The Criminal Code also contains provisions that cover indictable offences dealt with summarily,[81] or summary offences dealt with in the higher courts.[82]

19.149 Appeals from a final decision of the Magistrates Courts are currently heard by a District Court judge. Parties have one month from the date of the order to file an appeal with the District Court and must state the grounds for the appeal.[83] The law relating to appeals is well settled in case law and common law, and I will not make any changes to the accepted law or place any further limits on appeals. The new legislation will contain similar provisions as currently exist in the Justices Act, using clearer language to clarify what can and cannot be appealed.[84]

19.150 Parties who are aggrieved by the decision of a magistrate will still be able to appeal to the District Court to have the decision reviewed. However, I recommend 'aggrieved' be defined further in the new Act, to clarify that it is a party who has suffered a legal grievance as a result of the original decision, not someone who simply *feels* aggrieved by the decision. This has already been settled in case law[85] but should be explicitly stated in the new legislation.

19.151 Part of the case law relating to appeals has involved scrutiny of the current section 222(2)(c) to determine if parties may also appeal the decision of a magistrate regarding the making of a costs order where the defendant has pleaded guilty. A direct interpretation of the provision makes it seem that a person pleading guilty is not able to appeal the making of a costs order, because section 222(2)(c) states a defendant who has entered

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[79] *Criminal Procedure Act 1921* (SA) s 76B.

[80] *Human Rights Act 2019* (Qld) s 32(4).

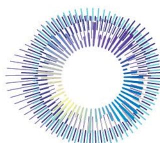
[81] Criminal Code ss 552J, 669A.

[82] Criminal Code s 668D.

[83] *Justices Act 1886* (Qld) s 222.

[84] See also, as to appeals to the District Court relating to private prosecutions, Chapter 13, Recommendation 13.19.

[85] *Owen v Edwards* [2006] QCA 526, [27]; *Commissioner of Police v Stjernqvist* [2022] QDC 95, [8] – [11].



a plea of guilty can only appeal 'on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate'.

19.152 The Court of Appeal has taken a wider interpretation of the provision and decided the making (or not) of a costs order is able to be appealed to the District Court, even when the defendant has pleaded guilty.[86] I recommend the appeal provisions in the new legislation confirm this position, to provide clarity for court users.

19.153 The provisions relating to service and obligations on the registry once an appeal is lodged will also remain the same, although I recommend some of the current procedural requirements should be moved to the rules of court.

19.154 The powers of the District Court when dealing with an appeal from the Magistrates Courts will also remain the same, with one addition. Currently, a District Court judge may strike out an appeal where the appellant (the person who filed the appeal) delays in prosecuting the appeal or fails to take a necessary step to progress the appeal.[87] However before this can be done, the other party to the appeal must make an application for the appeal to be struck out, in an approved form. This application is an extra step which I find unnecessary in many cases.

19.155 To address this, I recommend the powers of the District Court judge be expanded to allow appeals to be struck out on the court's own motion, in addition to the current provision allowing for the other party to make an application. The powers relating to the striking out of an appeal where the appellant does not attend the hearing of the appeal[88] will remain the same.

19.156 Finally, to avoid any doubt, the decision of a magistrate to commit an offence to a higher court is considered an administrative decision, because it is not the final determination of a matter. This means it is not able to be appealed to the District Court. This is the current position, and it will be maintained.

Corporations

19.157 Corporations as well as individuals can be held criminally liable for offences.

19.158 Express provisions have been introduced in Queensland when prosecuting corporations. These provisions establish as to how a corporation may be represented in court and how it may enter a plea or conduct its case.

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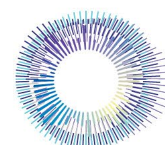
[86] *Smith v Ash* [2010] QCA 112.

[87] *Justices Act 1886* (Qld) s 229(1).

[88] *Justices Act 1886* (Qld) s 229(3).



19.159 A number of sections under the Criminal Code establish processes for when a corporation has been charged with an indictable offence. For example, section 594A outlines that where a corporation has been charged with an indictable offence, the corporation may be present in court through a representative.

19.160 For all respects, when a defendant corporation has elected an individual to act as a representative under the Criminal Code, all criminal procedure requirements that require the defendant can be done through that representative.

19.161 This provision also establishes that when a representative is acting in respect of a corporation, anything required by law to be done in the presence of the accused person, or to be read or said to or asked of the accused person, shall be construed as applying to that representative. Conversely, anything required to be done or said by the accused person personally may be done and said by the representative.

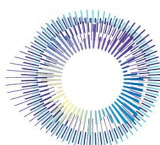
19.162 Section 644C of the Criminal Code establishes that, if a corporation has been given a court order requiring the attendance of an officer of the corporation, and that court order is not complied with, the court may issue a warrant for arrest of that officer. It also establishes that a court can make a costs order for any costs arising from noncompliance with a court order.

19.163 The *Penalties and Sentences Act 1992* allows for the sentencing of a corporation. Section 181A, for example, allows for a corporation to be fined if they have been convicted of an offence, where that offence under the legislation has a punishment of imprisonment attached to it.

19.164 There are some sections of the Justices Act that address procedure about corporate liability in criminal offences, however these are limited. For example, section 113A outlines the committal proceedings where the defendant is a corporation. The new legislation will also retain section 113A, to continue to allow for committal proceedings where the defendant is a corporation.[89]

19.165 I recommend the provisions under the Criminal Code that allow for a representative to appear when a corporation has been charged with an offence be replicated in the new criminal procedure legislation in respect of summary offences. The new legislation should also include provisions to address circumstances when a corporation does not comply with a court attendance order.

[89] Section 102FA of the Justices Act provides for the liability of executive officers when a corporation has committed the offence of publishing information about a private complaint in section 102F. This will also be retained. See further, as to private prosecutions and these provisions, Chapter 13.



Prerogative writs

19.166 The Justices Act refers to a number of prerogative writs such as an order in lieu of mandamus,[90] no certiorari orders,[91] and the writ of habeas corpus.[92] These provisions are archaic and are difficult to understand.

19.167 The prerogative writs of mandamus, prohibition and certiorari were abolished by the *Judicial Review Act 1991*[93] and the Supreme Court retained the power, on an application, to make orders to the same effect as each of those writs.[94] Chapter 14, part 4 of the *Uniform Civil Procedure Rules 1999* relate to the processes for judicial review.

19.168 The Justices Act also refers to the writ of habeas corpus.[95] The procedures for habeas corpus are now covered by Chapter 14, part 5 of the *Uniform Civil Procedures Rules 1999*.

19.169 It is clear these types of prerogative writs no longer have a place in modern and contemporary summary criminal procedure legislation. Therefore, I have not made any recommendations for these to be included in the new criminal procedure legislation. If any of the procedures contained in the Justices Act provisions are still required, then as a consequence of considering these provisions, minor consequential amendments may be required to the *Uniform Civil Procedure Rules 1999*.

Justices of the peace

19.170 Justices of the peace provide an invaluable service to the community. They are qualified volunteers who undertake a broad range of special responsibilities. A justice of the peace can witness and certify legal documents, including affidavits, and statutory declarations verifying a person's identity. They can also issue summonses and warrants in certain circumstances and perform other important procedural matters.

19.171 To be clear, the role of justices of the peace is outside the scope of this Review's terms of reference, meaning I have not recommended any changes to their existing powers and obligations. However, this Review is an opportunity to reduce confusion and assist with understanding of the court and the role of justices of the peace in the community.

19.172 Many provisions of the Justices Act refer to justices of the peace either in their community or 'bench' role (acting as the court). Historically, the title of the Act itself refers to justices

[90] *Justices Act 1886* (Qld) s 38.

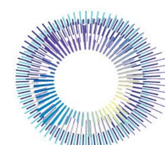
[91] *Justices Act 1886* (Qld) s 153.

[92] *Justices Act 1886* (Qld) ss 152, 233, 236, and 237.

[93] *Judicial Review Act 1991* (Qld) s 41.

[94] *Judicial Review Act 1991* (Qld) s s41(2).

[95] *Justices Act 1886* (Qld) ss 152, 233, 236, 237.



of the peace who, at the time the Act came in force, regularly constituted the court. The Justices Act originally set up how justices of the peace were appointed. Since about 1909 however, this bench role started to change with the development of the magistracy.[96]

19.173 The Justices Act has been amended to reflect some of these changes and the changing scope of the Justices of the Peace role. Significantly, in 1991, the *Justices of the Peace and Commissioners for Declarations Act 1991* was introduced to provide a legislative framework for the appointment, registration, and functions of justices of the peace and Commissioners for Declarations and for related purposes.

19.174 My view is given that provisions in the Justices Act relate generally to circumstances in which a justice of the peace can constitute a court and their role and powers when doing so, it is more appropriate for those to be relocated in the *Magistrates Courts Act 1921*. This approach ensures any new legislation is clear and simple to understand, and reflects contemporary practices and expectations.

19.175 I also note the role of justices of the peace in the Magistrates Courts may still be affected by other Acts such as the Criminal Code[97] or the *Justices of the Peace and Commissioners for Declarations Act 1991,*[98] which limits the extent of the type of proceedings a justice of the peace can do if sitting on the bench.

19.176 Accordingly, the new criminal procedure legislation will only refer to 'justice' or 'justices' when it is specifically referring to justices of the peace performing a community role in relation to Magistrates Court criminal procedure. The new legislation will be drafted in a way that makes roles and functions clear.

19.177 Although I have not recommended changes to the existing powers and obligations of justices of the peace, other recommendations made in this Review may have implications. These recommendations are made to be consistent with Queensland's modern court and justice system.

19.178 In particular, a consequence of this Review will be that provisions establishing the jurisdiction of the Magistrates Courts are relocated to the *Magistrates Courts Act 1921*. This will include section 30 of the Justices Act, which provides that a magistrate will constitute the court when present and available. However, consistent with the overarching requirement to modernise procedure and my earlier recommendations about removing barriers to the use of technology, the new legislation should not recreate limitations by continuing to require a magistrate be physically present. Accordingly, as part of the consequential amendments, any requirement for the physical presence of a magistrate

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[96] See further the discussion of this topic in Chapter 7, especially at [17.49] ff.

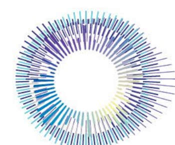
[97] Criminal Code (Qld) s 552C.

[98] *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29.

should be removed. Combined with my recommendations about the use of technology in courts, which allow for remote hearings in appropriate circumstances, this will have the effect that a magistrate will constitute the court if available in person or remotely with the use of technology. I acknowledge that a practical implication of this recommendation may be that fewer matters being heard by Justices of the Peace.

Recommendation

R19.1: The new criminal procedure legislation (or other suitable legislation) should contain all the criminal procedures proposed in this chapter, as well as all other general matters detailed in the drafting instructions (Appendix C).



CHAPTER 20: IMPLEMENTATION

Introduction

20.1 Effective implementation of legislative reform is the key to successful change and giving practical realisation to the desired reform outcomes. Implementation of a new piece of legislation such as this is complex and, in my view, should not be rushed.

20.2 It is essential that all participants in the Magistrates Courts' criminal jurisdiction, especially CSQ and registry staff, are properly advised, prepared, and resourced to implement the changes required by the proposed new criminal procedure legislation. Being ready for this transition and able to start working under a modernised system is a significant change for all. It should not be considered as a small undertaking.

20.3 Any implementation process must be fit for purpose for Queensland, and as such, familiarising magistrates, court staff and the profession with new systems and procedures will require a coordinated strategy.

20.4 To implement any reform of this nature, there are several matters for consideration, which I have discussed in greater detail below. While I acknowledge Queensland Courts are likely to bear the greatest impacts of implementation, I expect all criminal justice system participants will be required to consider how the new criminal procedure legislation affects their responsibilities and what changes they need to make to support its introduction and transition.

Implementation period

20.5 The Queensland Government's commitment about this Review extends to introduction of resulting legislation into the Parliament in the current term of Government, which ends 30 October 2024.

20.6 I recommend an implementation period of at least two years between the passage of any such legislation and its date of commencement. This is necessary to give sufficient time for the sector to prepare for and embed the required changes.

20.7 The magnitude of this reform to the Magistrates Courts criminal jurisdiction is unparalleled, given most of the work undertaken by the courts is connected to the Justices Act.

20.8 Without the Justices Act, everything needs to be recreated. The scale of this reform involves another cycle of complex work to develop regulations, rules of court, practice directions for magistrates, internal policies and procedures, training, and new forms. Putting the Act into operation must take the necessary time to get it right and that is why the implementation period should be two years at a minimum.

20.9 My reasoning for the need for this time frame is further explained below.

Implementation activities and considerations

Data gaps and improvement

20.10 Over the course of the Review, it has become apparent there is significant need for improvement in data collection, analysis and utilisation.

20.11 While appreciative of the data that we did receive, unfortunately there were sometimes significant gaps in the data, and at times the data failed to accurately paint a picture of current Magistrates Courts' criminal jurisdiction demands, pressures, and workloads. To be clear, this is not the fault of the people recording court matters or providing the data for this Review. It is a result of limitations in current systems (QWIC and paper files) that are not adequately designed to collect and collate this data in a clear, streamlined and error-free way.

20.12 Data collection, extraction and analysis is invaluable in helping the court and government agencies to measure, monitor and track demand pressure and system performance.[1]

20.13 Given my recommendation for the Review of the proposed criminal procedure legislation five years after commencement,[2] robust data collection and an accountable evaluation process will be essential to inform the impacts of the legislation and any associated changes.

20.14 I strongly encourage all criminal justice system agencies who may be impacted by the proposed legislation to also review and consider their data collection and analysis frameworks. The significance of meaningful data to track performance and improvements must not be underestimated. Better quality data collection is connected to anticipated Information and Communications Technology (ICT) reforms.

Information and Communications Technology

20.15 One of the key outcomes from this Review is to ensure criminal procedure legislation embraces technology and remains contemporary.

20.16 Dedicated, well-designed and fit for purpose ICT systems that support criminal procedure and associated court processes will be essential to the effective operation of the new criminal procedure legislation. A failure to prioritise fit-for-purpose technological solutions may mean the current delays and confusion experienced by court users becomes more protracted. During consultation, stakeholders consistently reported that the current lack

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[1] *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report two; Women and girls' experienaces across the criminal justice system* (2022), 8.

[2] See [20.57] ff below.

of technology or access to technological solutions impedes the accessibility and efficiency of court process.

20.17 By providing for electronic lodgement of forms, filing and serving of documents, and other technological solutions, court users will have greater access to justice in a timely, efficient and user-friendly way.

20.18 Some work has already commenced in the Magistrates Courts. In some courthouses, there are technological solutions for specific court processes. For example, a defendant can lodge a written plea of guilty online. In Brisbane, an online portal for registry committals is under development. More generally, the Queensland Courts and Tribunals Digitisation Program (CTDP) is underway, with the aim of enabling a future move to a digitised and paperless or paper-lite court system.

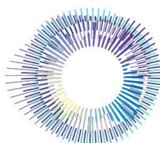
20.19 As explained in Chapter 10, the new criminal procedure legislation will not mandate the use of technology, but nor will it stand in the way of any technological innovation. As technological solutions continue to be developed, I am hopeful this legislation will be an impetus for encouraging and enabling a greater use of technology and the improvement of associated ICT solutions for courts.

20.20 The development of any new ICT database system should ensure that it can provide appropriate information to manage the workload of the courts and operate in a way that can assist with the administrative work of the court registry. The new ICT system should be designed to suit the desired procedures. Procedures should not be adopted or adapted to suit an available or existing ICT system.

20.21 The commencement of the new legislation would ideally be in conjunction with a move to improved ICT systems in the Magistrates Courts and the registries. It offers another important feature of modernisation. New ICT systems need to be functioning state-wide in all courthouses.

20.22 In Tasmania, the *Magistrates Court (Criminal and General Division) Act 2019* was passed in December 2019 but has not yet commenced. The latest annual report states '[t]he proclamation awaits development of the Astria IT system which will support the operation of the legislation'.[3] This reinforces the importance of Queensland taking early steps to develop and implement a new ITC database system during the implementation period for any new criminal procedure legislation.

[3] Magistrates Court of Tasmania, *Annual Report 2021-2022* (November 2022) 15–16. Other outcomes and activities in this period have included 'the drafting of new Rules and Regulations, and drafting of new processes and procedure for Court processes', as well as ongoing consultation with stakeholders.



Forms and practice directions

20.23 The new legislation should contain a provision regarding the making of forms.

20.24 I understand Queensland Magistrates Courts currently have around 86 approved forms under the Justices Act, ranging from those used by prosecutors in relation to charges, notices given to defendants, to those used by magistrates on the bench recording court outcomes.

20.25 The change to new legislation will require a comprehensive review of all current forms, and new forms will need to be created to suit the new legislation. I encourage courts to consider the accessibility and readability of forms. There should be clear steps taken to ensure forms are easily understood, available electronically (where appropriate) and supportive of the objects and principles in the new legislation, especially to enable simpler and clearer understanding.

20.26 Practice Directions are a useful tool to supplement both the Act and the *Criminal Practice Rules 1999*, especially as a way of making sure there is consistent application of the law between different magistrates and court locations.

20.27 Practice Directions issued by the Chief Magistrate related to criminal procedure in the Magistrates Courts will also require review and redevelopment. Some of them will still be useful and applicable, but others will need to change completely or substantially.

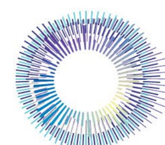
20.28 The proposed criminal procedure framework embeds some of the processes currently provided for by practice directions, particularly those that are most important to the progress of criminal matters, such as directions about disclosure and case conferencing. This Review will lead to the clearance of many of the current practice directions and the updating of others.

Policies and procedures

20.29 Critical to implementation will be accurate, relevant, and accessible supporting information and guidance material about the Magistrates Courts criminal process.

20.30 Ensuring not only Magistrates Courts, but all agencies and participants practising in the court, adopt policies and procedures that are up to date, clearly understood and consistent in content will go a long way to creating a coherent and consistent approach to criminal procedure in the courts.

20.31 As part of the implementation process, it will be essential for each criminal justice agency to update and develop a suite of policies and procedures which provide guidance on key aspects of the legislation and associated frameworks.



20.32 This will be a task of particular size and importance for CSQ. A consequence of the new legislation will be very significant changes to the policies and procedures followed by registry staff in their day-to-day operations as they apply the legislation and undertake the administrative work that assists in progressing matters through the court system. It will be necessary to identify those changes early, and to develop new policies and procedures in a timely way. Again, this reform is probably the most significant change to the business of the Magistrates Courts in recent times.

Training and support

20.33 There must be mandatory training and support for all court and registry staff involved in criminal proceedings. Staff should be clear about their roles and responsibilities, including how they can proactively assist all court users (not just defendants) to successfully navigate the criminal court process.

20.34 Court staff should be provided with adequate training, starting considerably before the commencement of the new legislation and on an ongoing basis. This should include information that will help to understand the new procedures, as well as specific training about their role using the new procedures.

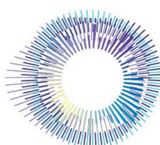
20.35 Given the significant number of staff and associated staff turnover in large government organisations such as CSQ, it is imperative that all induction documents and ongoing training sufficiently cover criminal procedure. It will be useful to also cover how staff provide best service to individual court users and offer information in ways that promote understanding and meet court users needs.

20.36 Continued training and ongoing support of all staff will be key to properly embedding the changes created by the new legislation and ensuring consistent practices across the state. Lack of consistency was a significant theme featured in the consultation feedback and is something that can be proactively addressed through a model of robust and ongoing training, support and development.

20.37 Similarly, the transition from the Justices Act to a new legislative operating framework will require training for magistrates. While many of the procedural concepts will be familiar, the new law will bring in a shift. It is vital magistrates are informed about the new procedures, as they are intended to promote consistency and reduce atypical practices from developing.

Resources for judiciary, practitioners and court users

20.38 During the Review process (especially when considering the approaches taken in other jurisdictions), I reviewed several resources created at the time new criminal procedure legislation was implemented to help people understand the new procedures and laws. In



Queensland, similar resources should be created and made available, not just for the benefit of court users but also for legal practitioners and the judiciary.

20.39 By way of example, the Magistrates' Court of Victoria created the *Criminal Procedure Act 2009 – Legislative Guide*.[4] I found this guide particularly useful. It clearly sets out the relevant changes created by the Act and is intended to assist those who use or work with the Act. A similar resource should be developed for Queensland. Importantly, it must be in plain English and presented in a simple, clear style that is easy to use. This is preferred even by professionals.

20.40 Second, there should also be a Magistrates Courts Benchbook about the new criminal procedure laws and other relevant matters. This would assist magistrates when exercising their judicial functions under the new Act but would also be of great benefit to the wider legal profession.[5]

20.41 The creation of a new Benchbook would be particularly important to understand and promote new procedural options, such as the new Summary Offences Diversion Program. If enacted, this would be an entirely new part of criminal procedure. Magistrates will be expected to balance a number of potentially complex factors in determining suitability for this diversion option. The Benchbook could, among other things, identify checklists and other relevant factors for consideration and provide guidance to magistrates about specific scenarios and options under the legislation to help with decision making. Practice Directions issued by the Chief Magistrate are also an important source of guidance for practitioners.

20.42 Consideration must be given to the production of a range of resources to assist court users in navigating the court process. These resources should embrace creativity and include various options for display, distribution, and consumption. Examples of useful resources I have seen include short informative videos available on courts websites or in court precincts, Easy English information sheets,[6] information being provided in multiple

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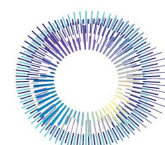
[4] Department of Justice (Victoria), *Criminal Procedure Act 2009 – Legislative Guide* (February 2010) (available at: <https://www.justice.vic.gov.au/criminal-procedure-act-2009-legislative-guide-by-chapter>).

[5] For examples of Benchbooks, see: Magistrates Court of Queensland, *Domestic & Family Violence Protection Act 2012 – Benchbook* (10th ed, December 2022); Supreme Court of Queensland, *Supreme & District Court – Benchbook* (November 2020); Magistrates Court of Queensland, *Childrens Court Child Protection Proceedings Benchbook* (July 2016) (all available at <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks>).

[6] Easy English documents are also called 'Easy Read' or 'Easy Access' documents. Easy English is described as 'a writing style that helps people who find it hard to read and understand English'. These are distinct from Plain English or Everyday English documents, which are written in 'a direct style of writing for people who can read at a reasonable level': Centre for Inclusive Design, *Easy English versus Plain English: A guide to creating accessible content* (Web Page, 2023), <https://centreforinclusivedesign.org.au/index.php/services/guides/2021/12/10/easy-english-versus-plain-english-guide/>.



languages, QR codes linking users to important information, and online decision-making matrixes helping to guide users to the information they need.[7]

20.43 There should be information for self-represented defendants trying to navigate the criminal procedures of the Magistrates Courts. This might include, for example, information about:

- which offences can be finalised in the Magistrates Courts, and which need to be committed
- how the case management process operates, including the different stages of a matter and what they should expect to happen at each court event
- what they can expect and ask for in relation to disclosure, and participation in case conferencing
- the nature and scope of available diversion options for summary offences, including their eligibility criteria
- the different ways that a matter can be finalised in the Magistrates Courts, including pleas of guilty, summary hearings and committal proceedings, and what happens if a party does not appear in court
- what happens after a matter is finalised, including the next steps, the availability of costs, the enforcement of orders and appeal processes.

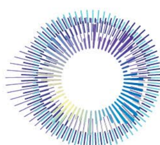
20.44 It is critical that materials for court users are offered in accessible formats across a range of mediums, including the provision of information on Queensland Government websites, as well as in physical ways, such as printed factsheets available in court. These materials must be as broadly accessible as possible, and available to the widest possible variety of court users.

20.45 The creation, embedding and continual updating of court resources will be essential to ensuring a consistent and clear approach to criminal procedure and improving access to justice in Queensland.

Regulation-making power

20.46 I recommend the proposed Act contain a regulation making power, giving the Governor in Council the ability to make regulations for various matters under the Act.

[7] For examples of resources, see generally: Victoria Police, *Reporting Crime: Your Rights*, Easy English Factsheet (November 2015) <https://www.humanrights.vic.gov.au/static/b0d071d9cd3e5f23fe23be099a304e51/Resource-Reporting_A_Crime-EE-2015.pdf>; Victoria Legal Aid, *Your day in court – A guide for people going to Magistrates' Court for less serious criminal offences* (13th ed, January 2020) <https://www.legalaid.vic.gov.au/your-day-court>; Victoria Legal Aid, *Personal safety and intervention order: mention hearings self-help guide for respondents* (July 2020) <https://www.legalaid.vic.gov.au/personal-safety-intervention-order-mention-hearings-self-help-guide-respondents>.



20.47 Having regulation making powers is a standard feature of primary legislation. It allows legislation to provide further detail enabling the law to operate, and a way to address issues quickly as circumstances change.

20.48 As identified in other chapters, the new regulations will also recreate some matters from the current *Justices Regulation 2014*, such as the districts and places for holding Magistrates Courts, and scales of fees.

20.49 I also recommend any new legislation contain a transitional regulation making power. These are sometimes included in legislation to provide for 'dealing with unforeseen difficulties that may arise in the transition from the previous legal framework to the new framework to be established under the new Bill.'[8]

20.50 This is a sensible and practical approach designed for exactly this type of reform, to ensure necessary matters can be effectively addressed in a timely matter. This is especially important given the fundamental role of any new Act to the administration of justice. Any such transitional regulation making should only be for a limited time as is appropriate.

Rule-making power

20.51 I am required, in making my recommendations, to consider ways to enhance consistency across the Queensland courts, particularly in relation to the *Criminal Practice Rules 1999*. Some of the Rules already apply in the Magistrates Courts.

20.52 In undertaking the Review, it is clear the Justices Act contains many mechanical provisions that could be devolved to rules of court. There are also additional matters of practice arising from the new model that would be better placed in rules.

20.53 In exploring the best setting for these rules that align with the objectives of consolidation and consistency, I recommend using the existing structures in the *Criminal Practice Rules 1999* as the best and most viable option. This approach avoids fragmentation by co-locating all criminal practice rules. Rules are made with the consent of the Rules Committee with members from all three levels of courts.[9]

20.54 It is generally intended that, wherever possible, the new legislation will provide the head of power, rights, responsibilities and consequences, and the rules will provide for the mechanics of the provisions. This will allow greater flexibility and allow for the natural evolution of procedure.

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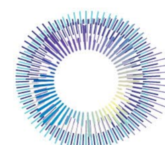
[8] Department of the Premier and Cabinet (Queensland), *The Queensland Legislation Handbook* (6th ed, November 2019) 7.3.3 "Does the legislation authorise the amendment of an Act only by another Act?" 37.

[9] *Supreme Court of Queensland Act 1991* (Qld) ss 85, 89.



20.55 The *Criminal Practice Rules 1999* are made under the section 85 of the *Supreme Court of Queensland Act 1991*. A consequential amendment may be required to expand the subject matter of the rules to include provisions of the new Magistrates Courts criminal procedure legislation. Consequently, no explicit rule making power needs to be included in the new legislation.

Savings and transitional provisions

20.56 When legislation is repealed and replaced with new legislation, is it best practice to consider including savings and transitional provisions in the new legislation. These provisions will ensure continuity of criminal proceedings already started in the Magistrates Courts under the Justices Act. The intent will be to ensure the disruption to courts and court users is minimal during the transition, and actions already completed under the Justices Act (such as commencing proceedings or committals) are accepted as valid under the new Act and do not need to be done again.

Review of Queensland's criminal procedure legislation

20.57 As stated throughout this Report, the Justices Act is now 136 years old and although parts of it have been changed and updated by being 'bolted on' to original provisions, it has not been fully or comprehensively reviewed.

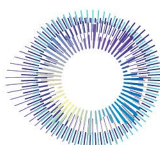
20.58 To ensure history does not repeat itself, I recommend the new criminal procedure legislation should specifically require there is a comprehensive review of the operation and effectiveness of the Act no later than five years from the date of commencement.

20.59 This requirement is appropriate given the scope and application of the new legislation. It is imperative to the system the Act continues to be contemporary and effective, as intended.

20.60 I have purposely suggested an initial review period of five years after commencement as this will allow analysis of data to inform understanding of where changes need to be made to improve performance.

20.61 In addition to this overall review, there are also several specific topics I recommend be considered (but not limited to) during this initial review period. Firstly, I have replicated the Justices Act sections as they relate to breaches of duty. However, this is clearly a little-used jurisdiction. Careful records of its use (or otherwise) over the next period should be kept, and there should be a review of whether the provisions are required.

20.62 Second, the in-court diversion programs, namely the new Summary Offences Diversion Program and the additional structures placed around referral to Adult Restorative Justice Conferencing, should also be considered during the first review. Specifically, this should



relate to its operation and effectiveness, as well as whether any further changes are required.

20.63 Any review should also extend to any newly created or adopted diversionary programs taking effect after the commencement of the legislation. As previously mentioned, I consider the expansion of diversion programs and service delivery are critically important matters and should continue to be reviewed in conjunction with Queensland's criminal procedure legislation.

20.64 For transparency, there should be a report tabled in Parliament about the outcomes of the review, by the responsible Minister, as soon as practicable after the review is completed. In the future, consideration should also be given to requiring additional reviews of the laws to ensure they remain contemporary and effective.

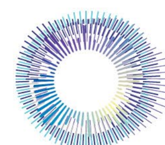
20.65 The broad review after five years should not replace discrete amendments needed as required to address specific technical or operational issues as they arise. It is clear an Act such as this needs constant monitoring and continual improvement. It is anticipated the new Act's modern format will allow for targeted amendments to be made in an easier way. These should be addressed in miscellaneous legislation amendment Bills routinely prepared by the Department of Justice and Attorney-General.

Conclusion

20.66 The development of the new Act is not the end state. It is the beginning. Its successful implementation requires significant investment of time and coordination as it comes with a raft of connected secondary legislation, and other necessary material to be prepared.

20.67 In addition, the criminal procedure laws require continual review to ensure it maintains currency and effectiveness. This undertaking is critical to enabling the proper functioning of the Magistrates Courts' criminal jurisdiction. To this extent, the review of criminal procedure laws is never truly finished, it is an 'ongoing task of aligning criminal justice processes with social needs, expectations and values as well as developments and opportunities.'[10]

[10] Martin Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 46.



Recommendations

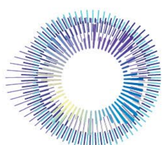
R20.1 A period of no less than two years before the date of commencement of the Act should be allocated for implementation of the new criminal procedure legislation.

R20.2 A comprehensive review of the new criminal procedure legislation should be conducted no later than five years from the date of commencement, and a report should be tabled in Parliament about the outcomes of the review. In addition to an overall review of the Act, specific consideration should be given to:

- **(a)** the retention of 'Breach of Duty' provisions, including whether they are required to be maintained;
- **(b)** the operation and effectiveness of provisions about new in-court diversion programs (namely, the Summary Offences Diversion program and the additional provisions about adult restorative justice conferencing), and whether any further changes are required;
- **(c)** any other diversionary programs that take effect after the commencement of the new legislation.

R20.3 The new criminal procedure legislation should contain standard provisions allowing for a regulation and form making power, and savings and transitional provisions as required. It should also include a transitional regulation making power given the nature of the reform.

R20.4 The *Criminal Practice Rules 1999* should be used for making rules of court required under the new criminal procedure legislation.



CHAPTER 21: CONSEQUENTIAL AMENDMENTS

Introduction

21.1 This Report has focused mostly on outlining the content of the new legislative framework for criminal procedure laws in Queensland's Magistrates Courts, to ultimately replace the Justices Act.

21.2 The Justices Act is a foundational piece of legislation in Queensland, with its considerable legacy a marker of the history and development of the state's criminal law and justice system.

21.3 The complex task of replacing the Justices Act is compounded by its heritage, which has entrenched its fundamental status. Due to its considerable years of operation the Justices Act has taken on an interconnected, layered, and supplementary role across a significant portion of Queensland legislation.

21.4 Most Queensland legislation refers to its operation and uses its general provisions to form the basis of conducting summary criminal prosecutions, or conversely ousts its all-purpose application to suit specific offence scenarios or specific Act requirements. In addition, Justices Act terms such as 'complaint' and 'examination of witnesses' frequently appear in other current legislation.

21.5 Under the Review's terms of reference, this Review is not only limited to creating a contemporary legislative replacement for the Justices Act. It must also consider the many individual pieces of legislation impacted and needing amendment as a consequence of the proposed new legislation, repeal of the Justices Act and other changes.

21.6 This chapter provides a brief overview of the consequential amendments required to existing Queensland legislation due to the Justices Act's wide-reaching scope. It discusses the need for a separate Consequential Amendments Bill to be developed and other matters.

Need to prepare two separate Bills

Substantial consequential amendments

21.7 Substantial consequential amendments are required to properly support and give effect to the commencement of any new Criminal Procedure Bill. The identification of the required consequential amendments is itself a significant, extensive and complex task.

Relocation of Magistrates Courts establishment and criminal jurisdiction provisions

21.8 The Justices Act does not only include provisions dealing with criminal procedure. It contains numerous substantive provisions relating to the establishment, jurisdiction,

constitution and powers of Magistrates Courts in the exercise of the courts' criminal jurisdiction.[1]

21.9 These important provisions must be maintained and relocated elsewhere after the Justices Act is repealed. I recommend this is best achieved by amending the existing *Magistrates Courts Act 1921* ('Magistrates Courts Act'), which currently contains provisions relevant to the exercise of the courts' civil jurisdiction. It is practical to adopt and expand this existing structure.

21.10 Combining provisions relating to the civil and criminal jurisdiction of the Magistrates Courts in one Act will mirror the structure of the *District Court of Queensland Act 1967*. Providing for consistency through greater alignment of the administrative and governance arrangements of the Magistrates Courts and the higher courts contributes to the general objectives of the Review.

21.11 The Justices Act provisions relating to the jurisdiction and powers of Magistrates Courts' registry officers will also be relocated into the Magistrates Courts Act. The names of certain roles will also be updated to minimise confusion and create consistency, such as the removal of the term 'clerk of the court' in the criminal jurisdiction in preference for 'registrar'.

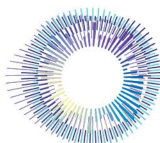
Creation of single Magistrates Court structure

21.12 If the recommendation to create a single Magistrates Court structure known as the 'Magistrates Court of Queensland' is accepted, further amendment to the Magistrates Courts Act will be required. This would also require a series of further changes to remove all references to Magistrates Courts (plural) where it appears and replace it with Magistrates Court (singular). Legislative references to 'a Magistrates Court' would also need to be replaced with 'the Magistrates Court'. A search of the current statute book reveals the term 'Magistrates Courts' appears at least once in 58 pieces of legislation, all of which would require amendment.

Change of court name and title

21.13 Similarly, should the change of court name and title to Local Court and Local Court judge be accepted, amendments to make this change are primarily needed to the Magistrates Courts Act and the *Magistrates Act 1991* (which contains provisions about the appointment and functions of magistrates), as well as a variety of other Acts where references to these are made.

[1] See, for example, *Justices Act 1886* (Qld) pt 3 in relation to the jurisdiction of the Magistrates Courts.



21.14 Again, this is a substantial task as the term 'Magistrates Court' appears in 154 pieces of legislation and the term 'magistrate' in 189 pieces of legislation (not including subordinate legislation such as regulations and rules). All these Acts would require amendment to update references from Magistrates and the Magistrates Court.

Repeal of Justices Act

21.15 Searches also show the term '*Justices Act 1886*' is referenced in 207[2] separate pieces of legislation administered by a range of Queensland ministers and departments.[3]

21.16 The repeal of the Justices Act alone requires amendment to each of these Acts. This would mean making amendments to approximately 37% of Queensland's legislation to replace the term Justices Act and update with appropriate references.

21.17 In addition, there will be a range of routine consequential amendments necessary to key intersecting criminal legislation like the Criminal Code, the *Police Powers and Responsibilities Act 2000* and other legislation to facilitate implementation of the new Criminal Procedure Bill, such as updating outdated terminology and references. Some of these amendments will be minor, while some may require a more detailed explanation depending on the extent of change.

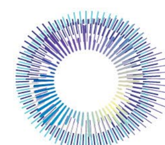
21.18 The below table[4] gives a snapshot of the sizeable task of making consequential amendments. It shows how many pieces of legislation and subordinate legislation those terms appear in. It may be that such terms appear more than once in the legislation.

Keyword	In force Acts	In force subordinate legislation
Justices Act 1886	207	8
Magistrates Court	154	29
Magistrates Courts	58	16
Magistrate	189	19
Complaint	237	34
Complainant	123	9
Summons	71	10
Clerk of court	3	0

[2] As at April 2023, there are a total of 565 primary Acts in force in Queensland.

[3] The Administrative Arrangements Orders set out the principal Ministerial responsibilities of Ministers and the Acts they administer, as well as the responsible departments, agencies and officer holders: *Administrative Arrangements Order (No. 1) 2022* (Qld) s 2, sch.

[4] Current as of 26 April 2023. The number of in force Acts does not include the original occurrence of the keyword in the Justices Act.



Clerk of the court	81	6
Examination of witnesses	64	3
Simple offence	18	1
Warrant in the first instance	3	0
Warrant of execution	4	1
Breach of duty	23	3
Total Acts in force	**565**	**433**

21.19 In many cases, making these consequential amendments is not just a simple task of finding and replacing outdated terms. The terms must be reviewed in the context of each provision, and carefully considered to ensure the consequential amendment is consistent with the original intent of the existing legislation. Importantly, any changes must not cause adverse consequences by altering the meaning and interpretation of a provision. For example, the term 'complainant' is in 123 pieces of legislation, and every occurrence must be reviewed to ensure only references to complainants (persons issuing complaints to bring people to court) under the Justices Act are amended.

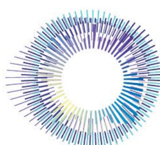
Separate Consequential Amendments Bill

21.20 The Consequential Amendments Bill will operate to give further meaning to the changes in the Criminal Procedure Bill. It will play an important overall role in clearly showing how other Acts are affected by the Criminal Procedure Bill.

21.21 Given the scale of the consequential amendments required to enable the new criminal procedure reforms, it is recommended that two Bills – the new Criminal Procedure Bill and the Consequential Amendments Bill – be prepared in conjunction with one another to fully achieve this reform.

21.22 Given its complexity, size and important overall role, it is important that timely consultation occur on the Consequential Amendments Bill. Where possible and suitable, consultation on both Bills should occur at the same time.

21.23 The two Bills are linked together and should commence on the same date. The scope and complexity of this parallel consequential work should not be underestimated. Conceptual thinking and significant skill, perseverance and detection work are required from many parties for a successful outcome. This will also involve collaboration with drafting professionals and considerable consultation with stakeholders across government.



Drafting instructions for the Consequential Amendments Bill

21.24 Unlike the position with the new Criminal Procedure Bill, this Report does not include separate drafting instructions for the Consequential Amendments Bill.

21.25 This is mainly for practical reasons: the Review's attention has been focused on developing instructions for the new comprehensive criminal procedure laws; the extraordinary volume of consequential amendments needing to be detailed; and that any final version of such drafting instructions can only be created with certainty once the proposed main reforms are accepted or otherwise by decision makers.

21.26 However, I recommend the drafting instructions for the Consequential Amendments Bill should be formed around achieving several key objectives, namely to:

- repeal the Justices Act and make amendments to the Queensland statute book consequential to its repeal, for example removing obsolete references.
- amend the Magistrates Courts Act to re-locate and update the various provisions that deal with the criminal jurisdiction of the Magistrates Courts and court establishment or constitution consequential to the repeal of the Justices Act, including any transitional provisions; and
- make consequential amendments across the Queensland statute book to the various affected Acts as a consequence of the new Criminal Procedure Bill, for example amendments updating references to the new legislation or changes in terminology as a result of the new Criminal Procedure Bill. Any such instructions should detail where more substantive changes are required, that are beyond replacement of terms.

21.27 Also, if accepted, consequential amendments of significance are required to the Magistrates Courts Act to achieve a single court structure, and any change of court name. This includes consideration of related savings and transitional provisions. Changes to the Magistrates Act are needed to change the use of the title of magistrate.

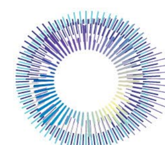
Cognate Bills

21.28 It is my recommendation these separate Bills should be treated as cognate Bills[5] for the purposes of parliamentary consideration. They are uniquely interlinked and need to be prepared, introduced and passed together to provide maximum relevance and meaning to each other.

Human rights considerations

21.29 It is not anticipated that the Consequential Amendments Bill will limit any human rights under the *Human Rights Act 2019* in and of itself. By its nature and content, the

[5] Two or more related Bills or Bills on related topics can be dealt with together as cognate Bills: Queensland Parliament, *Queensland Parliamentary Procedures Handbook* (August 2020) [7.19].



Consequential Amendments Bill is predominantly of an administrative function. This bill will ensure that interconnected legislation is appropriately updated for accuracy and relevance. These changes will ensure that Queensland's legislation operates as cohesively as possible.

21.30 The Consequential Amendments Bill will operate in conjunction with the new Criminal Procedure Bill, which is expected overall to promote human rights in criminal proceedings, particularly the right to a fair trial,[6] by bolstering procedural laws that support a contemporary and responsive justice system. More detailed human rights information relating to each proposed change has been considered as part of each respective chapter.

Recommendations

R21.1 A separate Consequential Amendments Bill should be prepared in conjunction with the new Criminal Procedure Bill. The Consequential Amendments Bill repeals the Justices Act 1886 and includes amendments to various Queensland Acts to facilitate the new Criminal Procedure Bill.

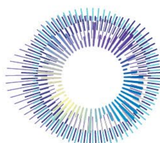
R21.2 The provisions in the Justices Act relating to the Magistrates Courts' jurisdiction, establishment, constitution, court officers, administration and other related matters should be relocated in the Magistrates Courts Act.

R21.3 The Magistrates Courts Act should be amended to enable any changes necessary for a change in court name and single court structure.

R21.4 The Magistrates Act should be amended to enable any changes to the title 'magistrate'.

R21.5 The Criminal Procedure Bill and Consequential Amendments Bill should be dealt with by the Parliament as cognate Bills.

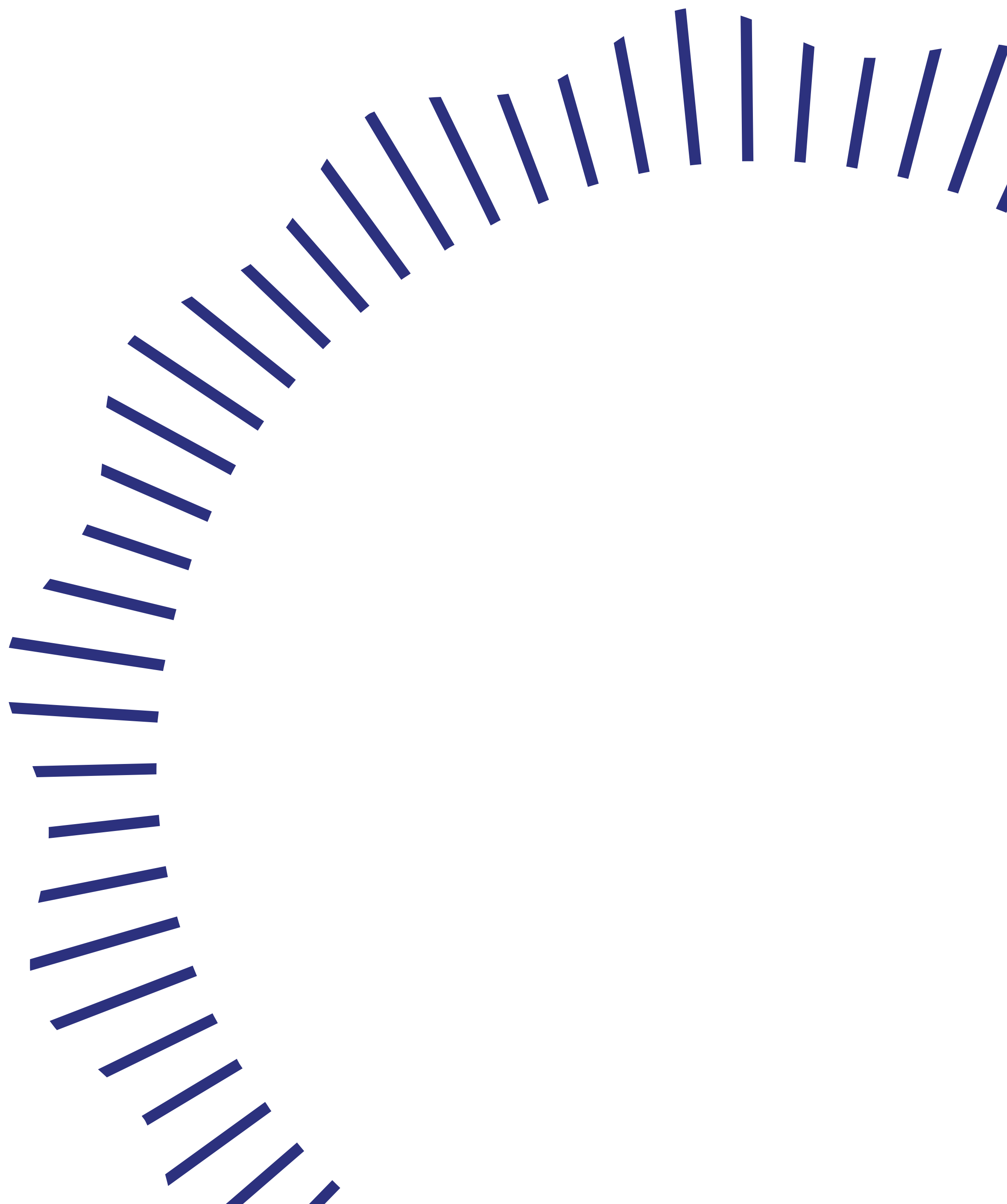
[6] *Human Rights Act 2019* (Qld) s 31.



CRIMINAL PROCEDURE REVIEW

MAGISTRATES COURTS

APPENDICES



APPENDIX A: TERMS OF REFERENCE

Review of Criminal Procedure in Queensland's Magistrates Courts

An independent reviewer, supported by a secretariat provided by the Department of Justice and Attorney-General, will lead a comprehensive review of Queensland Magistrates Courts criminal procedure laws.

The reviewer will be an eminent retired Judge who will oversee the review on behalf of the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence (Attorney-General).

The reviewer will:

1. make recommendations to create a new framework for contemporary and effective criminal procedure laws applying in Queensland's Magistrates Courts; and

2. based on the recommendations, provide expert criminal law guidance, knowledge, and oversight to the secretariat team in developing new criminal procedure legislation for the Magistrates Courts.

Background

Criminal procedure laws are fundamental to the effective operation of the criminal justice system, facilitating the fair and expeditious disposal of cases according to law.

In Queensland, offences are classified as regulatory or criminal offences. Criminal offences are further classified as indictable or simple offences. While all offences start in a Magistrates Court, different criminal procedural rules can apply depending on an offence's classification.

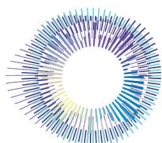
Magistrates Courts are the first tier of the Queensland courts system. A Magistrates Court operates without a jury. A magistrate sits alone and decides questions of both law and fact. This is referred to as dealing with matters 'summarily'; and the court exercising summary jurisdiction.

Magistrates Courts hear and determine most Local, State and Commonwealth simple and regulatory, as well as a wide range of indictable offences. When a Magistrates Court does not have summary jurisdiction to deal with an indictable offence, a committal proceeding occurs to transfer the case to the District or Supreme Court where it will be finalised.

Criminal cases account for most of the work of the Magistrates Courts. According to the Magistrates Courts Annual Report 2019-20, approximately 95 percent of all criminal matters in Queensland are dealt with by the Magistrates Courts. Many defendants appearing in the Magistrates Courts are not legally represented. Most people's experience and understanding of the criminal justice system in Queensland is informed by contact with a Magistrates Court.

The *Justices Act 1886* (Justices Act) is the key criminal procedure legislation for Queensland's Magistrates Courts. The Justices Act sets out the summary criminal procedure laws, that is the court process and procedures necessary for the prosecution of offences and administration of justice, including the way criminal matters are commenced, dealt with and determined.

The Justices Act has long been recognised as requiring modernisation. While the Justices Act has been periodically amended, it has not been comprehensively reviewed. The form of the Justices Act is generally recognised as problematic. It is written in an archaic style making it difficult to understand in parts, and this is not reflective of its central role in the administration of justice in Queensland.



In late 2020, the Queensland Government committed to commencing a comprehensive review of the Justices Act and the *Criminal Practice Rules 1999* (CPR), including consultation with a wide range of key stakeholders, the judiciary and legal practitioners. The commitment included introduction of legislation into the Parliament in the current term of Government.

Scope

The reviewer is asked to make findings and recommendations to the Attorney-General for a new legislative framework for contemporary and effective summary criminal procedure laws in Queensland to replace the Justices Act.

The reviewer should develop the framework for summary criminal procedure laws that follows the chronology of a criminal proceeding in the Magistrates Court, from instituting proceedings to resolution, including an appeals process.

To remove any doubt, summary criminal procedure laws include committal proceedings and mechanisms available to the court for managing how matters are dealt with, for example closing the court, attendance of witnesses, access to the court files. It does not include consideration of sentencing options or procedures.

In making recommendations, the reviewer should consider:

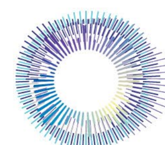
- the role and context of the Magistrates Courts in the criminal justice system in Queensland;
- alternative ways for the Magistrates Courts to deal with matters, and is not restricted to the existing summary criminal procedures contained in the Justices Act;
- necessary or desirable reforms that achieve contemporary and effective summary criminal procedure laws and practices;
- exploring options to improve existing summary criminal procedures;
- consolidating existing summary criminal procedure laws where this is necessary to promote a contemporary and effective legislative framework;
- summary criminal procedural laws that balance the interests of victims and accused persons;
- more efficient and effective methods of the court dealing with criminal offences, including ways to reduce court operational costs and procedural delays;
- adopting summary criminal procedures that enhance consistency across Queensland courts, where appropriate and particularly in relation to the CPR;
- leveraging where relevant, existing criminal procedure reviews and reforms undertaken in Queensland and in other relevant jurisdictions that align with a contemporary and effective framework;
- the need to protect and promote human rights;
- supporting increased use of technology and electronic processes for summary criminal procedure, including electronic lodgement, filing and service of documents;
- the extent to which existing legislation should be repealed or amended to give effect to the recommended new summary criminal procedure laws; and
- any other related matters the reviewer considers relevant.

The review will also consider whether:

- a single Magistrates Court of Queensland should be established; and
- Magistrates and the Magistrates Courts should be retitled as Local Court Judges and Local Court/s respectively, having regard to the costs and benefits of such a change.

The reviewer will then provide expert criminal law guidance, knowledge, and oversight to develop the necessary legislation to give effect to its recommendations.

The review is not an examination of the criminal justice system delivered through the Magistrates Courts in Queensland, including for example the general workings of the Magistrates Courts'



criminal jurisdiction, the institutions and issues associated with service delivery, determining what matters can be finalised within its jurisdiction, reforming the substantive criminal law and systems, drivers of crime, policing, outside court diversionary options and imprisonment.

The scope of the review does not include an evaluation of relevant reforms in the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010.*

Also, while summary criminal procedural laws are supplemented by other legislation, the scope of the review is not concerned with specific criminal offences (including offence classification) and generally does not include examination of the operation of these Acts, including for example: Criminal Code, *Bail Act 1980, Penalties and Sentences Act 1992, Evidence Act 1977, State Penalties Enforcement Act 1999, Police Powers and Responsibilities Act 2000, Victims of Crime Assistance Act 2009,* or the *Youth Justice Act 1992.*

Consultation

The Review will be informed by broad and wide-ranging consultation with:

- the judiciary, including the Chief Magistrate and the Rules Committee;
- Courts Services Queensland staff;
- prosecution agencies, including the Queensland Police Service and Director of Public Prosecutions (Queensland and Commonwealth);
- government departments, agencies, local governments and relevant statutory bodies;
- legal stakeholders and legal practitioners, including community legal centres;
- the public generally; and
- any other group or individual, considered appropriate given the scope of the review.

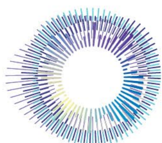
Consultation may be undertaken in any form.

Report

The Reviewer is to provide a summary report reflecting findings and recommendations to the Attorney-General by 30 April 2023.

The summary report is to guide preparation of legislation for contemporary and effective criminal procedure laws in Queensland's Magistrates Courts.

Further work as required is to be undertaken to develop the draft legislation.



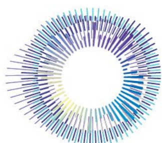
APPENDIX B: CONSULTATION DURING THE REVIEW

List of consultation meetings

The table below lists persons, representatives, and groups the Reviewer and Criminal Procedure Review Team met with during the course of the Review.

Stakeholder name
Aboriginal and Torres Strait Islander Programs and Partnerships staff, Court Services Queensland (CSQ), DJAG
ADA Law Community Legal Service
Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
Amaroo Aboriginal and Torres Strait Islander Elders Justice Group (Cairns)
Australian Securities and Investments Commission
Australian Federal Police
Bar Association of Queensland, including Criminal Committee representatives
Brisbane City Council Legal Services
Correctional Centre prisoners and staff, Queensland Corrective Services
Caxton Legal Centre Inc
Chief Magistrate, Deputy Chief Magistrates, and magistrates at various Queensland locations
Chief Judge of the District Court of Queensland and District Court Judges
Chief Justice of the Supreme Court of Queensland, the Senior Judge Administrator and Supreme Court Judges
Chief Psychiatrist of Queensland, and staff from the Mental Health and Other Drugs Branch, Queensland Health
Community Legal Centres Queensland
Elders and Respected Persons from COOEE Indigenous Family and Community Education Centre: • Bidjara Community and Goorathuntha Traditional Owners Pty Ltd • Southeast Qld First Nations Elders Alliance

• Bayside Community Justice Group Elders • Brisbane Elders
Court Link staff, DJAG
Court Services Queensland (CSQ) including Reform and Support Services and Registry staff, DJAG
Crown Law officers
Cultural Advisory Group, Magistrates Courts
Director of Public Prosecutions (Qld)
Dispute Resolution Branch staff, DJAG
First Nations Justice Officer, DJAG
Individuals with lived experience of Magistrates Courts criminal procedure
Justices of the Peace Branch staff, DJAG
Knowledge Consulting Pty Ltd
LawRight Qld
Legal Aid Queensland Chief Executive Officer and staff
Multicultural Australia Community Leaders
Mount Isa Community Justice Group
Office of the Director of Public Prosecutions (Cth) staff
Office of the Queensland Parliamentary Counsel
Public Guardian and Office of the Public Guardian staff
Queensland Advocacy for Inclusion (QAI)
Queensland Corrective Services staff
Queensland Human Rights Commissioner and Queensland Human Rights Commission staff
Queensland Law Society (including staff and members of various committees)
Queensland Police Service staff, including Police Prosecution Services staff

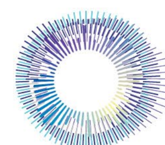


Queensland Sentencing Advisory Council Chair
Rules Committee, Supreme Court of Queensland
Sisters Inside Inc
Streamlining Criminal Justice Committee, Supreme Court of Queensland
The former Chief Justice of the Supreme Court of Queensland
The former Chief Magistrate
The Public Advocate, Queensland
Thursday Island Community Corrections Office
Thursday Island Justice Inc
Townsville Community Justice Group
Victim Assist Queensland
Women's Safety and Justice Taskforce Chair and secretariat staff
Women's Legal Service Queensland staff
Workplace Health and Safety Queensland Prosecutor
Yoombooda Ngujeena Rockhampton Aboriginal and Islander Community Justice Panel

List of submissions

The table below lists submissions on the Consultation Paper. The table lists by department/agency names only.

Stakeholder name
Aboriginal and Torres Strait Islander Legal Service
ADA Law Community Legal Service
Aged and Disability Advocacy Australia
Amazon Web Services
Australia Health Practitioner Regulation Agency
Australian Securities and Investments Commission
Bar Association of Queensland



Brisbane City Council
Brisbane Domestic Violence Service
Caxton Legal Service Inc
Centre Against Sexual Violence Inc
Clark & Associates Mediation Services Pty Ltd
Commonwealth Director of Public Prosecutions
Confidential submissions (7)
Court Services Queensland
Department of Regional Development, Manufacturing and Water
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
Department of Transport and Main Roads
Dispute Resolution Branch
Individual submissions (19)
Institute for Urban Indigenous Health
Justice Reform Initiative
Legal Aid Queensland
Legal Services Commission
LGBTI Legal Service Inc
Magistrates Association of Queensland
Office of the Public Advocate
Office of the Public Guardian
Pride in Law
Private solicitor
Prisoners (22 submissions)
Queensland Advocacy for Inclusion
Queensland Corrective Services
Queensland Human Rights Commission
Queensland Indigenous Family Violence Legal Service
Queensland Law Society

Queensland Police Service
Queensland Sexual Assault Network
Queensland University of Technology academics
Sisters Inside Inc
Strata Community Association (Qld)
TASC National Limited
Townsville Community Law Inc
Truth, Healing and Reconciliation Taskforce
Women's Legal Service Qld
Youth Advocacy Centre Inc

List of Mr Michael Shanahan AM presentations

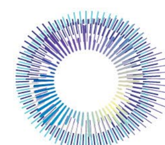
The table below lists forums Mr Michael Shanahan AM attended about the review of the *Justices Act 1886*. The table lists forums only.

List of forums
ABC Morning Radio 2022
Cultural Advisory Group meeting 2022
Magistrates Annual State Conference 2022
Streamlining Criminal Justice Committee meeting 2022 (2)
Streamlining Criminal Justice Committee meeting 2023

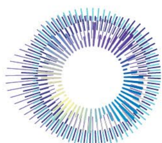
List of Consultation Reference Group (CRG) members

The table below lists persons and organisations represented on the CRG.

List of members
Aboriginal and Torres Strait Islander Legal Services
Bar Association of Queensland
Brisbane City Council Legal Services
Chief Magistrate and representatives
Court Services Queensland
Department of Transport and Main Roads



Indigenous Lawyers Association of Queensland Inc
Legal Aid Queensland
Office of the Director of Public Prosecutions (Qld)
Office of the Director of Public Prosecutions (Cth)
Queensland Corrective Services
Queensland Law Society
Queensland Police Service (including Queensland Police Prosecutions Service)
Victim Assist Queensland
Workplace Health and Safety Prosecutor



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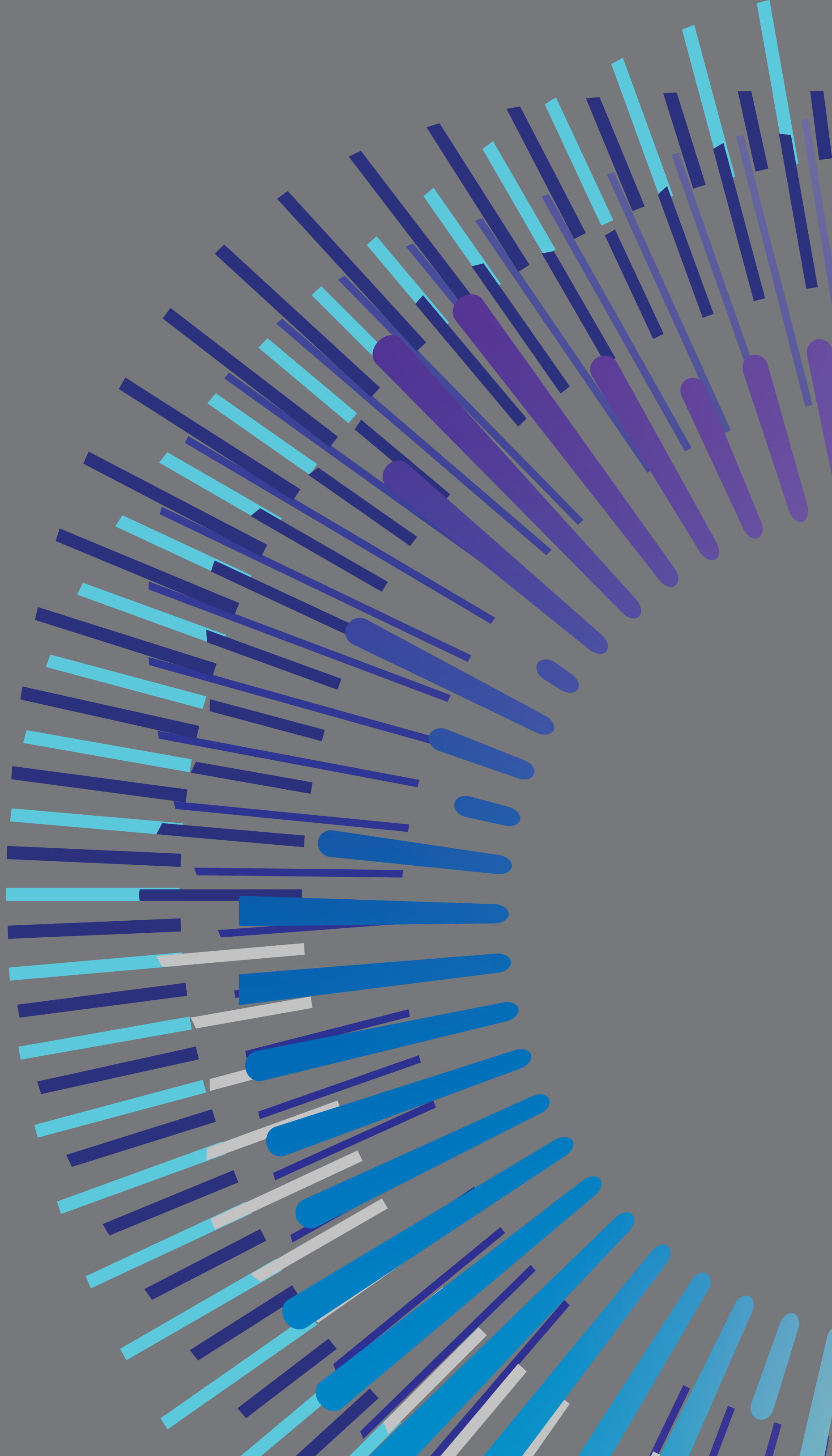

CRIMINAL PROCEDURE REVIEW

MAGISTRATES COURTS

VOLUME ONE: SUMMARY REPORT 2023