

CRIMINAL PROCEDURE REVIEW MAGISTRATES COURTS

Consultation Paper April 2022



Queensland
Government

The Criminal Procedure Review Team respectfully acknowledges the Aboriginal and Torres Strait Islander peoples as the Traditional Owners of Country throughout Queensland. This respect is extended to Elders past and present.

If you wish to make a submission to the Criminal Procedure Review - Magistrates Courts, you may do so in writing by:

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Criminal Procedure Review—Magistrates Courts

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Table of Contents

Table of Contents	3
Part 1: Introduction	5
Background to this review	5
Who is carrying out the review?	5
What is in this paper?	6
What we are doing in this review.....	6
What we are not doing in this review.....	8
Making a submission	9
Privacy statement	10
Part 2: Contemporary and Effective Criminal Procedure in the Magistrates Courts	11
Queensland Courts.....	11
Queensland Magistrates Courts	12
What is criminal procedure?	14
Criminal procedure in the Magistrates Courts	14
The <i>Justices Act 1886</i>	15
Contemporary and effective criminal procedure	17
Human Rights	19
Part 3: Key issues about criminal procedure in the Magistrates Courts	22
Introduction	22
Guiding principles	22
The Magistrates Courts and decision-makers.....	25
A single court?	25
What is in a name?	26
Technology and the courts	28
Types of proceedings heard in the Magistrates Courts	31
Starting proceedings.....	34
How are proceedings started?	34
When have proceedings started?	37
Particulars	37
Private prosecutions.....	39
Disclosure, case conferencing and case management.....	41
Queensland.....	42



Other Australian jurisdictions	43
In-court diversion and resolving proceedings.....	47
Principles.....	49
Types of in-court diversion.....	49
Cautions and no convictions.....	55
Summary hearings and pleas of guilty	56
Proceeding in the defendant’s absence.....	57
Committal proceedings.....	59
Committal proceedings in other Australian jurisdictions.....	62
Victims of crime	63
Costs.....	66
Conclusion	67
Appendix A: Terms of Reference	68



Part 1: Introduction

Background to this review

- 1.1 In Queensland, the court system is made up of the Magistrates Courts, the District Court and the Supreme Court. The Magistrates Courts are the first level of the court system. Proceedings for criminal offences are started in a Magistrates Court, and for many offences they are also finalised in that court.
- 1.2 Each court has criminal procedure laws. These laws are important because they make sure that matters are dealt with fairly and efficiently. Criminal procedure laws for the Magistrates Courts are mostly found in the *Justices Act 1886* (Justices Act). That Act sets out the courts' processes and procedures in relation to criminal matters, including the way matters are started, dealt with and determined (that is, how they are dealt with from beginning to end). The *Criminal Practice Rules 1999* also include some procedural rules about the operation of the Magistrates Courts.
- 1.3 The Justices Act is now 136 years old and, although parts of it have been changed and updated, it has not been comprehensively reviewed. It is written in an outdated style that can make it difficult to understand, and this is not consistent with its important role in the administration of justice in Queensland.
- 1.4 In late 2020, the Queensland Government committed to a comprehensive review of the Justices Act and the *Criminal Practice Rules 1999*, including consultation with a wide range of key stakeholders, the judiciary and legal practitioners. That commitment included introducing new Magistrates Court criminal procedure legislation into Parliament in its current term (October 2024).¹

Who is carrying out the review?

- 1.5 The review will be carried out by retired District Court Judge, Mr Michael Shanahan AM. Mr Shanahan was appointed as a District Court judge in 1999, and from 2011 to 2018 served as the President of the Childrens Court of Queensland. Before he became a judge, Mr Shanahan was an experienced criminal barrister and was the Public Defender with Legal Aid (Qld).
- 1.6 Mr Shanahan will conduct this review independently. He is supported by a small team (secretariat) provided by the Department of Justice and Attorney General.

¹ 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/>>.



What is in this paper?

- 1.7 This paper is divided into three parts.
- 1.8 Part 1 (this part) introduces our review. It explains what we will be doing, the intended outcomes of the review and the way you can contribute to the review.
- 1.9 Part 2 gives an overview of Queensland's courts, especially the Magistrates Courts. It also explains the relevance and application of the Justices Act and discusses the need for contemporary and effective criminal procedure laws in the Magistrates Courts.
- 1.10 Part 3 outlines some of the key issues relevant to creating contemporary and effective criminal procedure laws for the Magistrates Courts. These include, for example, the use of technology in the courts, ways to divert people out of the court system, changes to the way that proceedings are started, progressed and resolved, and the interests of victims.
- 1.11 This paper is not a comprehensive discussion of all issues relevant to criminal procedure laws in Queensland's Magistrates Courts. It raises a selection of matters about which we would like to consult. Additionally, this paper refers to criminal procedure laws in other jurisdictions, but it is not a complete explanation of those laws.

What we are doing in this review

- 1.12 This review's instructions are found in the terms of reference set out in **Appendix A**.
- 1.13 We are asked to make findings and recommendations about creating 'a new legislative framework for contemporary and effective summary criminal procedure laws' applying in Queensland's Magistrates Courts, which will replace the Justices Act. This framework will follow the progress of a criminal proceeding in the Magistrates Court from beginning to end (including an appeals process).
- 1.14 In this context, 'summary criminal procedure laws' include summary hearings and pleas of guilty, committal proceedings and other mechanisms used by the court to manage how matters are dealt with (such as provisions about closing the court, attendance of witnesses and access to court files). It does not include sentencing options (the types of sentences available) or procedures (the way sentencing processes are conducted).
- 1.15 In making recommendations, the matters we need to consider include:²

² Terms of reference, page 2. The list of matters included in this paragraph is not exhaustive.



- necessary or desirable reforms that achieve contemporary and effective summary criminal procedure laws and practices, including the consolidation of existing laws and options for improving existing procedures;
- adopting procedures that will increase consistency across all courts in Queensland, where appropriate but particularly in relation to the *Criminal Practice Rules 1999*;
- more efficient and effective methods for the courts to deal with criminal offences, including ways to reduce operational costs and procedural delays;
- alternative ways for the Magistrates Courts to deal with matters (not restricted to existing procedures in the Justices Act);
- balancing the interests of victims and accused persons, and more generally the need to protect and promote human rights;
- supporting the increased use of technology and electronic processes for summary criminal procedure, including electronic lodgement, filing and service of documents;
- whether other legislation needs to be repealed (revoked) or amended to give effect to other recommendations about the law (sometimes referred to as consequential amendments); and
- other related matters.

1.16 We will also consider whether the new laws should establish a single Magistrates Court of Queensland, and whether Magistrate and Magistrates Courts should be retitled as Local Court Judges and Local Courts, having regard to the costs and benefits of that change.

1.17 We will write a report that reflects these findings and recommendations and provide it to the Attorney-General by 30 April 2023. The report will guide the preparation of new contemporary and effective criminal procedure legislation for Queensland's Magistrates Courts. We will also undertake further required work to develop the draft legislation.





Image 1: Summary of Criminal Procedure Review process

What we are not doing in this review

- 1.18 There are some things that are outside the scope of this review.³
- 1.19 First, this review will not carry out a broader examination of the criminal justice system in Queensland, as it is delivered through the Magistrates Courts. This means that we will not be reviewing the general workings of the Magistrates Courts’ criminal jurisdiction, the offences that can (or cannot) be finalised in the Magistrates Courts or more general reforms to criminal laws and systems. We also will not be examining other institutions or issues associated with service delivery, drivers of crime, policing, diversionary options that are implemented outside of court and imprisonment.
- 1.20 Generally, this is to say that the review is limited to criminal procedure in the Magistrates Courts—how a criminal charge is dealt with in that court from beginning to end. We cannot make recommendations about other issues that do not relate to such criminal procedure. For example, we cannot consider or make 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.

³ Terms of reference, page 3.



1.21 We are also not reviewing the specific court procedures that apply when a child⁴ is charged with an offence. The *Youth Justice Act 1992* sets out rules and procedures that apply for children.

1.22 Second, this review is not reconsidering 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 kept in the new legislation. However, we will consider whether there should be further changes to the processes and procedures associated with those laws that may improve how the provisions operate.

1.23 Finally, other more general matters are outside the scope of this review. They include:

- 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;⁵
- 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, misdemeanours 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*, *State Penalties Enforcement Act 1999*, *Police Powers and Responsibilities Act 2000*, *Victims of Crime Assistance Act 2009*.

1.24 Our recommendations are focussed on developing new, contemporary and effective criminal procedure laws for adults in Queensland's Magistrates Courts.

Making a submission

1.25 Hearing from you is a very important part of the review. Making a submission will assist us in working out what needs to be added, changed, kept or improved in the law.

1.26 We are inviting you to send us a written submission in response to this consultation paper by the closing date of **30 June 2022**.

⁴ In Queensland, a child is an individual who is under the age of 18: *Acts Interpretation Act 1954* (Qld) sch 1 (definition of 'child').

⁵ See generally, *Justices of the Peace and Commissioners for Declaration Act 1991* (Qld).



- 1.27 Anybody can make a submission. To make sure that we develop the best possible recommendations, it is important that our review is informed by broad and wide-ranging consultation with a variety of people and groups. That means we need to hear about criminal procedure in the Magistrates Courts from all different perspectives. It is only by hearing from you that we can better understand issues and identify solutions.
- 1.28 We have included questions about some issues throughout this paper. In your submission, you can choose to answer the questions that are relevant to you and your views. You do not have to answer them all. You can also tell us about any other issues you think are relevant to our review or make any other suggestions specific to the review. Our contact details are available at the beginning of this paper.

Privacy statement

- 1.29 The Department of Justice and Attorney-General (DJAG) is collecting personal information from persons making comments, feedback or submissions to the consultation paper for the purpose of conducting the review of criminal procedure in the Magistrates Courts. This information will assist us by informing the development of related policy and legislative proposals.
- 1.30 Personal information includes your name, contact details, and commentary or opinions. Your personal information may be used and disclosed for the purpose of developing the reviewer's report and may be reproduced in the report. The reviewer's report will be published. Your comments or submission may also be provided to others with an interest in the review. DJAG may also contact you for further information on the issues you raise.
- 1.31 Your personal information will not be used for any other purpose unless otherwise required or authorised under a law. Your personal information will be handled in accordance with the *Information Privacy Act 2009*.
- 1.32 Comments and submissions in relation to this consultation paper will be treated as public documents and may be published on the [review's DJAG website](#) and included in the report to the Attorney-General.
- 1.33 If you would like your submission, or any part of it, to be treated as confidential, **please indicate this clearly**.
- 1.34 If you would like only your name and contact details to be treated as confidential, **please indicate this clearly**.
- 1.35 Please note that submissions may be disclosed if a person applies to see it under the *Right to Information Act 2009*. This means your submission may not remain confidential.



Part 2: Contemporary and Effective Criminal Procedure in the Magistrates Courts

Queensland Courts

- 2.1 Magistrates Courts operate throughout Queensland as part of the criminal justice system. They are the first level of the Queensland Courts system.¹ A Magistrates Court is sometimes referred to as a lower court, while the District and Supreme Courts are called higher courts.
- 2.2 The District Court is the second level of the court system. Matters are heard by judges, and criminal trials usually involve a judge and jury. The District Court hears appeals from some decisions made in the Magistrates Courts. These appeals are decided by a judge only.²
- 2.3 The Supreme Court is the third and highest level of the court system. The Supreme Court also includes the Court of Appeal. Like the District Court, matters are heard by judges and trials normally involve a judge and jury.³
- 2.4 Each court has a particular 'jurisdiction', which is the scope of a court's authority to decide matters. This means a court can only 'deal with' (process and finalise) matters within its jurisdiction.
- 2.5 There are different types of criminal offences: crimes, misdemeanours and simple offences.⁴ The classification of criminal offences by type normally controls which Queensland court has the jurisdiction to deal with a person's charges. An offence will usually have its type clearly stated in the legislation creating the offence.
- 2.6 Crimes and misdemeanours are 'indictable offences' which means that, unless the law says otherwise, they must be prosecuted (brought before the court) on an indictment and in a higher court. An indictment is a written document listing the offences that a person is charged with, which is traditionally presented to a higher court,⁵ mainly by a

¹ See generally, Queensland Courts, *About the Magistrates Court* (Web Page, 30 January 2019) <<https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>>.

² See generally, Queensland Courts, *About the District Court* (Web Page, 19 January 2017) <<https://www.courts.qld.gov.au/courts/district-court/about-the-district-court>>.

³ See generally, Queensland Courts, *About the Supreme Court* (Web Page, 19 January 2017) <<https://www.courts.qld.gov.au/courts/supreme-court/about-the-supreme-court>>.

⁴ Criminal Code (Qld) s 3(1)–(2).

⁵ *Ibid* ss 1 (definition of 'indictment'), 3(3).



Crown prosecutor representing the ‘Crown’.⁶ Generally, crimes and misdemeanours are more serious criminal offences.

2.7 The Criminal Code provides for many crimes and misdemeanours to be fully prosecuted in a Magistrates Court.⁷

2.8 Other criminal offences are known as ‘simple offences’ and cannot be prosecuted on an indictment. These are prosecuted in a Magistrates Court, mainly by Queensland Police Prosecutions.⁸

2.9 There are also a small number of offences called ‘regulatory offences’. These are an alternative to a charge of a criminal offence and are also prosecuted in a Magistrates Court.⁹

2.10 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.¹⁰

Queensland Magistrates Courts

2.11 Magistrates Courts operate at around 130 locations throughout Queensland.¹¹

2.12 The Magistrates Courts deal with approximately 94 percent of all criminal matters in Queensland. Of all Queensland courts, ‘it is the Magistrates Courts that most people will have contact with’. In 2020–21, there were 167 739 adult defendants dealt with on 368 407 charges (a decrease from last year). Also in that period, matters for 189 526 adult defendants were finalised.¹²

2.13 Criminal proceedings are started in a Magistrates Court. Generally, the Magistrates Courts hear and determine proceedings about:

- breaches of duty;
- regulatory offences;
- simple offences;

⁶ Ibid s 560; *Director of Public Prosecutions Act 1984* (Qld).

⁷ Criminal Code (Qld) ch 58A.

⁸ Ibid s 3(2), (4), (5).

⁹ Ibid s 3(1), (4); *Regulatory Offences Act 1985* (Qld).

¹⁰ Criminal Code (Qld) s 651; see also ss 652–53.

¹¹ Queensland Courts, *About the Magistrates Court* (Web Page, 30 January 2019) <<https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>>.

¹² Queensland Courts, *Magistrates Courts of Queensland: Annual Report 2020–2021* (October 2021) 22–3, Appendix 1 (*Magistrates Courts Annual Report 2020–21*). In addition, 23 602 adult defendants were dealt with for criminal breaches on 30 927 charges: Appendix 1A.



- indictable offences that can be dealt with by a Magistrates Court.

2.14 For these proceedings, a magistrate sits alone (without a jury) to hear a charge, decide (determine) if an accused person is not guilty or guilty and impose a sentence.¹³ A person can also choose to plead guilty, meaning there is no need for a hearing.

2.15 The process of being dealt with by a magistrate alone is referred to as dealing with matters 'summarily', as a 'summary proceeding' or as the court exercising 'summary jurisdiction'.¹⁴ Consequently, the types of offences dealt with in a Magistrates Court are often referred to together as 'summary offences'.

2.16 We will explain more about these different types of proceedings in part 3 of this paper.

2.17 Queensland Magistrates Courts also deal with some Commonwealth criminal offences, traffic offences and 'quasi-criminal offences'. It is reported by the Magistrates Courts that:¹⁵

The term Quasi-Criminal Offences describes those regulatory offences prosecuted by Public Officers. Included are breaches of areas of law controlled by government agencies at the local, state and federal levels (eg, building codes, environmental protection laws and taxation).

2.18 It has been reported that '[t]he Magistrates Court resolves more than 90% of all criminal matters initiated, primarily through pleas of guilty but also through summary trials'. It was also reported that most matters are 'minor' or 'common and uncomplicated', and that most of those 'will be finalised within the first or second court appearance'.¹⁶

2.19 For adults, the most common types of offences sentenced in the Magistrates Courts are generally traffic and vehicle offences (such as offences about licensing, registration and the use or operation of vehicles) and justice and government offences (such as breaching a bail undertaking or disobeying a direction by police).¹⁷

2.20 Most criminal matters determined in the Magistrates Courts do not result in a sentence of imprisonment. The most common penalty given as a sentence is a monetary order, such as a fine.¹⁸

2.21 Some more serious indictable offences cannot be dealt with by the Magistrates Courts. Where that is the case, a Magistrates Court will follow procedures for the offence to be 'committed' to the District Court or Supreme Court. This means that the charges are

¹³ In relation to sentencing, see *Penalties and Sentences Act 1992* (Qld).

¹⁴ As to this terminology, see also *Acts Interpretation Act 1954* (Qld) s 44.

¹⁵ *Magistrates Courts Annual Report 2020–21* (n 12) 22.

¹⁶ M Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 65.

¹⁷ Queensland Sentencing Advisory Council, *Sentencing trends for 2005-06 to 2019-20* (7 January 2021) <<https://www.sentencingcouncil.qld.gov.au/research/sentencing-trends/200506-to-201920#court-level>>.

¹⁸ *Ibid.*



transferred to the higher court, where they will be dealt with on indictment. We will talk more about this in part 3 of the paper.

What is criminal procedure?

2.22 When we refer to ‘criminal procedure’, we mean the way that criminal charges are dealt with by a court from beginning to end. It is the ‘sequence of steps’¹⁹ in the court process. This includes how and when a criminal charge is started, progressed and finalised.

2.23 It has been explained that:²⁰

The rules governing criminal law procedure are found in various statutes, court rules, practice directions as well as internal agency policy and procedure documents. Cultural factors and traditions also impact on procedure and what happens in practice.

2.24 For this review, criminal procedure does not include some of the decisions made while a criminal charge is dealt with, such as what offences a person should be charged with, whether a person should plead guilty and what penalty a person should be given. However, some of those decisions can have an impact on criminal procedure. For example, the type of offence that a person is charged with will impact on how their matter progresses and in which court it is resolved.

2.25 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. It bolsters confidence in the criminal justice system and underpins its key objectives of fairness, accessibility and timeliness.

Criminal procedure in the Magistrates Courts

2.26 The *Justices Act 1886* (Justices Act) sets out the main criminal procedure laws for Queensland’s Magistrates Courts. The *Criminal Practice Rules 1999* set out rules for courts about a range of procedural matters such as forms, evidence and trial proceedings. Some of these rules apply to criminal proceedings in the Magistrates Courts.²¹

¹⁹ Moynihan (n 16) 64.

²⁰ *Ibid* 58.

²¹ *Criminal Practice Rules 1999* (Qld) r 5.



2.27 The progression of a criminal matter for an adult through a Magistrates Court is set out in a general way in the following diagram.

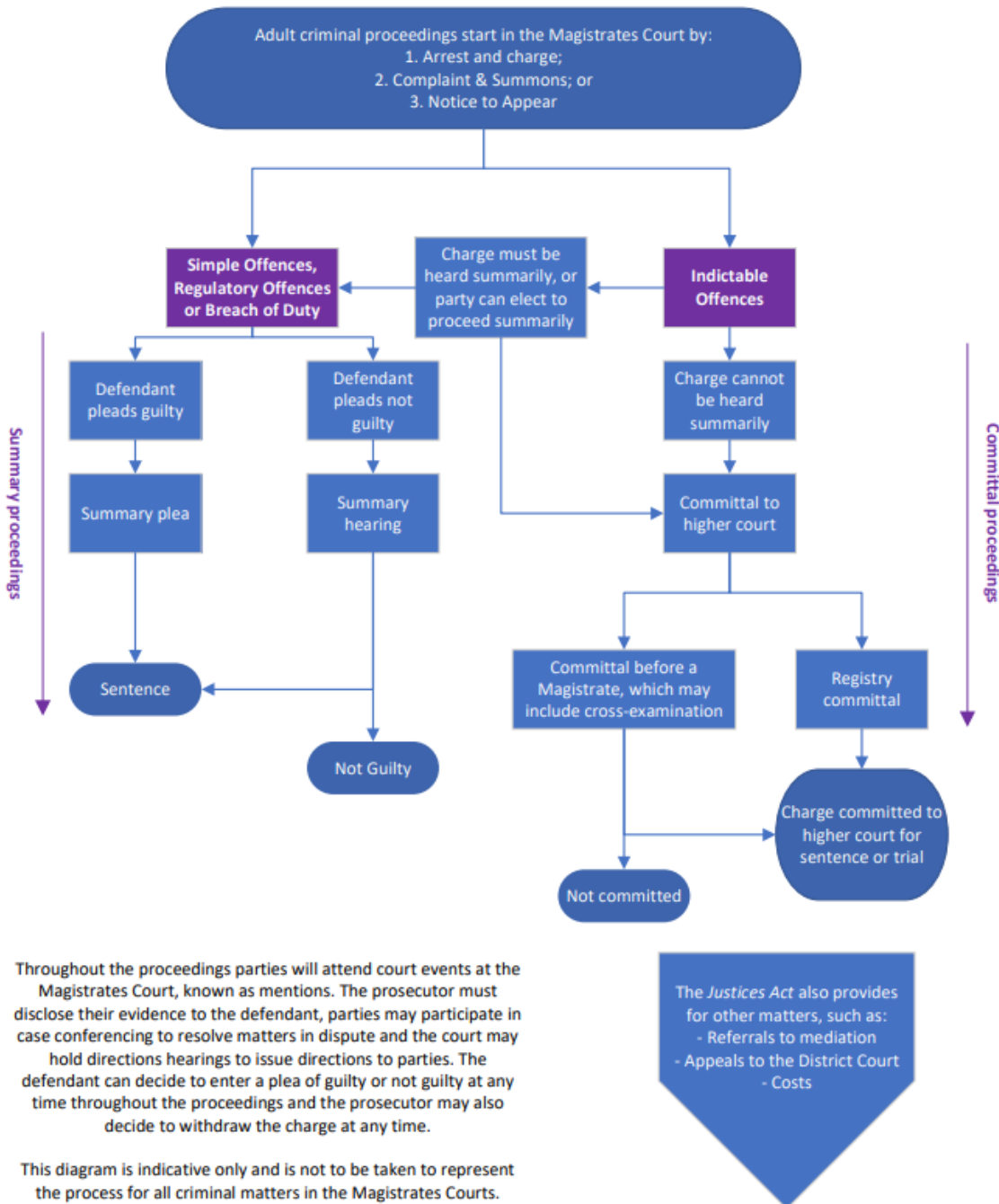


Image 2: The progression of an adult criminal matter through the Magistrates Courts.

The Justices Act 1886

2.28 The Justices Act was written in 1886 and started on 1 January 1887. It is 135 years old—older than ballpoint pens, zippers, electric ovens and vacuum cleaners. It was



written before the first public radio broadcast, before the Wright brothers took the first aeroplane flight, and before Australia became a nation.²²

2.29 Due to its age, the Justices Act is difficult to understand. Many sections of the Justices Act are still the same as when they were originally written. Other sections have been changed and new sections have been added, but the Act has never been comprehensively reviewed or updated. This adds to difficulties in understanding the Act.

2.30 Also due to its age, the Justices Act still includes ideas that are not as relevant today. For example, many sections still refer to court decisions being made by justices of the peace, when in practice this work is done by magistrates.²³

2.31 In 2010, retired Supreme Court Judge Martin Moynihan AO QC reported:²⁴

Criminal justice legislation drafted in the 1800's necessarily reflected a far less complex society and had the need for far fewer substantive offences than is now the case. Colonial society had very different needs, expectations, values and social requirements. Colonial and post-colonial society was pretty simple and fairly homogenous.

...

In contrast, modern society is increasingly complex, technologically advanced and diverse.

...

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.

2.32 Appropriately, the current expectations on courts and the broader justice system are vastly different to colonial era Queensland. Mr Moynihan commented that there is an 'ongoing task of aligning criminal justice processes with social needs, expectations and values as well as developments and opportunities'.²⁵

2.33 Our task is to create a new legislative framework for contemporary and effective criminal procedure laws applying in Queensland's Magistrates Courts. Any new legislation created will replace the Justices Act. Our task also includes reviewing the parts of the *Criminal Practice Rules 1999* that relate to the Magistrates Courts.

²² Australia became a nation on 1 January 1901.

²³ See *Justices Act 1886* (Qld) s 30(2). In relation to magistrates' appointment and qualifications, see the *Magistrates Act 1991* (Qld).

²⁴ Moynihan (n 16) 43–5.

²⁵ *Ibid* 46.



Contemporary and effective criminal procedure

2.34 To develop contemporary and effective criminal procedure in the Magistrates Courts, we need to adopt a contemporary view of the criminal justice system within which those courts operate. This system traditionally includes law enforcement, courts and corrections agencies. A modern and contemporary view of this system also includes legislation, prosecution and defence lawyers, advocacy and oversight bodies, agencies involved in prevention and intervention, and the community (including community members who engage directly with the system, such as offenders, victims of crime and witnesses).²⁶

2.35 In his 2010 report, Mr Moynihan reported on ‘the working of Queensland courts in the civil and criminal jurisdictions with a view to making more effective use of public resources’. He concluded that ‘an effective criminal justice system should provide equal justice to all according to law by disposing of cases: impartially, fairly, expeditiously, with the minimum unavoidable delay, and with the minimum but necessary use of public resources’. In addition, the public should be able to ‘confidently expect a fair process and a just outcome’ regardless of how and where a matter is resolved, and opportunities to resolve matters early should be encouraged.²⁷

2.36 Scotland conducted a review of ‘summary justice’ in 2002, which considered summary criminal procedures. That review began with the understanding that the ‘central tenants’ to any justice system are that it should be:²⁸

- fair to victims and accused persons;
- effective in punishing, deterring and helping to rehabilitate offenders; and
- efficient in its use of time and resources.

2.37 Throughout the review, fairness, effectiveness and efficiency remained key principles or objectives of Scotland’s summary criminal justice system. However, the review also identified other priorities and principles particularly relevant to summary justice, namely:²⁹

- having procedures and documents that are simple and easy to understand;

²⁶ See generally Moynihan (n 16) 46–58; Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) xii; Department of Justice and Attorney-General (Queensland), *Strategic Plan 2018–22* (July 2021).

²⁷ Moynihan (n 16) 17–18, 25.

²⁸ The Summary Justice Review Committee (Scotland), *Consultation on First Order Issues* (March 2002) 9.

²⁹ The Summary Justice Review Committee (Scotland), *Report to Ministers* (January 2004) 6–10.



- improving the speed at which the system operates by minimising formalities (but recognising that some formalities are required for fairness);
- achieving consistency in decision making, even where courts are in different locations and have different local considerations;
- making sure that it is clear who is accountable or responsible for different parts of the system and how steps can be taken to make improvements; and
- operating in a way that focuses on the users of the system, including engagement with local communities and the needs of groups such as victims and witnesses.

2.38 In addition to operating in a way that accommodates the needs of people using the criminal justice system and the broader community, contemporary and effective criminal procedure must recognise that some of those people—such as women, people with disability, people from culturally and linguistically diverse backgrounds, and First Nations people—have particular needs and vulnerabilities.

2.39 For example, the Women’s Safety and Justice Taskforce has recently recommended a ‘state-wide plan to improve safety for victims of domestic and family violence including coercive control when attending courts’. This includes:³⁰

- upgrading courts to improve safety by providing safe waiting rooms, protected witness rooms and safe entry and exit routes;
- reducing in the number of court appearances required, and engaging security staff in courts when victims are required to attend;
- permitting victims to appear and participate in court remotely by telephone or video, and providing for electronic lodgement of court documents;
- enhancing court services and safety planning, especially for people with disability and culturally and linguistically diverse people; and
- ‘a focus on improving victim safety and participation and fairness for Aboriginal and Torres Strait Islander peoples, particularly in relation to domestic and family violence related matters as a key objective of work already underway to review the *Justices Act 1886* to establish contemporary, efficient and effective criminal justice procedure for the future’.

³⁰ Women’s Safety and Justice Taskforce, *Hear her voice: Addressing coercive control and domestic and family violence in Queensland* (Report No 1, December 2021) vol 3, 642–51, Rec 49.



2.40 More specifically, the Taskforce said that the review of the Justices Act and the *Criminal Practice Rules 1999*:³¹

provides an important opportunity to improve the criminal justice process to better meet the safety and protection needs of victims, including victims of domestic and family violence. The review should also include, as a primary objective, improving cultural capability within criminal justice procedures to better enable participation and fairness for Aboriginal and Torres Strait Islander peoples in the proceedings that affect them.

2.41 The Australian Law Reform Commission noted in its report, *Pathways to Justice – An inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, that ‘[c]ommunication 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.’³² Further, that ‘a culturally appropriate court process was “critical when providing a justice response for Aboriginal and Torres Strait Islander people”’.³³

2.42 As we undertake this review, one of our aims is to develop contemporary and effective criminal procedure that takes into account the needs and preferences of people who use the Magistrates Courts, including groups of people that have specific needs or vulnerabilities. We welcome submissions about ways that this could be achieved.

CONSULTATION QUESTIONS

QUESTION 1: Generally, how are criminal procedures in the Magistrates Courts working? What could be changed or improved?

QUESTION 2: What does ‘contemporary and effective’ mean to you? How should those concepts be applied to criminal procedure laws in the Magistrates Courts?

QUESTION 3: How could criminal procedures in the Magistrates Courts better accommodate the needs of different people? What is needed to allow for better understanding, connection and participation? This might include (but is not limited to) First Nations people, people from culturally and linguistically diverse backgrounds, women, people with disability, victims of crime and the general community.

Human Rights

2.43 The *Human Rights Act 2019* (HRA) protects and promotes fundamental human rights held by every person in Queensland.

³¹ Ibid vol 3, 651.

³² 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.

³³ Ibid 333, quoting Cultural and Indigenous Research Centre Australia, *Evaluation of Indigenous Justice Programs Project A: Aboriginal Sentencing Courts and Conferences, Attorney General’s Department Final Report* (2013) 87.



2.44 All new legislation drafted in Queensland must be ‘compatible’ with human rights. Laws must be interpreted in ways that are compatible with human rights. Public entities, such as government departments and the Queensland Police Service, must act and make decisions in ways that are compatible with human rights, and must consider human rights when making decisions. Courts are required to consider the HRA in certain circumstances.³⁴

2.45 Human rights are an essential part of the criminal justice system. We will consider human rights impacts throughout this review. Some of the relevant human rights set out in the HRA include:³⁵

- Cultural rights for Aboriginal and Torres Strait Islander people: Aboriginal and Torres Strait Islander people 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.
- Right to liberty and security of person: 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: 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.
- Rights in criminal proceedings: A person charged with an offence has the right to be presumed innocent until proven guilty. They are entitled to ‘minimum guarantees’, including:
 - to know what they are charged with;
 - to be tried without unreasonable delay;
 - to defend themselves against the charge, including to examine witnesses in the case;

³⁴ *Human Rights Act 2019* (Qld) pt 3; Queensland Human Rights Commission, *Balancing life and liberty: The second annual report on the operation of Queensland’s Human Rights Act 2019* (2021).

³⁵ Eg, *Human Rights Act 2019* (Qld) ss 28–9, 31–2, 34.



- to have legal assistance, including legal aid if they are eligible, and to have an interpreter or other person to help with communication, if required;
 - not to be required to give evidence against themselves or to confess guilt.
- Right not to be tried or punished more than once: 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.

2.46 The HRA says that a human right ‘may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.³⁶ What this means is that the human rights in the HRA ‘are not absolute and may be balanced against the rights of others and public policy issues of significant importance’.³⁷ There is a list of factors that can be used to decide whether to limit a human right, including the purpose of the limitation, its importance and whether there is another less restrictive way of achieving that purpose.³⁸

2.47 Breaching a human right does not give a person a basis to start court proceedings. However, if a court application is made based on some other law, then parties can refer to the HRA and the court must make decisions that are compatible with human rights.³⁹

2.48 The human rights framework in Queensland is a critical factor in any policy or procedural changes. Part of our decision-making process will involve considering compatibility with human rights, and we encourage anyone making submissions to do the same.

³⁶ Ibid s 13(1).

³⁷ Explanatory Note, Human Rights Bill 2018 (Qld) 16.

³⁸ *Human Rights Act 2019* (Qld) s 13(2).

³⁹ Ibid pt 3 div 3; Queensland Human Rights Commission, *Balancing life and liberty: The second annual report on the operation of Queensland’s Human Rights Act 2019* (2021) 58–71.



Part 3: Key issues about criminal procedure in the Magistrates Courts

Introduction

- 3.1 This part of the paper discusses some of the key issues that arise in relation to criminal procedure in Queensland's Magistrates Courts.
- 3.2 This is not intended to be a complete discussion of criminal procedure in the Magistrates Courts or all the issues relevant to the current law. It is a selection of early issues we have identified that we would like to consult about. For each issue there are some questions to guide submissions, but you are not restricted to answering those questions in your submission.
- 3.3 This part also includes some information about relevant criminal procedure laws in other Australian jurisdictions. However, it is not a complete explanation of the law in other jurisdictions.

Guiding principles

- 3.4 The *Justices Act 1886* (Justices Act) does not include any guiding principles, purposes or objects of the Act. These are sometimes included in other Acts to explain the principles underpinning the law, or what an Act intends to achieve. They can sometimes be used to help with decision making under an Act.
- 3.5 In Queensland, some other Acts include principles. For example, the first principle for administration of the *Domestic and Family Violence Protection Act 2012* is 'the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount'. There are also further principles to be applied, including:¹
 - people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives should be minimised. Their views and wishes should be sought before making any decisions that affect them;
 - perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;

¹ *Domestic and Family Violence Protection Act 2012* (Qld) s 4.



- a civil response under this Act should operate in conjunction with, not instead of, the criminal law.

3.6 Similar guidance exists in the *Youth Justice Act 1992*, which includes the following principles:²

- The youth justice system should ‘uphold the rights of children, keep them safe and promote their physical and mental wellbeing’.
- Children dealt with under this Act should be treated with dignity and respect and be encouraged to treat others with dignity and respect. They should have procedures explained to them in a way that the child understands, be given the opportunity to participate in and understand any criminal proceedings and have access to legal and other support services. Proceedings should be conducted in a ‘fair, just and timely way’ and finalised as soon as practicable.
- Children who commit offences should be diverted away from the courts’ criminal justice system, unless the nature of the offence and the child’s criminal history mean that court proceedings should be started. They should be held accountable and encouraged to accept responsibility for their behaviour, and dealt with in a way that gives opportunities to develop in ‘responsible, beneficial and socially acceptable ways’.
- Victims should be given the opportunity to participate in the process.
- A parent of a child should be encouraged to fulfil parental responsibility for the child and supported in their efforts to fulfil this responsibility.
- If practicable, Aboriginal and Torres Strait Islander children should be dealt with in a way that involves the child’s community.

3.7 Other legislation contains statements about the management of a specific jurisdiction, confirming matters are to be dealt with fairly, transparently and as soon as possible. For example:³

- the objects of the *Queensland Civil and Administrative Tribunal Act 2009* include ‘to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick’.
- the *Uniform Civil Procedure Rules 1999* include a ‘philosophy’. This states that the purpose of the rules is to ‘facilitate the just and expeditious resolution’ of issues ‘at a minimum of expense’. The rules should be applied by courts ‘with

² *Youth Justice Act 1992* (Qld) s 3, sch 1.

³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3; *Uniform Civil Procedures Rules 1999* (Qld) r 5.



the objective of avoiding undue delay, expense and technicality and facilitating [that] purpose'. Parties to proceedings 'impliedly undertake' to proceed in an expeditious way.

3.8 We are considering whether the new criminal procedure legislation should include similar kinds of guiding principles. As we explained in part two of this paper, we want to develop contemporary and effective criminal procedure laws for the Magistrates Courts. Some relevant guiding principles might be:⁴

- procedures should be fair for victims and defendants;
- matters should be dealt with efficiently, in relation to both time and resources;
- procedures and documents should be simple and easy to understand;
- formalities should be minimised to improve the speed at which the system operates (but it should be recognised that some formalities are required for fairness);
- the system should operate in a way that focuses on its users, including by engaging with local communities and groups such as victims and witnesses;
- court procedures should be culturally appropriate for Aboriginal and Torres Strait Islander people wherever possible and acknowledge the diversity of cultural practices across Queensland;
- people should not be disadvantaged in proceedings because they are from a culturally or linguistically diverse background and do not speak English as a first language;
- criminal procedures should be adaptive to modern and changing technology.

3.9 Whether there should be any principles in the new legislation about diverting people out of the Magistrates Courts is considered separately, as part of the discussion about in-court diversion.

CONSULTATION QUESTION

QUESTION 4: Should the new legislation include guiding principles? If so, what should the main themes of those principles be?

⁴ For further discussion, see eg, M Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 17–18, 25; The Summary Justice Review Committee (Scotland), *Report to Ministers* (January 2004) 6-10.



The Magistrates Courts and decision-makers

A single court?

- 3.10 In Queensland, there are multiple Magistrates Courts. This is a continuation of earlier court structures, which established multiple lower courts to hear less serious matters. 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.⁵
- 3.11 Having multiple Magistrates Courts can sometimes cause difficulties. For example, there are complicated laws about where proceedings for some offences can be started and heard. If those laws are not followed, it can result in the proceedings being unable to continue.⁶
- 3.12 In contrast, Queensland has a single District Court⁷ and a single Supreme Court. Other Australian states and territories have established a single Magistrates Court or Local Court.⁸
- 3.13 There may be benefits in changing the law to have a single Magistrates Court of Queensland. This approach could improve the efficiency of the Magistrates Court and registry administration. It could allow for more flexibility about where proceedings are started and heard, as well as how matters can be transferred between court locations. There would not need to be any changes to the places where a Magistrates Court can sit across Queensland.⁹

CONSULTATION QUESTION

QUESTION 5: Should the law be changed to create a single Magistrates Court of Queensland?

⁵ *Justices Act 1886* (Qld) ss 22, 22B; *Justices Regulation 2014* (Qld) ss 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.

⁶ *Justices Act 1886* (Qld) ss 23C, 139.

⁷ 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).

⁸ Eg, *Local Court Act 2015* (NT) s 4; *Magistrates Court Act 1989* (Vic) s 4.

⁹ See generally: 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) 17, 20.



What is in a name?

- 3.14 In most States and Territories, including Queensland, the first level of the court system is called the Magistrates Court. In New South Wales and the Northern Territory, it is called the Local Court.¹⁰
- 3.15 Except in the Northern Territory, these courts are headed by a Magistrate. In the Northern Territory, the Local Court is headed by a Local Court Judge.¹¹
- 3.16 Name changes for courts do occur. In 1964 in Queensland, the Court of Petty Sessions (criminal jurisdiction) merged with the Magistrates Court (civil jurisdiction) to become the Magistrates Courts. In 2005, the Magistrates Court of Western Australian was created, taking over from the merger of its Court of Petty Sessions, Small Claims Tribunal and Local Court. In 2012, the name of the Federal Magistrates Court of Australia changed to the Federal Circuit Court of Australia and its judicial officers changed from being Federal Magistrates to Judges. In 2021, the Federal Circuit Court merged with the Family Court of Australia and is now the Federal Circuit and Family Court of Australia.¹²
- 3.17 In Queensland, legislation sets out the way judicial wages are calculated.¹³ There is a difference in the salary and allowances paid to judges and magistrates. According to the Magistrates Courts Annual Report in 2020–21, there were 98 magistrate positions in Queensland. There are also 40 appointed acting magistrates who relieve for magistrates on leave.¹⁴
- 3.18 We are not looking at changing the wages paid to magistrates. We are looking into the costs and benefits of changing the name and we will consider this more during the review. We want to know your initial ideas about the changes.
- 3.19 Arguments for renaming Queensland Magistrates Courts as ‘Local Courts’ and renaming Magistrates as ‘Local Court Judges’ include:¹⁵
- The term ‘Magistrate’ is outdated and inconsistent with the public’s understanding of who makes decisions in the court. People may not always

¹⁰ *Local Court Act 2007* (NSW); *Local Court Act 2015* (NT). The Northern Territory has a two-tier court system consisting of the Local Court and the Supreme Court.

¹¹ *Local Court Act 2015* (NT) pt 5.

¹² *Magistrates Court Act 2004* (WA); *Federal Circuit and Family Court of Australia Act 2021* (Cth).

¹³ See generally, *Judicial Remuneration Act 2007* (Qld); Queensland Courts, *Judicial Remuneration* (Web Page, 20 March 2020) <<https://www.courts.qld.gov.au/about/publications/judicial-salaries>>.

¹⁴ Queensland Courts, *Magistrates Courts of Queensland: Annual Report 2020-2021* (October 2021) 16 (*Magistrates Courts Annual Report 2020–21*). For the appointment of acting magistrates, see *Magistrates Act 1991* (Qld) s 6.

¹⁵ See generally, on this topic: J Lowndes, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part I’ (2000) 74 (August) *The Australian Law Journal* 509; J Lowndes, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part II’ (2000) 74 (September) *The Australian Law Journal* 592.



know what it means. The community knows the term judge and expects a judge to deal with their court matters. This strengthens the community's knowledge of the law.

- The terms 'Local Court' and 'Local Court Judge' are easier to understand and using them may avoid misunderstandings about the role of the courts' decision-makers. This gives the public more confidence in the overall justice system. These terms are also consistent with the fact that these courts sit in local communities. The term 'Your Honour' is used to address judicial officers in all courts. On the other hand, it can be argued that the term 'magistrate' is useful to distinguish between Magistrates, District Court Judges and Supreme Court Justices. Changing the title might cause confusion, especially as judges are associated with juries and magistrates (and Local Court judges will) operate without a jury.
- Magistrates perform important judicial work – like judges. Magistrates Courts have a significant criminal (and civil) jurisdiction and Magistrates make judgements of fact and law that determine most criminal matters, including a wide range of serious offences. In many ways (though not all), the role of magistrates is the same as the role of judges in the Supreme and District Courts. Magistrates and Judges are subject to the same standards of judicial conduct, apply the same law, and contribute to the administration of justice.
- Magistrates Courts are a clear part of the court structure and hierarchy. Historically, they operated differently to higher courts. Initially, decision-makers included justices of the peace and people appointed from the public service (clerks of the court) rather than people with a professional legal background. This is no longer the case.¹⁶ Like other courts, Magistrates Courts operate independently and impartially, and Magistrates are recognised as permanent and independent judicial officers.

3.20 The Australian Judicial Officers Association also supports changing the title of 'magistrate' to 'judge' in all Australian jurisdictions.¹⁷

CONSULTATION QUESTIONS

QUESTION 6: Should the Queensland Magistrates Courts be renamed as Local Courts?

QUESTION 7: Should the title of 'Magistrate' be changed to 'Local Court Judge'?

¹⁶ The *Magistrates Act 1991* (Qld) sets out the eligibility requirements for appointment as a Magistrate.

¹⁷ 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.



Technology and the courts

- 3.21 In Queensland, some legislative provisions allow the Magistrates Courts to use technology, but others have not been updated. The Justices Act was drafted when the sort of technology we use today was not contemplated.
- 3.22 Some parts of the Justices Act still include manual processes, such as requirements to sign documents, file original documents, send documents via post or registered post and attend court in person. These could be made more efficient with the use of technology.
- 3.23 For example, filing documents in court is still a manual, paper-based process. A party must attend a courthouse registry in person to start proceedings or file paper documents. We have visited the Magistrates Court registry at Brisbane. The court file is a paper-based physical file that contains all the documents ('material') filed in a matter. This file is stored, retrieved and used to record court events and outcomes. Even where parties can file documents via email, the document will be printed and placed on the physical court file. The Chief Magistrate recently noted that the COVID-19 pandemic 'highlighted [the] limitations of paper files', particularly the inability to adjourn matters electronically. He stated that '[t]he Court needs to move to electronic lodgements as soon as possible, especially in the criminal jurisdiction'.¹⁸
- 3.24 Some Magistrates Court proceedings can be conducted remotely by phone or audio-visual link. This is generally used for brief court mentions (such as where the physical attendance at court of parties is not required) and is also used for defendants in custody. It can sometimes be used by witnesses when giving evidence.¹⁹
- 3.25 During the pandemic, remote appearances and reliance on technology increased to ensure continuing access to justice. Most court events took place by remote appearances, with in person appearances often discouraged due to public health considerations. Hearings and sentences proceeded either in person or remotely where possible, or were adjourned to a later date. Lawyers were encouraged to apply for adjournments online.²⁰
- 3.26 The Justices Act also includes laws about 'computer warrants'.²¹ Warrants must usually be signed by a person, but these laws allow a computer to be used to create, store and manage warrants. If a computer warrant is created by following the

¹⁸ *Magistrates Courts Annual Report 2020–21* (n 14) 4.

¹⁹ *Justices Act 1886* (Qld) s 23EC, pt 6A; *Evidence Act 1977* (Qld) pt 3A; *Penalties and Sentences Act 1992* (Qld) s 15A. Police watchhouses, youth detention centres and adult correctional facilities have video conferencing facilities so that defendants in custody can attend court events without being transported to court.

²⁰ Queensland Courts, *COVID-19 Magistrate Court arrangements: Information guide* (September 2021) <https://www.courts.qld.gov.au/data/assets/pdf_file/0008/695825/magistrates-court-guidelines-for-covid-19-v1.pdf>.

²¹ These were introduced in 1996: *Justices (Warrants) Amendment Act 1996* (Qld) (as passed).



approved procedures, it will comply with any requirement for a warrant to be signed. A computer warrant can be used in the same way as an original signed warrant.²²

- 3.27 Other legislation also provides for the use of technology. In Queensland, for example, evidence given by a child or a person with an impairment of the mind can be recorded and played in court at a later hearing.²³ In some proceedings related to domestic violence, protected witnesses (including people experiencing domestic violence and children) can give evidence remotely from another location via audio-visual link.²⁴ This approach can improve the safety and experience of particularly vulnerable witnesses who would otherwise be required to attend court and give evidence in court with other parties present.
- 3.28 The Women’s Safety and Justice Taskforce is currently considering how the court process can be improved for victims of sexual violence. Some options are allowing victims to choose how they give evidence (including by giving it remotely) or allowing their evidence to be recorded and used in later court proceedings.²⁵ The Taskforce has already recommended that, to improve their safety, victims of domestic and family violence should be able to appear and participate in court proceedings via video or telephone, and electronic lodgement processes should be developed and implemented.²⁶ We do not intend to duplicate the important work being done by the Taskforce, but our recommendations for improving criminal procedures may overlap with its recommendations.
- 3.29 There are many examples of technological innovation being adopted across the Australian and international courts sector due to the advancement of and access to digital technology, community expectations, the pandemic and general shifts toward digital platforms. These include the use of:
- Electronic lodgement and filing portals, allowing parties to file documentation through an online portal. The document is automatically date stamped and a court seal is applied, meaning no edits can be made after the document is filed. Disclosure may also take place through an electronic portal. In some jurisdictions, other parties are automatically notified that a new document has

²² *Justices Act 1886* (Qld) pt 4 divs 6A, 6B.

²³ *Evidence Act 1977* (Qld) s 93A.

²⁴ *Domestic and Family Violence Protection Act 2012* (Qld) s 150.

²⁵ Women’s Safety and Justice Taskforce, *Women and girls’ experiences across the criminal justice system as victims-survivors of sexual violence and also as accused persons and offenders* (Discussion Paper 3, February 2022) 55–7. Its report is due to be published in June 2022.

²⁶ Women’s Safety and Justice Taskforce, *Hear her voice: Addressing coercive control and domestic and family violence in Queensland* (Report No 1, December 2021) vol 3, Rec 49.



been filed and can view it online immediately, meaning the documents do not need to be physically served.²⁷

- Electronic case management systems, reducing the amount of paper and physical files in the court system.²⁸ Court files are electronic and can be viewed and accessed by approved court staff without the need to transfer physical files between court locations. Requests to inspect and copy court files are also done electronically, without the person having to attend the courthouse.
- Court orders may be issued electronically, removing the need for an original paper order containing the court's seal. This already occurs in some jurisdictions within Queensland, depending on the law and the rules of the court.²⁹
- Remote trials, including the giving of evidence remotely. This was used in Victoria during the pandemic.³⁰
- Live streaming of court proceedings on a video platform, including archives of previous live streams.³¹ This allows people who cannot go to court in person to observe a proceeding or watch it later.

3.30 We are mindful that current Magistrates Courts processes and procedures in Queensland are mostly paper-based. When we are recommending new legislation, we can make sure it allows for electronic process options and make changes to remove legislative barriers that might be preventing that transition.³² However, changes to adopt electronic procedures is a separate comprehensive project needing funding and implementation over time.

²⁷ Eg, Federal Circuit and Family Court of Australia, *How do I eFile?* (Web Page) <<https://www.fccoa.gov.au/hdi/efile>>; *Magistrates Court Act 1989* (Vic) s 136A; *Criminal Procedure Act 2009* (Vic) s 49; Magistrates' Court Authentication and Electronic Transmission Rules 2021 (Vic); Magistrates' Court of Victoria, *eDocs Portal* (Web Page, 19 February 2021) <<https://www.mcv.vic.gov.au/lawyers/edocs-portal>>. In Victoria, the court is not limited from issuing or providing anything in paper form: *Magistrates Court Act 1989* (Vic) s 136A(3)(a).

²⁸ Eg, Singapore Courts, *Integrated Case Management System (ICMS)* (Web Page, 19 July 2021) <<https://www.judiciary.gov.sg/services/icms>>.

²⁹ Eg, *Childrens Court Rules 2016* (Qld) r 19; *Domestic and Family Violence Protection Act 2012* (Qld) s 153; *Uniform Civil Procedure Rules 1999* (Qld) r 978A.

³⁰ Magistrates' Court of Victoria, *Online Magistrates' Court* (Web Page, 21 January 2021) <<https://www.mcv.vic.gov.au/lawyers/online-magistrates-court>>; County Court of Victoria, *Virtual Hearings and Trials* (Web Page, 8 September 2021) <<https://www.countycourt.vic.gov.au/going-court/virtual-hearings-and-trials>>.

³¹ Eg, Federal Court of Australia, *Videos* (Web Page) <<https://www.fedcourt.gov.au/digital-law-library/videos>>; High Court of Australia, *Recent AV recordings* (Web Page) <<https://www.hcourt.gov.au/cases/recent-av-recordings>>. A Protocol for the Recording and Broadcasting of Judgement Records is currently in place for the Queensland Supreme and District Courts: Queensland Courts, *Protocol for the Recording and Broadcasting of Judgment Remarks* (Web Page) <https://www.courts.qld.gov.au/data/assets/pdf_file/0007/485224/protocol-for-recording-and-broadcasting-judgment-remarks.pdf>.

³² Eg, *Electronic Transactions (Queensland) Act 2001* (Qld).



CONSULTATION QUESTIONS

QUESTION 8: Should the new Act contain general provisions to allow for electronic processes and procedures? If yes, are any safeguards required?

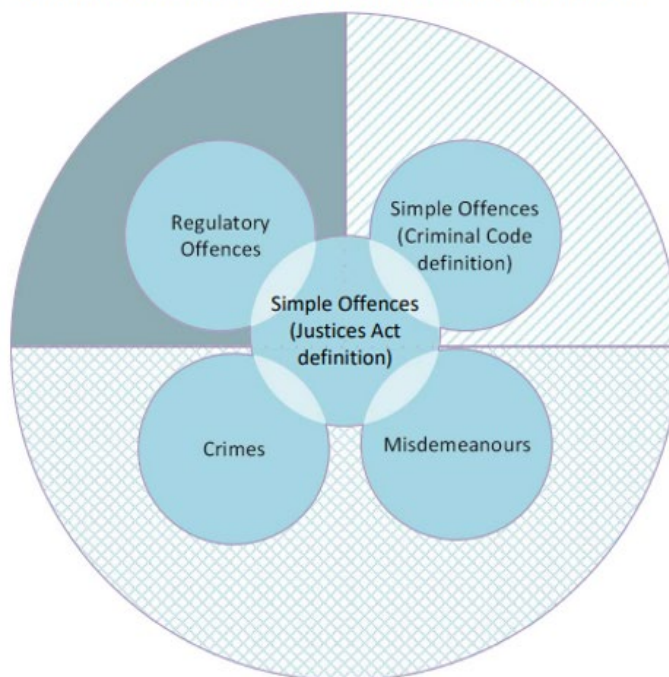
QUESTION 9: What criminal procedures in the Magistrates Court could be improved by using technological solutions? Are there any criminal procedures for which technology should not be used? Please provide examples.

QUESTION 10: Should summary hearings be conducted remotely? Why or why not?

Types of proceedings heard in the Magistrates Courts

3.31 As we discussed in part two of this paper, there are different types of proceedings heard and determined in the criminal jurisdiction of the Magistrates Courts.

General offence types heard and determined in the criminal jurisdiction of the Magistrates Courts






-  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

Image 3: Visual representation of different offence types dealt with in Magistrates Courts and their overlay with other offence types



- 3.32 First, there are proceedings for ‘breach of duty’. A breach of duty is 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. For an act or omission to be a breach of duty, it cannot be a simple offence or ‘a non-payment of a mere debt’.³³ These proceedings are heard in a Magistrates Court and are dealt with in the same way as simple offences as defined under the Justices Act.
- 3.33 Second, Magistrates Courts can deal with ‘regulatory offences’. These offences are:³⁴
- unauthorised dealing with shop goods valued at \$150 or less (known as ‘shoplifting’);
 - leaving a restaurant or hotel 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.
- 3.34 Third, Magistrates Courts hear and determine proceedings about ‘simple offences’, as defined by the Criminal Code. These are criminal offences that are not crimes or misdemeanours, and that cannot be prosecuted on an indictment.³⁵
- 3.35 The term ‘simple offence’ is also used in the Justices Act, but it is defined differently. There it means any offence, whether or not it is indictable, for which a person can be convicted by a Magistrates Court and punished by a fine, imprisonment or other penalty.³⁶ This is a broader definition than in the Criminal Code. It also includes indictable offences that can be dealt with summarily, which are explained below. Having two different definitions of ‘simple offence’ can sometimes be confusing.
- 3.36 The term ‘simple offence’, as it is defined in the Justices Act, is also used by other legislation. For example, the *Mental Health Act 2016* uses this term to establish procedures for adjourning or dismissing complaints about simple offences.³⁷ For this reason, it is important that new legislation about criminal procedure in the Magistrates Courts retains the broader concept of a ‘simple offence’ as defined by the Justices Act. To avoid the confusion that comes from having two meanings of ‘simple offence’, the new legislation could retain that concept but call it something else. An option might be to replace the Justices Act term ‘simple offence’ with ‘summary offence’.

³³ *Justices Act 1886* (Qld) s 4 (definition of ‘breach of duty’).

³⁴ Criminal Code (Qld) s 3(1), (4); *Regulatory Offences Act 1985* (Qld).

³⁵ Criminal Code (Qld) s 3(2), (4)-(5). See also [2.8] above.

³⁶ *Justices Act 1886* (Qld) s 4 (definitions of ‘simple offence’ and ‘summary conviction’).

³⁷ *Mental Health Act 2016* (Qld) ch 6 pt 2.



- 3.37 A Magistrates Court can also hear and determine indictable offences (that is, crimes and misdemeanours) that can be dealt with summarily. Chapter 58A of the Criminal Code lists a range of indictable offences contained in the Criminal Code that must generally be heard and determined summarily. It also lists some indictable offences that must be heard and determined summarily if the prosecution or the defence ‘elect’ to do so. However, despite those lists, there are some circumstances where a Magistrates Court cannot deal with these offences summarily. This includes where the defendant could not be adequately punished by the Magistrates Court, which can usually sentence a person to a maximum of three years imprisonment, or where there are ‘exceptional circumstances’, such as a connection to other offences being tried on indictment.³⁸
- 3.38 In this review we cannot make changes to the operation of other laws, including the Criminal Code, and we cannot change which indictable offences are dealt with summarily or the circumstances in which that takes place. However, we can consider whether any procedural changes could make it easier to use these laws. For example, we could consider relocating the laws in chapter 58A to the same Act as other procedural laws applying to the Magistrates Courts or redrafting them to make them easier to read and understand.³⁹
- 3.39 As we noted in part two of this paper, Magistrates Courts can also deal with some Commonwealth criminal offences, traffic offences and ‘quasi-criminal offences’.⁴⁰
- 3.40 Where an offence cannot be dealt with by a Magistrates Court, it will be committed to the District or Supreme Court to be dealt with on indictment.

CONSULTATION QUESTIONS

QUESTION 11: In practice, in what circumstances are proceedings about breach of duty currently used in the Magistrates Courts?

QUESTION 12: How should new legislation about criminal procedure in the Magistrates Courts deal with the term ‘simple offence’, and the fact that the Justices Act currently defines this term differently to the Criminal Code? For example, should the new legislation keep the current meaning of the term in the Justices Act but rename it as a ‘summary offence’?

QUESTION 13: What procedural changes (if any) should be made to chapter 58A of the Criminal Code and the laws about indictable offences dealt with summarily? For example, should they be moved or redrafted to improve their readability?

³⁸ Criminal Code (Qld) ch 58A.

³⁹ See generally, as to redrafting of Chapter 58A, Department of Justice and Attorney General (Qld), *Criminal justice procedure reform: An information paper for criminal justice stakeholders and the community* (February 2012) 21, App A.

⁴⁰ See [2.17] and *Magistrates Courts Annual Report 2020–21* (n 14) 22.



Starting proceedings

How are proceedings started?

- 3.41 No matter what the type of criminal offence is, criminal proceedings for adults start in a Magistrates Court.
- 3.42 Currently, any person can start a criminal proceeding in Queensland.⁴¹ This includes a member of the public, a police officer or a public officer. In the Justices Act, a 'public officer' includes, for example, an officer or employee of the State or Commonwealth public service or a local government who is acting in an official capacity.⁴² Proceedings started by an individual who is not a public officer are often called private prosecutions.⁴³
- 3.43 The way a proceeding is started will vary depending on who is starting it and the circumstances in which it is started. Generally, a proceeding may be started by:
- arrest and charge,⁴⁴ with or without a warrant;
 - issue and service of a notice to appear by a police officer; or
 - service of a complaint and summons.⁴⁵

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

Image 4: Summary of methods to commence criminal proceedings in Magistrates Courts

⁴¹ *Acts Interpretation Act 1954* (Qld) s 42.

⁴² *Justices Act 1886* (Qld) s 4 (definition of 'public officer').

⁴³ *Ibid* s 4 (definition of 'private complaint').

⁴⁴ For citizens' powers of arrest, see *Criminal Code* (Qld) ch 58.

⁴⁵ *Justices Act 1886* (Qld) ss 42, 53. Sometimes a warrant is issued instead of a summons: pt 4 div 6.



- 3.44 A 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 and service of a notice to appear.⁴⁶
- 3.45 Notices to appear are commonly issued and served on the spot. Generally, a notice to appear is a document served on a person by a police officer when the officer 'reasonably suspects that the person has committed or is committing an offence'.⁴⁷ Generally, 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. This notice is treated as the equivalent of a complaint and summons under the Justices Act, except for certain details.⁴⁸ The date and time for the person's appearance before a court must be at least 14 days from the service of the notice for an adult (unless a shorter time is agreed) and as soon as practicable after service of the notice for a child.⁴⁹ 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.⁵⁰ The officer must also provide a separate bench charge sheet for each charge.⁵¹
- 3.46 We are not changing police powers to arrest and charge a person, or the ability to issue a notice to appear.
- 3.47 The Justices Act provides for proceedings to be started using a complaint and summons. The complaint and summons process is the only way persons other than police can start proceedings. The complaint sets out in writing the offence (or offences) that the defendant is accused of committing. It may be made by the complainant, their lawyer or another authorised person. The summons states when the defendant is required to appear in court. Both the complaint and summons must be made before a Queensland justice of the peace, filed in court and served on the defendant.⁵²
- 3.48 The term and concept of a complaint and summons appears outdated. The process of obtaining them is regarded as time-consuming. For example, notices to appear

⁴⁶ See generally, *Police Powers and Responsibilities Act 2000* (Qld).

⁴⁷ *Police Powers and Responsibilities Act 2000* (Qld) s 382(2).

⁴⁸ *Ibid* ch 14 pt 5, particularly s 388(5).

⁴⁹ *Ibid* s 384(3).

⁵⁰ *Ibid* s 385(1).

⁵¹ *Justices Regulation 2014* (Qld) s 13(3).

⁵² *Justices Act 1886* (Qld) pt 4 divs 1, 3 and 5. A complaint can sometimes be followed by the issue of a warrant for the defendant's arrest. Where that is the case, the complaint must be sworn on oath: pt 4 divs 3, 6.



were introduced as an alternative way for police to start proceeding against a person because it ‘does not involve the delay associated with issuing a complaint and summons’ under the Justices Act.⁵³

- 3.49 Some jurisdictions have moved away from the use of complaint and summons and instead adopted a broader approach to the use of notices to appear. For example, new Tasmanian legislation provides for a court attendance notice to be issued by a police officer, public officer or another person authorised by an Act. The notice and a charge sheet must be filed with the court.⁵⁴
- 3.50 In Victoria, a police officer or public official may either sign a charge sheet and issue a summons which must then be filed in court or, for a summary offence or an indictable offence that can be heard and determined summarily, serve a notice to appear which must be filed with a charge sheet and evidence of service.⁵⁵
- 3.51 There are different methods for other people wanting to commence proceedings, such as members of the public. For example, in the new Tasmanian legislation, the person must file a charge sheet and then the registrar may issue a court attendance notice.⁵⁶
- 3.52 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 complaint and summons, and for all notices to appear, the document is ‘personally served’, meaning it must be given to the defendant in person.⁵⁷ In this review, we do not intend to change the need for service of a document that starts criminal proceedings.

CONSULTATION QUESTIONS

QUESTION 14: How should criminal proceedings in Queensland be started by persons other than police under the new legislation? For example, should the complaint and summons be replaced by a notice that the person must appear in court?

QUESTION 15: How can procedures for starting proceedings be simplified?

⁵³ *Police Powers and Responsibilities Act 2000* (Qld) s 382(1).

⁵⁴ *Magistrates Court (Criminal and General Division) Act 2019* (Tas) ss 4 (definitions of ‘prescribed prosecutor’ and ‘private prosecutor’), 40, 42(2), 51, 52 (not in force). The Tasmanian legislation is to commence operation in October 2022. New South Wales also relies on notices issued by a police officer, public officer or the court: *Criminal Procedure Act 1986* (NSW) ss 47–50, 172–75.

⁵⁵ *Criminal Procedure Act 2009* (Vic) ss 5(a), 6(1), 14, 21–2.

⁵⁶ *Magistrates Court (Criminal and General Division) Act 2019* (Tas) ss 40(1), 51.

⁵⁷ The *Justices Act 1886* (Qld) s 56 allows for an alternative of service by registered post.



When have proceedings started?

- 3.53 Proceedings for simple offences, as defined by the Criminal Code, must generally be commenced within one year from the time the matter of the complaint arose.⁵⁸ This is known as a limitation period. If outside of the stated timeframe, the charges cannot be heard by the court and the prosecution cannot continue. We are not intending to review the law about time limitations.
- 3.54 In Queensland, as explained previously, proceedings can be commenced by a complaint and summons. The timing of exactly ‘when’ a proceeding has started is unclear under the Justices Act. However, there is a requirement that a complaint and summons is 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).⁵⁹
- 3.55 In other jurisdictions, the law includes a clear statement about ‘when’ a proceeding starts. For example, in New South Wales, proceedings are started by issuing and filing a court attendance notice and proceedings are considered to have started on the date the notice is filed in court. The notice must also be served on the accused person.⁶⁰ In Victoria, a proceeding is started by signing or filing a charge sheet, not by service of a notice to appear.⁶¹

CONSULTATION QUESTION

QUESTION 16: Should the new legislation about criminal procedures in the Magistrates Courts have a clear statement of when proceedings have started? For example, should proceedings start on the date that material is filed in court?

Particulars

- 3.56 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 similar words) in an Act, order, by-law, regulation or other instrument that creates the offence, then the description will be sufficient in law.⁶²
- 3.57 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

⁵⁸ *Justices Act 1886* (Qld) s 52. The section provides that other times for starting proceedings can occur. The one-year limitation period also applies to a complaint about a breach of duty. No time limit applies to indictable offences.

⁵⁹ *Justices Act 1886* (Qld) s 54(2).

⁶⁰ *Criminal Procedure Act 1986* (NSW) ss 47, 52–3, 172, 177–78.

⁶¹ *Criminal Procedure Act 2009* (Vic) ss 5(a), 6(1), 26.

⁶² *Justices Act 1886* (Qld) ss 42, 46, 47(1).



must be sufficiently described so that the person can understand the charge/s against them.⁶³

3.58 A police notice to appear only requires general particulars, such as the type of offence and when and where it occurred.⁶⁴ This is a consequence of the notices being carried and issued on the spot by police officers. But there are also additional requirements. 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 in the court. A bench charge sheet must state:⁶⁵

- the name of the complainant and defendant;
- the charged offence and adequate particulars about the nature of the charge, such as the time and place of the offence, the person aggrieved and any property in question;
- any circumstances of aggravation (matters that make the offence more serious).

3.59 The filing of the bench charge sheet 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).⁶⁶

3.60 In the higher courts, an indictment must contain the offence with which the person is charged, including sufficient particulars to inform the accused person of the charge.⁶⁷ Further particulars about the charge can be given to the defendant separate from the indictment (and, if necessary, proceedings adjourned).⁶⁸

3.61 Similar requirements exist in other jurisdictions. For example, in New South Wales, the court attendance notice must describe the offence and briefly state the particulars of the offence, including the time, date and place of the alleged offence.⁶⁹

⁶³ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

⁶⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 386(1). This does not affect the prosecution's duty to provide 'proper particulars' during a prosecution, and 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): s 387.

⁶⁵ *Justices Act 1886* (Qld) s 42; *Justices Regulation 2014* (Qld) ss 13–14.

⁶⁶ *Police Powers and Responsibilities Act 2000* (Qld) s 387.

⁶⁷ *Criminal Code* (Qld) s 564. Examples of particulars include the time, place, alleged victim, any property (if any) in question and circumstances of aggravation.

⁶⁸ *Ibid* s 573. See also section 574 which states Chapter 60 of the *Criminal Code* also applies to indictments dealt with summarily.

⁶⁹ *Criminal Procedure Act 1986* (NSW) ss 50, 175; *Local Court Rules 2009* (NSW) rr 3.2(2), 3.11(2). The notice can describe an offence, act or thing in a way that is sufficient for the purposes of an indictment: *Criminal Procedure Act 1986* (NSW) ss 50(5), 175(5).



CONSULTATION QUESTIONS

QUESTION 17: What requirements should be included in the new Magistrates Courts criminal procedure legislation about the description of an offence?

QUESTION 18: If the new legislation provides for a notice about proceedings to replace a complaint and summons, what requirements should there be about information that must be included in that notice? Should the requirements be consistent across all initiating documents, or should there be a requirement to file a second document?

Private prosecutions

3.62 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.⁷⁰ Generally, they are complaints made by individual members of the public in a private capacity. Private prosecutions do not occur frequently.

3.63 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 complainant’s person (body) or property, then additional procedural provisions will apply. These include:⁷¹

- the defendant can request written particulars at the first appearance, and the complaint will be struck out if sufficient particulars are not given.
- the defendant can apply for the complaint to be dismissed on the ground that it is an abuse of process, frivolous or vexatious. When this application is made, a complainant can be ordered to give security for the defendant’s costs and if they do not comply then the complaint will be struck out.
- the complaint can be struck out if it is not prosecuted with ‘due diligence’.

3.64 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 the court is satisfied there is sufficient evidence for the defendant to be tried for an indictable offence.⁷²

3.65 The ability to bring a private prosecution in the Magistrates Court provides access to justice, particularly when the public prosecuting agency decides not to prosecute. In Queensland, recent private prosecutions about matters such as assault⁷³ and

⁷⁰ *Justices Act 1886* (Qld) s 4 (definition of ‘private complaint’).

⁷¹ *Ibid* pt 5 div 2.

⁷² *Ibid* s 103A. The defendant can appear by way of their lawyer until ordered to appear in person.

⁷³ *Arndt v Rowe* [2011] QDC 313.



threatening violence in the context of domestic violence⁷⁴ demonstrate the use of private prosecutions in criminal procedure laws. Another recent decision demonstrates the application of those additional procedural provisions.⁷⁵

3.66 Other jurisdictions have formal procedures in place to assess whether private complaints should commence in certain circumstances.

3.67 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:⁷⁶

- the notice does not disclose grounds for the proceedings;
- the notice is not in the required form;
- 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)*).⁷⁷

3.68 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 commencing proceedings.⁷⁸

3.69 In Tasmania, a private prosecution for an offence in the Criminal Code requires the consent of the Director of Public Prosecutions, who must be satisfied the person is acting in good faith and on reasonable grounds.⁷⁹

3.70 In this review, we do not intend to remove a person's ability to bring a private prosecution as they play an important role in access to justice. However, we will consider whether procedures for private complaints are fair and contemporary, and whether there should be any limits on making private complaints in particular circumstances. For example, we will consider whether there should be a more appropriate way to manage vexatious private complaints.

⁷⁴ 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>>.

⁷⁵ *DBX v TAT* [2021] QCA 242.

⁷⁶ *Criminal Procedure Act 1986* (NSW) ss 14, 49, 174; *Local Court Rules 2009* (NSW) r 8.4.

⁷⁷ See, as to starting proceedings under that Act, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) pt 10 div 3.

⁷⁸ *Criminal Procedure Act 1986* (NSW) ss 49(3), 174(3).

⁷⁹ *Justices Act 1959* (Tas) s 27(3); *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 41 (not in force).



CONSULTATION QUESTIONS

QUESTION 19: Are the current provisions about private complaints in the Justices Act working in practice? If not, why?

QUESTION 20: Should the new legislation about criminal proceedings in the Magistrates Courts place any limits on private complaints? Why or why not? For example:

- (a) should the additional procedural provisions that currently apply to some indictable offences be extended to any private complaint?
- (b) should there be limitations on the circumstances in which a private complaint may be brought, such as where it may be vexatious?
- (c) should any private complaint be subject to assessment or review before it can proceed? If yes, how should this operate?

Disclosure, case conferencing and case management

- 3.71 Disclosure is an important part of criminal procedure. It refers to the process of the prosecution giving the defendant all the relevant evidence against them in relation to the offences they are charged with. It is important the defendant knows the case against them, so they have a fair trial. Disclosure assists in minimising court delays, facilitating timely pleas of guilty, narrowing the issues in contest at a trial and supporting the effective use of public resources.⁸⁰
- 3.72 A prosecutor has a special role in criminal proceedings to present the whole case and find where the truth lies.⁸¹ Because of this special role, there are broad duties including under the common (case) law that require a prosecutor to disclose evidence being relied on in a criminal case, as well as any other relevant evidence, to the defendant. These are called 'disclosure obligations'. This applies to all offences being prosecuted in the Magistrates Courts.⁸²
- 3.73 Case conferencing and case management relate broadly to requirements that parties attempt to resolve criminal matters before a hearing or committal is required. Requirements can range from informal discussions between parties outside of court, through to formal court appearances where parties must discuss issues and narrow the matters in dispute.

⁸⁰ Moynihan (n 4) 85–6.

⁸¹ *R v Apostilides* (1984) 154 CLR 563. Disclosure is part of the prosecutor's main duty to conduct the case fairly.

⁸² *Criminal Code 1899* (Qld) s 590AB; *Grey v R* [2001] HCA 65; *Mallard v R* (2005) 224 CLR 125; Moynihan (n 4) 87.



Queensland

- 3.74 The Queensland Criminal Code has specific laws about disclosure for indictable offences, including indictable offences heard summarily.⁸³ The prosecution must disclose all the evidence to be relied on, and all the things in their possession that would help the accused's case unless disclosure is unlawful or contrary to the public interest. There is a detailed list of documents the prosecution must give to a defendant, and those that can be requested.⁸⁴ Disclosure obligations are ongoing.⁸⁵ There are some timeframes for disclosure to happen, for example for a committal proceeding the prosecution needs to give the accused person the material at least 14 days before the hearing.⁸⁶ The Magistrates Court can give directions about disclosure, including setting a timetable for compliance with disclosure obligations.⁸⁷
- 3.75 For proceedings in higher courts, the defendant also has disclosure obligations. They must give notice about any evidence of an alibi and any expert evidence.⁸⁸
- 3.76 Magistrates Courts practice directions encourage legally represented parties to adult criminal proceedings (whether they will be finalised summarily or committed) to 'case conference'. The parties must discuss the issues in dispute and attempt to resolve the matter.⁸⁹ Where matters are not resolved or will be committed, practice directions also set out timeframes for adjournments, disclosure obligations, applications, and other administrative matters.⁹⁰
- 3.77 After case conferencing of summary matters, the matter may be resolved as a plea⁹¹ or listed for a committal or summary hearing. When listed for hearing, there are often no more mentions or reviews before the hearing date. This can mean that hearings do not proceed as scheduled. For example, further conferencing much closer to the hearing may resolve a matter or there may be newly identified issues (which could mean that a matter ends or is rescheduled).

⁸³ Criminal Code (Qld) ch 62 div 3, see also s 590AD (definitions of 'relevant proceeding' and 'prescribed summary trial'); *Justices Act 1886* (Qld) s 41.

⁸⁴ Criminal Code (Qld) ss 590AH (for mandatory disclosure), 590AJ (for on request disclosure).

⁸⁵ *Ibid* ch 62 div 3, ss 590AB and 590AL.

⁸⁶ *Ibid* s 590AI.

⁸⁷ *Justices Act 1886* (Qld) pt 4 divs 10A–10B; *Criminal Practice Rules 1999* (Qld) ch 9A.

⁸⁸ Criminal Code (Qld) ch 62 div 4.

⁸⁹ Magistrates Courts of Queensland, *Case Conferences and Callovers in Criminal Matters* (Practice Direction No 9 of 2010).

⁹⁰ *Ibid*; Magistrates Courts of Queensland, *Witnesses Giving Evidence in Committal Proceedings* (Practice Direction No 12 of 2010), (amended 21 September 2017).

⁹¹ This depends on a range of matters. Prosecuting agencies may also discontinue proceedings.



- 3.78 In recent annual reports, the District Court of Queensland credited a more manageable workload to careful case management (particularly in larger centres) with regular case reviews to narrow issues and determine the likely course a matter will take.⁹²
- 3.79 In practice, there can be delays in the disclosure of evidence. When this happens, parties can apply to a Magistrate for a direction hearing.⁹³ Direction hearings can also be held about other procedural matters such as applications for witnesses to appear via phone or videolink, the issuing of summons, joining complaints, and arrangements for the giving of evidence by witnesses in committal matters (including determining applications to cross examine witnesses).⁹⁴

Other Australian jurisdictions

- 3.80 In other Australian jurisdictions, there are sometimes more prescriptive requirements about disclosure, case conferencing and case management.
- 3.81 Some jurisdictions have adopted a ‘staged approach’ to disclosure, where material is given to the defendant throughout proceedings. The intention is to make more material available earlier in the proceedings, especially for summary matters. This aims to resolve matters quickly, reducing requirements for full disclosure and summary hearings.
- 3.82 For example, the Northern Territory and Victoria require disclosure of a ‘preliminary brief’ for summary matters which include a statement of facts, any available witness statements, video footage, records of interview, and criminal history. In the Northern Territory this must be disclosed within seven days of the first court mention, and in Victoria within 21 days of the charge being filed with the court. Full disclosure is provided later if the matter remains contested.⁹⁵
- 3.83 In New South Wales, a brief of evidence is not required — even when a matter is contested — for some minor traffic offences (such as offences related to driving unlicensed) or summary offences where the only penalty is a fine.⁹⁶
- 3.84 Several jurisdictions also have requirements for case conferencing or case management in their criminal procedure laws. These concepts often overlap.

⁹² *Magistrates Courts Annual Report 2020–21* (n 14) 16.

⁹³ *Justices Act 1886* (Qld) pt 4 divs 10A–10B; *Criminal Practice Rules 1999* (Qld) ch 9A.

⁹⁴ *Justices Act 1886* (Qld) s 83A.

⁹⁵ *Local Court (Criminal Procedure) Act 1928* (NT) ss 60AD, 60AE; *Criminal Procedure Act 2009* (Vic) ss 24,35–41. In South Australia, preliminary briefs are used for indictable matters: *Criminal Procedure Act 1921* (SA) s 106.

⁹⁶ *Criminal Procedure Act 1986* (NSW) s 187(5); *Criminal Procedure Regulation 2017* (NSW) r 24.



3.85 Some jurisdictions have requirements applying to matters to be finalised in the lower court. For example:

- in addition to a pre-hearing mention, legally represented parties must attend a conference outside of court to negotiate charges and narrow or resolve issues, referred to as ‘criminal party conference’ (ACT);⁹⁷
- a matter can be listed for a ‘case management hearing’ or a ‘contest mention hearing’ if the defendant pleads not guilty. This can include identifying areas of agreement and dispute, exploring alternative options and, if necessary, facilitating the hearing (ACT, Tasmania, Victoria);⁹⁸
- parties must fulfil ‘pre-trial preparation’ before a matter is listed for hearing. This includes conferring ‘fully and frankly’ to identify issues of fact and law, explore ways to finalise the matter and determine how long a hearing will take (SA);⁹⁹
- if a defendant pleads ‘not guilty’ at the first mention, a directions hearing is listed for a minimum of 4 weeks’ time where the parties are to give indications about issues in dispute, intended pleas and other matters (NT).¹⁰⁰

3.86 Some jurisdictions have requirements applying to offences that could be committed to a higher court. For example:

- parties must meet for a case conference to attempt to resolve the issues in dispute or resolve the matter into a plea of guilty. The parties must file a certificate outlining the conference with the court (NSW);¹⁰¹
- a case conference is held in the presence of a Magistrate (SA);¹⁰²
- the court may direct parties to attend a ‘committal case conference’ to facilitate the effective management of proceedings and the timely resolution of issues (Victoria).¹⁰³

⁹⁷ Australian Capital Territory Magistrates Court, *Adult Criminal Matters* (Practice Direction Criminal No 1, 1 January 2020) 3–4.

⁹⁸ Ibid; 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.

⁹⁹ *Magistrates Court Rules 1992* (SA) rr 8, 26; 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/>>.

¹⁰⁰ *Local Court (Criminal Procedure) Act 1928* (NT) ss 60AH–60AL.

¹⁰¹ 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.

¹⁰² Magistrates Court of South Australia, *Consolidated Criminal Practice Directions* (October 2015) [6.00].

¹⁰³ Magistrates’ Court of Victoria, *Committal Case Conference* (Practice Direction No 7 of 2013, October 2013); *Magistrates’ Court Criminal Procedure Rules 2019* (Vic) r 63.



- 3.87 In Western Australia the Magistrates Court has broad case management powers, including to order parties to:¹⁰⁴
- conduct ‘without prejudice’ discussions or take other steps to identify areas of agreement;
 - come to court to deal with case management and pre-trial issues; and
 - do ‘anything that, in the court’s opinion, will or may facilitate the case being conducted and concluded efficiently, economically, and expeditiously’.
- 3.88 The Northern Territory adopts a combined approach. It has similar broad powers of case management, but also adopts a more prescriptive method for how matters, particularly committals, progress.¹⁰⁵ The prosecution must elect whether an offence will be dealt with summarily or committed to a higher court and the brief must be ordered at the first mention. The matter is then case managed until an examination hearing (committal hearing) can be conducted.¹⁰⁶ This approach appears to provide the court with more opportunity to proactively manage committal matters and transfer the charges to a higher court as soon as practical.
- 3.89 There can be challenges with case conferencing and case management, for both summary and committal matters, when a person is self-represented. While many jurisdictions do not prohibit case conferencing with self-represented persons, jurisdictions such as Victoria and the Australian Capital Territory maintain a more proactive approach. Victoria actively encourages all parties (including self-represented people) to comply with case conferencing requirements, although the court or a registrar can dispense with that obligation.¹⁰⁷ In the Australian Capital Territory, a criminal party conference is not automatically scheduled for a self-represented defendant, but they are free to negotiate with the prosecutor to attempt to resolve the matter.¹⁰⁸
- 3.90 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 steps, with the parties required to deal with procedural matters throughout

¹⁰⁴ *Criminal Procedure Act 2004* (WA) s 137.

¹⁰⁵ *Local Court (Criminal Procedure) Act 1928* (NT) pt V div 1, s 112A.

¹⁰⁶ Northern Territory Local Court, *Procedures During and Following Preliminary Examination (Committal)* (Practice Direction No 13, as at February 2021).

¹⁰⁷ Magistrates’ Court of Victoria, *Summary Case Conference Procedure* (Practice Direction No 3 of 2010, July 2010).

¹⁰⁸ Australian Capital Territory Magistrates Court, *Adult Criminal Matters* (Practice Direction Criminal No 1, 1 January 2020) 3.



the proceedings. On the fourth step, the matter should proceed by committal or be listed for hearing.¹⁰⁹

3.91 In addition to more intensive case management approaches, other jurisdictions have also adopted timeframes for summary and committal matters, party elections, disclosure obligations and case conferencing. Examples include:

- For indictable matters in New South Wales, the charge certificate (which specifies the offences that are the subject of the proceedings) must be filed and served no later than the day ordered by the Magistrate, within six months of the matter first coming before the court.¹¹⁰
- In South Australia, for contested summary matters, a pre-trial conference must not be more than 20 weeks from the day the charge is first before the court, and the hearing no more than 26 weeks from that day.¹¹¹
- The Australia Capital Territory requires the prosecution to make an election about how an offence will be dealt with before the second time the proceeding is before the court, or at least 21 days after the first time the proceeding is before the court.¹¹²

CONSULTATION QUESTIONS

QUESTION 21: Are the current disclosure obligations in Queensland working in the Magistrates Courts? If not, why?

QUESTION 22: How could the disclosure process be improved? For example, could the new criminal procedure legislation include a staged approach to disclosure, or include timeframes for disclosure in summary and committal proceedings?

QUESTION 23: Should the Criminal Code disclosure obligations be extended to all offences in Queensland?

QUESTION 24: Should there be any disclosure obligations on defendants in the Magistrates Courts (for example, about an alibi or expert witnesses)?

QUESTION 25: Are the current case conferencing requirements in Queensland working in the Magistrates Courts? If not, why?

QUESTION 26: Should the new criminal procedure legislation include requirements about case management? If yes, what requirements should be included? Should these be

¹⁰⁹ 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).

¹¹⁰ *Criminal Procedure Act 1986* (NSW) s 67.

¹¹¹ Magistrates Court of South Australia, *Consolidated Criminal Practice Directions* (October 2015) [3.09].

¹¹² *Crimes Act 1990* (ACT) s 374.



different for offences that will be dealt with summarily and those that will be committed to a higher court?

QUESTION 27: If the new legislation does include requirements about case management:

- (a) should they be mandatory? Why or why not?
- (b) how should they apply when a defendant is self-represented?

QUESTION 28: Should the new criminal procedure legislation include any requirements about timeframes for matters progressing through the Magistrates Courts? If yes, what should they be?

In-court diversion and resolving proceedings

- 3.92 In Queensland, there are opportunities for adults alleged to have committed an offence to be diverted out of the traditional criminal justice system at various stages.
- 3.93 There are a range of options for diversion by police officers. These generally apply before a person appears in court charged with an offence, when the person admits to (or does not deny) the offence. These include a caution or referral to a program, such as the graffiti removal program or the drug diversion assessment program. These police diversion options are sometimes, but not always, at the discretion of police officers.¹¹³
- 3.94 The *Mental Health Act 2016* gives magistrates powers to dismiss or adjourn simple offences (as defined under the Justices Act) when they are satisfied the person charged with the offence was of unsound mind or is unfit for trial.¹¹⁴ In some circumstances, the court can refer the person for appropriate treatment and care; for example, if the person has a disability.¹¹⁵
- 3.95 Queensland Magistrates Courts also operate specialist alternative courts for some defendants, such as the Queensland Drug and Alcohol Court and the Murri Court.¹¹⁶ Those specialist courts can be accessed by people who are pleading guilty to an offence. Court Link is another initiative operating at eight Magistrates Courts¹¹⁷ which connects defendants with treatment and support services to address needs

¹¹³ Eg, *Police Powers and Responsibilities Act 2000* (Qld) ss 379–380; *Youth Justice Act 1992* (Qld) s 11; Queensland Police Service, *Operational Procedures Manual*, Issue 87 (Public Edition, 8 April 2022) [2.22], [3.2], [5.3]. Police have limited discretion in relation to the drug diversion assessment program: *Police Powers and Responsibilities Act 2000* (Qld) s 379(1).

¹¹⁴ See generally, *Mental Health Act 2016* (Qld) ch 6 pts 1–2.

¹¹⁵ *Ibid* s 174.

¹¹⁶ Queensland Courts, *Queensland Drug and Alcohol Court* (Web Page, 15 March 2021) <<https://www.courts.qld.gov.au/courts/drug-court>>; Queensland Courts, *Murri Court* (Web Page, 23 January 2017) <<https://www.courts.qld.gov.au/courts/murri-court>>. Similar specialist courts are also available in other jurisdictions.

¹¹⁷ Namely: Brisbane, Cairns, Ipswich, Southport, Caboolture, Redcliffe, Maroochydore and Mount Isa.



contributing to offending. In some circumstances, judicial monitoring of progress occurs and positive engagement may be considered in sentencing.¹¹⁸

- 3.96 As part of this review, we are looking at possible new and innovative ways that adults charged with certain offences can be diverted out of the court system once proceedings have started (in-court diversion) but before the person pleads guilty or is sentenced. When these kinds of diversions are used, the intention is matters are resolved through ways outside the traditional court process and outcome. That is, a person would not go through a summary hearing or plead guilty, and they would not be sentenced for any offences. The scope of this review means that we cannot consider sentencing options to incorporate diversion.
- 3.97 We consider that the general objective of in-court diversion is to reduce a person's contact with the criminal justice system at an early stage, including by addressing issues relating to offending by providing appropriate therapeutic interventions and allowing for the participation of victims. Having a range of practical, alternative ways to address offending and prevent continued interactions has other system benefits including saving criminal justice resources, allowing for the proper focus on more serious matters. The Queensland Productivity Commission (QPC) reported diversion can provide a more proportionate response to dealing with first-time offenders or low harm (minor) offending given the costs involved in prosecuting such matters.¹¹⁹
- 3.98 We have explored several types of possible in-court diversions and ways of resolving proceedings below. We want to hear what you think about in-court diversion ideas, especially whether such concepts will work in practice, whether they are effective and worthwhile, and what any implications may be. You may also like to point out other possibilities. On the other hand, you might have different views on the use of in-court diversion.

CONSULTATION QUESTIONS

QUESTION 29: Should the new legislation about criminal procedure in the Magistrates Courts include 'in-court diversion'?

QUESTION 30: If yes, what types of in-court diversion should be available? What sort of offences should they be available for? What safeguards are required?

¹¹⁸ Queensland Courts, *Court Link* (Web Page, 6 April 2021) <<https://www.courts.qld.gov.au/services/court-programs/court-link>>; Queensland Courts, *Court Link: Helping people make positive changes* (Fact Sheet) <https://www.courts.qld.gov.au/data/assets/pdf_file/0008/583172/cip-fs-court-link.pdf>.

¹¹⁹ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) 154.



Principles

3.99 Earlier in this paper, we discussed whether new legislation about criminal procedure in the Magistrates Courts should include principles. As part of this review, we will also consider whether there should be any specific principles (or similar) about in-court diversion.

3.100 In New South Wales, criminal procedure legislation has a part dedicated to ‘intervention programs’.¹²⁰ There are specific objects for this part, namely:¹²¹

- to provide a framework for the recognition and operation of programs that offer alternative ways of dealing with people who have committed (or are alleged to have committed) an offence; and
- to make sure these programs apply fairly to everyone eligible to participate, and that they are properly managed and administered; and
- to reduce the likelihood of future offending by facilitating participation in these programs.

3.101 These objects also recognise that the rights of victims should be protected and maintained in accordance with the Charter of Victims Rights,¹²² and that ‘the successful rehabilitation of offenders contributes to the maintenance of a safe, peaceful and just society’.¹²³

CONSULTATION QUESTION

QUESTION 31: Should the new legislation about criminal procedure in the Magistrates Courts have specific objects or principles about ‘in-court diversion’? If yes, what should they be?

Types of in-court diversion

Mediation

3.102 Mediation is currently provided for under the Justices Act.

3.103 After a summons is issued, a Magistrate or the clerk of the court can order the complainant to submit the matter to mediation if they consider it would be better resolved by mediation, or if the complainant consents. If a dispute is resolved by mediation, the criminal matter will not proceed any further. In other circumstances,

¹²⁰ *Criminal Procedure Act 1986* (NSW) ch 7 pt 4.

¹²¹ *Ibid* s 345(1).

¹²² See now *Victims Rights and Support Act 2013* (NSW).

¹²³ *Criminal Procedure Act 1986* (NSW) s 345(2)(b).



such as where a party refuses to mediate or a matter is unsuitable for mediation, another order will be made for the proceeding to continue in court.¹²⁴

- 3.104 During proceedings for a simple offence as defined under the Justices Act or a breach of duty, a hearing can be adjourned so that the matter can go to a mediation session.¹²⁵
- 3.105 In Queensland, matters are referred to ‘adult restorative justice conferencing’. This is a facilitated meeting between the person who has caused harm (who is accused of an offence) and the people most affected by it. It gives the victim an opportunity to tell their story and hold the accused person accountable for their actions. It also provides the accused person with an opportunity to take responsibility for their actions and take steps to repair that harm.¹²⁶
- 3.106 The court, police, prosecutor or corrective services can refer people to restorative justice conferencing. Victims and defence lawyers can also suggest it. Participation is always voluntary, and it can take place at any stage of a criminal proceeding. After the conference, the referrer will be told the outcome and, with everyone’s consent, given a copy of any agreement. When the matter is before the court, the referrer will decide how to proceed, including whether the court process should continue or what impact this will have on a defendant’s sentence.
- 3.107 In practice, adult restorative justice conferencing is not available to all defendants involved in criminal proceedings in the Magistrates Courts. There is limited resourcing in regional and remote locations. Issues surrounding the funding of this (and other) programs is outside the scope of this review.

CONSULTATION QUESTION

QUESTION 32: Are the existing criminal procedure laws about mediation of matters in the Magistrates Court working effectively? If not, why? Should there be any changes?

Deferred prosecution agreements

- 3.108 Deferred prosecution agreements are used in the United Kingdom in relation to organisations (not individuals) that have committed economic crimes, such as fraud or bribery. In those cases, after a company is charged with an offence, proceedings can be suspended if a judge approves a deferred prosecution agreement. The

¹²⁴ *Justices Act 1886* (Qld) ss 53A–53B, 54(5). See also generally *Dispute Resolution Centres Act 1990* (Qld).

¹²⁵ *Justices Act 1886* (Qld) s 88(1), (1B).

¹²⁶ Queensland Government, *About Adult Restorative Justice Conferencing* (Web Page, 15 June 2018) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.



company can then agree to various terms, such as payment of money or cooperation in other matters. If they do not honour those conditions, the prosecution can resume.¹²⁷

3.109 It is suggested that deferred prosecution agreements have the potential to be used in relation to youth crime or vulnerable adults who commit crimes, particularly First Nations people in those groups. These agreements will allow services, treatments and other restorative practices to be engaged and monitored by the courts. Importantly, this would operate as an agreement between the parties rather than as a court order. That is consistent with the approach of some Aboriginal communities to the settlement of criminal matters (including punishment), which focuses on negotiation and agreement. It was stated that 'if short sentences can be avoided and effective agreements achieved' then this approach may be 'an innovative way to achieve a more peaceful future'.¹²⁸

3.110 A deferred prosecution is not the same as a deferred sentence. When a sentence is 'deferred', it means a plea or finding of guilt has been recorded and the sentence will be postponed to a later date. If the person is of good behaviour during that time, they can be given a less severe sentence. In contrast, when a prosecution is deferred and any requirements are completed, the matter ends without a finding of guilt, conviction or sentence. We are not reviewing sentencing procedures or options as part of this review.

3.111 The recent QPC report about imprisonment and recidivism focused on police diversion options (pre-court) and specifically recommended the introduction of a deferred prosecution model in this context.¹²⁹ The QPC stated:¹³⁰

Deferred prosecution provides benefits over [police use of] simple cautions because it provides an offender with an incentive not to reoffend (or to seek treatment). It has advantages over court-based diversions because it avoids complex court processes and provides more certainty to the offender.

3.112 The Queensland Government response stated it 'is committed to ensuring police and courts have a range of responses available to effectively address offending behaviour

¹²⁷ F Gerry and D Kelly, 'Around the nation: Northern Territory – Is it time for deferred prosecution agreements in the Northern Territory' (2016) 90(6) *Australian Law Journal* 387, 387.

¹²⁸ *Ibid* 391.

¹²⁹ Queensland Productivity Commission (n 119) Rec 34, lvi, 154. The QPC suggested that for these deferred prosecution agreements, there should be an ability to include conditions such as 'referral to assessment, no repeat offending, restorative mediation or other agreed action (such as an apology or other restitution)': 154.

¹³⁰ *Ibid* xli. It was also noted that '[u]nder court-based diversions, the judge retains discretion to take into account any actions an offender has taken'.



and will consider the specific recommendations of the QPC as part of this process'. It also stated that '[t]here are no legislative amendments planned'.¹³¹

CONSULTATION QUESTIONS

QUESTION 33: Could an in-court deferred prosecution scheme work in the Queensland Magistrates Courts? What issues need to be considered?

QUESTION 34: What new procedures could be included in criminal procedure laws in Queensland to allow for a deferred prosecution?

QUESTION 35: In what circumstances should a deferred prosecution occur? What offences should be excluded? What is an appropriate timeframe to defer a prosecution?

Diversionsary programs

3.113 Diversionsary programs are intervention programs that provide specific measures for dealing with defendants as an alternative to prosecution. They may include drug and alcohol rehabilitation programs, counselling, or other therapeutic programs. In this review, we are considering diversionsary programs available to the court that allow a defendant to participate in programs before any plea or finding of guilt (not as part of a sentence).

3.114 Some diversionsary programs are like deferred prosecutions, in that successfully completing the program will mean the prosecution ends.

3.115 In Victoria, there is a court-based (post-charge) Criminal Justice Diversion Program aimed at diverting first-time or low risk individuals. At any time before a plea, proceedings for a summary offence or an indictable offence that can be determined summarily can be adjourned for 12 months to allow the defendant to participate in a diversionsary program. It is required that:¹³²

- the defendant acknowledges responsibility for the offence (but this is not a plea);
- participation appears appropriate to the court (which may inform itself in any way); and
- the prosecution and defendant both consent.

3.116 The court will hold a hearing to decide whether the defendant is suitable for diversion. The victim can give the court their views, including whether they agree with the defendant participating in the diversionsary program and how they have been affected

¹³¹ Queensland Government response to the Queensland Productivity Commission inquiry into imprisonment and recidivism (January 2020) 11.

¹³² Criminal Procedure Act 2009 (Vic) ch 3 pt 3.3 div 2. There are some road safety offences to which this does not apply.



by the offence. If the defendant is suitable, the court will develop a plan. It can include requirements the court thinks are appropriate, such as for the defendant to apologise or compensate the victim, undertake counselling, do voluntary work, donate to charity, or attend a relevant course.¹³³

3.117 If the program is completed to the court's satisfaction, no plea will be taken and the defendant must be discharged without a finding of guilt. If the diversionary program is not completed, the defendant's compliance with the program will be considered during sentencing.

3.118 The Victorian Legislative Council Legal and Social Issues Committee 2022 report 'Inquiry into Victoria's criminal justice system' found that 'police cautions and court-based diversion programs are important mechanisms for diverting people away from the criminal justice system and connecting them with the social supports necessary to address the factors underpinning their offending'.¹³⁴ A 2004 evaluation of the Victorian diversionary program found that '94% of diversions were successfully completed' and that participants responded positively to the program.¹³⁵ The report found that the use of diversionary programs is generally supported, and recommends the Victorian government investigate opportunities for improving access to court-based diversion programs, including recommending reviewing the need for the prosecutor's consent.¹³⁶

3.119 In Queensland, the Women's Safety and Justice Taskforce report recommended the creation of a new court-based domestic violence perpetrator diversion scheme. This is an example of a recommendation to defer prosecution to allow for in-court diversion for some domestic and family violence related offending.

3.120 The scheme would apply to defendants accused of breaching a domestic violence order when (among other things):¹³⁷

- the defendant admits their conduct;
- the defendant has not previously breached any domestic violence order and does not have previous convictions for domestic and family violence related offences;

¹³³ Magistrates' Court of Victoria, *Diversion* (Web Page, 16 March 2020) <<https://www.mcv.vic.gov.au/find-support/diversion>>; Magistrates' Court of Victoria, *Criminal Justice Diversion Program* <www.mcv.vic.gov.au/sites/default/files/2018-10/Criminal%20Justice%20Diversion%20Program%20brochure.pdf>.

¹³⁴ Legislative Council, Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's criminal justice system* (Report, March 2022) vol 1, Finding 18, Rec 24 (*'Inquiry into Victoria's criminal justice system'*).

¹³⁵ *Ibid* vol 1, 497.

¹³⁶ *Ibid* vol 1, 497–501, Rec 62.

¹³⁷ Women's Safety and Justice Taskforce (n 26) vol 3, Rec 74, 730-34.



- the behaviour constituting the breach could not also be prosecuted as an indictable offence; and
- the court is satisfied the defendant is suitable for participation, taking into account any victim's views and wishes and the nature of the behaviour in the context of the relationship between the victim and defendant.

3.121 If the intervention program is completed, the defendant will not be further dealt with for the breach of order. Failure to complete the program will result in the breach offence being returned to court for prosecution (unless the defendant applied to vary or revoke the diversion order). Failure to complete the diversion program could also be considered by a sentencing court as an aggravating factor if the person is convicted of breaching a domestic violence order or another domestic violence offence in the future.

3.122 In New South Wales, an accused person or offender may be referred for participation in an intervention program. This can occur as a condition of the person's bail, or the court can adjourn proceedings for up to 12 months before a finding of guilt, with bail granted to allow time for assessment and participation in the program.¹³⁸ There are also some sentencing options involving intervention programs.¹³⁹ An intervention program can be conducted in relation to summary offences, or indictable offences that can be dealt with summarily. Current intervention programs are the 'circle sentencing intervention program' and the 'traffic offender intervention program'.¹⁴⁰

CONSULTATION QUESTIONS

QUESTION 36: Could an in-court diversion program (as in Victoria) work in the Queensland Magistrates Courts? What issues need to be considered?

QUESTION 37: What procedures could be included in criminal procedure laws in Queensland to enable the Magistrates Court to divert a person out of the court system before the person pleads guilty or is sentenced? For example, could the court make its own orders? What types of requirements could be included?

QUESTION 38: Are there any offences, or types of offences, for which in-court diversion should not be available?

¹³⁸ *Criminal Procedure Act 1986* (NSW) ch 7 pt 4.

¹³⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 10, 11. Specifically, the court can defer a person's sentence for up to 12 months to allow for participation in an intervention program or, following a finding of guilt but without proceeding to conviction, the court may discharge a person on the condition of their participation in a program. The court can also dismiss a charge.

¹⁴⁰ *Criminal Procedure Act 1986* (NSW) ss 347–48; *Criminal Procedure Regulation 2017* (NSW) pts 7, 9.



Cautions and no convictions

3.123 In Queensland, a child accused of committing an offence can be cautioned by a police officer instead of being brought to court.¹⁴¹ The child must admit committing the offence to the police officer and consent to the caution. After cautioning, the child will not be prosecuted for the offence and the caution will not be part of their criminal history. The purpose, nature and effect of the caution must be explained to the child.¹⁴²

3.124 If a child pleads guilty to an offence before the Childrens Court, the court can decide to dismiss the charge instead of accepting the plea. The court must be satisfied that the child should have been cautioned, or that no action should have been taken in relation to the offence. The court may choose to administer a caution to the child or direct a police officer to do so.¹⁴³

3.125 In relation to adults, police have a discretion to issue adult cautions for 'lower-end, non-habitual offending' without commencing proceedings. The adult must not deny committing the offence and must provide informed consent to the caution. A police officer cannot issue an adult caution for indictable offences that cannot be dealt with summarily, or for any offences (whether or not they can be dealt with summarily) involving:¹⁴⁴

- domestic and family violence;
- drink or drug driving;
- offences against the *Drugs Misuse Act 1986*; or
- a victim, where an injury amounts to 'bodily harm' (or worse) or where the victim experienced an outstanding financial loss.

3.126 In Scotland, some options available to the court include:¹⁴⁵

- 'if it appears to meet the justice of the case', convicting a person of the offence and dismissing them with an 'admonition' (which is a formal warning not to offend again); or

¹⁴¹ *Youth Justice Act 1992* (Qld) pt 2 div 2.

¹⁴² *Ibid* ss 15–18.

¹⁴³ *Ibid* s 21.

¹⁴⁴ Queensland Police Service, Operational Procedures Manual, Issue 87 (Public Edition, 8 April 2022) [3.2.2].

¹⁴⁵ *Criminal Procedure (Scotland) Act 1995* s 246; Scottish Sentencing Council, *Sentences and Appeals* (Web Page) <<https://www.scottishsentencingcouncil.org.uk/about-sentencing/sentences-and-appeals/>>.



- taking into account the nature of the offence and the defendant's character, making an order of an 'absolute discharge' (with no conviction in summary matters).¹⁴⁶

3.127 We want to know if cautions or absolute dismissals could work to resolve proceedings.

CONSULTATION QUESTIONS

QUESTION 39: Should the Magistrates Court have the power to issue a caution if it is of the view the police officer should have cautioned the adult person (in a similar way to the Childrens Court)?

QUESTION 40: Should new legislation about criminal procedure provide, as in the Childrens Court, that instead of accepting a plea of guilty the Magistrates Court can dismiss a matter, and may caution an adult? What issues need to be considered?

QUESTION 41: Should cautions be formally recorded? If so, in what circumstances could a proceeding end this way? What should be included in the new criminal procedure legislation? What issues need to be considered?

QUESTION 42: Should the court be able to strike out a charge or order an 'absolute dismissal' for trivial matters (not as part of a sentence)? If so, what matters would be trivial? In what circumstances should this occur?

Summary hearings and pleas of guilty

3.128 When a matter is dealt with summarily in the Magistrates Court, the defendant will enter a plea of guilty or not guilty.

3.129 If a defendant pleads guilty, the matter will proceed to sentence. This can include referrals to specialist courts, such as the Queensland Drug and Alcohol Court or the Murri Court.¹⁴⁷

3.130 A defendant can plead guilty in writing to an offence that is not indictable. A defendant can also submit a guilty plea for a 'minor offence' online through the Queensland Courts website.¹⁴⁸ In those circumstances, the defendant does not need to appear at the next court date. If the written plea is accepted, the Magistrate may sentence the defendant in their absence. Otherwise, if the written plea is not accepted, the matter

¹⁴⁶ See also, in Queensland, the *Penalties and Sentences Act 1992* (Qld) ss 17–19. This provides for a sentence of an absolute release, especially where no punishment should be imposed.

¹⁴⁷ *Justices Act 1886* (Qld) s 145; Queensland Courts, *Queensland Drug and Alcohol Court* (Web Page, 15 March 2021) <<https://www.courts.qld.gov.au/courts/drug-court>>; Queensland Courts, *Murri Court* (Web Page, 23 January 2017) <<https://www.courts.qld.gov.au/courts/murri-court>>.

¹⁴⁸ Queensland Courts, *Plead guilty online* (Web Page, 13 December 2021) <<https://www.courts.qld.gov.au/going-to-court/plead-guilty-online>>.



will be adjourned and dealt with later as if the defendant had not made a written plea (and the defendant will be required to appear).¹⁴⁹

3.131 If a defendant pleads not guilty, the matter will proceed to a summary hearing. The prosecution must prove ‘beyond reasonable doubt’ that the defendant is guilty. This can involve calling witnesses to give evidence, producing evidence and making submissions to the court. The defendant can cross-examine prosecution witnesses, call their own witnesses and submit evidence in their defence. At the end of the summary hearing, the Magistrate will consider the evidence and either find the defendant guilty and proceed to sentence or find the defendant not guilty and dismiss the charge.¹⁵⁰

Proceeding in the defendant’s absence

3.132 In addition to written pleas of guilty, matters can also be finalised where the defendant has not attended court or consented to the matter proceeding without them. Traditionally a proceeding without one (or more) parties being present at court is known as ‘*ex parte*’. Under the Justices Act, if the Magistrate is satisfied the defendant had reasonable notice of the date and time to attend court, the Magistrate may proceed to hear and determine the case as if the defendant had attended, issue a warrant for the police to bring the defendant before the court or adjourn the matter.¹⁵¹

3.133 If the Magistrate finds the defendant guilty in their absence,¹⁵² the Magistrate can sentence the defendant to any of the standard sentencing options. However, the Magistrate cannot sentence the defendant to imprisonment or cancel, suspend or disqualify the person from holding a licence (or another type of authorisation)¹⁵³ unless the matter is adjourned and the defendant is notified that they can appear at the next court date to make submissions about the penalty they should be given. If the defendant does not appear at the next date, they can be sentenced in their absence.¹⁵⁴

3.134 If the prosecution is started by a police officer or public officer¹⁵⁵ and is for a simple offence as defined under the Justices Act or breach of duty, the Magistrate may decide the case based on what the prosecution submits in writing or states to the

¹⁴⁹ *Justices Act 1886* (Qld) s 146A.

¹⁵⁰ *Ibid* pt 6 div 3.

¹⁵¹ *Ibid* s 142(1).

¹⁵² This includes following a written plea of guilty.

¹⁵³ Specifically, a licence, registration, certificate, permit or other authority that is held under any Act: *Justices Act 1886* (Qld) ss 142(2)(a), 142A(6)(b)–(c).

¹⁵⁴ *Justices Act 1886* (Qld) ss 142(2)–(4), 142A(6)–(8).

¹⁵⁵ See [3.42] and *Justices Act 1886* (Qld) s 4 for the meaning of ‘public officer’.



court, as if those things had been proven by evidence given under oath.¹⁵⁶ This means there is no hearing, and the prosecution does not need to bring witnesses or victims to court to give evidence. It allows for the matter to be decided sooner.

- 3.135 When a person is convicted and sentenced without being present or having their lawyer present, they must be sent a notice of any conviction and any order that was made.¹⁵⁷
- 3.136 Other jurisdictions have some differences in their provisions. In Victoria, if a defendant is found guilty in their absence, the court must not sentence them to imprisonment. There are also limits on the amount of any fine, and they cannot be ordered to pay more than \$2000 in restitution or compensation. If it seems during the proceedings that the penalty is likely to be imprisonment or exceed those financial limits, the court must adjourn so the defendant can attend and may issue a warrant for the defendant to be arrested and brought before the court.¹⁵⁸ Under the new Tasmanian law due to commence in October 2022, the court may find a person guilty in their absence but can only sentence them to a fine or a conviction and discharge, or decide not to record a conviction and dismiss the charge. Other sentences or orders can only be made when the defendant is present in court.¹⁵⁹
- 3.137 Some safeguards also apply. Rehearings are available in Queensland and other jurisdictions when a matter is dealt with in the defendant's absence.¹⁶⁰ They are generally allowed when the defendant can show they did not have proper notice about the court date or there is some other reason why the matter should be reopened. In Queensland, the defendant has two months to apply to the court for a rehearing. This period cannot be extended, even if the defendant does not become aware of the court decision until after the period has expired.¹⁶¹

CONSULTATION QUESTIONS

QUESTION 43: Are criminal procedures about summary hearings and pleas of guilty, including written pleas of guilty, working in practice? How could they be changed or improved?

¹⁵⁶ *Justices Act 1886* (Qld) s 142A(4).

¹⁵⁷ *Ibid* ss 142A(10), 150.

¹⁵⁸ *Criminal Procedure Act 2009* (Vic) s 87.

¹⁵⁹ *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 28 (not in force).

¹⁶⁰ The original conviction or orders cease, and the court rehears the matter exercising all the powers and procedures it has on the original hearing. However, rehearings are not available following dealing with a defendant in their absence where they have notified the court of a written plea of guilty. For information on rehearings in Victoria, see *Criminal Procedure Act 2009* (Vic) ch 3 pt 3.4.

¹⁶¹ *Justices Act 1886* (Qld) ss 142(6), 142A(12); *Guy v McLoughlin* [2006] QDC 17, [14].



QUESTION 44: When should a matter be able to be dealt with in the defendant's absence (if at all)?

QUESTION 45: If a Magistrate is dealing with a matter in the defendant's absence, should the sentencing options available to the Magistrate be restricted? If yes, how?

Committal proceedings

- 3.138 We previously said some indictable offences can only be decided by the Supreme and District Courts. For these indictable offences, there must be a 'committal' to transfer the offence (or offences) from the Magistrates Court to the Supreme or District Court. Committal proceedings are a separate function of the courts working in its administrative role to transfer charges to a higher court.¹⁶²
- 3.139 Generally, before a Magistrate can commit a charge, they must be of the opinion there is sufficient evidence to put the defendant on trial. If the Magistrate does not consider there is sufficient evidence, then the charge may be dismissed.¹⁶³ A defendant can sometimes consent to a committal, meaning that the Magistrate is not required to consider whether there is sufficient evidence.¹⁶⁴ If a defendant pleads guilty to the charges in the Magistrates Court, they will be committed to the higher court for sentence. Otherwise, the charges will be committed for trial (but the defendant can still choose to plead guilty later).
- 3.140 In Queensland, the committals process was significantly reformed in 2010.¹⁶⁵ These reforms included limiting the circumstances in which witnesses would have to give evidence during a committal and providing for alternative ways for a committal to take place. In this review, we will not be removing or changing the committals system or undoing the effects of those reforms. However, we will consider whether we can make changes that improve the criminal procedures and processes related to committals.
- 3.141 The current committals process generally allows for three types of committal proceedings:¹⁶⁶

¹⁶² *Grassby v The Queen* (1989) 168 CLR 1, 11. Committals are the use of administrative power (not judicial power). This means no binding decision about guilt is made. The distinction can be seen in the *Justices Act 1886* (Qld) s 71 which refers to the 'room or place in which justices take the examinations and statements of persons charged with indictable offences for the purpose of committal for trial', compared to a court where hearings occur.

¹⁶³ *Justices Act 1886* (Qld) ss 104, 108, 110A(7), (9), (10).

¹⁶⁴ *Ibid* s 110A(6D)–(6F).

¹⁶⁵ See *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) (as passed).

¹⁶⁶ For committal proceedings see *Justices Act 1886* (Qld) pt 5 divs 5–8. The *Justices Act* uses the phrase 'examination of witnesses in relation to an indictable offence' when dealing with committals (see also the definition of that phrase in s 4).



- Registry committal:¹⁶⁷ Does not occur in court. This is where the prosecution and the defence¹⁶⁸ consent to the matter being committed. The process is done by court registry staff on the papers (administratively). Most committals in Queensland are registry committals. The current provisions are very detailed and require the filing of notices at different points. Anecdotally we understand the current requirements can lead to delays if steps are not complied with fully (for example, if notices are not completed accurately and promptly by prosecution and defence).
- Full hand up committal:¹⁶⁹ Occurs in court before a Magistrate. The written witness statements are used instead of the witnesses giving evidence in person in court. Unrepresented defendants can proceed by full hand up committal if the magistrate is satisfied of certain matters. A legally represented defendant can consent to being committed without consideration of the written statements. Where a defendant is unrepresented or is represented but does not consent to the matter being committed, the magistrate decides if there is sufficient evidence to commit the defendant for trial. The provisions are complex. They also set out the requirements about the way statements need to be signed and other matters.
- Committal with examination:¹⁷⁰ Occurs in court before a Magistrate. This involves the cross-examination of (at least some) prosecution witnesses. It requires the consent of the prosecution, otherwise the permission of the court is required. This is discussed further below. The magistrate decides if there is sufficient evidence to commit the person for trial.

¹⁶⁷ See generally *Justices Act 1886* (Qld) pt 5 div 7A.

¹⁶⁸ The defendant must be represented by a lawyer: *Justices Act 1886* (Qld) s 114(1)(e).

¹⁶⁹ See generally *Justices Act 1886* (Qld) pt 5 div 5.

¹⁷⁰ *Ibid.*



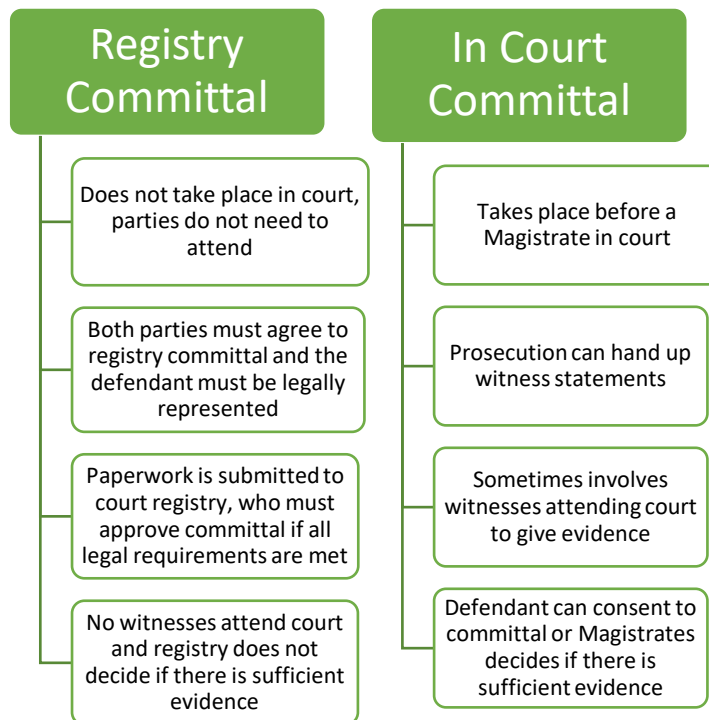


Image 5: Comparing registry committals and in court committals

3.142 A defendant in a committal proceeding may apply to examine or cross-examine a prosecution witness who has made a written statement. If the prosecution does not consent to calling the witness, this application will only be granted if the Magistrate decides that there are ‘substantial reasons why, in the interests of justice’ the witness should attend to give oral evidence or be available for cross examination.¹⁷¹ There is no specific guidance in the legislation about what is meant by ‘substantial reasons why it is in the interests of justice’, which can lead to varying interpretations of this provision.¹⁷²

3.143 Our current laws on cross examination in committals are based on New South Wales legislation.¹⁷³ In New South Wales there are relevant principles established in case law. These include:¹⁷⁴

- The purpose of restrictions on cross-examination is to ensure criminal proceedings are not delayed by unnecessary or lengthy cross-examinations of witnesses at the committal stage.

¹⁷¹ Ibid ss 83A(5AA), 110B(1).

¹⁷² See generally *Blackledge v Police* [2011] QMC 7; Lexis Advance, *Carter’s Criminal Law of Queensland* (online at 4 April 2022) [391,490.20]. See also Director of Public Prosecutions (Qld), *Director’s Guidelines as at 30 June 2016* (under review), [16].

¹⁷³ Moynihan (n 4) 193.

¹⁷⁴ *Sim v Corbett* [2006] NSWSC 665, [20]; *McKirdy v McCosker* (2002) 127 A Crim R 217, [29]; *Qaumi v DPP* (2008) 186 A Crim R 72, [51]–[57].



- The obligation is on the defence to satisfy the court there are substantial reasons why cross-examination is required. Each case is considered based on its unique circumstances, which means an exhaustive list of what might constitute substantial reasons cannot be given.
- The purpose of requiring a witness for cross-examination must be made clear by the defence. It is not enough to make general broad statements like the cross-examination is 'relevant' or 'goes to credit'.
- Where the prosecution has fully disclosed their case and the witness statements are sufficiently detailed, not all contradictions or inconsistencies between witnesses will require cross-examination at the committal stage.

3.144 Some examples of what might amount to 'substantial reasons' include: where cross examination might result in the defendant being discharged or not committed for trial, where a victim has given different versions of an alleged offence, to prevent the defendant being taken by surprise at trial, or where it may narrow the issues in dispute (which is especially important when there might be a lengthy trial).¹⁷⁵

3.145 The Justices Act currently contains specific provisions for committal proceedings where the defendant is a corporation.¹⁷⁶

Committal proceedings in other Australian jurisdictions

3.146 Committal proceedings operate differently in other Australian jurisdictions.

3.147 Some jurisdictions have removed the requirement for Magistrates to be satisfied there is sufficient evidence to proceed with the charge. Instead, they rely on case management procedures to make sure there is a sufficiently strong case for trial.¹⁷⁷

3.148 For example, in Western Australia the court lists the matter for a 'disclosure/committal hearing' when the defendant enters no plea, or any plea other than guilty, to an indictable offence. The disclosure/committal hearing is listed for a date that gives the prosecution reasonable time to comply with full disclosure obligations. If the prosecution complies with disclosure requirements, the defendant must enter a plea at the disclosure/committal hearing and the matter is committed for sentence or trial. If the prosecution has not complied with their disclosure requirements, the court may adjourn the matter again for this to be completed. If the prosecution has still not

¹⁷⁵ Lexis Advance, *Carter's Criminal Law of Queensland* (online at 4 April 2022) [391,490.20] citing *Police v K* [2011] QMC 2; *Police v ED* [2011] QMC 3; *Police v DWB* [2011] QMC 4; *Blacklidge v Police* [2011] QMC 7.

¹⁷⁶ *Justices Act 1886* (Qld) s 113A.

¹⁷⁷ See eg, *Criminal Procedure Act 1986* (NSW) s 55; *Criminal Procedure Act 2004* (WA) s 44. Magistrates make sure the procedural steps are complied with (supervisory role).



complied by the second disclosure/committal hearing, the court may adjourn the matter further or dismiss the charge.¹⁷⁸

3.149 In New South Wales, the Director of Public Prosecutions must file a charge certificate with the court, confirming they have enough evidence to prove the charge. After this certificate is filed but before the matter is committed, parties must hold a case conference to try and resolve the matters in dispute or reach a plea of guilty so the matter can be finalised.¹⁷⁹

CONSULTATION QUESTIONS

QUESTION 46: How could the existing committal procedures in Queensland be improved? (This applies to registry committals and committals taking place in court.)

QUESTION 47: Should there be a compulsory directions hearing before a committal takes place? If yes, what should be the purpose and requirements of this hearing? Should there be any circumstances where a directions hearing can be waived (for example, where the parties indicate a matter will proceed as a registry committal)?

QUESTION 48: In relation to the examination of witnesses during committal proceedings, should the law include guidance about what is 'substantial reasons, in the interests of justice'?

Victims of crime

3.150 In this review, we are also considering the interests of victims of crime. In doing so, we fully acknowledge victims are not a single generic group with uniform interests seeking the same results.

3.151 We cannot make changes to other existing laws about how victims can be involved in criminal proceedings (such as the *Victims of Crime Assistance Act 2009* or the *Evidence Act 1977*). However, we can consider how criminal procedures in the Magistrates Courts might be able to better consider the needs and interests of victims.

3.152 In Queensland, the *Victims of Crime Assistance Act 2009* contains a charter of victims' rights. A 'victim' is a person who suffered harm:¹⁸⁰

- because a crime was committed against them;
- because they are a family member or dependent of a person who died or suffered harm because of a crime committed against that person; or

¹⁷⁸ *Criminal Procedure Act 2004* (WA) ss 41, 44.

¹⁷⁹ *Criminal Procedure Act 1986* (NSW) ss 66–7, 70, 75.

¹⁸⁰ *Victims of Crime Assistance Act 2009* (Qld) s 5. It sometimes also includes victims of domestic violence and their family members, dependents or helpers.



- as a direct result of intervening to help a person who died or suffered harm because of a crime committed against that person.

3.153 In this Act, a ‘crime’ means an offence that is related to domestic violence or an offence ‘against the person’ of someone. An offence ‘against the person’ is an offence that causes someone harm, such as assault or murder.¹⁸¹

3.154 The rights of victims include:¹⁸²

- being informed about the investigation of the crime and each major decision made about the prosecution (such as a decision about the charges brought or the acceptance of a plea of guilty to a lesser charge);
- being informed about the issuing of a warrant, bail applications and their outcome, relevant court processes and whether they can attend, diversionary programs available to the defendant, and the outcome of criminal proceedings against the defendant;
- being protected from unnecessary contact with, or violence or intimidation by, the defendant and their witnesses, family members or supporters; and
- making a victim impact statement for consideration during sentencing.

3.155 We understand that the interests of victims can be taken into account procedurally in the different ways discussed below. We are interested in hearing what other ways could improve victims’ interests in criminal procedures in the Magistrates Court.

3.156 Restorative justice (mediation) is important for victim involvement. This is an ‘internationally recognised evidence-based response to criminal behaviour, which views a criminal offence as more than an act of breaking the law’. Mediation ‘examines the harm caused to the victim, family relationships and the community’.¹⁸³

3.157 In Queensland, adult restorative justice conferencing has a significant element of victim recognition and participation. If a victim agrees to participate, the conference provides a ‘safe environment’ for the victim to talk about the harm caused by the offence, have their questions answered by the person responsible and discuss what needs to be done to make things right in a way that is meaningful to them.¹⁸⁴

¹⁸¹ Ibid s 6; Criminal Code (Qld) pt 5.

¹⁸² *Victims of Crime Assistance Act 2009* (Qld) sch 1AA.

¹⁸³ Queensland Government, *About Adult Restorative Justice Conferencing* (Web Page, 15 June 2018) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

¹⁸⁴ Ibid.



3.158 Youth justice conferences are incorporated into various stages of youth criminal proceedings, including as a sentencing option. In 2020-21, it was reported that of the matters that were conferenced, 98% ‘resulted in an agreement being reached between conference participants’.¹⁸⁵

3.159 A recent Victorian Parliamentary Committee report found that:¹⁸⁶

Restorative justice processes give a greater voice to victims of crime in criminal justice proceedings compared to traditional processes, such as court proceedings. This increased participation can lessen the trauma and dissatisfaction many victims of crime experience navigating the mainstream criminal justice system.

3.160 Deferred prosecution agreements, discussed earlier, can also allow for victim participation. It has the potential to be a more culturally responsive approach for First Nations people as it can allow for victim participation in restorative justice processes and negotiated outcomes to resolve matters in a culturally appropriate way.¹⁸⁷

3.161 Victims can also be protected by having criminal procedure laws that resolve matters quickly and simply. These laws should not impose additional procedural requirements that delay matters. According to a recent Victorian report:¹⁸⁸

A fast resolution to a criminal matter can benefit victims for several reasons, including:

- allowing victims to move forward in their recovery
- reduced interactions with police or the court system, which can be distressing
- victims may feel safer from the offender, or from similar criminal acts, once their case has been resolved ...

3.162 We also know the Women’s Safety Justice Taskforce is considering women and girls’ experience as victim-survivors of sexual violence. The Taskforce is interested in how the court process can be improved to better support victims and improve effectiveness and efficiency, while also ensuring just outcomes. Its report is due at the end of June 2022. We are not seeking to duplicate this important work around victim experience or improving victim participation. Our review’s focus is on Magistrates Court procedures to resolve criminal offences. However, we can learn from its report.

¹⁸⁵ Queensland Courts, *Childrens Court of Queensland: Annual Report 2020-21*, 24.

¹⁸⁶ *Inquiry into Victoria’s criminal justice system* (n 134) vol 1, Finding 33.

¹⁸⁷ Gerry and Kelly (n 127) 387.

¹⁸⁸ Department of Justice and Community Safety (Victoria), *Improving victims’ experience of summary proceedings* (Final Report, November 2021) 4.



CONSULTATION QUESTION

QUESTION 49: How can victims' interests be incorporated into Magistrates Court criminal procedures? This includes decisions to divert a defendant out of the criminal justice system, diversionary processes and outcomes, and court proceedings (for example, in closing the court room or considering adjournment applications).

Costs

- 3.163 When we use the term 'costs' we mean an amount of money for legal expenses in a proceeding. When a party to a legal proceeding is successful, they can sometimes be awarded costs, which must be paid by the other party.
- 3.164 The Justices Act allows for costs to be awarded on summary convictions and orders¹⁸⁹ in the Magistrates Court in certain circumstances. They can also sometimes be awarded when a matter is dismissed or appealed to the District Court, or when a party has not complied with a direction about disclosure.¹⁹⁰ This is another way the criminal jurisdiction of the Magistrates Court is different to the higher courts.
- 3.165 Costs are not ordered automatically by a magistrate on conviction or dismissal. The magistrate has a discretion to award costs looking at all the circumstances. Also, there are special considerations for making costs orders when a charge brought by a police officer or public officer is dismissed. A magistrate needs to be satisfied it is 'proper' that the order is made considering the relevant circumstances, including whether the proceeding was brought and continued in good faith.
- 3.166 Anecdotally, we understand costs orders are not normally sought by the Queensland Police Service following a conviction.
- 3.167 Generally, only 'just and reasonable' costs can be awarded. What is just and reasonable links to the scale of costs in the *Justices Regulation 2014*. This scale sets out the types of work for which costs can be awarded and the maximum amount of costs that is allowed.¹⁹¹ Broadly, this means not all legal expenses are recoverable.
- 3.168 In this review, we are not removing the ability for costs to be ordered in the Magistrates Courts. We are interested in hearing how the scheme operates and what could be improved. We have noted the scale of fees has not been updated in some time.

¹⁸⁹ This includes convictions for indictable offences that have been dealt with in the Magistrates Courts.

¹⁹⁰ Eg, *Justices Act 1886* (Qld) ss 83B(4)(b), 157–158A, 226, 232(4). There are other circumstances where costs can be awarded.

¹⁹¹ *Justices Act 1886* (Qld) ss 158B, 232A; *Justices Regulation 2014* (Qld) s 19, sch 2. Higher costs can be awarded if satisfied the higher amount is just and reasonable having regard to the special difficulty, complexity or importance of the case.



3.169 We have also noticed costs are treated differently under the *Drugs Misuse Act 1986*. Costs cannot be awarded in relation to proceedings for offences under that Act, except where the costs are awarded because of a failure to comply with a direction about disclosure.¹⁹²

CONSULTATION QUESTIONS

QUESTION 50: Are the costs provisions in the current legislation working? What could be improved?

QUESTION 51: Should the law be changed so that costs can be awarded in relation to offences under the *Drugs Misuse Act 1986* that are heard and decided in the Magistrates Courts, consistent with the current provisions in the Justices Act?

Conclusion

3.170 As we explained at the beginning, this part of the Consultation Paper has discussed some of the key issues related to criminal procedure in Queensland's Magistrates Courts. It also includes some specific questions that we would like to hear your views about. In making your submission, you can respond to some or all of these questions.

3.171 However, this paper is not a complete discussion of the procedural law in the Magistrates Courts or all the relevant issues under the Justices Act. There might also be other issues we have not mentioned here that you want to tell us about. We want to hear from you about those issues in your submission.

3.172 This is a ground-breaking review, especially given the important role Magistrates Courts have in dealing with criminal matters in Queensland. This is a significant opportunity to contribute to the reshaping of criminal procedure laws so they match with contemporary justice system needs, expectations and values suitable for the Magistrates Courts.

3.173 We want to thank you for taking the time to help us with this important work. It is only with your help that we will be able to understand the issues, identify solutions and make recommendations that will shape a new legislative framework for contemporary and effective criminal procedure laws in Queensland's Magistrates Courts.

3.174 We will consider your submissions as we prepare the report to guide the preparation of new criminal procedure legislation in Queensland's Magistrates Courts.

3.175 We are looking forward to hearing from you.

¹⁹² *Drugs Misuse Act 1986* (Qld) s 127.



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.

