15 July 2022

His Honour Judge Michael Shanahan AM
Criminal Procedure Review
Magistrates Court
GPO Box 149
BRISBANE QLD 4001

By email: Criminal-Procedure-R@justice.qld.gov.au

Dear Judge

Submission in response to Consultation Paper April 2022

The Association is grateful to have received the Criminal Procedure Review Magistrates Courts Consultation Paper, and to have the opportunity to provide its preliminary views with respect to the questions contained therein. This response has been prepared by members of the Association's Criminal Law Committee.

In this submission, the Association's responses are contained in numbered paragraphs, which correspond with the questions posed in the Consultation Paper.

Criminal procedure in the Magistrates Court – generally.

1. The Association considers that summary criminal procedures in Queensland generally work well, but that there is room for improvement. The Association's views about the scope for improvement is set out in our responses to the following questions.

2. In the Association's view, the summary of the 2002 Scottish review of its criminal procedures contained in sections 2.36 and 2.37 of the Consultation Paper provides an appropriate description of the priorities and principles appropriate to the development of a 'contemporary and effective' summary criminal procedure in Queensland.

3. The Association recognises the importance of ensuring all community groups (including First Nations people, people from culturally and linguistically diverse backgrounds, women, people with disability, victims of crime and the general community) are able to understand, connect with and participate in the summary criminal process. The Association recognises that each group is best placed to propose amendments to better accommodate the needs of its members, and the Association will be interested to review and consider these proposals in due course. The Association will be pleased to be included in discussions related to these proposals as the consultation progresses.

[redacted]

Guiding principles

4. In the Association's view, it would not be necessary to include a statement of guiding principles in the new legislation. In this regard, the Association notes that the District and Supreme Courts operate without legislation incorporating such a statement. However, if guiding principles were to be included, the Association considers that principles along the lines of those set out in section 3.8 of the Consultation Paper would be appropriate.

A single Magistrates Court?

5. The Association does not oppose the creation of a single Magistrates Court of Queensland. This would bring the structure of the Magistrates Court in line with that of the District and Supreme Courts, and would be likely to improve the efficiency and flexibility of the operation of the Court.

Renaming the Court

6. The Association has considered the arguments in support of renaming the Magistrates Court as the Local Court. Notwithstanding the reasons which would support such a change, the Association holds some concerns about the proposal. The Association would be grateful to be included in further consultation on this issue when it is considered in detail in due course.

7. The Association holds similar reservations about the potential renaming of the title 'Magistrate' as 'Local Court Judge' and, for that reason, would be grateful to be included in further consultation on this issue when it is considered in detail in due course.

Technology and the Courts

8. The Association considers that the new Act should contain provisions to allow for electronic processes and procedures as part of the modernisation of the summary criminal procedure.

9. The Associations considers that the key areas where procedures could be improved by the use of technological solutions include the signing and filing of court documents and warrants, and providing for some court appearances to be conducted remotely by video or audio link.

10. The Association considers that it is appropriate that the new Act contain a presumption in favour of summary hearings being conducted in person. However, as with the District and Supreme Courts, it would be appropriate for there to be provisions which would allow for witnesses to give evidence remotely in certain circumstances (ie because they are a professional witness, or are located remotely).

Types of proceedings heard in the Magistrates Court

11. The Association is not aware of proceedings in the Magistrates Courts concerning alleged breaches of duty, suggesting that, in practice, such proceedings are rare.

12. The Association is in favour of uniformity of language as between *Code* and any legislation about criminal procedure. The current situation, whereby "simple offence" is defined differently in the *Justices Act* and the *Code* is unhelpful and potentially confusing.

The term "summary offence" has the advantage of clearly connoting that such an offence can (or must) be dealt with in a summary way.

13. Chapter 58A of the *Code* is, in the Association's view, unnecessarily complex and highly confusing. It would be preferable if the provisions that governed which indictable offences could (or must) be dealt with summarily were completely re-drafted.

Starting proceedings

14. In the Association's view, the current system of complaint and summons should be replaced with a single mechanism involving an attendance notice (however described). Legislation governing any such mechanism should make it plain that the initiating process is not amenable to challenge by reason of technical defects. That is not to say that the court should not retain its power to stay or dismiss a charge in the event that it is found to be an abuse of process, duplicitous or insufficiently particularised.

15. Starting proceedings could be simplified by the adoption of a procedure similar to that involved in the issue of a Notice to Appear.

When have proceedings started?

16. In order to facilitate a determination about whether proceedings have been commenced within the limitation period, it will be necessary for the legislation to specify when the proceedings are to be regarded as having been formally commenced. As to when that should be, that will depend upon the initiating process that is ultimately settled upon, however the Association takes no position as between the date of issue of the attendance notice, or the date upon which it is filed in the court. The date of service on the defendant should be avoided, as that might permit a defendant to avoid service until after the effluxion of the limitation period.

Particulars

17. The Association supports a process whereby an attendance notice would contain basic information as to the nature of the charge, the identity of any victim or any property in question as well as any circumstance of aggravation. This would not relieve the prosecution from the need to provide proper particulars at a later time.

18. This requirement should be consistent across all initiating documents. There should not be a uniform requirement for the filing of a second document containing further particulars, as the need for this will vary according to the nature of the case.

Private prosecutions

19. In the Association's view, the current provisions regulating private prosecutions permit the misuse of the procedure for malicious or vexatious purposes. *DBX v TAT* [2021] QCA 242 is a good example, although there have been several other cases – some involving the same would-be prosecutor. Whilst the current provisions in the JA can be used to bring the proceedings to an end, the defendants are exposed to a process that is expensive and time-consuming – something which arguably achieves the objectives of the prosecutor.

20. Whilst the Association recognises the need to preserve the right of a private individual to prosecute allegedly criminal behaviour (particularly when the authorities refuse to do so,

such as in the case of *Rowe v Kemper* [2008] QCA 175) the ability to commence a private prosecution should be subject to restriction to prevent abuse. This could be achieved by a process whereby a person wishing to commence a private prosecution must first seek leave of the court or a registrar. Furthermore, the current provisions (or something to similar effect) that regulate the conduct of a private prosecution should be retained.

Disclosure, case conferencing and case management

21. The Association's view is that most prosecutors and prosecuting authorities understand their obligations of disclosure. The failure of that obligation is limited to circumstances where individual prosecutors do not appreciate the scope and nature of those obligations. These persons, the subject of that criticism, are the exception. This reflects the growing professionalism of Police Prosecutions and other prosecuting authorities (who frequently brief counsel at the private bar).

22. The disclosure process can be improved by a staged process of disclosure that occurs on a set time frame. This is developed in the answer to question 28.

23. The Association's view is that the disclosure obligations should be the same across all courts. The adequacy of disclosure is essential to a fair hearing of a matter.[1] Inconsistency in disclosure obligations does not advance that fundamental goal. This would be effectively implemented by the extension of the disclosure obligations under the Criminal Code to all offences in Queensland.

24. As it is the Association's view that the disclosure obligation ought be the same across all jurisdictions, it follows that the defence obligations should be the same.[2] The timely disclosure of such evidence prevents unnecessary adjournment of the hearing of a matter.[3]

25. The Association acknowledges the great benefits of proper case conferring to the administration of justice. The principal complainant of the practitioners is the inconsistency in the actual process of case conferencing. The limitation to case conferencing has been the inadequacy of resourcing that process. In Brisbane case conferencing is limited to a single day before matters are called over.[4] The prosecutors have often only received the brief at the time of conferencing and so are placed under enormous pressure to resolve matters without reflection or a full appreciation of the brief. The default position of the prosecutor, which is explicable in the circumstances, is to defer to the opinion of the arresting officer. Outside of Brisbane, case conferring is *ad hoc* and dependent upon the attitude and resourcing of the prosecutors allocated to those Courts.

26. By reason of the answer set out immediately above, the Association's view is that a formalisation of the case conferencing process in the legislation is desirable. There are differences between what is necessary to manage a matter that will proceed by way of committal, and a matter that will proceed by way of Summary Trial.[5] However, the differences in proceeding are not determinative of how a matter ought to be managed.

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[1] *R v HAU* [2009] QCA 165.
[2] In accordance with s.590A of the *Criminal Code.*
[3] Cf. *R v Sullivan* [1970] 1 QB 253 at 258.D-F.
[4] In the Brisbane Courts that is the Wednesday before the Summary Callover.
[5] The present practice directions, as they apply to Committals, necessitate a degree of case management.

The nature of the case will determine what degree of case management is necessary. It is the simplicity or complexity of issues that are inherent to a particular case that are determinative of their respective need for management.

In light of the above, the Court should be given broad powers of case management[6] with identified goals to be achieved in a timely way.[7]

The Association recommends the development "Best Practice Guides"[8] that assist the prosecution (and the defence) in fulfilling its obligations of efficiently advancing criminal cases to their resolution.

27. It is the Association's view that case management should be mandatory. This follows from an acknowledgment as to the importance of the process. There is no reason why such importance is diminished in the case of a self-represented litigant, in fact the importance of managing the court process in the context of a self-represented litigant may in fact be heightened.

28. It is the Association's view that there should be timeframes for matters progressing through the Magistrates Courts. The great majority of matters are capable of being resolved in a four month time frame. That time frame may be extended or contracted at the application of a party by reason of the matters inherent complexity, simplicity or to meet the practicalities of a particular defendant.[9] The provision of a full-brief should occur within six-weeks of the charging of an individual. However, a significant part of the delay in provision of a full briefs is a consequence of inadequate resourcing of forensic processes and the inordinate delay in their provision.[10] In the absence of addressing this issue, any mandated time frame will be incapable of being complied with.

In-court diversion and resolving proceedings

29. The Association agrees to "in court diversion" as part of the legislation. The Association agrees with the conclusions of the Queensland Productivity Commission (the QPC) that asserts:[11]

Our report makes the case for a narrowing of the scope of criminal offences. We argue for some crimes to be punished with non-custodial options. We propose a greater role for restitution and restorative justice. We recommend widening the sentencing options available to the courts. We conclude that better rehabilitation and reintegration would reduce recidivism. We recommend an expansion of diversionary options. We consider the overrepresentation of Indigenous people and provide recommendations.

30. The Association agrees with the key points made by the Queensland Productivity Commission.[12] This report acknowledges the complexity of criminal behaviours in individuals and the multi-faceted contributors to their offending.[13] The risks of court

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[6] As is the case in the Northern Territory (although that involves Committal proceedings): 3.88 and n.105.
[7] Like the "four steps" in NSW: 3.90 and n.109.
[8] A suitable model, *mutatis mutandis*, may be seen in the publication of the Victorian Magistrates Court: *Best Practice Guide: Changes to Summary Procedure in the Magistrates' Court*.
[9] Cf. They may face further charges that need to be dealt with at the same time.
[10] Cf. Drug Analysis, Cellebrites and other forensic certificates.
[11] *Inquiry into Imprisonment and Recidivism*. This thesis statement is taken from the foreword to the Report.
[12] *Inquiry into Imprisonment and Recidivism* at p.154.
[13] Op cit at p.156

diversion are both to the community, if the interventions are inadequate to curb offending behaviour, and the offender, if they are criminalised by the "net-widening" which has a tendency to increase the imposition of sanctions. [14] The Association agrees with the use of legislated Court Diversion that would incorporate the QPC recommendations that include:[15]

(a) Deferred Prosecution Agreements;[16]
(b) The expansion of non-statutory cautions;[17]and
(c) A multi-stage caution and diversion scheme for personal drug possession.[18]

Principles

31. The Association supports the inclusion of specific objects or principles relating to "in-court diversion". The Association considers that the introduction of novel measures for dealing with criminal offending is best accompanied by guidance to judicial officers in the exercise of their discretion to use these measures, as well as principles that attempt to establish their importance. Furthermore, the introduction of such new measures will require appellate oversight to ensure that they are used correctly and appropriately. This is especially so since the novel measures would be being made available to the lowest court in the State's judicial hierarchy. Appellate oversight is best achieved when the discretion conferred on the lower court is not entirely unfettered, but is guided by underlying principles or objects.

The Association considers that the specific principles or objects required will depend on the policy objectives sought to be achieved by the diversion measures included in the legislation. However, broadly speaking, they ought to include recognition of the following matters:

(a) the importance of rehabilitation of offenders in the maintenance of community safety;
(b) that for low-level offences or for first-time, or non-recidivist offenders (i.e. those who may have a criminal history, but one that is dated or contains only infrequent entries), diversion is to be preferred when it seems it is likely to be effective in preventing further offending;
(c) that victims' rights pursuant to the Charter of Victims' Rights in the *Victims of Crime* Assistance *Act 2009* will be protected and that victims will be able to choose whether or not to be involved in any diversion process that occurs; and
(d) the importance of cultural considerations for both a defendant and victim when making decisions about diversionary options.

Mediation

32. The Association considers that the existing laws around mediation are capable of improvement. The laws relating to mediation, including the court's powers and the rights and obligations of the parties are not easily located or followed. Section 53A of the *Justices* Act *1886* empowers the court to make a mediation order. This section makes no

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[14] Op. cit at p.158.
[15] This is recommendation 34 of the Report: p.179.
[16] Op. Cit at p.165, 11.7. But see the reservations over the admission of guilt expressed by ATSILS at p170.
[17] Op. cit at p.176, Box 11.5.
[18] Op. cit at p.165, 11.6.

mention of referrals for mediation by the police. The Act does not include the words "adult restorative justice conferencing" at all. The experience of the Association's members is that the Magistrates Court *rarely* makes orders for mediation to occur pursuant to s.53A.

Further, the Act is silent as to the procedures to be adopted once the police have agreed to refer a matter for an adult restorative justice conference. This process is also not mentioned anywhere in the *Dispute Resolution Centres Act 1990*. For a legal practitioner *not* experienced in the criminal justice system in Queensland's Magistrates Courts, the procedure is not easily to be gleaned from an examination of the legislation. Greater clarity would be likely to increase the use of such options, especially for low-level offending and non-recidivist offenders who might be more likely to approach their local general practice solicitor rather than a firm with a focus on criminal law.

Deferred prosecution agreements

33. The Association considers that a scheme for deferred prosecutions could work in Queensland. Issues to be considered include the need to expand the powers and jurisdiction of Queensland Corrective Services and the Department of Youth Justice to include supervision of, and provision of services to those who are subject to such an agreement and the creation of conditions of such an agreement flexible enough to respond dynamically to the criminogenic needs of those people. It would also require the education of police prosecutors about the purposes and principles underlying such a scheme and, if possible, requiring an independent exercise of discretion in relation to suitability, removed from the involvement of arresting police officers.

34. The new procedures required would include:

    (a) strong and binding guidelines or directions to prosecutors about the use of such agreements and their purpose;
    (b) timeframes within which decisions must be made and limits on the length of deferral periods;
    (c) which offences or types of offences may be the subject of deferral agreements and which offences are excluded;
    (d) what steps must be taken to return a matter to court if a person fails to comply with their obligations under a deferral agreement including the giving of notice of an intention to return a matter to court and allowing a further opportunity to comply and then the taking into account of partial compliance in any further court process including sentencing.

35. The Association supports the broadest possible availability of offences be included in such a scheme to enable diversion to be as effective as possible. The Association submits that, if a charge can be heard and decided summarily, any diversion options ought to be available, including a deferred prosecution agreement. Given the nature of the summary jurisdiction, the Association considers that a deferral period of up to 12 months maximum would be appropriate, especially given that many simple offences have this as a statutory limitation period.

Diversionary programs

36. The Association considers that a diversion program could work in the Queensland Magistrates Court. The issues to be considered are similar to those in question 33 above

in relation to deferred prosecutions about the powers of Corrective Services and Youth Justice to supervise such programs.

37. The Association considers that the inclusion of a pre-plea diversion system would require, at least:

    (a) procedures to quickly identify matters that are potentially suitable for such a diversion;
    (b) the establishment of a pre-plea hearing allowing both parties to be heard on the making of such a diversion;
    (c) a formal procedure for the acknowledgment of responsibility;
    (d) a flexible form of order enabling the court to create a diversionary program dynamic enough to meet a particular defendant's criminogenic treatment needs;
    (e) timeframes for the completion of any diversionary program;
    (f) guidance on the admissibility of the acknowledgment of responsibility in any subsequent proceedings if the matter is returned to court; and
    (g) the role of any partial compliance in the sentencing system.

    The court ought to be able to make an order for a diversion program sufficiently flexible to maximise the effect of the interventions required by each particular defendant.

38. The Association has long supported the creation of the broadest possible toolbox for the exercise of judicial discretion in dealing with offenders. As such, the Association considers that all matters capable of being heard and decided summarily ought to be able to be diverted in as many ways as possible to allow for the best approach for dealing with each defendant.

Cautions and no convictions

39. The experience of the Association's members who practice in the Childrens Court is that the court's power to administer cautions if it considers police ought to have done so is used appropriately and effectively. Such a regime could be effective in the adult jurisdiction also in dealing with first-time or non-recidivist offenders (as described in question 31 above). In keeping with the Association's longstanding position on the importance of judicial discretion in dealing with offenders, the Association supports the introduction of a caution scheme for adult offenders also.

40. The procedure for the Childrens Court refusing to accept a plea, dismissing a charge and issuing a caution found in s.21 of the *Youth Justice Act 1992* would be an appropriate model for the creation of a similar power in the Magistrates Court. Issues to be considered would include the person's criminal history, their history of cautions and the nature and seriousness of the offence.

41. The Association considers it important that any action taken by a court in relation to a charge ought to be recorded in some way. This includes decisions to divert or caution defendants rather than to convict and punish them.

    The Association can also see the sense in being able to be put such a record before a court considering making a further diversion order. The difficulty with such an approach, however, is that if the Magistrate decides not to divert a person, the Magistrate is then aware of matters which otherwise ought not be placed before them on sentence (assuming

that the caution is taken not to constitute part of the person's criminal history). This could be avoided if provision were made for sentence to take place before a different Magistrate, however this is impractical in places with a single Magistrate.

If a record is to be kept, the Association notes that the Queensland Police Service already keeps criminal histories marked "Not for Production in Court". These histories contain a record of a person's appearances in court which do not form part of a criminal history and are, therefore, otherwise inadmissible such as:

(a) records of charges discontinued, dismissed or struck out;
(b) charges of which they have been acquitted; and
(c) charges still pending before the courts.

These "Not for Production in Court" histories for children also contain a record of previous cautions and other diversionary outcomes.

It may very well be possible to record adult cautions and diversionary outcomes in a similar way. The difficulty then comes in limiting the use of them by a sentencing Magistrate who ought not be aware of them in determining sentence.

42. Again, the Association considers that the more broadly equipped the judiciary is with tools to appropriately dispense justice in individual cases, the better the system is able to meet its ultimate aims of detecting offending and dealing with offenders in a manner appropriate to their particular offences and personal circumstances. As such, the Association would support the inclusion of an option to dismiss trivial charges without proceeding to conviction.

    The Association notes that Magistrates are currently empowered, pursuant to s.19 of the *Penalties and Sentences Act 1992*, to release an offender absolutely. If the Magistrate does so, the Magistrate must not record a conviction (s.16). This option still requires a conviction to have been returned, either by plea or by finding after trial. In the experience of the Association's members, this tends to occur when Magistrates consider offences to be trivial or prosecutions to be overzealous.

    In the Association's submission, Magistrates know triviality when they see it. It would not be appropriate to attempt to legislatively define triviality. Such a determination ought to be one made with a broad discretion to do so having regard to any relevant facts or circumstances.

43. The Association considers that the criminal procedures about summary hearings and pleas of guilty generally work well in Queensland.

44. The Association considers that matters should continue to be able to be dealt with in the defendant's absence, including matters involving written pleas of guilty, in the situations that are permitted under the current legislation, and which are summarised in sections 3.130, 3.132 and 3.133 of the Consultation Paper.

45. The Association considers that the sentencing options available to a Magistrate who is dealing with a matter in the defendant's absence should be restricted in the following way. That is, a Magistrate should not have the power to sentence the defendant to imprisonment, or to cancel, suspend or disqualify the person from holding a licence (or another type of authorisation) in the defendant's absence.

Instead, if it appears likely that imprisonment or a relevant cancelation, suspension or disqualification is likely, the Magistrate should be required to adjourn the proceedings so that the defendant can attend, and if necessary, the Magistrate may issue a warrant for the defendant to be arrested and bought before the Court. Such an approach would be similar to the approach that has been taken in Victoria and which is proposed under the new Tasmanian Legislation which comes into force in October 2022.

The Association does not consider it necessary to otherwise restrict the sentencing discretion that is available to a Magistrate who is dealing with a matter in the defendant's absence, by the imposition of financial limits to the fines which may be imposed or by otherwise limiting the sentencing options that are available to the Magistrate. The Association considers that this position strikes an appropriate balance between the protection of a defendant's rights, natural justice and the efficient conduct of the Court.

Committal proceedings

46. Given that the current review is not looking at making reforms to the committals procedures that were introduced 2010, the Association does not have any specific view as to how the existing committal procedures can be improved, other than by recognising that the current registry committal procedure is an area in which technological advancements should be utilised in order to streamline the online process.

47. The Association considers that there is no need for a compulsory directions hearing before a committal takes place, and that the mandating of such a hearing would add an additional layer of procedural complexity to the committals process which is unlikely to have significant utility or to promote the efficiency of the Court.

48. The Association does not consider that further guidance about what constitutes "substantial reasons, in the interests of justice" should be included in the legislation as there is a danger that such "guidance" may have the effect of unduly restricting the circumstances in which substantial reasons are found to exist. If further guidance is ultimately to be included in the legislation, the Association considers that it is critically important that such guidance includes the principle that "each case is considered based on its unique circumstances, which means that an exhaustive list of what might constitute substantial reasons cannot be given".

Victims of Crime

49. The Association recognises that diversionary processes as discussed at [29] – [38] above are significant ways in which victim's interests can be incorporated in the Magistrates Court Criminal Procedures.

Costs

50. The experience of the Association is that there are significant problems in the current application of the costs provisions, stemming from the wording of ss 157 - 159 of the Act and the decision of *Bell v Carter*; *ex parte Bell* [1992] QCA 254 which has been interpreted as requiring that no costs order can be made after a formal dismissal of the relevant charges. This decision has also been interpreted as applying to costs order after conviction.

Accordingly, there is significant uncertainty, impracticality and, at times injustice, in cases involving the cost provisions in the current act, as the current interpretation of these provisions prevents a cost application being heard if the Magistrate has "formally dismissed" or "convicted" a person in relation to the relevant charges. The practical effect of such an interpretation is that unless a Magistrate is extremely careful as to the form of words used and actions taken after the Magistrate has formed the view that the charges should be dismissed or that there should be a conviction, the hearing of the cost application must occur during the same proceeding and cannot be adjourned to be heard at a later time either in full or part-heard.

The decision of *Madden v Commissioner of Police* [2021] QDC 152, which is currently under appeal, is a recent case which starkly illustrates these problems with the application of the current legislation.[19] The problems arising from the current application of the costs provisions in Act have also been recognised in decisions such as *Gibson v Canniffe* [2008] QDC 319 and *Baker v Smith (No 2)* [2019] QDC 242. Having regard to these issues, the Association strongly considers that the costs provisions should be amended to ensure that that the jurisdiction to determine costs applications is not limited until the final conclusion of the court proceedings.

51. The Association considers that 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 Court, in a way that is consistent with the cost provisions in the Justices Act.

The Association will be pleased to continue to engage in the review process as it progresses, and looks forward to engaging further in the consultation process.

Yours faithfully

[redacted]

Tom Sullivan QC
President

[19] In *Madden*, the police had withdrawn charges against Ms Madden and conceded that she was entitled to receive a costs order in her favour, but disputed the quantum of the order. In court, the police offered no evidence in relation to the charges and the Magistrate stated that the charges were dismissed and endorsed the bench charge sheet to that effect. A cost application was made on behalf of Ms Madden in the same proceeding, but the costs application was adjourned on the request of the police. As indicated, police had conceded that Ms Madden was entitled to a costs or in her favour but sought an adjournment in order to made submissions in relation the quantum of that order. When the costs application was heard at a later time, the Magistrate held that the wording of s159 and the decision in *Bell v Carter* meant that the Court had no jurisdiction to award costs after the initial adjournment of the matter. The decision of the Magistrate was upheld by the District Court in *Madden v Commissioner of Police* [2021] QDC 152.