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Mr Michael Shanahan AM
Reviewer,
Criminal Procedure Review – Magistrates Court

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

11th July 2022

Dear Mr Shanahan,

THE CRIMINAL PROCEDURE REVIEW (MAGISTRATES COURT)

We welcome the review and the opportunity to re-envision the operation of the Magistrates Courts.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld)Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our

submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

COMMENT

Summary

As will be seen from our responses to the questions below, we see three major themes emerging that would transform criminal proceedings and criminal practices in the Magistrates Courts.

Firstly, the three main functions of the Magistrates/Local Court should be criminal proceedings, diversionary responses and mediation options. Presently diversionary functions and the availability of mediation are seemingly seen as ancillary, not central to the functions and purpose of the Court.

Secondly, the greater use of electronic processes during the pandemic demonstrated a number of benefits that greatly improved access to justice and those improved ways of conducting matters should not be lost as the impacts of the pandemic start to recede. Such does however involve a balancing act in terms of ensuring that the us of technology does not adversely impact upon the quality of legal representation or indeed, allied to such, the cultural competency of legal representation.

Finally, trauma-informed responses need to inform almost every aspect of the way the Courts functions. It was an unexpected lesson from the pandemic that we hope will not be lost when the criminal procedures and thus the functioning of the Courts are being reimagined.

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

• The queuing and allocation of magistrates, courtrooms and court time could all be better managed.

There are huge implications to this which are invisible to the court, for example many new courts are built further away from public transport routes, defendants who live in cheaper areas have much fewer public transport options which take a lot longer and come from areas where there are low rates of car ownership and driver licensing thus having a very small pool of driving

assistance to call upon. Such compounds the potential for defendant from more disadvantaged backgrounds, to end up serving custodial sentences for failing to appear in court.
Carparks are few and expensive around courthouses, there is not much flexibility in arrangements for a client who has to 'duck out' and move their car because the three hour parking limit has expired.

The other barrier is for clients who have carer responsibilities for an invalid or childcare responsibilities to make suitable arrangements to attend Court.

With greater use of technology and electronic processes then the crowding and workload problems of the Court would be substantially reduced which in turn could lead to a more manageable workload and fewer people having to physically attend. Such in turn could lead to the allocation of time slots (such as 9-11 am, 11-1pm) might become more feasible, for example 80% of the people allocated 11 am - 1 pm will have their matter mentioned in that slot, for those with more complicated matters a four hour slot could be allocated.

We are aware of various innovations in The Singapore Courts and in the Courts of South Australia that may lend themselves to local conditions in Queensland.

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

- The use of plain and simple language.
- Straightforward procedures that are easy to understand and relatively easy to comply with.
- Court outreach activities to explain the work of the Court.
- Innovations designed to improve non-physical access as well as remind defendants of pending court dates.

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.*

• Often Aboriginal and Torres Strat Islander people have suffered significant trauma and when their antecedents are placed on the record during sentencing proceedings, it can cause distress and further trauma for the defendant. In other court forums the subject matter would lead to the Court being closed but not so in sentencing proceedings. Being able to obtain an order to close the court room to traverse such personal material would assist in reducing the distress and further trauma.

• Often Aboriginal and Torres Strait Islander defendants find the court process overwhelming. Introducing a cultural liaison officer at each court house to assist defendants when they first enter a court house would help defendants have a greater understanding of the court process. This is particularly significant for defendants who ae not represented by ATSILS (who already utilise Indigenous Court Support Officers and Field Officers, to ensure just that).

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

- We agree that the new criminal procedure legislation should include guiding principles, especially making explicit reference to rule of law protections and human rights principles.
- We agree with the suggested guiding principles provide in the consultation report.
- We agree that the system should operate in a way that focuses on its users, including by engaging with local communities and in particular – community justice groups.
- We agree that Court procedures should be culturally appropriate for Aboriginal and Torres Strait Islander people wherever possible and acknowledge the diversity of cultural practices across Queensland.

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

• The centralising of the Courts would better facilitate the ability for a Court to exercise jurisdiction over matters that presently fall outside its jurisdictional boundaries. The greater use of technology and remote appearances and electronic adjournments and bail applications would reflect the lesser impact that distance now has on the effective operation of the Courts.

While a rebadging process is being undertaken, the creation of culturally safe places and layout of the courthouses should be examined.

For Courts to be Local Courts it would be advantageous to reflect the aspects of Country (with permission from the Elders) on which the Courthouse stands.

Any changes to names of the Courts or Magistrates or jurisdiction of the Courts will create a need for culturally appropriate information to be created to explain the changes.

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

While there will always remain some residual need for paper-based processes (e.g. remote localities where access to a printer might be highly problematic), we agree that the implementation of electronic processes can have multiple benefits including increased efficiencies, ease of accessing documents, and other process improvements that increase access to justice.

Digital poverty is a new term that has been coined to describe the obstacles for those who do not own or have access to electronic devices, those who live in areas with either no telecommunication signal (there are still too many areas in Queensland where this is so) or unreliable telecommunication signals. Any changes to procedures will still have to accommodate the access to justice issues for this group.

Specifically, the two main benefits of electronic processes would be:

- Electronic case management systems would improve efficiency in the courts (but are highly costly to implement for e.g. funding-poor community legal centres).
- Permitting defendants to appear and participate in court remotely by telephone.

Two significant insights we gained during the pandemic were:
Challenges re lack of transport to get to the Court is a much bigger problem than even we had realised; and the ability of defendants to appear remotely (or via their legal representatives), significantly reduced the fail to appear numbers.

Trauma and mistrust of the system is a significant barrier which has also been significantly overcome by telephone appearances. The word "sentence" is used interchangeably with "jail sentences" and attending court is often equated with being imprisoned - even when advised that their appearance will not result in a term of actual imprisonment (or even involves a sentencing process). It is significantly easier to explain the effect of different orders and what is needed to comply with orders when the client is not impacted by a freefall downward spiral of-fear and misconceptions based upon historical encounters.

There are a number of failures to appear caused by arrests being made outside the doors of the courthouse as the defendant is trying to appear before the court with no notification as to why a defendant is not present for their matter. Appearances by telephone encourage the better practice of issuing a notice to appear to defendants who submit to the jurisdiction of the Court.

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.*

• The three main criminal procedures which automatically lend themselves to the use of technological solutions are electronic adjournments, remote sentences and registry committals.

Additionally appearances on driving charge matters should be facilitated remotely in many instances. It is counterproductive to require a defendant's appearance in Court in person in circumstances where the sentencing outcome means they can no longer drive and alternative transport options are limited or non-existent. We have had clients with disqualified driving for driving home after attending court (not just to get home, but in order to return their vehicle).

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

• Yes – the arrangements during the COVID pandemic demonstrated the benefits of more flexible hearing arrangements, and while there will always be exceptions to the rule (and thus there should be a defence 'election' discretion), as a general proposition there can be greater flexibility with witnesses in summary proceedings giving evidence remotely, even evidence by a victim or a witness.

This flexibility would assist when matters cross several Magistrates districts. It would also address illogicalities that can arise from time to time.

> For example a pensioner couple originally from Roma but now living in Brisbane were charged with a domestic violence offence for having raised voices in a verbal argument in Roma. Even though the only other pertinent witnesses were the neighbour who complained about the noise to police and the arresting officer who laid the charge, police did not consent to a hearing in Brisbane with the two other witnesses appearing by phone. Unable to afford the cost of travelling to Roma and obtaining temporary accommodation to contest the charge in Roma, the couple felt they had no option other than to plead guilty in Brisbane.

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

• In every instance where the term 'breach of duty' appears in the Act, other than in Section 4 where it is defined, it appears as 'part of the broader description "simple offence or breach of duty'. Offences or breaches of duty are created in other legislation or derived from other sources of law The provisions put in place the procedural machinery and fairnesses to be applied to the defendant in such proceedings, especially requirements for proper service of the complaint and time limits. The importance of those provisions are that jurisdiction is contingent upon proper service and other procedural fairnesses such as time limits for proceeding

In general, breaches of duty as provided for in the Justices Act typically involve regulatory matters, relating to a positive duty placed on a person by the provisions of an Act, where such are not defined in that Act as simple (or indictable) offences. Other sources of duties for invoking the jurisdiction of the Court may be derived from international and maritime obligations.

Alternative phraseology being used for such matters might make them more readily understood – perhaps 'regulatory breaches', but whichever term is used, it must encompass all breaches of duty that it may fall to the court to exercise jurisdiction over. There is no specific need in our view for amendment to the provisions in the Justices Act which treat such proceedings effectively the same as for a simple offence.

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'?*

• We agree that the best course of action is that the new legislation keeps the current meaning of the term in the *Justices Act* but renames it as a 'summary offence'.

The proposal to amend the term 'simple offence' as is currently provided in the Justices Act is broadly supported, the proposed 'summary offence' is logical. If this course is adopted, it might also be helpful to amend the definition of (what would then be) 'summary offence' to not just read "any offence (indictable or not)…" but to explicitly state "(indictable, simple or regulatory)", to ensure there is no ambiguity. It could potentially also directly refer to what is currently provided in chapter 58A regarding indictable offences being dealt with summarily, see further comments regarding that below.

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?*

• Our preference is to relocate the laws in chapter 58A to the same Act as other procedural laws applying to the Magistrates Courts and also redrafting them to make them easier to read and understand when doing so.

The provisions in Chapter 58A of the Code are difficult to follow and do not lend themselves to clear and consistent application by the Courts accordingly. While noting that the delineation of offences (ie. what should or should not be dealt with by the Magistrates Court) is outside the scope of this review, it would be a worthwhile exercise to re-draft these provisions so that the current provisions setting this out can be made more coherent.

One option for doing so would be to replace the provisions that are currently set out in Sections 552A through to 552BB with a single section referring to a schedule, somewhat similar to that provided in Section 552BB, which would simply set out each offence provision and in lieu of Column 3 'Relevant Circumstance' it would set out whether it can be dealt with summarily and any limitations on that. There would be no need then for the repetitive statements that all such subsections apply subject to Section 552D, further the schedule would make it eminently more workable for practitioners and the Courts who need simply look up the offence provision in numerical order and check what the rule is for it. The current use of 'excluded offences' and 'relevant circumstances' in our view is the key overcomplication in the current drafting of these provisions.

Section 552D as currently drafted also can be perhaps needlessly complicating for Magistrates, and parties, seeking to determine whether a matter ought be retained by them or to proceed on indictment. A redrafting of this as part of an overall relocation of this chapter would also be useful accordingly. It could initially provide that "A Magistrate must abstain from dealing summarily with an indictable offence under this chapter if:", followed by subsections setting out each of the matters currently addressed in subsections (1) through (2A).

We also note that subsection (2) effectively seeks to provide judicial discretion in a Magistrate determining whether for any reason tabled by a defendant a matter ought be dealt with on indictment, notwithstanding the usual rules providing otherwise. This is hampered by the heading being 'When Magistrates Court must abstain from jurisdiction' (emphasis added) and the structure of the provision accordingly. It could be redrafted as 'on application by the defence, a Magistrate may abstain from dealing with a charge summarily under the provisions of this Chapter if the Magistrate is satisfied that it is in the interests of justice to do so'. Though again, we note and accept that such a redrafting might fall outside the scope of this review to the extent that it amends the substance of the current provision in the Criminal Code

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?*

• adopting a similar approach to other jurisdictions, the complaint and summons could be replaced by a notice that a person must appear in court.

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

• The introduction of a new procedure by which a charge sheet could be filed electronically and upon receipt the registrar may then issue a court attendance notice.

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?*

• A clear statement of when proceedings commenced would be preferable and that proceedings commence on the date the material is filed in court.

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

It is important thar the accused should be properly notified of the details of the offence so as to be able to meet the charge. The requirements should be the same as the requirements for a bench charge sheet:

- 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).

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?*

• As outlined in our answer to Question 17, the charge should be properly particularised and follow the same requirements as the requirements for a bench charge sheet.
• in our view the requirements should be consistent across all initiating documents.

At this stage we do not see a requirement to file a second document.

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

• Our office has insufficient interaction with the bringing of private complaints to be able to offer an informed view.

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?

• Private complaints are not subject to the same processes of a review of evidence and the exercise of an independent prosecutorial discretion in accordance with the Queensland DPP Directors Guidelines.

There should be a preliminary hearing to deal with private complaints that are misconceived, oppressive or vexatious. The Magistrate's Court should have sufficient powers to control its own processes and to protect them from abuse.

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

• Yes generally disclosure obligations do work in Queensland (but noting our caveats to that expressed in the following questions).

Having said that, the satisfactory discharge of the disclosure obligation varies from Arresting Officer to Arresting Officer. Sometimes that issue stems from an overloaded AO, sometimes it is a failure to appreciate the obligations resting on prosecutorial authorities. Our service is aware of times when the Police Prosecutor has repeatedly tasked an AO but requests for disclosure go unanswered due to the AO not responding to the PPC tasks.

There should be Court supervision of failure to disclose causing delay and unfairness.

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?*

• A staged approach making evidence available earlier in the proceedings in respect of summary offences would make the process of case conferencing more efficient. We have referred to the Northern Territory and Victorian approach in our answer to question 26.

One particular problem is when the investigation has not been thorough. While some police officers are careful to collect evidence including possibly exculpatory evidence, others only collect the bare minimum. it is particularly frustrating when police fail to collect available CCTV or only part of it and many weeks later the CCTV has been written over. Early provision of the brief would help identify what further evidence should have been obtained and to remedy the situation

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

• Yes, while a lot of police prosecutors are punctilious about proper disclosure, others may refuse reasonable requests for disclosure. Our service is aware of instances where failure to provide full and proper disclosure has led to unfairness. Oftentimes we only become aware of the problem when there is a change of police prosecutor or a DPP prosecutor reviews the file and remedies the defects in disclosure.

There is a duty to afford fairness to an accused and matters in the Magistrates Court should not proceed under some lesser standard.

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

• A large number of rules have sprung up around challenges to motor vehicle offences which are fair to the extent that the Prosecution must prove their case and need to meet the challenges to the evidence by calling of expert witnesses. The rules are unfair if they place unrealistic deadlines on defendants so as to deny them the ability to obtain advice and specialist assistance.
The rules should remain flexible for circumstances where an accused may have been previously unaware of an alibi witness or even how to contact such a person, (this may happen quite frequently when seasonal workers may be potential witnesses). It must also be remembered that not all accused are able to obtain legal representative assistance, especially early on (e.g. to explain what is required from an evidentiary perspective).

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

• Case conferencing requirements could be improved. When done well it serves the interests of justice well, that charges are appropriate and properly supported by evidence and that charging discretions have been exercised properly and in accordance with the Director's Guidelines.

However practices vary widely across the State, from plain indifference towards the process to rigorous discharge of the prosecutorial ethical obligations as a minister of justice to everything in between. Effective case conferencing is a key element in affording both fairness to the accused and the public purse - so should be better supported by rules and supervised by the Court, possibly in mandatory case management hearings.

QUESTION 26: *Should the new criminal procedure legislation include requirements about case management? If yes, what requirements should be included? Should these be different for offences that will be dealt with summarily and those that will be committed to a higher court?*

• Yes the new criminal procedure legislation should include requirements about case conferencing to ensure case conferencing occurs. The requirement should not just appear in practice directions but also be explicitly provided for in the legislation.

The Northern Territory and Victorian approach of a 'preliminary brief' for summary matters which include any available witness statements, video footage (CCTV and Body Worn Footage) and records of interview is a useful practice which should be explicitly adopted here. It affords fairness to the accused and assists with the management of the Court caseloads as it helps expedite matters that could be resolved early.

It may also help identify matters which more suitably are candidates for diversion.

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?*

• the requirement should be mandatory to ensure that the case management process is adhered to. Otherwise it throws additional expense and burden on a defendant who is not at fault and already disadvantaged by the lack of compliance by the prosecutorial authorities. A mechanism to dispense with the need for a mandatory case management hearing such as filing a notice would be a cheap and procedurally efficient way to dispense with unnecessary case management hearing.

• The process can still apply when a defendant is self-represented. If the self-represented defendant is getting over-the-counter assistance but not legal representation, the filing on a portal of a notice dispensing with a case management hearing would assist the court. In other circumstances the need for a case management hearing would be greater not less than for a represented defendant. Another approach for unrepresented defendants may be to adopt something similar to that used in the Family Court for Registrars to supervise the progress of matters.

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?*

• There should be standard time frames for matters progressing through the Magistrates Court to address delays that are productive of unfairness, delay and cost. In some circumstances an

accused may be deprived of the right to work because of a weak allegation that is not supported by evidence – or was denied bail based upon same.

A 'preliminary brief' for summary matters including any available witness statements, video footage and records of interview could be made available within 14 – 21 days.

Failure to supply analysis certificates over an extended period of time should lead to the charges being dismissed (other than in an exceptional 'show cause' scenario – onus on prosecutor).

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

• Yes, and as explained later also the power to refer to external diversionary programs.

We anticipate that there should be diversion and dismissal of charges in lieu of charges proceeding. We also anticipate that there could be diversion following appearance on charges but court ordered diversion in place of existing sentencing proceedings.

In the latter case it may be appropriate for a pre-sentencing report to outline diversionary programs available both within the court and externally in the community.

The weaknesses of a model based only on the court diversion programs is that they fill up quickly as demand often exceeds supply; there is a waiting list which either delays the court processes and/or defeats the purpose of the diversion program to respond promptly to the offending behaviour; the dearth of culturally appropriate and culturally safe programs within the current court ordered program offerings and further; the lack of court ordered program offerings in rural and remote areas.

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?*

• if the charge falls within the jurisdiction of the Magistrates Court then in our view court diversion options should be available.

Obviously some charges lend themselves more readily to court diversion processes than others, but these practices will develop in time.

Often a diversion is appropriate because of the personal circumstances of the offender, such as cognitive disability, behavioural disorders and mental health issues, behavioural problems arising from trauma triggers, as well as the more classic drug and alcohol addiction, which often co-occurs with other problems.

It is because diversion becomes appropriate because of highly unusual circumstances of offending or significant mental health or behavioural issues of the offender that the question should be less focused on types of offences and more on the personal circumstances of the offender or the surrounding factual circumstances of an unusual type of offending. Such could also ease the pressure on the Mental Health Court in terms of currently 'required' referrals.

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?*

• yes, as expanded upon in later questions, we think a key role of the Magistrates Courts should be diversion (and the other is mediation) and to that end the legislation about criminal procedure should contain key principles and objects, similar to the Queensland *Youth Justice Act*, to explicitly provide for diversion, to explain its centrality in the process and to assist in interpretation of related legislation.

In support of that it would also be helpful to have a Diversion Benchbook.

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?*
• The mediation processes that are being carried out presently have shown that mediation is an important and viable process for the disposition of matters. However it is a drop in the ocean for current needs. The availability of mediation is largely confined to urban centres and is limited in availability. There is little available for culturally safe or appropriate mediation processes in the present system. The ability of the Court to more broadly refer out mediation work to mediators who are in rural, remote and regional areas and to culturally safe mediators would alleviate this problem.

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

• In the higher Courts the ability to adjourn a sentence for 6 months to allow a defendant to undertake programs and to work to provide restitution to the victims of the crime is an effective power which can serve the purposes of rehabilitation and improved long term safety of the community and restitution and restorative steps to make amends towards the individual victims and the wider community for the impact of the crime.

A broader power to defer a prosecution in the Magistrates Court could have similar beneficial outcomes. It would also help address the problems of the mentally unwell, those struggling with cognitive disability or behavioural disorders or trauma related triggered behaviours being

caught up in a perpetual cycle of criminal charges and incarceration when better and more effective ways to address their behaviour in public spaces could be found.

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

• The power of a Court over its own proceedings should include the power to defer prosecutions. As argued for elsewhere in our response, we believe that the role of the Magistrates Court should be as much about diversionary processes and mediation processes as much as prosecutorial proceedings. The power to defer prosecutions would support the efficacy of these other roles of diversion (especially to therapeutic programs) and mediation, including restorative justice processes. There will be circumstances where the power to defer prosecutions will protect an accused's right to procedural fairness.

Such a power, which obviously will be circumscribed by the need to act judicially should not otherwise be unduly circumscribed. Given the very wide range of factual circumstances in which prosecutions are launched to bring a wide range of defendants before the courts, it is better to leave the magistrate with a full discretion to exercise, otherwise too many conditions on the power could lead to artificial results.

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

• A prosecution could be deferred for example to allow an accused to complete a 13 week rehabilitation program, a parenting program, or to be resettled in accommodation with social worker supports or carers. By demonstrating successful completion of programs or stabilised living arrangements (often accompanied by the reestablishment of a medication regime), it allows the accused that they have addressed the root causes of their offending behaviour and provides a basis on which the court may have some confidence that risk factors have been addressed and repeat offending is far less likely. Ultimately, it should be up to a magistrates discretion based upon individual circumstances.

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

• Programs such as the in-court diversion program in the Victorian Courts are worth considering. Referrals to Community based programs should also be available (in order to overcome shortages and shortfalls in the in-house programs). Benefits include shorter waitlists, a greater number of spaces on programs, programs that are culturally safe and more effective for Aboriginal and Torres Strait Islander persons, programs that are available in community and not

just city centres, and often more flexible hours in which to participate e.g. weekends to fit around work commitments.

In our view, a diversionary function, especially diversions to therapeutic responses, should be seen as a key role of the court. In fact we would say that the three main arms of the Magistrates Court's functions should be a diversionary role into more appropriate therapeutic responses in-house and in the community, a referral pathway into mediation (traditional mediation and community mediation with restorative responses) as well as the traditional criminal justice model. In our view the absence or minimal availability of the other two roles, diversion and mediation, has led to the over-incarceration crisis which it must be said is primarily being driven by magistrates courts sentencing practices.

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?*

• Far more flexible procedures and pathways could be implemented in the laws to give the Courts greater flexibility in diverting matters that don't properly belong in the criminal justice system or shouldn't properly attract convictions or exposure to the risk of jail sentences.
The Courts should have referral pathways to therapeutic programs and mediation processes which can be more easily invoked, for example, defence lawyers should be able to propose mediation and have it considered by the court. Presently the personal stances of some prosecutors make it impossible to have the option formally considered. The Court should also on its own motion be able to refer a person before the court to diversionary options.

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

• Court diversion is appropriate when the circumstances of the offending are relatively minor or trivial or technical or when the choice of charge has been made so as to deprive the accused of a defence.

Some examples include where a Commit Public Nuisance was laid instead of Assault, when a tenant has been charged with wilful damage for painting a wall, when the driver of a rental car has been charged with UUMV for returning a car three days late.

• Court diversion is appropriate when the personal circumstances of the offender mean that offending behaviour is better addressed by therapeutic responses.

Some examples of persons with offending behaviour who fall into this category include persons with cognitive disability, persons with mental health issues or behavioural disorders or persons suffering trauma who have been triggered by actions or events.

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)?*

• Yes. Policing practices vary widely including bringing charges in circumstances where a caution would have been more appropriate. The Court should not be the helpless recipient of inappropriate charges and it would support the ability of the court to protect its processes and the fairness of proceedings to dismiss inappropriate charges. This would support the obligations on the Courts under the *Human Rights Act*2019;to ensure that limitations on human rights are only necessary and proportionate.

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?*

• Yes. As in the Childrens Court there will be situations, taking into account the Defendant's Criminal History or lack of it, the Court's discretion to impose sentences and control its own processes should include dismissing a matter, and also fora caution to be administered.

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?*

If it is appropriate for a caution to be recorded in lieu of other sentences then it raises the question of whether Child Safety or Blue Card Services should be able to use the caution adversely against the person who has been cautioned. Similarly there may be implications for holders of security licences or serving members of the defence forces.

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?*

• Yes the court should be able to order an 'absolute dismissal' for offences within the jurisdiction of the court. This should occur when the prosecution evidence taken at its highest cannot sustain the charge. This should also be open to the Court when disclosure timeframes have not been adhered to.

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?*

• Yes. Improvements could be made by having a portal for filing written submissions, so that they are attached to the file prior to court. This would be an improvement for defendants with legal representation but it would also be of assistance for defendants with no access to legal representation but only over the counter legal assistance. Sentencing submissions filed through a portal would assist a tongue-tied defendant who would otherwise struggle to make appropriate submissions on their own behalf to the court.

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

• the presence of the defendant in proceedings adverse to his or her interests or liberty is an important and fundamental part of the right to a fair hearing however in circumstances where the matter is minor in nature and the likely penalty imposed, taking the defendant's criminal history into consideration, would not be more than a fine, then that would be an appropriate matter to deal with in the absence of the defendant. Indeed, many of our clients end up being sentenced to imprisonment for breach of bail, where the underlying substantive charge, of itself, was relatively trivial.

However, the counterbalancing rule to preserve the defendant's rights are that the defendant should be able to request a reopening of proceedings to have the matter proceed in his or her presence.

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?*

• Yes, if a Magistrate proceeds in the absence of an defendant, that can often lead to unfairness because the court will not ordinarily reopen a sentence even if the defendant puts reasons before the court as to genuine mistake or other reasons that prevented their attendance. This problem is heightened for defendants in rural or remote areas or where the magistrates court exercising jurisdiction is a significant distance away from their regular place of residence or work. Deemed service can operate unfairly against seasonal workers and those who work for extended periods (e.g. fishing trawlers) from the mainland. The limited grounds available to seek a review or appeal of the Magistrates decision can result in the unfairness of proceeding in the defendant's absence being entrenched. This is especially so for convictions leading to licence disqualifications.

The sentencing options should be limited to:

- fines (with a limitation of the amount) or

- a conviction and discharge, or
- an exercise of the discretion not to record a conviction and/or dismiss the charge.

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

• The electronic application for a registry committal could be improved by having a portal that records date time stamps, for when items have been opened. That would then create a record so that accurate dates in relation to the progress of the matter could be placed before the 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)?*

• A compulsory directions hearing before a committal takes place would have a number of positive outcomes. It would allow for deficiencies in the provision of a full brief of evidence and disclosure to be ventilated (especially if scientific analysis or the provision of video evidence is running late). It would provide timeframes to facilitate a registry committal to progress without delay. Issues surrounding witness availability could also be addressed in a compulsory directions hearing.
• There is a need to legislatively enshrine the current practice directions constituted under s706A dealing with agreements – turning them into provisions with resulting consequences for failing to comply, as in the Criminal Code. Currently the system is one which does not compel expediency of disclosure on the part of the Crown when disclosing all relevant evidence to the defence.
• Waived should be a judicial discretion based upon the circumstances – for example matters to be committed for sentence or committal pending a Mental Health report as the only matter in issue.

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'?*

• Yes – at the moment the tests of substantial reasons and in the interests of justice can lead to very different results and guidance would be of assistance to all parties. There should be guidance (though not exhaustive in nature) "as to substantial reasons in the interests of justice." An example of this is the non-exhaustive list in the Local Court (Criminal Procedure) Act 1928 where under s105H it deals with the range of factors to be taken into account – not exhaustive in nature – for which an application can be granted in the interests of justice. Among these are

that it would lead to an early plea of guilty, there is inadequate disclosure of the Crown case, cross examination may lead to a discontinuance of the Crown case, among others.

The balance between efficiency and affording fairness to the accused should be re-set to afford greater fairness to the accused.

The litmus test should be affording fair trial guarantees to the accused. The assumption in the Moynihan reforms is that the accused has sufficient knowledge of the surrounding circumstances of the allegations to be able to make forensic decisions appropriately, especially in articulating the grounds as to why there might be substantial reasons or why it would be in the interests of justice to obtain leave to cross examine particular witnesses. Those assumptions may pan out if the accused had some level of involvement in the circumstances surrounding alleged offending, but those assumptions are misplaced if the accused did not (or did, but e.g. was adversely affected by a drug at the time thus impinging upon cognition).

The only capacity of an accused to conduct an investigation, or to obtain broader evidence or qualifications to evidence from the witnesses that has not been collected by the police is to be able to cross-examine witnesses and to put documents and other evidence to them.

The variation in practices in allowing applications to cross examine and the cost and uncertainty associated with such applications is that making an application to cross examine would in all likelihood exhaust the financial resources of an accused for little or no result.

Oftentimes it leads to the need for a pre-trial hearing before the District or Supreme Court, unnecessarily adding expense or delay in circumstances where the evidential issues could have been sorted out more expeditiously.

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)*.

Already, magistrates will acknowledge the presence in the court room of a victim or relative of the victim. General members of the community or groups who feel they have an interest in the outcomes are also a presence on court days.

Victim centric processes are much more difficult to implement in the high volume fast paced Magistrates Court than they are in the higher courts. For the Magistrates Courts that do schedule long plea dates this may be more achievable for the long pleas but quite difficult for those who do not or where the plea is not a long plea.

The timing of a plea can often be hard to predict even for a defence lawyer, whether the sign off for a negotiated modification to a charge has actually occurred, whether long requested disclosure material to help resolve a matter of contention has actually been supplied to the prosecutor in time to supply to the defence lawyer, whether a medical report or assessment has been written up and supplied. Where a defendant has been refused bail, there is additional pressure to have the defendant sentenced before too much time has been spent in custody (relative to the seriousness of the charge).

Ideally diversionary outcomes would be used heavily where defendants with mental health issues (often coupled with addiction), behavioural disorders, cognitive impairments and trauma-related disordered behaviour, and drug and alcohol addiction. Diversionary options would therefore be imposed in situations where rehabilitation and mitigating circumstances outweigh the gravity of the crime.

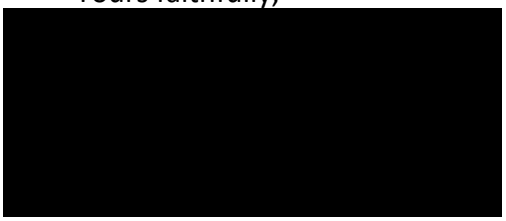
QUESTION 50: *Are the costs provisions in the current legislation working? What could be improved?*

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?*

This can more appropriately be commented upon in detail by private firms and community legal centres obtaining "pro bono" representation for their clients. However as a general principle effective powers to order costs are needed to prevent misuse of the standing of the courts and wastage of court resources. Vexatious, oppressive, and plainly misconceived prosecutions which impose time, cost, and worry on the accused citizen. The courts must have a power to impose costs orders to at least partially remediate the unfair burden placed upon the citizen and to deter similar misuse of the criminal justice system in future.

We thank you for the opportunity to comment on this important review.

Yours faithfully,



Shane Duffy

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