Queensland Law Society

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Office of the President

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[redacted]

The Honourable Michael Shanahan AM
Department of Justice and Attorney-General
[redacted]

Eryn Voevodin
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By email: [redacted]
Copy to:

Dear Mr Shanahan AM and Ms Voevodin

Criminal Procedure Review – Consultation Paper April 2022

Thank you for the opportunity to provide feedback on the *Criminal Procedure Review Consultation Paper April 2022* (**Consultation Paper**). The Queensland Law Society (**QLS**) appreciates being consulted on this important review.

This response has been compiled by the QLS Criminal Law Committee, Human Rights & Public Law Committee, Childrens Law Committee, First Nations Legal Policy Committee and Domestic & Family Violence Law Committee, whose members have substantial expertise in this area.

We thank the Criminal Procedure Review Team for the manner in which it has thus far consulted with relevant stakeholders. We address each Consultation Paper question below.

Q1 Generally, how are criminal procedures in the Magistrates Courts working? What could be changed or improved?

The Magistrates Courts of Queensland deal with 95 per cent of all criminal matters and play an important role in administering criminal justice in Queensland.[1] The Society agrees with the review Terms of Reference that an individual's experience, perception and understanding of Queensland's criminal justice system is often informed by the person's contact with a Magistrates Court. Similar sentiments have been expressed in a previous review of Queensland's criminal justice system (**Moynihan Report**):

[1] Queensland Courts, *Magistrates Courts of Queensland Annual Report 2019 – 2020*, 20.

> For most citizens, the Magistrates Court is the face of the criminal justice system. Most people who have contact with the courts will only do so in the Magistrates Court. The vast majority of criminal cases (approximately 96% of people charged with criminal offences) are finalised in the Magistrates Court either by pleas of guilty or by summary trial... [T]he functioning of this forum and the quality of justice delivered has a profound and pervasive effect on the public's confidence and faith in the justice system.[2]

Despite the central role the Magistrates Courts play in Queensland's criminal justice system, there is a widely held view that the efficacy and efficiency of the Magistrates Courts is undermined by the *Justices Act 1886* (Qld) (**Justices Act**). This is attributed to three key factors. First, criminal justice procedure in Queensland is skewed towards a trial as the probable outcome. The Moynihan Report highlighted the need to reorient criminal justice procedures away from the trial as the likely outcome to facilitate early and fair outcomes:

> Although the criminal trial is seen as the 'end point' for the criminal justice system, in fact, in the order of 90% of all criminal cases in all jurisdictions are resolved without a trial.
>
> Criminal procedure should be directed at moving accused people through the system to finalisation by: the prosecution discontinuing the case; a plea of guilty; trial and verdict of either guilty or not guilty at the earliest opportunity for those remaining cases.
>
> The system is skewed towards the criminal 'trial' as the probable or only outcome and procedures are geared towards this. According to the ODPP, more than 80% of matters it receives for prosecution in the Supreme or District Courts are resolved without a trial but very often in the week before trial or even on the morning of the trial. That is, the exception, (trial) drives the system and its procedures rather than a focus on an earlier determination. An effective system will identify those cases that can be resolved without trial and facilitate their resolution at the earliest opportunity. ... Put shortly, there is a trade-off between early preparation to effect a resolution by discontinuance and plea of guilty and saving cost of trial to verdict by a jury.[3]

Second, the prolix, archaic and complicated nature of the Justices Act presents a significant barrier to access to justice, especially for self-represented defendants, who may lack the necessary resources and understanding to enforce their rights (and comply with their obligations) in the Magistrates Courts. The provisions in the Justices Act do not follow a logical sequence; related provisions may be located in entirely separate chapters or parts of the Justices Act.[4] This is further complicated by the substantial amendments that have been made to the Justices Act over the past 100 years, with many of these amendments "bolting on" to the original provisions. There is thus an urgent need to replace the Justices Act with a modern and effective legislative framework which is both logical and sequential, and prescribes clear and effective summary criminal procedures.

Third, there are concerns that excessive charging by police may create 'inefficiencies and costs to the criminal justice system as a whole in refining and negotiating appropriate charges and getting early pleas of guilty'.[5] The Australian Law Reform Commission (**ALRC**) has previously identified that police charging practices can result in Aboriginal and Torres Strait Islander people

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[2] The Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland* (December, 2008) 53.
[3] Ibid 59.
[4] For example, provisions about change of venue in the Justices Act are located both at the beginning and towards the end of the Justices Act, despite the fact these provisions should be read together.
[5] Moynihan (n 2) 72.

being subject to overcharging.[6] Recent evidence from Victoria also indicates that young Aboriginal people and culturally and linguistically diverse people who offend are more likely to be charged with a criminal offence instead of receiving cautions or diversions.[7]

The Moynihan Report identified these and other challenges in criminal justice procedures that remain relevant today:

- the urgent need for more cohesive and relevant criminal justice procedure legislation;
- the need to reorient criminal justice procedures away from the trial as the likely outcome to facilitate early and fair outcomes;
- the need for consistent, accurate and appropriate police charging practices;
- the need for greater collaboration and coordination between agencies in determining priorities and allocating resources;
- the need for mechanisms and practices to encourage the early involvement of competent and experienced legal advisors on both sides to conduct negotiations, refine charges, give appropriate advice and to make high quality submissions to the court;
- the need for government funding of agencies and agency allocation of funding to be aligned with clearly articulated justice system outcomes and in particular, the early resolution of criminal matters; and,
- the need for soon and certain hearing dates with a minimal number of unnecessary court events.[8]

Q2 What does 'contemporary and effective' mean to you? How should those concepts be applied to criminal procedure laws in the Magistrates Courts?

We agree with the priorities and principles identified in Scotland's summary criminal procedure review, referred to at [2.37] of the Consultation Paper:

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

A modern and effective legislative framework

It has been highlighted that the substantive and procedural provisions of the Justices Act 'are no longer appropriate to the world in which they now apply' because there are 'limits to the extent to which processes developed in the late 19th century environment can be effectively

[6] Which occurs when a person is charged with multiple offences in relation to one incident or is charged too high for an offence: Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples* (Final Report, ALRC Report 133, December 2017) 457 [14.42].
[7] Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice* System (Summary Booklet, March 2022) xxi.
[8] Ibid 79.

applied to, or adapted for today's dynamic and complex world'.[9] A contemporary and effective legislative framework is required to ensure Queensland's criminal procedure laws are logical, clear, sequential, accessible, and align with social needs, expectations and values as well as developments and opportunities. Accordingly, we recommend the Justices Act be re-drafted in more appropriate and modern language.

Use of modern technologies

The Society supports the increased use of technology and electronic processes to increase efficiencies in the Courts. We acknowledge the Magistrates Courts have implemented an eLodgements system to allow for some documents in civil matters to be filed using CITEC Confirm. However, we understand parties to a criminal matter are unable to file documents electronically and continue to file in hard copy or via post. We also note defendants in the Magistrates Courts now have the option to submit an electronic guilty plea for simple and minor offences. However, our members report this service is used sparingly by defendants. QLS considers that electronic pleas of guilty should be allowed only where it is appropriate to do so (for example, where the defendant is represented).

The impacts of COVID-19 prompted significant changes in the way court processes are conducted, including increased uptake of electronic filing and remote court appearances across a number of Queensland Courts. The use of audio-visual link systems have been particularly influential in this regard, enabling courts to take oral evidence from defendants and witnesses in different geographical locations, reducing the need to travel long distances to court and lowering the time and administrative costs associated with attending court in person.[10]

Our members report numerous benefits associated with this uptake of technology, including: enhanced efficiencies, particularly given that most business in the State is conducted electronically; reduced legal costs for clients; reduced operating costs for law firms; reduced delays; increased efficiencies in Court resources; enhanced access to justice; more flexible work practices for lawyers and their clients; the ability to check a matter's status online, significantly reducing the number of phone calls to the Courts; removing the need for Court staff to return documents by post; providing regional practitioners the ability to inspect court files; ensuring limitations for filing (such as the 60 day time period for a compulsory conference) are easily adhered to by all practitioners; and, facilitating stronger security practices in respect of access to Court materials.

Given these significant benefits and Queensland's large and decentralised nature, the Society is strongly in favour of increased use of technology and electronic Court processes for summary criminal procedure, including electronic lodgement, filing and service of documents. New criminal procedure laws should facilitate the use of digital technologies and electronic processes, and be sufficiently flexible to accommodate future technological advances. This is critical to ensuring the long-term sustainability and efficiency of the criminal justice system and will work to bring Queensland processes into line with the majority of other Australian jurisdictions.

While it is important to enable the use of modern technologies, the legislation must be cognisant of the challenges such technologies might present in the criminal justice context. For example,

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[9] Ibid 45.

[10] Australian Institute of Criminology, *Audiovisual link technologies in Australian criminal courts: Practical and legal considerations* (Research Report 22, 2021) 1.

it must also have regard to the access to justice barriers technology can present for some people, who may not have access to certain devices or high speed internet connection, or who may have cognitive or other disabilities that impact their ability to engage with certain technologies.

Facilitating the use of digital technologies must also be coupled with appropriate funding and resourcing to avoid the unintended consequence of such technologies contributing to further inefficiencies in the system.

Culturally appropriate and accessible procedures

Queensland's criminal procedure laws must be culturally appropriate for the communities to which they apply. The overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system has been extensively documented, along with the barriers to access to justice faced by Aboriginal and Torres Strait Islander people in the criminal justice context. The Australian Law Reform Commission (**ALRC**) has undertaken significant work into the challenges faced by Aboriginal and Torres Strait Islander people appearing as defendants before the criminal justice system.[11]

For example, given Aboriginal and Torres Strait Islander people come from a variety of communities and language groups, some of them may 'find it difficult – if not impossible – to understand legal proceedings without access to an interpreter'.[12] The prevalence of hearing loss may make it equally difficult for Aboriginal and Torres Strait Islander people to understand and participate in legal proceedings.[13] The right to be able to understand legal proceedings is well-established in both international[14] and domestic[15] law, and flows through to obligations under the *Human Rights Act 2019* (Qld) (**Human Rights Act**).[16] However, the ALRC highlights practical challenge remain in procuring access to interpreters, both in relation to Aboriginal and Torres Strait Islander languages and where a person experiences hearing loss.[17]

Criminal procedure laws must also account for cross cultural communication issues with respect to Aboriginal and Torres Strait Islander people; for example, 'gratuitous concurrence' which means agreeing to any and every proposition, and the possibility of being misunderstood because important body language cues are missed or not given their full significance by the

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[11] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, ALRC Report No 133, December 2017) 319 [10.1].

[12] Ibid 321 [10.5]. Research from South Australia also indicates that Magistrates may try and address this by making an effort to use less formal language to aid comprehension among court participants: Queensland Treasury, *Wise practice for designing and implementing criminal justice programs for Aboriginal and Torres Strait Islander peoples* (Research Report, April 2021) 41.

[13] Australian Law Reform Commission (n 11) 321 [10.7].

[14] 'In the determination of any criminal charge against him, everyone shall be entitled to ... be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him': *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

[15] On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her: *Ebatarinja v Deland* (1998) 194 CLR 444, [26].

[16] Where a person charged with a criminal offence is entitled to 'be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, type of communication the person speaks or understands' and 'to have the free assistance of an interpreter if the person cannot understand or speak English': *Human Rights Act 2019* (Qld) s 32(2)(a), (i).

[17] Australian Law Reform Commission (n 11) 322 [10.11].

listener.[18] Accordingly, the Society considers it critical that any new criminal procedure laws are both culturally appropriate and culturally safe for Aboriginal and Torres Strait Islander people.

Additionally, Queensland's criminal procedure laws should be accessible to all Queenslanders. Consideration should be given, for example, to a section similar to that of s 72 of the *Youth Justice Act 1992* (Qld) (**YJA**), which requires the court to ensure, as far as practicable, that the child understands: the alleged offence, including the matters that must be established before the child can be found guilty; the court's procedures; and, the consequences of any order that may be made.[19] This can be done by way of a direct explanation of the matters in court; having some appropriate person give the explanation; having an interpreter or another person able to communicate effectively give the explanation; and, causing an explanatory note in English or another language to be supplied.[20]

The Consultation Paper also appropriately recognises the need to accommodate the needs of people with disability, people from culturally and linguistically diverse backgrounds, and victims of domestic and family violence, who may have particular needs and vulnerabilities.

Compatibility with Queensland's human rights laws

The *Human Rights Act 2019* (Qld) (**Human Rights Act**) establishes a number of human rights relevant to people who have contact with Queensland's criminal justice system, including the right to: recognition and equality before the law (s 15); protection from torture and cruel, inhuman or degrading treatment (s 17); privacy and reputation (s 25); protection of families and children (s 26); cultural rights (s 27) and cultural rights of Aboriginal and Torres Strait Islander peoples (s 28); liberty and security of person (s 29); humane treatment when deprived of liberty (s 30); a fair hearing (s 31); be treated in an age appropriate way, in relation to children in the criminal process (s 33); not to be tried or punished more than once (s 34); and, not to be tried or punished for retrospective criminal laws (s 35).

Section 32 of the Human Rights Act sets out the fundamental rights of persons charged with a criminal offence:

> (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
> (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
> (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;
> (b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;
> (c) to be tried without unreasonable delay;
> (d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;
> (e) to be told, if the person does not have legal assistance, about the right, if eligible, to legal aid;
> (f) to have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid under the Legal Aid Queensland Act 1997;
> (g) to examine, or have examined, witnesses against the person;

[18] Ibid 325 [10.19].
[19] *Youth Justice Act 1992* (Qld) s 72(2).
[20] Ibid s 72(3).

(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;
(i) to have the free assistance of an interpreter if the person cannot understand or speak English;
(j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;
(k) not to be compelled to testify against themselves or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
(4) A person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

It is vital that any new criminal procedure legislation be compatible with these human rights. Our members highlight, in particular, that the procedures associated with accessing interpreters and disclosure may not be compatible with the rights included in the HRA.

Practical considerations

The Society supports practical initiatives to increase the accessibility of Queensland's criminal justice system. For example, consideration should be given to improving the way we obtain evidence from certain people, including defendants (for example, by examining the potential expansion of the Queensland Intermediary Scheme).[21] The ALRC has also identified the symbolic and deterrent value in the formal court environment, but highlighted that courts can also be 'threatening or overwhelming'.[22] Previous recommendations have been made to develop guidelines to be used when new courts are established and existing facilities are modified.

Q3 How could criminal procedure in the Magistrates Courts better accommodate the needs of different people? What is needed to allow for better understanding, connection and participation?

Cultural diversity[23] is an intrinsic feature of contemporary Australia and courts have consistently recognised the need for an inclusive legal system that ensures equity of access for all people.[24] At a practical level, it is also well recognised that diversity on the bench 'helps all judges to meet the obligation to be aware of and understand the differences arising from disability, gender, sexual orientation, religious conviction, race, ethnic background, and culture' and maintains public confidence in the judiciary.[25]

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[21] Queensland Courts, QIS Pilot Program (Web page, 21 June 2021) <https://www.courts.qld.gov.au/services/queensland-intermediary-scheme/qis-pilot-program>.
[22] Australian Law Reform Commission, [18.185]. Although the ALRC's recommendations relation to court design were made with respect to child offenders, they are equally applicable to adults.
[23] Along with racial, religious, age, sex/gender, ability/disability diversity.
[24] Hon TF Bathurst AC and S Schwartz, 'Doing right by "all manner of people": building a more inclusive legal system' (Speech, Law Society of New South Wales, 1 February 2017); Hon H Wood, 'Cultural diversity: reflections on the role of the judge in ensuring a fair trial' (2016) 28 *JOB* 35.
[25] Lynne Leitch, 'Strengthening Judicial Integrity through Inclusiveness and Diversity: A Canadian Perspective' (online, 2021) <https://www.unodc.org/dohadeclaration/en/news/2021/12/strengthening-judicial-integrity-through-inclusiveness-and-diversity_-a-canadian-perspective.html>. See also Daniel J Crooks III, 'Race and Gender on the Bench: How Best to Achieve Diversity in Judicial Selection' (2013) 892) *Northwestern Journal of Law & Social Policy* 174; Sherrilyn A Ifill, 'Racial Diversity on the Bench: Beond Role Models and Public Confidence' (2000) 57(2) *Washington and Lee Law Review* 405.

In this respect, the Society has consistently advocated for investment in a judicial commission to support the rule of law, maintain the independence of the judicial branch of government, and improve public confidence by the arm's length handling of complaints.[26] A judicial commission could, for instance, organise and supervise an appropriate scheme of continuing education and training, including Aboriginal and Torres Strait Islander cultural capability training of judicial officers. The commission could also be responsible for considering ways to increase the number of Aboriginal and Torres Strait Islander judicial officers across the State. Further, the commission could examine complaints against judicial officers, including delays in delivering judgments and inappropriate conduct directed towards workers or persons appearing before the officer.[27]

Our members also urge the Criminal Procedure Review Team to consider Aboriginal and Torres Strait Islander peoples as separate and distinct from other marginalised groups identified in the Consultation Paper. The Society recommends that criminal procedure laws facilitate a strengthening of existing legal mechanisms to ensure adequate cultural safety for Aboriginal and Torres Strait Islander people. The Queensland Murri Court, for example, has been successful in many of its objectives, including reducing the over-representation of Indigenous offenders in prison and juvenile detention, reducing reoffending, improving court appearance rates and strengthening the relationships between the court and Indigenous community.[28] In this way, the Murri Court more appropriately recognises the collective nature of Indigenous culture and provides individualised support for the defendant. In contrast, our members report there are limited support mechanisms in place for Aboriginal and Torres Strait Islander defendants in the Magistrates Courts, where the defendant often does not have a proper understanding of the proceedings.

Similarly, members of our Childrens Law Committee report there has been an inability to identify a consistent and effective Murri Court model for children. Another barrier for young people is the numbers of young people listed on court days, which significantly affects the Childrens Court's ability to properly engage with young people and explain the process to them and their families. Our members also report parents are often left in the waiting room with young children for hours at a time, and recommend the Childrens Court have sittings to reduce time spent waiting (for example, a 9am sitting and a 2pm sitting). There would also be benefit from a physically separate Childrens Court that is appropriately designed and resourced to account for the unique factors affecting young offenders and their families.

We also urge the Review Team to consider the need to maximise people's ability to participate in Magistrates Courts proceedings, where cognitive disabilities, impaired decision-making ability and experiences of trauma etc. may impact on their participation.

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[26] Matt Dunn and Kate Brodnik, 'A judicial commission for Queensland?', *Proctor* (online, 5 May 2022) <https://www.qlsproctor.com.au/2022/05/a-judicial-commission-for-queensland/>.

[27] The Society has previously call for a commitment to the establishment of a judicial commission in our 2020 Call to Parties Statement: Queensland Law Society, *2020 Call to Parties Statement – Queensland State Election* <https://www.qls.com.au/Content-Collections/Statements/QLS-call-to-parties-QLD-State-Election>.

[28] Australian Institute of Criminology, *Evaluation of the Queensland Murri Court: Final Report* (Technical and Background Paper Series No 39, 1 October 2010). See also, Ken Taylor, 'Introduction from the Queensland Law Society' (2018) 25 *Pandora* vii; Elena Marchetti, 'Indigenous Sentencing Courts in Australia', in Antje Deckert and Rick Sarre (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 379.

Q4 Should the new legislation include guiding principles? If so, what should the main themes of those principles be?

QLS supports the inclusion of an appropriately drafted objectives clause in any new criminal procedure act, which would bring it into line with comparable legislative frameworks prescribing court processes. For example, there is an objectives clause contained in the YJA which provides a list of overriding objectives to govern criminal law procedures in the Children's Court.[29] The YJA also contains a comprehensive set of youth justice principles.[30]

The *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) includes a section titled 'Philosophy – overriding obligations of parties and court', which outlines the purpose of the rules:

> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.[31]

Objectives clauses may also be relied upon by the judiciary and legal profession as an interpretive aid where uncertainty or ambiguity exists in the legislation. Accordingly, we would support an appropriately drafted objectives clause to clarify the overarching operation of the legislation and aid its interpretation. We recommend consideration be given to an objectives clause describing the principal objectives of the legislation, which could include (among others) to:

- establish a clear and accessible procedure for the conduct of criminal proceedings;
- facilitate the fair, effective and efficient administration of criminal justice;
- give effect to the rights and responsibilities set out in the *Human Rights Act 2019* (Qld);
- recognise the overrepresentation of Aboriginal and Torres Strait Islander People in the criminal justice system;
- provide for the use of electronic technology in relation to criminal procedure and the court record of criminal proceedings; and,
- balance the needs of both those alleged to have committed a crime and their victims.

Some members also suggest the legislation recognise the unique circumstances of the colonisation of Australia and the deleterious and traumatic impact this has had on generations of Aboriginal and Torres Strait Islander peoples in all areas of their lives.

Q5 Should the law be changed to create a single Magistrates Court of Queensland?

Currently, Queensland Magistrates Courts are established pursuant to designated districts based on geographical locations (e.g. Redcliffe, Holland Park or Beenleigh). We note the current Magistrates Courts structure in Queensland stands in contrast with other jurisdictions, including Victoria, New South Wales and Western Australia, which have all introduced a single Magistrates or Local Court.

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[29] *Youth Justice Act 1992* (Qld) s 2.
[30] *Youth Justice Act 1992* (Qld) s 3, sch 1.
[31] *Uniform Civil Procedure Rules 1990* (Qld) s 5.

QLS recognises the potential benefits associated with a single Magistrates Court of Queensland, including consistency in practices across Queensland Magistrates Courts and improved uniformity across Australian jurisdictions, as well as an increased ability for the Chief Magistrate to counsel other Magistrates. As such, the Society is generally supportive of the establishment of a single Magistrates Court of Queensland. However, our members raise the need for a continued ability for Magistrates to make local practice directions specific to that area's needs.

Q6-7 Should the Queensland Magistrates Courts be renamed as Local Courts? Should the title of 'Magistrate' be changed to 'Local Court Judge'?

We are also supportive of retitling the Magistrates Court of Queensland as the Local Court of Queensland, and of Magistrates being retitled as Judges. Our members highlight that the terms "local court" and "judge" better reflect the contemporary nature of the Magistrates Courts and the role of Magistrates, and may be more easily understood by the community. However, we note consideration should be given to significant cost implications that may arise for the state from these changes.

More broadly, we raise for consideration the potential benefits of separate criminal and civil divisions of a renamed Local Court, along with the expansion of the Local Court's civil jurisdiction. We make this submission for two main reasons. First, the Queensland Civil and Administrative Tribunal (**QCAT**) was established to deal with minor civil disputes in a way that is accessible, fair, just, economical, informal and quick,[32] in circumstances where parties can sufficiently self-represent. QCAT's current jurisdiction, however, encompasses the resolution of matters that are difficult to reconcile with these principles. For example, construction disputes, guardianship matters and professional discipline matters are often complex, time-consuming and involve technical legal arguments, occasioning the need for legal representation to ensure a fair hearing for all parties. In our view, it may be more appropriate for these (and some other) matters to be heard in a civil division of the Local Court. Second, distinguishing between the civil and criminal jurisdiction of the Local Court would ensure matters are heard and decided by judicial officers who are qualified expert practitioners in either criminal or civil matters.

Q8 Should the new Act contain general provisions to allow for electronic processes and procedures? If yes, are any safeguards required?

Yes, the new Act should contain general provisions to allow for electronic processes and procedures. We refer to our comments in response to Question 2 above.

Sufficient safeguards will be required to ensure technology does not become an access to justice barrier. Our members report some of their clients do not have access to email, computers or reliable internet connection. The legislation must suitably acknowledge that a court could not, for example, issue an arrest warrant unless a person has acknowledged receipt of an electronic document, or proceed with a matter unless the person has had the opportunity to consult with their legal representative.

Our members raise the following suggested safeguards for consideration:

- The presiding judicial officer and the court clerk, and the courts service generally, should ensure a clear beginning and end for each video-link appearance, with time warnings

[32] *Queensland Civil and Administrative Tribunal Act 2009* s 3(b).

and prompts. There must be a formal greeting and standard court introduction to the proceedings.

- All detention centres should provide materials such as diagrams of the courtroom, information on court etiquette and forms of address to prepare people for any video hearing.
- All those taking part in the court hearings should be encouraged to use less formal language and to provide additional explanations to ensure that people are capable of understanding the court processes taking place via the video link.
- All detention facilities should ensure that video-link suites are soundproof.
- There are gaps in the data being collected by the various agencies involved in the use of video links in the youth justice system, including by the courts, detention centres, child safety services, the watch house and police. These agencies need to collect the data required for a complete understanding of how the links are used and the outcomes of their use for the children. In particular, the agencies should be seeking to ensure that the use of the links is not disadvantaging children by shortening their time in and access to the court, extending the overall time for matters to be finalised, or resulting in adverse outcomes in terms of sentence or time in detention.

Q9 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?

The Society agrees with the proposition that technology will improve the efficiency of court processes and we strongly support the increased use of technology where possible and appropriate.

Members of our Childrens Law Committee highlight that young people and very young people may be disadvantaged by remote participation. Further, matters involving an interpreter may make it difficult for a person where they are not in the presence of the interpreter or able to easily see the interpreter. The Childrens Law Committee recommends flexibility in the use of technology for criminal procedures involving children. For example, it may be beneficial to some young people to attend a sentencing remotely, but detrimental to others. Similarly, getting instructions from a child during a summary hearing will be complicated where the hearing is held remotely.

Members of our First Nations Legal Policy Committee have expressed concerns about bail hearings, where remote bail hearings could work effectively for some Aboriginal and Torres Strait Islander people but not all. In particular, it will be necessary to develop safeguards to ensure the person comprehends and understands the proceedings. This could be done via a legislative provision that requires the Magistrate to ensure the defendant understands the proceedings, consents to a remote hearing and has had sufficient opportunity to seek advice from their legal representative.

Q10 Should summary hearings be conducted remotely? Why or why not?

Our members report some summary hearings are dominated by technical legal arguments, where others involve issues of fact and witness credibility. Accordingly, a sufficient degree of flexibility is required when deciding whether a summary hearing should be conducted remotely. The Society is generally supportive of summary hearings being conducted remotely, so long as sufficient safeguards are in place. For example, the consent of the parties should be obtained,

and consideration should be given to additional safeguards for children and those who need access to an interpreter or intermediary.

Our members highlight the common law makes clear where there are issues of credit in relation to a particular witness, that person should not be allowed to give evidence by phone unless the parties consent on account of the court's reduced ability to assess the reliability of their evidence. This and similar safeguards established under common law should remain.

Q11 In practice, in what circumstances are proceedings about breach of duty currently used in the Magistrates Courts?

Our members report breaches of duty under 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. In this respect, the use of alternative phraseology for such matters might make them more readily understood (for example, "regulatory breaches"). Aside from this, 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 simple offences. Indeed, we note in every instance where the term 'breach of duty' appears in the Justices Act, other than in s 4 where it is defined, it appears as 'a simple offence or breach of duty'.

Q12 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? Should the new legislation keep the current meaning of the term in the Justices Act but rename it as a 'summary offence'?

Consistency between the *Criminal Code 1899* (Qld) (**Criminal Code**) and criminal procedure laws is self-evidently desirable, to avoid confusion and potential questions of statutory construction arising. The Society is broadly supportive of the proposal to rename the term 'simple offence' as a 'summary offence' in the Justices Act. If this proposal is adopted, we recommend amending the definition of (what would then be) a 'summary offence' to explicitly state "(indictable, simple or regulatory)" as opposed to the current wording "any office (indictable or not)", to avoid ambiguity. The definition might also directly refer to what is currently provided in chapter 58A of the Criminal Code regarding indictable offences being dealt with summarily. See our comments below in response to Question 13.

Q13 What procedural changes (if any) should be made to chapter 58A of the Criminal Code and the laws about indictable offences dealt with summarily? Should they be moved or redrafted to improve their readability?

Our members report the provisions in chapter 58A of the Criminal Code are difficult to follow and do not lend themselves to clear and consistent application by the courts. While we acknowledge the delineation of offences (that is, what should or should not be dealt with by the Magistrates Courts) is outside the review's scope, the Society supports re-drafting these provisions so that the current provisions setting this out are more coherent. One option would be to replace the provisions currently set out in ss 552A to 552BB with a single section referring to a schedule, similar to that provided in s 552BB, which would simply set out each offence provision and in lieu of Column 3 'Relevant Circumstances' it would set out whether it can be dealt with summarily and any limitations. There would be no need, then, for the repetitive statements that all such subsections apply subject to s 552D. Further, the schedule would make it more workable for practitioners and the courts, who need simply look up the offence provision in numerical order and confirm the rule for that offence. In our view, the current use of 'excluded

offences' and 'relevant circumstances' is a key over-complication in the current drafting of these provisions.

We do not have a firm view about the location of laws concerning indictable offences being dealt with summarily. Noting the comments about the review's scope at 3.38 of the Consultation Paper and given our view that redrafting these laws would be beneficial, it may be desirable to remove these laws from the Criminal Code and insert them into the Justices Act.

Our members report s 552A as currently drafted can also be unnecessarily complicated for Magistrates, and parties, seeking to determine whether a matter ought to be retained by them or to proceed on indictment. Accordingly, a redrafting of this part, along with an overall relocation of this chapter, would be useful. For example, it might initially provide: '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 Magistrates with judicial discretion to determine whether for any reason tabled by a defendant a matter ought to be dealt with in indictment, notwithstanding the usual rules providing otherwise. This is hampered by the heading 'When Magistrates Courts must abstain from jurisdiction' (emphasis added) and the provision's structure. We suggest this could be drafted to read: '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'. However, we acknowledge that such a redrafting might fall outside the scope of this review to the extent it would amend the substance of the current provision in the Criminal Code.

Q14 How should criminal proceedings in Queensland be started by persons other than police under the new legislation? Should the complaint and summons be replaced by a notice that the person must appear in court?

The Society supports replacing the complaint and summons procedure with a notice that the person must appear in court. The commencement of criminal proceedings by public officers via complaint and summons is outdated and inefficient. Persons (other than police officers) who are capable of commencing criminal proceedings are generally senior officers within statutory organisations, vested with significant statutory responsibilities. The current Justices Act requirement that such persons lay a complaint before a Justice of the Peace (in circumstances where the Justice of the Peace is often less experienced than the complainant themselves) is both time-consuming and unnecessary.

We highlight police officers from the most junior rank of constable can commence criminal proceedings via notice to appear, without review by a justice of the Peace. The distinction between that process and the commencement of an offence by a public official is not justified, particularly so where a statutory body is vested with legislative power to commence proceedings for alleged offences within its legislative framework. In such circumstances, it should be sufficient for the appointed person to themselves execute the documentation (that is, a notice to appear or similar) necessary to commence proceedings.

In circumstances where a higher degree of oversight is required, it would be appropriate to specify for those particular offences that consent of a particular person is required. For example, a proceeding in respect of an offence against the *Criminal Law (Sexual Offences) Act 1978*

(Qld) requires that a person authorised in writing by the Minister is required to commence proceedings.[33]

The distinction between that process and the commencement of an offence by a public official is simply not justified. This particularly so where a statutory body is vested with legislative power to commence proceedings for alleged offences within its legislative regime. In those circumstances it should be sufficient for the appointed person within that body to themselves execute the documentation, (such as a notice) necessary to commence proceedings (whether the term/document 'complaint' is maintained, or a 'certificate of charge' or similar, as in other jurisdictions).

Members of our Childrens Law Committee also highlight a notice to appear in relation to breaching an order will be much easier for children to understand in the youth justice space. However, there might be merit in retaining a different procedure to distinguish a breach from an offence, because breaches should not be treated the same way as a criminal charge.

Q15 How can procedures for starting proceedings be simplified?

Our members suggest that removing the requirement to file a complaint would reduce the number of prosecutions (in particular, regulatory prosecutions) that are struck out on the basis of archaic and confusing legal technicalities provided for in complex cases. This would also assist where limitation dates are approaching.

However, we stress that the current particulars regime should be maintained to ensure the defendant knows the case against them from the outset. This facilitates the focusing of all parties on the specific allegations and available evidence from the earliest point in proceedings. Accordingly, regardless of whether the complaint name and/or process is amendment, the requirement for at least basic particulars identifying all 'essential factual ingredients' should remain.

Q16 Should the new legislation about criminal procedures in the Magistrates Court have a clear statement of when proceedings have started? Should proceedings start on the date that material is filed in court?

The Society agrees there should be clarity as to when proceedings are commenced.

Q17 What requirements should be included in the new Magistrates Courts criminal procedure legislation about the description of an offence?

Currently, the Justices Act requires an offence to be described using the words (or similar words) in an act, order, by-law, regulation or other instrument that creates the offence.[34]

Where the prosecution relies upon any circumstance of aggravation, including one preconditioned on the occurrence of a previous conviction(s), it should be obliged to expressly allege the circumstances of aggravation in the charge if the increased maximum penalty is to apply.

A Notice alleging previous convictions, and the Queensland criminal record itself, should be served on the defendant by no later than the first Court appearance date if a criminal record is to be relied upon by the prosecutions.

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[33] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 13.
[34] *Justices Act 1886* (Qld) ss 42, 46, 47(1).

These requirements are fundamental and should be incorporated in a revised Justices Act.

In light of the increasing number and complexity of offence provisions within the Criminal Code (Qld) and other statutes (including the various iterations of available circumstances of aggravation), the QLS is of the view that an adequate description of an offence necessitates specific reference to the offence provision by section, subsection and statute name. Requiring merely a statement of the short title of an offence is apt to occasion unfairness to the defendant and ambiguity to the Court.

Q18 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?

In general terms, the information and particulars of an offence required to be disclosed by the prosecution to the defendant varies according to the stage of proceedings.

For example, a Notice to Appear requires only a description of the type of offence charged and when/where it occurred.[35] A bench charge sheet requires the name of the complainant and defendant, the charged offence and adequate particulars such as the time and place of offence, the aggrieved and any property in question, and finally any circumstances of aggravation.[36]

In QLS's view, neither level of detail is sufficient to provide a defendant with adequate/meaningful particulars of an offence. Provision by the prosecution of adequate/meaningful particulars of the offence is a cornerstone of the fair and efficient administration of criminal justice. As Kirby J stated in *KRM v The Queen*:[37]

> The rule of particularity: ..... the first is that the essential character of our criminal justice system is accusatorial. The normal rule is that a person accused of a criminal offence, is entitled to be informed not only of the "legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge"..... The common law is disinclined to permit the conviction of an accused person upon "inexact proofs, indefinite testimony, or indirect inferences". In harmony with this fundamental postulate, the rule established for criminal trials in Australia is ordinarily one which requires a high degree of specificity in the accusations, charges and evidence proffered by the prosecution.

In *Johnson v Miller,*[38] Evatt J referred to the requirement for provision of adequate particulars of a charge to the defendant as a precondition for the exercise of the "fundamental right" to decide upon one's plea and/or to object to the admission of evidence on the basis of relevance. His Honour continued: 'This fundamental right cannot be exercised where there is a lack of substantial particularisation of the offence.'[39]

We consider any provisions in a new Justices Act setting out the requirements for the detail needed in an initiating Notice must give effect to these principles. This necessarily means a Notice must contain the defendant and the complainant's full names, dates of birth, time/date/place of alleged offence, a description of the acts or omissions alleged,

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[35] *Police Powers and Responsibilities Act 2000* (Qld) s 386(1).
[36] *Justices Act 1886* (Qld) s 42; *Justices Regulation 2014* (Qld) ss 13–14.
[37] (2001) 206 CLR 332, 96.
[38] (1937) 59 CLR 467, 407-8.
[39] Ibid.

time/date/place of to appear, consequences of failing to appear, and a recommendation to seek legal advice/legal aid. The basis for this recommendation is entrenched in common law principles.

Notice of a charge which merely rehearses the words contained in an offence provision, identifies the provision and states the alleged time, date and place of the offence is not enough. There needs to be identification in the Notice of the act and/or omission that is alleged against the defendant and said to constitute the commission of each element of the offence charged.

Consistent with the common law, this degree of detail is required to inform the defendant of the case against them, so the defendant may properly prepare their case (whether that be through exercising their right to plead guilty, object to evidence, and/or make 'forensic' judgements such as decisions relating to cross-examination and the deployment of evidence).[40]

We also consider the legislation should require prosecuting authorities to serve upon the defendant, at the time s/he is charged, with a copy of the initiating notice, any accompanying bench charge sheet, a police statement of facts and any criminal record alleged. These requirements should be consistent across all initiating documents. Such requirements will encourage/compel prosecuting authorities to seriously engage with the evidence and their case before making the decision to charge. This is desirable and in the interests of both justice and efficiency.

Q19 Are the current provisions about private complaints in the Justices Act working in practice? If not, why?

The continued ability to bring a private prosecution or complaint has been criticised on numerous grounds, including: they increase vexatious and frivolous complaints and place additional stresses on an already over-burdened court system; they allow private complainants to essentially act as the prosecution, which sidelines the critical role of public interest in the criminal law; and, people who make private complaints are hampered by their own conflict of interest in a matter such that they cannot objectively take the public interest into consideration.[41]

Despite these criticisms, private prosecutions and complaints (where supported with appropriate safeguards to protect against misuse) can work to remedy broader institutional issues; for example, the unreliability of prosecutorial discretion, insufficient ODPP funding and broader failures in prosecuting certain types of offences.[42] It has been identified that existing barriers to exercising the right to private prosecutions are: financial costs; the DPP's power to takeover and discontinue proceedings; and, consent provisions for commencing prosecutions.[43]

Private prosecutions are significantly more common in England and Wales, and drawing on that experience, some recommendations for improvement in Queensland include:

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[40] Ibid 497–8.

[41] Findlay Stark, 'The Demise of Private Prosecutions' (2013) 72(1) *Cambridge Law Journal*; Claire de Than and Jesse Elvin, 'Private Prosecution: A Useful Constitutional Safeguard or Potentially Dangerous Historical Anomaly?' (2019) 8 *Criminal Law Review* 656; Anne Louise Prestidge, 'Private Prosecutions in New Zealand – A Public Concern?' (2019) 50 *Victoria University of Wellington Law Review* 107; L H Leigh, 'Private Prosecutions and Diversionary Justice' [2007] *Criminal Law Review* 289. For an overview on the benefits of retaining private prosecutions in the Queensland context, see Rachna Nagesh, 'Private Prosecutions in Australia – Bolstering Access to Criminal Justice' (Research Paper).

[42] Nagesh (n 41) 9.

[43] Ibid 26-7.

- publication of clear guidance as to the DPP's power to takeover and discontinue proceedings;
- removal of consent provisions, except for sensitive matters where confidential information may be at risk;
- a costs recovery scheme where defendants and private complainants have equal access to the scheme; and,
- a central registry of private prosecutions to permit greater oversight of such proceedings and permit data analysis for reform purposes.[44]

However, any changes to the current provisions about private complaints must ensure sufficient safeguards are in place to uphold the right to procedural fairness and a fair trial. In particular, the Childrens Law Committee recommends restricting the ability to bring a private complaint against a child or young person.

Q20 Should the new legislation about criminal proceedings in the Magistrates Courts place any limits on private complaints? Why or why not?

We refer to our comments in response to Question 19 above.

Q21 Are the current disclosure obligations in Queensland working in the Magistrates Courts? If not, why not?

The prosecution obligation to disclose evidence in a criminal proceeding is a fundamental component of ensuring that those proceedings are conducted fairly against a defendant. Though this was not always thought to be the case, the law is now settled insofar as the importance of this disclosure is concerned; as well as contributing to the fairness of the proceedings, the obligation to disclose is also accepted to be of greater utilitarian benefit than the alternative (when balanced against the increased resources required to make disclosure of evidence) – requiring the prosecution to turn over their evidence early in proceedings minimises delays, facilitates timely pleas of guilty, and narrows the issues in contest at trial.[45]

<u>The prosecution's obligation to disclose in the Magistrates Courts</u>

Chapter 62, Division 3 of the Criminal Code sets out, in no small detail, the obligations that apply to the prosecution regarding disclosure in criminal proceedings – what such disclosure must include, and when it must occur. There is little controversy about the general scope of these obligations, at least from a defence perspective.

As far as Magistrates Court proceedings are concerned, however, the Criminal Code laws only apply to 'relevant proceedings';[46] being committals and 'prescribed summary trials' (trials for indictable offences being heard summarily under the Criminal Code or the *Drugs Misuse Act 1986* (Qld) (**DMA**)).

The Justices Act does not deviate from this distinction between committals/prescribed summary trials and other proceedings, instead simply adopting the Criminal Code provisions in full[47].

Notwithstanding this apparent shortfall in the legislation, prosecution disclosure still occurs as a matter of course in 'non-prescribed' criminal matters in the Magistrates Courts. No doubt, this is as a result of a combination of the application of the ODPP Director's Guidelines, the QPS

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[44] Ibid.
[45] *R v Spizzirri* [2001] 2 Qd.R. 686, at 688
[46] *Criminal Code 1899* (Qld) s 590AD.
[47] *Justices Act 1886* (Qld) s 41.

Operational Procedures Manual, and the common law duties placed upon a prosecution to act fairly.[48]

Additionally, the *Human Rights Act 2019* (Qld) may also operate to require prosecution disclosure, notwithstanding the absence of any specific legislative requirement to do so in non-prescribed proceedings.[49]

Consideration will need to be given to some exceptions to disclosure; for example, where the safety of a person is at stake or where making disclosure may breach the provisions of another act (for instance, the confidentiality provisions of the *Child Protection Act 1999* (Qld).

How does disclosure occur?

The legislation provides some guidance on when disclosure is to occur – at least 14 days before committal/prescribed summary trial.[50] However, s 590AI does encourage the prosecution to make disclosure earlier than that 'deadline'.

Magistrates Court Practice Directions No 10 & 13 of 2010 expand on the timeline for prosecution disclosure, requiring a staggered approach to the provision of material, either by default or upon defence request. Under those Directions, Magistrates may direct the prosecution to provide a full brief of evidence, or specific evidence that has been requested by defence, by a given date, as part of the case management process ("callover") prior to the matter being listed for hearing. Interestingly, the Practice Directions draw no distinction between 'prescribed summary matters'/committals and other summary matters, as the Criminal Code does.

Where the prosecution has not complied with their obligation to disclose, either pursuant to a direction given by the Court under the Practice Directions or to a request made by defence, then the defendant can apply to the Court for a formal direction per s 83A(5)(aa) of the Justices Act – known as a Disclosure Obligation Direction.[51] This can only be done at a Directions Hearing, which is held in accordance with s 83A of the Justices Act and Chapter 9A of the *Criminal Practice Rules 1999* (Qld), requiring the exchange of correspondence between the parties outlining what is sought and why, and the filing of a written application and copies of that correspondence.

A Disclosure Obligation Direction can be broad;[52] requiring the prosecution to provide specified material to the defence is the most obvious application, though the Court can also order that the Arresting Officer attend Court to give evidence about the particular thing sought to be disclosed by the defence, or even inspecting the thing itself to determine if it should be disclosed.

Like the other provisions of the legislation dealing with disclosure, however, Disclosure Obligation Directions are also limited by reference to the definition of 'relevant proceedings' under the Criminal Code.[53]

Confusingly, s 83A(5A) of the Justices Act appears to provide an additional qualification to the power of a Court to make directions concerning disclosure and expand it to all summary proceedings, but not by qualifying the power to make a Disclosure Obligation Direction. Instead, the power of the Court to make a direction about a party providing a copy of expert reports or 'a

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[48] *R v Apostilides* (1984) 154 CLR 563; *R v Lucas* [1973] VR 693.
[49] *Human Rights Act 2019* (Qld) s 32.
[50] *Criminal Code 1899* (Qld) s 590AI(2)(a).
[51] *Justices Act 1886* (Qld) pt 4, div 10B.
[52] *Justices Act 1886* (Qld) s 83E.
[53] *Justices Act 1886* (Qld) s 83D.

statement, report or other stated information relevant to the proceeding'[54] is qualified by s 83A(5A) of the Justices Act to provide that, in a summary proceeding, 'a Magistrate may give a direction under subsection (5)(a) about prosecution disclosure, despite subsection (5)(aa) and section 41'.

Are there consequences for non-compliance with a disclosure direction?

The Justices Act provides limited relief for defendants who are confronted with a refusal to comply with a Disclosure Obligation Direction:

Costs

A defendant can apply for costs in limited circumstances where the prosecution has not complied with a disclosure direction. Section 83B of the Justices Act sets out a staggered process where, on application by a defendant or on the Court's own initiative, the prosecution (the legislation uses the words 'a person' – so this could also include, for example, the arresting officer) file and serve an affidavit, or give evidence in Court, explaining and justifying the non-compliance.

If the Court is not satisfied with the explanation given, then the proceedings can be adjourned to allow for compliance.[55] Further, if satisfied the noncompliance was unjustified, unreasonable or deliberate, the Court can also make an award of costs to the defendant that is 'just and reasonable'.[56] Such costs may only be awarded 'in relation to the adjournment', limiting the scope of any potential order to those costs arising as a result of the adjournment to the proceedings.

The real limit to this costs power flows from the fact that it only arises where there has been non-compliance with a direction given per s 83A(5)(aa) (that is, at a Directions Hearing). The power to award costs does not apply where the prosecution has not complied with their general obligations to disclose evidence under the Criminal Code or the Practice Directions.

The general costs provisions in the Justices Act would not operate to provide a remedy in those situations where a formal Disclosure Direction has not been given, only being enlivened where a charge is dismissed by the Court.[57]

Refusal to admit evidence

The Court retains the residual discretion to exclude any evidence if it would be unfair to the defendant to admit it.[58] This would, in the appropriate case, extend to an order refusing to allow the prosecution to admit evidence not disclosed to a defendant either at all, or in a timely fashion.

The Justices Act expressly acknowledges the existence of this discretion in the context of the disclosure obligations in s 83C(2):

> This division does not affect—
>
> > (a)any other power a court has in relation to a failure to comply with a disclosure obligation, including, for example, the court's power to exclude evidence if it would be *unfair* to a defendant to admit the evidence.

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[54] *Justices Act 1886* (Qld) s 83A(5)(a).
[55] *Justices Act* (Qld) s 83B(4)(a).
[56] *Justice Act* (Qld) s 83B(4)(b).
[57] *Justices Act* (Qld) s 158.
[58] *Evidence Act* (Qld) s 130.

Of course, the unfairness to a defendant caused by prosecution non-compliance with a disclosure direction – for example, by providing material on the day of a hearing, when it ought have been provided much earlier – is easily remedied, by adjourning the relevant proceedings to allow time for the defence to consider that material. It is accordingly difficult to envisage a situation where a Court would exercise the discretion to exclude evidence simply due to late disclosure by the prosecution.

A defendant's obligation to disclose

Whenever mention is made of 'disclosure' in the context of criminal proceedings, it is generally understood to refer to obligations on the prosecution to disclose relevant material/evidence to an accused person. And whilst in fact it almost always does refer to this, there are instances where the defence also bears an obligation to disclose information or evidence to the prosecution.

In Queensland, Chapter 62 Division 4 of the Criminal Code provides three instances in which defence disclosure must occur:

Alibi – s 590A of the Criminal Code

Where a defendant proposes to call evidence of alibi, formal notice of that evidence (the witnesses' name and address) must be given to the prosecution within 2 weeks of the defendant's committal hearing, or they will be unable to call that evidence at trial without leave.

The section specifically provides that it only applies to 'trial on indictment' – meaning proceedings in the District or Supreme Court only. There is no equivalent provision in the Justices Act, suggesting that this obligation does not apply to proceedings in the Magistrates Court.

Expert evidence – s 590B of the Criminal Code

If expert evidence is relied on as part of the defence case, then the defendant is to give written notice of the name of the expert and their proposed opinion/finding 'as soon as practicable', along with a copy of the report 'as soon as practicable' prior to the trial date.

The section does not reference jurisdiction, only using the terminology 'trial' as the relevant proceeding in which the obligation arises. The section does refer (at s 590B(2)) to the 'directions judge' acting under s590AA or the 'trial judge', however, which implies proceedings on indictment in the superior courts, rather than summary proceedings. There is no equivalent provision in the Justices Act.

It is at least arguable that the obligation does not extend to the lower courts, though our members report that, in practice, early disclosure of expert reports relied on by defence does still occur.

Evidence sought to be called under s 93B of the Evidence Act – s 590C of the Criminal Code

Where a defendant wishes to adduce evidence per s 93B of the *Evidence Act 1977* (Qld) (**Evidence Act**) – out-of-court representations made by persons who are unavailable to give evidence at trial – then they must also give notice to the prosecution, 'as soon as is practicable' before the trial date, of the details of the evidence sought to be called.

This section, like s 590B of the Criminal Code, uses the term 'trial' throughout, and also (at s 590C(3)) refers to a directions judge or trial judge, giving rise to the same inference that the

obligation only extends to trial by indictment. Again, there is no equivalent provision in the Justices Act.

Are the provisions on the Justices Act working?

Our members highlight inconsistent and irregular disclosure by the prosecution as a contributing factor to the current workability of the provisions. There are ambiguities about the obligations on the prosecution when dealing with summary proceedings that are not "relevant" per the Criminal Code, and the Court's limited powers to deal with non-compliance with those obligations.

The Childrens Law Committee also raise the issue of disclosure in relation to the rebuttable presumption of *doli incapax*. Our members note the provisions of a timely brief of evidence would be useful in disclosing all the relevant cautions for summary matters that a child may have received. There is currently no specific practice direction relating to briefs of evidence for *doli incapax*. Consequently, there are no applicable timeframes surrounding the delivery of briefs of evidence relating to *doli incapax*. Our members report that delays in providing briefs of evidence have resulted in parties being unable to raise *doli incapax*, because Police have subsequently charged and interviewed the alleged offenders with other offences. Delays in providing briefs of evidence can delay the resolution of the matter, which in turn, prolongs a young person's time spent on remand or on bail. We are aware of *doli incapax* matters that have taken 12 months to resolve, because there was no clear understanding from the prosecution or the court on how to conduct the matter. Accordingly, we consider an appropriately drafted practice direction would be highly beneficial.

Q22 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?

Our members report that in practice, despite the (mostly) clear obligations placed on the prosecution to provide disclosure in a timely manner, there is little consequence for non-compliance with these obligations. The Court's power to award costs, for example, is limited by the cumbersome process of having to apply for a Directions Hearing, receive said Direction, and then establishing not only non-compliance with the Direction but also that the non-compliance was deliberate or unwarranted (the other remedies of stay of proceedings and exclusion of evidence are notoriously difficult to invoke). Our members report matters where directions to disclose briefs of evidence have gone unanswered by Police for over 12 months with no remedy to the client. Accordingly, there is little comfort for a defendant confronted with a failure to comply with the disclosure obligations.

In our view, non-compliance and in particular persistent non-compliance with such directions should be sufficient to give rise to an entitlement to costs. We recommend s 83A(8) of the Justices Act be amended to remedy its current deficiency; that is, it speaks only to 'directions' as opposed to other relevant proceedings (including mentions and directions given by Magistrates in the normal course of a matter, for example about disclosure of material or responses to submissions).

We also recommend the consequences for non-compliance with disclosure obligations be made more immediate and significant. We favour the NSW approach, where the Court not only has a more flexible power to award costs for non-compliance with a disclosure obligation which results

in delay to the proceedings,[59] but the Court must refuse to admit evidence sought to be adduced by the prosecution if said evidence has not been disclosed in accordance with the disclosure obligations.[60] The Court retains a discretion to admit the evidence in circumstances where the non-compliance is trivial, or there was good reason for it, but the default position requires strict compliance with the obligations to disclose.

Q23 Should the Criminal Code disclosure obligations be extended to all offences in Queensland?

Yes, we consider the obligations should be extended to all offences in Queensland. There does not seem to be a sufficient reason upon which to distinguish between a prescribed and non-prescribed summary hearing insofar as the obligation to disclose is concerned; an accused person is always entitled to a fair trial. Formally extending the obligations to all summary offences would reflect the actual practice occurring in the Magistrates Court in any event. Thus, it could not be argued that doing so would substantially increase the prosecution's workload or cause delays to proceedings generally.

Q24 Should there be any disclosure obligations on defendants in the Magistrates Courts (for example, about an alibi or expert witnesses)?

We consider there should be disclosure obligations on defendants in the Magistrates Courts to ensure consistency between the relevant jurisdictions. It should be made clear that the obligations which would otherwise apply to defendants for trials by indictment also apply to summary trials. There are clear benefits to all parties for proper and timely disclosure of these matters to occur, particularly in relation to the provision of alibi evidence.

Given the nature of summary trials, however, we consider a greater degree of flexibility ought to be permitted. Unlike with proceedings on indictment, where the defendant will have had access to the evidence brief for some time before their obligation to disclose an alibi arises, a defendant in a summary proceeding may only have a short window of opportunity after receiving the brief to organise their defence.

In extending the obligation to a defendant facing trial in the Magistrates Court, the legislation should prescribe that disclosure of alibi evidence occur 'as soon as practicable' prior to trial, with the understanding that the Court will adopt the approach taken in the higher jurisdictions and allow adjournments of trial proceedings where the timing of the disclosure results in some prejudice to the prosecution (for example, if given so close to the trial that the prosecution have no real opportunity to investigate or respond to the evidence proposed).

The Magistrates Court's power to issue disclosure directions or otherwise give directions about the proceedings (per s 83A) should also make clear that this power extends to directions that a defendant make disclosure (and when) of alibi evidence, expert opinion evidence or evidence under s 93B of the Evidence Act.

Q25 Are the current case conferencing requirements in Queensland working in the Magistrates Courts? If not, why not?

Our members report that different attitudes to case conferencing within each prosecution office makes it difficult to know whether a case conference can be conducted face to face, by telephone, or whether an office has an internal policy that they do not do case conferences or

[59] *Criminal Procedure Act 1986* (NSW) ss 118, 216.
[60] Criminal Procedure Act 1986 (NSW) ss 90, 188.

a practitioner/defendant must make a submission. We consider there is a need for some level of uniformity across the prosecution officers to allow defence lawyers to efficiently communicate with an identified officer with authority to make a decision and reach a resolution on matters without the expense that may be occasioned by a submission.

Q26 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?

Our members consider the challenges with case conferencing might best be addressed through practice directions and enforcement of those practice directions, rather than legislation which has the potential to be inflexible to changing circumstances (for example, a client's capacity to finance a matter or health issues).

Q27 If the new legislation does include requirements about case management: Should they be mandatory? How should they apply when a defendant is self-represented?

For the reasons expressed above, we consider making matters mandatory beyond disclosure risks creating a rigid and inflexible system that will not always meet with the realities of life for defendants, practitioners, police officers, witnesses etc. Self-represented defendants, in particular, require a sufficient degree of flexibility. Imposing strict deadlines on such defendants may only serve to create more opportunities for self-represented defendants to be in breach.

Q28 Should the new criminal procedure legislation include any requirements about timeframes for matters progressing through the Magistrates Courts? If yes, what should they be?

We consider defendants should be entitled to progress matters through the court system, especially those destined for the higher courts, with certainty they have been afforded procedural fairness, including the opportunity see, review and respond to all evidence and matters relevant to the case against them. Accordingly, we would not support requirements around timeframes for matters progressing through the Magistrates Courts without significant discretion for flexibility. Once a matter exits the Magistrates Court, a defendant (save for matters where investigations are ongoing) should be in a position to know of all matters to be raised against them in any future trial or sentence. Mandated times may not ultimately enable that to occur and the only persons likely to be adversely impacted from such a situation is defendants.

Q29 Should the new legislation about criminal procedure in the Magistrates Courts include 'in-court diversion'?

Yes, the Society highlights diversionary programs and options are well known to enable rehabilitation which in turn reduces recidivism and increases efficiencies in the criminal justice system.

Q30 If yes, what types of in-court diversion should be available? What sort of offences should they be available for? What safeguards are required?

We consider introducing a number of different initiatives providing in-court diversion may prove cumbersome, lack clarity and result in infrequent or inconsistent use. A singular in-court diversion program could provide simplicity and clarity. We refer, in particular, to the Criminal Justice Diversion Program (**CJDP**) introduced in Victoria in 1997. The benefits of the CJDP are expressed as follows:

- When appropriate, restitution is made to the victim of the offence and the victim receives an apology.
- It reduces the likelihood of re-offending.
- Offenders avoid an accessible criminal record.
- The offender receives assistance with rehabilitation.
- Offenders receive appropriate counselling and/or treatment.
- It provides assistance towards local community projects with voluntary work and donations.[61]

The matter must meet the following criteria before a diversion can be recommended:

- The offence is triable summarily and not subject to a mandatory or fixed sentence or penalty (except demerit points).
- The defendant acknowledges responsibility for the offence.
- There is sufficient evidence to gain a conviction.[62]

The existence of prior convictions does not disqualify an offender from the program but the Court will take this into account in deciding whether the CJDP is appropriate. Offences under the *Road Safety Act 1986* (Vic) may be suitable for diversion.[63]

Where a charge involves a victim, the Court seeks the victim's views of the matter. This may include: whether the victim agrees with the course of action; the amount of compensation sought for damage to property; and, how the crime has affected the victim. Victims are not obliged to respond to the Court's contact. However, the victim is entitled to express their view by way of letter or in person on the day of the hearing. The Court will notify victims of the hearing's outcome, if requested to do so.

Prior to any appearance before a Magistrate, the Diversion Co-ordinator interviews the offender to identify the major issues in the case and to advise the Magistrate of appropriate services for the offender. This interview assists the presiding Magistrate and lessens the required amount of court time. A diversion hearing is then conducted in open court before a Magistrate, who assesses the suitability of the offender and a plan is developed. The plan may require the offender to: apologise to the victim in a letter or in person; compensate the victim; attend counselling and/or treatment; perform voluntary work; donate money to a charitable organisation, local community project or the like; attend a defence driving course or other relevant program; and, any other condition the Magistrate deems appropriate. The charges are adjourned while the plan is undertaken.

If the conditions are successfully completed, the charges are discharged with no finding of guilt and the outcome is recorded in a similar manner as a caution. The record is not available to the public, including potential employers. If the offender does not successfully complete the conditions, the matter is referred back to the Mention Court of the Magistrates' Court as if the matter was being listed for the first time and all information regarding Diversion is removed from the file.

<u>What sort of offences should they be available for?</u>

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[61] Magistrates' Court of Victoria, *Criminal Justice Diversion Program* (Brochure, 2018) <https://www.mcv.vic.gov.au/sites/default/files/2018-10/Criminal%20Justice%20Diversion%20Program%20brochure.pdf>.

[62] Ibid.

[63] However, demerit points are still recorded with VicRoads for the relevant regulated offences.

It would be our preference that in-court diversion is available to all minor offences proceeding through the Magistrates Court, which includes (but is not limited to): drug offences; dishonesty offences; wilful damage type offences; public nuisance and associated alcohol related offences; obstruct/assault police offences; assaults; and, contraventions of domestic violence orders.

What safeguards are required?

We suggest safeguards similar to those implemented as part of the CJDP in Victoria, including:

- Diversion must be voluntary.
- No formal plea of guilty required prior to the program being approved so the matter can proceed to trial if necessary.
- The complainant (where one exists) should be consulted although this should not be a determinative factor if rejected by the complainant.
- Diversion would not be appropriate where the offence mandates a minimum or fixed sentence (except demerit points).
- Diversion would not be appropriate where the offender has an extensive, recent criminal history.

Members of our First Nations Legal Policy Committee also raise the need for the following:

- Support for in-court diversionary programs where offenders are supported by family and community, coupled with sufficient resourcing and funding to support rehabilitation.
- Access to culturally appropriate services for diversionary programs, including a community led process for their development.
- Post-release support for the offender.

Q31 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, the new legislation about criminal procedure would benefit from inclusion of specific principles relating to in-court diversion. We suggest, as a starting point, consideration of the principles included in the *Criminal Procedure Act 1986* (NSW):

> (1) The objects of this Part are--
>
> (a) to provide a framework for the recognition and operation of programs of certain alternative measures for dealing with persons who have committed an offence or are alleged to have committed an offence, and
>
> (b) to ensure that such programs apply fairly to all persons who are eligible to participate in them, and that such programs are properly managed and administered, and
>
> (c) to reduce the likelihood of future offending behaviour by facilitating participation in such programs.[64]

Q32 Are the existing criminal procedure laws about mediation of matters in the Magistrates Court working effectively? If not, why? Should there be any changes?

[64] *Criminal Procedure Act 1986* (NSW) s 345 (1).

The benefits of restorative justice approaches to improve outcomes for victims, offenders, and communities are well established.[65]

Currently, a Magistrate or clerk of the Court can order a matter to mediation if they consider it would be better resolved by mediation, or if the complainant consents under s 53A of the Justices Act. However, the power to refer a matter to mediation in the Magistrates Court only allows for the referral of a matter to a qualified mediator under the *Dispute Resolution Centres Act 1990* (Qld). Our members report this requirement can result in some Police Prosecutors rejecting an application for referral to mediation on the basis of jurisdictional issues where there are no Dispute Resolution Branches in the particular region, or because of a backlog of such referrals in the relevant Dispute Resolution Branch.

Accordingly, we suggest consideration be given to relaxing the requirement and allowing referrals to be made a "suitably qualified restorative justice mediator" (or similar). We highlight, however, that changes are also required to the Police Operational Procedures Manual (**OPM**) to ensure Queensland Police Officers and Prosecutors can also make referrals to suitably qualified restorative justice mediators. Currently, the OPM provides that Police Officers and Prosecutors can only refer matters to the Dispute Resolution Branch or local Community Justice Groups (as relevant), where QPS does not have agreements with private mediators or any other entities to provide this service.[66]

We also consider that Magistrates should retain an independent discretion to refer a matter to mediation, and that additional resources are needed to ensure mediation is appropriately funded state-wide to reduce delays from referrals and increase efficiencies in the broader criminal justice system.

Q33 Could an in-court deferred prosecution scheme work in the Queensland Magistrates Courts? What issues need to be considered?

In response to Questions 33 to 35, the Society supports in principle any diversionary mechanisms which will make available an alternative to criminal prosecution in appropriate cases. A deferred prosecution scheme has been previously explored in Australia at the federal government level in relation to corporate crime.[67] A similar mechanism for individuals would have the benefit of facilitating offenders, particularly vulnerable offenders, having their criminogenic needs addressed through restorative and rehabilitative processes not involving criminal prosecution. The philosophy underpinning this scheme is not unlike that already

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[65] 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, 22 February 2022) 62; Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, August 2019) recommendation 8; Jacqueline Joudo Larsen, *Restorative justice in the Australian criminal justice system* (Australian Institute of Criminology, Research and Public Policy Series 127, 2014); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 174-94; Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 24 March 2022) ch 10; Kathleen Daly, 'Restorative Justice and Conferencing in Australia' (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice, No 186, February 2001).

[66] Queensland Police Service, *Operational Procedures Manual* (effective 3 June 2022) 3.3.

[67] Attorney-General's Department, Australian Government, *A proposed model for a deferred prosecution agreement scheme in Australia* (Consultation Paper, 31 March 2017) <https://www.ag.gov.au/integrity/consultations/proposed-model-deferred-prosecution-agreement-scheme-australia>.

operating in Queensland's Drug and Alcohol Court and extending this would provide judicial officers more options to appropriately deal with individuals in particular cases.

Q36 Could an in-court diversion program (as in Victoria) work in the Queensland Magistrates Courts? What issues need to be considered?

QLS supports increased availability of diversionary options within our criminal justice system, and we refer to our answer to Question 30 above. We consider increased in-court diversion programs would assist in addressing the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system; remove less serious offenders from the system; decrease risks of recidivism; and, increase prospects of rehabilitation. Further, such programs can avoid stigmatising or labelling younger or first offenders in criminal proceedings.

We raise the following issues for further consideration:

- **At what point in proceedings is the option available** – It will need to be considered at what point in proceedings diversion should be available. For example, at first mention after an acknowledgement of responsibility by the defendant or any time pre-sentence. We highlight the Magistrates' Court of Victoria Practice Direction 1 of 2003 places limits on when the diversion program is available in the court process. While the purpose of this limitation appears to be to reduce the risk of abuse of the option to delay matters in the system, consideration needs to be given to the fact that those most likely eligible for diversionary programs will be unrepresented or have limited representation. Given the benefits of diversion, QLS considers there should be significant flexibility in any in-court diversion program to ensure those who are most suitable are able to utilise the option.
- **Options while in custody** – With the increase in availability and use of technology to communicate with prisoners, broader consideration should be given to what services/programs those in custody can access. Currently, several diversionary options are only available to those on bail. While that may be necessary in some programs, greater consideration should be given to attempting to capture those in custody who would otherwise be appropriate for diversion.
- **Repeat offenders** – Any diversionary program should be sufficiently flexible in its treatment of repeat offenders, to ensure referral to diversion programs contemplate not only first-time offenders.
- **Resourcing** – Diversionary programs should be adequately funded and resourced across Queensland. Currently, some diversionary options are only available in South East Queensland or in large regional centres. For example, mediation is currently not available state-wide and requires significant additional funding to ensure equity of access. This is particularly important given the well-documented benefits of restorative justice (discuss above), which include strengthening an offender's connection to their community, performing better than court processes to reduce recidivism, and delivering higher overall victim satisfaction compared to the traditional court process.

Q37 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?

QLS supports broad terminology, similar to that used in s 59 of the *Criminal Procedure Act 2009* (Vic) to ensure Magistrates have wide-ranging discretion as to what offences and which types of offenders can be diverted. As discussed above, some guidelines may be required in relation

to eligibility, offence types and consent. Our members report that sometimes diversion has a rehabilitative purpose where input from the prosecution or victim may be less relevant.

The procedure to be adopted could be set out in a Practice Direction or guidelines, and could be accommodated within specific court lists to keep track of the progress of various diversion programs. This would require support in court registries and coordination among the various agencies whose services may be relevant to the conduct or programs while a person is diverted from the criminal justice system.

Similar to the Victorian model, we recommend that legislative reform should contemplate how the matter is concluded if the diversion program is completed (that is, charges are discharged with no finding of guilt where a caution may be recorded) or if not completed (for example, by referral back to the Magistrates Court as if the matter was being listed for the first time and all information regarding the diversion is removed from the file).

Q38 Are there any offences, or types of offences, for which in-court diversion should not be available?

As above, we support enabling Magistrates to exercise their discretion in determining which matters are appropriate for in-court diversion. It may be necessary to restrict in-court diversion to offences that are not subject to a mandatory or fixed sentence or penalty (except demerit points). The Court should have regard to the victim's input (where relevant), but should have the ability to refer a matter without the victim's or police officer's/prosecution's consent where it considered appropriate to do so.

QLS acknowledges there are potential risks associated with domestic violence offences that may make some diversionary options (such as mediation) unsuitable. However, a broad and discretionary legislative framework could allow for alternative diversionary models, such as those suggested in the Consultation Paper, which may assist in referring perpetrators to counselling programs and support.

Q39 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, we consider the Magistrates Court should have the power to issue a caution in circumstances where the Magistrate is of the view the police officer should have cautioned the adult person. We highlight the importance to police cautions and their potential impact on certain communities:

> To a significant degree, police determine who enters the criminal justice system, and how individuals enter it, particularly for summary offences. The use of discretion is a central part of police work, and police must continually decide whether to intervene, and how to intervene. The available evidence shows that police discretionary decisions work against the interests of Indigenous people. For example, in the case of juveniles, various studies – conducted over the last two decades – have found that Indigenous young people do not receive the benefit of a diversionary police caution to the same extent as non-Indigenous people.[68]

[68] C Cunneen and A Porter, 'Indigenous Peoples and Criminal Justice in Australia' in A Deckert and R Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 667, 670.

Criminal procedure legislation should empower Magistrates to divert matters away from the criminal justice system where appropriate, by way of caution (or infringement notice), or at least recommend those options be considered again. In addition, we consider Magistrates should have the power to dismiss a charge where appropriate, similar to the discretion provided under s 21 of the YJA when police fail to caution a child.

QLS also recommends consideration be given to better use of s 394 of the *Police Powers and Responsibilities Act 2000* (Qld) which provides an ability for police to issue infringement notices for some offences under the *Summary Offences Act 2005* (Qld) (**SOA**) and associated offences, instead of initiating criminal proceedings. While not directly within the Review's Terms of References, we consider this an appropriate opportunity to explore the expansion of infringement notice options to include other offences under the SOA and offences under the *Regulatory Offences Act 1985* (Qld).

Q40 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?

We deal with Question 40 in our answer to Question 42 below.

Q41 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?

QLS considers there should be some formal recording of the issue of a caution. However, this ought not to appear in a person's criminal history. The purpose of a caution is to avoid both proceeding to a conviction and the potential implications of a conviction (i.e. disclosure to authorities). We suggest the issue of a caution be recorded on the person's non-TORUM history, similar to the issue of infringement notices.

Q42 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?

QLS considers the legislation should provide Magistrates with the power to absolutely dismiss a matter, as well as the power to dismiss a matter and issue a caution, in lieu of accepting a plea of guilty. Consideration could be given to developing a provision not dissimilar to ss 17-19 of the *Penalties and Sentences Act 1992* (Qld) which allow the court, having considered certain matters, to order an absolute dismissal or dismiss the matter and issue a caution

The exercise of the power should involve the exercise of discretion following consideration of a number of factors provided for under legislation. The power should be available where the court considers it appropriate having regard to:

- whether the person admits guilt for the offence;
- whether the person has recently been cautioned for a similar offence;
- whether the person could have been cautioned by Police or perhaps whether Police could have issued an infringement notice for the offence;
- the relevance of any criminal history of the person and where that criminal history is recent;

- the seriousness of the offence and whether the circumstances under which the offence was committed that make the offence less serious than what it would be if it had been committed under other circumstances;
- whether the offence occurred in special/exceptional circumstances; or,
- whether the prosecution of the person in those circumstances is in the public interest.

Importantly, the power should not necessarily be limited in terms of its application to particular offences; save that it ought not to apply to offences which must proceed on indictment (it should not apply to exclude indictable offences which may be dealt with summarily, either by prosecution or defence election). Instead, the court should determine whether the matter is appropriate for a dismissal or dismissal and caution by reference to the facts of the particular matter and the circumstances in which it occurred.

Q43 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?

Our members report that criminal procedures about summary hearings and pleas of guilty are generally not working in practice for self-represented defendants. Many self-represented defendants are not aware that they have an option of submitting a written plea of guilty and when they do submit one, often do not provide sufficient information for the plea to be properly considered. Other self-represented defendants do not avail themselves of the services of duty lawyers, or are not eligible for same. For instance, a person charged with a drink driving offence where a sentence of imprisonment is not likely is not eligible to have the assistance of a duty lawyer, but the consequences of them pleading guilty can be significant if they plead guilty to a defendable charge or have their licence disqualified in circumstances where they could have applied for a work licence. Many who may be eligible for guilty plea funding by Legal Aid Queensland are not eligible for hearing funding and do not have the financial means to fund a legal representative privately. Self-represented defendants in both circumstances are ultimately reliant upon Presiding Magistrates to guide them through the procedures. This results in a lack of efficiency in the operation of the busiest jurisdiction, the Magistrates Courts, and reduces the ability to safeguard the rights of persons in the criminal justice system. Increased funding availability and the provision at the earliest opportunity of plain-English guides for self-represented defendants would largely improve these issues.

For represented defendants, the criminal procedures do work in practice provided the relevant prosecuting authority responds to case conference requests, submissions, and brief disclosures in a timely fashion.

Q44 When should a matter be able to be dealt with in the defendant's absence (if at all)?

The current process of allowing matters to be dealt with in the defendant's absence if the charge is not indictable, if a written plea of guilty has been submitted, or if a person does not appear but the Magistrate is satisfied the person had reasonable notice, should continue to be allowed but only where it is appropriate to do so. For example, where the defendant is represented or can clearly show that they understand the charge, that they are guilty of the charge, and the likely consequence/s.

Q45 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?

The Justices Act restricts Magistrates from imposing sentences of imprisonment or suspending/disqualifying a person's licence or other authority, and such restrictions should

remain. A further restriction of not allowing the recording of a conviction should be added. The stance taken in Victoria (under s *87* of the *Criminal Procedure Act 2009* (Vic) should also be considered in Queensland to impose a limit on the quantum of any fine, restitution, or compensation. The current rehearing time limit of two months should be extended to at least three months given the time it may take for a court to notify a defendant of the court decision, that person to then seek legal advice and/or file the appropriate application (particularly when such defendants may be of limited financial means to take the initial step of obtaining legal advice).

Q46 How could the existing committal procedures in Queensland be improved?

The Society strongly believes the committals process, and a defendant's right to a committal hearing, must not be limited or restricted in any way as a result of the Review. The committals process is an integral aspect of safeguarding the rights of accused persons in the criminal justice system. Committal hearings work to prevent miscarriages of justice and ensure manifestly weak cases are dismissed at the earliest stage, contributing to court efficiencies and financial savings where cases do not proceed to trial. They also provide an opportunity for issues to be narrowed prior to trial.

Nonetheless, there are existing procedures within the current committals process that would benefit from reform to improve outcomes and efficiencies:

- The unwarranted and unfounded discrepancy between the prosecution's test as to whether the evidence is sufficient to prosecute (that is, whether there is a reasonable prospect of the defendant being found guilty of the offence) and the test imposed by a committing Magistrate (whether, as a question of law, a jury could lawfully find the accused guilty on the prosecution evidence taken at its highest).
- The lack of a viable avenue of appeal under the current legislative scheme governing committal proceedings.
- The interplay between Legal Aid funding arrangements and the conduct and/or uptake of committal proceedings.
- The significant delays in getting through the committal process, which can be partly resolved by resourcing and process improvement.
- The refusal by police prosecution to consent to a charge of Contravene DVO (aggravated offence) proceeding by way of Registry Committal.

Our members also report that most practitioners will not make an application to cross-examine a witness at a committal hearing, viewing it as both a waste of time and client resources, because there is a tacit understanding that despite the merits of a case the prosecution will refuse the application. Additionally, there are significant issues with the disclosure regime, where disclosure obligations under Criminal Code are often not honoured and materials not produced in a timely fashion or significantly delayed.

While we understand some of these issues may be considered outside the scope of the current Terms of Reference (for example, the discrepancy between the prosecution's test and the committing Magistrate's test), we take this opportunity to reiterate that addressing these issues could significantly improve the efficacy and efficiency of the Magistrates Court in dealing with summary criminal matters.

Q47 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?

The Society does not support a mandatory rule that a compulsory directions hearing occur before a committal takes place and cautions against imposing a one size fits all approach. While case management can be very useful in criminal proceedings, we consider the mechanisms that have informally come about in the summary jurisdiction will inevitably encourage or require such processes.

Q48 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'?

We acknowledge statutory guidance regarding the test under s 110B of the Criminal Code may aid in achieving consistency and predictability, and would support in principle the inclusion of same in the legislation. It is critically important, however, that any statutory guidance about what constitutes 'substantial reasons, in the interests of justice' has considerable width and gives effect to the paramount consideration that an accused should have a fair trial.[69]

The legislative reforms arising out of the Moynihan Report[70] were not intended to, and did not, change the essential function of the committal hearing or the important role it plays in the criminal justice system. Committal hearings continue to constitute an important part of the protection provided by the criminal process to an accused.[71] In this respect, the Society endorses the statement of principle in relation to what substantial reasons mean contained in *Director of Prosecutions v Losurdo*,[72] which is '…"substantial reasons" does not mean "special", and to establish substantial reasons for the attendance of witnesses at committal proceedings it is not necessary to show that the case is exceptional or unusual.'[73] This statement of principle aligns with the crucial role that a committal hearing plays in ensuring an accused receives a fair trial in the higher court.

It is also incumbent on both the prosecution and the defence to use the disclosure and committal process to ensure that all relevant issues are explored such that preliminary legal argument and the trial proper can proceed expeditiously to a fair and final conclusion. In this sense, committal hearings also play an important role in the prosecution of offences.

A review of authorities in relation to the Queensland and analogous New South Wales provisions provides examples of the type of situations that will lead to a finding that it is in the interests of justice to allow cross-examination of a witness at a committal hearing. The following list is not, and cannot be, exhaustive; each case will turn upon its own facts. Nevertheless, we consider these important circumstances in which 'substantial reasons, in the interest of justice' will exist:

- to clarify the evidence proposed to be called, so as to avoid a defendant being taken by surprise at trial;[74]

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[69] *Chapman v Gentle* (1987) 28 A Crim R 29, 32.
[70] *Civil and Criminal Jurisdiction reform and Modernisation Amendment Act 2010* (Qld).
[71] *Barton v The Queen* (1980) 147 CLR 75, 99 (Gibbs ACJ) and 106 (Stephen J).
[72] (1998) 44 NSWLR 618.
[73] Ibid 623.
[74] *Director of Public Prosecutions v Losurdo* (1998) 44 NSWLR 618; *Sim v Magistrate Corbett* [2006] NSWSC 665.

- in order to gain a proper understanding of the case being advanced against the defendant;[75]
- to narrow the issues in dispute;[76]
- where cross-examination might substantially undermine the credit of a significant prosecution witness;[77]
- where a critical witness, including a complainant, has made inconsistent statements;[78]
- to avoid the need for a *Basha* inquiry in the higher court;[79]
- where the matters of cross-examination may allow for a legal ruling on admissibility or the exercise of a discretion to exclude evidence;[80]
- where the Crown case is weak;[81]
- where cross-examination would be likely to result in discharge of the defendant;[82] and,
- where there is a likelihood that cross-examination will demonstrate grounds for a no true bill application.[83]

Numerous decisions have confirmed the above examples as the type of circumstances which will constitute 'substantial reasons'.[84] Accordingly, we consider these circumstances the starting point for any statutory guidance as to what will constitute 'substantial reasons, in the interest of justice'. Importantly, any guidance included in the legislation must correctly state the proper common law threshold of the test and take care not to introduce unduly restrictive criteria.

Q49 How can victims' interests be incorporated in Magistrates Court criminal procedures?

The Society supports the continued incorporation of victims' interests into criminal procedures. It is important to keep in mind that some victims may be in an ongoing relationship with alleged offenders and may be victims of ongoing domestic and family violence. We have previously supported the introduction of a pilot program relating to video recorded evidence in chief. Consideration should be given to other mechanisms to enhance victim support, such as that available under the *Domestic and Family Violence Protection Act 1999* (Qld), and also the recommendations arising out of the Women's Safety and Justice Taskforce reports. Equally, the Review Team should consider the needs of women as offenders in criminal justice procedures, and this has been considered in the most recent Women's Safety and Justice Taskforce consultation, with its report due on 30 June 2022.

Q50 Are the costs provisions in the current legislation working? What could be improved?

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[75] *Hanna v Kearney* [1998] NSWSC 227; *Poliakov v George* [2009] NSWSC 1133;
[76] *Hanna v Kearney* [1998] NSWSC 227.
[77] *Director of Public Prosecutions v Losurdo* (1998) 44 NSWLR 618.
[78] *Baines v Gould & DPP* (1993) 67 A Crim R 297, 303.
[79] *Abdel-Hady v Magistrate Fruend & Anor* (2007) 177 A Crim R 517; *Director of Public Prosecutions v Losurdo* (1998) 44 NSWLR 618.
[80] *Director of Public Prosecutions v Losurdo* (1998) 44 NSWLR 618; *Hanna v Kearney* [1998] NSWSC 227; *Sim v Magistrate Corbett* [2006] NSWSC 665.
[81] *Baines v Gould & DPP* (1993) 67 A Crim R 297, 303.
[82] *Director of Public Prosecutions v Losurdo* (1998) 44 NSWLR 618.
[83] *Director of Public Prosecutions v Losurdo* (1998) 44 NSWLR 618.
[84] See, e.g. *Police v DWB* [2011] QMC 4; *Archer v Police* [2011] QMC 54 [25]; *Moon v Commissioner of Police* [2012] QMC 21 [26].

The Justices Act currently gives the Court a discretion to order costs in favour of a party in limited circumstances. The Court may order that a defendant, upon conviction, pay the complainant's costs that are just and reasonable[85] or, in the alternative, award costs to a defendant where a charge is dismissed[86] or appealed to the District Court,[87] or when a party has not complied with a direction about disclosure,[88] even where the complainant is a police officer or a public officer.[89]

In most cases, what costs are "just and reasonable" is determined according to a scale in the *Justices Regulation 2014* (Qld).[90] This scale of costs prescribes set and maximum amounts that can be awarded. A higher award of costs is only available where the applicant can establish they are just having regard to special difficulty, complexity or importance of the case.[91]

Magistrates must exercise their discretion to award costs judicially,[92] however their discretion to refuse to award costs is 'unfettered'.[93] Examples of relevant circumstances which a Magistrate may take into account include whether the proceedings were brought in good faith and/or conducted appropriately, whether the dismissal was made on technical grounds or due to insufficient evidence, whether the defendant brought suspicion on themselves or acted unreasonably by declining an opportunity to explain their version of events or produce evidence likely to lead to exoneration before a charge was laid.[94]

Overall, the provision of costs provides for the compensation of a successful defendant to a very limited degree. There is no element of punishment of the unsuccessful party.[95]

Part 8, Chapter 62, Division 3 of the Criminal Code deals with disclosure in criminal proceedings. The prosecution bears a specific and ongoing obligation to disclose.[96] Proceedings are to be conducted with the 'single aim of determining and establishing truth'. This requires 'full and early' disclosure of all evidence that the prosecution propose to rely on.[97] Relevantly, s 590AC(2) of the Criminal Code does not invalidate proceedings where failure to comply with various disclosure obligations has occurred. Under s 83(4)(b) of the Justices Act, costs can be awarded in favour of the defendant where noncompliance with a disclosure directions[98] was unjustified, unreasonable or deliberate.

Our members report the reality is that the statutory disclosure obligations are more honoured in the breach. The absence of an effective costs regime in the event of non-disclosure and delays in evidentiary disclosure lead to the initiation of unmeritorious prosecutions, and the elongation of proceedings, resulting in undue stress, ignominy and expense.

Broadening the costs provisions within the Justices Act available to the defendant upon dismissal or acquittal, as well as instances of unjustified failures to disclose, would enhance the

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[85] *Justices Act 1886* (Qld) s 157.
[86] *Justices Act 1886* (Qld) s 158A, s 158(1).
[87] *Justices Act 1886* (Qld) ss 226, 232.
[88] *Justices Act 1886* (Qld) s 83B(4)(b).
[89] *Justices Act 1886* (Qld) s 158A(1)
[90] *Justices Act 1886* (Qld) ss 158B, 232A; *Justices Regulation 2014* (Qld) s 19, sch 2.
[91] *Justices Act 1886* (Qld) ss 158B, 232A.
[92] *Latoudis v Casey* (1990) 170 CLR 53.
[93] *Per McMurdo P in Smith v Ash* [2011] 2 Qd R 175 [19].
[94] *Justices Act 1886* (Qld) s 157A.
[95] *Scanlon v Queensland Police Service* [2011] QDC 236.
[96] *Criminal Code Act 1899* (Qld) s 590AB.
[97] *Criminal Code Act 1899* (Qld) s 590AB
[98] *Justices Act 1886* (Qld) s 83A(5(aa).

efficiency of the system as a whole. It would be expected that the deterrent aspect of a cost liability will encourage prosecuting authorities to properly assess the merits of a charge before it is brought, and to make evidentiary disclosure without delay.

We consider the current cost provisions to be inadequate, where they should be simplified, broadened and made so that they more readily apply. In particular, the scale of costs should either be abolished or updated to incorporate higher prescribed sums, more commensurate with the actual and substantial costs typically incurred by a defendant in engaging private representation to properly contest prosecutions in the summary jurisdiction. Further, QLS supports insertion of prescriptive, criteria or check-list based provisions, whereby costs may be more readily awarded against prosecuting authorities who, due to a failure to make timely and full disclosure of evidentiary materials, including adequate particulars, cause inordinate, unreasonable or unjustifiable delay to the disposition of proceedings. There should be a punitive element to the costs regime, including in the area of disclosure, to deter to initiation of unmeritorious prosecutions and to deter prosecuting authorities from failing to provide full and timely evidentiary disclosure.

Q51 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 Court, consistent with the current provisions in the Justices Act?

Section 127 of the DMA states that no costs can be awarded with respect to any proceedings arising out of a charge under an offence defined within the DMA. This prohibition does not apply to costs awarded for a failure to comply with a direction about disclosure.[99] We are not aware of the underlying rationale for why a cost regime does not apply in DMA proceedings. Accordingly, we consider the law should be changed so that costs can be awarded in relation to offences under the DMA that are heard and decided in the Magistrates Court. This would promote consistency in the law and provide an important safeguard for defendants in DMA proceedings.

Additional matters for consideration

Indicative sentencing

Given the review is concerned with identifying measures to reduce Court costs and delays for summary criminal matters, we urge the Review Team to consider the use of indicative sentencing on the basis it has the potential to expedite summary criminal matters (and in doing so, result in reduced costs and delays). We note other domestic and international jurisdictions have implemented indicative sentencing:

- In Victoria, the *Criminal Procedure Act 2009* (Vic) allows an accused to apply to the Magistrates Court for a sentence indication.[100]
- In England, indicative sentencing has been available for indictable proceedings since 2005 following the decision in *R v Goodyear*.[101]
- In New Zealand, the *Criminal Procedure Act 2011* (NZ) authorises a court to give a sentence indication at the request of the defendant.[102]

[99] *Drugs Misuse Act 1986* (Qld) s 127(2)
[100] *Criminal Procedure Act 2009* (Vic) s 60.
[101] [2005] EWCA 888.
[102] *Criminal Procedure Act 2011* (NZ) ss 60-65.

Indicative sentencing allows a defendant to consider a guilty plea at an early stage of the proceedings with as much information as possible, and may remove the need for a contested trial. This in turn improves efficiencies in criminal proceedings due to increased Court time and resources.

Costs for the defence

Our members report the recovery of costs is an ongoing issue and often a substantial barrier for vulnerable defendants. This is, in part, due to the operation of s 158 of the Justices Act which does not automatically entitle a successful defendant to costs.

The inability for a client to recover costs at the successful resolution of their criminal matter creates significant hardship to defendants. We encourage the Review Team to consider whether costs should be payable to a successful defendants in committal matters, as well as in summary matters, without limitation (for example, that imposed by s 83A(8) of the Justices Act).

The use of ex-officio indictments

Our members report that ex-officio indictments are rarely used in Queensland where there is a perception among some Crown Prosecutors that they are unable to be used at all. Accordingly, the Society recommends consideration be given to clarifying the use of ex-officio indictments.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted].

Yours faithfully

[redacted]

Kara Thomson
President