Sisters Inside Inc.
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Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system

14 July 2022

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

Eryn Voevodin
Executive Director, Criminal Procedure Review Team
Department of Justice and Attorney-General
[redacted]

By email: [redacted]
Copy to: [redacted]

Dear Mr Shanahan AM and Ms Voevodin

Criminal Procedure Review – Magistrates Court - Consultation Paper April 2022

Sisters Inside welcomes the opportunity to provide the following submission to the **Criminal Procedures Review Magistrates Court**. In this submission we have not addressed every aspect of the Consultation Paper, rather we discuss specific issues the workers at Sisters Inside consider relevant to our work with criminalised women and girls and important to raise to the Review team's attention.

Overview of our thoughts

The Magistrates Court of Queensland is described as a 'sausage machine' by most who encounter it – countless individuals experiencing extreme hardship, mental illness, and disability pass in and out of its doors on a daily basis, without receiving anything resembling 'fairness' or 'access to justice'. There is insufficient protection of these individual's legal and human rights, particularly where they are unrepresented. They are over-policed on the street and in their homes, and then criminalised by an inefficient, impersonal, and chronically time poor system that has little to no regard for their needs and life circumstances. This knowledge should underpin any recommendations made by the Review team.

We acknowledge that the Review team is unable to deal with matters relating to resourcing, but we think it important to raise that there is desperate need for more sentencing courts in the Magistrates Court with greater resources available to them. Due to court delays, women we support are frequently held in custody for months waiting to plead guilty to offences. This has an astronomical human cost.

However, merely funding additional sentencing courts and magistrates is not a long-term or well-reasoned solution. The court's significant workload is in large part a result of over-policing and needless charging by the Queensland Police Service – particularly of First Nations people. The minor crimes which so often pass through the Magistrates Court, such as shoplifting, public nuisance and drug possession, do not require a criminal justice response. Many magistrates acknowledge that they are unable to craft sentences which effectively or appropriately intervene in this variety of 'criminal behaviour'.

Rather, being prosecuted for minor or poverty-related offences just creates additional difficulties in the already highly stressed lives of these individuals. It exposes them to further criminalisation, for example, through the risk of failure to appear charges, or the imposition of fines which cannot be repaid resulting in drivers' licence suspension. Therefore, the issues in the Magistrates Court discussed in the first chapter must be at least in part resolved by addressing the excessive and punitive policing in Queensland.

The discussion of 'culturally appropriate and accessible procedures' in the Consultation Paper implicitly acknowledges that Aboriginal and Torres Strait Islander people are disproportionally represented in the cohort of defendants before the Magistrates Court. This is because of the ongoing colonial project in this nation and the systemic racism imbedded at all levels of the state and criminal legal system. Whilst there is absolutely a greater need for interpreters, Aboriginal and Torres Strait Islander court support workers, and specialist courts, Sisters Inside is of the view that the criminal legal system in the settler state is fundamentally not 'culturally appropriate'. It is a colonial mechanism of control and dispossession, and making it 'accessible' or 'participatory' does not change that fact, nor make it human rights compliant. The only solution is to stop criminalising Aboriginal and Torres Strait Islander people and instead provide the essential social services and support they are entitled to.

For those that do proceed through the Magistrates Court, the process needs to be made easier to navigate and understand. The women we support frequently have no idea what is going on in their matters and find it impossible to participate in matters that so profoundly affect their lives. Though we consider much more substantial change is needed, modernising the legislative framework and language used is one step towards improving this issue. We consider that new legislation should require the court to ensure, as far as practicable, that

defendants understand: 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. This requirement is already contained in the Youth Justice Act 1992 (Qld). Obviously, this will necessitate magistrates spending more time with each defendant, and therefore greater resourcing.

The obligation to attend numerous court sittings places significant strain on individuals, particularly when they do not have their own transport or funds to access public transport. The number of appearances the defendant is required to make ought to be reduced wherever possible, and any obligation to attend court should be matched with comprehensive support services for that person.

Taking these matters into account, we are in general supportive of changes to the Magistrates Court procedures which encourage:

- reduced charging and prosecution by the QPS and ODPP;
- greater use of absolute dismissals, cautions, and, where appropriate and necessary, diversionary programs which do not subject the defendant to ongoing heightened surveillance/monitoring or other negative consequences;
- greater protection for defendant's legal rights; for example, stricter disclosure obligations for the prosecution, and the prevention of avoidable or inappropriate guilty pleas by defendants, particularly unrepresented defendants;
- quicker resolution of matters where charges are uncontentious and the defendant intends to plead guilty, so to avoid lengthy periods on remand;
- greater time and attention to be paid to individual matters that proceed through the Magistrates Courts, such that an individual's circumstances can be properly taken into account;
- the coordination by the court of culturally-appropriate, wraparound services for individuals appearing before the Magistrates Courts, including: relationship, trauma and substance abuse counselling, physical and psychological healthcare, and support to access Centrelink, NDIS, temporary housing, and long-term social housing. These services must be long-term, voluntary, and operate independently of the court and police.

This submission closes with a discussion of the Special Circumstances Court. We consider that reintroducing this specialist court program is the most impactful and valuable change that could be made to the Magistrates Court of Queensland. We request the Review team give that discussion particularly close consideration.

Technology and the courts

Sisters Inside generally is supportive of the increased use of technology and electronic Court processes for summary criminal procedure, including electronic lodgement, filing and service of documents. Any mechanism that makes it easier to comply with court requirements will reduce the risk of failure to appear charges. In particular, we are supportive of phone appearances for both lawyers and defendants in callovers, which was introduced during the Covid-19 pandemic. We do not think leave should need to be sought to appear for callovers by phone. Additionally, we support tools allowing for the online adjournment of matters, as it limits unnecessary appearances for matters that are not ready to be listed or otherwise dealt with. There should be complete acceptance of material filed electronically for any and all matters in the Magistrates Court. New legislation should accommodate the use of digital technologies and electronic processes.

That being said, we do have some reservations about the use of video technology for sentencing. In our experience, those with intellectually disabilities are often quite unable to use technology to the extent required to effectively engage in electronic court processes. Specifically, one Sisters Inside support worker said that women she supports are often confused and feel 'removed' or unable to participate in videolink hearings. They often don't know who is in the room or speaking to them, or when it is their turn to speak. The overall significance and meaning of the hearing can therefore be lost, which increases the risk a woman may not understand her sentence and breach it as a result. We also worry videolinks are used to 'hurry up' the time which a defendant actually has before a magistrate, which has obvious consequences for fairness and achieving justice. Further, for those who are homeless or living in poverty, the requirement to use technology to engage with procedural requirements can be a significant barrier to justice.

Accordingly, we think in-person and paper services must remain available as an option and the use of electronic procedures, such as online guilty pleas, must not limit a defendant's right to legal advice and representation. We also support a legislative provision that requires the Magistrate to ensure proceedings are understood by the defendant, that they consent to a videolink hearing, and that they have had sufficient opportunity to seek advice from their legal representative.

A process we think is particularly noteworthy is the system where the duty lawyer will telephone call the defendant when it is their turn to be interviewed prior to going into the mention. The interview will occur entirely over the phone. People experiencing mental illness, those with an intellectual disability, or those who simply have a lot of stresses in their life (for example, child safety involvement or domestic violence victimisation), find it very difficult to wait for what is usually several hours in the main waiting room to have their name called by the duty lawyer. This can create a lot of tension, distress, and frustration – especially in the already stressful court environment. As a result, vulnerable people often

leave court and miss their mention, and then have a warrant issued for their arrest. Whereas under the current telephone call procedure, people can go outside for a cigarette, buy some food from a nearby shop, or go for a short walk to calm their nerves, without the risk of missing their turn in court. Any procedure which makes the strain of a full day in the Magistrate Court easier on people who already live incredibly difficult lives in welcomed by Sisters Inside.

Starting proceedings

We consider that the current particulars regime must be maintained; defendants need to know what the specific allegations and evidence is against them from the very beginning so that they can properly assess their options and seek legal advice. The particulars need to be substantial, meaningful, and specific. We do not consider that the information routinely provided on Notices to Appear or bench charge sheets currently meet this criteria. They often merely repeat the exact wording of an offence provision and state the alleged time, date and place of the offence. Any new Magistrates Court legislation ought to give effect to these principles in the provisions around initiating notices, particularly, the need for them to specify the act and/or omission that is alleged and said to constitute the commission of each element of the offence charged.

We also submit that the legislation should require the prosecution/police to serve upon the defendant, at the time of being charged, a copy of the initiating notice, any accompanying bench charge sheet, a police statement of facts and any criminal record alleged. Not only will this enable the defendant to know the case they have to answer, but will also deter prosecutors from making ill-conceived decisions to charge in circumstances where the evidence of the commission of an offence is weak or prosecution is not in the public interest.

Disclosure, case conferencing and case management

There needs to be a set timeframe for the disclosure of evidence by the prosecution and the court needs to have greater coercive power to order the disclosure of evidence by the prosecution. Disclosure by the prosecution is often incredibly slow – often over 12 months – and defendants have little recourse.

Sisters Inside are specifically concerned that there are no applicable timeframes surrounding the delivery of briefs of evidence relating to *doli incapax*, which needlessly prolongs a young person's time spent on remand or on bail.
Securing a cost order, or any other remedy, is exceedingly difficult and outside the grasp of most defendants, who have little ability to self-represent and limited access to Legal Aid,

due to it being severely underfunded and time poor. The absence of an effective costs regime to deal with non-disclosure means that weak prosecution cases are allowed to flourish; moreover, proceedings are drawn out over long periods, which causes significant distress.

Persistent non-compliance with disclosure obligations which result in delay to the proceedings should give rise to a costs order against the prosecution. We think that costs orders should also be available as of right in cases of dismissal or acquittal. This would deter bringing of unmeritorious cases by prosecutions. Further, we support legislative amendments in line with that in New South Wales, where 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, so long as the non-compliance is not trivial or where there was good reason for it. This will encourage strict compliance.

We consider disclosure obligations should be extended to all offences in Queensland – regardless of whether they are prescribed or 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.

In regard to case conferencing, we do not think a rigid and inflexible legislative system is best suited for determining if, when, and how they must occur. We consider this will just create greater difficulties for self-represented defendants. Practice directions are likely best placed to deal with case conferencing. We do not think that case conferencing needs to occur in every matter. To avoid undue delay and unnecessary procedures, a full brief of evidence should be able to be ordered and the matter listed for trial without a case conference having been held, as they are often simply not required.

Diversions and Cautions

We consider that magistrates need to be empowered and encouraged to issue a caution in circumstances where they are of the view the police officer should have cautioned the person in the first place. It is well known that due to systemic racism, police discretionary decision-making results in Indigenous people receiving police diversion less than non-Indigenous people. Sisters Inside sees this in action on a daily basis. Magistrates, lawyers, and academics often report that police view their role as being the 'big stick' of the law, tasked with pursuing charges wherever possible, without regard for what is necessarily fair or in the interests of justice. We consider that any new legislation should provide, as in the

Childrens Court, that instead of accepting a plea of guilty the Magistrates Court can dismiss a matter and issue a caution. We also consider that Magistrates should have a wide discretion to strike out a charge or order an 'absolute dismissal'. This should not be recorded on the defendant's criminal history.

Common situations in which this could occur include charges for personal use drug possession, public nuisance (and other 'street' offences), contravene police direction, obstruct/assault police charges, breach of DVO, and breach of bail. Though, it should not be limited to these offences, and magistrates ought to be given broad discretion to issue a caution, strike out, or dismiss a charge wherever it is deemed in the interest of justice, taking into account the nature of the offence and the defendant's circumstances. We do not envisage any significant issues stemming out of this amendment, rather it will deter police and prosecutions from pursing trivial or unfair charges.

We are generally supportive of increased in-court options, including a deferred prosecution scheme. We consider diversion is preferable to findings of guilt and criminal sentences, which merely serve to entrench individuals in the system, often with incarceration as the result, without ever effectively addressing their needs. A singular in-court program would provide clarity, such as that in Victoria. We do think, however, that any diversionary schemes need to be led by community-controlled organisations and coupled with sufficient resourcing and funding for these organisations. Diversionary programs cannot just be a 'tick box' exercise that merely create additional difficulties the lives of already very stressful people. Diversionary programs must, wherever possible, be developed and led by Aboriginal and Torres Strait Islander people.

Diversion programs must be equally accessible by those who are unrepresented, and the Court must have a duty to facilitate this. Diversion ought to be available at any stage of proceedings, as defendants are often not aware of their options until later in proceedings. Magistrates should have broad discretion to order diversion and it should not be limited to only certain offences. We envisage that it could be used for all offences. The consent or other views of victims may be considered, but it should not be determinative, and the consent of police/prosecution should certainly should not carry any weight in decisions about diversion by the Court. Defendants need not admit guilt for the offence, rather they should just have to consent to the diversion. Prior convictions should not be a barrier, even where a defendant has an extensive and/or serious criminal history. Further, we support legislation which provides that the Magistrate must consider that there is sufficient evidence to support the charge, and a caution or dismissal must not be more appropriate.

Diversionary programs should be focused on counselling, education and training programs, and support with securing the fundamentals of life – food, health, and safe and stable

housing. Many defendants before the court do not have these basic necessities, and their 'offending' is often directly related to their daily struggle to survive. In some domestic violence cases, family relationship counselling may also be appropriate. Clearly, identifying who is suitable for diversion and developing a diversionary plan alongside community-controlled organisations is a time-consuming task, and therefore greater resourcing for the Magistrates Court will be required.

We recognise there is research that restorative justice/mediation is successful and supported by the involved parties in *some* situations. However, it is the view of Sisters Inside that it is wholly inappropriate where there is no 'direct', personal victim (say, where the 'victim' of an offence was a corporation) or where offending related to survival. We also consider it inappropriate where the defendant is mentally unwell or suffers from intellectual disability. We consider it is inappropriate most of the time for children, whose offending is near always related to responsible adults and the state not providing them with proper care, and merely serves to further traumatise and antagonise them. 'Successful' restorative justice fundamentally relies of the existence of a 'perfect' victim (willing to offer forgiveness), and the 'perfect' defendant (remorseful and willing to admit fault) – which rarely exists. Most importantly, it is incapable of addressing the underlying causes of crime – poverty, trauma, mental illness, and substance addiction.

That being said, there are circumstances where restorative justice is an appropriate diversion, so long as the defendant and victim agree to it. We think that where an individual is charged with assault of a police officer (under the *Criminal Code Act 1899* (Qld) or the *Police Powers and Responsibilities Act 2000* (Qld)), the police officer involved ought to be able to agree to dispose of the charge via restorative justice. This is not the case at present and means that these matters needlessly result in a conviction and sentence.

There must not be any additional punishment or hardship caused for failing to comply with a diversionary program. Any level of engagement with programs and services is a success for most defendants. Success must be measured by improvements in quality of life – not by strict compliance or 'recidivism' rates. If conditions of a diversionary plan are successfully completed, even if only partially, charges should be discharged with no finding of guilt and not recorded on the defendant's criminal history. If there is no engagement at all with the diversion and the defendant has been given multiple opportunities and significant support to engage with the program over a suitable period of time (no less than 12-months), the matter should be re-referred to the mention court of the Magistrates' Court. It should then be dealt with as if the matter was being listed for the first time and all information regarding diversion should be removed from the file.

Committal proceedings

We do not think that there should be any limits or restrictions to the situations in which committal hearings take place. They are an important function of our criminal law and an essential safeguard against weak cases. Amendments which would reduce the extent to which Magistrates have oversight of the existence of sufficient evidence to put the defendant on trial would undermine defendants' legal and human rights. It also ensures courts are efficient and issues are narrowed prior to trial.

Though, there are related issues that we think should be addressed, such as the significantly lower test applied by the prosecution concerning whether evidence is sufficient to prosecute, the significant delays because of a lack of resourcing, and the refusal by police prosecution to consent to a charge of Contravene DVO (aggravated offence) proceeding by way of Registry Committal.

Summary hearings and pleas of guilty

Matters should only be dealt with in the defendant's absence where they are represented, or have plead guilty and can clearly show that they understand the charge and the likely consequences. Amendments should be made to stipulate that convictions cannot be recorded where the defendant is absent for sentencing. Further, there should be limits on the quantum of any fine, restitution, or compensation. Given the difficulties vulnerable defendants have in being contacted by the court, understanding what is required of them, and seeking legal advice, the time limit to have a sentence reheard should be extended to at least three months.

Costs

As stated above, the current cost provisions ought to be simplified and broadened, such that defendants are able more readily able to receive costs against the prosecution for a failure to make timely and full disclosure, and where proceedings are dismissed due to being trivial or not in the interests of justice. Further, higher prescribed sums should be available, to meet the substantial costs incurred by a defendant even in the Magistrates Court. The inability for defendants to recover costs as of entitlement and without limitation at the successful resolution of their matter – be it committal or summary – creates significant hardship.

Costs should most definitely be able to 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. We cannot see any rationale for an inconsistency in the law in this regard.

Additional comments

Indicative sentencing regime

Sisters Inside considers that an indicative sentencing regime, as exists in Victoria, New Zealand, and England, ought to be implemented. This is particularly beneficial for unrepresented defendants, who may or may not be remanded in custody, as this gives them greater certainty about the sentence they are looking at. They are enabled to make better informed decisions based on this information, such as whether to make a guilty plea at an early stage. This will reduce the number of contested matters and expedite summary criminal matters. Costs and needless delays will be reduced as a result.

Special Circumstances Court

We strongly recommend that the Special Circumstances Court model that existed in the Brisbane Magistrates Courts from 2007 to 2012 be reinstated and expanded to cater for a greater cohort of defendants. This model aimed to work with people in the early stages of the criminal justice process who had committed minor offences, to minimise their risk of becoming entrenched in the system and to address the underlying causes of their offending. The Court used bail and sentencing options to place people with support services – Sisters Inside being one of these organisations – to help them address the underlying causes for offending (e.g. unmet housing and health needs).

This program was highly successful and supported by organisations, defendants, and magistrates. We conducted an extensive evaluation of our support work with women in the program from 2007 to 2011 and request that the Review team consult our full evaluation report.[1] In summary, we found that:

- About 30% of the 240 women we supported in this program were Aboriginal and Torres Strait Islander;

[1] See full report at Sisters Inside Inc, *How We Do It: Evaluation of the Sisters Inside Special Circumstances Court Diversion Program* (2011) https://drive.google.com/file/d/0Bwng-wvle4wBLTBLYWwwMTFfdlVvQS1EVnRTWjBNaEdNaTdF/view?resourcekey=0-Gr2m9c0SPsx4Wb9f5ozz5g

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- 239 of the 240 women involved in the program had a reduced rate of offending during and following their involvement;
- The program had a 96% success rate in diverting women from prison – in other words – only 9 (4%) women who participated in the program over a 3 year period were imprisoned for new offences committed since commencement of their involvement. This is particularly remarkable considering all 240 women had previously spent time in prison. Most of these new offences were outside the SCC jurisdiction;
- By our conservative estimates, the immediate cost of the SCC program was $1,875 per participant (calculated by dividing the total Program budget over 3 years ($450,000) by the number of women (240)), as compared to $10,818 per prisoner for just 60 days (two months) of imprisonment (the average length of imprisonment for women).

As far as we are aware, the program was defunded purely because there was little political appetite to attribute resources to a diversionary model, rather than because it was unsuccessful or unworkable. It is illogical to spend time and money formulating new models for a more effective Magistrates Court when a tried and tested model actually existed just 10 years ago. Sisters Inside would welcome the opportunity to work alongside criminalised women going through the Special Circumstances Court again and feel confident that the results we achieved in 2007-2010 could be replicated.

Thank you for considering this submission. If you would like to discuss any aspect of it further, please do not hesitate to contact me on [redacted]

Yours sincerely

[redacted]

Debbie Kilroy

Chief Executive Officer

Sisters Inside Inc