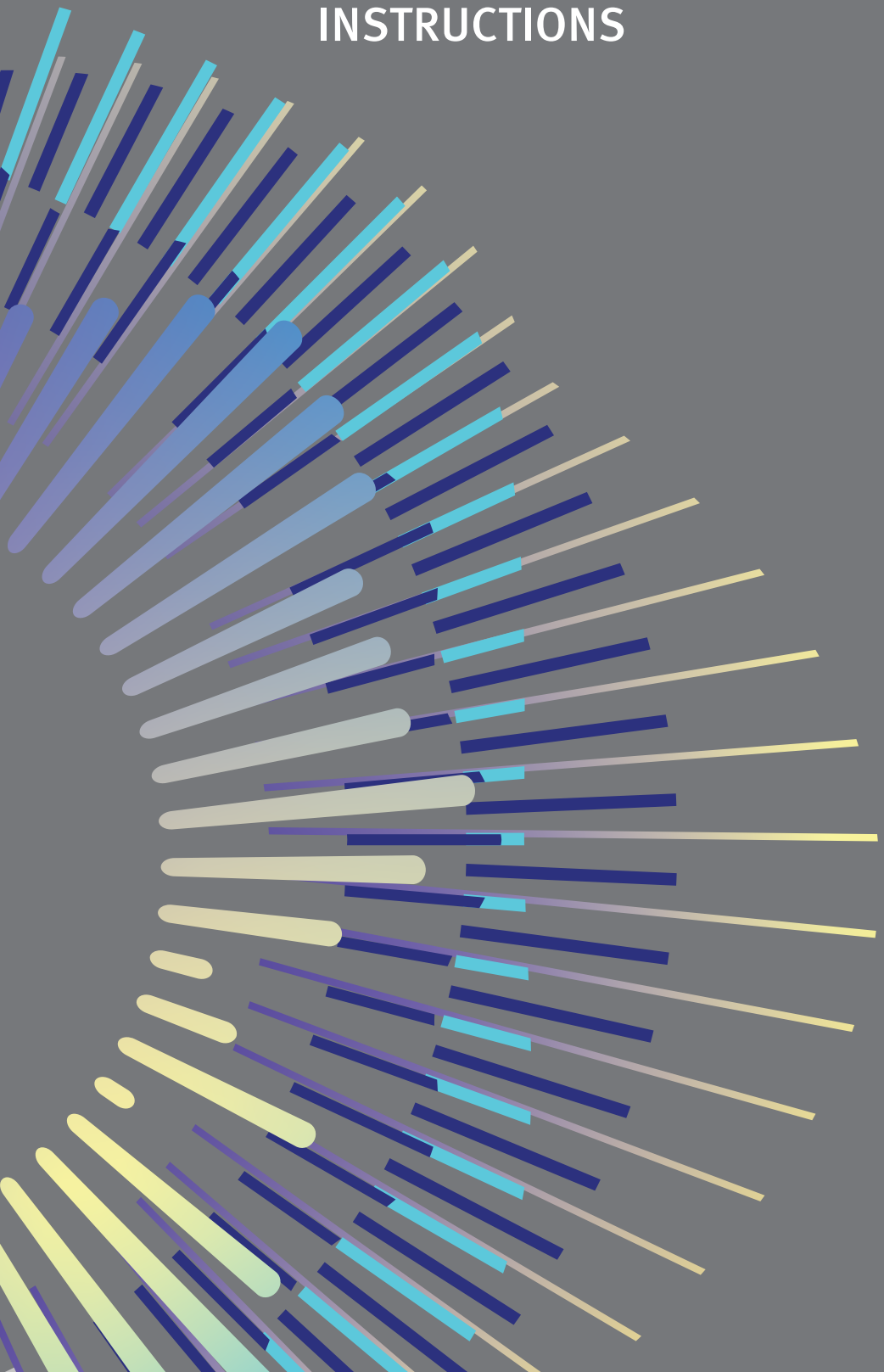
CRIMINAL PROCEDURE REVIEW
MAGISTRATES COURTS

VOLUME TWO: APPENDIX C — DRAFTING INSTRUCTIONS



Queensland Government

Acknowledgment of Country

We respectfully acknowledge Aboriginal and Torres Strait Islander peoples as Traditional custodians of this country. We recognise their continuing cultural and spiritual connection to land, sea and community and pay our respects to Elders past, present and emerging.

Criminal Procedure Review — Magistrates Courts

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Previous publications

Criminal Procedure Review – Magistrates Courts: Consultation Paper (April 2022) available at <https://www.justice.qld.gov.au/initiatives/criminal-procedure-review-magistrates-courts/consultation>.

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The law and other material referred to in this Report is current as at 14 April 2023.

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Appendix C: Part 1 — List of Recommendations

This is a complete list of all recommendations made in the Summary Report, *Criminal Procedure Review — Magistrates Courts*.

Chapter 7: One court, new titles

R7.1 The current Magistrates Courts should be combined into a single Magistrates Court of Queensland. However, the districts and places currently appointed for the holding of Magistrates Courts must be preserved.

R7.2 Each Magistrates Court should be retitled as a Local Court (or, if Recommendation 7.1 is accepted, the Magistrates Court of Queensland should be retitled as the Local Court of Queensland).

R7.3 Magistrates should be retitled as Local Court judges. However, for clarity, this will not affect matters relating to magistrates' wages, superannuation, entitlements or allowances.

Chapter 8: New criminal procedures for the Magistrates Courts

R8.1 The *Justices Act 1886* (Qld) should be repealed.

R8.2 New legislation for criminal procedures in the Magistrates Courts, called the Criminal Procedure (Magistrates Courts) Bill, should be drafted and implemented in Queensland, in accordance with the drafting instructions annexed to this Report.

Chapter 9: Objects and guiding principles of the new criminal procedure law

R9.1 The new criminal procedure legislation should contain objects, consisting of the following:

1) The object of the Act is to set out a contemporary and effective criminal procedure framework for the Magistrates Courts that:

a) simplifies court procedures and encourages better understanding for all court users;

b) enables matters to be dealt with in a way that is accessible, fair, just, consistent and timely; and

c) facilitates and improves the use of technology.

R9.2 The new criminal procedure legislation should contain guiding principles, following the objects clause, consisting of the following:

1) The court and every participant in a criminal matter act in a way that applies and promotes the objects of the Act.
2) In criminal proceedings, there should be a focus on court users and steps should be taken to ensure court users understand procedures and outcomes.
3) The court and every participant treat all court users with respect and dignity, and in a way that promotes human rights.
4) In criminal proceedings, the court and every participant act in a way that promotes:
   a) a defendant's right to a fair trial according to law;
   b) the interests and safety of victims and witnesses; and
   c) the needs of individual court users, and makes reasonable adjustments to meet those needs.
5) The court and its procedures recognise the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples in all stages of criminal proceedings.
6) In criminal proceedings, the court and every participant have an obligation to move matters forward, including by:
   a) preparing, administering and conducting matters in a way that is purposeful and timely;
   b) genuinely engaging in case conferencing and case management procedures;
   c) promoting the early resolution of matters, including through the use of diversion in appropriate circumstances; and
   d) using technology when appropriate and available.

Chapter 10: Technology

R10.1 The new criminal procedure laws for the Magistrates Courts should provide that any action or function that can be done, or power that can be exercised under those laws may be completed electronically, unless another Act provides otherwise. This should include, but is not limited to:

   a) executing, filing and transmitting documents, notices or other information;
   b) attending court as a magistrate to conduct criminal proceedings;
   c) attending court as a legal practitioner, defendant, victim or witness (including, for defendants, from a correctional centre or another place in the ways currently provided); and
   d) conducting remote summary hearings and committal proceedings.

R10.2 However, where a court participant does not have access to the technology used in the court, they must not be disadvantaged by this and must be able to access manual processes as meets their needs.

Chapter 11: Types of offences decided in the Magistrates Courts

R11.1 Chapter 58A of the Criminal Code should be redrafted in the way set out in Recommendations R11.2–R11.6, and those redrafted provisions should be located in the new criminal procedure legislation.

Indictable offences in the Criminal Code that are dealt with summarily

R11.2 For indictable offences in the Criminal Code that may be dealt with summarily, the new criminal procedure legislation should:

- **a)** include a numerical list of all indictable offences in the Criminal Code that can be dealt with summarily, which includes information about any election required and any limitations or requirements associated with the offence being dealt with summarily (based on sections 552A through 552BB);
- **b)** permit a Magistrates Court to decide the value of any property or damage to property in a particular matter (based on section 552G);
- **c)** provide for an indictable offence to be dealt with summarily despite the amount of time that has passed since the matter arose (based on section 552F);
- **d)** provide for the circumstances in which a magistrate must abstain for dealing with an offence summarily (as set out in section 552D) and make it clear that if a matter is dealt with as a committal proceeding following any evidence being heard, the matter must be committed in court in accordance with Recommendation 17.21 (committals); and
- **e)** provide for the maximum penalty that can be imposed when a matter is dealt with summarily (based on section 552H).

Procedural matters for indictable offences dealt with summarily

R11.3 For any indictable offence where a party must make an election about whether the charge is dealt with summarily, the new criminal procedure legislation should include procedures for:

- **a)** a self-represented defendant to make an election, which includes giving the defendant an explanation of the charges and their options (based on section 552I(2);
- **b)** a lawyer to make an election on a defendant's behalf, including a requirement for the defendant to be present when it is made;

c) a prosecutor to make an election, which must take place before the defendant is asked to enter any plea

and in each case, these procedures must be flexible enough to accommodate any additional requirements for making an election that are included in another Act.

R11.4 A party may apply to change their election about whether an offence is or is not to be dealt with summarily. The application:

a) will apply in relation to any offence for which an election is required, when the party who has made an election wants to change it;

b) may not be made after any evidence to prove the charge has been called by the prosecution at a summary hearing;

c) will be heard by a Magistrates Court, which may hear submissions and consider evidence about the application, and must consider all relevant circumstances when reaching a decision; and

d) may be granted by the court for good reason, taking into account all relevant circumstances.

R11.5 In considering whether the court should abstain from dealing with any indictable offence summarily, regard may be had to the defendant's criminal history when making the decision unless that is prohibited by another Act. However, a magistrate must disregard the defendant's criminal history unless it is otherwise admissible for the purposes of determining the charge, unless and until the defendant is found guilty or convicted of the offence.

R11.6 If a Magistrates Court abstains from dealing with any indictable offence summarily, unless some other Act applies, the new criminal procedure legislation should provide a clear pathway for the matter to be committed to a higher court. In circumstances where a defendant is found guilty and convicted at a summary hearing, the matter must be committed for sentence.

Parts of Chapter 58A that are relocated or not recreated

R11.7 The laws about the constitution of a Magistrates Court dealing summarily with an indictable offence in the Criminal Code (section 552C) should be relocated to the *Magistrates Courts Act 1921*.

R11.8 The laws about where an indictable offence in the Criminal Code can be heard and decided summarily (section 552E) are adequately addressed in other parts of the new criminal procedure legislation and should not be recreated.

R11.9 The ability to appeal an indictable offence in the Criminal Code on the ground that it was an error for the Magistrates Court to have decided the charge summarily (section 552J) should be included in the new criminal

procedure legislation. However, it should be located in the same place as other laws about appeals.

The term 'simple offence' in the Justices Act

R11.10 The new criminal procedure legislation should retain the meaning of the term 'simple offence' as it is defined in the *Justices Act 1886*, but the term should be renamed 'summary offence'.

Breach of duty proceedings

R11.11 The 'breach of duty' jurisdiction that currently exists in the *Justices Act 1886* should be included in the *Magistrates Courts Act 1921*.

R11.12 The new criminal procedure laws should apply, with necessary modifications, to a proceeding for a breach of duty as if it were a summary offence.

Chapter 12: Starting proceedings

R12.1 The new framework for criminal procedure laws applying in Queensland's Magistrates Courts establishes a notice-based model for starting criminal proceedings which requires that to start a proceeding a court attendance notice must be issued, served on the defendant, and filed in court.

Language

R12.2 The criminal procedure legislation uses simple and easy to understand language by:

- **a)** replacing the term 'complainant' with, as appropriate:
  - **i)** 'authorised person' – the person who starts a criminal proceeding for a charge (or charges) by completing and signing the court documents;
  - **ii)** 'prosecutor' – the person who appears in the proceedings and prosecutes the charge (or charges).
- **b)** replacing the term 'complaint' with 'charge'.

How to start a proceeding

R12.3 A criminal proceeding can be started in the Magistrates Courts by an authorised person using a Court Attendance Notice.

Who can issue a Court Attendance Notice

R12.4 A Court Attendance Notice can be issued directly to a defendant by an 'authorised person', which means:

- **a)** a public officer;

b) a person who is acting in the execution of a duty imposed by law or the proper administration of a Queensland Act or a Commonwealth Act;

c) another prescribed person or category of persons; and

d) a person who has been authorised by the Magistrates Court to issue a Court Attendance Notice.

R12.5 The term 'public officer' means:

a) an officer or employee of the public service of the state or the Commonwealth; or

b) an officer or employee of a statutory body that represents the Crown in right of the state or the Commonwealth; or

c) an officer or employee of a local government;

who is acting in an official capacity.

R12.6 A prescribed person under Recommendation 12.4(c) should include an RSPCA Inspector.

When to issue a court attendance notice

R12.7 A Court Attendance Notice can be issued and served on a defendant by an authorised person if the authorised person:

a) reasonably suspects the person has committed or is committing an offence; or

b) is asked by another authorised person who has the suspicion mentioned in paragraph (a) to issue and serve the notice.

Contents of a Court Attendance Notice

R12.8 As a minimum, the Court Attendance Notice must state the following details:

a) the provision number of the alleged offence under a specific Act or Regulation;

b) the description of the offence alleged to have been committed in the words of the Act, order, by-law, regulation or other instrument creating the offence;

c) general particulars of the alleged offence, such as the date, time and place of the offence, and any persons or property involved in the offence;

d) if known, any circumstances of aggravation or that the offence is a domestic violence offence;

e) the name of the defendant;

f) whether the defendant was, at the time of the alleged offence, an adult or a child;

g) a requirement that the defendant appear before a court at a stated date, time and place:

i) For an adult — at least 14 days from the date of the notice (or, with the defendant's written agreement, a stated shorter time after the notice is served); or

ii) For a child — as soon as practical after service of the notice;

h) the signature, name and contact details of the authorised person; and

i) any requirements or authorisations to commence a proceeding (for example, the consent of the Attorney-General).

R12.9 If there is a technical defect in the wording of a charge, this cannot be relied on to allow the charge to be struck out. The charge may be amended to correct any defects, provided the defendant would not suffer material injustice or prejudice if the amendment is allowed.

Signing a court attendance notice

R12.10 The authorised person must sign the Court Attendance Notice. If the authorised person is seeking a warrant, the notice should also include an application for a warrant. It must be declared before a justice of the peace that the contents of the application are true and correct. There must be a discretion in the justice of the peace to issue the warrant.

Service and filing of a Court Attendance Notice

R12.11 A Court Attendance Notice must be personally served on a defendant, except where otherwise authorised by another Act or law. A public officer, or a person aiding an officer, may enter a place and stay for a reasonable time for the purpose of serving a summons, but only with the occupier's consent if the premises (or part of the premises) are exclusively for residential purposes.

R12.12 If a defendant cannot be personally served with a Court Attendance Notice, the authorised person may follow procedures (to be set out in Regulations or Rules) for substituted service by way of registered post, by leaving the notice with another person, or by any other authorised method allowed for under the Regulations or Rules.

R12.13 A Court Attendance Notice and a signed declaration of service must be filed:

a) for personal service — within seven days of service but before the person is required to appear in court under the notice, which is usually 14 days (but can be shorter if the parties agree). In any

circumstances, it should be filed at least two clear days before the first appearance date. If an agreement to appear earlier does not allow this to happen, then it should be filed as soon as possible.

b) for substituted service — within the same time frames, and with a signed declaration of service detailing the reasons why the defendant was not personally served.

R12.14 If the defendant does not appear in court and:

a) the court is not satisfied the defendant was properly served with the notice — the court must strike out the attendance notice. This would not prevent another proceeding being started for the same offence.

b) the court is satisfied the defendant was properly served with the notice — the court may issue a warrant for the person's arrest or deal with the matter in the defendant's absence.

c) the court is satisfied the defendant was properly served with the notice but has a reasonable excuse for not appearing — the court may enlarge the original notice and adjourn the matter to another date, with the defendant's appearance required on that date.

R12.15 Recommendation 12.14(c) should also apply to a notice to appear issued by a police officer under the *Police Powers and Responsibilities Act 2000*.

Proceedings started by warrant

R12.16 A Court Attendance Notice relating to any charge may be accompanied by a warrant issued by a justice of the peace only if:

a) the contents of the Court Attendance Notice and the application for a warrant are declared true and correct before a justice of the peace (see Recommendation 12.10); and

b) the justice of the peace is satisfied that:

i) proceeding by way of a Court Attendance Notice without a warrant would be ineffective because the defendant:

(A) would avoid service of the Court Attendance Notice; or

(B) would not comply with the requirement to appear in court; or

(C) would commit an offence; or

(D) would continue or repeat an offence charged in the Court Attendance Notice; or

(E) would endanger another person's safety or property; or

(F) would interfere with witnesses or otherwise obstruct the course or justice; or

ii) the authorised person has proof that the defendant no longer lives at their last known address; or

iii) the defendant's whereabouts are unknown; or

iv) the defendant is the subject of another warrant; or

v) the Act or law creating the offence authorises issuing a warrant in the first instance.

R12.17 A Court Attendance Notice and warrant must be filed with the court as soon as practical, but no later than 7 days after the issuing of the warrant.

R12.18 Where a Court Attendance Notice has been issued and filed, and before the date the matter is first before the court, the registrar or a magistrate may, on application by the authorised person or prosecutor, issue a warrant for the defendant's arrest if satisfied there are substantial reasons to do so and it is in the interests of justice, taking into account relevant matters set out in the Rules.

Where to start a proceeding

R12.19 A Court Attendance Notice must be filed in a court registry that is:

a) nearest to where the offence is alleged to have been committed; or

b) authorised by another Act or law.

R12.20 Despite recommendation 12.19:

a) if the authorised person and the defendant agree, the Court Attendance Notice may be filed in another court; and

b) if two or more Court Attendance Notices are to be filed in respect of the same defendant, they may all be filed in a court in which any one of them could be filed.

R12.21 Where an offence occurs:

a) in, on or in relation to a vehicle, vessel or aircraft; and

b) in the course of a journey or a flight landing in Queensland; and

c) the court district within which the offence occurred is uncertain;

the Court Attendance Notice may be filed in any court district that the vehicle, vessel or aircraft passed through or over during the relevant journey or flight.

R12.22 If a Court Attendance Notice is not filed in the 'correct' court registry, as set out in recommendations 12.19 – 12.21, this does not invalidate any proceeding.

When a proceeding starts

R12.23 A criminal proceeding is taken to have commenced on the date that the Court Attendance Notice, with accompanying material regarding service of

the notice or issue of a warrant and the charge sheet(s), are filed with the court registry.

Charge Sheet

R12.24 At the same time as a Court Attendance Notice (with or without an arrest warrant) is filed, a second document called a 'Charge Sheet' must also be filed. A copy of the Charge Sheet should be provided to the defendant at the first appearance date.

R12.25 The Charge Sheet must include the following information:

- **a)** the name of the defendant and of the authorised person;
- **b)** the offence with which the defendant is charged and adequate particulars of the charge to inform the defendant of the nature of the charge, including for example, the following particulars –
  - **i)** particulars of the alleged time and place of committing the offence;
  - **ii)** particulars of the person, if any, alleged to be the victim;
  - **iii)** particulars of the property, if any, in question;
- **c)** A number for each alleged offence;
- **d)** any circumstances of aggravation on which it is intended to rely, or a statement that the offence is a domestic violence offence; and
- **e)** any other requirements prescribed by the regulations.

R12.26 Each offence alleged on a Charge Sheet must be given a unique charge number by the Court.

R12.27 For the purposes of a Charge Sheet:

- **a)** it is sufficient to describe the offence in the words of the Criminal Code or the Act defining it, or in similar words; and
- **b)** a description of persons or things that would be sufficient on an indictment is sufficient on a charge sheet.

R12.28 The content of Recommendations 12.24–12.26 must be explicitly included in legislative requirements about starting proceedings (not in Regulations or Rules).

Circumstances of aggravation

R12.29 If a Court Attendance Notice or a Charge sheet alleges as a circumstance of aggravation that a defendant has been previously convicted of an offence, a magistrate must disregard that circumstance of aggravation for the purposes of determining the charge, until such time as the defendant is found guilty of the offence.

R12.30 Whether or not a previous conviction has been alleged as a circumstance of aggravation on a Court Attendance Notice or Charge Sheet, a defendant's criminal history can be relied on when sentencing the defendant for an offence. This will not increase the maximum penalty that can be imposed for an offence.

First appearance

R12.31 A defendant who has been served with a Court Attendance Notice must attend the first court appearance in person. However, this will not affect the defendant's ability to enter a guilty plea in writing, or the court's ability to deal with the matter in the defendant's absence.

Chapter 13: Private prosecutions

Procedures for private prosecutions

R13.1 The new criminal procedure legislation should include a separate part for procedures relating to private prosecutions which sets out a process for a magistrate to assess a proposed private prosecution and decide whether the matter should be authorised to proceed.

Application to the Magistrates Courts

R13.2 A person bringing a private prosecution for any offence must make an application to the Magistrates Courts for authorisation to bring a private prosecution and issue a Court Attendance Notice on the defendant.

R13.3 The application must be made by the person who wants to start the private prosecution, or by another person on their behalf (for example, a private lawyer).

R13.4 The application should be in writing and include the following:

- **a)** details about the applicant (and any representative);
- **b)** information about the proposed charge(s);
- **c)** a summary of the evidence proposed to prove the charge(s); and
- **d)** any other information required by the court.

R13.5 The application must also be:

- **a)** accompanied by a completed Court Attendance Notice and Charge Sheet that can be served on the defendant if the application is granted;
- **b)** filed at the Magistrates Court where the proceeding must be started; and
- **c)** filed within any time limits that apply to starting the proceeding.

Hearing an application

R13.6 The application must be listed for a hearing before a magistrate only, who must assess the matter and decide whether they are satisfied, in all the circumstances, that the private prosecution should be permitted to proceed. In making this decision, the magistrate may take into account a number of considerations, including:

- **a)** whether the charge alleged is an offence known at law;
- **b)** whether any other prosecuting agency has already brought a charge against the accused person based on the same set of facts or circumstances;
- **c)** whether there is sufficient public interest in prosecuting the matter;
- **d)** whether the proceeding is frivolous, vexatious, misconceived or would be an abuse of process;
- **e)** whether the proceeding is lacking in substance in terms of there being no reasonable or available evidence that could be disclosed, produced or relied on to prove the charge; and
- **f)** any other relevant circumstances.

R13.7 In reaching a decision:

- **a)** the court may receive any information that it considers appropriate to enable it to properly consider the application; and
- **b)** the application may be adjourned for further information or evidence to be provided at a later date.

R13.8 If the magistrate is satisfied that the private prosecution should proceed, then the magistrate must make an order in the following terms:

- **a)** that the application is approved, and the private prosecution is permitted to proceed;
- **b)** that the person making the application has been granted authorisation to issue a Court Attendance Notice and is an 'Authorised Person' for the purposes of starting that proceeding by way of a Court Attendance Notice;
- **c)** that the matter be listed for first mention on a specific date and time at that court; and
- **d)** that the Court Attendance Notice include the information ordered above in (b) and (c) and be served on the accused person.

R13.9 The date included in the Court Attendance Notice (R13.8(c)) must provide sufficient time for service and ensure that the defendant has sufficient notice of the date.

R13.10 If the magistrate refuses the application, an order must be made in those terms and the private prosecution must not proceed. The magistrate must give reasons for their decision.

When a private prosecution starts

R13.11 Once a magistrate makes an order approving an application, the prosecution must be taken to have started on the date the application was filed with the registry.

R13.12 Where an application is filed within any time limits for starting a proceeding (R13.5(c)) but is not finalised until after that time has expired, the private prosecution must not be prevented from starting and continuing (if the application is granted).

Service of a Court Attendance Notice

R13.13 Once an application for a private prosecution has been approved and a court date is allocated to the matter, the defendant must be served with the Court Attendance Notice within seven days of the approval and in accordance with the usual rules about service.

R13.14 The magistrate may make specific orders about how the defendant must be formally served.

Starting private prosecutions by arrest warrant

R13.15 To start a private prosecution by way of an arrest warrant, a person must file an application for authorisation to bring a private prosecution and issue a Court Attendance Notice on the defendant, as well as an application for an arrest warrant.

R13.16 The magistrate may hear and decide the two applications together, considering the application for a warrant in the same way as any other such application, and may make any of the following orders:

- **a)** that both applications are refused (and provide reasons for this);
- **b)** that both applications are adjourned for further information or evidence to be provided;
- **c)** that the application is approved, the private prosecution is permitted to proceed, the applicant is an authorised person for the purposes of issuing a Court Attendance Notice, and:
  - **i)** list the matter for a court date with the Court Attendance Notice to be served on the defendant; or
  - **ii)** a warrant is to be issued for the defendant's arrest.

Private prosecution proceedings

R13.17 A person must be prohibited from communicating or publishing information about, or accessing the court records for, a private prosecution (including the fact of the application itself):

- **a)** until the defendant's first court appearance, if an application to start a private prosecution is granted; and
- **b)** always, if an application to start a private prosecution is refused.

R13.18 Once a private prosecution has started, it must proceed in the same way and according to the same procedures as any other prosecution for a criminal offence in the Magistrates Courts.

R13.19 The new criminal procedure legislation relating to any appeal regarding a private prosecution should expressly provide for an appeal pathway to the District Court of Queensland:

- **a)** by an applicant, on the ground that their application to start a private prosecution was refused; or
- **b)** by a defendant, following a final determination of a private prosecution in the Magistrates Courts, on the ground that the application to start the private prosecution should not have been granted.

Chapter 14: Disclosure, case conferencing and case management

R14.1 The new framework for criminal procedure in the Magistrates Courts will adopt a structured approach that incorporates elements of disclosure, case conferencing and case management through a series of stages that must be followed by the parties and the Court.

R14.2 At each stage of this structured approach, a magistrate will have a discretion to use general powers of case management to vary the standard approach in a way that is appropriate for a particular matter; for example, to vary standard time frames, or so that parties to a matter are not required to complete a particular step or stage or can follow a particular case management approach.

Object

R14.3 The new criminal procedure legislation should state that the object of the new laws about disclosure, case conferencing and case management is to reduce delays in criminal proceedings in the Magistrates Courts by creating a clear, structured and staged framework for how charges progress, from the beginning through to a listing for a summary hearing or a committal proceeding.

Disclosure

R14.4 It should be explicitly stated in the legislation establishing the new framework for criminal procedure that:

- **a)** there are no changes to the existing disclosure obligations set out in chapter 62 of the Criminal Code, or to their application to matters dealt with in the Magistrates Courts; and
- **b)** there are no changes to the current disclosure obligations in common law, or to their application to matters dealt with in the Magistrates Courts.

R14.5 The new framework for criminal procedure in the Magistrates Courts will adopt **a staged approach to disclosure**. The staged approach should include:

- **a)** the provision of a 'preliminary brief', which is to be disclosed by the prosecution to the defendant no later than 21 days after the second court mention; and
- **b)** the provision of a full brief of evidence only after the parties have engaged in mandatory case conferencing and attempted to resolve the matter.

R14.6 At the first court mention, the prosecution must make the following available to the defendant:

- **a)** a 'Statement of Facts';
- **b)** the defendant's criminal and traffic histories;
- **c)** a notice explaining the rules of the court, including the importance of legal representation, the defendant's right to access advice from LAQ, ATSILS or a community legal centre and details of how to contact them; and
- **d)** a list of the prosecution witnesses to be relied on (to the extent known).

R14.7 At the second court mention, a magistrate may order a 'Preliminary Brief' to be provided to the defendant in **21 days**. The preliminary brief should contain sufficient material to identify the elements of the offence, and may include the following (as determined by the magistrate and informed by the prosecution and defence):

- **a)** the documents contained in Recommendation 1.6(a)–(d) above;
- **b)** any evidentiary material including (but not limited to) body-worn camera footage, electronic record of interview, photographs and witness statements ;

c) any information, document or other thing that is relevant to the alleged offences, which may assist the defendant in understanding the evidence against them; and

d) a list from a QPS officer, or another prosecuting agency officer, containing any other outstanding evidence the prosecution may seek to present in the future (for example, forensic certificates or DNA evidence).

R14.8 A preliminary brief should not be required:

a) for traffic offences commenced under the *Transport Operations (Road Use Management) Act 1995*, including contested traffic offences commenced by way of Traffic Infringement Notice;

b) for other offences commenced by way of an infringement notice;

c) for regulatory offences commenced under the *Regulatory Offences Act 1985*;

d) where defence do not require the preliminary brief as a plea of guilty is intended from the outset;

e) where the charges are contested, and the magistrate determines that a full brief can be ordered after being satisfied a preliminary brief is not sufficient to address the matters in contest; or

f) in other circumstances the magistrate deems appropriate.

R14.9 Where there has been noncompliance with disclosure obligations, the court may adjourn a matter for disclosure to be rectified or an explanation provided. If the disclosure obligations are not met and the Court is not satisfied with any explanation, specifically for noncompliance with the disclosure obligations provided for by the Criminal Code, the Court may:

a) request an affidavit or require a person to come to court to explain the noncompliance with their disclosure obligations;

b) order costs where noncompliance is unreasonable, deliberate or unjustified;

c) in circumstances where the noncompliance is deliberate or ongoing, the charge may be struck out and costs may be ordered. This will not be a bar to further proceedings.

R14.10 The new framework for criminal procedure in the Magistrates Courts should also include disclosure requirements that apply to a defendant. These should be consistent with the current requirements in the Criminal Code, and require the defendant to give the prosecution notice of any of the following matters no later than 21 days before a summary hearing (although a shorter time frame may be permitted, if appropriate):

a) alibi evidence;

b) expert evidence; and

c) evidence of a representation made by a person who is not available to give evidence under section 93B of the *Evidence Act 1977*.

Case conferencing and case management

R14.11 The new framework for criminal procedure in the Magistrates Courts should adopt a structured and staged approach to case management. The approach should implement a clear framework for how charges progress through the court, including the steps required to be taken by parties at each stage of the proceedings.

R14.12 The **first stage** of the case management process will relate to the defendant's initial court appearances and should require that:

a) at each mention, the magistrate ask the defendant an initial series of dedicated 'case management questions' relating to matters such as legal representation, how the charge might be finalised and how the defendant intends to plead to the charge, to inform how the matter will progress;

b) the second mention take place no later than 14 days after the first mention;

c) the preliminary brief be disclosed to the defendant after the second mention (generally within 21 days);

d) once the case management questions are adequately answered, ideally after the second mention, the matter be progressed to the second stage.

R14.13 The defendant should be given a notice at the first mention which includes information about matters such as:

a) the date, time and location of the next court event;

b) their right to legal advice;

c) the options available to them, including entering a plea of guilty, obtaining a preliminary brief and engaging in case conferencing;

d) what to expect at the next court dates; and

e) what might happen if they do not attend court.

R14.14 The defendant should also be given a notice after each subsequent court date that, as a minimum, includes the date, time and location of the next court event.

R14.15 Case conferencing should be encouraged at all stages of the new case management model. The **second stage** of the case management process will specifically relate to case conferencing, and will:

a) require that case conferencing is undertaken for all adult criminal charges, whether they are to be finalised in the Magistrates Courts or committed to a higher court;

b) state that case conferencing is a mandatory step for all matters (subject to the magistrate's discretion), and must be approached by the parties as a genuine attempt to narrow the issues in dispute or resolve the matter;

c) make clear that case conferencing can be undertaken in a variety of ways including verbal submissions, written submissions and in-person conferencing (including remotely); and

d) explicitly include conferences with self-represented defendants, with safeguards for fairness such as:

i) putting the circumstances of the case conference and outcomes on the court record;

ii) recording the case conference; or

iii) handing the court a certificate signed by the parties confirming a case conference was conducted and documenting the agreed outcomes.

R14.16 The **third stage** of the case management process will apply after the parties have completed case conferencing, and where a full brief of evidence has been provided and the matter remains contested. In these circumstances, the parties must indicate how the matter will proceed and the Court will allocate the matter further court dates, as appropriate.

R14.17 For contested offences that will be heard and decided at a summary hearing in the Magistrates Courts, the matter may be allocated dates for:

a) all pre-hearing applications identified in relation to the matter;

b) a summary hearing review, which should take place approximately two weeks before the summary hearing and advise the court about matters such as:

i) whether parties are legally represented;

ii) whether disclosure obligations have been complied with;

iii) whether there are any admissions of fact, or whether the issues in contest can be narrowed down;

iv) which witnesses are required to give evidence or be made available for cross examination (including all witness availability);

v) if any applications for special or protected witnesses are required under the *Evidence Act 1977*, or whether other

arrangements are required (such as an application for a witness to give evidence remotely via phone or video-link);

vi) whether interpreters or other reasonable adjustments are required for a party or witness; and

vii) an estimate of the length of the hearing;

c) a summary hearing.

R14.18 For contested offences that will be committed to the District Court or the Supreme Court, the parties must indicate whether the matter is to proceed by way of:

a) registry committal;

b) court committal;

c) an application for a committal hearing with cross-examination; or

d) any combination of the above where oral submissions are to be made or evidence it to be led

and the Court will allocate further court dates as required. The Court may also allocate a further review mention if it is considered necessary for that matter.

Chapter 15: Court-ordered diversion

R15.1 The new criminal procedure legislation applying to Queensland's Magistrates Courts should provide a framework for a structured approach to two court ordered diversion options for adult defendants who are on bail, namely:

a) Adult Restorative Justice Conferencing

b) The Summary Offences Diversion Program.

Objects of court-ordered diversion

R15.2 The court-ordered diversion chapter in the new criminal procedure laws should include specific objects, namely:

a) to provide a framework for the recognition and operation of court-ordered diversion options for dealing with persons who have committed a summary offence or are alleged to have committed an eligible offence

b) to recognise that diversion is an opportunity for meaningful participation in the criminal justice system by a person who has committed or is alleged to have committed an eligible offence, as well as for victims to participate to the extent they desire

c) to ensure that options for court-ordered diversion apply fairly to all persons who are eligible to participate in them, and that they are properly managed and administered

d) to reduce the likelihood of future offending behaviour by facilitating the use of and participation in court-ordered diversion options

e) to recognise the rights of victims should be protected and taken into account when considering diversionary options, but not always require a victim's consent to order a diversionary option in relation to a defendant

f) to provide a framework for the greater inclusion of cultural considerations, including the distinct cultural consideration of Aboriginal peoples and Torres Strait Islander peoples, in the resolution of summary offences.

Application to summary offences

R15.3 Generally, court-ordered diversion should be available for all charges that can be finalised in the Magistrates Courts; that is, for all summary offences.

***Note**: The use of adult restorative justice conferencing is already provided for under other legislation and is not presently limited to any particular types of offences. That position will not be affected by this Review.*

***Note**: There are further limits on the availability of the Summary Offences Diversion Program for some types of offences, as set out at R15.18.*

R15.4 If an indictable offence can be finalised in the Magistrates Courts following an election by one party, a court-ordered diversion may apply to that offence if the party elects to deal with the matter in the Magistrates Courts.

Magistrate's discretion

R15.5 Despite a court-ordered diversion being available for an offence, for each charge, a magistrate should have the discretion to decide whether a court-ordered diversion is appropriate in all the circumstances taking into account a range of considerations, including:

a) the complainant's views, including whether they consent to participate or engage in a diversion option such as mediation

b) whether there is an ongoing relationship between the defendant and the complainant (including whether a domestic and family violence protection order is in place)

c) the nature and seriousness of the alleged offence, including whether it is an offence involving actual violence or domestic and family violence, or an offence that is sexual in nature, or any offence that carries a mandatory penalty or disqualification

d) whether the defendant has previously been ordered to other diversion options by the court or another agency (including whether the defendant successfully completed the conditions, how recently another diversion order was made, and the nature of the offences that a diversion option was granted for)

e) if the defendant has the ability to meaningfully participate in a court-ordered diversion

f) if either the defendant or complainant is an Aboriginal person or a Torres Strait Islander person, whether any other relevant stakeholders such as a Community Justice Group member, Elder or Respected Person should be involved in the process

g) the appropriateness of the diversion option, taking into account all other relevant circumstances.

R15.6 A party to a proceeding may apply to the Magistrates Court for an order relating to a diversion option, or for a diversion option to be the outcome in a proceeding, however it is ultimately at the magistrate's discretion. Parties may make submissions about whether a matter is suitable for court ordered diversion for consideration.

Acceptance of responsibility

R15.7 It should be a requirement that, before a magistrate makes an order for a court ordered diversion, a defendant must 'accept responsibility' for the alleged offence.

R15.8 Any acceptance of responsibility for an offence by a defendant is inadmissible as evidence in any proceeding for that offence and does not constitute a plea of guilty to the offence.

Court-ordered referrals to Adult Restorative Justice Conferencing

R15.9 The new criminal procedure legislation should, instead of the current powers to order or adjourn a matter for mediation, provide a framework for procedures that allow magistrates to make an order referring an eligible offence to Adult Restorative Justice Conferencing (ARJC), subject to the magistrate's discretion (Recommendation 15.5).

R15.10 In addition to the requirement for the defendant to accept responsibility (Recommendation 15.7), a referral to ARJC should require that the defendant and complainant (victim) consent to the referral.

R15.11 Despite Recommendation 15.10, a court-ordered referral to ARJC should not require consent from the prosecutor. However, the parties to the matter must be given an opportunity to make submissions to the court about why a referral is or is not appropriate.

R15.12 A court-ordered referral to ARJC should be available at any stage of a proceeding, including after a plea of guilty has been entered.

R15.13 The new criminal procedure legislation should provide that when a court-ordered referral to ARJC is made, the matter is formally referred to a 'prescribed agency' able to provide accredited and free ARJC services. The Queensland Government's Dispute Resolution Branch should be named as a prescribed agency.

Procedure following Adult Restorative Justice Conferencing

R15.14 The new legislative framework should outline the procedures following ARJC. Specifically, where an outcome or agreement between the parties has been reached:

- **a)** the prosecutor may, at their own discretion, choose to withdraw the charge and end the proceeding
- **b)** if the charge is not withdrawn, then it will proceed in the usual way
- **c)** if the charge proceeds to sentence, the fact that the defendant has participated in an ARJC and has reached an agreed outcome is a matter that must be taken into account at sentence.

R15.15 In circumstances where a matter is referred to ARJC, but a conference is not conducted or an agreed outcome is not reached:

- **a)** the matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered
- **b)** any unsuccessful attempt to have a matter undergo ARJC cannot be used against a defendant throughout the remainder of a proceeding, particularly at sentence.

R15.16 For clarity, the new criminal procedure legislation should explicitly state that the provisions about referral of a charge or charges to ARJC do not affect, and are in addition to, any other pathways open for referral to ARJC.

Summary Offences Diversion Program

R15.17 The new criminal procedure legislation should establish the Summary Offences Diversion Program. The program should be based on Victoria's Criminal Justice Diversion Program (CJDP) and should have many (but not all) of the same general features.

Application of the scheme

R15.18 Generally, the Summary Offences Diversion Program should provide that a magistrate may make an order for a matter to proceed through the Summary Offences Diversion Program:

a) in circumstances where the defendant has accepted responsibility for the offence (Recommendation 15.7)

b) for an offence that can be finalised summarily (subject to the magistrate's discretion in Recommendation 15.5), excluding the following offences:

i) a summary offence punishable by a mandatory minimum or fixed sentence or penalty, including a penalty affecting a licence (such as cancellation, suspension or disqualification)

ii) an offence for which a defendant was issued an infringement notice and elected for the matter to be heard in court.

R15.19 For clarity, a summary offence where the only mandatory penalty is the incurring of demerit points is eligible for the Summary Offences Diversion Program. However, any demerit points will still be incurred, regardless of participation by a defendant in the Summary Offences Diversion Program.

Prosecutorial consent

R15.20 When an application for a matter to proceed through the Summary Offences Diversion Program is made, the prosecutor, defendant and victim must have the opportunity to make submissions about whether the order is appropriate in all the circumstances. However, there is no requirement for the prosecution to consent to the order, and no power in the prosecutor to veto or refuse the making of the order.

Conditions of an agreement

R15.21 If an order is made for the defendant to enter the Summary Offences Diversion Program, then the defendant will enter an 'agreed plan' with a number of conditions, which is approved by the magistrate. The defendant must consent to the plan and its conditions.

R15.22 The magistrate must be reasonably satisfied that a defendant has the capacity and capability to meet the 'agreed plan' under the Summary Offences Diversion Program.

R15.23 The new criminal procedure legislation should not prescribe the number or types of conditions that can be included in a plan, to allow for adequate flexibility. However, the legislation should contain a clause that any condition:

a) must be fair, reasonable, appropriate in the circumstances, accessible and proportionate to the charges

b) must be achievable within the time frame of the order

c) must not be overly onerous for the defendant.

Monitoring of conditions and concluding proceedings

R15.24 Once the defendant has entered an agreed plan, proceedings may be adjourned for the shortest reasonable time to allow the defendant to complete the conditions, but for no longer than six months.

R15.25 The adjournment may be extended for a further six months, so that the matter is adjourned for up to 12 months in total, if appropriate. A magistrate may also list a matter for additional mentions as appropriate, to review the defendant's compliance to date with the agreed plan.

R15.26 The defendant must submit evidence of their compliance with the agreed plan to the court. When the matter returns to the court the magistrate will review this evidence to determine whether the defendant has completed the requirements of the program. If appropriate in the circumstances, the magistrate may exercise a discretion to decide that the defendant has substantively completed those requirements.

R15.27 If a defendant has completed or is found to have substantively completed the requirements of the program:

- **a)** no plea to the charge will be taken
- **b)** the charge must be dismissed, and the defendant must be discharged without any finding of guilt
- **c)** the fact of participation and the dismissal of the charge is a defence to a later charge for the same offence, or for a similar offence arising from the same circumstances.

R15.28 If a defendant has not complied with the requirements of the program:

- **a)** the matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered
- **b)** if the charge proceeds to sentence, the extent to which the defendant complied with the scheme must be taken into account at sentence, but lack of compliance cannot be used against the defendant as an aggravating factor.

R15.29 Participation in the Summary Offences Diversion Program should not be treated as a finding of guilt, except for the purposes of:

- **a)** laws relating to confiscation, firearms, weapons control and other similar matters
- **b)** the incurring of any demerit points.

Procedures following court-ordered diversion options

R15.30 It should be made clear that any charges that are successfully diverted by way of referral to ARJC or participation in the Summary Offences Diversion Program should be formally recorded on an adult's not-for-production

criminal history, and that the parties will not be required to pay court costs, levies or fees.

Chapter 16: Hearings, pleas and matters finalised in a party's absence

Pleas

Entering a plea

R16.1 A defendant charged with an offence that can be finalised in the Magistrates Court may give their plea to the court:

- **a)** verbally;
- **b)** in writing (for guilty pleas only);
- **c)** electronically;
- **d)** using an interpreter or communication aid;
- **e)** by instructing their lawyer to enter a plea on their behalf (but the defendant must still be present at the court event); or
- **f)** in another way permitted by the rules of the court.

R16.2 Where a matter contains multiple charges that can be finalised in the Magistrates Courts, a defendant can enter a 'bulk plea' to those charges.

R16.3 Before accepting a plea, a magistrate must ask an unrepresented defendant a series of 'plea confirmation questions' to confirm that the defendant:

- **a)** is aware of their right to get legal advice;
- **b)** understands each of the charges against them;
- **c)** understands that by pleading guilty they are admitting to the offence and can be sentenced for it; and
- **d)** has not been subject to any threat, promise or inducement to enter the plea.

R16.4 For any defendant entering a bulk plea, whether unrepresented or not, the magistrate must confirm the defendant:

- **a)** intends to enter the same plea to each charge, by way of bulk arraignment; and
- **b)** understands that by entering a bulk plea, this means their plea will be applied as if it is a plea to all charges before the court.

R16.5 If the magistrate is satisfied the defendant understands the plea being entered, the magistrate must state in court, on the record, that the plea has been accepted. For guilty pleas, the magistrate must also state that the defendant is convicted of the offence on the record and in open court.

R16.6 If a defendant is required to enter a plea in court but will not plead or answer directly to the charge, the court may, if it thinks fit, enter a plea of not guilty on the defendant's behalf.

Written pleas of guilty

R16.7 A written plea of guilty may be entered for any offence that can be finalised in the Magistrates Courts unless prohibited by another Act. It must contain:

a) The defendant's full name, date of birth and contact information. If the defendant has a lawyer, the lawyer's contact information should also be included.

b) The charge(s) being pleaded to (by reference to the unique number on the Charge Sheet, if known).

c) An acknowledgment that the defendant is aware of their right to seek legal advice and has done so if they wish.

d) A signature or an acknowledgment from the defendant that they are the defendant charged with the offence, and that they are entering the plea voluntarily and of their own free will.

e) An acknowledgment that once the court receives the written guilty plea:

i) the matter may proceed to sentence in the defendant's absence;

ii) any penalty may (if applicable) include cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority; and

iii) any penalties or license disqualification periods will commence from the date of sentence.

f) If the defendant wants to provide them, written statements to the court for consideration during sentencing. This is not for the defendant to dispute the facts of the charge, but to share any information they believe is relevant to the magistrate deciding the sentence. For example, their work history, family circumstances, any expressions of remorse and potential impacts of certain sentences. The defendant may also attach other relevant documents such as medical reports or character references.

g) Any other information required under the rules of court.

R16.8 A written plea of guilty must be received by the Magistrates Courts no later than two clear business days before the next scheduled court event. However, the magistrate may decide to accept written guilty pleas made closer to the court event if it is in the interests of justice to do so. The time frames for written pleas of guilty will be included in the rules of the court.

R16.9 Once the court receives a written plea of guilty, the court must provide the prosecutor with a copy of the plea and other documents received.

However, failing to do so will not be a bar to the matter proceeding at the next court event.

R16.10 When a written plea of guilty is received by the court, the magistrate will consider whether to accept the plea at the next court event. A magistrate may decline to accept a written plea of guilty if it does not satisfy these requirements or for another reason. The other reasons will not be limited by legislation, but may include circumstances where information provided in the written plea or at the next court event indicates that:

a) the defendant did not enter the plea themselves;

b) the defendant did not understand the consequences of the plea;

c) the defendant may have a lawful excuse or defence; or

d) the magistrate otherwise requires them to attend court.

Withdrawing a written guilty plea

R16.11 A guilty plea made in writing can be withdrawn before it is accepted by the magistrate, by any kind of written notice signed or acknowledged by the defendant and for any reason. The defendant may also attend the next court event and verbally advise the court they wish to withdraw the written plea before it is accepted by the magistrate.

Hearings

R16.12 The final hearing to determine a criminal matter in the Magistrates Courts should be called a 'summary hearing'.

R16.13 The new framework for criminal procedure laws applying in Queensland's Magistrates Courts should state that the procedure to be followed in a summary hearing in the Magistrates Courts is to be the same as the procedure followed in criminal trials in the Supreme Court. This will include (but is not limited to) procedures about:

a) the order in which the parties present their cases; and

b) the examination, cross-examination and re-examination of witnesses; and

c) the admission of evidence; and

d) any submission that there is no case to answer.

R16.14 Current provisions for admissions of fact at a summary hearing should be maintained.

R16.15 A defendant must attend a summary hearing in person (including remotely).

R16.16 All parts of a summary hearing may be conducted electronically if a magistrate approves this in the interests of justice, subject to evidentiary laws already set out in the *Evidence Act 1977*.

R16.17 At the conclusion of the hearing, the magistrate must find the defendant guilty and convict the defendant of the offence or dismiss the offence (by finding the defendant not guilty), state that finding on the record in court and give reasons for the decision.

Procedure in absence of one or more parties

R16.18 A matter will be able to proceed in the absence of one or more parties where the offence (or offences) can be finalised in the Magistrates Courts, unless the defendant has a right of election which has not yet been exercised.

R16.19 If a prosecutor does not attend a court event, and the court is satisfied the prosecutor was given adequate notice of the court event:

- **a)** the magistrate may adjourn the matter to another court date and notify the parties, or strike out the charge and order costs; and
- **b)** if the matter is adjourned and the prosecutor does not appear at the adjourned court date, the magistrate must strike out the charge unless there is good cause not to do so.

R16.20 If a defendant does not attend a court event, and the court is satisfied the defendant has been given adequate notice of the date, the court may:

- **a)** proceed to hear and decide the case without the defendant present;
- **b)** issue a warrant for the defendant to be arrested and brought before the court;
- **c)** if the defendant has already pleaded guilty, proceed to sentence; or
- **d)** adjourn the case to another date without issuing a warrant and send the defendant a notice about the requirement to appear at the next court event and the consequences for failing to do so.

R16.21 Information about whether a party was aware of a court date may include:

- **a)** proof of service of a court attendance notice or police notice to appear;
- **b)** submissions from the parties;
- **c)** information on the court file about actions taken by the registry, such as sending a notice about the court event.

R16.22 When a defendant does not attend court and the magistrate proceeds to hear and decide the case in the defendant's absence, a hearing may be conducted based on the facts and particulars provided by the prosecutor in the original notice, stated in court or provided in other material presented

to the court, rather than by calling witnesses to give evidence. The magistrate has a discretion about whether it is appropriate to proceed on this basis, which is decided based on the circumstances of each case. This may apply to all prosecutors, not only public and police officers.

R16.23 If neither party attends a court event, the provisions for proceeding in the absence of the prosecutor are to take effect first.

Sentencing in defendant's absence

R16.24 Where a defendant has been found guilty or has pleaded guilty to an offence that can be finalised in the Magistrates Courts but is absent from court at the time of sentencing, the court may proceed to sentence the defendant in their absence.

R16.25 A defendant absent from court may not be sentenced to:

a) imprisonment, including a suspended sentence or intensive correction order; or

b) an order cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority.

R16.26 If the court considers that a sentence of imprisonment or an order relating to a licence or similar (described in Recommendation 16.25) may or must be given:

a) the matter must be adjourned to a later date; and

b) the defendant must be sent a notice requiring them to attend court on the adjourned date. The notice must explain the reason their attendance is required and the possible outcomes if they do not attend on the day.

R16.27 If a matter has been adjourned in accordance with recommendation 16.26 and the defendant does not attend at the next court date:

a) a sentence of imprisonment may not be imposed in the defendant's absence and a warrant will be issued for the defendant's arrest unless the magistrate considers that it is appropriate to adjourn the matter further;

b) an order cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority may be imposed in the defendant's absence.

R16.28 The notice requirements in Recommendation 16.26 as they relate to orders about licenses or similar may be dispensed with at the magistrate's discretion, if the prosecutor can show the defendant has already been notified such an order may be made in their absence or has already consented to this in a written plea of guilty.

R16.29 If a defendant is sentenced in their absence, they must be notified by the court that sentencing has taken place and given information about the sentence imposed.

Rehearing a matter decided in a party's absence

R16.30 Where a matter was finalised in a party's absence, that party may apply to the Magistrates Court for a rehearing. The application may be granted at the magistrate's discretion, and the grounds for granting the application may include that the party:

- **a)** did not receive notice of the court date where the matter was decided in their absence; or
- **b)** did not receive sufficient notice of the court date to be able to attend; or
- **c)** did receive notice of the court date but failed to attend for a good reason, which is to be detailed in the rehearing application; or
- **d)** other reasons in the interests of justice.

R16.31 An application for a rehearing must be:

- **a)** made within two months of the matter being finalised for the defendant or one month for the prosecutor, but in either case can be allowed at a later time if a magistrate considers it appropriate;
- **b)** filed with the court, and a copy must be given to the other party;
- **c)** heard in open court and with the parties permitted to attend and make submissions; and
- **d)** granted at the discretion of the magistrate.

R16.32 If an application for rehearing is granted, the original convictions and order will no longer have effect, and at the rehearing the court will have the same powers and procedures as at the original hearing. If the applicant does not attend the rehearing, the original convictions or orders may remain in place.

R16.33 All parties must be notified of the outcome of the rehearing application.

R16.34 If an application for a rehearing and an appeal to the District Court are ongoing at the same time, the appeal cannot be decided until the application for rehearing has been finalised.

R16.35 A party cannot apply for a rehearing of a matter that has already been the subject of a decided appeal by that party to the District Court.

Chapter 17: Committals

Language and simplicity

R17.1 In the new criminal procedure laws for the Magistrates Courts, part 5 division 5 of the Justices Act will be redrafted in simple language and set out a clear framework for committals in Queensland. The general concepts and processes currently contained in part 5 division 5 and other committal divisions will be retained.

R17.2 The new committals framework should use the following terminology:

a) **Committal proceeding**: this term will be defined to include all types of committals;

b) **Registry committal**: this term will be defined to include committals conducted by the registrar and the legislation will (as in the current Justices Act) set out the processes and procedures related to these committals;

c) **Court committal**: this term will be defined to include any type of committal occurring in court, including both a 'hand-up committal' that relies entirely on witness statements and a committal involving any form of oral evidence (as well as any combination of the two). These court committals will have clearly defined requirements and processes set out in the new legislation;

d) **Statement**: this term will replace the current term 'written statement' and is intended to include statements provided in various forms, such as one that is in writing or made as an audio-visual recording. A written statement must contain an acknowledgement or declaration that the contents are true and that the maker is aware of the consequences of making a false statement, but this need not refer to the *Oaths Act 1867*.

R17.3 The provisions of the new criminal procedure framework that permit the use of technology should, among other things, provide for the greater use of technology in committal proceedings, particularly administrative aspects such as the electronic lodgement and exchange of documents and electronic statements.

R17.4 The new committals framework should explicitly acknowledge that committals are an administrative process and are not subject to an appeal or stay of proceedings.

Registry committals

R17.5 The new committals framework should extend eligibility for registry committals to self-represented defendants with the same general conditions as are currently provided for in section 114 of the Justices Act.

R17.6 To facilitate the use of registry committals by self-represented defendants and provide appropriate protections, safeguards must be put into place to ensure the defendant understands what is required of them and what they are doing, including:

- **a)** giving defendants simple information about the registry committal process at an early stage of proceedings;
- **b)** providing plain English instructions for completing the registry committal process; and
- **c)** requiring a defendant to make a declaration about relevant legal matters (for example, that the defendant will not give evidence or call witnesses and acknowledges that the sufficiency of the evidence will not be considered).

R17.7 The requirement that a defendant who is not in custody must not be in breach of any condition on their bail undertaking should be removed as a condition of registry committal eligibility.

R17.8 Time frames for progressing a registry committal should be introduced into the Rules. The rules should include:

- **a)** defence have 14 days from the date they indicate to the court the matter is ready to proceed via registry committal, to prepare their application and send to the prosecution for consideration;
- **b)** prosecution should, as soon as practical but no later than 14 days, respond to the defence application to proceed via registry committal;
- **c)** upon receiving the prosecution response, the registry should progress the application as soon as practical; and
- **d)** parties may apply to the registrar for an extension of the time frames, and the registrar must have sufficient discretion to case manage the registry committal process or bring the file back before a magistrate for ongoing case management.

R17.9 Before a registry committal can take place, the witness statements must have been disclosed to the defendant. The defendant may consent to a registry committal taking place without the witness statements being filed in court, but an agreed list of witness statements must be filed instead. The defendant (or their lawyer) must not be able to waive these requirements, meaning the defendant cannot consent to the statements not being disclosed to them, or to the statements or the list of statements not being filed in court for the purposes of a registry committal.

R17.10 A list of witness statements must include the full name of each witness giving a statement and the date on which their statement was declared.

The contents of the list must be agreed to by the prosecution and the defendant.

R17.11 The statements listed in a list of witness statements will form the depositions for a matter. Following a registry committal, the party in possession of the listed statements must transfer or provide them to the prosecuting agency.

Court committals

R17.12 Consistent with Recommendation R17.1, the concepts in sections 104 and 108 of the Justices Act should be combined, simplified and expressed in way that sets out the general steps in a committal hearing, including by providing:

a) The purpose of committal proceedings is for the magistrate to consider all the evidence before the court and decide whether the evidence is sufficient to commit the defendant for trial for an indictable offence;

b) At the close of the prosecution case, if the magistrate is not satisfied the evidence meets the test for committal, the defendant must be discharged;

c) If the magistrate is satisfied there is sufficient evidence, they must call on the defendant about whether they wish to call any evidence or make a submission about the sufficiency of the case;

d) If the defendant makes a submission or offers any evidence, then the magistrate must again consider the sufficiency and decide, after any defence evidence is heard, whether the matter is to be committed to a higher court on a consideration of all the evidence; and

e) If the matter is to proceed, the magistrate must ask if the defendant wishes to say anything in answer to the charge or enter any plea; and

f) Following any statement or plea, the magistrate must commit the matter to a higher court and, if the matter is committed for trial, give warnings about alibi evidence in accordance with section 590A of the Criminal Code.

Hand-up committals

R17.13 Consistent with Recommendation R17.1, section 110A should be redrafted to provide a clear and consistent approach to the way in which the prosecution and defence can give and call evidence during a committal proceeding.

R17.14 The redrafted law should contain three parts relating to:

a) General Provisions:

b) Prosecution Provisions; and

c) Defence Provisions.

R17.15 The **General Provisions** should contain the following concepts:

a) prosecution evidence should be in statement form (unless the prosecution chooses otherwise), but there must still be a process for ensuring the defendant understands the process and their entitlements and rights;

b) a statement should not be required to contain a declaration under the *Oaths Act 1867*, but should be required to include a signed acknowledgement or declaration relating to the truth of the statement and the consequences of making a false statement;

c) the prosecution and defence can agree to the cross-examination of a witness; and

d) the magistrate must generally be required to consider whether all the evidence is sufficient to commit the defendant to a higher court for an indictable offence, however a defendant (including a self-represented defendant) can waive the application of that test.

R17.16 In relation to Recommendation 17.15(d), specifically:

a) a defendant can waive the application of the committal test regardless of how the committal proceeded, including where all evidence is in statement form and where there is a combination of written and oral evidence; and

b) if the test is waived by a self-represented defendant, the magistrate must take steps to ensure the defendant understands what they are doing and the consequences of doing so, including by explaining the process to the defendant and asking questions to confirm their understanding.

R17.17 The **Prosecution Provisions** should contain the following concepts:

a) although the prosecution evidence should generally be in statement form, the prosecution has the right to call a witness to give oral evidence, either to supplement a written statement or to give full oral evidence, without any requirement to first obtain leave of the court; and

b) where the prosecution calls oral evidence, defence must have the right to cross examine the witness about that oral evidence (but where the evidence supplements a written statement, must still obtain prosecution consent or a direction from a magistrate to cross-examine the witness about their written statement).

R17.18 The **Defence Provisions** should contain the following concepts:

a) a defendant may call a witness to give oral evidence in a committal proceeding, after which the prosecution will have the right to cross examine the witness;

b) a defendant may tender a written statement for admission as evidence if the prosecution agrees to its admission, and that agreement may be subject to the person being present for cross-examination;

c) the magistrate has the discretion to require that a witness for the defendant appear at a committal hearing to give evidence, even in circumstances where a written statement of that witness has been or could be admitted as evidence.

Committals with cross-examination

R17.19 The committals framework in the new criminal procedure legislation should provide guidance about what is meant by the phrase 'substantial reasons why, in the interests of justice', by setting out a non-exhaustive list of circumstances in which such reasons might exist. These circumstances will include:

a) to clarify the evidence proposed to be called, to avoid a defendant being taken by surprise at trial;

b) to gain a proper understanding of the case being advanced against the defendant;

c) to narrow the issues in dispute;

d) where cross-examination might substantially undermine the credit of a significant prosecution witness;

e) where a critical witness, including a complainant, has made inconsistent statements;

f) to avoid the need for a *voir dire* or pre-trial hearing in the higher court (commonly referred to as a 'Basha inquiry');

g) where the matters of cross-examination may found a legal ruling on admissibility or the exercise of a discretion to exclude evidence;

h) to enable the defendant to make a submission on the evidence;

i) where cross-examination would be likely to result in discharge of the defendant; and

j) where there is a likelihood that cross-examination will demonstrate grounds for the exercise of the prosecution discretion not to proceed with the charge.

R17.20 Where a magistrate permits cross examination of a witness, the magistrate must give reasons for their decision which set out the witnesses to be cross examined and the issues for cross examination.

R17.21 The procedure for the defence to make a request for cross-examination of a prosecution witness should not change. However, the law (or associated Rules or Regulations) should clearly set out the steps in the process and assign clear time frames to each step.

Other matters

R17.22 The committals framework should include a clear process for the steps to be taken when a charge proceeded summarily, but after evidence was presented the magistrate formed the view that the matter was too serious to be dealt with in the Magistrates Court. The law should be to the same effect as other laws about these circumstances, such as section 118 of the *Drugs Misuse Act 1986*.

R17.23 The current provisions in the Justices Act relating to depositions, and to the required steps for transmission of documentation after a committal has been conducted, should be maintained but simplified. Consequently, the *Criminal Law Amendment Act 1892* should be repealed.

R17.24 The committals framework should contain clear provisions applying when a defendant absconds partway through a committal proceeding, to the effect that:

- **a)** the committal proceeding must not continue, and a warrant must be issued for the defendant's arrest; and
- **b)** if the defendant is later located and arrested, any evidence already heard in the committal proceeding before the defendant absconded is deemed to be evidence in any later committal proceeding.

Chapter 18: Costs and enforcement

R18.1 The new criminal procedure legislation should include provisions about costs orders for either party that can apply:

- **a)** when a matter being dealt with summarily is adjourned (Recommendation 18.5);
- **b)** following noncompliance with a disclosure order (Recommendation 18.6);
- **c)** at the conclusion of a matter dealt with summarily (Recommendations 18.7–18.11);
- **d)** on appeal, as is currently provided for in the *Justices Act 1886*.

Application and timing of costs orders

R18.2 An application for costs:

a) may be made at the time that the event for which the party is seeking costs takes place, or later in the proceeding; and

b) may be adjourned for later consideration of any application for costs, even if a charge has been dismissed or finalised in another way; and

c) can be decided in a party's absence, although notification of the outcome and any order made must be sent to that party.

Costs orders for summary offences

R18.3 In the Magistrates Courts, a costs order should be available for:

a) any offence that is dealt with summarily in the Magistrates Courts, including indictable offences that are (or are being) dealt with summarily; and

b) in relation to a costs order following noncompliance with an order about disclosure in accordance with the Criminal Code, any offence whether or not it can be dealt with summarily.

R18.4 To achieve Recommendation 18.3(a), section 127 of the *Drugs Misuse Act 1986* should be repealed.

Costs on adjournment and non-disclosure

R18.5 Where a matter being dealt with summarily is adjourned, the court may order the costs of and connected with the adjournment to be paid by either party to the other for an amount the court considers is just and reasonable.

R18.6 The current law about costs following noncompliance with an order for disclosure in accordance with the Criminal Code in section 83B of the *Justices Act 1886* should be maintained. Generally, the new law should provide that:

a) where noncompliance is not satisfactorily explained and a proceeding is adjourned, and the court is satisfied that the noncompliance was unjustified, unreasonable or deliberate, the court may order the prosecution to pay the defendant's costs in relation to the adjournment, in an amount the court considered just and reasonable; and

b) where the court is satisfied there is deliberate or ongoing noncompliance with the direction, the court may strike out the charge and order the prosecution to pay the defendant's costs in an amount the court considers is just and reasonable.

Costs when a matter is finalised summarily

R18.7 At the conclusion of a matter dealt with summarily, costs will be available:

- **a)** to the prosecution in matters where there is a conviction or when an order is made;
- **b)** to the defendant in circumstances where the charge is dismissed or struck out, including but not limited to the following reasons:
  - **i)** want of jurisdiction;
  - **ii)** the prosecutor has not attended court;
  - **iii)** the charge has been withdrawn by the prosecution; or
  - **iv)** the prosecution offers no evidence.

R18.8 Where costs are awarded in the circumstance set out in Recommendation 18.7, a party may be awarded the costs that are just and reasonable taking into account all relevant circumstances, including, for example:

- **a)** whether the participants have acted in good faith during the proceedings, including whether the costs were necessary for the prosecution to achieve justice or for the defendant to defend themselves;
- **b)** whether there has been a failure by a party to comply with the objects or principles of the criminal procedure legislation, or an order of the court;
- **c)** the conduct of the parties during any criminal investigation. For example, whether the investigation was conducted appropriately and according to law, and whether the defendant behaved in a way that a reasonable person would believe suspicious;
- **d)** the conduct of the parties during court proceedings. For example, if the parties genuinely engaged in case conferencing and complied with any disclosure and case management requirements throughout the proceeding, and if any costs were incurred due to over caution, negligence, mistake or merely the wishes of a party;
- **e)** the circumstances of the outcome. For example, if a matter was dismissed on technical grounds rather than due to lack of evidence, when a matter was withdrawn, and if a defendant was acquitted of a charge but convicted of a different charge;
- **f)** any other matter the magistrate considers relevant.

R18.9 Consistently with the current law, in deciding the costs that are just and reasonable to be paid at the conclusion of a matter in accordance with Recommendation 18.7, a magistrate may award costs only:

a) for an item allowed under a scale of costs prescribed under a regulation; and

b) up to the amount allowed for the item under the scale.

R18.10 Despite Recommendation 18.9, as in the current law, a magistrate may award a higher amount for costs if satisfied the amount is just and reasonable having regard to the special difficulty, complexity or importance of the case.

R18.11 The scale of costs currently in schedule 2 of the *Justices Regulation 2014* should be revised and updated to reflect contemporary legal professional costs, in accordance with yearly inflation rates. There should also be a mechanism by which the scale is regularly reviewed and updated in accordance with inflation rates.

After the issuing of costs orders

R18.12 When a costs order is made in the Magistrates Courts, it must be immediately referred to SPER.

R18.13 When a matter is decided in a party's absence, an order for the payment of costs must still be immediately referred to SPER, however there must be a period of time before SPER may commence any enforcement action, to allow the defendant to be notified of the order and to pay the amount or apply for a rehearing.

R18.14 For any costs order:

a) the person against whom the costs order is made cannot be subject to default imprisonment if the debt is unpaid; and

b) if the order is appealed to the District Court, payment will be stayed until the appeal is decided and then required in any amount ordered or confirmed on the appeal.

R18.15 Where a costs order is made against a police officer, public officer or government agency, this will constitute a civil debt that can be recovered in court.

Enforcement of monetary orders

R18.16 The new criminal procedure legislation should replicate the effect of section 161A of the *Justices Act 1886* and provide that a monetary order made in connection with a criminal proceeding in the Magistrates Courts, other than an order for costs, can be immediately referred to SPER.

Chapter 19: Other matters

R19.1 The new criminal procedure legislation (or other suitable legislation) should contain all the criminal procedures proposed in this chapter, as well as all other general matters detailed in the drafting instructions (Appendix C).

Chapter 20: Implementation

R20.1 A period of no less than two years before the date of commencement of the Act should be allocated for implementation of the new criminal procedure legislation.

R20.2 A comprehensive review of the new criminal procedure legislation should be conducted no later than five years from the date of commencement, and a report should be tabled in Parliament about the outcomes of the review. In addition to an overall review of the Act, specific consideration should be given to:

- **a)** the retention of 'Breach of Duty' provisions, including whether they are required to be maintained;
- **b)** the operation and effectiveness of provisions about new in-court diversion programs (namely, the Summary Offences Diversion program and the additional provisions about adult restorative justice conferencing), and whether any further changes are required;
- **c)** any other diversionary programs that take effect after the commencement of the new legislation.

R20.3 The new criminal procedure legislation should contain standard provisions allowing for a regulation and form making power, and savings and transitional provisions as required. It should also include a transitional regulation making power given the nature of the reform.

R20.4 The *Criminal Practice Rules 1999* should be used for making rules of court required under the new criminal procedure legislation.

Chapter 21: Consequential amendments

R21.1 A separate Consequential Amendments Bill should be prepared in conjunction with the new Criminal Procedure Bill. The Consequential Amendments Bill repeals the *Justices Act 1886* and includes amendments to various Queensland Acts to facilitate the new Criminal Procedure Bill.

R21.2 The provisions in the Justices Act relating to the Magistrates Courts' jurisdiction, establishment, constitution, court officers, administration and other related matters should be relocated in the Magistrates Courts Act.

R21.3 The Magistrates Courts Act should be amended to enable any changes necessary for a change in court name and single court structure.

R21.4 The Magistrates Act should be amended to enable any changes to the title 'magistrate'.

R21.5 The Criminal Procedure Bill and Consequential Amendments Bill should be dealt with by the Parliament as cognate Bills.

Appendix C: Part 2 — Drafting Instructions

Part 1: Preliminary

1.1 Short title

Instructions

A short title provision is required. The short title is the Criminal Procedure (Magistrates Courts) Bill.

1.2 Commencement

Instructions

That a period of no less than 2 years from the date of commencement of the Act be allocated for implementation of the new criminal procedure legislation.
It is proposed the Bill commences on proclamation or a date to be fixed to enable significant and necessary related implementation action.

1.3 Act binds all

Instructions

The Bill will bind all persons, including the State and, subject to the limits of the legislative powers of the Parliament, the Commonwealth and all other States.

1.4 Objects of Act

Instructions

The object of the Bill is to set out a contemporary and effective criminal procedure framework for Magistrates Courts, that –

a) simplifies court procedures and encourages better understanding of processes for all court users;

b) enables criminal proceedings to be dealt with in a way that is accessible, fair, just, consistent, and timely; and

c) facilitates and improves the use of technology.

1.5 Guiding principles for administration of the Act

Instructions

The following principles apply to the administration of this Bill:

a) The Court and every participant in a Magistrates Court criminal proceeding act in a way that applies and promotes the objects of the Act.

b) In Magistrates Court criminal proceedings, there should be a focus on court users and steps should be taken to ensure court users understand procedures and outcomes.

c) The Court and every participant treat all court users with respect and dignity, and in a way that promotes human rights.

d) In criminal proceedings, the Court and every participant act in a way that promotes:

   i) a defendant's right to a fair trial according to law;

   ii) the interests and safety of victims and witnesses; and

   iii) the needs of individual court users and makes reasonable adjustments to meet those needs.

e) The Court and its procedures recognise the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples in all stages of its criminal proceedings.

f) In criminal proceedings, the Court and every participant has an obligation to move matters forward, including by:

   i) preparing and conducting matters in a way that is purposeful and timely;

   ii) genuinely engaging in case conferencing and case management procedures;

   iii) promoting the early resolution of matters, including using diversion in appropriate circumstances; and

   iv) using technology when appropriate and available.

A *participant* is anyone involved in any way with a criminal proceeding. This includes but is not limited to court users such as defendants, legal practitioners (defence and prosecution), registry staff, court officers, and magistrates.

It is the responsibility of all participants to uphold and apply these principles when performing obligations and functions under this Bill.

1.6 Application of this Act

Instructions

This Bill provides the general practice, powers and procedures to be exercised by the Magistrates Court in its criminal jurisdiction. That is, it provides the processes for the types of proceedings dealt with in the Magistrates Court.

It may be useful to insert a cross reference to note the criminal jurisdiction of the court is set out in the *Magistrates Court Act 1921* (as amended by the Consequential Amendment Bill).

Provisions should also clarify that in doing so, the Bill:

a) applies subject to specific provisions in other Acts (see instructions [1.7] below).

b) does not seek to codify the common law about criminal procedure. The common law continues to apply, where it is not displaced by statute law.

c) other criminal legislation continues to be relevant including for example the *Bail Act 1980*, the *Evidence Act 1977*, the Criminal Code, the *Police Powers and Responsibilities Act 2001* and the *Penalties and Sentences Act 1992*.

1.7 Application of this Act in relation to other Acts

Background

The new Bill inherits the operating context of the Justices Act. The Justices Act has in many instances been adopted by other Acts but with modifications for the particular subject, circumstances, or context requirements of those other Acts.

- *Police Powers and Responsibilities Act 2000*, Part 5 (Alternative to arrest) especially the Notice to appear provisions available to police only. Although noting section 388 (5) (Notice to appear equivalent to a complaint and summons), states subject to this part the Justices Act and other Act applies to a notice to appear in the same way as it applies to a complaint and summons.
- *Youth Justice Act 1992* (YJA), section 66 (Application of usual laws where necessary): which does the work of applying the Justices Act to a proceeding in the Childrens Court and providing that it (YJA) prevails to the extent of any inconsistency. Section 65 (Magistrates Court jurisdiction in aid) contains a similar provision.
- Various other Acts state the way prosecutions can be commenced (for example section 33 Bail Act without complaint and summons), extend the time limits for commencing prosecutions for simple offences or stipulate who can initiate proceedings and what requirements or authorisations are needed to validate such actions.

There is no intention to interfere with these arrangements which have been specifically tailored to suit requirements of certain offences, subject matter, organisational structures and operating needs in specific Acts. The possibility of harmonisation of these provisions is beyond the scope of this current review. It is therefore necessary to recognise and adopt the existing legislative context.

An approach that globally takes into account these adaptions is preferred to reduce unnecessary repetition of phrases such as “except to the extent provided in this or another Act”, “unless some other [provision] is made by the law relating to the particular cases”, or “unless a contrary intention appears” appearing in each section of the Bill given the array of customised adjustments made across the Queensland statute book. This course should also guard against any negative consequences from its inadvertent omission in any particular context.

Instructions

The Bill needs to acknowledge its application must be read subject to any special provisions contained in other Acts relating to criminal procedure for its (the other Acts) particular purposes.

In summary, the Bill provides for the usual (general) application of criminal procedure laws in the Magistrates Court, however these can be added to, displaced (overridden) or modified by the provisions of other Acts. Where other Acts have included these provisions, these provisions prevail, and or operate in addition to the general laws. Drafting advice is sought as to the form of words that best achieves this intent.

1.8 Definitions

Instructions

It is proposed the Bill include a dictionary defining key terms, contained in a schedule. The bulk of these will be identified during drafting, however the following terms requiring definition at this time include:

- *Appearance*, as in right of appearing to conduct a matter, means as defined in the Magistrates Courts Act.
- *Arrest warrant* means a warrant issued by the Court or a magistrate that requires a defendant to be arrested for the purpose of bringing them to Court to be dealt with according to law.
- *Attendance* means physical attendance and remote attendance (if permitted/authorised). First attendance in relation to the defendant before the Court means the first attendance before the Court required (date, place, time); see also return date.
- *Authorised Person* – the person who is authorised to start a criminal proceeding for a charge (or charges) of an offence by completing and signing the court documents under this Act.

- *Audio link facilities* means facilities, including telephone, that enable reasonably contemporaneous and continuous audio communication between persons at different places.
- *Bail* means bail under the *Bail Act 1980*.
- *Circumstance of aggravation* means any circumstance where a defendant is liable to a greater punishment on conviction and sentence than if the offence were committed without the existence of that circumstance (see Criminal Code).
- *Charge* means an allegation that a person has committed an offence (see *Acts Interpretation Act 1954)*.
- *Charge Sheet* means a written charge filed in a Magistrates Court having jurisdiction to deal with the defendant.
- *Committal proceeding* means a registry committal or a court committal which transfers an indictable offence to the higher court.
- *Conviction* includes a finding of guilt, and the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded.
- *Court* means the Magistrates Court as defined under the *Magistrates Courts Act 1921*.
- *Court Event* means the general term for each time a matter is before a Magistrates Court in its criminal jurisdiction.
- *Committal* means a court event where it is decided whether the charge (or charges) will be transmitted to a higher court. This will include registry committals, hand up committals and committals with cross-examination (and any combination of these last two (excluding a registry committal).
- *Defendant* means the person charged with a summary or indictable offence before a Magistrates Court; and being dealt with under this Act in relation to the commission of an indictable or summary offence. The person alleged to have committed an offence.
- *Domestic violence offence* see the Criminal Code, section 1.
- *Higher court* means the District Court or Supreme Court of Queensland as defined under each respective Acts.
- *Indictable offence* means an offence classified as crime or misdemeanor under the Criminal Code and which may be prosecuted before the Supreme Court, the District Court, or other court having jurisdiction in that behalf, by indictment in the name of the Attorney-General or other authorised officer. See section 3 of the Criminal Code.

- *Indictment* means a written charge presented to a court (other than a Magistrates Court) having jurisdiction to try the accused person.
- *Justice of the Peace* means as defined in the *Justice of the Peace and Commissioners for Declarations Act 1991.*
- *Lawyer* means an Australian lawyer who, under the *Legal Profession Act 2007*, may engage in legal practice in this State.
- *Magistrate* means as defined in the *Magistrates Act 1991.*
- *Magistrates Courts jurisdiction* means as defined under the *Magistrates Courts Act*.
- *Mention* means any event where a case comes before the Magistrates Courts for the purpose of progressing the matter; for example, for the parties to advise the outcome of case conferencing, or to list a matter for summary hearing.
- *Offence* means a regulatory, simple or indictable offence. See Criminal Code, sections 2 and 3.
- *Order* includes any order, adjudication, grant or refusal of any application, and any determination of whatsoever kind made by a Magistrates Court, and any refusal by a Magistrates Court to hear and determine any complaint or to entertain any application made to it, but does not include any order made by Magistrates committing a defendant for trial for an indictable offence, or dismissing a charge of an indictable offence or granting or refusing to grant bail.
- *Party*, to a proceeding, means (a) a (defendant) person who is charged with an offence the subject of the proceeding; or (b) the prosecution in relation to an offence the subject of the proceeding. In an appeal, the appellant or respondent.
- *Prosecution* means the person in charge of the prosecution or a person appearing for the prosecution.
- *Prosecutor* – the person who appears for the prosecution in the proceeding and prosecutes the charge (or charges) for the offence.
- *Private prosecution* means a prosecution sought to be made by a person who is acting in a private capacity and is not— (a) a public officer; or (b) in bringing the charge, acting in— (i) the execution of a duty imposed on the person by law; or (ii) the proper administration of an Act or Commonwealth Act.
- *Public officer* means:

    (a) an officer or employee of the public service of the State or the Commonwealth; or

(b) an officer or employee of a statutory body that represents the Crown in right of the State or the Commonwealth; or

(c) an officer or employee of a local government;

who is acting in an official capacity. [These definitions use current section 4 Justices Act definitions.]

- *Rehearing* means rehearing granted following a rehearing application.
- *Reopening* means reopening proceedings to fix certain errors, not errors in a sentence.
- *Registry committal* means a committal proceeding conducted by the registrar.
- *Regulatory Offence* means offences defined in the Criminal Code, section 3 and contained in the *Regulatory Offences Act 1985*.
- *Registrar* (formerly the clerk of the court) means as defined under the Magistrates Courts Act.
- *Return Date*, means the first date on which the proceeding is listed before the Magistrates Court.
- *Rules of Court* means the *Criminal Practice Rules 1999,* made under the *Supreme Court of Queensland Act 1991.*
- *Simple offence* means as defined in the Criminal Code, section 3.
- *Summary offence* means any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise. This replaces the Justices Act definition of simple offence.
- *Summary conviction* means conviction before a Magistrates Court for a summary offence.
- *Summarily* means a magistrate deciding a matter alone in the Magistrates Courts jurisdiction.
- *Summary hearing* means a court event where a contested charge (or charges) is heard and determined, during which the prosecution and defendant may present evidence and the Magistrate must make a finding of guilty or not guilty.
- *Verdict and Judgement record* see *Criminal Practice Rules 1999.*
- *Video link facilities* means facilities, including closed-circuit television, that enable reasonably contemporaneous and continuous audio and visual communication between persons at different places, including, for example, video link facilities.

As much as possible, definitions should support understanding of criminal procedure law and use simple English terms that best reflect the action being undertaken.

Part 2: Starting proceedings for a summary offence or an indictable offence in the Magistrates Courts

2.1 Application of this Part

Background

It is not intended to include provisions in this Part about starting proceedings by arrest and charge (including powers of citizen's arrest) or notice to appear forms (only issued by police) under other legislation such as Chapter 14 of the PPRA and the Criminal Code. This is because such methods of commencing criminal proceedings are more closely and appropriately aligned with police powers and responsibilities.

Instructions

This Part acknowledges the various ways to initiate charges. It provides a modernised notice-based scheme for starting charges for criminal proceedings for summary or indictable offences in the Magistrates Court (including committal proceedings) and outlines all related procedures.
Note this applies to proceedings unless this Act or another Act provides otherwise. Whether this needs to be continuously stipulated needs to be determined during drafting (see instructions [1.7]).
Also as indicated by its heading this method only applies in a Magistrates Court and does not affect starting of matters in the higher courts under the Criminal Code see sections 560 (presenting of indictments), section 561 ex officio procedures (direct indictments presented by the Director of Public Prosecutions in higher courts with or without a committal process), or a direction for prosecution for perjury (section 697).

2.2 How criminal charges are started in a Magistrates Court under this Act

Background

A criminal proceeding is started in a Magistrates Court by initiating a charge for an offence, i.e. charging a person with an offence.
The Bill will primarily outline how charges are started using a new Court Attendance Notice method and other supplementary requirements such as the issue of a warrant for the person's arrest. This new method will replace the complaint and summons/warrant format in the Justices Act.
Other laws will continue to provide for additional ways of starting charges[1] in the Magistrates Courts:

[1] See *Acts Interpretation Act 1954* (schedule 1) charge of an offence means a charge in any form.

Alternative 1: Issue and service of a Notice to Appear (NTA) under the PPRA[2] (used by Queensland police officers only).

Key points

- Police NTAs are commonly issued and served on the spot. They are a short document.
- Police may issue and serve an NTA on a person if the police officer reasonably suspects the person has committed or is committing an offence, or is asked to do so by another police officer who has the requisite suspicion.
- Section 384 of the PPRA provides for the content of an NTA. NTAs need only be signed by the person serving it. The NTA needs to be filed in court as soon as possible after service.
- Section 388 of the PPRA states that a statement in an NTA is taken to be a complaint under the Justices Act. Consequential amendments are separately provided.
- Supplemented by a bench charge sheet (BCS) under section 13 of the *Justices Regulation 2014*. A police officer must give (file) the clerk if the court a separate bench charge sheet for each charge. This may be given electronically.

Alternative 2: Arrest a person (with or without a warrant) in circumstances where the person is charged.[3]

Key points

- In Queensland, the law relating to arrest *with or without warrant* by police is contained in chapter 14 of the PPRA (Part 2 and Part 1 respectively). Part 6 of the PPRA deals with the duties of police after arrest.
- It is lawful for a police officer to arrest an adult, without warrant, if the police officer reasonably suspects the person has committed, or is committing an offence, if it is reasonably necessary for one of the reasons specified in the section 365 of the PPRA.
- Where an arrest warrant is issued under section 371(b) for an offence other than an indictable offence (i.e. time limits for commencement apply): section 373 PPRA states a complaint is taken to be made, and the proceedings started, when the warrant is issued.

The law about arrest and charge is complex using various provisions in the PPRA and Justices Act. The outcomes include:

[2] See sections 382 – 390 PPRA. Police also issue an infringement notice for certain minor simple offences. The infringement notice contains information about the alleged offence and fine amount. Objections to the fine can be heard in court. E.g. Section 27 *State Penalties Enforcement Act 1999* – if, within 28 days, an alleged offender elects to have the offence decided by the Magistrates Court or takes no action a proceeding for an offence may be started under the *Justices Act 1886*.

[3] Arrest can occur for various reasons not all resulting in charges see: PPRA for discontinuance; arrest and detain for questioning about the offence if it is an indictable offence (Ch 15) ; arrest and detain for breath testing etc.

Outcome 1: Arrest the person (with or without a warrant) - discontinue the arrest

- release the person because the reason for arrest no longer exists; or
- more appropriate to charge the person by NTA or summons; or
- more appropriate to issue an infringement notice under the PPRA.

Outcome 2: Arrest the person (with or without a warrant) - charge the person orally[4] or with offence stated in warrant

- take the person before a court as soon as reasonably practicable to be dealt with according to law.
- If the arrested person is delivered into the custody of a watch-house manager:
    - decide whether or not to grant bail under the *Bail Act 1980*; or
    - issue and serve an NTA.

If the defendant is arrested on the charge, with or without a warrant – and brought to court or bailed – a BCS is required under section 13 of the *Justices Regulation 2014*. A police officer must give the clerk of the court a separate bench charge sheet for each charge. This may be given electronically.
If detained until court, the BCS is shown to the defendant and put with the defendant's property.
If released, the defendant is given a bail undertaking (acts as summons) and the BCS (acts as complaint).

Alternative 3: Another law may expressly provide for the way proceedings for an offence are started

See for example, the Bail Act section 33 (failure to appear in accordance with undertaking): which provides proceedings for an offence against this section— (a) shall be instituted and taken, without the laying of a complaint; see Criminal Code section 56A (Disturbance in house when parliament not sitting): provides every person shall be brought before a magistrate without formal written complaint and there charged with such an offence.

Alternative 4: Where a person is present at a proceeding and does not object a further charge can be added (or amended) and proceeded with[5] using a BCS.

[4] Section 391 PPRA requires a police officer to inform the person they are under arrest and the nature of the offence for which arrested. If arrested with a warrant must inform the person about nature of warrant. Understand in practice in practice the person is orally charged if decision is made to arrest and charge (prosecute). Words of the charge can be read from the prepared BCS.

[5] Current sections 42(1A) and (2) Justices Act; and sections 13 and 14 Justices Regulation 2018

Instructions

Criminal charges for a proceeding for an offence in the Magistrates Court are started under this Bill by an authorised person using a Court Attendance Notice (CAN).

To be clear, the CAN is the initial charging document (the form of the charge) notifying the defendant of the charges of the offence and requiring their attendance in the Magistrates Court to be dealt with at a specified date, time and place.

A defendant is charged when served with a CAN. Later instructions provide for when the criminal proceedings commence.

The Bill also provides a scheme for other documents to accompany a CAN to facilitate its effectiveness (such as warrant of arrest) and formalise charges before the Court (a Charge Sheet).

There is a need to acknowledge other legislation exists that provides for how charges are started – as the Bill will also provide for certain document requirements and actions in these circumstances.
Under this Bill where a charge is started by the defendant being arrested on the charge (with or without warrant); or served with a NTA for the offence; or additional charges are laid/ or amended - a Charge Sheet needs to be filed. This replicates concepts in section 42 Justices Act, and section 13 of the Justices Regulation. Later instructions discuss the intent, use, filing, form and content of a Charge Sheet.

2.3 When a Court Attendance Notice may be issued

Instructions

An *authorised person* may issue a CAN, if the authorised person:

a) reasonably suspects the person has committed or is committing an offence; or

b) is asked by another authorised person who has the suspicion mentioned in paragraph (a) to issue and serve the notice.

This draws on concepts in sections 53 of the Justices Act, and section 282 of the PPRA about threshold tests. It does not override prosecution agencies own policy in commencing charges.

2.4 Who can issue a Court Attendance Notice

Instructions

A CAN can be issued directly to a defendant by an 'authorised person', which means:

a) a public officer

b) a person who is acting in the execution of a duty imposed by law or the proper administration of a Queensland Act or a Commonwealth Act;

c) another prescribed person or category of persons; and

d) a person who has been authorised by the Magistrates Court to issue a Court Attendance Notice. [See later instructions for details about starting a 'private prosecution'.]

Please include RSPCA inspectors as a prescribed person using the current Justices Act definition in section 4, an RSPCA inspector means a person who— (a) holds an appointment as an inspector under the *Animal Care and Protection Act 2001*; and (b) is an employee of the Royal Society for the Prevention of Cruelty to Animals (Queensland) Limited.

The term 'public officer' means:

a) an officer or employee of the public service of the State or the Commonwealth; or

b) an officer or employee of a statutory body that represents the Crown in right of the State or the Commonwealth; or

c) an officer or employee of a local government;

who is acting in an official capacity.
These definitions use current section 4 Justices Act definitions.

2.5 Required contents of a Court Attendance Notice

Background

The CAN charges the person and notifies them of the nature of the charge and requirement to attend court to answer charges.
The actual form of the CAN should provide the defendant with some information about the court process. For example, it should explain that they have the option to plead guilty or not guilty, including how to enter a plea of guilty in writing, and give information about the consequences of failing to appear in court, including that the charge may be dealt with in their absence. Simple and clear language is preferred.

The CAN is not intended to be the formal charging document.

As such, it is not subject to traditional formalities and requirements of complaints and summons. The charge sheet is the document to which the more formal rules of criminal pleadings apply. The Bill sets outs the requirements of the CAN.

A CAN can list all the alleged charges against the defendant.
The function of the CAN is to provide the initial charge mechanism, inform the defendant in enough detail to enable them to understand the charge and prepare a defence, and require the person to come to court to be dealt with for the charges.

Instructions

A Court Attendance Notice must be:

a) in writing in an approved form;

b) signed by the authorised person;

c) and as a minimum, contain the following details:

   i) the provision number of the alleged offence under a specific Act or Regulation;

   ii) the description of the offence alleged to have been committed in the words of the Act, order, by-law, regulation or other instrument creating the offence; [replicates current section 47(1) of the Justices Act];

   iii) general particulars of the alleged offence, such as the date, time and place of the offence, and any persons or property involved in the offence to inform the defendant of the nature of the charge;

   iv) if known, any circumstances of aggravation;

   v) if the offence is a domestic violence offence;

   vi) the name of the defendant;

   vii) whether the defendant was, at the time of the alleged offence, an adult or a child;

   viii) a requirement that the defendant appear before a Magistrates Court at a stated date, time and place:

      (1) For an adult — at least 14 days from the date of the notice (or, with the defendant's written agreement, a stated shorter time after the notice is served); or

      (2) For a child — as soon as practical after service of the notice;

   ix) the signature, name and contact details of the authorised person; and

x) any requirements or authorisations to commence a proceeding (for example, the consent of the Attorney-General).

Whether the contents of the CAN are more suitable to inclusion in court rules will be further considered during drafting.

The place for the defendant's appearance should align with the provisions detailing the place of the Magistrates Court where the proceedings are to commence.

The effect of the CAN is to charge the person served with the offence. The CAN will require the person to appear at a certain time and place at a Magistrates Court to answer the charge where it can either be heard and determined by a summary hearing or a plea of guilty in (if it can be finalised summarily), or proceed as committal and be dealt with according to law.

A served CAN is not invalid by reason of it not complying fully with, or containing errors about, the minimum details itemised above. The commencement of a criminal proceeding is not invalid only because it was started with a non-compliant CAN. However, it may be grounds for an adjournment.

[See further instructions as to filing of the CAN and the Charge Sheet, requirements of the Charge Sheet, and amendments to a Charge Sheet]

2.6 Signing requirements of a Court Attendance Notice

Background

Currently, all complaints need to be made before a justice of the peace. If an arrest warrant is required then the complaint must be sworn on oath before a justice of the peace. These requirements will change in the new criminal procedure framework. Public officers are bound by codes of conduct and various other integrity protocols as part of their roles, meaning the oversight provided by justices of the peace is no longer required. Further, the new pathway to initiate private prosecutions will provide additional safeguards.

Instructions

Similar to a police NTA, the new CAN does not need to be sworn or made before a justice of the peace.
The authorised person must sign the CAN.
See later instructions for additional signing requirements in an application for an arrest warrant. Essentially if an arrest warrant is sought both the CAN and the application seeking the arrest

warrant must be declared before a justice of the peace to reflect the seriousness associated with the consequences of the issuing of an arrest warrant.

2.7 Service of Court Attendance Notice

Background

Service provisions are currently in sections 57 of the Justices Act.
A person is charged with an offence in a CAN when served with the CAN. Service of a CAN does not commence a criminal proceeding.

Instructions

A CAN must be personally served on a defendant, except where otherwise authorised by another Act or law.
If a defendant cannot be personally served with a CAN, the authorised person may follow procedures (to be set out in Regulations or Rules) for substituted service for example by way of registered post, by leaving the notice with another person, or by any other authorised method allowed for under the Regulations or Rules. Note the Youth Justice Act provides for service provisions on a child.
If the CAN can not be served prior to the time the defendant is required to appear at the Magistrates Court, a registrar of the court may extend the date in the CAN. This modifies and updates current sections 54 (3) and (4) of the Justices Act.
[See further instructions as to service of document]

2.8 Right of entry to serve a Court Attendance Notice

Instructions

Please recreate current section 56A Justices Act to provide a right of entry to serve a CAN for an authorised officer who is a public officer (who is not a police officer), or person aiding them. It is proposed to include a note referring the reader to the power of police officers to serve documents under section 19 of the PPRA.

Authorisation given to a private person will include orders on service requirements. [See further instructions as to private prosecutions].

2.9 Proof of service of a Court Attendance Notice

Background

Proof of service is critical information for the court to proceed with the charge, for example proceeding in the absence of the defendant. Further detailed instructions are listed below in relation to first attendance of the accused.

Instructions

A person who serves a CAN must record the service information in writing in a Declaration of Service document, including reasons why incapable of personal service. Rules will be developed about the form and information to be contained for proof of service in a Declaration of Service. The Declaration of Service is sufficient evidence of proof of service of the documents on the defendant.

2.10 Court Attendance Notice with arrest warrant

Background

The current Justices Act provides that a complaint and a warrant for the defendant's arrest can sometimes be used, instead of or in addition to a summons. The purpose is to ensure the defendant's appearance in court in circumstances where the CAN alone is not effective.
The Bill will also provide for an application to a justice of the peace for a warrant to arrest a defendant in connection with a CAN issued by an authorised person other than a police officer.

Current state – key points

The current sections differentiate between charges for indictable and simple offences and confusingly, these warrants are given different terms – a warrant to apprehend or a warrant in the first instance –but in effect achieve the same purpose.
In both cases an application for the warrant is made to a justice of the peace. If satisfied of certain conditions (currently different tests apply whether an indictable or simple offence has been charged) the justice of peace can authorise the issue of a warrant to apprehend the person and bring them before the court to answer (attend and appear) the complaint and be further dealt with according to law.
Where such a warrant is requested, the complaint must be sworn on oath before a justice of the peace.[6]

[6] Section 51(a) Justices Act

The Justices Act provisions allow for the issue of an arrest warrant at any time before (or after) the time mentioned in the summons for the persons appearance.[7]

New model

Like current sections in Division 6 of the Justices Act,[8] the new Bill should allow an authorised person who has completed a CAN charging a person with an offence (not being a regulatory offence) to obtain an arrest warrant in particular circumstances.

If a warrant to arrest the defendant is issued under this division, the CAN is obsolete as a form of bringing the accused to court. Generally speaking, although the initial charge is contained in the CAN the person is notified of the charge on the execution of the arrest warrant (as service cannot be effective).

Police officers do not need to be included as they can use provisions in the PPRA for arrest with warrant.[9]

Unlike the current provisions there is no need to have separate tests for indictable and simple charges. The warrant should be referred to as an arrest warrant. See also section 369 (Arrest under warrant) PPRA that provides:

(1) It is lawful for a police officer acting under a warrant issued under any Act or law to arrest the person named in the warrant.

(2) In this section— ***arrest*** includes apprehend, take into custody, detain, and remove to another place for examination or treatment.

Clear process requirements for the grounds and other requirements for the arrest warrant should be set out in accordance with the instructions below.

Warrant after Court Attendance Notice issued and served but before court date

There may be circumstances where a CAN has been issued and served but it becomes apparent that a warrant may be needed for the defendant's arrest. For example, the defendant may indicate they intend to leave the State or may pose a risk to an alleged victim or witness. This is modelled on New South Wales provisions, see *Criminal Procedure Act 1986* (NSW) s 181; *Local Court Rules 2009* (NSW) r 7.3.

Police officers have this power under section 368 PPRA.

Instructions

An authorised person may:

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[7] Section 58(2) Justices Act. Section 54 provides ways for summons to be extended.

[8] See particularly sections 57 and 59 of the Justices Act.

[9] See PPRA Chapter 14, Part 2

a) before the CAN is served (on the person named in the notice) apply to a justice of the peace); or

b) after the CAN is served (on the person named in the notice) and before the first court appearance (the 'return date');

apply to the registrar or magistrate of the court at the place where commencing charges for the issue of a warrant to arrest the person for the offence (not being a regulatory offence) and bring the named person before the court to attend and appear and be further dealt with according to law.

This draws on sections 57 and 58 of the Justices Act.
No objection can be made to an arrest warrant issued under this section on the ground that—

a) the justice who issued the warrant and the authorised person were at the date of its issue—

   i) officers of the same department, subdepartment, branch or section of a department of the Government of the Commonwealth or of the State; or

   ii) employees of Brisbane City Council; or

   iii) employees of the same local government within the meaning of the Local Government Act 2009; or

b) the justice who issued the warrant was at the date of its issue, the authorised person's lawyer, that lawyer's partner, or an employee of either of them, or a lawyer, director or employee of an incorporated legal practice that represented the authorised person.

This recreates section 53(2) of the Justices Act.
A warrant of arrest can be issued at any time before the time mentioned in the CAN for the person's appearance. This draws on section 58 of the Justices Act.

2.11 Process for applying for an arrest warrant accompanying a Court Attendance Notice

Instructions

The application for the arrest warrant must be—
a) accompanied by the CAN and Charge Sheet;

In this circumstance, the contents of the CAN and the Charge Sheet must be declared before the justice of the peace. This will also serve as satisfaction there is reasonable grounds to suspect the named person committed the offence charged. This draws on section 51(1) of the Justices Act.

b) in writing in an approved form;

c) contain required information stating the grounds on which the warrant is sought; and

For example, if the application— is made because the applicant reasonably believes proceeding or continuing to proceed against the person named by the CAN would be ineffective; the application must state the belief and the reasons for the belief. This draws on section 59 of the Justices Act and is consistent with section 370(4) (Arrest warrant application) of the PPRA.

d) made in accordance with any rules, including requiring contents being declared as true and correct before a justice of the peace.

The justice of the peace or registrar/magistrate may refuse to consider the application until the person seeking the arrest warrant gives the justice all the information the justice requires about the application in the way the justice requires under rules. Example— the justice may require additional information supporting the application to be given by statutory declaration. This mirrors section 370(5) of the PPRA.

2.12 Grounds for issuing arrest warrant accompanying a Court Attendance Notice

Background

Note the requirements of the CAN include a declaration there are reasonable grounds to suspect the person named committed the offence.

Instructions

The justice of the peace may issue the arrest warrant if satisfied of certain matters.
The Bill should outline the grounds/criteria on which an issuer (justice of the peace, registrar, magistrate) must be satisfied to issue a warrant.
These criteria should apply to a warrant for any offence (not being a regulatory offence) and include:

a) there are reasonable grounds to suspect the named person committed the offence; and

b) reasonable grounds to suspect proceeding by way of a Court Attendance Notice without a warrant would be ineffective;

Some examples of this could be there are reasonable grounds to suspect that if the defendant were not arrested, the defendant: -

i) would avoid service of the Court Attendance Notice;

ii) would not comply with the requirement to appear in court i.e. likely to fail to appear to answer a charge for the offence);

iii) would commit an offence;

iv) would continue or repeat an offence charged in the Court Attendance Notice;

v) would endanger another person's safety or property; or

vi) would interfere with witnesses or otherwise obstruct the course of justice;

c) the authorised person has proof the defendant no longer lives at their last known address; or

d) the defendant's whereabouts are unknown/cannot currently be located or served with a Court Attendance Noticer; or

e) the defendant is the subject of another warrant for his or her arrest; or

f) the Act or law creating the offence authorises issuing a warrant in the first instance.[10]

The registrar or magistrate can issue warrant if there are substantial reasons to do so and it is in the interests of justice. The criteria to issue a warrant should be similar to the criteria for a justice of the peace to issue a warrant.

In cases where a registrar has refused to issue a warrant, there should be no right to review this decision. The matter would simply be heard on the first attendance date by the court.

An arrest warrant for a defendant may be issued even if the CAN alleges an offence the statutory penalty for which does not include imprisonment.

2.13 Arrest Warrant accompanying a Court Attendance Notice – form and content

Background

Provisions should replicate, with updating, current sections 60 (Direction of warrant) and 62 (What warrants shall order) of the Justices Act.

Instructions

An arrest warrant must:

a) be in an approved form

b) state that any police officer may arrest the person named in the warrant;

c) state the name of person and the offence the person is alleged to have committed (consistent with information in CAN);

d) require the person who arrests the person (executes the warrant) named in the arrest warrant to bring the person before the Court as soon as reasonably practicable to answer the charges in the Court Attendance Notice and Charge Sheet and to be further dealt with according to law;

e) form part of or be attached securely to a copy of the CAN and Charge Sheet;

[10] For example, see *Penalties and Sentences Act 1992* (Qld) s 128.

f) contain any other prescribed information, such as name of the applicant, what is sufficient to describe the offence (the words of the law defining it), a description of persons or things that would be sufficient in an indictment is sufficient in an arrest warrant; and

g) be signed by the person who issues it.

2.14 Notice of Court Attendance Notice and Charge Sheet

Instructions

As soon as practicable after a person arrests an accused under an arrest warrant the person must be given a copy of the CAN and the Charge Sheet to which the warrant relates.

2.15 Duration of arrest warrant

Instructions

General - the arrest warrant is not returnable to any particular time or place of court.
The arrest warrant remains in force until executed and may be executed by arresting the person at any place. The Magistrates Court will have statewide jurisdiction not limited to districts.
In this section— arrest, a person named in a warrant, includes apprehend, take into custody, detain.
This part of the provision replicates the intent of section 63 of the Justices Act.
If the defendant served with the CAN appears on the date, time and place the arrest warrant should be vacated by the court.

2.16 Arrest warrants in general

Instructions

The new Bill should also contain provisions for arrest warrants to be issued by the court in a range of circumstances. This may include, if the court dealing with the charge requires the defendant's presence, or if the defendant absents themselves during proceedings without permission, or if the defendant fails (after proof of proper service) to appear in accordance with the CAN. Warrants may also be issued in relation to witnesses.
Provisions about the effect of these warrants should largely replicate those above for contents and effect.
In terms of duration, an arrest warrant for a person issued by a court —

a) remains in effect until the person concerned is brought before the court under the warrant or appears voluntarily in the court, whichever happens first; and

b) is itself sufficient authority to any person to whom it is directed to act according to it.

If an arrest warrant issued requires a person to be brought before a court, the person —

a) must be brought before the court as soon as practicable; and

b) may be brought before the court at any place where it is sitting.

Amending warrants

Provisions allowing for defects in arrest warrants to be corrected are also required (replicating section 48(2) of the Justices Act). If an arrest warrant is defective in substance or form, the court, on an application by a party or on its own initiative —

a) must order that the document be corrected if the defect is not material to the merits of the case; or

b) may order that the document be corrected in any other case if the defendant would in fact suffer material injustice or prejudice if the amendment is allowed.

Later instructions provide circumstances when an arrest warrant can be issued. It may be practical for a provision to be included in a Part dealing with general procedure. For completeness, sections 248 to 255 of the Criminal Code refer to the execution of warrants, and the insertion of a note cross referencing the application of these may be required.

2.17 Filing of a Court Attendance Notice and proof of service with or without a warrant

Instructions

A CAN [11] and a signed declaration of service must be filed with the Court where proceedings are to commence, i.e. in the registry where the charge is to be heard.
If an arrest warrant is issued by a justice of the peace before service of the CAN, the arrest warrant must accompany the CAN.
An arrest warrant issued after service of the CAN will be in the registry where the CAN is filed. This is a normal administrative process. If required, rules can be developed as to how these documents need to be matched together and held together.
The time for filing is:

a) for personal service — within seven days of service but before the person is required to appear in court under the notice, which is usually 14 days (but can be shorter if the parties agree);

b) for substituted service — within the same timeframes, and with a signed declaration of service detailing the reasons why the defendant was not personally served.

In either circumstance, it should be filed at least two clear days before the first attendance (appearance of defendant) date. This allows for registry processes to occur. If an agreement to

[11] See section 385 (Filing notice to appear) of the PPRA – time frame is 'as soon as reasonably practicable after service' the NTA must be lodged with the court at the place required to appear.

appear earlier does not allow this to happen, then it should be filed as soon as possible or at least by date of appearance (otherwise the proceeding has not commenced).
This will replace the requirement to recreate section 4 of the *Justices Regulation 2018*.
Provisions should also clarify:

a) the Charge Sheet should also be filed [see further instructions below];

b) if the CAN and signed Declaration of Service is not filed in the 'correct' court registry then the notice is not invalid. Steps can be taken to transfer the matter to the correct court;

c) there is no requirement that the 'authorised person' (person initiating charge) themselves must be the person to (personally) file the notice;

d) Rules will specify how filing can occur, noting the use of technology.

2.18 No filing costs may be levied for certain authorised persons

Instructions

Please also provide that an authorised person who is a police officer or a *State related authorised officer* is exempt from filing costs of a CAN.
This replicates the intent of section 21 (Fee exemption for State-related complainant) of the Justice Regulation, noting the current term state-related complainant requires updating. To be clear the definition should remain.
Section 21(3) of the Justice Regulation currently defines State-related complainant means—

a) the Sovereign; or

b) the State or a person acting for the State; or

c) an entity, or a person acting for an entity, whose expenditure is entirely payable out of the consolidated fund.

It may be appropriate to retain this provision in the regulations or rules.

2.19 Requirement to file a Charge Sheet

Background

The Bill will maintain the existing practice of requiring a (Bench) Charge Sheet to be issued and filed where a person is:

- arrested and charged (with or without a warrant);
- served with a NTA under the PPRA (charged with the offence);

In summary a Bench Charge Sheet is used as the document that formalises and better details the charge which must be answered by the defendant.

In keeping with the objectives of improving understanding, consistency and overall simplification it is intended that the Bench Charge Sheet, containing the particulars of the offence, be renamed as Charge Sheet. This new title provides greater information about the importance of the form. The Bill will expand the use of a Charge Sheet and require it to be prepared and filed with a CAN.

The intention is that the Charge Sheet is the formal charging document before the court, mirroring the role and importance of an indictment in the higher courts.

In the higher courts, an indictment must set out the offence with which the person is charged, including sufficient particulars to inform the accused person of the charge.[12] This can include the time and place of the offence, the alleged victim and any property in question, and must also include any circumstances of aggravation. Further particulars about the charge can be given to the defendant separately from the indictment (and, if necessary, proceedings adjourned).[13] It is important to note section 574 which states the provisions of chapter 60 of the Criminal Code relating to indictments also applies to complaints for indictable offences dealt with summarily.[14]

The Charge Sheet is the document that needs to comply with all the formal requirements of form and content (e.g. joinder, description). It is the document that is to be amended and substituted if required.

The Charge Sheet will be used to formally record the charges regardless of the initial mode of commencement. This will include for all the different ways charges are commenced such as police by way of NTA, or arrest and charge.

The Charge Sheet is also the way an additional charge may be added when a proceeding has commenced provided the defendant is present and does not object. Later instructions deal with this aspect.

Instructions

The Bill should provide that a separate written document called a 'Charge Sheet' must be filed in the registry where the defendant is to appear, by a police officer or an authorised person regardless of the mode of starting the charge:

- arrested and charged (with or without a warrant)
- served with a NTA under the PPRA (charged with the offence)
- where a Court Attendance Notice (with or without an arrest warrant) is issued and filed.

Filing is to occur in a way provided for by the Rules.

A copy of the Charge Sheet must be provided to the defendant at the first appearance date.

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[12] Criminal Code (Qld) s 564.

[13] Ibid s 573.

[14] The provisions of chapter 60 'relating to indictments apply to complaints preferred against offenders upon their trial before justices in order to their summary conviction of an indictable offence.'

The Charge Sheet is the formal record of the charges before the Court against the defendant. This is the document that is amended or altered by the prosecutor if changes are required and is the document subject to formal rules about form.

2.20 Failure to file a Charge Sheet

Instructions

If a Charge Sheet is not filed, there is no formal charge before, the court and the court has no jurisdiction. [See later instructions about commencing proceedings]

2.21 Charge Sheet – contents

Background

The new Charge Sheet will contain information consistent with the current requirements of the Bench Charge Sheet.[15]

Distilled from case law (see *John L Pty Ltd v Attorney-General* (NSW) [1987] HCA 42; (1987) 163 CLR 508 and in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531) is that the act or omission must be identified and that the common law requires that a defendant is to be entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge. It is generally accepted that the **legal elements** consist of the matters that, as a matter of law, must be established for the offence to be made out; and the **essential factual ingredients** concern the time, place and manner in which the offence was committed.

A Charge Sheet can have one or multiple offences listed, subject to the rules of joinder. This may mean that a defendant is issued one CAN and there is one corresponding Charge Sheet. Alternatively, if the charges are not joinable, there may be one CAN and multiple corresponding Charge Sheets.

Where co-offenders are charged with offences arising out of the same set of facts, separate Charge Sheets will be issued to each defendant. Each defendant will have their own individual charge numbers listed according to those offences which they are alleged to have committed, although these offences can be cross-referenced in the Charge Sheet to the other alleged co-offender. The court may order the charges against co-offenders be heard together.

Instructions

The Charge Sheet should be in an approved form, be in writing and include the following information:

[15] *Justices Regulation 2014* (Qld) s 14.

a) the name of the defendant and of the authorised person;

b) the offence with which the defendant is charged and adequate particulars of the charge to inform the defendant of the nature of the charge, including for example, the following -

   i) particulars of the alleged time and place of committing the offence;

   ii) particulars of the person, if any, alleged to be the victim;

   iii) particulars of the property, if any, in question;

c) a unique charge number for each alleged offence to be inserted given by registry on filing;

d) any circumstances of aggravation on which it is intended to rely, or

e) a statement the offence is a domestic violence offence; and

f) any other requirements under this or another Act, prescribed by the regulations or contained in rules.

For the purposes of a Charge Sheet:

a) it is sufficient to describe the offence in the words of the Criminal Code or the Act defining it, or in similar words; and

b) a description of persons or things that would be sufficient on an indictment is sufficient on a charge sheet.

In relation to (b) please replicate sections 46 and 47(1) of the Justices Act. Section 46 provides that "such description of persons or things as would be sufficient in an indictment shall be sufficient in complaints." Noting where the offence charged is an indictable offence, the requirements about indictments (currently provided in Chapter 60 of the Code) already apply (see section 574 of the Code). It is proposed that the way in which these provisions align are applied is resolved in drafting.

2.22 Charge Sheets and defects

Background

The charging document is important as it contains a statement of the offence and provides the foundation for the court's jurisdiction to hear and determine the charge. It also serves to inform the defendant of the charge.

According to *Halsbury's Laws of Australia*, at common law a charge which fails to disclose an offence known to law is a *nullity* and does not give the court jurisdiction, enabling the court to quash it as being insufficient in law.[16]

[16] See at [130-13245] Defective information, complaint or charge.

Where this occurs, and the charge is quashed by the Court, the prosecutor may of course re-charge the defendant validly.

The view previously was that the ability given in legislation to amend defects was limited.[17] Basically, if a charge sheet does not disclose an offence, then the court does not have jurisdiction to amend other than for correcting minor defects (technical objections).[18]

Section 48 of the Justices Act provides a power to amend the charge for defects in substance or in form (amongst other matters).
If at the hearing of a complaint, it appears there is a defect in substance and in form – and an objection is taken to the defect - the court must make such order for the amendment as appears necessary or desirable in the interests of justice. If no objection is taken, then the court may make such orders.

Sections 48(1)(a) of the Justices Act provides that noncompliance with section 43 (i.e. it does not properly comply with the provisions of joinder) is not considered a defect.
In such a case of noncompliance, section 43(3) provides that if an objection is taken the prosecutor is required to identify the matter on which to proceed. If no objection is taken, the court can proceed and may determine the matters of complaint (section 43(3)(b)).
Section 48(3) enables an amendment to include a statement the offence is a domestic violence offence.

It is useful to note the operation of section 571 (Formal defects) of the Criminal Code which states:

a) An indictment is not open to objection by reason of the designation of any person by a name of office or other descriptive appellation instead of by the person's proper name, nor for omitting to state the time at which the offence was committed, unless the time is an essential element of the offence, nor for stating imperfectly the time at which the offence was committed, nor for stating the offence to have been committed on an impossible day, or on a day that never happened or has not yet happened.

[17] *Guilfoyle v Niepe Constructions* [2021] QMC 1at [94]. On the question of the meaning of "in substance or in form" ….:The "defects" "in substance or in form", ... are either defects merely of form, or defects which, while of substance, are yet not defects which are so radical and fundamental as prior to Jervis' Act would have meant that the complaint in which they existed could not operate to confer jurisdiction on the justices.

[18] (1946) 73 CLR 583 at 601 per Dixon J.

Further, section 572 (Amendment of indictments) enables indictments to be amended at trial[19] in certain circumstances, including to insert omitted words (or vice versa) or any count that ought to be included has been omitted, if the court considers that the insertion or omission is:

- not material to the merits of the case; and
- the accused will not be prejudiced in their defence.

The court can make the order on such terms (if any) as is necessary as the court considers reasonable.

Again, section 572(1A) provides if the court considers the offence charged in the indictment is also a domestic violence offence, the court may order that the indictment be amended to state the offence is also a domestic violence offence.[20]
Section 574 (Summary convictions) applies sections 571 and 572 to indictable offences dealt with summarily in the Magistrates Court.
Previously, issues about the content (or particulars) of a complaint and summons have been used to argue that the court does not have jurisdiction over a matter.
In the Northern Territory, the law has the effect that a defect in the wording of the charge (that is, in its 'substance or form') cannot always be relied on to allow the charge to be struck out. The charge can be amended to correct any defect.[21]

182 Information or complaint not to be objected to for irregularity

No objection shall be taken or allowed to any information or complaint in respect of:
(a) any alleged defect therein, in substance or in form; or
(b) any variance between it and the evidence adduced in its support at the preliminary examination[22] or at the hearing (as the case may be):
Provided that the court shall dismiss the information or complaint, unless it is amended as provided by section 183, if it appears to it:
(a) that the defendant has been prejudiced by the defect or variance; or
(b) that the information or complaint fails to disclose any offence or matter of complaint.

183 Amendment of information or complaint

If it appears to the court before whom any defendant comes or is brought to answer any information or complaint that the information or complaint:
(a) fails to disclose any offence or matter of complaint, or is otherwise defective; and

[19] Following arraignment

[20] Section 572(1A) of the Criminal Code

[21] *Local Court (Criminal Procedure) Act 1928* (NT) ss 182–83.

[22] Preliminary examination is term for committal proceeding.

(b) ought to be amended so as to disclose an offence or matter of complaint, or otherwise to cure the defect, the court may amend the information or complaint upon such terms as may be just.
In recent years the scope of the power of amendment under section 48 of the Justices Act in relation to defects in complaints has been considered by Queensland courts. With an establishing principle that '*it is not to be assumed that every failure to allege a necessary ingredient of a charge is beyond the reach of the power of amendment under s 48*'[23] subject to the applicable principles.
In *Critchley v Schlumberger Oilfield Australia Pty Ltd*,[24] Richards DCJ concluded that the pleading was defective as they did not allege the three elements in the relevant section 43(1) of the *Radiation Safety Act 1999*. However, after considering the width of the power of amendment under section 48 Justices Act and the principles cited in *Broome v Chenoweth*,[25] *Harrison Kypri*,[26] and *Karimbla*,[27] in allowing the appeal, Her Honour concluded at [18] & [24] that the particulars identified the act alleged and that it was clear what the allegations were and the substance of those allegations. Her Honour said "The defence can be in no doubt ... from the complaint laid as to the nature of the complaint ...".

Jackson J in *Harrison* found that, despite the complaint requiring "major surgery", it was not a nullity and amenable to amendment. However, the particulars given in the complaint as originally pleaded were extensive and His Honour was able to glean "the story" from them so that the defendant was clearly apprised of the factual nature of the case: at [138] & [139].The scope of section 48 was recently considered in *J Hutchinson Pty Ltd v Guilfoyle* [2022] QCA 186.
The case involved a complaint under the Justices Act that alleged a breach of a statutory health and safety duty pursuant to the *Work Health and Safety Act 2011* (Qld).

The appellant applied in the Magistrates Court to have the complaint struck out on the basis that it was void, because the "*complaint on its face fails to particularise the legal ingredients of any offence and therefore fails to engage the jurisdiction of the Court*".

The complaint was struck out by the learned Magistrate as being a nullity which was 'beyond the reach of amendment'. That order was challenged on appeal to the District Court on the sole

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[23] *Harrison v President of the Industrial Court of Queensland & Ors* [2016] QCA 89 at [132]

[24] [2016] QDC 338

[25] (1946) 73 CLR 583 at 601 per Dixon J. "*An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the extreme, an information may contain nothing which can notify the charge with any offence known to the law. Such a case may not be covered by the power of amendment*."

[26] [2011] VSCA 257; (2011) 33 VR 157 at [24] per Nettle JA.

[27] [2014] QSC 56 per Jackson J.

ground that the Magistrate was wrong to find that the complaint was a nullity. The point in issue was identified by the learned primary judge as: 'whether the complaint was sufficient to confer jurisdiction on the Magistrates Court, or whether the complaint was a nullity'.
The learned primary judge allowed the appeal and set aside the Magistrate's order. The Court of Appeal dismissed the appeal.

The Court of Appeal set out the approach of the District Court judge:

> [14] The learned primary judge referred to two passages from the decision of Jackson J in Harrison where the impact of the power of amendment in s 48 of the Justices Act was addressed:
>
> > "[132] …It is not to be assumed that every failure to allege a necessary ingredient of a charge is beyond of the reach of the power of amendment under s 48";
> > "[154] In my view, it should be accepted that if the facts alleged in the particulars included the required essential elements of a properly pleaded charge, the complaint was one capable of amendment even though the limitation period may have expired after the particulars were provided."

His Honour followed the decision of the Northern Territory Court of Appeal in *S Kidman & Co Ltd v Lowndes CM*. There the Court of Appeal held that the charge was not a nullity because there was a power of amendment.

> "115 The power of amendment in the Justices Act (NT now Local Court (Criminal Procedure) Act sections 182 and 183) is **wide-ranging and extends to any defect in a charge whether in substance or in form**, and may even be exercised where there is a variation between the charge and the evidence presented in the proceeding. **It serves the purpose of ensuring that justice is not defeated by errors and omissions which are not productive of injustice.**

Kidman also referred to some of the considerations that apply when considering the question of amendment.

> "[117] First, an amendment should not be permitted which would have the effect of charging a different offence out of time. To do so would be tantamount to permitting a new charge to be laid. …
> [118] Secondly, under s 183 of the Justices Act (NT) the relevant enquiry — in circumstances **where the complaint does disclose an offence known to the law** — is **whether the amendment of the complaint would otherwise give rise to injustice. That will depend upon the circumstances of the case**. The question will usually involve some enquiry as to whether the defendant was in a position prior to the expiry of

> the limitation period to ascertain the true nature of the charge from the terms of the complaint together with extraneous materials and circumstances. That enquiry is not necessarily limited to the ascertainment of whether the police brief or particulars were provided prior to the expiry of the limitation period, **and should not be divorced from a consideration of whether the defendant would in fact suffer material injustice or prejudice if the amendment is allowed.**
>
> [119] There are a number of ways in which material injustice or prejudice could conceivably manifest.[28] In circumstances where the application for amendment is made after the conclusion of a trial but before judgment is pronounced, injustice may lie in the fact that the defendant was precluded from testing or leading evidence directed to the complaint as proposed to be amended. There may be circumstances in which the proposed amendment to the complaint will call into question issues where the relevant evidence has been lost or is likely to have been lost. There may be circumstances in which an application to amend is made so long after the commission of the alleged offence, or the expiry of the limitation period, that it would be oppressive to allow the amendment. There may be circumstances in which a defendant has unwittingly arranged its affairs such that it is unable to fairly defend itself if an amendment is permitted to cure a defect in the complaint. Finally, there may be circumstances in which the public interest in the expeditious resolution of criminal litigation militates against amendment."

In allowing the amendment, the court in *Kidman* considered a range of factors that mitigated any material injustice to the defendant: from [117]. Given the history of that matter, the defendant was found to have a sufficient understanding of the case from extraneous information prior to the expiration of the limitation period; the incident occurred on the property owned and controlled by the defendant; a coronial investigation was conducted in conjunction with a WorkSafe investigation; these resulted in the defendant being served with a prohibition notice issued by WorkSafe preventing the defendant from using the loader in question; and then an improvement notice requiring the defendant to review its procedures for hazard identification etc.

The Queensland Court of Appeal considered the relevance of *Kidman*, given the appellant contended it was no assistance as it was from a different statutory regime/jurisdiction. This was rejected:

> "At [56] …The legislation was the same for the creation of the offence. The only difference was in the provision governing amendment. As to that, both statutes give a court power to amend where a complaint is defective. Section 183 in the Northern Territory is engaged where a complaint "fails to disclose any offence or matter of complaint, or is otherwise defective". In Queensland s 48 is engaged where a complaint

[28] The District Court states at [76]: The range of relevant circumstances which might affect a decision to permit amendment is vast.

> exhibits “a defect therein, in substance or in form”. Failure to disclose an offence or matter of complaint is comprehended by the phrase “defect of substance or in form”. And each section is engaged where a complaint contains a defect.
>
> [57] In our view, the differences between the two provisions are not so great as to limit the utility of the observations in Kidman that a defective complaint, such as that in the present case, is not a nullity, and capable of amendment under a provision such as s 48 of the Justices Act.”

This 2022 case clarifies the law about the extent of the meaning of ‘a defect in substance’ and that a complaint that fails to disclose an offence is capable of amendment under section 48 of the Justices Act provided it involves a consideration of whether the defendant would in fact suffer material injustice or prejudice if the amendment is allowed.

Similarly to the NT section it can be said the power of amendment in the Justices Act is wide-ranging and extends to any defect in a charge whether in substance (or in form) , it serves the purpose of ensuring **that justice is not defeated by errors and omissions not productive of injustice**.

Consistent with improving understanding of procedures, it is useful to embed the recent decision in the wording of the section to make clear that section 48 like the NT section 183 contemplates that a charge sheet that fails to disclose an offence is capable of correction.

Instructions

The new legislation should recreate section 48(1) of the Justices Act with appropriate amendment, including to refer to a charge sheet to improve understanding of its application.

The new provision should be drawn from sections 48 of the Justices Act, sections 571 and 572 of the Criminal Code, sections 183 of the *Local Court (Criminal Procedure) Act 1928* (NT) and applicable case law, particularly *J Hutchinson Pty Ltd v Guilfoyle* [2022] QCA 186 and its endorsement of *S Kidman & Co Ltd v Lowndes CM* [2016] NTCA 5.

The new provision should include the following:

The defendant may before pleading apply to the court to quash the Charge Sheet on the ground that it is formally defective so as to be invalid (section 596 Criminal Code).

An amendment to correct a defect in substance or form can be made at any time before the determination of the charge by judgement (finding of guilty or not guilty).

The power of amendment in the Justices Act is wide-ranging and extends to any defect in a charge whether in substance (or in form). The ability of the court to exercise the discretion to correct such defect serves the purpose of ensuring that justice is not defeated by errors and omissions **not productive of injustice**.

Section 42(1A) provides that where a defendant is present at a proceeding and does not object, an amended charge may be made against the defendant. This is qualified by the court having the obligation to consider making such order is in the interests of justice.
If the court is satisfied no injustice will be done by amending the charge sheet, the court may make the order on such terms (if any as the court thinks reasonable.[29] A court may refuse the correction if it cannot be made without injustice to the defendant.
Whether the correction gives rise to injustice depends upon the circumstances of the case, and should include a consideration of whether the defendant would in fact suffer material injustice, such as the correction is material to the merits of the case or prejudice their defence if the amendment is allowed.[30]
Failure to disclose an offence or matter of complaint is comprehended by the phrase “defect of substance or in form” so that a charge sheet that fails to disclose an offence is capable of correction/amendment under section 48 Justices Act., unless the required amendment cannot be made without injustice to the defendant.

The application to amend a charge sheet to correct a defect in substance and form can be made by the defendant or the prosecutor, or the court of its own initiative.
Non-compliance with the joinder provisions is not considered a defect in substance or form (objections can be taken to the form and can be dealt with separately by severance etc).
No objection can be taken by the defendant to the Charge Sheet as being invalid and therefore a nullity because it contains the (formal) defects mentioned in section 571 of the Criminal Code:

- describing a person by a name of office or descriptive appellation, instead of by name;
- omitting the time at which the offence was committed (where time is not an essential element of the offence);
- stating imperfectly the time at which the offence was committed;
- stating that the offence was committed on an impossible day;
- stating that the offence was committed on a day that never happened, or has not yet happened.

The court may order the Charge Sheet to be corrected to cure these as appears necessary and, on such terms, (if any) as the court thinks is reasonable in the interests of justice (for example the court may order an adjournment).
If a Charge Sheet is amended by order under this section, the Charge Sheet is to be treated as having been filed in the amended form for the purposes of the hearing and all proceedings connected with the hearing.

[29] See section 572(3) Criminal Code

[30] See section 572(1) Criminal Code

2.23 Charge Sheets and amendments

Background

Correcting defects are a subset of broader ability to amend Charge Sheets. Amendment of court documents in currently contained in section 48 of the Justices Act.

Instructions

An amendment can be made at any time before the determination of the charge by judgement (finding of guilty or not guilty).
The powers may be exercised by the court of its own initiative or on application of the prosecutor or defendant.
The Charge Sheet may be amended to:

- correct any defect in substance or in form (not relating to noncompliance about joinder). [See instructions above]
- correct any variance (variation) between the charge and the evidence led by the prosecution at the summary hearing. This replicates section 48(1)(c) of the Justices Act;
- correct any omission of words or a charge that should have been included, correct any inclusion of words that should have been omitted, include any charge that should have been included (but was omitted). This replicates section 572 (1) of the Criminal Code;
- provide adequate particularisation of the act or omission alleged;
- If the court considers the offence charged is also a domestic violence offence, the court may order that the charge sheet be amended to state the offence is also a domestic violence offence. (This replicates section 48(2) of the Justices Act and section 572 (1A) of the Criminal Code.

The order for amendment may be made if it is in the interests of justice and:

- the variance, omission or insertion is not material to the merits of the case; and
- the accused would not be prejudiced in their defence.

If the amendment is made, the court may adjourn the matter and make all necessary orders (including orders under the Bail Act) it considers reasonable. This draws on section 49 Justices Act and section 572(1) of the Criminal Code.
The consequences upon the proceeding/summary hearing should be the same for all parties as if the original charge sheet were proceeded with. This draws on section 572(4) of the Criminal Code.
If the court makes an order under this section the amended Charge Sheet must be amended accordingly by the court, registrar or some other person ordered to do so; and each party is

entitled to a copy of the amended Charge Sheet upon request. This draws on section 50 Justices Act.

Rules can be developed about the mechanics of documenting the amendment and providing the document to the parties.

The provision should also allow for the amendment of the Charge Sheet if the accused is incorrectly named and the court is satisfied of the error. These replicates section 597 (Misnomer) of the Criminal Code: *If the accused person says that the person is wrongly named in the indictment, the court may, on being satisfied by affidavit or otherwise of the error, order the indictment to be amended*. This misnomer amendment does not make the charge sheet invalid.

As noted above similar provisions should enable amendments such as correction of defects in warrants to arrest a defendant (see section 48(1)(b) of the Justices Act) and other court documents. This may be more appropriately located near provisions dealing with arrest warrants or miscellaneous general provisions.

2.24 Adding a further charge when proceedings started

Instruction

Please retain the effect of section 42(1A) Justices Act to be clear a further charge can be added in court to an existing charge/s (although no written CAN or NTA has been made) provided it is in the interests of justice and the accused would not be prejudiced in their defence. This is considered an amendment and should be merged with the provisions above.

In these circumstances added charges can be commenced by amending the Charge Sheet (if joinable charges) or filing an additional Charge Sheet with the court. The defendant needs to be provided with the additional/amended Charge Sheet.

2.25 Multiple charges – express alternatives

Background

A complaint can be made up of alternative charges. This is separate from joinder considerations. Alternative charges are framed as a person being charge X or in the alternative charge Y. For example, public soliciting or public nuisance. Unlike joinder the person can not be found guilty of all offences on the charge sheet.

Instructions

Under the Bill, a charge sheet may charge two or more offences as alternatives to one another. These need to be expressly identified as alternatives.

2.26 Rules about joinder of charges

Background

Current section 43(1) of the Justices Act creates the general rule that limits a complaint to containing one charge only. A complaint for one indictable offence; or a complaint for offences other than indictable offences. Separate complaints are required for the different classifications (see sections 43(1)(a) and (b)).

There are exceptions to this rule for practical reasons relating to the efficient administration of justice. Kenny states "joinder (of offences and offenders) … minimises the need for a multiplicity of trials with the same or similar evidence being led, with consequential was of time, expense and personal hardship to the defendant as well as inconsistent verdicts on same evidence. However, to guard against unfairness to the person charges there is a discretion in the court to direct the separate trial of charges and for the separate trial of any persons jointly charged."[31]

The joinder of charges (multiple charges) is allowed in certain express circumstances:

a) for **indictable offences** as outlined in section 567 (joinder of charges) in the Criminal Code;[32]

b) for cases **other than indictable offences** – if the matters are:

   i) alleged to be constituted by the same act or omission on the part of the defendant; [this ground does not appear in the Code for indictable offences] or

   ii) alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or

   iii) founded on substantially the same facts; or

   iv) or form part of, a series of offences or matters of complaint of the same or a similar character; or

c) when otherwise expressly provided.[33]

For completeness the Criminal Code Chapter 61 (Effect of Indictment) contains provisions dealing with true (natural) alternatives to charges. These provisions enable a person to be convicted, in the alternative, of an offence other than that named in the complaint. These provisions are not considered in the context of joinder and discussion of alternative charges.

[31] RG Kenny, *An introduction to Criminal Law in Queensland and Western Australia,* p. 80

[32] Section 574 (Summary Convictions) of the Criminal Code applies this to indictable offences dealt with summarily.

[33] See also *Penalties and Sentences Act 1992*, s 138 (Application of Justices Act) which contains provisions about joinder for breach proceedings.

Instructions

An objective of the review is to provide greater procedural consistency between the jurisdictions. The joinder provisions in the Bill should mirror the rules in the Criminal Code to the greatest possible extent.

The Bill should set out the following in relation to joinder provisions:

General rules

a) A Charge Sheet must **contain one charge only** unless charges can be joined together under this Bill, or otherwise expressly under another Act.

   This allows charges of a Code definition simple and indictable offence to be joined in the one charge sheet if joinable. This is a change from current section 43 Justices Act.
   This incorporates section 43(1)(a) and (c) of the Justices Act and picks up **exceptions for indictable offences** in section 572(2) of the Criminal Code which allows charges for more than one indictable offence to be joined in certain circumstances.
   This also picks up specific exceptions sections 568(6),(7),(8), (9), (10) of the Criminal Code which allows joinder of specific indictable offences as alternative charges. It may be that procedures set out in subsections (7), (9) and (10) need to be replicated for the summary jurisdiction/magistrate context if these charges are finalised in the Magistrates Court. This may be more appropriate to be included in effect of joinder in relation to multiple charges.
   The Bill creates exceptions for joinder of offences other than indictable offences in the same terms as 567(1) of the Criminal Code. Current section 43(1)(b)(i) of the Justices Act will not be recreated.

b) A Charge Sheet must relate to **one person (defendant) only** unless this Bill or another Act expressly provides otherwise.

   For example, the Criminal Code contains exceptions in sections 568 (11) (12) and 569. Currently these provisions only apply to indictable offences. The Bill will extend the application of these provisions to offences other than indictable offences, noting the operation of section 574 of the Criminal Code.

c) A Charge Sheet must allege **one offence only** unless this Bill or another Act expressly provides otherwise.

   For example, the Criminal Code allows multiple offences to be charged in an indictment as one in some cases. For example, the Criminal Code exceptions contained in section 568 (1) – (5A), (10A).

d) If a Charge Sheet contains more than one charge, each charge must be in a separate and consecutively numbered paragraph. This replicates section 43(2) Justices Act.

Exceptions under this Bill

a) **Multiple charges** can occur in the following scenarios.

Under the Bill, a Charge Sheet may charge two or more offences (two or more simple offences, or simple and indictable offences may be joined in the same Charge Sheet) **against the same person** if the offences the subject of the charge –

i) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or

ii) are founded on substantially the same facts; or

iii) are, or form part of, a series of offences of the same or a similar character.

The Bill should replicate section 48(2) of the Justices Act and section 567(3) and (4) of the Criminal Code proving that where a Charge Sheet contains more than one charge, each charge should be set out in the Charge Sheet in a separate paragraph called a charge and there is no need for any allegation of connection between the offences. Charges should be numbered consecutively.

A failure to comply with this requirement does not invalidate proceedings. Note sections 386(2) of the PPRA and 138(3) of the PSA state it is not necessary to set out paragraphs and objection can not be taken on the ground each matter is not set out in separate paragraphs.

b) **Multiple defendants**, under the Bill extend the application of sections 568 (11), (12) and 569 of the Criminal Code to offences other indictable offences, or where otherwise expressly provided. This enables two or more defendants charged with true simple offences to be charged together.

c) **Multiple offences, under the Bill** extend the application of sections 568 (1) – (5A), and (10A) of the Criminal Code to a Charge Sheet.

2.27 Effect of joinder

Instructions

If a Charge Sheet contains 2 or more charges, the charges must be tried together unless the court makes an order for a separate hearing.

If one Charge Sheet charges 2 or more defendants, the defendants must be heard together unless the court makes an order for separate hearing.

[See further instructions below about: joint hearing; separate hearing.]

2.28 Effect of non-compliance with joinder rules about multiple charges

Instructions

Non-compliance with the joinder rules is not a defect in substance and form allowing for amendment. This maintains the current position in sections 43(3) and 48(1) of the Justices Act. Non-compliance does not invalidate proceedings (section 43(3)(b)).

If this occurs, the court has the discretion to order that one or more of the matters be heard separately. If such an order is made, the procedure is the court asks the prosecutor to elect which charge is to be heard first.

The procedure on the separate hearing of a charge is the same in all respects as if the charge had been set out in a separate Charge Sheet. If the Magistrates' Court makes an order for a separate hearing, the court may make any orders the court considers appropriate (including for or in relation to the defendant's bail).

2.29 Alleging circumstances of aggravation – previous conviction for same offence

Background

A person accused of an offence has a right to know what they are charged with, including whether a circumstance of aggravation is being alleged against them.

Generally, a 'circumstance of aggravation'[34] is a particular fact about an offence that makes it more serious, and means the maximum penalty is higher. For example, it can include a person being armed or in the company of others at the time of the alleged offence. It is important for both the defendant and the magistrate to be aware of the full extent of the alleged offence.

Another circumstance of aggravation can relate to whether a defendant has a criminal history and has previously been sentenced for a similar type of offending. Currently, section 47 of the Justices Act requires the defendant be served with a notice that the complainant intends to advise the court of a previous conviction upon the defendant being convicted of the current offence. If the notice is not given then the previous conviction cannot be relied on to increase the maximum penalty for the offence, however the defendant's overall criminal history will be relevant to determining the defendant's sentence.[35]

In the higher courts, a circumstance of aggravation must be charged in an indictment. However, a circumstance of aggravation that is a previous conviction can be relied on for sentencing an

[34] A '*circumstance of aggravation'* defined in section 1 of the Criminal Code as meaning 'any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.'

[35] *Justices Act 1886* (Qld) s 47(2)–(8).

offender even if it is not charged in the indictment, although it does not increase the maximum penalty that may be imposed.[36]

The current notice requirements contained in section 47 of the Justices Act are not being recreated.

Instructions

In general, any circumstance of aggravation should be included in the Court Attendance Notice and the Charge Sheet, if these circumstances are known at the time the proceeding is started. If it becomes apparent later that a circumstance of aggravation is to be alleged or relied on, then it should be amended on the Charge Sheet.

If a CAN or a Charge Sheet alleges as a circumstance of aggravation that a defendant has been previously convicted of an offence, a Court must disregard such circumstance of aggravation when determining the charge, until such time as the defendant is found guilty of the offence. The Court can then have reference to the existence of the allegation of the previous conviction and sentence the defendant for the circumstance of allegation (higher maximum penalty).

If the previous conviction has not been alleged as a circumstance of aggravation on a CAN or Charge Sheet, it does not prevent a defendant's criminal history (which includes the previous charge) from being considered when sentencing the defendant. The provision should clarify that a defendant's criminal history can be relied on for sentencing in the ordinary course even if a relevant previous conviction is not alleged as a circumstance of aggravation on a Court Attendance Notice or a Charge Sheet. To be clear, this will not increase the maximum penalty (to the penalty imposed if the circumstance of aggravation applied) it will be taken into account for sentencing purposed for the maximum penalty (simpliciter).
This replicates section 564(2A) of the Criminal Code and draws on section 47(7) of the Justices Act.

[36] Criminal Code (Qld) s 564(2)–(2A), (5). However, the defendant is not arraigned on a circumstance of aggravation that is a previous conviction if the matter proceeds to trial, so that the jury are unaware of the defendant's criminal history: s 630.

2.30 Time limits for commencing summary proceedings

Background

The rationale for time limits for summary offences "*reflects the relatively minor nature of summary offences … and the inappropriateness of requiring a person to defend charges that are based on incidents that have occurred some time ago*".[37]

Section 52 (1) of the Justices Act provides for the time limit for commencing proceedings for a simple offence (*note current Act definition*).

Proceedings must be commenced within 1 year from the time when the act or omission constituting the offence arose (was done or omitted) unless another Act provides differently. Many Acts creating offences have included different limitation periods.

This is subject to another exception introduced in 2010 contained in section 52(2) of the Justices Act which extends the period to two years provided certain conditions occur.
The common law provides that proceedings for indictable offences can commence at any time.
It is important to note that section 52(1) does not operate to impose the 12 month time frame if the Act creating the indictable offence that may or must be dealt with summarily provides the Magistrates Court has jurisdiction for the offence regardless of the time when the offence arose. See for example section 552F of the Criminal Code (noting most - but not all matters - are contained in the Criminal Code).

This does mean however if another Act allows or requires an indictable offence to be decided summarily and that Act is silent as to when the proceedings must be started then under section 52(1) the proceeding **must be started within one year from the time the offence occurred, unless some other time is provided**.[38]
The time frames for commencing summary proceedings is not changing under the Bill.

Instructions

A provision should set out the time limits for when summary proceedings should be commenced replicating current section 52 (Limitation of proceedings) of the Justices Act.
Ways to improve the understanding of this key provision will be considered during drafting.

[37] Hemming A, Feld F and Anthony T, Criminal Procedure in Australia (2nd ed) Butterworths, 412

[38] See for example *Health Ombudsman Act 2013*, sections 262 (indictable offence of reprisal) and 269 (no statement as to start although extends timeframe for summary offences).

2.31 When does a proceeding commence

Background

The Justices Act does not state 'when' a proceeding has started. This lack of clarity is unhelpful and should be corrected to improve understanding of court procedures.

Instructions

Under this Bill for a charge contained in a CAN - a criminal proceeding is taken to have commenced on the date the signed CAN, with accompanying material regarding service of the notice or issue of a warrant and the Charge Sheet/(s), is filed with the court registry.
See exception for starting a private prosecution (instruction below), which is taken to start on grant of authorised person status and filing of CAN, application for warrant and Charge Sheet.
Consider whether a note should be inserted alerting the reader to section 373 of the PPRA which provides that in relation to police arrest and charge on warrant proceedings are taken to be started when an arrest warrant for an offence other than an indictable offence is issued.

2.32 Where proceedings commence

Background

Currently due to the decentralised structure of the Magistrates Courts there are complicated laws about where proceedings for some offences can be started and heard (geographical jurisdiction). If those laws are not followed, it can result in the proceedings being unable to continue.[39] Some Acts override the geographical divisions and allow for matters to be determined at any location.
See section 118 (3A) of the *Drugs Misuse Act 1986*.
It is practical that a matter should be heard and determined in the court closest to where an offence is alleged to have occurred. This will also reflect the new single Magistrates Court structure.

Instructions

Unless another Act authorises elsewhere or Regulation or Rules developed under this Act provide otherwise a CAN (and accompanying material) must be filed in a Magistrates Court (registry) that is nearest to where the offence is alleged to have been committed.
However, if the authorised person and the defendant agree, the CAN may be filed in another court.
Also, if two or more CANs are to be filed in respect of the same defendant, they may all be filed in a court in which any one of them could be filed.

[39] *Justices Act 1886* (Qld) ss 23C, 139.

Provisions should also clarify that where an offence occurs:

a) in, on or in relation to a vehicle, vessel or aircraft; and

b) in the course of a journey or a flight landing in Queensland; and

c) the court district within which the offence occurred is uncertain; then

the Court Attendance Notice may be filed in any court district that the vehicle, vessel or aircraft passed through or over during the relevant journey or flight.

This draws on current sections 139(1)(c)-(d) of the Justices Act.

The place where a proceeding commences is used to inform the defendant in the Court Attendance Notice.

If a Court Attendance Notice is not filed in the 'correct' court registry this does not invalidate any proceeding.
[See further as to transfer of proceedings]

2.33 First attendance by person charged

Instructions

A person who has been properly served with a CAN must attend the first court attendance (date provided) in person,[40] whether or not legally represented, unless there is a reasonable excuse. The first attendance in the first time the defendant is required to appear and attend according to information in charge document.

However, a CAN should be struck out by the court if the person does not appear, and the court is satisfied the defendant was not properly served with the notice requiring attendance.
This means the court proceeding for that charge would not go ahead and would be struck out, and the person would not be subject to a warrant application for failing to appear in court or required to appear later.

However, striking out the notice would not prevent another proceeding being started for the same offence, and a new notice being served on the person to require them to appear in court. This is consistent with the procedure relating to police Notices to Appear (see section 390 of the PPRA.) Where the court is satisfied the person was properly served with the CAN (making them aware of the requirement to appear in court), the law should allow for a warrant to be issued for the person's arrest or for the matter to be dealt with in the person's absence.

[40] In person reference includes video or audio.

See further instructions on the procedure on failing to appear on a summary or indictable offence, and the court's ability to deal with the matter in the defendant's absence in situations of 'cash bail', or the defendant's ability to enter a guilty plea in writing.

Please retain the application of the exception in s150A (Justices may order that complaint is ended). Section 150A was inserted into the Justices Act in 2017. It applies to a complaint where police cash bail was granted under section 14 of the Bail Act and provides justices with a new legislative option to end a complaint and take no further action. The provision recognises that police cash bail is predominantly issued in relation to minor offending that may not warrant criminal sanction. The explanatory notes state section 150A is designed specifically to provide justices with a prompt, efficient and consistent way to deal with the complaint for all defendants granted cash bail irrespective of whether or not the defendant appears in court. By ending the complaint, it means the complainant will not have a criminal history because there has not been any finding of guilt. The new provision does not affect the court's discretion to hear the complaint, where the particulars of the complaint warrant hearing.

Reasonable excuse

However, if the person advises the court of a reasonable excuse for not appearing then the court should also be given the power to enlarge the original notice and adjourn the matter to another date (with the defendant's appearance required on that date). This is particularly fair and appropriate where a person's appearance is genuinely affected by real-world issues outside of their control, such as a global pandemic or catastrophic weather event .

Part 3: Commencing a private prosecution

Background

A private complaint can be made about any offence.[41] However, if it is about an indictable offence, other than an offence alleging an injury to the complaint's person (body) or property, then currently additional procedural provisions apply under the Justices Act.[42] The current Justices Act provisions are cumbersome.

This part sets out a new scheme for starting a private prosecution for any offence in the Magistrates Court and related matters. This is a change from the current position under the Justices Act. However, both the current and new model have as their goal a system that permits private prosecutions to be brought but is balanced with sufficient safeguards for the defendant against the starting and continuation of inappropriate proceedings.

[41] Reflects concept in section 42 *Acts Interpretation Act*

[42] *Justices Act 1886* (Qld) pt 5 div 2.

In summary, the initial step will be for a magistrate to assess the proposed private prosecution and decide whether to authorise the matter proceeding, i.e. become an authorised person. The status of authorised person allows starting of a charge for an offence and criminal proceedings in the Magistrate Court. The new definition of authorised person includes a person authorised by the Magistrates Court to issue a CAN.
Once authorisation has been given, the matter will proceed according to the general procedures applying to all criminal matters started by way of a CAN.

3.1 Application of part

Instructions

The part applies if a private person wants to initiate a charge for any offence. A private person can only start a prosecution for an offence if given an authorised person status under this part. As a private person can only start a charge for the offence by way of a CAN if authorised to do so.

3.2 Terminology

Instructions

A *private person* is an **adult person** (or representative of a corporation) who is not a public officer or who is not acting in the execution of a duty imposed on them by law or the proper administration of an Act or Commonwealth Act. A private person is a member of the public acting in a private capacity.
A *private prosecution* is a prosecution started by a private person and requiring authorisation from the Magistrates Court to issue a CAN.
Note the concept of '*authorised persons'* for starting proceedings above, includes a person who has been authorised by the Magistrates Court to issue a CAN.
An authorised person is distinct from a 'Prosecutor', who is the person that appears in a proceeding and prosecutes the charge (or charges). In a private prosecution, the authorised person will usually also be the prosecutor, but the roles are distinct for the purposes of criminal procedures.

3.3 Application to be an authorised person to start a private prosecution

Instructions

This initial application process for a 'private person' to become an 'authorised person' is detailed in the instructions below.
A private person wanting to start a prosecution for any type of offence, must first make an application to the relevant Magistrates Court for authorisation to issue the CAN charging the

defendant and requiring their appearance in Court (to become an 'authorised person' under this Bill).
The relevant Magistrates Court is the court at the place where the charge should be started in accordance with the provisions of the Bill.

The application must be made by the person who wants to start the private prosecution, or by their legal representative.

The application should be signed and in writing in an approved form and include the following:

a) details about the applicant (and any representative);

b) details about the potential defendant (relationship to applicant);

c) information about the proposed charge(s);

d) a summary of the evidence proposed to prove the charge(s); and

e) any other information required by the court under Regulations or Rules.

The application must also be:

a) accompanied by a completed Court Attendance Notice, application for arrest warrant (if any), and Charge Sheet that can be served on the defendant if the application is granted;

b) filed at the relevant Magistrates Court where the proceeding must be started; and

c) filed within any time limits that apply to starting the proceeding.

3.4 Hearing of application to become 'authorised person' to start charge

Instructions

If an application is filed, the registrar of the relevant Magistrates Court must set a date for hearing of the application and issue a notice to the person advising of the date for determining the application. Rules of court currently deal with applications.[43] Further rules may be developed to provide for this circumstance, especially in relation to confidentiality.
The application must be listed for hearing before a magistrate only, who must consider the application and decide whether they are satisfied, in all the circumstances, that the private prosecution should be authorised (permitted) to proceed.
The private person is entitled to be present and represented by a lawyer on the hearing before the magistrate in court and make submissions.
In hearing the application and reaching the decision:

[43] See chapter 3 (Application), Criminal Practice Rules 1999

a) the court may receive any information that it considers appropriate to enable them to properly consider the application; and

b) the application may be adjourned for further information or evidence to be provided by the person at a later date, or for the matter to be decided.

The magistrate must make their decision on the information that is reasonably available to them at the time. There is no information to be sought or obtained from the potential defendant at this time.

3.5 Grounds to become 'authorised person' to start charge

Instructions

The magistrate assesses and decides whether to grant the application.
If, after hearing the application, the magistrate must be satisfied in all the circumstances the private prosecution should be permitted to proceed and the person should be an authorised person under this Bill.
In making any decision, the magistrate may consider the following circumstances, including:

a) whether the charge alleged is an offence known at law;

b) whether any other prosecuting agency has already brought a charge against the accused person based on the same set of facts or circumstances;

c) whether there is sufficient public interest in prosecuting the matter;

d) whether the proceeding is frivolous, vexatious, misconceived or would be an abuse of process;

e) whether the proceeding is lacking in substance in terms of no reasonable or available evidence that could be disclosed, produced or relied on to prove the charge. To be clear this is **not** requiring a consideration of reasonable prospect of success and if there is a prima facie case (sufficient evidence); and

f) any other relevant circumstances.

3.6 Orders on grant of authorised person status

Instructions

If the magistrate is satisfied that the private prosecution should proceed, then the magistrate must make an order in the following terms:

a) the application is approved, and the private prosecution is permitted to proceed;

b) the person making the application has been granted authorisation to issue a Court Attendance Notice and is an 'Authorised Person' for the purposes of starting that proceeding by way of a CAN;

c) the matter be listed for first mention on a specific date and time at that court; and

d) the CAN include the information ordered above in (b) and (c) and be served on the accused person.

The date included in the CAN must provide sufficient time for service and ensure that the defendant has sufficient notice of the date.

Effect of authorisation

Once a private prosecution has been through this application process and has authorisation to start, it will proceed in the same way and according to the same procedures as any other prosecution for a criminal offence of its type. An exception is for when a private prosecution starts (see below).

3.7 Orders if grant of 'authorised person' refused

Instructions

If the magistrate refuses the application, an order must be made in those terms and the private prosecution must not proceed. The magistrate must dismiss the application and give reasons for their decision.

Effect of refusal of authorisation

Subject to any appeal,[44] an order dismissing the application will mean that the application cannot be brought again — that is, the applicant cannot bring a second or subsequent application to privately prosecute the defendant for the same offence or for another offence based on the same circumstances.

3.8 When does a private prosecution start

Background

Earlier instructions provide that proceeding should be taken to have started after the defendant has been served with a CAN, on the date the CAN and Charge Sheet is filed with the registry. This approach is less suitable for private prosecutions, which will be before the court prior to service because of the required 'authorised person' application. The application is also

[44] See grounds for appeal later instructions.

accompanied by the CAN and Charge Sheet – which can be filed on the grant of authorised person status.
This has the effect of 'backdating' the start date, but is appropriate as it accurately reflects when the matter first came before the court. It will also be necessary in some cases to ensure that a proceeding is started within any time limits for that offence. There may be occasions where an application is filed within time limits but is not heard or finalised until after that time has expired. A prosecution should not be prevented from starting in those circumstances.

Instructions

If an authorisation application is granted, a private prosecution should be taken to have started on the date that the application was filed with the relevant court registry.
Where an application is filed within any time limits for starting a proceeding but is not finalised until after that time has expired, the private prosecution must not be prevented from starting and continuing (if the application is granted).

Authorisation allows the filing of the CAN and the Charge Sheet.

3.9 Starting private prosecutions by arrest warrant

Background

There may be occasions when a person applying to be authorised to start a private prosecution also wants to apply for an arrest warrant, rather than serving the defendant with a CAN.

Instructions

To start a private prosecution by way of an arrest warrant, a person must file an application for authorisation to bring a private prosecution and issue a CAN on the defendant, as well as an application for an arrest warrant.
The magistrate may hear and decide the two applications (authorisation and issue of an arrest warrant) together. The application for a warrant should be considered in the same way as an application for a warrant made in any other proceeding, as described in the instructions above.
After hearing the applications, the magistrate may decide to:

a) make an order refusing both applications and provide reasons for this; or

b) make an order adjourning the applications for further information or evidence to be provided on a later date; or

c) make an order that the applicant is an authorised person for the purposes of issuing a CAN and the prosecution is to proceed, and list the matter for a court date, with the CAN to be served on the defendant; or

d) order the prosecution is to proceed (the applicant is an authorised person) and a warrant is to be issued for the defendant's arrest.

3.10 Service of a Court Attendance Notice

Instructions

Once an application for a private prosecution has been approved and a court date is allocated to the matter, the defendant must be served with the CAN within seven days of the approval and in accordance with the usual rules about service.
The magistrate may make specific orders about how the defendant must be formally served. This order can consider the circumstances of the case and require service take place in a particular way or that a particular person might not be suitable in some circumstances. For example, personal service by an applicant on a defendant may be unsuitable in matters involving violence.

3.11 Prohibition on publication of information about private prosecutions

Background

It is important to balance a person's right to make an application to the Magistrates Courts for authorisation to start a private prosecution with the rights of the proposed defendant.
A prohibition on communication or publication (and access to records) protects the defendant's right to privacy and reputation and prevents the defendant finding out about the private prosecution in the media or elsewhere without first being served with a CAN.

Instructions

Filing of a private prosecution authorisation application is confidential.

A person (the applicant or otherwise) must be prohibited from communicating or publishing information about, or accessing the court records for, a private prosecution:

a) until the defendant's first court appearance, if an application to start a private prosecution is granted; and

b) always, if an application to start a private prosecution is refused.

This prohibition should include communication in any format and publication in things like publicly distributed (electronic) newspapers and magazines, public broadcasts, and public speeches (but not recognised law reports where the parties are anonymised).
It should be a simple offence to breach this prohibition and the penalty should be consistent with other communication and publication prohibition offences or other offences related to breaching confidentiality. Consideration will be given about the setting out any executive officer liability in

this context modelled on section 102FA (Executive officer may be taken to have committed offence) of the Justices Act.

Part 4: Case management and other measures to reduce delays in proceedings

Background

Chapter 14 deals with disclosure, case conferencing and case management.
The Bill should provide for a 'staged approach' with dedicated steps embedded in the new legislation. See high level overview of stages below and detailed case management flow chart:

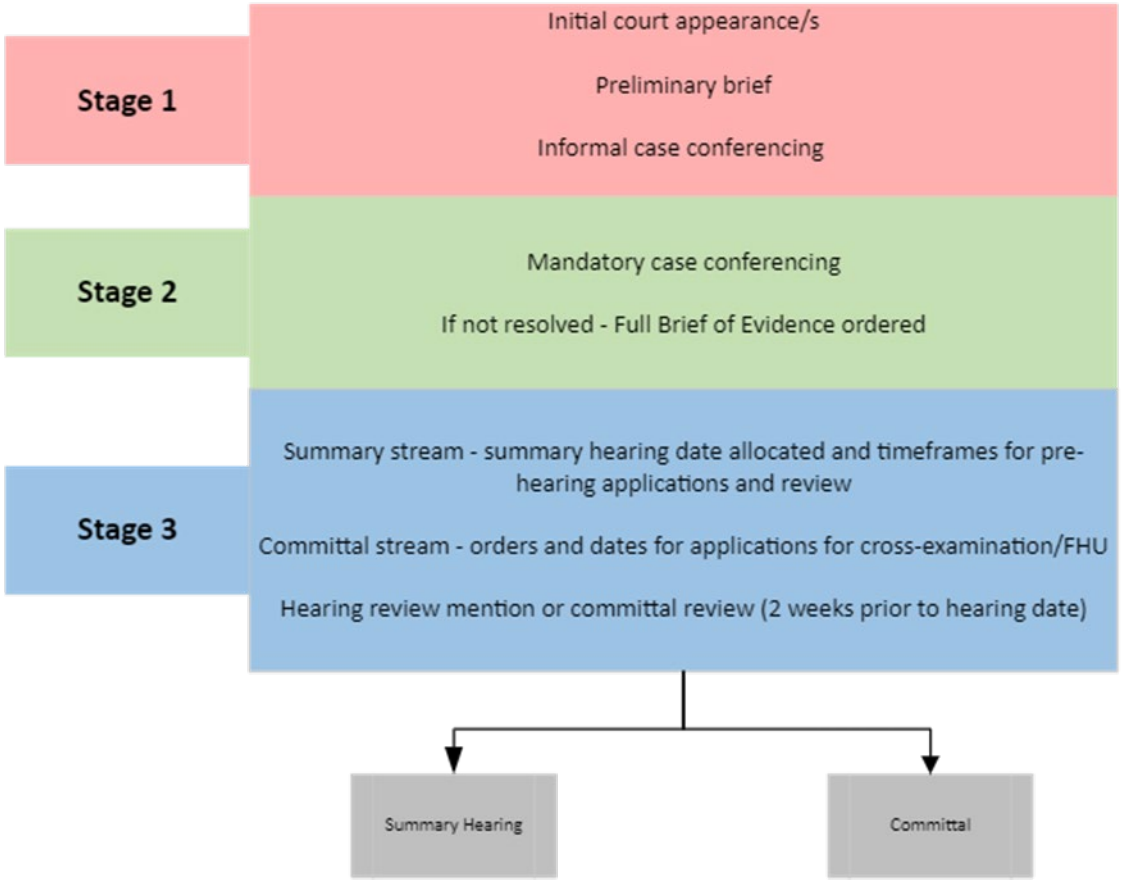

Diagram: Stages of Case Management

Instructions

Division 1: Preliminary

4.1 Application

Instructions

This Part applies to summary proceedings (including a sentencing hearing) and committal proceedings, unless otherwise provided.

4.2 Purpose

Instructions

The purpose of this division is to reduce delays in criminal proceedings by creating a clear structured and staged framework for how charges progress through courts by –

a) requiring certain disclosure to be made by the prosecution and the defence at stipulated timeframes before the proceedings are heard;

b) reinforcing the Bill's guiding principles that parties have an obligation to prepare and conduct matters in a way that is purposeful and timely and come to court to move matters forward to resolution; and

c) enabling the court to undertake case management in proceedings, including ordering case conferencing.

It is intended the new scheme will:

a) improve understanding and transparency about steps in the criminal process for all parties (including victims);

b) create greater certainty about the timeframes for summary and committal hearing dates;

c) produce consistency in practice;

d) promote more effective and early decision making to encourage resolution of matters; and

e) improve overall effectiveness of criminal procedure in Magistrates Courts.

4.3 General – Terminology

Instructions

The new framework will identify court events using consistent and specific terminology. The primary terms used will be:

- **Mention** – any event where a case comes before the Magistrates Courts for the purpose of progressing the matter; for example, for the parties to advise the outcome of case conferencing, or to list a matter for summary hearing;
- **Summary hearing** – a court event where a contested charge (or charges) is heard and determined, during which the prosecution and defendant may present evidence and the magistrate must make a finding of guilty or not guilty. (The term summary 'trial' is not used given it is easily confused with trials in the higher courts. The term 'hearing' more accurately reflects the Magistrates Courts process). A plea of guilty may be referred to as a sentencing hearing.
- **Committal** – a court event where it is decided whether the charge (or charges) will be transmitted to a higher court. This will include registry committals, hand up committals and committals with cross examination (or any combination of these last two (excluding a registry committal)).

There may also be other types of court events, such as an 'application hearing' or a 'direction hearing'. These will be identified throughout the report.
Each time a matter is before a Magistrates Court in some capacity, this may be referred to as a '**court event**'.

4.4 General – Court has overriding discretion

Instructions

The structured timeframes should be the general/default position. The court has a discretion to vary the structured framework to ensure the approach is suitable to the proceedings it is dealing with.
To be clear at each stage of this structured approach, a magistrate has a discretion to use general powers of case management to vary the structured (standard) framework approach in a way that is appropriate for the matter it is dealing with; for example, to vary standard timeframes, or order parties to a matter are not required to complete a particular step or stage or follow a particular case management approach.
The structured and staged approach requirements do not prevent a defendant from pleading guilty at any time (including on the first attendance or in writing), or prevent a matter being dealt with in the defendant's absence.

Division 2: Disclosure

4.5 General – Disclosure

Instructions

It should be explicitly stated in the new Bill that the disclosure scheme in this Part does not affect:

a) the existing prosecution disclosure obligations set out in chapter 62 of the Criminal Code, and their application to matters dealt with in the Magistrates Courts; and

b) generally the current disclosure obligations in common law, or to their application to matters dealt with in the Magistrates Courts. Apart from introducing disclosure obligations on the defendant as specified.

Also, nothing in this Part affects the available general direction hearings and disclosure obligations direction that can be made. These provisions operate in addition to the preliminary brief disclosure, e.g. to bolster requests. Later instructions replicate sections 83A to 83E of the Justices Act, with additional change to enable the court to strike out the charge in circumstances where disclosure non-compliance is deliberate or ongoing.

Subdivision 2A: Preliminary disclosure by the prosecution

4.6 Preliminary brief contents

Background

The preliminary brief should contain evidentiary items which strike a practical balance between containing sufficient material to identify elements of the offence (to assist with decision making about strength of case/merits, identify the real issues and enabling early resolution) and the reasonable efforts and burdens placed on the investigating authority to produce these items if matters resolve by way of an early plea.

For context, it is not envisaged the preliminary brief contain items such as forensic testing outcomes, other medical/DNA evidence, computer analysis/financial data, or QPS internal corroboration witnesses. Although it should be said, if any of these items are in the possession of the prosecution and/or investigating authority these should be included and disclosed in the preliminary brief.

The preliminary brief may also include items such as lists identifying material which is not yet available but may be useful to inform the defendant and as such can be the subject of specific disclosure orders. The defendant may be able to request a specific evidentiary item and the court can be properly advised of the time it will take to produce it. This can be considered by the court in setting the new court event date, allowing sufficient time for these actions to occur. This also reinforces the intent of the provision to have parties come to court prepared and be able to say when items are required for case management purposes.

Instructions

The preliminary brief should be made up of material sufficient to identify the elements in issue of the offence and include any relevant material that can be delivered to the defendant as early as possible in proceedings.
The preliminary brief may include the following material (as determined by the magistrate, and informed by the prosecution and defence):

- a 'Statement of Facts' prepared by the prosecution (currently for most criminal cases, this is the QP9 'Statement of Facts' provided by QPS);
- the defendant's criminal and traffic histories; or a statement defendant has no previous convictions.
- a notice explaining the rules of the court, including the importance of legal representation, the defendant's right to access advice from LAQ, ATSILS or a community legal centre and details of how to contact them;
- a list of the prosecution witnesses intended to be relied upon (to the extent known at that time or able to be disclosed);
- any key evidentiary material including (but not limited to) body worn camera (BWC) footage, electronic record of interview (EROI), photographs and, witness statements etc;
- any information, document or other thing that is relevant to the alleged offences, that may assist the defendant in understanding the evidence against them; and
- a list from a QPS officer, or another prosecuting agency officer, about any other outstanding evidence the prosecution may present in the future (such as forensic certificates or DNA evidence).

As stated above direction hearings (include disclosure obligation direction) can be used. See later instructions.

4.7 When a preliminary brief should be provided

Instructions

At the second mention, if a preliminary brief is required, the magistrate (in consultation with the prosecution and defence) can order a preliminary brief and make specific orders about its contents.
Disclosure of the preliminary brief should happen no later than 21 days after the brief is ordered. However, a magistrate may use their discretion to decrease or extend timeframes when appropriate (including in locations where the court does not sit regularly) or based on additional

information provided by the prosecutor/investigating authority. See further instructions about case management and structured approach.

4.8 How a preliminary brief should be provided

Instructions

Please replicate section 590AM (How disclosure may be made) of the Criminal Code, with amendments as required.

4.9 When a preliminary brief is not required

Instructions

A provision should be included setting out when a preliminary brief is not required to be given to the defendant.

A preliminary brief is not required:

a) for traffic offences commenced under the *Transport Operations (Road Use Management) Act 1995*, including contested traffic offences commenced by way of Traffic Infringement Notice;

b) for other offences commenced by way of an infringement notice;

c) for regulatory offences commenced under the *Regulatory Offences Act 1985*;[45]

d) where defence do not require the preliminary brief as a plea of guilty is intended from the outset;

e) where the charges are contested, and the magistrate determines that a full brief can be ordered after being satisfied a preliminary brief is not sufficient to address the matters in contest (in these circumstances it is intended the matter will still be required to follow the case management steps, unless the court dispenses with those as well); or

f) in any other circumstances the magistrate deems appropriate. For example, where the stipulated timeframe cannot be met due to officer unavailability, exceptional circumstances, or emergencies.

Subdivision 2B: Preliminary disclosure by a defendant

Instructions

The Bill should include limited disclosure obligations on a defendant. These are consistent with the current requirements in Part 8, Chapter 62, Division 4 of the Criminal Code

[45] Where a preliminary brief is not required but simple/regulatory charge is contested, the usual common law requirements about disclosure apply and a magistrate can make any necessary orders about disclosure. Parties can use direction hearings to obtain material. Additionally, the matter will still follow the same case management pathway set out for obtaining a summary hearing listing.

A provision should require the defendant to give the prosecution notice of any of the following matters no later than 21 days before a summary hearing (although a shorter timeframe may be permitted if appropriate):

- alibi evidence;
- expert evidence;
- advance notice of representation if person who made it is unavailable (as relevant to matters able to be dealt with in the Magistrates Court).[46]

Sections 590A, 590B and 590C of the Code need to be replicated with appropriate amendment for the Magistrates Court context. Detail about the notice requirements may be better outlined in Rules of court.

Division 3: Case management procedure

4.10 Purpose of Division

Instructions

To set out a clear case management framework for how criminal charges progress through the Magistrates Court, including the steps required to be taken by the court and parties at each stage of the proceedings.
To achieve a strong and consistent approach to case management and to ensure charges are progressed and finalised in a timely way, the magistrate is required to ask case management questions at each court mention to assist with the progression of matters.
Case management is supported by the early disclosure of the preliminary brief and case conferencing.

4.11 Application of Division

Instructions

This applies to all criminal charges proceeding through the Magistrates Court.
This case management pathway is not fixed, and magistrates retain discretion to cater to circumstances where the matter is not able to follow the staged approach below for example where case conferencing may be waived. Even in circumstances where this discretion is utilised to deviate from the case management approach, matters should still follow the remainder of the process.

[46] Section 93B of the *Evidence Act 1977* applies to prescribed criminal proceedings for offences defined in chapters 28 to 32 only.

4.12 Purpose of case management court mentions

Background

This Division will set out standard time frames connected with court events and disclosure of the preliminary brief, but a magistrate may use their discretion when appropriate. Outside of these requirements, rather than controlled by strict time frames, the stages of proceedings will require proactive steps to be taken at each court mention. This flexibility suits the various court operations across the State by providing the court with a broad general power of case management combined with some more formal time frames for progression of matters. Discretion will enable orders to be made specifically for the matters and conduct of the court calendar.

Instructions

Each court mention is intended to be purposeful and achieve one of the following:

- an outcome – such as a plea of guilty, or advice as to a plea of guilty or not guilty, or an election to be made about dealing with an indictable matter summarily, or the form of a committal proceeding for the matter to proceed to a resolution;
- progress the matter to the next stage (see further below); or
- adjourn without steps taken, if the magistrate is satisfied there are appropriate reasons for the adjournment.

4.13 Case management questions

Instructions

At each court mention a magistrate is required to ask defendant or legal representatives applicable ‘case management questions’ to enable it to be informed of how matters should progress.
The magistrate must ask the questions in clear and simple terms and in a way the defendant will be able to understand.
The magistrate may consider the circumstances of a case and exercise their discretion about which questions are necessary to be asked.
Generally, standard case management questions may include:

- Are you going to get legal representation?
- Have you sought legal advice?
- Are there any applications for Legal Aid/ATSILS relevant to the progress of the matter?
- Can the charge be dealt with summarily (in the Magistrates Courts)?

- Can the charge be dealt with in another way (for example, by mediation, or a diversionary program)?
- If elections are required, whose election is it and can the matter be managed in the committal stream? If not, why?
- Does the defendant intend to adjourn the matter, plead guilty or not guilty? Can the parties be directed to take a specific step (for example, to engage in case conferencing before the next court date)?
- If seeking an adjournment, are there reasonable grounds or good reason for the court to grant an adjournment? (However, an exception is the first attendance, where no reason is required.)

4.14 Stage one case management – initial court appearances

Background

A defendant's first court appearance will generally be following an arrest or in response to a notice to appear or new CAN.
Some matters will resolve at the first (or second) appearance by a plea of guilty (in writing, ex parte) or cash bail forfeiture, while others will progress through the subsequent stages.
Case management and case conferencing should occur from the outset.

4.15 First court appearance case management

Instructions

At the first court date (court appearance 1) it is not envisaged any specific case management steps will be required.
However, the standard case management questions should be canvassed to ensure proper management from the outset. As mentioned above, the extent of the standard case questions can be adapted to suit the circumstances and the magistrate may consider which questions are necessary to be asked.
At the first appearance the magistrate should make the following minimum enquiries to an unrepresented defendant appearing before the court -

- if the person has or intends to have legal representation?
- how the person intends to deal with the matter?

At the first court date the defendant can plead guilty (and proceed immediately to hear and determine the charge if it is able to be finalised), indicate a plea of guilty or not guilty.
The magistrate can proceed to hear the plea of guilty immediately or adjourn the matter for a lengthy plea of guilty on a future date.

Note, if the defendant does not appear the matter can be dealt with by adjournment, hearing in the defendant's absence or issuing of an arrest warrant. The defendant may have indicated a written plea of guilty and be dealt with accordingly. Further cash bail may be forfeited, and the matter ended. To be clear these options are always available to the court on a court event. [See later instructions about summary procedure]. There are also prescribed outcomes if the prosecution does not appear at a court event.

The magistrate can grant an adjournment (e.g. for the purposes of obtaining legal assistance or advice about the matter, or satisfied other reasons), and may make any order the court considers appropriate.

Any adjournment should generally be no later than 14 days after court appearance 1.

Setting a specific timeframe ensures the matter will return to court and be progressed in a timely way, but the 14-day period also gives a defendant time to obtain legal advice or take other necessary steps.

As always, the magistrate will have a discretion to vary this timeframe if it is appropriate (for example, to give a defendant additional time to seek legal advice).

Extending this timeframe should only be done in limited circumstances and where appropriate to prevent perpetual adjournments and reduce the delay currently associated with progressing matters through courts. Again, parties are required to 'take steps' and 'move matters forward' at each court event.

The magistrate should also be encouraging informal case conference with the prosecution from the first appearance.

4.16 Initial notice to defendants at the first court appearance

Instructions

A First Court Appearance Notice must be in an approved form.

A First Court Appearance Notice should be in easy-to-read language/s and can include pictures and images.

This will assist in ensuring defendants have access to justice by increasing their understanding of how the case will progress through the Magistrates Courts, including what to expect at each stage.

The notice may include the following prescribed information such as:

- the date, time, and location of the next court date (including the room in the courthouse if possible);
- their right to seek legal advice if they have not already done so;
- the defendant's right to enter a guilty plea at any time before the hearing, which means the defendant will proceed to sentencing as soon as possible;

- their entitlement to a preliminary brief of evidence and avenues for how to engage in case conferencing;
- what to expect at the next court dates;
- what might happen if they do not attend court; and
- any other prescribed relevant information or required by the Rules.

The Notice contents may be better contained in Regulations or Rules of court.

4.17 Documents to be provided by prosecution to defendant at the first court appearance

Instructions

At the first mention of a matter, the prosecution must (subject to the exercise of the courts' discretion) provide to the defendant or their lawyer (if known) the following:

- a 'Statement of Facts' (currently for most criminal cases, the QP9 'Statement of Facts' provided by QPS);
- the defendant's criminal and traffic histories;
- the Charge Sheet/s
- a prescribed initial notice explaining the rules of the court, including the importance of legal representation, the defendant's right to access advice from LAQ, ATSILS or a community legal centre and details of how to contact them; and
- a list of the prosecution witnesses intended to be relied upon (to the extent known at that time or able to be disclosed).

This material can also be provided directly by the authorised person/police investigating or arresting officer. Rules can provide how the material can be given and any timeframes.

4.18 Unrepresented defendants provided with additional notices

Instructions

Unrepresented defendants should also be given a notice issued by the court after each subsequent court date.
It is not intended that all the information in the initial notice be repeated each time, but at a minimum it should include the date, time and location of the next court date (including the room in the courthouse if possible). The notice may be given electronically.

4.19 Second court appearance – timing, orders and case management questions

Instructions

Timing

The second court date (court appearance 2) should generally be no later than 14 days after court appearance 1 (see instructions above about variation in limited circumstances).

Orders

For matters not resolving by a plea of guilty/ex parte hearing etc, the magistrate can order:

- if appropriate or required, the preliminary brief (as set out above) be provided – with orders about specific contents;
- the matter to be adjourned with the preliminary brief to be provided in 21 days (subject to discretion)

Case management questions should be asked to assist in identifying issues and progressing the matter. Upon being satisfied of the above case management questions, parties (and the court) should be taking all steps to proactively move the matter forward through the case management stages.

Case conferencing

Informal case conferencing should be encouraged.

4.20 Second stage of case management – case conferencing

Background

The second stage of the case management process specifically relates to a mandatory case conferencing step (subject to magistrates ability to waive requirement).
Case conferencing will apply to all adult criminal charges not yet resolved, (represented or unrepresented defendants) even if a matter is known to be contested, and whether they are to be finalised in the Magistrates Court or committed to a higher court.
In contested matters, case conferencing can still be a valuable tool for identifying and narrowing the issues in dispute, identifying the witnesses or other evidence to be called, as well as making arrangements for any summary/committal hearing.
Given parties should have the preliminary brief at an early stage, it is intended case conferencing at this stage will require less in-court appearances (reducing those which currently relate to disclosure requests).

Instructions

Case conference is a conference between the prosecution and the defendant for the purpose of managing the progression of the case – including:

a) identifying and providing to the defendant any information, document or thing in the possession of the prosecution/investigating authority that may assist the accused to understand the evidence available to the prosecution; and

b) identifying any issues in dispute and genuine attempt to resolve them (narrowing of issues); and

c) identifying the steps required to advance the case; and

d) any other purpose prescribed by the rules of court

The Magistrates' Court may order the parties to attend a case conference. A case conference is a mandatory step (subject to the magistrate's ability to waive the requirement if following advice from the parties it is not required, for example murder charge). However, nothing prevents a case conference from being conducted at any other time if the parties agree.

If ordered the case conference must be conducted before the charges progress to stage three of case management. The general position is the matter is not to be listed for summary hearing or a committal hearing, and a full brief of evidence can only be ordered after the parties have engaged in mandatory case conferencing and attempted to resolve the matter.

4.21 How case conferencing is to occur

Background

Given most parties at this stage should have the preliminary brief, it is intended case conferencing at this stage for most represented defendants will require less in-court appearances (reducing those which currently relate to disclosure requests). This should remove unnecessary court attendances and improve efficiency in managing voluminous daily court lists and related practice management benefits.

Case conferencing methods should be sufficiently flexible to adapt to a variety of situations. However, case conferencing with self-represented defendants will be explicitly recognized and permitted under the Bill.

Instructions

The court is empowered to set a schedule for case conferencing. Although setting a schedule for case conferencing is not mandatory.

A magistrate may decide that case conferencing for some matters is better left to the management of the parties and simply set a date for the next court appearance, with case

conferencing to have taken place before that date. Rules creating uniform direction may be created setting out standard case conferencing direction that may be used.
However, a more prescribed schedule will have a place in some matters. For self-represented defendants (or matters where the magistrate considers intensive case management is required), a schedule and standardised information about how to case conference and what will happen on the next court date may assist with progressing and resolving matters.
Whether or not the court sets a schedule for case conferencing, it is not intended to require parties case conference matters in a specific way. Case conferencing can be formal or informal and be undertaken in a variety of ways including verbal submissions, written submissions and in-person conferencing (including remotely).
Should parties be engaged in case conferencing and require additional time to resolve matters, applications should be made to the registry requesting extensions of time frames and administrative adjournments (by consent). Later instructions deal with the powers of the registrar to make orders by consent.
In-court mentions should be avoided in circumstances where parties can continue to meaningfully conference and progress matters.

4.22 Case conferencing and use of information

Instructions

Similar to section 54(7) of the *Criminal Procedure Act 2009* (Victoria) provide that evidence of—
(a) anything said or done in the course of a case conference; or
(b) any document prepared solely for the purposes of a case conference— is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given or relied on before any court or person acting administratively or judicially, unless—
(c) all parties to the case conference agree to the giving of the evidence; or
(d) the proceeding is a criminal proceeding for an offence alleged to have been committed during, or in connection with, the case conference.
This provision is to apply to committal proceedings, and all summary offences.

4.23 Case conferencing with self-represented defendants

Background

The inability for the Police Prosecution Service (main prosecution agency in Magistrates Courts) to conference with self-represented persons is one of the greatest impediments to resolving matters in Magistrates Courts in a timely way.
The new Bill should explicitly recognise and permit such case conferencing.

Instructions

A case conference may be held between the prosecution and a defendant who is not legally represented (self-represented). Such a case conference must be conducted with safeguards to fairness such as:

a) putting the circumstances of the case conference and outcomes on the court record;

b) audio or video recording the case conference that occurs; or

c) handing the court a certificate signed by the parties confirming a case conference was conducted and documenting the agreed outcomes.

Rules of court may be developed about the conduct of case conferencing with self-represented defendants.

It is essential case conferencing, particularly with self-represented persons is as efficient as possible. Therefore, it is prudent the prosecution utilise their discretion when determining which safeguard (if any) should be adopted in which circumstances.

4.24 Case conferencing outcomes

Instructions

Matters resolved by the mandatory case conferencing process can be finalised in the usual manner (for example, a plea of guilty, listed for lengthy sentence or withdrawal/amendment of charge/s) at the next return date to court (court event), or on that date if the case conferencing took place at court on the day.

Matters that could not be resolved by the mandatory case conferencing process will proceed with the full brief of evidence being ordered at the next return date to court (court event).

4.25 Third stage of case management – full brief of evidence

Background

The approach of first ensuring the matter remains contested after the full brief of evidence is disclosed, in combination with the set schedule of court mentions, is intended to reduce the number of contested matters ‘falling over’ on the date of hearing and the resourcing costs associated when that occurs.

Instructions

If the matter remains contested after mandatory case conferencing, the court should be informed and order the full brief of evidence and list the matter for further mention.

Noting the court may have at any earlier time in the proceeding ordered the full brief of evidence.

The defendant can by notice inform the prosecution, after the case conference, that they will be seeking the court to order the full brief of evidence.
The schedule for the provision of the brief and subsequent mention should be guided by the prosecution. The prosecution should be able to indicate to the court how long it will take for the full brief of evidence to be prepared and served on defence, considering matters such as the complexity of the brief and the need for evidence that can be associated with lengthy wait times, such as forensic certificates.
The Magistrates Court can order the date for the service of the full brief.
The Magistrates Court can make all necessary orders, including further case conferencing (if suitable) to occur prior to the next mention.

4.26 How full brief of evidence must be served

Instructions

The full brief should be given in a way similar to the preliminary brief. Please replicate section 590AM of the Criminal Code.

4.27 Contents of full brief of evidence

Instructions

Nothing in this section prevents agreement between the prosecution and the defendant to agree to more limited disclosure i.e. less material than is required in a full brief.
Unless earlier disclosed to the defendant, whether in a preliminary brief, at a case conference or otherwise, a full brief must contain—

a) any document, information, or thing on which the prosecution intends to adduce or rely on as evidence in proceedings in order to prove the commission of the offence/s;

b) any other document, information, or thing in the possession of the prosecution/investigating agency that is relevant to the alleged offence, whether or not the prosecution intends to rely on it.

c) a notice in the approved form —

   i) explaining this material may be used as evidence at a summary hearing of the charged offence in their absence; and

   ii) explaining the importance of the defendant obtaining legal representation; and

   iii) advising that the accused has the right, if eligible, to Legal Aid under the Legal Aid Queensland Act 1977; and

   iv) providing details of how to contact Legal Aid Queensland.

The defendant may make a request for material identified but not provided in the full brief of evidence.
Reiterate the limitations on disclosure (if unlawful or contrary to the public interest) as contained in Part 8, chapter 62 subdivision D, and chapter subdivision E (viewing) apply here, and extend to simple offences.

4.28 Third stage of case management – summary or committal proceedings stream

Instructions

After the full brief has been disclosed and considered by the defendant/defence, and the parties have engaged in further case conferencing (if appropriate), at the next court event the parties must indicate how the matter is to proceed.

Subdivision 3A: Procedure before summary hearing (Summary proceedings stream)

4.29 Listing summary offences

Background

Again, the intent is to have a summary hearing date given only after satisfied the matter is definitely proceeding.

Instructions

For summary offences that are still contested and able to be heard and determined in the Magistrates Court, at this point the court will allocate dates for:

a) all pre-hearing applications including any applications under the *Evidence Act 1977* for special or protected witnesses, applications for witnesses to give evidence via phone or video link or any other pre hearing issues to be settled;

b) a summary hearing review date to confirm the matter remains contested (particularly following any applications), all witnesses are available and the matter is ready to proceed. This should occur at least two weeks prior to the hearing date;

c) a summary hearing.

However, the court should use its discretion about whether all listings are initially given to a matter as a block. For example, if a party advises that an application will be made and the outcome of that application will determine the course of the matter, then the matter should be listed only for the hearing of that application with tentative court listings given to the others that parties can advise are no longer needed.

4.30 Summary hearing review purpose

Instructions

The purpose of the summary review hearing is to ensure hearings are properly vetted and ready to proceed.

Specifically, the summary hearing review should canvass:

a) whether parties are legally represented;

b) whether disclosure obligations have been complied with;

c) whether there are any admissions of fact, or whether the issues in contest can be narrowed down;

d) which witnesses are required to give evidence or be made available for cross examination (including all witness availability);

e) if any applications for special or protected witnesses are required under the Evidence Act 1977, or whether special arrangements are required for witnesses (such as an application for a witness to give evidence remotely via phone or video link);

f) whether interpreters or other reasonable adjustments are required for a party or witness; and

g) an estimate of the length of the hearing; and

h) other relevant matters.

4.31 Summary hearing review – timing, appearances and conduct

Instructions

A summary hearing review should take place approximately two weeks before the summary hearing.

All parties are expected to personally appear (which can include a remote appearance) at the summary hearing review.

A summary hearing review may be conducted remotely via videolink or telephone in circumstances where magistrates conduct remote circuit courts or a single magistrate attends multiple courts.

Streamlining the issues to be canvassed at a summary hearing review may be assisted using a 'Certificate of Readiness' completed by the parties prior to the mention (or similar type mechanism) to ensure all pre-hearing issues are resolved prior to the hearing date. The use of a certificate or similar may be addressed in relevant court Rules.

Subdivision 3B: Procedure before committal hearing (committal proceedings stream)

4.32 Case management committal stream mention

Instructions

For contested offences that will be committed to the District Court or the Supreme Court, the parties must advise the court whether the matter is to proceed by way of:

a) registry committal;

b) court committal; or

c) an application for a committal hearing with cross-examination; or

d) any combination of (b) and (c) above where oral submissions are to be made or evidence it to be led.

The court will allocate further court dates as required. The court may also allocate a further review mention if it is considered necessary and make any other relevant orders.

Part 5: Court-ordered diversion

Division 1: Preliminary

5.1 Objects of this Part

Instructions

Include the following specific objects for this part about court-ordered diversion, based on the New South Wales legislation, namely to:[47]

a) provide a framework for the recognition and operation of court-ordered diversion options for dealing with persons who have committed or are alleged to have committed a summary offence;

b) recognise that diversion is an opportunity for meaningful participation in the criminal justice system by a person who has committed or is alleged to have committed a summary offence, as well as for victims to participate to the extent they desire;

c) ensure that options for court-ordered diversion apply fairly to all persons who are eligible to participate in them, and that they are properly managed and administered;

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

d) reduce the likelihood of future offending behaviour by facilitating the use of, and participation in, court-ordered diversion options;

e) recognise the rights of victims should be protected and taken into account when considering diversion options, but not always require a victim's consent to order a diversionary option in relation to a defendant; and

f) provide a framework for the greater inclusion of cultural considerations, including the distinct cultural consideration of Aboriginal peoples and Torres Strait Islander peoples, in the resolution of summary offences.

5.2 Purpose of Part

Instructions

This Part provides a framework for a structured approach to two court-ordered diversion options, namely:

a) Summary Offences Diversion Program; and

b) Adult Restorative Justice Conferencing.

5.3 Application of part – generally

Instructions

Generally, court-ordered diversion should be available for **adult defendants on bail** for any summary offences charge that can be finalised in the Magistrates Courts. For example, regulatory, simple or indictable offences (i.e. following an election by one party, a court-ordered diversion may apply to that offence if the party elects to deal with the matter in the Magistrates Courts).

Note: The use of adult restorative justice conferencing is already provided for under other legislation and is not presently limited to any particular types of offences. That position will not be affected by this review.

Note: There are further limits on the availability of the Summary Offences Diversion Program for some types of offences, as set out below.

5.4 Suitability of court-ordered diversion subject to Magistrate's overriding discretion

Instructions

The magistrate has the overriding discretion to decide whether a court-ordered diversion is appropriate in all the circumstances, taking into account a range of considerations such as:

a) the complainant's views, including whether they consent to participate or engage in a diversion option such as mediation;

b) whether there is an ongoing relationship between the defendant and the complainant (including whether a domestic and family violence protection order is in place);

c) the nature and seriousness of the alleged offence, including whether it is an offence involving actual violence or domestic and family violence, or an offence that is sexual in nature;

d) whether the defendant has previously been ordered to other diversion options by the court or another agency[48] (including whether the defendant successfully completed the conditions, how recently another diversion order was made, and the nature of the offences a diversion option was granted for);

e) if the defendant can meaningfully participate in a court-ordered diversion;

f) if either the defendant or the victim is an Aboriginal person or Torres Strait Islander person, whether any other relevant stakeholders such as a Community Justice Group member, Respected Person or Elder should be involved in the process; and

g) any other relevant circumstances.

Division 2: Summary Offences Diversion Program

Background

This division introduces a new in-court diversion scheme. The scheme proposed is, in most respects, modelled on Victoria's Criminal Justice Diversion Program (CJDP), which operates through its Magistrates Court,[49] with some changes primarily about length of order, and the need for prosecution consent in that jurisdiction.

5.5 Eligibility for Summary Offences Diversion Program

Instructions

The scheme does not apply if the defendant:

a) is charged with an offence punishable by a minimum or fixed sentence or mandatory penalty, including penalties affecting a licence (such as cancellation, suspension or disqualification); or

b) an offence for which a defendant was issued an infringement notice and elected for the matter to be heard in court.

[48] This information should be ascertained from the not for production criminal history (see instruction about recording such orders).

[49] *Criminal Procedure Act 2009* (Vic) s 59; Magistrates' Court of Victoria, *Criminal Justice Diversion Program* available at <https://www.mcv.vic.gov.au/find-support/diversion>.

Any offences that mandatorily incur demerit points should be eligible for the Summary Offences Diversion Program if that is the only mandatory penalty or sentence attached to that offence. As in Victoria, demerit points will still be incurred by the defendant even if a diversion is successfully completed because that process relates to matters of administration, licensing and public safety and should not be interfered with.
The provision should clarify the section does not affect the incurring of demerit points made under traffic legislation.

5.6 Procedure for Summary Offences Diversion Program orders

Background

Unlike the Victorian model, there should be no requirement for the prosecution to consent to an order that the defendant participate in the Summary Offences Diversion Program. Although it is important to consider prosecutorial support for a defendant's admission into the program, a lack of support should not be the determining factor for a defendant's eligibility.

Instructions

The eligible defendant can make an application for Summary Offences Diversion Program order if, at any time before taking a formal plea from an adult defendant on bail for a summary offence -

a) the defendant advises the court they accept responsibility for the offence; and

b) it appears appropriate to the Magistrates' Court, which may inform itself in any way it considers appropriate, the defendant should participate in a diversion program.

When an application for a Summary Offences Diversion Program is made, the prosecutor, defendant and complainant must have the opportunity to make submissions about whether the order is appropriate in all the circumstances. However, there is no requirement for the prosecution to consent to the order, and no power in the prosecutor to veto or refuse the making of the order.
There should be a clear statement that the defendant's acknowledgement to the court of the acceptance of responsibility for the offence is inadmissible as evidence in any proceeding for that offence and does not constitute a plea of guilty to the offence.
Rules of court and approved forms may be required to be developed to facilitate this process.

5.7 Summary Offences Diversion Program orders

Instructions

If the magistrate considers the defendant's participation is appropriate in all the circumstances, the court may order the defendant to enter into a Summary Offences Diversion Program.

In making any order, the magistrate must particularly be reasonably satisfied that a defendant has the capacity and capability to meet the 'agreed plan' under the Summary Offences Diversion Program.

A Summary Offences Diversion Program contains an 'agreed plan' entered into by the defendant with a number of conditions, which is approved by the magistrate. The defendant must consent to the agreed plan and its conditions.

Once an agreed plan has been established and agreed to by the defendant and magistrate, Summary Offences Diversion Program orders are made endorsing the agreed plan and adjourning the charges for the shortest possible reasonable time to allow for compliance with the conditions and completion of the diversion program orders.

The maximum length of time for which a matter can initially be adjourned at this stage is **six months**.

Rules of court should be developed to establish how the defendant must submit evidence of their compliance to the court as appropriate (for example, certificates of completion for participation in programs or a copy of an apology letter sent to a victim).

If the application is refused the defendant continues under the general procedures for an offence of the type charged.

5.8 Content of any agreed plan

Background

In Victoria, the average CJDP plan has approximately two to three conditions attached. Most of these conditions are easy for a defendant to meet but still effective as a diversion option. In Victoria, the most common conditions imposed on a CJDP plan were a donation (71.7%), an apology to a victim (33.1%), and a letter of gratitude to an informant (24%).

Instructions

There is no intention to prescribe the number or types of conditions that can be included in a plan, to allow for adequate flexibility. Possible examples of types of conditions may be instructive. However, a provision should be included to make clear that any condition stipulated in an agreed plan:

a) must be fair, reasonable, appropriate in the circumstances and proportionate to the charges;

b) must be achievable within the timeframe of the order; and

c) must not be overly onerous for the defendant, and requirements are accessible.

5.9 Variation of Summary Offences Diversion Program orders

Instructions

The court may vary or set aside an order at any time, whether on its own motion or on the application of a party. For example, a magistrate should be able to extend the adjournment for a period of up to 12 months in total, where appropriate.

The magistrate can, at their discretion, list a matter for mention earlier than the expiration of the order as a way of 'checking' on the defendant's progress. More generally, at any point during an adjournment, the matter can be brought back before the court. For example, the prosecution may take this course if it is apparent the defendant is not complying with the plan. The defendant may also do so if they need to vary the plan, if they have completed the plan earlier than expected, or if they no longer want to complete the plan.

5.10 Proof of Summary Offences Diversion Program performance

Instructions

On the date given for the return to court (adjournment period) the defendant must submit evidence of their compliance with the agreed plan to the court. When the matter returns to the court the magistrate will review this evidence to determine whether the defendant has completed the requirements of the scheme. If appropriate in the circumstances, the magistrate may exercise a discretion to decide that the defendant has substantively completed those requirements.

5.11 Effect of a Summary Offences Diversion Program orders

Instructions

If a defendant completes including substantively the agreed plan to the satisfaction of the Magistrates' Court—

a) no plea to the charge is to be taken; and

b) the Magistrates' Court must dismiss the charge and the defendant is discharged without any finding of guilt; and

c) the fact of participation and the dismissal of the defendant is a defence to a later charge for the same offence, or for a similar offence arising from the same circumstances. See certificate of dismissal that can be granted (as an evidentiary aid) instructions].

Participation in the Summary Offences Diversion Program should not be treated as a finding of guilt, except for the purposes of:

a) laws relating to confiscation, firearms, weapons control and other similar matters;

b) the incurring of any demerit points.

Further, because the proceeding ends via in-court diversion, it is necessary to clarify neither party will be eligible to seek costs.

If a defendant does not complete the agreed plan to the satisfaction of the Magistrates' Court, the

a) matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered; and

b) if the charge proceeds to sentence, the extent to which the defendant complied with the scheme must be taken into account at sentence, but lack of compliance cannot be used against the defendant as an aggravating factor.

5.12 Recording of Summary Offences Diversion Program orders

Instructions

Participation in the Summary Offences Diversion Program should be formally recorded in a verdict and judgement record and on an adult's not-for-production criminal history.

Division 3: Adult Restorative Justice Conferencing

Background

In Queensland, the adult mediation process is referred to as adult restorative justice conferencing (ARJC).[50]

Currently under the Justices Act, magistrates or the clerk of the court have the power to order mediation in specific circumstances. After a summons has been issued, 'a magistrate or clerk of the court can make an order to mediate if they consider that the matter would be better resolved by mediation than by proceeding on the summons; or the complainant consents to the order'.[51]

If an order to mediate is made, the summons is not served and no other action taken, unless a magistrate or clerk of the court orders that the summons may be proceeded with under section 53B of the Justices Act if satisfied of certain events, for example the complainant withdraws the consent, or because of a decision made by a director of a dispute resolution centre under the *Dispute Resolution Centres Act 1990*, or the defendant refuses to attend or participate.[52] This process requirement will not be retained, replaced with court-ordered referrals below.

The Justices Act also provides for a matter that can be finalised in the Magistrates Courts to be adjourned to allow for the charge to be the subject of a mediation session under the *Dispute*

[50] *Dispute Resolutions Centres Act 1990* (Qld) s 28.

[51] Justices Act 1886 (Qld) s 53A(1)-(2).

[52] *See Justices Act 1886* (Qld) s 53B

Resolution Centres Act 1990.[53] This enables parties to a criminal proceeding in the Magistrates Courts to elect to mediate a matter between themselves, with no need for a referral or other involvement from the court (except to adjourn the matter). Nothing in the new criminal procedure framework should prevent this informal process from continuing.

If the mediation process resolves the matter, the criminal charge can by withdrawn by the police prosecutor or proceed to sentence. However, the current legislation does not provide any framework for either scenario about how a matter is to proceed once a mediation has been conducted, or what procedures should be implemented in the event a mediation is successful or unsuccessful.

5.13 Court-ordered referrals to Adult Restorative Justice Conferencing

Instructions

A Court may make an order referring a charge/s of any offence to ARJC under the *Dispute Resolutions Centres Act 1990* subject to specified suitability and eligibility requirements. To be clear, the proceeding has started and is before the court.

A court-ordered referral to ARJC is available at any stage of a proceeding, including after a plea of guilty has been entered.

When a court-ordered referral to ARJC is made, the matter is formally referred to a 'prescribed agency' able to provide accredited and free ARJC services. The Queensland Government's Dispute Resolution Branch should be named as a prescribed agency.

To remove any doubt, the new criminal procedure legislation should explicitly state that the provisions about referral of a charge or charges to ARJC under this part does not affect, and are in addition to, any other pathways open for referral to ARJC.

Rules of court and approved forms may be required to facilitate this process.

5.14 Suitability for referral to Adult Restorative Justice Conferencing

Instructions

Include the ARJC referral can be made if the magistrate considers the charge is appropriate in all the circumstances taking into account a range of considerations (i.e. subject to the application of the magistrate's discretion) outlined above at 5.4.

The parties to the matter must be given an opportunity to make submissions to the court about why a referral is or is not appropriate.

[53] *Justices Act 1886* (Qld) s 88(1B).

5.15 Eligibility for referral to Adult Restorative Justice Conferencing

Instructions

Include the following eligibility criteria:

a) It is not limited to only summary offences that can be finalised in the Magistrates Court.

   In the case of ARJC it is also appropriate for the scope of referral to be widened to all offences (again, subject to discretion). This is because, in current practice, matters that must be dealt with on indictment can already be referred to the existing ARJC program and it is not intended to interfere with that approach.[54] Further, a referral to ARJC does not guarantee a particular outcome, meaning that an agreement reached at ARJC about an offence that will later be committed to a higher court is not excluded.

b) The defendant must indicate to the court they accept responsibility for the offence charged. This acceptance should be accompanied by the clear statement 'any acceptance of responsibility for an offence by a defendant is inadmissible in any proceeding for that offence and does not constitute a plea of guilty to the offence.'

   However, court-ordered referral to ARJC should also be available after a plea of guilty has been entered. There are times when this would be appropriate in the circumstances. For example, it may be suitable where the defendant has indicated remorse and would like an opportunity to repair the harm or damage they have caused, and the complainant has consented to engage and participate in ARJC.

c) The defendant and the complainant with whom they will conference must both indicate their consent to referral and participating in ARJC.

d) Court-ordered referral to ARJC does not require consent from the prosecutor. The prosecutor entity can indicate its support or opposition for the referral. However, this is not the deciding factor.

5.16 Procedure following Adult Restorative Justice Conference

Background

Currently, the Justices Act does not make clear what happens after a matter has been mediated. This should be rectified in the new framework. To be clear, ARJC is about achieving an outcome or agreement and not about the court being informed about the successful completion of the agreement.

[54] See *Dispute Resolutions Centres Act 1990 (Qld)*, s 30 which allows a director to decide the specified classes of disputes for mediation.

Instructions

Provide that, where a matter has been referred and conferenced and an outcome or agreement between the parties has been reached:

a) the prosecution may, at their own discretion, choose to withdraw the charge and end the proceeding;

b) if the charge is not withdrawn, then it will proceed in the usual way[55] for its type of offence; and

c) if the charge proceeds to a sentence, the fact that the defendant has participated in ARJC and reached an agreed outcome is a matter that must be taken into account on the sentence.

If an agreement is reached and the prosecution withdraws the charge, the court will formally discharge the defendant. This is not considered a dismissal.

If a conference is not conducted or an agreement is not reached, then:

a) the matter will proceed according to law under the usual criminal procedures as if a plea has not yet been entered; and

b) any unsuccessful ARJC attempt cannot be used against a defendant throughout the remainder of a proceeding, particularly at sentencing.

Part 6: Summary Proceedings

Division 1: When indictable offences can be dealt with summarily

Background

Most indictable offences are in Queensland's Criminal Code. Chapter 58A of the Criminal Code sets out the circumstances in which an indictable offence located in the Code may or must be dealt with summarily by a Magistrates Court. Whether an offence is dealt with summarily is always subject to section 552D of the Criminal Code.

Chapter 58A of the Criminal Code also includes other procedural provisions relevant to indictable offences that are finalised summarily.

The intent is for necessary provisions from Chapter 58A to be redrafted so it can be easily understood and applied by court users, and located in the new Bill.

The first Part should replicate some sections of chapter 58A, to clearly and simply set out the indictable offences in the Criminal Code that can be dealt with summarily.

[55] This can include an amendment of the original charges.

The second part of that chapter should set out some general procedural matters applying to all indictable offences dealt with summarily, particularly related to the making of an election. There are also some sections in chapter 58A that do not need to be recreated, or that should be moved to another Act. The review report addresses these in-depth.

Redrafting and relocating of Chapter 58A provisions is not intended to make substantive changes to the content of the law. It will not change the classification of offences, and no changes to which offences can be dealt with summarily and in what circumstances.

6.A Criminal Code indictable offences dealt with summarily

Instructions

For indictable offences in the Criminal Code that may be dealt with summarily, the new criminal procedure legislation should:

a) include a numerical list of all indictable offences in the Criminal Code that can be dealt with summarily, which includes information about any election required and any limitations or requirements associated with the offence being dealt with summarily (based on sections 552A through 552BB);

   The intention is a reader can use the list to easily find the offence they need to know about, and access all relevant information about dealing with that offence summarily in one place. Drafting advice as to the best contemporary format to achieve this outcome (e.g. use of schedule) will be considered.

b) permit a Magistrates Court to decide the value of any property or damage to property in a particular matter (based on section 552G); For example, in a case where there is damage to a car, a magistrate may hear evidence about the cost of repairing the damage and decide about the value of the damage in that case.

c) provide for an indictable offence to be dealt with summarily despite the amount of time that has passed since the matter arose (based on section 552F);

d) provide for the circumstances in which a magistrate must abstain for dealing with an offence summarily (as set out in section 552D) and make it clear that if a matter is dealt with as a committal proceeding following any evidence being heard, the matter must be committed in court in accordance with committals instructions below at 9.42.

   Where a magistrate abstains from dealing with a matter summarily after the defendant has been found guilty and convicted of the offence at a summary trial, then the matter should be committed for sentence. This concept is explained further below when discussing the use of a defendant's criminal history in determining if a matter should be dealt with summarily, because it is most likely to arise in that scenario.

e) provide for the maximum penalty that can be imposed when a matter is dealt with summarily (based on section 552H). In each case, the person may not be punished more than if the offence had been dealt with on indictment.[56] However, the specific provision about the maximum penalty that can be imposed by justices (section 552H(1)(c)) should be relocated to the same place as those parts of section 552C that are about justices of the peace.

6.B Non-Criminal Code indictable offences dealt with summarily

Instructions

The Bill should recognise that other Acts outside the Criminal Code contain provisions relating to indictable offences that can be dealt with summarily, including information about any election and other requirement etc. These provisions will continue to operate.
It is not proposed to move the laws about the disposition of those other indictable offences into the new criminal procedure legislation. It is also not proposed to include a list of all those other indictable offences that can be dealt with summarily in the new legislation.
The approach in these Acts is sufficient to make clear that, unless there is some specific provision otherwise, the general laws about criminal proceedings in the Magistrates Courts apply. Following the introduction of the new criminal procedure legislation for the Magistrates Courts these will be amended, if necessary, to refer to the new criminal procedure legislation instead of the Justices Act. Otherwise, at this time, they will remain unchanged.

6.C Effect of indictable offence dealt with summarily

Instructions

Indictable offences that can be dealt with summarily are *summary offences*. The effect of being classified as a *summary offence* is the charge can generally be dealt with in the Magistrates Court in accordance with the procedure on charge of a summary offence in the Bill outlined below. However, this classification is not definitive and is subject to considerations (see section 552D of the Criminal Code). If these apply, the charge is moved from summary procedure to being dealt with by a committal proceeding.
Section 659 (Effect of summary conviction for indictable offences) of the Criminal Code should be relocated with these sections to give a clear indication of the effect of summary conviction for an indictable offence.

[56] Criminal Code (Qld) ss 552C(1)(a), 552H.

Division 2: General procedural matters applying to all indictable offences dealt with summarily

6.D Making an election for a matter to be dealt with summarily

Background

Section 552I of the Criminal Code applies specifically to offences that must be heard and decided summarily unless the defendant elects for jury trial (that is, unless the defendant elects for the matter to be committed to a higher court).
The provisions in section 552I about the process for taking a plea and dealing with a matter summarily do not need to be recreated in full as these will be addressed by provisions dealing with pleas and case management (a magistrate will make enquires about any election, including which party is to make the election and when it will be made).

Instructions

Provide procedures for taking an election in the following scenarios. These processes for making an election should apply to any offence, not only offences in the Criminal Code:

a) When taking an election from a self-represented defendant:

   The court must:

   i) state the substance of the charge to the defendant in a way the defendant will understand;

   ii) explain that the defendant is entitled to be tried by jury, and is not obliged to make a defence; and

   iii) ask the defendant whether they want the charge to be dealt with summarily.[57]

b) This full process is not required where a defendant is represented by a lawyer to give this explanation and communicate the defendant's instructed election to the court. The defendant must be present in court when the election is made by their lawyer. This can include being present remotely. This approach is consistent with the requirement that a lawyer may enter a plea for a defendant when instructed if the defendant is present in court.

c) A process for the prosecution to make an election about whether an offence is dealt with summarily.

   Currently, chapter 58A does not include a process for the prosecution to make an election about whether an offence is dealt with summarily. To make the steps in the criminal process clear, the Court is required to ask the prosecutor whether the prosecution wants the charge to

[57] Modelled on Criminal Code (Qld) s 552I(2).

be decided summarily. This must take place before the defendant is asked to enter any plea to the charge.

There are sometimes additional steps in an election made under another Act — for example, an election may also be subject to a defendant's consent. The process for making an election should be flexible enough to accommodate any extra steps and should also require the magistrate to provide an adequate explanation of those steps to the defendant so they can properly participate in the process.

6.E Changing an election for how a matter to be dealt with

Background

Currently, there is nothing to prevent a party from changing an election after it has been made. This can lead to delays in matters being finalised, as proceedings move from summary to committal and back again.
For the prosecution and for legally represented defendants, this decision is a considered one that is informed by legal knowledge and advice. Self-represented defendants are given an explanation in court before making this decision, as discussed previously. Against that background, the ability to change an election an unlimited number of times and on any basis is not reasonable.

Instructions

Provide that once a party has made an election, it cannot be changed without the permission of the Magistrates Court under the procedure below. This requirement for permission to change an election applies equally to the prosecution and the defendant. This is a new provision.

6.F Procedure for changing an election for how a matter to be dealt with

Instructions

A party may apply to change their election about whether an offence is or is not to be dealt with summarily. The application:

a) will apply in relation to any offence for which an election is required, when the party who has made an election wants to change it;

b) may not be made after any evidence to prove the charge has been called by the prosecution at a summary hearing, or any evidence heard by the Court at court committal;

c) will be heard by a Magistrates Court, which may hear submissions and consider evidence about the application, and must consider all relevant circumstances when reaching a decision; and

d) may be granted by the court for good reason, taking into account all relevant circumstances.

Rules of court and approved forms may be developed to facilitate this process.

6.G Use of criminal history and adequately punished

Background

Whether an offence is dealt with summarily is subject to section 552D of the Criminal Code. Section 552D includes a subsection that a Magistrates Court must not deal with an offence summarily if satisfied, at any time and after hearing submissions from the parties, that 'because of the nature or seriousness of the offence or any other relevant consideration' the defendant may not be adequately punished in the Magistrates Court.

For any offence dealt with summarily by a magistrate, the maximum available penalty is generally 100 penalty units ($14 375) or three years imprisonment.[58]

Where the defendant elects whether a charge is dealt with summarily, it is unclear whether the court may decide that it cannot adequately punish a defendant after receiving a plea or deciding guilt and then the process i.e. commit the defendant to a higher court.

For offences in the Criminal Code, this is further complicated by section 552I(9)(b), which states that unless a defendant's criminal history is admissible in evidence in relation to a charge, the court must not have any regard to it before receiving a plea of guilty or making a decision about guilt, or for deciding whether the defendant may be adequately punished on a summary conviction.

Some other Acts allow a magistrate to abstain from dealing with a matter summarily if the magistrate considers it should be prosecuted on indictment and provide a process for disregarding a plea and instead dealing with the matter as a committal proceeding.

Other jurisdictions have dealt with this issue more explicitly. For example, in Victoria the legislation explicitly states that for the purpose of deciding whether a charge is appropriate to be determined summarily, the court 'must have regard to… the adequacy of sentences available to the court, having regard to the criminal record of the accused'.[59] In Western Australia, if the court convicts the defendant of an offence but considers that it cannot adequately sentence the defendant due to the seriousness of the offence, the court may commit the defendant for sentence.[60]

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[58] See Criminal Code, s 552H

[59] *Criminal Procedure Act 2009* (Vic) s 29(2)(b).

[60] Criminal Code (WA) s 5(9). More generally, in the Northern Territory, a court may discontinue summary proceedings and proceed as a committal matter if 'having regard to its seriousness, the intricacy of the facts or the difficulty of any question of law likely to arise at the trial or any other relevant circumstances', it considers the charge should be tried by the Supreme Court: *Local Court (Criminal Procedure Act 1928* (NT) s 122A. In Tasmania, at any time the court can determine that it is appropriate for an offence to be committed, but the legislation specifically states that in making that determination the court is to take into account the seriousness of the offence and the number and nature of other pending charges: *Magistrates Court (Criminal and General Division) Act 2019* (Tas) s 101(6)–(7) (not in force).

The law on this point is unclear and should be clarified.

Instructions

For all indictable offences in the Criminal Code and in other Acts, the law should clearly permit a magistrate to consider a defendant's criminal history when deciding whether the defendant can be adequately punished for the offence on summary conviction.

This is subject to, if another Act (i.e. non Criminal Code) includes different laws about the use of a defendant's criminal history in relation to particular offences, then those more specific laws in the other Act should continue to apply.

This will mean that when a magistrate is deciding whether to abstain from dealing with any charge summarily, the magistrate can consider the defendant's criminal history. This will apply regardless of which party has the election, and where it is mandatory to deal with the matter summarily. To be clear, the reference to the criminal history should be permitted at any stage of a proceeding.

In considering a defendant's criminal history, it is important the law also explicitly state that a magistrate must otherwise disregard the defendant's criminal history (unless otherwise admissible for the purposes of determining the charge), unless and until the defendant is found guilty or convicted of the offence. This is an important caveat on this power which is necessary to protect the defendant's right to a fair hearing.

6.H Procedure if Magistrates Court must abstain from dealing with matter summarily

Instructions

Where a magistrate considers a defendant's criminal history and decides that a charge cannot be adequately punished by being dealt with summarily, a clear process should be set out as the matter must be committed to a higher court.

The procedure should be as follows:

a) if any evidence was heard as part of the summary hearing, before a magistrate decided to abstain from hearing the matter, then the matter must continue as a committal hearing and be committed in court. That is –

   i) any plea entered by the defendant must be disregarded; and

   ii) any evidence already heard must be deemed part of the evidence in the court committal; and

   iii) the committal must take place in court so that before the defendant is committed, they are addressed by a magistrate in accordance with the equivalent of section 104 of the Justices Act.

(a registry committal is not contemplated as being available in these circumstances)

b) if the magistrate's decision is made after the defendant is found guilty after a summary hearing and convicted of the offence, then the matter should be committed for sentence in the higher courts. The proceeding is treated as a court committal. That is -

   i) finding of guilt and conviction is recorded as a committal for sentence; and

   ii) any evidence already heard must be deemed part of the evidence in the court committal; and

   iii) the committal must take place in court only;

   iv) before the defendant is committed, they are addressed by a magistrate in accordance with the equivalent of section 104 of the Justices Act.

c) If the magistrate's decision is made before any evidence was heard (including on a plea of guilty), then the matter must be dealt with as a committal proceeding – this means all committal options are available including a registry committal. Any plea entered by the defendant must be disregarded.

Division 3: Procedure on charge of summary offence

6.1 Application of Division

Instructions

This Division applies if a defendant is charged[61] in any form with a summary offence.

6.2 Written plea of guilty

Background

This recrafts sections 146A (Proceeding at the hearing on defendant's confession in absentia) of the Justices Act, with updates to improve its form for better readability and practical application. Written pleas can be made for any offence able to be finalised (sentenced) in the Magistrates Court (unless expressly prohibited). This provides for an early and quick resolution pathway. To improve awareness of the option to plead guilty in writing, Court Attendance Notices should contain advice about this option.

Instructions

A defendant charged with a summary offence may lodge with the registrar of the court at the place they are required to appear to answer the charge (the relevant Magistrates Court registry)

[61] See *Acts Interpretation Act 1954* (Schedule 1) definition of charge of an offence means a charge in any form.

a notice in writing advising the defendant will plead guilty to the charged offence/s without appearing in court.
A written plea of guilty can be entered for any offence that can be finalised in the Magistrates Court, unless this is prohibited by a regulation made under this Act or another Act.
The written plea of guilty notice can be sent by the defendant at any time during proceedings, i.e. it is not limited to the first court event date.

6.3 Notice of a written plea of guilty

Instructions

A written plea of guilty must be received by the relevant Magistrates Courts registry no later than two clear business days before the scheduled court event. The relevant registry is the place of the Court nominated in the Court Attendance Notice.
However, the magistrates may decide to accept the form of the written plea if it is in the interests of justice to do so.

6.4 Written plea of guilty – Notice contents and requirements

Instructions

The notice is to be in the approved form. However, a notice does not have to be in an approved form if the written notice is accepted by the Magistrates Court.
Rules of court should outline the notice must contain the following information:

a) the defendant's full name, date of birth and contact information;

b) if the defendant has a lawyer, the lawyer's contact information should also be included;

c) the charge(s) being pleaded to (by reference to the unique number on the Charge Sheet, if known or inserted by the registry). This can also be done by marking the charges on the Court Attendance Notice/ or reference to the Charge Sheet. If it is not clear to the Magistrate which charges are being pleaded to, then the plea will not be accepted;

d) an acknowledgment that the defendant is aware of their right to seek legal advice and has done so if they wish;

e) a signature or an acknowledgment from the defendant that they are the defendant charged with the offence, and that they are entering the plea voluntarily and of their own free will; This should replicate wording reflecting the rule of prudence (no threat promise or inducement had been made);

f) an acknowledgement the defendant wishes to plead guilty in writing without appearing before the court;

g) an acknowledgment that once the court receives the written guilty plea:

i) the matter may proceed to sentence in the defendant's absence;

ii) any penalty may (if applicable) include cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority; and

iii) any penalties or licence disqualification periods will commence from the date of sentence.

h) may be accompanied by additional written material containing information the defendant wished to tell the court in relation to mitigation of penalty. If the defendant wants to provide them, written statements to the court for consideration during sentencing. For example, their work history, family circumstances, any expressions of remorse and potential impacts of certain sentences. The defendant may also attach other relevant documents such as medical reports or character references; and

i) any other information required under the rules of court.

The written plea notice must be signed or acknowledged by the defendant, and this can be done electronically. A lawyer cannot sign a written guilty plea on behalf of a client but can assist clients with the process or submit a plea signed or acknowledged by their client.
Similarly, another person cannot sign a written plea on behalf of a defendant but can support a defendant with completing a written form, if the defendant completes the acknowledgement.
If the written plea of guilty purports to be signed by the defendant or, if a corporation, by a representative, it is admissible in evidence without proof that it was so signed, in the absence of evidence to the contrary.
The written guilty plea notice does not need to be sworn in front of a solicitor or justice of the peace.

6.5 Requirement to advise prosecutor of written plea of guilty

Instructions

If a court receives a written plea of guilty notice from a defendant, the court must advise the prosecutor about it as soon as practicable and give them a copy of the notice and any other accompanying documents. This can occur in any way the court thinks fit, including electronically. However, failing to do so will not be a bar to the matter proceeding at the next court event.

6.6 Written plea of guilty – withdrawal

Instructions

A written plea may be withdrawn by any kind of written notice signed or acknowledged by the defendant and given to the court before the plea is accepted by the Magistrate in court, or by the

defendant attending the next court event for the matter (where it is scheduled to be dealt with) and advising the Magistrate before they accept the plea.
The defendant does not need to give any reason for why the plea is being withdrawn, and the Magistrate is to disregard the written guilty plea and its contents including any additional material as if it was never submitted.
A written notice to withdraw the plea may be given to the court by the defendant's lawyer but must still be signed or acknowledged by the defendant.
If the court is notified of the withdrawal before the scheduled court event for the charge, the court must advise the prosecutor of it as soon as practicable.
Where the defendant has withdrawn the notice of a written plea, the defendant is expected to attend the mention date.
If the defendant fails to appear on the next mention, the court can deal with the matter in the defendant's absence according to ways set out below.

6.7 Written plea of guilty not accepted – procedure

Instructions

When a written plea of guilty is received by the court, the magistrate will consider whether to accept the plea in open court at the next court event.
A magistrate may decline to accept a written plea of guilty if it does not satisfy the notice requirements (for e.g. inadequate information provided, unsigned notice, unclear what charges are being pleaded to) or for another reason.
The other reasons will not be limited by legislation, but may include circumstances where information provided in the notice or additional material with the written plea or at the next court event indicates that:

a) the defendant did not enter the plea themselves;

b) the defendant did not understand the consequences of the plea;

c) the defendant's version of the material facts of the charges and or the charges differs substantially from those in the Court Attendance Notice or Charge Sheet;

d) the defendant may have a lawful excuse or defence; or

e) the magistrate otherwise requires them to attend court.

The court may ask the prosecutor for submissions on whether the matter should proceed on a written plea of guilty.
If a magistrate decides not to proceed with the written plea of guilty, the court must adjourn the charge/s to a new court date; and must issue to the defendant (or representatives) a notice advising of the new court date; and an approved notice that explains why the charge/s was not dealt with. The court can make all relevant and necessary orders as required, including as to bail.

On the court event date on which the charge is adjourned the court must proceed in accordance with the provisions setting out the procedure for dealing with summary offences below - when both parties appear, one party appears, or neither party appears.

6.8 Written plea of guilty accepted – procedure

Instructions

If a court receives a written plea of guilty notice from the defendant and the court accepts the written plea of guilty, the court may proceed to immediately hear and determine the charge in the absence of the defendant as if the defendant had pleaded guilty (that is make a finding of guilt against (convict) the defendant of the charge and proceed to sentence the defendant), or adjourn the charge for sentence at a later convenient time (i.e. if considered long sentence). See further instructions below.
If adjourned, the court must issue a notice advising of the (adjourned) new court event date.
This is for information only and the defendant is not required to attend the court on that date and no action can be taken for failing to attend. If the defendant appears on the adjourned date the matter is still to be dealt with as a plea of guilty unless the defendant indicates otherwise.

Division 4: Procedure in the absence of one or more parties

6.9 Application

Instructions

This Division applies if a defendant is charged in any form, including where the person fails to answer a Court Attendance Notice, appears by NTA, is a person is granted bail or permitted to go at large without bail under the *Bail Act 1980*. It may be useful to recreate section 142A(15) of the Justices Act.
This makes it clear that the procedures apply at any court event, where the court date was fixed as a mention date or a hearing date.
This Division applies to all summary offences that can be finalised in the Magistrates Courts unless the defendant has a right of election which has not yet been exercised. For the offences where an election has not been made, these are treated as indictable offences. See further instructions about committal proceedings, especially the court's ability to issue an arrest warrant in certain circumstances.
If the defendant has entered an election to be dealt with summarily this Division can apply.
The court may use these provisions at any scheduled court event.
The reference to absent defendant means the defendant: if self-represented is not in attendance; or if represented the legal representatives have failed to attend and appear on the defendant's

behalf and the defendant's appearance is excused, or the legal representatives are in attendance and the defendant does not appear and such appearance was not excused.

6.10 How is court satisfied of notice of court date

Instructions

Information about whether a party was aware of a court date may include:

a) proof of service of a Court Attendance Notice or police Notice to Appear;

b) submissions from the parties if lawyer (represented) in previous attendance;

c) information on the court file about actions taken by the registry, such as sending a notice about the court event.

6.11 Procedure if prosecutor absent

This recrafts section 141 and draws on section 147 of the Justices Act.

Instructions

If on a court event for a charge able to be finalised in the Magistrates Court, the prosecutor does not appear but the accused does appear, or has notified the court of an intention to plead guilty in writing, and the court is satisfied the prosecutor had adequate notice of the court event, then:

a) the court may adjourn the matter to another date (and notify the parties) on any terms it considers appropriate; or

b) strike out the charge for prosecution non-appearance[62] with or without costs.[63]

If the case is adjourned and the prosecutor fails to attend at the next court event, then the Magistrate must strike out the charge unless there is good cause not to do so.
The court can make any orders with an order to adjourn it thinks fit, including orders as to bail.
If the court makes a costs order, the costs orders should be just and reasonable. However, these are not limited to any scale of costs (see later instructions).
If the matter is struck out the matter ends and, subject to rehearing application and outcomes, must be recommenced. Compliance with starting proceedings including time frames for commencement apply.

[62] Later instructions outline terms strike out etc and its effect.

[63] Current s 147 Justices Act provides if the complainant does not appear the justices may dismiss the complaint with or without costs.

6.12 Procedure if defendant absent and no plea of guilty

Background

This recrafts section 142 of the Justices Act. It is important the court can finalise criminal matters efficiently, especially where they are about less serious offences or result in less serious penalties. Sometimes, when a defendant does not appear, it is more appropriate for a court to adjourn the matter or issue a warrant for the defendant's arrest. However, on other occasions, it is appropriate that the court proceeds to finalise the matter in the defendant's absence. These provisions, combined with the limitations on sentencing discussed below, strike an appropriate balance.

Instructions

If at any court event (including a day to which the charge has been adjourned) the prosecutor appears and the defendant does not appear and has not pleaded guilty to the charge, whether orally or by means of a written plea; and the court is satisfied the defendant has been given notice of the scheduled court date, the court may:

a) proceed to hear and decide the case in the absence of the defendant in accordance with this division, i.e. a summary hearing can proceed in an abridged form as per instructions below.

b) issue a warrant for the defendant to be arrested and brought before the court to be dealt with according to law;[64]

c) adjourn the charge to another date without issuing a warrant to arrest the defendant if it thinks this appropriate.

The magistrate may enlarge the defendant's bail, enlarge the court attendance notice or allow the defendant to go at large, depending on the circumstances. A notice must be sent to the defendant notifying them of the requirement to appear at the next court event and the consequences for failing to do so.

Note also the matter may be dealt with by ending the charges if police cash bail is granted.[65] See later instructions.

[64] The current requirement for the Magistrate to be satisfied the charge has been substantiated on sworn evidence is removed, and a warrant may be issued on the basis that the defendant did not attend court, if properly served or otherwise aware of the court date. The requirements for warrants generally are discussed further in Chapter 19.

[65] Current section 150A (Justices may order that complaint is ended).

6.13 Absent defendant taken to have pleaded not guilty

Instructions

A defendant in proceedings who is absent and who has not lodged a written plea of guilty in accordance with notice requirements or pleaded guilty orally at any prior appearance is taken to have pleaded not guilty. The court may proceed to hear and decide the case in the absence of the defendant as a summary hearing in accordance with the provisions of this Division (see abridged summary hearing form).

6.14 Adjournment of charges if arrest warrant issued for absent defendant

This replicates section 143 Justices Act.

Instructions

If court issues a warrant for the non-appearance of the defendant, the charge/s are adjourned until the defendant is arrested and brought back before the court to be dealt with according to law.
The prosecutor must be given reasonable notice of the time and place at which the defendant will be brought.

6.15 Procedure if defendant absent but plea of guilty

This recrafts section 142 and 146A of the Justices Act.

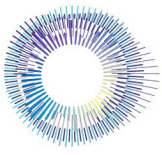
Instructions

If at any court event (including a day to which the charge has been adjourned) the prosecutor appears and the defendant does not appear but has pleaded guilty to the charge, whether orally or by means of a written plea that has been accepted; and the court is satisfied the defendant has been given notice of the court event, the court may hear and determine the charge as if the defendant has pleaded guilty to the charge in person before the court.

6.16 Procedure if prosecutor and defendant are absent

Background

This draws on section 147 of the Justices Act.
Very rarely in the Magistrates Courts there are occasions when neither prosecutor nor defendant attends the court event, without prior explanation. In such cases, the provisions for proceeding in the absence of the prosecutor are to take effect first.



Instructions

In such cases, the provisions for proceeding in the absence of the prosecutor are to take effect first. The matter will either be struck out for prosecution non-appearance that day or adjourned, and if adjourned then the prosecutor and defendant notified of the next court date.
Given the prosecutor is the one bringing the charges, the onus is on them to attend court and progress the matter. If on the adjourned court event the prosecutor does not appear, the court must strike out the charge for non-appearance with or without costs,[66] as per 6.11 of these instructions, unless good cause is shown.
If the court makes a costs order, the costs orders should be just and reasonable. However, these are not limited to any scale of costs (see later instructions).
If the prosecutor appears at the next court event but the defendant does not, the matter proceeds under the provisions covering the defendant's absence.

6.17 Procedure for deciding charges in absence of defendant where no plea

Background

For the general background on operation of section 142A of the Justices Act see *Guy v McLoughlin*,[67] "*that is to say, the magistrate can deal with the complaint without evidence and without the presence of the defendant*."
This recrafts section 142A of the Justices Act which allows for public officers and police officers to present their case without having to call witnesses. However, this ability should be expanded to all prosecutors as it enables the court to deal with matters as efficiently as possible. The magistrate has a discretion about whether it is appropriate to proceed on this basis, which is decided based on the circumstances of each case.

Instructions

For the purposes of this section a prosecutor is not limited to a police or other defined public officer.
When a defendant does not attend court and the magistrate proceeds to hear and decide the case in the defendant's absence, a summary hearing may be conducted based on the facts and particulars provided by the prosecutor in the original notice, stated in court or provided in other material presented to the court, rather than by calling witnesses to give oral evidence.
The court may determine proceedings heard in the absence of the defendant on the basis of the CAN without hearing the prosecutor's witnesses or any other additional evidence of the

[66] Current s 147 Justices Act provides if the complainant does not appear the justices may dismiss the complaint with or without costs.

[67] [2006] QDC 17

prosecutor if it is satisfied of service and is of the opinion the charges set out in the CAN are sufficient to establish the offence charged.
The prosecutor retains the ability to call oral evidence from witnesses if the prosecutor so desires and may advise the court of this preference.
If it is so satisfied, the court must presume in the absence of evidence to the contrary the CAN was issued appropriately and may take as proved any allegation in the CAN containing the charge that was served on the defendant.
If it is of the opinion that the matters set out in the CAN are not sufficient to establish the offence, the court may, require the prosecutor to refer to the statement of facts, preliminary brief or full brief of evidence served on the defendant. Further requirements about admissibility of documents and process should be informed by section 55 of the *Criminal Procedure Act 2004* (WA), sections 83, and 84 of the *Criminal Procedure Act 2009* (Vic) and section 200 of the *Criminal Procedure Act 1986* (NSW).
Note: Section 142A (13) of the Justices Act is to be maintained that only a magistrate can exercise these powers (except for an adjournment).

6.18 Proof of criminal history in absence of defendant

Instructions

A criminal history is required to be given at the first appearance and as part of the preliminary brief.
Provide for the use and admissibility of a criminal history given to the defendant modelled on section 86 of the Victorian *Criminal Procedure Act 2009*.
If the Magistrates' Court—

a) finds the defendant guilty in the absence of the defendant; and

b) is satisfied that a copy of the criminal history was given to the defendant or representatives a reasonable time before the mention of the charge— the criminal history is admissible for the purpose of sentencing and—

c) is evidence that the accused has the previous convictions set out in the criminal history; and

d) is evidence of its contents and particulars set out in the history.

6.19 Procedure for deciding charges in absence of defendant where plea of guilty

Instructions

If the defendant has previously entered a plea of guilty or the court accepts the written plea of guilty, the court must proceed as if the defendant has pleaded guilty to the charge in person and

proceed to record that the defendant is convicted of the offence at the time the plea is accepted and may sentence the defendant in the defendant's absence.
Before determining the matter, the court must require a statement of the facts relating to the offence to be given by the prosecutor and consider any written material or recorded statement given to the court by the prosecutor or lodged by the defendant as additional material with a plea of guilty notice.
A defendant's criminal history is admissible if given to the defendant beforehand. This can be done at the time of arrest or before or at first appearance.

6.20 Limitations on sentencing in absence of defendant

Background

This draws on concepts in section 142 of the Justices Act.
If the court is hearing the matter without the defendant, the court cannot initially sentence the defendant to imprisonment, or cancel, suspend, or disqualify the defendant from holding or obtaining any licence, registration, certificate, permit or other authority. These sentences effect the liberty of a person, and specific procedures are required to strike the correct balance between efficiency and procedural fairness.
The court must first adjourn the hearing to allow the defendant to attend court and make submissions about the appropriate sentence. A notice of adjournment must be given to the defendant in person or by post, or electronically if permitted.
Some penalties require the consent of the defendant, such as a community corrections order, including probation and community service (requires consent of defendant); or a good behaviour bond (as the defendant is required to sign documents after the sentence). A magistrate can decide not to impose these sentences in the absence of the defendant and option is to order a warrant or adjournment with the appearance of the defendant to deal with these.
For completeness section 48(2) of the Penalties and Sentences Act 1992, provides a court may fine an offender even though it has been unable to ascertain the financial circumstances of them.

Instructions

Where a defendant has been found guilty, or has pleaded guilty to an offence, in their absence, the court may proceed to making a finding of guilt and sentence the absent defendant.
However, an absent defendant cannot be sentenced to:

a) imprisonment, including a suspended sentence or intensive correction order or where imprisonment is in combination with another order; or

b) an order (mandatory or discretionary) cancelling, suspending or disqualifying the defendant from holding or obtaining any licence, registration, certificate, permit or other authority;

If the court considers that a sentence of imprisonment or an order relating to a licence or similar above, may or must be given:

a) the matter must be adjourned to a later date; and

b) the defendant must be sent a notice requiring them to attend court on the adjourned date and explaining need for attendance and consequences (warrant issued).

The court can make any order it considers fit with the adjournment order. The exception to the adjourning and issuing of a notice is where the prosecutor can demonstrate to the magistrate that the absent defendant has already been made aware that their license (or similar) may be restricted on the court date if they do not attend, the magistrate can dispense with the notice requirement and proceed immediately to sentence. [This will encourage prosecutorial authorities to give proper notice to defendants in advance and limit the adjournments in a matter.]

6.21 Notice requiring attendance to appear for certain sentence orders – contents

This draws on concepts in section 142(2) – (5) and 142A (6) of the Justices Act.

Instructions

The notice requiring attendance for sentence at the adjourned court date must be an approved form in writing issued by the court, explaining the:

a) new court date and time;

b) reason their attendance is required;

c) possible outcomes if they do not attend on the day e.g. including that orders about a licence or similar may be made in their absence and any disqualification or suspension will apply from that date; and

d) that a warrant may be issued for their arrest.

It will be for the magistrate to identify which penalty the defendant is at risk of, to ensure defendants are receiving targeted notices about the penalty they are facing which requires attendance at court. In particular, the notice should not be generic to avoid any misunderstanding about when a defendant is at risk of being sentenced to imprisonment. It may be appropriate to have notice framed in words such as must attend court for sentencing

6.22 Sentencing procedure on absent defendant

Instructions

If a matter has been adjourned and the notice requiring attendance for sentence issued and the court is satisfied of its service and the defendant fails to attend the next court event stipulated in the notice, the magistrate may:

a) proceed to sentence the defendant in their absence and make any orders relating to a licence, registration, certificate, permit or other authority.

However, where the appropriate sentence is imprisonment, a defendant cannot be sentenced in their absence and an arrest warrant must be issued.

However, the magistrate may also adjourn the matter further if it is appropriate in the circumstances.

The notice requirements as they relate to orders about licences or similar may be dispensed with at the magistrate's discretion, if the prosecutor can show the defendant has already been notified such an order may be made in their absence or has already consented to this in a written plea of guilty. See instructions above about circumstances of aggravation, and in particular failure to allege a previous conviction.

6.23 Notice of finding of guilt and outcome in absence

Instructions

This draws on sections 142A (10), 150(3) and 151 of the Justices Act.

If a defendant is found guilty or sentenced in their absence, they must be notified by the court that sentencing has taken place and given information about the sentence.

The proper officer is obliged to make a record (**a verdict and judgement record**) containing the name of the person tried, sentenced or otherwise dealt with and including stated details under the Criminal Practice Rules, rule 62. This should be provided to the defendant without request (r 62 (3A)).

The verdict and judgement record should be accompanied by a notice informing the defendant of the ability to apply for a rehearing where available. This draws on sections 142(6) and 142A(10 AA) of the Justices Act. The notice should include information about the timeframe for making the application (2 months from the date of the order/determination in absence).

Division 5: Rehearing a matter decided in absence of parties

Background

This recrafts concepts in sections 142(6) and 142A(12) of the Justices Act relating to rehearings.

The case of *Guy v McLoughlin*[68] states at [11]:

> "A person who is convicted on an offence under section 142A and who wishes to challenge the merits of that conviction is required to follow the statutory procedure in subsection (12) and apply for a rehearing. If a rehearing is granted, there will be an ordinary summary trial with evidence and findings of fact can be made and a decision reached by the magistrate, which can then be subject to appeal under section 222. If the application for rehearing is refused, there can be an appeal against that decision under section 222."

Preference is given to model the new provisions on sections 70 to 72 of the *Criminal Procedure Act 2004* (WA), giving more structure to rehearing applications.

6.24 Application

Background

The ability to have a matter reheard does not apply to written pleas of guilty where the defendant has nominated this pathway. These are appropriately dealt with by existing appeal mechanisms.

Instructions

Except for a written plea of guilty or plea orally entered, any party to a charge finalised in their absence can apply to the Magistrates Court for a rehearing, including a prosecutor where the proceedings have been struck out for non-appearance, in the way provided under this Division.

6.25 Grounds for making rehearing application

Instructions

If a matter was decided in a party's absence, that party (or if now legally represented, the representative) may apply to the relevant Magistrates Court for a rehearing.

A rehearing is an order that sets aside the original decision and orders the charges to be dealt with again, on the grounds the applicant (prosecutor or the defendant):

a) did not receive notice of the court date where the matter was decided in their absence; or

b) did not receive sufficient notice of the court date to be able to attend; or

c) did receive notice of the court date but failed to attend for a good reason, which is to be detailed in the rehearing application; or

d) other reasons in the interests of justice.

[68] [2006] QDC 17

The application should state the grounds and include any written supporting evidence.
An application made may relate to 2 or more decisions made at one hearing and must be made to the court's registry at the place where the decision was made and in accordance with any rules or prescribed regulations.
The relevant Magistrates Court is the place that dealt with the matter and imposed the conviction and sentence.

6.26 Timing of making application to rehear

Instructions

The defendant's current right to apply within 2 months of the charge being finalised will be maintained. The prosecutor will have 1 month to apply for a rehearing where the charge was dealt with in their absence. The prosecutor has a shorter timeframe because of their role in court proceedings and general obligation to attend court and progress charges.
However, exceptions can be made to these timeframes if a magistrate considers it appropriate.

6.27 Rehearing application - form and contents

Instructions

A party making a rehearing application must file the written application with the relevant court stating the reasons why the person did not appear and the grounds for the application to rehear. The applicant must give a copy of the application to the other party after it has been filed with the court. The rehearing application must be decided in open court so both parties have the option to attend and be heard before the magistrate decides.
Criminal Practice Rules chapter 3 (Applications) could be expanded to include this process and its requirements.

6.28 Procedure for application to rehear

Instructions

There are currently no clear procedures in the Justices Act for how the application to rehear is dealt with by the court.[69] Please replicate section 72(4) of the *Criminal Procedure Act 2004* (WA). If an application is made to the registrar of the court, the registrar must set a date for rehearing of the application and issue a notice to the parties advising them of the date for determining the rehearing application.

[69] See however Practice Direction No. 6 of 2009

At the rehearing application the court may grant the application if it is satisfied following hearing from the parties, that it is in the interests of justice to do so.
In considering the rehearing application the court may consider the information in the notice and supporting information and receive information or submission made by a party to the proceedings that it considers appropriate to enable it to decide the rehearing application.
The court dealing with an application to rehear need not be constituted by the same magistrate who constituted the court that made the decision to which the application relates.
Rules of court currently deal with applications.[70] Further rules may be developed to provide for this circumstance.

6.29 Failure to appear at rehearing application

Instructions

If the applicant fails to appear at the time fixed for the rehearing application the application is struck out.

6.30 Effect of granting a rehearing

Instructions

If a rehearing application is granted the court will order the charge to be reheard and set the original finding/s of guilt aside, with the effect:

a) any sentence imposed or other order made as a result of the conviction is set aside (ceases to have effect); and

b) any action to enforce the penalty or order must cease (e.g., the court must inform SPER);

c) if as a result of the conviction the defendant was disqualified from holding or obtaining a licence etc, the court must notify the person responsible for issuing the licence of the fact that the disqualification is set aside.

If the rehearing application is refused the conviction and orders originally made (in the absence of the party) remains from the date originally imposed.

6.31 Procedure if court orders charges to be reheard

Instructions

If a court orders the charge/s be reheard (dealt with again), the court —

a) may deal with the charge again immediately if the parties consent; but

[70] Criminal Practice Rules 1999, rule 16.

b) otherwise, must set a court date when the charge will be dealt with again and may make any orders and issue any documents that are necessary as a consequence.

The rehearing occurs as a summary hearing. On such a rehearing, the court shall have all the powers and procedures that it has in the case of an original hearing where both persons appear (including case management).
However, if the applicant does not attend the rehearing, the original convictions or orders are re-instated. This is the current position see sections 142 (7)– (8) and 142A(12A)–(12B) of the Justices Act.
The court that rehears the charges need not be constituted by the same magistrate.

6.32 Rehearing application and appeal to the District Court under this Act

Instructions

If an application for a rehearing and an appeal to the District Court are ongoing at the same time, the appeal cannot be decided until the application for rehearing has been finalised.
A party cannot apply for a rehearing of a matter that has already been the subject of a decided appeal by that party to the District Court.

Division 6: Procedure where both parties appear

6.33 Procedure if prosecutor and defendant appear

Instructions

If both the prosecutor and the defendant appear on the first return date (mention) of the charge/s, or any new court date (given as a consequence of any adjournment or way the defendant is brought to court), the court may take steps required to deal with the matter as provided under the Bill, including :

a) adjourn the charges to another date for any good reason, including case management processes; or

b) if the defendant intends to plea guilty and the charges can be finalised in the Magistrates Court proceed to deal with the charges as a sentence immediately on that date, or adjourn the charges for a sentence hearing; or

c) proceed to hear and determine the matter according to law by asking the defendant to plead to the charge, or if it thinks fit adjourn the summary hearing (or sentencing hearing) to another date for mention or hearing.

If it is the first appearance and the matter is not resolving as a plea on the day, the court should commence case management practices, including questions about legal representation etc.

Also, the court retains the ability to exercise at any time the procedures that apply in dealing with a matter in a party's absence if the occasion arises.
In granting any adjournment, the court can make any orders it thinks are fit.
At any time before a defendant's summary hearing the court may determine any question of law or procedure or give any direction entitled to make at law about any aspect of the conduct of the proceeding. See instructions about direction hearings.

6.34 Types of pleas available to charges at summary hearing

Background

The Criminal Code contains a range of pleas, for example replating to the court not having jurisdiction. Given the operating context of the Magistrates Court and its focus on simple and efficient ways of dealing with charges, these issues are better raised separately during case management process and dealt with by application to the court. If these matters are not raised until the defendant enters a plea, multiple unnecessary court events may have already occurred. This reflects current sections 145 and 146 of the Justices Act.

Instructions

If a defendant may or must plead to a charge, the defendant may plead:

a) not guilty to the charges on the Charge Sheet or

b) guilty to the charges on the Charge Sheet;[71]

Division 6A: Summary hearing

6.35 Defendant to be asked to plead

Instructions

If both the defendant (whether or not legally represented) and the prosecutor are present on the date of a summary hearing, the court must in open court state the substance of the charge to the defendant, as set out in the charge sheet, and ask the defendant if they plead guilty or not guilty. After the defendant enters a plea, the Magistrates Court must then deal with the charge/s summarily as required.
However, the court may proceed by bulk arraignment if satisfied of certain matters (outlined below).

[71] A charge sheet can be amended by a prosecutor following case management, or for other reasons.

Timing

The summary hearing is deemed to begin when the defendant is asked to plead and enters a plea.[72]

6.36 How plea in court given

Instructions

A defendant asked to plead may give their plea to the court:

a) verbally - this includes a defendant attending court by video link or by phone, where their personal presence in the courtroom is not required.[73]

b) using an interpreter or communication aid;

c) by instructing their legal representative to enter a plea on their behalf (but the defendant must be present at the court event, including remotely to allow for the opportunity to object to the plea).[74]

6.37 Court's obligations prior to accepting plea if defendant unrepresented

Instructions

Before accepting a plea, including a bulk plea, a magistrate must ask an unrepresented defendant a series of '*plea confirmation questions*' to confirm that the defendant:

a) is aware of their right to get legal advice; and

b) understands each of the charges against them.

For the purposes of entering a plea or answering the questions, it is sufficient for the court or the defendant to describe the offence charged in general terms.

6.38 Court's obligation prior to accepting a guilty plea if defendant unrepresented

Instructions

If an unrepresented defendant indicates **a plea of guilty** then prior to accepting a guilty plea, the magistrate must confirm the defendant:

a) understands that by pleading guilty they are admitting to the offence and can be sentenced for it; and

[72] See 597C(3) Criminal Code.

[73] See section 15A of the *Penalties and Sentences Act 1992.*

[74] Written pleas of guilty are accepted where the defendant is not present. If the defendant appears and had earlier provided a notice written plea this can be verified by asking the plea to be entered verbally.

b) has not been subject to any threat, promise or inducement to enter the plea (rule of prudence).[75]

For the purposes of entering a plea or answering the questions, it is sufficient for the court or the defendant to describe the offence charged in general terms.

6.39 Procedure if defendant refuses to enter a plea

Instructions

If a defendant is required to enter a plea in court but will not plead or answer directly to the charge, the court may, if it thinks fit, enter a plea of not guilty to the charge/s before the court on the defendant's behalf.
A plea entered by a court on behalf of a defendant has the same effect as if it had been entered by the defendant.[76]

6.40 Procedure on pleading to multiple charges - 'bulk arraignment'

Background

Court delays can be experienced, in cases where the defendant has multiple charges, by each charge having to be read individually. Laws relating to bulk pleas are currently included in section 145 of the Justices Act and, in the Criminal Code, sections 552I and section 597C(2).
The laws currently permit bulk pleas for offences that can be finalised in the Magistrates Court, but only where defendants are represented. This is changing with safeguards. Defendants, whether they are represented or not, can enter a single plea to multiple charges by entering a bulk plea. For all bulk pleas, the magistrate must confirm certain matters with the defendant.

Instructions

For any defendant, whether represented or not, a bulk arraignment can occur with the consent of the defendant and if the court is satisfied the defendant:

a) intends to plead to each charge in the same way by way of bulk arraignment; and

b) understands that by entering a bulk plea, this means their plea to one charge will be applied as if it is a plea to all charges before the court.

To be clear, the bulk plea is just a tool for pleading to many offences in the same way (there is no minimum) and does not prevent the defendant from pleading not guilty to some and guilty to others. It does not mean pleading to everything before the court in the same way. It gives the ability to bundle up charges that are being pleaded to in the same way. There is nothing to

[75] See form of words in current section 114(2) of the Justices Act (acknowledgement).

[76] This is consistent with section 601 of the Criminal Code.

prevent the defendant from splitting off charges they wish to contest and pleading to others by way of bulk plea.

For unrepresented defendants, magistrates must first ask the plea confirmation questions (in 6.37) prior to asking the bulk plea questions, to ensure defendants are aware of the substance of the charges and the right to obtain legal advice.

If the Magistrates Court proceeds by a bulk arraignment, the court is not required to state the substance of any charge or charge sheets before the court to the defendant.

To remove any doubt the court can fulfil this obligation by using schedules or lists prepared by the prosecutor which identifies the short form of the charge (for example 100 wilful damage charges).

A bulk arraignment means:

a) If the charge sheet contains more than one charge, a plea to any number of charges may be taken at one and the same time on the basis that the plea to one charge will be treated as a plea to any number of similar charges on the same charge sheet; or

b) If more than one charge sheet is before the court, a plea to any of the charge sheets may be taken as a plea to any number of charge sheets.

6.41 Court to record acceptance of plea

Background

This is to provide a 'short form' less confusing version of the higher courts' *allocotus*[77] procedure. The administration of the allocotus constitutes the courts acceptance of the verdict of the defendant's plea of guilty. At that point the defendant is convicted and the court moves to sentencing. The failure to administer it is not fatal as at common law it is only one way of indicating the court's acceptance.

The intent is the court takes action that indicates it acceptance of the plea of guilty. It is intended to have the same effect about the timing of the recording of a conviction but avoid the strict formality in the Magistrates Court setting.

Instructions

If the magistrate is satisfied the defendant understands the plea being entered, the plea will generally be accepted.

Where a **plea of guilty** has been entered, the magistrate must state in open court, on the record, that the plea of guilty has been accepted.

A short verbal statement such as: "Your plea of guilty has been accepted, and the court formally records you as pleading guilty to the charge and convicts you of the offence".

[77] See section 648 of the Criminal Code.

Timing

The magistrate's recording of its acceptance of the plea of guilty and conviction sets the point of conviction of the defendant. This is relevant for timeframes for appeal and other matters.

6.42 Procedure if defendant pleads guilty

Instructions

If a defendant pleads guilty in court, and the court accepts the plea, the court formally records that the defendant is guilty of the charges and convicts the defendant of the offence and can proceed to sentence and makes orders or deals with the defendant in any manner authorised by law, as the case requires.

Adult sentencing is regulated by the separate *Penalties and Sentences Act 1992*. It is not intended to replicate sentencing procedure in the Bill.

For completeness, a guilty plea (in any form) that has been accepted/recorded by a magistrate can only be withdrawn by making an application to overturn.[78] There is case law applying to the test which is not being set out in this Bill. The new Bill is not codifying the common law.

6.43 Procedure if defendant pleads not guilty

Background

This recreates sections 146 and 148 of the Justices Act.

Instructions

If a defendant **pleads not guilty**, the court proceeds to a summary hearing to decide the charges.

A defendant must attend a summary hearing in person (including remotely). Later instructions provide for the procedure if a defendant disrupts proceedings.

To the extent the procedure for a summary hearing is not contained in this Bill,[79] the conduct and procedure to be followed in a summary hearing in the Magistrates Courts is to be the same as the procedure followed in criminal trials in the Supreme Court.

This will include (but is not limited to) procedures about:

a) the order in which the parties present their cases; and

b) the examination, cross-examination and re-examination of witnesses; and

c) the admission of evidence; and

[78] A guilty plea made in writing can be withdrawn before it is accepted by the Magistrate, by any kind of written notice signed or acknowledged by the defendant and for any reason.

[79] See e.g. instructions about amendment of charges, separate trial or joint trials etc

d) any submission of no case to answer.

In the summary hearing of a charge, the defendant is entitled to defend the charge and to cross-examine any witness called by the prosecutor and to call, examine and re-examine any witness, subject to the *Evidence Act 1977*. This recrafts section 72 of the Justices Act.
Also, a summary hearing can be conducted digitally or electronically with the magistrate's permission if the court considers it is in the interests of justice. The conduct of the hearing is subject to the *Evidence Act 1977*.
See section 15A of the Penalties and Sentences Act in relation to sentencing.

6.44 Admissions of fact

Instructions

Replicate current section 148A (Admissions of Fact) of the Justices Act with updates to terminology and omitting references as required. The cross reference to the operation of section 644 of the Criminal Code in relation to the admission of a fact on the hearing of a complaint that relates to an indictable offence being heard and decided summarily needs to be retained.

6.45 Proof of negative

Instructions

Replicate current section 76 (Proof of negative) of the Justices Act, with appropriate updated terminology to improve understanding.

6.46 Offences involving circumstances of aggravation

Instructions

Replicate section 575 of the Criminal Code for application for a charge at a summary hearing, to provide for the same effect. This makes clear the application of the law

6.47 Conviction for attempt to commit offence

Instructions

Note, unlike indictable offences, simple offences do not have a general provision regarding attempts to commit a simple offence as a crime. See in comparison section 535 of the Criminal Code. Attempts for simple offences only exist if the Act creating the offence also provides that the attempt to do the act/omission (the offence) is also an offence. See e.g. section 210 (Attempts to commit offences) of the *Animal Care and Protection Act 2001.*

Replicate section 583 (1) of the Criminal Code to apply in the context of a simple and indictable offences dealt with summarily at summary hearing taking into account attempts are only available for a simple offence if the Act creating the offence provides for this.

6.48 Summary hearing determination by the court

Instructions

The court must decide the summary hearing after hearing the defendant, prosecutor, witnesses and evidence as authorised by law (common law, this Act and any other Act).
At the conclusion of the hearing, the magistrate may find the defendant guilty of the charge and convict the defendant of the offences charged, or make an order as to the defendant (e.g. if no case to answer successful or charges withdrawn (No evidence offered – NETO'd) by the prosecutor, or dismiss the charges as the justice of the case requires). Also note the ability to vary the charge [see amendment instructions].
The magistrate must state any finding on the record in court and give reasons for the decision.

6.49 Summary hearing – finding of guilt procedure

Instructions

If a court finds the defendant guilty of the offences charged after a summary hearing the court must sentence the defendant for the offence and may make any other orders in respect of the defendant as authorised in law, as the case requires.
See also instructions for formal orders and convictions.

6.50 Summary hearing - matters withdrawn by the prosecutor procedure

Instructions

The court may, at any time before the charges the subject of the summary hearing has been finally determined, permit the charges to be withdrawn on such terms (if any) as it thinks fit.
If a matter is withdrawn by the prosecutor, the matter is struck out and the defendant is taken to be discharged in relation to the offences concerned. See later instructions about effect of withdrawal (including for re-charging and costs).

6.51 Procedure on dismissal – finding of not guilty procedure

Background

Draws on section 149 of the Justices Act and section 700 of the Criminal Code.

Instructions

A court may make an order of dismissal and give the defendant a certificate certifying that a matter has been dismissed if it decides to dismiss the matter.
A court must give the defendant a certificate certifying that a matter has been dismissed if requested to do so by the prosecutor or by the defendant (including representatives) against whom a matter has been dismissed. The request for a certificate can be made at any time, including after the proceedings have concluded.
To remove doubt a certificate of dismissal is not available where a prosecutor has withdrawn charges.

6.52 Effect of certificate stating that matter has been dismissed

Instructions

A certificate certifying a matter has been dismissed, if produced and without any further proofs being required, prevents any later proceedings in any court for the same matter against the same person.
A consequential amendment to remove section 700 of the Criminal Code is required.

Division 7: Dismissal of charges under Mental Health Act 2016

6.53 Dismissal under the Mental Health Act 2016

Background

Under section 172 of the *Mental Health Act 2016* (MHA), a Magistrates Court may dismiss a simple offence (as currently defined in the Justices Act) if the court is reasonably satisfied, on the balance of probabilities, that the person charged with the offence was, or appears to have been, of unsound mind when the offence was allegedly committed or is unfit for trial. See also section 173 MHA.

Instructions

Provisions should alert the reader to the operation and effect of the relevant provisions of the MHA.

Division 8: Dismissal of charges if police cash bail granted

6.54 Court may dismiss charges if police cash bail granted

Instructions

Replicate current section 150A (Justices may order that complaint is ended) of the Justices Act with necessary updates to refer to the proceedings being dismissed as required about the operation and effect of this provision.

Division 9: Convictions and orders

6.55 Record of conviction or any other orders to be made

Background

This draws on sections 151(3) and (4) of the Justices Act. Note verdict and judgement records are used in context of remand warrants see current section 88A of the Justices Act. Later instructions provide for this circumstance.

Instructions

A court must make a record of any remand in custody, conviction, order or any other matter as a verdict and judgement record (proper form of record). This is to be kept as a record of the court. Rule 62 of the Criminal Practice Rules sets out the requirements of a verdict and judgment record.
The registrar must give the defendant a copy of the record on request by the defendant in accordance with the Rules.

Part 7: Costs in summary proceedings

Background

The Magistrates Courts are a 'costs jurisdiction': Costs in the criminal jurisdiction are not automatically ordered. Costs orders are not a sentence. Generally, they are awarded for compensation to the 'successful' party to offset the expenses associated with the legal proceeding. They are not awarded to 'punish' an unsuccessful party.

Circumstances in which costs may be ordered

- Magistrates have the power to order costs on adjournment of a matter that may be finalised (currently defined simple offence) in the Magistrates Courts. Specifically, one party can be

ordered to pay the costs 'of and occasioned by the adjournment' to the other party as 'may appear just'.[80]

- If the prosecutor has not attended court;[81]
- During the course of proceedings, a magistrate may issue a direction for the disclosure of evidence or other material to the defendant in accordance with disclosure obligations under the Criminal Code.[82] If a person fails to comply with this direction, the court can order the person to give evidence (either in writing or orally) about why they have failed to comply with this direction.[83] After considering the evidence, if the magistrate is satisfied the noncompliance was unjustified, unreasonable or deliberate, then the magistrate may order the defendant be paid an amount of costs that is considered 'just and reasonable'.[84]
- In the **Justices Act, part 6 division 8**[85] allows a magistrate to order a defendant to pay the prosecutor's costs if they are convicted summarily, and to order a prosecutor to pay the defendant's costs if the charge is dismissed or struck out because the court does not have jurisdiction. The costs awarded to either party must be the costs that, to the magistrate, 'seem just and reasonable'.[86] If the prosecutor is a police officer or public officer[87] there are further limits on when a magistrate may make a costs order against them. The magistrate must also be 'satisfied that it is proper' for the costs order to be made following a consideration of all relevant circumstances. A list of examples is provided in the Act.

In deciding costs that are just and reasonable in these circumstances, the court can generally only order costs for items listed in the 'scale of costs' and only up to an amount allowed for in that scale. The scale of costs lists legal professional work and other disbursements that can be claimed, and how much can be claimed for each. This scale is currently in the Justices Regulation 2014 and originally came into force in July 1999. Amounts in the scale have not been updated since that time. If a party wants to recover an amount above the scale of costs, the

[80] *Justices Act 1886* (Qld) s 88(3).

[81] This maintains the current powers in *Justices Act 1886* (Qld) s 147. See also, as to strike out following non-attendance, Chapter 16.

[82] *Justices Act 1886* (Qld) s 83A(5)(aa). See further Chapter 14.

[83] *Justices Act 1886* (Qld) s 83B(1).

[84] *Justices Act 1886* (Qld) s 83B(4)(b).

[85] *Justices Act 1886* (Qld) ss 157-160.

[86] *Justices Act 1886* (Qld) ss 157-58.

[87] In this section, the term 'public officer' does not include 'an officer or employee of the public service of the Commonwealth, an officer or employee of a statutory body that represents the Crown in right of the Commonwealth, or an officer or employee of a local government': *Justices Act 1886* (Qld) s 158A(6).

magistrate must be satisfied a higher amount is 'just and reasonable having regard to the special difficulty, complexity or importance of the case'.[88]

- There are separate costs provisions relating to appeals under the Justices Act. A District Court judge can make orders for costs to be paid by either party 'as the judge may think just'.
- Under the Drugs Misuse Act 1986, no costs can be awarded for any proceeding under that Act, except in relation to a failure by a party to comply with a court direction about disclosure.[89] The exception about not complying with disclosure was added in 2010 during the Moynihan reforms,[90] but the main provision is from the original Act as it was passed in 1986.

Instructions

Costs are an important part of the Magistrates Court jurisdiction, and the overall position is not changing. Magistrates will maintain the power to order costs on adjournment, and non-disclosure as currently allowed. The costs available on appeal will remain the same as the current provisions in the Justices Act. These instructions are dealt with separately under general procedures below.

There should be a division in the new Bill dealing with costs when a summary proceeding is finalised drawing on current part 6, division 8 of the Justices Act in accordance with the instructions below. Prosecutors who successfully prosecute a matter to conviction should maintain the ability to apply to the Magistrates Court for costs, and defendants who have had charges dismissed should be able to seek the costs incurred to defend the charge. However, the terminology used in the law and processes should be made clearer.

7.1 Costs on summary conviction – awarded to the prosecutor

Instructions

Recraft current section 157 of the Justices Act.

For prosecutors seeking costs, these are currently available 'in all cases of summary convictions and orders' (and a 'summary conviction' is defined as a conviction for an offence that can be finalised in a Magistrates Court.

The term 'costs on conviction' should be updated to 'costs on a finding of guilt or the acceptance of a guilty plea' so it is easier to understand.[91] It should be clear conviction in this context is

[88] *Justices Act 1886* (Qld) s 158B(2).

[89] *Drugs Misuse Act 1986* (Qld) s 127.

[90] *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) s 63.

[91] As adopted from Criminal Code (Qld) s 77.

anyone who pleads or is found guilty of a summary offence or indictable offence dealt with summarily may be subject to paying the prosecutor's costs if the criteria in the previous paragraph is met.

7.2 Costs on summary dismissal, withdrawal, strike out – awarded to the defendant

Background

For defendants, costs are currently available if the magistrate *dismisses* a charge,[92] or when a charge is struck out because the court does not have jurisdiction to hear it.[93]
The term 'dismiss' is not defined and can sometimes be unclear, given it is used in different ways in different parts of the Justices Act. Further, there is case law to suggest that costs would not be able to be ordered when a charge is withdrawn as opposed to being dismissed.[94]

Instructions

Recraft current section 158 of the Justices Act.
Costs should be available to a defendant when a charge that was able to be dealt with summarily is dismissed (not guilty) or struck out, including but not limited to the following reasons:

a) want of jurisdiction (meaning the court does not have jurisdiction to deal with the offence);

b) the prosecutor has not attended court;[95]

c) the charge has been withdrawn by the prosecution; or

d) the prosecution offers no evidence.

Any of those circumstances could involve a situation where a defendant has incurred costs that it is just and reasonable to recover. However, this will not apply to any discharge following a committal proceeding or to the ending of a proceeding in another way not listed here, such as by cash bail, under the Mental Health Act or dismissal following in court diversion.

7.3 Test for order costs awarded to defendant or prosecutor

Background

The current two-tier test for ordering costs — that a party can be ordered to pay costs that seem 'just and reasonable' in accordance with the scale, but higher amounts may be ordered if the

[92] Section 158(1) of the Justices Act

[93] Section 158 (2) of the Justices Act (for 'want of jurisdiction')

[94] *Turner v Randall* [1988]) 1 Qd R 726, 728; *Besgrove v Larson* [2001] QDC 144, [14]–[17] (McGill DCJ).

[95] This maintains the current powers in *Justices Act 1886* (Qld) s 147. See also, as to strike out following non-attendance, Chapter 16.

magistrate is satisfied the amount is 'just and reasonable having regard to the special difficulty, complexity or importance of the case' — will be retained in the new criminal procedure laws.[96] However, the 'just and reasonable' test is subject to two additional tests or considerations.
First, the scale of costs states that only 'necessary or proper' costs may be allowed. This means a cost is allowed only to the extent to which:[97]

- incurring it was necessary or proper to achieve justice or defend a party's rights; or
- it was not incurred by over-caution, negligence, mistake or merely at the wish of a party.

Second, there is an additional test set out in section 158A, to the effect that costs may be ordered against a prosecutor who is a police officer or a public officer[98] only if a magistrate is also satisfied that it is 'proper' for the costs order to be made.
These circumstances should be considered (with appropriate variations) to a costs order made against either party. To be clear, this means that these circumstances will be taken into account for any prosecutor (including a police officer, public officer, private prosecutor or another person) and for the defendant.

Instructions

Maintain the current position that either party may be awarded costs that are 'just and reasonable'.
The change is to apply consideration of 'proper' circumstances for any prosecutor and defendant, as detailed below.
What amounts to 'just and reasonable' will require a magistrate to take into account all relevant circumstances, and the law will provide a non-exhaustive list of examples. The examples of what to consider will not be definitive and allow magistrates to consider any matters they deem relevant. The examples should be drawn from the 'proper' test currently in section 158A and the 'necessary or proper' considerations in the scale of costs. They should include:

a) whether the participants have acted in good faith during the proceedings, including whether the costs were necessary for the prosecution to achieve justice or for the defendant to defend themselves;

b) whether there has been a failure by a party to comply with the objects or principles of the criminal procedure legislation, or an order of the court;

c) the conduct of the parties during any criminal investigation. For example, whether the investigation was conducted appropriately and according to law, and whether the defendant behaved in a way that a reasonable person would believe suspicious;

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[96] *Justices Act 1886* (Qld) ss 157–8, 158B.

[97] *Justices Regulation 2014* (Qld) sch 2 reg 3.

[98] With the exceptions of officers or employees of the Commonwealth or a local government: n 87.

d) the conduct of the parties during court proceedings. For example, if the parties genuinely engaged in case conferencing and complied with any disclosure and case management requirements throughout the proceeding, and if any costs were incurred due to over caution negligence, mistake or merely the wishes of a party;

e) the circumstances of the outcome. For example, if a matter was dismissed on technical grounds rather than due to lack of evidence, when a matter was withdrawn, and if a defendant was acquitted of a charge but convicted of a different charge;

f) any other matter the magistrate considers relevant.

7.4 Limits on amount of costs orders

Instructions

Recraft section 158B of the Justices Act.
In deciding the costs that are just and reasonable to be paid at the conclusion of summary proceedings, a magistrate may award costs only:

a) for an item allowed under a scale of costs prescribed under a regulation; and

b) up to the amount allowed for the item under the scale

However, a magistrate may award a higher amount for costs if satisfied the amount is just and reasonable having regard to the special difficulty, complexity or importance of the case.
The scale of costs currently in schedule 2 of the *Justices Regulation 2014* should be revised and updated to reflect contemporary legal professional costs.

7.5 Application and timing of costs orders

Instructions

A magistrate will have the authority to order costs on an application from either party, as available. In addition, after a proceeding has been finalised, a magistrate will maintain jurisdiction to decide costs in the matter until those costs are settled. The law should provide for the recent Court of Appeal case[99] which reconsidered previous authority that a magistrate has no jurisdiction to make a costs order if a formal order of dismissal has already been made. It is appropriate to allow a matter to be adjourned for consideration of costs, even though a charge has been dismissed or finalised. This avoids substantial injustice and substantial inconvenience and inefficiency.
This will allow each party to review any costs being sought and make informed submissions about those costs. If a party does not attend court on this occasion, costs orders may still be made in their absence.

[99] *Madden v Commissioner of Police* [2023] QCA 31.

7.6 Enforcement of costs orders by registration

Background

Costs orders and any other monetary orders (such as order for fines, compensation or restitution) will all be referred to SPER for enforcement. Court registries will no longer have enforcement powers. This single pathway for unpaid amounts will provide for consistency in how orders and debts payable are managed and enforced, and for early access to payment options that might assist a person.

Instructions

Where an order for costs is made by a magistrate, the costs order must be automatically referred to SPER by either the magistrate or the proper officer of the court. This will allow the courts to refer all costs orders to SPER as soon as they are made, consistent with both the current and proposed new approach to other monetary orders.

Referring a costs order to SPER is not in itself enforcement action, and it will be a matter for SPER to take any enforcement action appropriate as permitted under the *State Penalties Enforcement Act 1999*.

While costs orders will be referred to SPER for enforcement, the person owing money must not be subject to imprisonment for defaulting on any payments. This is because costs are not a penalty. This aligns with existing provisions in the State Penalties Enforcement Act which prevent an order being referred to SPER if the original order did not allow for default imprisonment.[100] A similar provision already exists for the payment of offender levies in Part 10A Offender levy in the Penalties and Sentences Act (PSA), particularly section 179F (Enforcement of offender levy by registration).

It is suggested it may be useful to model provisions on enforcement of costs on section 179F of the PSA.

When a matter is decided in a party's absence, an order for the payment of costs must still be immediately referred to SPER, however there must be a period of time before SPER may commence any enforcement action, to allow the defendant to be notified of the order and to pay the amount or apply for a rehearing.

To remove any doubt, costs orders made against police or public officers cannot be referred to SPER because those officers are fulfilling a public function. Methods of enforcement used by SPER would not be effective against police officers, public officers or government agencies.[101]

It is expected publicly funded agencies, as model litigants, comply with all orders of the court. However, for any matters where enforcement is required, it should be made clear that these

[100] Section 34(2B) SPE Act.

[101] Section 158A(3) (4) of the Justices Act.

costs ordered will constitute a civil debt that can be recovered in court. As in the current Justices Act, if there is an appeal against a costs order then payment of those costs shown in the certificate will be stayed until the appeal is decided and will be later paid in the amount ordered or confirmed by a further order made in the appeal.[102] It is noted section 54 of the SPE Act provides for the effect of appeal on an enforcement order.

7.7 Miscellaneous

Instructions

Draw on section 159 to ensure the cost orders is recorded in the verdict and judgement record and consistent with the recording of formal conviction and orders above.

7.8 Enforcement of monetary orders

Background

When SPER was introduced, the Justices Act was amended to permit the early registration of a matter with SPER, without any requirement to first attempt to use the enforcement provisions (warrant of execution) under the Justices Act. It was explained that:

> The early registration of the matter with SPER will allow the associated benefits including increasing access to all debtors to the customer focused and flexible payment options offered by SPER. Further, this amendment will provide for one streamlined single and consistent fine collection system and allow court registries to focus on providing more court related services.[103]

The new criminal procedure legislation should not provide for a 'warrant of execution'. As explained, these warrants are no longer used or appropriate, and any enforcement actions required to recover money from individuals and corporations should be managed by the dedicated SPER scheme. However, a warrant of execution or 'levy by distress or execution' is still provided for in some other legislation, such as the Tow Truck Act 1973. Where that is the case, as is presently provided for in section 161A of the Justices Act, those matters should be able to be referred to SPER instead of a warrant being issued.

Instructions

Replicate the effect of section 161A (Mode of levying penalties, moneys) to provide that a monetary order made in connection with a criminal proceeding in the Magistrates Courts, other than an order for costs, can be immediately referred to SPER.

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[102] Section 158A(5) Justices Act.

[103] Explanatory Note, State Penalties Enforcement and Other Legislation Amendment Bill 2006 (Qld) 17.

This is currently grouped in this part for convenience, it may be more appropriate to locate such a provision under general matters or as a transitional provision.

Part 8: Appeals from Magistrates Court orders

Background

Part 9 Division 1[104] of the Justices Act covers appeals of an order made in a Magistrates Court to a single judge of the District Court.[105] These appeals are generally known as '222 appeals'.
Under section 222(1), an appeal can be made by a person who 'feels aggrieved as complainant, defendant or otherwise[106] by an order',[107] generally within one month of the date of the order.
However, the following exceptions apply in section 222(2):

a) a person cannot appeal a conviction or order made in a summary way under section 651 of the Criminal Code;[108]

b) if the order relates to an indictable offence dealt with summarily, a complainant (prosecutor) may only appeal against a sentence or an order for costs;

c) if a defendant pleads guilty or admits the truth of a complaint, a person may only appeal on the ground that a fine, penalty, forfeiture or punishment was excessive or inadequate.

The Attorney-General may appeal to a District Court judge against an order made summarily within one month after the date of the order (s 222(2A)).
Case law is settled that appeals are from final orders (not allowing for appeals against interlocutory rulings).[109]

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[104] Sections 231 – 232A of the Justices Act.

[105] Section 117 of the *Youth Justice Act 1992* states this Part 9 applies in relation to an order made by justices dealing summarily with a child charged with an offence subject to certain changes e.g. references to a District Court judge are taken to be a reference to the Childrens Court judge.

[106] Only the parties can properly be referred to as either complainant or defendant (section 42JA). Consequently, the reference to "a person who feels aggrieved…otherwise" is clearly a reference to someone who is not a party to the original proceedings.

[107] 'Order' is defined broadly in section 4 of the Justices Act. However, it excludes any order made by justices committing a defendant for trial for an indictable offence, or dismissing a charge of an indictable offence, or refusing to grant bail and in the last mentioned case, whether or not the justices are sitting as a Magistrates Court or to hear an examination of witnesses in relation to an indictable offence.

[108] Section 668D of the Criminal Code separately provides for a person convicted of a summary offence under section 651 to appeal against conviction or sentence on particular grounds, some of which require leave.

[109] See *Schneider v Curtis* [1967] Qd R 300.This is based on construction of order made on complaint; that an appeal only lies from an order which disposes of the complaint, for example by dismissing it, or by entering a conviction and imposing a penalty. Such an appeal does not lie from a ruling there is no case to answer, for although this may amount to the refusal of the application, it is made upon an incidental application during the hearing of a complaint and is not an order made on the complaint. This is consistent with broader policy regarding appeals not being immediately available for interlocutory matters for e.g., leading to fragmentation and (unnecessary) delay of criminal processes. For completeness, costs orders are considered final orders: *Coulter v Ryan* [2006] QCA 567.

An appeal is by way of rehearing on the original evidence unless the District Court is satisfied there are special grounds for giving leave to adduce fresh, additional, or substituted evidence (s 223).

It is noted continued references to 'justices' has been the source of judicial consideration given orders are made by magistrates.[110]

In *Smith v Ash*[111] the court considered whether an appeal lies against a magistrate's refusal to award costs where the defendant had pleaded guilty, i.e., prohibited under section 222(2)(c). The majority of the Court considered section 222(2)(c) should not be construed as prohibiting appeals to the District Court from a magistrate's costs order:

> At [9] "*…Reading the exceptions to the appellate jurisdiction of the District Court conferred by S222(2)(a)–(c) consistently with each other, it seems incongruous that the legislature intended s 222(2)(c) to exclude defendants who plead guilty from appealing in respect of final costs orders whilst allowing the complainants where a defendant has been found not guilty to appeal under s 222(2)(b) against cost orders*."

Appeals and private prosecutions

Currently, the Justices Act allows a magistrate's decision to dismiss a private prosecution under section 102C on the basis that the proceeding is an abuse of process, frivolous or vexatious to be appealed to a judge of the Supreme Court in chambers by way of application made by originating summons. The decision on appeal will be final. Further, section 102D expressly provides that there are no other appeal rights in relation to that application, or a magistrate's decision to strike out a matter due to lack of particulars.[112] This is inconsistent with the District Court of Queensland Act 1967 which states that an appeal may not be made from a Magistrates Court to the Supreme Court.[113]

The new scheme for private prosecutions set out above, shifts similar considerations of vexatious, abuse of process into the test for authorisation. Essentially, the new scheme provides that once a private prosecution is authorised it will proceed in the same way and according to the same procedures as any other prosecution for a criminal offence.

Once a private prosecution has run its course in the Magistrates Court, it can be appealed in the same way as any other summary criminal prosecution.

An appeal should be able to be made by an applicant on the ground that their application to start a private prosecution was refused and they are aggrieved by that decision.

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[110] *Tierney v Commissioner of Police* [2020] QDC 33.

[111] [2010] QCA 112. The Court also considered that legislative provisions limiting jurisdiction were to be narrowly construed; " I consider if the legislature intended s 222(2)(c) to restrict the appellate jurisdiction conferred by s 222(1) by prohibiting appeals in respect of costs where a person pleaded guilty it would have clearly have stated as much.

[112] *Justices Act 1886* (Qld) s 102D(5).

[113] *District Court of Queensland Act 1967* (Qld) s 112.

An additional ground of appeal should also be available to a defendant, following the final determination of a private prosecution in the Magistrates Courts, where they are aggrieved by a decision to grant an application to start a private prosecution and the prosecution allowed to proceed.

Theoretically, this 'preserves' the current appeal right under section 102D to the Supreme Court and provides consistency with the way Magistrates Court orders are to be appealed.

Criminal Code

There are also provisions about appeals from an order of the Magistrates Court in the Criminal Code:

- **Section 552J** (1) (2) provides for appeals is summarily convicted of indictable offence on the basis the Magistrates Court erred by deciding the conviction or sentence summarily. **Section 552J** (3) states the Attorney-General may appeal against sentence on grounds the Magistrate erred by deciding the sentence summarily.[114]
- **Section 668D** provides a person convicted of a summary offence by a court under section 651 to appeal against conviction or sentence on particular grounds, some of which require leave. This an appeal to the Court of Appeal.
- **Section 669A** provides for appeals by the Attorney-General to the Court of Appeal against a sentence for an indictable offence dealt with summarily (s669A(1)(b)). If the Attorney General appeals under this provision, any appeal from the accused person under the Justices Act is also shifted to the Court of Appeal and both appeals must be heard together (s 669A(6)).
- **Section 669A(2A)** provides for the Attorney-General to refer a point of law (a '**case stated**') arising at a summary trial of an indictable offence to the Court of Appeal if the person has been:
    - **acquitted** of the charge at the summary trial; or
    - **discharged** on the charge after the prosecution, because of a decision on the point of law by the court of trial, indicates to the court that it will not further proceed on the charge in the proceeding before the court; or
    - **convicted**, following a determination of the court of trial on that point of law—
        - of a charge other than the charge that was under consideration when the point of law arose; or
        - of the same charge with or without a circumstance of aggravation

[114] See also the *Dangerous Prisoners (Sexual Offenders) Act 2003* (s 43AI), *Police Service Administration Act 1990* (s 10.23C*), Penalties and Sentences Act 1992* (s 161ZU) contains similar provisions to s 552J.

In this section **discharged** includes the dismissal or striking out of a charge at a summary hearing.
Although section 669A Criminal Code also provides in part for the Attorney-General to appeal or refer a point of law in relation to some summary matters, those provisions should not be relocated into this Bill. They operate in the context of chapter 67 of the Criminal Code and cannot be easily separated.

Instructions

There should be a Part in the new Bill dealing with 'Appeals'.
Generally, there is no intention to interfere with or alter rights under these appeal provisions. The interpretation given through the consideration of common (case) law is to remain. A decision to commit a person for trial is not within the definition of 'order.' Drafting advice is sought as to whether the appeals provisions should be a division within the summary proceedings part.
Most of the sections in Part 9 Division 1 should be replicated in this Part, in a simple format that can be easily understood. Some terms will need to be updated for consistency with other proposed amendments in terminology, for example the replacement of the term 'clerk of the courts' with 'registrar'.
Further information about the order of sections and the intention for some matters to be moved to the Rules or other parts of the Bill is discussed further below.

8.1 Right of appeal to a single District Court judge

Instructions

Section 222 (1) – (2A) of the Justices Act should be replicated to set out the rights of appeal by an aggrieved person or the Attorney-General and any exceptions to those rights, as per the current law.
In redrafting, consideration should be given to the following:

a) The term 'aggrieved' should be clarified, in line with case law authority,[115] to provide greater assistance to users. A person is aggrieved where they have a real or direct interest in the proceedings or in the decision sought to be reviewed (not just 'busybodies 'or persons 'meddling officiously').

   The annotations in Kennedy Allan (p.472) discuss '*any person who feels aggrieved*' in the context of now repealed section 209 Justices Act (appeal by order to review) - but with the same opening phrase – and states: *The word aggrieved refers not to the party's state of mind, but to the legal position. The section does not give an appeal to anybody but a person who is*

[115] *Owen v Edwards* [2006] QCA 526 at [27] ; *Commissioner of Police v Stjernqvist* [2022] QDC 95 at [8] – [11]

by the direct act of the magistrate 'aggrieved' – that is, who has had something done or determined against him. A person aggrieved is someone who has suffered a legal grievance, one against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something.

b) The appeal grounds for the defendant and the Attorney-General under equivalent of section 552J (1)-(3) Criminal Code should also be included here, as per the current law.

Drafting advice is sought as to how this is best incorporated in the provision about appeal rights for the defendant – given case law 'makes it quite clear that where a defendant enters an unequivocal plea of guilty that person has no right of appeal against conviction under section 222 of the Justices Act."[116] Section 552J (4) should be located with the equivalent provision to section 225 dealing with powers of judge on hearing the appeal.

c) Amending the section to reflect the decision in *Smith v Ash* in relation to costs allowing for a ground of appeal in section 222(2)(c). This approach provides clarity for court users and avoids unnecessary judicial consideration.

d) Any appeal regarding a private prosecution should expressly provide for an appeal pathway to the District Court of Queensland:

i) by an applicant, on the ground that their application to start a private prosecution was refused; or

ii) by a defendant, following a final determination of a private prosecution in the Magistrates Courts, on the ground that the application to start the private prosecution should not have been granted.

This draws on current appeal rights for a private prosecution under section 102D of the Justices Act.

e) Note the operation of current section 83A(7) which is to be recreated: *A direction must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.*

f) Consistent with modernisation, terms like *justice* should be removed and replaced with court. Further revisions for context and definitions may be required as broader drafting progresses.

8.2 Starting an appeal

Instructions

Recreate section 222(3) (5) (8) (9) of the Justices Act.

[116] *Commissioner of Police v James* [2013] QCA 403 at [11]

To start the appeal, the appellant must file a notice of appeal in the relevant District Court registry.
The notice of appeal must be in the approved form and state— (a) the appeal grounds; and (b) the details required under rules.
If the appellant is in custody, the notice of appeal must be filed in the District Court district where the appellant is in custody. Also, an appellant is taken to have filed the notice of appeal in the District Court registry if the appellant is in custody in prison and gives the notice of appeal to the prison's general manager.
The relevant District Court registry means the District Court at the place where the appeal will be heard. This is determined by use of the District Court of Queensland Regulation and the corresponding Magistrates Courts district where the order (the subject of the appeal) was originally made.

8.3 Effect of starting an appeal

Instructions

Section 222A should be replicated to identify the stay of particular matters prior to an appeal being lodged and as a result of an appeal being lodged.[117] Query whether the section 222A (1) and 2(a) should be noted in the Penalties and Sentences Act.

8.4 Appeal generally a rehearing on the evidence

Instructions

Section 223 (Appeal generally a rehearing on the evidence) should be replicated to identify how appeals are to be determined.

8.5 Powers of District Court judge incidental to appeal

Instructions

Section 224 (Powers of judge incidental to appeal) should be replicated.

[117] This section (inserted in 2004) replicates section 670 of the Criminal Code to stay, unless otherwise ordered, the payment of restitution or compensation payments and the operation of section 26(1) of the *Sale of Goods Act 1896* until the expiration of the appeal period. Section 26(1) revests automatically property in stolen goods following the conviction of an offender.

8.6 Powers of District Court judge on appeal

Instructions

Section 225 (Powers of judge on hearing appeal) should be replicated. This should also include the powers of the appeal court in section 552J(4) Criminal Code. Section 224A (4) may also be better suited in this provision.
Section 231 (Enforcement of decision) (2) and (3) should be replicated. The utility of section 231(1) needs to be considered in light of broader changes to the enforcement provisions and its relationship with section 225(4). It appears it may be necessary to clarify enforcement may continue as if no appeal had been brought.

8.7 Attendance of appellant at appeal

Instructions

Section 224A (1) – (3) should be replicated to insert a provision to identify the right of an appellant to be present at the appeal, and when leave is required.

8.8 Judge may state case

Instructions

Section 227 should be replicated enabling the judge to refer a special case to the Court of Appeal about a question of law.

8.9 Discontinuance of appeal

Instructions

Section 228A should be replicated allowing for the discontinuance of an appeal by filing a notice in the approved form with the relevant registrar; and enabling the issue of a warrant for the appellant.

8.10 Appeal may be struck out

Instructions

Section 229 should be replicated empowering the District Court judge to strike out the appeal in certain circumstances. In addition to the current ability of a judge to strike out an appeal where the appellant fails to appear at the hearing following proper notice, the provision should also allow the appeal to be struck out on the court's own motion where the appellant delays prosecuting the appeal or fails to take a necessary step to present the appeal. This avoids waiting until the day of the appeal under section 229(3). Although 229(3) should be maintained.

8.11 Appeal not to be defeated for defect in notice etc

Instructions

Section 228 should be replicated.

8.12 Notice of appeal decision

Instructions

Section 230 Justices Act (Memorandum of judge's determination) should be recrafted drawing on rule 116 (2) of the Criminal Practice Rules.

8.13 Costs

Instructions

Sections 226, 232 and 232A relating to costs of the appeal need to be replicated with modernisation, to remove the need for a certificate and omit references to recognisances in 232(3). Restructuring is also requested to set out when costs are not available on appeal (s 232(4)). Drafting advice is sought as to whether costs on appeals are best dealt with here or under the specific part of the Bill relating to costs.

8.14 Miscellaneous

Instructions

The following provisions in the Justices Act are proposed for inclusion in the Rules:

a) provisions relating to how an appeal is started in section 222(3), (6), (7), consistent with similar provisions in relation to appeals to the Court of Appeal (currently in the Criminal Practice Rules 1999 (CPR);

b) section 222B (Appeal documents must be sent to the relevant registrar), but this provision should be subject to any parts of the Bill dealing with electronic transmission to allow the notices to be provided electronically;

c) section 222C (Contact details and address for service), but this provision should be updated to include the giving of an email address (consistent with rule 73);

d) section 222D (Duty of relevant registrar to give notice of appeal and appeal hearing); and

e) section 222E (Duty of relevant registrar to give notice when particular issues arise).

Further consideration will be given about the need for further rules, retention of these provisions, consistency with Criminal Practice Rules and additional ways to modernise. Possible further

rules for development could relate to the registrar's powers and obligations, including appeal record book, and parties access to records and exhibits.

Part 9: Committal proceedings

Division 1: Preliminary

9.1 Application of Part

Background

In general, current part 5 division 5 – 9 of the Justices Act should be redrafted in simple language and set out a clear framework to assist with better understanding. This is especially so for Part 5, division 5. The general concepts and processes currently contained in these will be retained. The new part should facilitate the use of technology. Specifically in relation to committal proceedings, the new legislation should be drafted to enable the filing and exchange of documents electronically, support electronic lodgment of committal paperwork and reduce the current impacts associated with providing 'signed statements' in committal proceedings. The instructions set out below are a guide only to how the relevant divisions could be restructured.

Instructions

This part applies if a proceeding is started against a defendant by an authorised person for a charge of an indictable offence, except if—

a) the charge is, or is to be, decided summarily; or

b) under the Criminal Code, section 561, an indictment against the defendant for the offence has been presented in a court of criminal jurisdiction; or

c) under the Criminal Code, section 686, an information for the offence has been presented against the defendant; or

d) under the Criminal Code, section 697 a court (other than a Magistrates Court) directs a prosecution for perjury.

9.2 Failure to appear on charge of indictable offence

Background

This draws on current section 103 of the Justices Act. The Police Powers and Responsibilities Act 2000 contains a provision that the Notice to Appear is equivalent a complaint and summons (section 388) this will be updated as part of consequential to reflect new initiating documents.

Instructions above provide for failing to appear for a summary offence. This makes clear what occurs for an indictable offence. It should not impede any options available under the Bail Act if failing to appear where bail has been granted.

Instructions

To remove any doubt, the Court is empowered to issue an arrest warrant for a defendant who fails to appear at any time on an indictable offence proceeding by way of a committal proceeding. If a defendant is:

a) charged with an indictable offence; and

b) a Court Appearance Notice has been issued and served on the defendant; and

c) the defendant does not attend (including remotely) at the time and place mentioned in the Court Appearance Notice as required; and

d) the court has not excused the attendance; and

e) the court is satisfied of its service on the defendant; and

f) satisfied from information that matter of the charge is substantiated;

the court may issue an arrest warrant for the defendant to bring the defendant before the court to answer the charges be dealt with according to law.

9.3 Definitions for Part

Instructions

The outdated description used for a committal proceeding in the Justices Act of 'examination of witnesses in relation to an indictable offence' will no longer be used.
The terms used are:

a) **Committal proceeding** - this term will be defined to include all types of committals;

b) **Registry committal** – this term will be defined to include committals conducted by the registrar and the legislation will (as in the current Justices Act) set out the processes and procedures related to these committals;

c) **Court committal** – this term will be defined to include any type of committal occurring in court, including both a 'hand-up committal' that relies entirely on witness statements and a committal involving any form of oral evidence (as well as any combination of the two). These court committals will have clearly defined requirements and processes set out in the new legislation.

d) **Statement**: this term will replace the current term 'written statement' and is intended to include statements provided in various forms, such as one that is in writing or made as an audio-visual

recording (section 93A Evidence Act). A written statement must contain an acknowledgement or declaration about the truth of the contents and the consequences of making a false statement, but this need not refer to the *Oaths Act 1867*.

9.4 Nature of committal proceedings and this effect

Instructions

The new committals framework should explicitly acknowledge that committals are an administrative process.
Given committals in all forms are considered an administrative process include a clear statement they are not subject to appeal (not considered final orders) or a stay of proceedings application as an abuse of process.[118]

9.5 Ways defendant may be committed for trial or sentence

Instructions

Introduce the ways committal proceedings can occur by setting out the defendant can be committed for trial or sentence to the competent higher court for an indictable offence by a registry committal or a court committal.
This will assist in locating procedures about each in separate divisions.

9.6 Supervisory responsibility of magistrates

Instructions

Recreate current section 103B of the Justices Act. The recreated section needs to also take into account the strengthened case management under the new Bill.

Division 2: Registry committals

9.7 Committal order by registrar

Instructions

a) The registry committal application is to be filed and the process occur at a registry of the court at a place the defendant is being dealt with for the matter (i.e. required to appear in the Court Attendance Notice, or other notification, or place transferred to be dealt with);

[118] *Higgins v Mr Comans*, Acting Magistrate & DPP (Qld) [2005] QCA 234

b) The registrar at a place may, under this part, order that the defendant be committed for trial or for sentence, before a court of competent jurisdiction, for an indictable offence if all of the following apply.

Recreate section 114 (1)(b) – (h), (2), (5) and (6) with the following changes:

a) the statements have been made in a way substantially complying with the rules (such as acknowledgement requirements etc);

b) remove the requirement that a defendant who is not in custody must not be in breach of any condition on their bail undertaking as a condition of registry committal eligibility. [Any concerns about the defendant's compliance with bail and suitability for registry committal can be accommodated by the prosecution in deciding to give consent to a registry committal].

c) extend eligibility for registry committals to self-represented defendants; [There will be a range safeguards to issue understanding. It is anticipated accompanying material will set out the requirements of a registry committal, and the case management process will ensure the magistrate explains registry committal.]

d) the defendant or the defendant's lawyer has—

   i) filed a *registry committal notice*; and

   ii) served a copy of the notice on the prosecution as required under the rules;

A *registry committal notice* incorporates current section 114(1)(f) of the Justices Act and means a notice in the approved form in clear and simple language declaring that—

1) the defendant does not intend to give evidence, or call any witnesses, in relation to the defendant's committal;

2) the defendant consents to— (i) a registry committal for trial; or (ii) a registry committal for sentence;

3) acknowledges the functions and powers of the registrar processing the registry committal does not include considering or deciding whether the evidence before the registrar is sufficient to put the defendant on trial for the indictable offence i.e. there is no discretion and the charges will be committed to the competent court;

4) if the defendant advises they are entering a plea of guilty and committed for sentence, the notice must include information about no obligation to enter any plea and include modern statement "nothing to hope from any promise and nothing to fear from any threat, that may have been held out to induce the defendant to make any admission or confession of guilt."

5) comply with any other requirements of Regulation or Rules.

e) timeframes for progressing a registry committal should be introduced into the Rules. The rules should include:

   i) defence have 14 days from the date they indicate to the court the matter is ready to proceed via registry committal, to prepare their application and send to the prosecution for consideration;

   ii) prosecution should, as soon as practical but no later than 14 days, respond to the defence application to proceed via registry committal;

   iii) upon receiving the prosecution response, the registry should progress the application as soon as practical;

   iv) parties may apply to the relevant registrar for an extension of the timeframes, and the registrar must have sufficient discretion to case manage the registry committal process or bring the file back before a magistrate for ongoing case management.

f) the defendant may consent to a registry committal taking place without the witness statements being filed in court, but an agreed 'List of Witness Statements' must be filed instead.

g) the defendant (or their lawyer) is no longer able to waive the requirements in section 114(1)(c), meaning the defendant cannot consent to the statements not being disclosed to them, or to the statements (or the List of Statements) not being filed in court for the purposes of a registry committal.

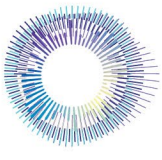
h) a List of Witness Statements must include the full name of each witness giving a statement and the date on which their statement was declared. The contents of the list must be agreed to by the prosecution and the defendant/defence.

i) the statements listed in a List of Witness Statements will form the depositions of each witness for a matter. Following a registry committal, the party in possession of the listed statements must transfer or provide them to the relevant prosecuting agency. See later instructions.

9.8 Conduct of registry committal

Instructions

Recreate the intent of sections 115(4) and (5) of the Justices Act updating for terminology (e.g. reference to registrar).



9.9 Registrar's functions for a registry committal

Instructions

Recreate sections 115 (1),(2), (6) and (10) of the Justices Act. Omit sections 115 (7) (8) and (9) as there is no need to retain sections 108(2) or 113(4) of the Justices Act due to modern court listing practices .
Any notices must be given in accordance with the Rules.

9.10 Effect of registry committal orders

Instructions

Recreate sections 114(3) and 116 (1) of the Justices Act to provide:
After the registrar's order is made, no person may be examined in relation to the committal of the defendant for trial or for sentence for the indictable offence.
The registry committal takes the place of the procedures that would otherwise apply about conducting a committal proceeding in relation to the indictable offence.

9.11 Continuation of remand on registry committal

Instructions

Recreate section 88B of the Justices Act. Updates to relevant sections in the new Bill are required.

9.12 Application of registry committals to indictable offences under other Acts

Instructions

Recreate section 117 of the Justices Act, noting recent case law has limited the application of this section where the other Act has provided the magistrate must make a statement to the person under section 104(2)(b) of the Justices Act (this can only take place as a court committal). The current example in the legislation needs reconsideration.

Division 3:Court committals

9.13 Application

Instructions

This division applies if a registry committal is not conducted in relation to the indictable offence.
A court committal is any type of committal occurring in court.

9.14 Conduct of court committals generally

Instructions

Magistrates should ordinarily conduct court committals. The constitution of the court is provided for in the *Magistrates Courts Act 1991* that needs consequential restructuring following the jurisdictional provisions of the Justices Act being relocated to it and setting out the court composition which follows current section 30 of the Magistrates Courts. Retain that unless otherwise provided that a single justices of the peace can perform a committal hearing (section 104(1)(a) of the Justices Act). The constitution and jurisdiction of the court is to be set out in the amended Magistrates Courts Act.

Reproduce section 110A(16) to advise the law about taking certain children's evidence for committal proceedings, for certain offences, is contained in the Evidence Act 1977, part 2, division 4A, subdivision 2. Further references to the operation of this subdivision may be required.

9.15 Types of court committals

Instructions

This division provides for two types of court committals –

a) a '**hand-up committal**' that relies entirely on admissible witness statements (other than exhibits); and

b) a **committal hearing** involves any form (some or all) of permitted oral evidence (i.e. it can involve combinations to admissible statement evidence and oral evidence).

9.16 Defendant to attend court committal

Instructions

Recreate section 104(1)(b), and refer to equivalent of sections 40 and 104A of the Justices Act. The court committal must be conducted in the presence of the defendant and if the defendant is represented the defendant's lawyer.

This requirement does not apply if the defendant:

a) is excused from attending under new equivalent of section 104A of the Justices Act.

b) Is excluded from the court committal under the recrafted contempt of court provision (that was section 40 of the Justices Act and now in the Magistrates Courts Act).

9.17 When defendant may be excused from attending court committal

Background

Provisions allow for multiple defendants' court committals to be heard together.

Instructions

Recreate section 104A of the Justices Act which allows a magistrate to make an order excusing the defendant who is appearing with 1 or more defendants from attendance after considering certain matters.
If a magistrate excuses attendance during the taking of any evidence for the prosecution, bail may be granted or enlarged on any such conditions the magistrate thinks fit in accordance with the Bail Act. If the defendant is remanded or otherwise in custody, this can continue.

9.18 Magistrate may transfer a court committal

Instructions

Similar to provisions allowing the transfer of summary proceedings. It is intended to include an equivalent provision to allow the court to make an order transferring a court committal to another place if the court considers:

a) it is necessary to ensure a fair examination of witnesses, or

b) it is appropriate to transfer the committal proceeding to the court at the place nearest to where the offence is alleged to have been committed; or

c) it is appropriate for any other reason.

A committal transfer order may be made on the originating court's own initiative; or an application by the prosecutor or defendant.

Division 4: Procedure for hand up committals and committal hearings

Background instructions

Section 110A (Use of tendered statements in lieu of oral testimony in committal proceedings) of the Justices Act. This critical section needs to be recrafted to set out a clear approach to the court committal process, including admissibility of statements. It is still the intention that a hand up committal will be the 'default' way for a committal proceeding to take place in court.

The new framework should divide the contents of this section into three separate parts, namely:

General provisions

The general provisions will relate to the following:

a) prosecution evidence should be in statement form (unless the prosecution chooses otherwise), but there must still be a process for ensuring the defendant understands the process and their entitlements and rights (see below under prosecution provisions);

b) the requirements of admissibility of the statements;

c) clear delineation between hand up committal and requirements, and committal hearing and requirements;

d) the requirement for a statement to contain a declaration under the Oaths Act 1867 should be removed. It is outdated and places increased burden on QPS and prosecution authorities to ensure statements comply. A signed acknowledgement or declaration without the Oaths Act 1867 requirement will be sufficient as contemplated by current section 110A(6C)(c);

e) the prosecution and defence can agree to the cross-examination of a prosecution witness; and

f) the magistrate must generally be required to consider whether all the evidence is sufficient to commit the defendant to a higher court for an indictable offence, however a defendant (including a self-represented defendant) can waive the application of the committal test.

It should be made clear that any defendant, both legally represented and self-represented, should **be able to waive the application of the committal test**. This is a change from the current position.

In addition, this should apply **regardless of how evidence is presented**, including when there is a combination of tendered witness statements and oral evidence. This is a change from the current position.

When a self-represented defendant seeks to waive the application of the committal test, the magistrate will be required to ensure the defendant understands what they are doing and the consequences of doing so. This will include explaining the process to the defendant and asking questions to confirm their understanding.

Prosecution provisions

The prosecution provisions should clearly set out the ways in which the prosecution can give and call evidence in committal proceedings.

Although the ‘default’ position will be that the prosecution should give evidence by way of statements (which could be written or recorded in another lawful way), the prosecution should also have the right to call oral evidence if they choose. This could be either to supplement a written statement, or to have a witness give full oral evidence. There should be no requirement for the prosecution to first obtain leave of the court.

This approach is consistent with the Moynihan Report, which recommended that the prosecution be able to call a witness to give evidence at a committal hearing. The report stated:[119]

> If the prosecution wishes to call a witness at committal hearing, it should be able to do so. This would normally be for an opportunity to test the evidence of a prosecution witness which is in the interests of both parties and the public.

In circumstances where the prosecution has called oral evidence, to ensure procedural fairness the defendant must have the right to cross-examine the witness about that oral evidence.
If the evidence supplements a written statement by that witness, cross-examination as of right will be limited to the additional oral evidence. Defence will still have to seek either prosecution consent or a direction under [equivalent of] section 83A(5AA) if they want to cross-examine the witness on their written statement.[120]

Defence provisions

There is a need to clearly set out how and when defence can give or call evidence.
Sections 110A(2), (6B), (8) and (9) are largely related to evidence tendered or called by the defendant, and all need simplification. Generally, the intent of these provisions will be maintained, to the effect that:

a) a defendant may call a witness to give oral evidence in a committal proceeding, after which the prosecution will have the right to cross-examine the witness;

b) a defendant may tender a statement for admission as evidence if the prosecution agrees to its admission, and that agreement may be subject to the person being present for cross-examination; and

c) the magistrate has the discretion to require that a witness for the defendant appear at a committal hearing to give evidence, even in circumstances where a statement of that witness has been or could be admitted as evidence.

It is appropriate that there are different limitations on when the prosecution and defence may give or call evidence, and that witnesses for the prosecution and defence are treated differently.
At a committal hearing there is no obligation on the defendant to prove anything, unlike the prosecution who must meet the committal test. As such, any decision by a defendant to call evidence is a choice and a consequence of that choice is that the witnesses may be required to come to court and may be cross-examined by the prosecution.

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[119] M Moynihan, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) 193, 215, Rec 45.

[120] The Magistrates Court may grant an adjournment in circumstances where oral evidence is led and parties need the opportunity to consider the evidence presented.

Subdivision 1: Evidence

9.19 Admissibility of statements – general

Instructions

Recraft sections 110A(6C) and 110 (14) of the Justices Act to provide for the general admissibility requirements of a statement for a court committal.

A statement complies with the general admissibility requirements if:

a) the statement is made in a way substantially complying with the rules (this can address the authorisation/acknowledgement aspect); and

b) a copy of it has been made available, by or on behalf of the party proposing to tender it, to the other party or parties; and

c) when the copy was made available, the party proposing to tender it advised that the copy was being made available with the intention that the statement be admitted under this subdivision/section.

If a statement admitted in accordance with this section refers to any other document as an exhibit, the copy of the statement given to any other party to the proceedings must be accompanied by that document or sufficient information to enable the other party to inspect the document or a copy thereof.

9.20 Admissibility of statements by prosecution

Instructions

Recraft sections 110A (3)(a),(4), (5),(6C) and (14) of the Justices Act.

If the prosecution tenders a statement of a witness, and the defendant is legally represented the magistrate must admit the statement as evidence (without the witness appearing to give evidence or make a statement) if the statement complies with the *general admissibility requirements* and must not require the witness to appear before them to give oral evidence or make a statement unless the witness is required to be called because a direction has been issued under the equivalent of section 83A(5AA), or the prosecution and the defence have agreed the witness will be present to be cross-examined (current section 110A(5)).

Note the prosecution should always have the right to call oral evidence if they choose. This could be either to supplement a written statement, or to have a witness give full oral evidence. There should be no requirement for the prosecution to first obtain leave of the court.

However, if the defendant is not legally represented the above does not apply **unless** the magistrate is satisfied of all of the following —

a) the defendant understands what the committal proceeding is about and the possible consequences for the defendant arising out of the proceeding;

b) the defendant is aware that the defendant—

   i) is entitled to be legally represented; and

   ii) may apply for legal assistance;

c) the defendant has been made aware that the defendant has a right to apply for a direction under [equivalent] section 83A(5AA) that the witness attend the proceeding to give oral evidence;

d) the defendant has been given an explanation about the requirements that apply under this division for making an application as mentioned in paragraph (c).

If the magistrate is not satisfied, the statements cannot be admitted in lieu of the witness appearing before them to give oral evidence.

9.21 Admissibility of statements by defence

Instructions

Recraft sections 110A (2), (6B), (6C), (8) and (14) of the Justices Act.

a) If the defence tenders a statement of a witness, the magistrate may admit the statement as evidence (without the witness appearing to give evidence or make a statement) only if –

   i) the statement complies with the general admissibility requirements; and

   ii) the prosecution agrees to its admission; and

   iii) no other party to the proceeding objects, before the written statement is admitted in evidence, to the statement being admitted under this section.

A statement tendered by the defence may be admitted as evidence subject to agreement/condition between the prosecution and the defence that the person making the statement shall be present when the statement is tendered to be cross-examined by the other party or parties, as the case requires, and in any such case the magistrate consider both the written and the oral evidence in respect of that person. See below at 9.24.

9.22 Effect of statements admitted as evidence

Instructions

Recraft sections 110A (6A) and (15) of the Justices Act.

Note section 110A((12) (13) of the Justices Act relate to use at trial.

If a statement is admitted as evidence, the statement—

a) is taken to be evidence given or a statement made under the equivalent of section 104 upon an examination of witnesses in relation to an indictable offence; and

b) is admissible as evidence to the same extent as it would be if the contents of the statement had been given by the oral evidence of the witness who made the statement.

Any document or object referred to as an exhibit and identified in a statement admitted in accordance with this section shall be treated as if it had been produced as an exhibit and identified during the proceedings by the maker of the statement.

Subdivision 2: Oral evidence

Background

Although the 'default' position will be that the prosecution should give evidence by way of statements (which could be written or recorded in another lawful way), the prosecution should also have the right to call oral evidence if they choose. This could be either to supplement a written statement, or to have a witness give full oral evidence. There should be no requirement for the prosecution to first obtain leave of the court through any attendance direction.
In circumstances where the prosecution has called oral evidence, to ensure procedural fairness the defendant must have the right to cross-examine the witness about that oral evidence.
If the evidence supplements a statement by that witness, cross-examination as of right will be limited to the additional oral evidence. The defence will still have to seek either prosecution consent or a direction under the equivalent of 83A(5AA) if they want to cross-examine the witness on their written statement or have the maker attend for oral evidence.

9.23 When prosecution witness may give oral evidence

Instructions

Recraft sections 110A (3), (4) and (5) of the Justices Act.
A witness for the prosecution may give oral evidence in the committal hearing at the discretion of the prosecution, for example to give full evidence if the prosecution does not intend to tender a statement of the witness. The prosecutor is not required to obtain a direction under the equivalent of section 83A(5AA) to call a witness to give examination in chief.

If the prosecutor calls the witness to give evidence in chief, the defendant must have the right to cross-examine the witness about that oral evidence.

If a written statement for a prosecution witness has been tendered, and the prosecution wants to supplement the statement with oral evidence, cross-examination as of right is limited to the substance of the additional oral evidence.

If a written statement for a prosecution witness has been tendered (and prosecution relying on it) a magistrate may require a prosecution witness to attend to give oral evidence only if:

a) a direction has been given requiring the witness to be present for cross-examination (under the equivalent of section 83(5AA); or

b) the prosecution and the defence have agreed the witness will be present for cross-examination; or

c) if the defendant is not legally represented, and the magistrate is not satisfied they understand the proceedings and the consequences (contained in current section 110A(4)).

9.24 When defence witness may give oral evidence

Instructions

Recraft sections 110A(8) and (9) of the Justices Act.
A witness for the defence may give oral evidence in the committal hearing whether or not a statement of the witness has been admitted or is admissible, if the magistrate requires that witness to attend before them and to give evidence.
Also if there is agreement between the defence and prosecution the statement was admitted on the basis the person making it would be subject for cross-examination.

9.25 Limitation on cross-examination of particular prosecution witnesses

Instructions

Retain and recraft section 110C of the Justices Act for readability and updates to refer to attendance direction and attendance direction hearing (which subsumes existing sections 83A(5AA) and 110B of the Justices Act.)

Subdivision 3: Attendance direction – oral evidence

9.26 Application of subdivision

Instructions

Recraft sections 83A(5AA) and 83A(5AB)(b) of the Justices Act.
This subdivision applies if the prosecution tenders or intends to tender a statement for a witness and:

a) does not intend to have the maker of the statement attend before the court as a witness to give oral evidence; or

b) does not intend to have the maker of the statement available for cross-examination on the written statement (there is no agreement between the prosecution and the defence that the maker of the statement will appear for cross-examination).

The subdivision does not apply to a statement that is the evidence of an affected child under the *Evidence Act 1977*, part 2, division 4A, subdivision 2.

Provide a cross reference to direction hearing under general procedures which includes other directions that can be given at court committal (see in particular current section 83A(5)(g). Need to further consider whether all committal directions should be co-located.

9.27 Magistrate's power to grant attendance direction

Instructions

Recreate sections 83A(5AA), (5AC), (6), (8), (9) and 110B of the Justices Act.
A magistrate may give a direction (an attendance direction) requiring the prosecution to call the prosecution witness –

a) to attend before a magistrate as a witness to give oral evidence; or

b) to be made available for cross-examination on the written statement.

A magistrate must not give an attendance direction unless the magistrate is satisfied there are **substantial reasons why, in the interest of justice** the maker of the prosecution statement should attend to give oral evidence or be made available for cross-examination on the statement. Provide the following guidance about what is meant by the phrase '**substantial reasons why, in the interests of justice**', by setting out a non-exhaustive list of circumstances in which such reasons might exist. These circumstances will include:

a) to clarify the evidence proposed to be called, to avoid a defendant being taken by surprise at trial;

b) to gain a proper understanding of the case being advanced against the defendant;

c) to narrow the issues in dispute;

d) where cross-examination might substantially undermine the credit of a significant prosecution witness;

e) where a critical witness, including a complainant, has made inconsistent statements;

f) to avoid the need for a voir dire or pre-trial hearing in the higher court (commonly referred to as a '*Basha inquiry'*);

g) where the matters of cross-examination may found a legal ruling on admissibility or the exercise of a discretion to exclude evidence;

h) to enable the defendant to make a submission on the evidence;

i) where cross-examination would be likely to result in discharge of the defendant; and

j) where there is a likelihood that cross-examination will demonstrate grounds for the exercise of the prosecution discretion not to proceed with the charge.

Also an attendance direction can not be given if it would provide for cross examination that would not otherwise be permitted. For example, the *Evidence Act 1977*, section 21N provides that a person charged may not cross-examine a protected witness in person. This retains section 83A(5AC) of the Justices Act.

An attendance direction is binding unless a magistrate, for special reason, gives leave to reopen the direction.

Increased disclosure provisions and case conferencing requirements should assist parties to make their elections, narrow the issues in dispute, identify any requirements to call witness or make applications, and have matters committed as soon as practical.
Sections 83A(9) should ideally no longer be normal practice, however is preferred over an adjournment taking place, especially of parties are prepared. Continue to provide for its occurrence.

9.28 Magistrate to give reasons for attendance direction

Instructions

Recreate section 110B(6) of the Justices Act.
A magistrate must give reasons for the magistrate's decision (to grant or refuse) about an attendance direction. If granted the attendance direction must set out the witnesses to be called, or cross-examined and the issues for cross-examination. Cross reference to limitation on cross-examination of prosecution witnesses above.

9.29 Withdrawal of attendance direction

Instructions

Recreate section 110B(8) of the Justices Act.
Provide that if an attendance direction is given on application by the defendant - a magistrate may, on application by the prosecution, withdraw the attendance direction if the defendant (or their lawyer) does not appear at the committal hearing.

9.30 Procedure for applying for an attendance direction

Instructions

Recreate sections 83A(2),(3), (6), (8) and 110B(2) of the Justices Act.
An attendance direction may be given –

a) on the magistrate's own initiative; or

b) on application by the defence in the way set out under the Rules.

An application in relation to the maker of a particular statement may be made only once unless a magistrate gives leave for a subsequent application to be made on the basis of special reasons considered by the magistrate to exist.
An attendance direction must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.
To remove any doubt, it is declared that costs are not payable on a attendance direction hearing in relation to an offence dealt with by way of committal proceeding.
This procedure is not intended to limit the ability to apply for any other direction/s under general procedures (see later instructions).

9.31 Requirements for defendant's application for attendance direction

Instructions

Recreate 110B(3)-(5), (7) of the Justices Act between the new Bill and in the accompanying rules as appropriate.
The procedure for the defence to make a request for cross-examination of a prosecution witness should not change. That is, the defence should seek the prosecution's consent prior to applying for a direction from the court.
However, the law (or associated Rules or Regulations) should clearly set out the steps in the process and assign clear timeframes to each step. These timeframes will form part of the case management of committal matters in Magistrates Courts.
The proposed case management model for committals includes a mandatory direction hearing (unless the court orders otherwise or parties are excused from that step). This will also assist in addressing the need for greater oversight of applications for cross-examination, including timely and appropriate responses.

Division 5: Hand up committals

9.32 Application

Instructions

Recreate section 110A(6D)(a) of the Justices Act.

This division applies if all the evidence before the magistrate consists of statements admissible under this Part, without reference to other evidence by way of exhibits.
Noting exhibits are not produced separately they are generally identified in a (written) statement admitted in accordance with the requirements and treated as if it had been produced as an exhibit and identified during the proceedings by the maker of the statement.

9.33 Hand up committal process – committal test not required

Background

Any defendant, either legally represented or self-represented, should be able to waive the application of the committal test. This is a change from the current position in section 110A which restricts this to legal represented defendants (see 110A(6D)).
The Justices Act includes a test for determining whether a charge should be committed; this is commonly referred to as the 'committal test'.
Specifically, section 104 of the Justices Act requires a magistrate to consider if the evidence is sufficient to put the defendant on trial for an indictable offence.[121] This has been interpreted to require that 'a reasonable jury properly directed according to law could convict the accused of the offence charged'.[122] This is also sometimes referred to simply as a 'prima facie' case.
Instructions:
Draws on sections 104, 108, 110A(4)(6D)(6E)(6F) and 113(1) of the Justices Act, with changes as indicated.
This section applies if the defendant is –

a) legally represented; or is

b) self represented and the magistrate is satisfied understands the process following asking series of questions of the style and providing explanations in current section 110A(4) of the Justices Act [When a self-represented defendant seeks to waive the application of the committal test, the magistrate will be required to ensure the defendant understands what they are doing and the consequences of doing so. This will include explaining the process to the defendant and asking questions to confirm their understanding].; and

c) the defendant, or the defendant's lawyer consents to the defendant being committed for trial, or sentence, without consideration of contents of the statements (waiver of the committals test).

[121] The use of the term 'any indictable offence' or 'an indictable offence' in section 104 has the effect that the evidence in a case does not necessarily need to support the indictable offence originally charged. If the evidence does not support the offence charged but does support a charge of a different indictable offence, the defendant may be committed to a higher court on a charge of that different offence.

[122] *Grassby v The Queen* (1989) 168 CLR 1, [11] (Dawson J).

The magistrate must, without deciding whether the evidence is sufficient to put the defendant upon trial for an indictable offence -

a) formally charge the defendant; and

b) ask the defendant, using the form of words provided under the rules, whether the defendant wants to say anything in answer to the charge or enter a plea; and

c) either:

   i) commit the defendant for trial for the offence (see later instructions for order for committals drawing on section 104 of the Justices Act); or

   ii) commit the defendant for sentence for the offence.

If, in response to being addressed by the magistrate the defendant pleads guilty to a charge of an indictable offence. The magistrate must commit the defendant for sentence for the indictable offence.

The magistrate must commit the matter to a higher court as appropriate with warnings about alibi evidence in accordance with section 590A of the Criminal Code (see instructions orders for committal for trial).

Include current section 110A(6F) of the Justices Act to provide consent to waive committals test can be given even if the defendant has made 1 or more unsuccessful applications for an attendance direction.

9.34 Hand up committal process – committal test required

Instructions

Draws on sections 104, 108, 110A(10), 113 of the Justices Act.

If the defendant or the defendant's lawyer does not consent to waiving the committals test, or the magistrate is not satisfied the defendant understands process sufficiently – the magistrate must

a) consider the prosecution evidence (i.e. contents of the statements) before the magistrate; and

b) after hearing any submissions the prosecution and the defence desire to make (e.g. defence may make a submission indicating that the prosecution has preferred the wrong charge or that there is insufficient evidence to commit the matter based on the evidence before the court); and

c) decide whether the evidence is sufficient to put the defendant on trial for an indictable offence.

If the magistrate is not satisfied the prosecution evidence is sufficient to put the defendant on trial for an indictable offence (not satisfied the evidence meets the committal test), the defendant must be discharged in relation to the charge the subject of the committal proceeding.

If the magistrate is satisfied there is sufficient evidence on the prosecution evidence, they must ask the defendant, using the form of words provided under the rules, whether the defendant

wants to give evidence or say anything in answer to the charge or enter a plea (the form of words is a reference to updated section 104(2)(b));
If, in response to being addressed by the magistrate the defendant pleads guilty to a charge of an indictable offence, the magistrate must commit the defendant for sentence for the indictable offence.
If the defendant does not answer or does not offer any evidence, or enter a plea the magistrate must commit the matter to a higher court for trial with warnings about alibi evidence in accordance with section 590A of the Criminal Code (see instructions orders for committal for trial).
If, in response to being addressed by the magistrate, the defendant indicates the defendant wants to offer evidence. The magistrate must hear and receive all admissible statements offered for the defence.
The defendant can tender any admissible statements.
If this occurs, then the magistrate must again consider the sufficiency of all the evidence offered by the prosecution and the defence (including any submission in response to the magistrate's invitation) and decide whether the matter is sufficient to be committed to a higher court.
If the magistrate decides after considering all the evidence (including any answer made) that the evidence is not sufficient, the magistrate must discharge the defendant.
If the magistrate decides the evidence is sufficient, the magistrate must ask if the defendant wishes to say anything in answer to the charge or enter any plea; and commit the defendant to the court of competent jurisdiction (see later orders about committal).
Following any statement or plea, the magistrate must commit the matter to a higher court as appropriate (trial or sentence) with warnings about alibi evidence in accordance with section 590A of the Criminal Code (see instructions orders for committal for trial).
The magistrate can make any orders as to remand or bail as necessary.

Division 6: Committal hearings

9.35 Application

Instructions

This subdivision applies if any of the evidence for the court committal is given orally by witnesses under this Part.

9.36 References to evidence offered for prosecution or defence

Instructions

Draws on sections 110A(6), 104 and 108 of the Justices Act.
A reference in this division to the evidence offered by the prosecution is a reference to –

a) any statement of the witnesses for the prosecution, admitted under this Part, including any documents or objects referred to as exhibits and identified as statements; and

b) any oral evidence of the witnesses for the prosecution admitted under this Part;

c) a reference in this division to the evidence offered by the defence is a reference to –

   i) any statement of the witnesses for the defence, admitted under this Part, including any documents or objects referred to as exhibits and identified as statements; and

   ii) any oral evidence of the witnesses for the defence admitted under this Part.

9.37 Committal hearing process – committal test not required

Background

A defendant can waive the application of the committal test regardless of how the committal proceeded, including where there is a combination of written and oral evidence. This is a change from the current position see section 110A(7) of the Justices Act.

Instructions

A defendant or the defendant's lawyer can waive the application of the committal test.
If the test is waived by a self-represented defendant, the magistrate must take steps to ensure the defendant understands what they are doing and the consequences of doing so, including by explaining the process to the defendant and asking questions to confirm their understanding.
If the defendant, or the defendant's lawyer consents to the defendant being committed for trial, or sentence, without consideration of contents of the statements (waiver of the committals test) .
The magistrate must, without deciding whether the evidence before the court is sufficient to put the defendant upon trial for an indictable offence -

a) formally charge the defendant; and

b) ask the defendant, using the form of words provided under the rules, whether the defendant wants to say anything in answer to the charge or enter a plea; and

c) either, depending on plea:

   i) commit the defendant for trial for the offence (see later instructions for order for committals drawing on section 104 of the Justices Act); or

   ii) commit the defendant for sentence for the offence.

If, in response to being addressed by the magistrate the defendant pleads guilty to a charge of an indictable offence. The magistrate must commit the defendant for sentence for the indictable offence.

The magistrate must commit the matter to a higher court as appropriate with warnings about alibi evidence in accordance with section 590A of the Criminal Code (see instructions orders for committal for trial).
The magistrate can make any orders as to remand or bail as necessary.

9.38 Committal hearing process – committal test required

Instructions

Draws on section 110A(6), (7), 104, 108, 113(1) of the Justices Act.
If the defendant or the defendant's lawyer does not consent to waiving the committals test, or the magistrate is not satisfied the defendant understands process sufficiently – the magistrate must when all the evidence offered for the prosecution is before the magistrate —

a) consider the evidence; and

b) decide whether the evidence is sufficient to put the defendant on trial for an indictable offence

If the magistrate is not satisfied the evidence is sufficient to put the defendant on trial for an indictable offence, the magistrate must discharge the defendant in relation to the charge the subject of the committal hearing.
If the magistrate is satisfied the evidence is sufficient to put the defendant on trial for an indictable offence, the magistrate must ask the defendant, using the form of words provided under the rules (update equivalent of section 104(2)(b)), whether the defendant wants to say anything in answer to the charge or enter a plea.
If, in response to being addressed by the magistrate the defendant pleads guilty to a charge of an indictable offence. The magistrate must commit the defendant for sentence for the indictable offence.
If, in response to being addressed by the magistrate, the defendant indicates the defendant wants to offer evidence. The magistrate must hear and receive all admissible evidence offered for the defence.
The magistrate must, after receiving any evidence offered for the defence —

a) consider—

   i) all the evidence before the magistrate offered for the prosecution and the defence; and

   ii) any statement made by the defendant in response to being addressed; and

b) after hearing any submissions made by the prosecution and the defence, decide whether the evidence is sufficient to put the defendant on trial for an indictable offence.

If the magistrate is not satisfied the evidence is sufficient to put the defendant on trial for an indictable offence, the magistrate must, order that the defendant be discharged in relation to the charge the subject of the committal hearing.

If the magistrate is satisfied the evidence is sufficient to put the defendant on trial for an indictable offence, the magistrate must ask if the defendant wishes to say anything in answer to the charge or enter any plea.
Following any statement or plea, the magistrate must commit the matter to a higher court as appropriate (trial or sentence) with warnings about alibi evidence in accordance with section 590A of the Criminal Code (see instructions orders for committal for trial).
The magistrate can make any orders as to remand or bail as necessary.

Division 7: Committal proceedings in relation to corporations

9.39 Procedure if defendant a corporation

Instructions

This division seeks to recraft section 113A (Committal proceedings where defendant is a corporation) of the Justices Act
This division applies if the defendant is a corporation. Suggest improve readability by separating current subsection in section 113A into own provisions and modernise and update language.

Division 8: Committal in absence without leave of defendant

Instructions

This is a new provision. The committals framework should contain clear provisions applying when a defendant absconds (absence without permission) partway through a committal proceeding, to the effect that:

a) the committal proceeding must not continue, and a warrant must be issued for the defendant's arrest; and

b) if the defendant is later located and arrested, any evidence already heard in the committal proceeding before the defendant absconded is deemed to be evidence in any later committal proceeding. It should be treated as a committal part heard. The defendant should not be entitled to 'start over' the committal process. These later proceedings will be required to take place in court (as opposed to by registry committal) because the committal is already in progress.

This approach will not prevent a defendant from raising new information or issues that have become known in the intervening period and dealing with those as part of the continuing committal proceeding. If a committal had commenced but later there is no evidence before the court (for example, because any transcript is lost) this provision will not prevent a committal from being restarted in those circumstances.

There may be circumstances where the time passed between the defendant absconding and being brought before the court has meant the original magistrate is no longer available. In those circumstances, it is prudent for another magistrate to conduct the proceedings.
[See later instructions for absence due to exclusion]. The committal should continue and the defendant returned to court to call called upon and committed.

Division 9: Procedure after committal for trial or sentence

9.40 Committal document obligations

Instructions

If a court decides to commit a defendant for trial or sentence, or discharge the defendant it must record the decision and any order it makes connected with the decision. See interaction with rule 62 (Verdict and judgement record) of the Criminal Practice Rules.
This should also recreate necessary sections from part 5, Division 8 of the Justices Act.
The current provisions in the Justices Act relating to depositions, and to the required steps for transmission of documentation after a committal has been conducted, should be maintained but simplified and modernised in the following way:

- Section 121 (Transmission of undertaking as to bail) – should be recrafted to provide if the defendant has entered into an undertaking for bail relating to the defendant's committal before a person other than the magistrate or registrar who committed the defendant for trial or for sentence then the person must send the undertaking to the registrar of the place where the committal proceeding occurs to form part of the material sent with the depositions.

- Sections 126 (Transmissions of depositions), 128 (Authority of judge) and 130 (Division applies also to registry committals) – should be recrafted and merged.

  The ODPP (Qld) is no longer the sole prosecutor in the higher court – see for example the Commonwealth DPP. Also, the regions referred to in the current section no longer exist. The concepts in section 126 and 128 are best merged. The Criminal Practice Rules contain a definition of director of public prosecutions that may be useful.[123]

  Provide that the registrar at the place where the committal proceeding occurs must, as soon as practicable after the defendant is committed, send all committal documents to relevant prosecution authority.

  The relevant prosecution authority must send the committal documents received under to the relevant superior court in compliance with any direction given by that court.

[123] Rule 20 of the CPR requires the DPP to provide a 'transmission sheet'.

Committal documents means a document provided for under the Regulations or Rules that relates to—

a) the committal of the defendant; or

b) any grant of bail relating to the defendant's committal.

There is no need to recreate section 127 (Duty of Attorney-General etc) and section 129 (Recommittal in error) is now dealt with in reopening provisions in general procedures (see later instructions).

Division 10: Use of committal evidence at trial or sentence

9.41 Effect of committal evidence

Background

Generally, depositions are made up of the evidence given in a committal proceeding, including both written statements and oral evidence. Depositions are important because they are provided to the higher court and can be relied upon if a witness who previously gave evidence is unavailable or deceased etc

There is a need to recreate but simplify and modernise sections 77, 110A(12), (13),(13A), (15) and 111 of the Justices Act. Consideration needs to also be given to section 116 (2) which has effect for a registry committal.[124]

Item 1 – reference to depositions

The term 'deposition' is used in section 77 (Taking of evidence) of the Justices Act.

(1) The deposition of a witness must be—

(a) written; and

(b) read to the witness or, if the defendant consents, by the witness; and

(c) then signed by the witness and the presiding judicial officer.

(2) Subsection (1) applies subject to the Recording of Evidence Act 1962 or any other Act.

Section 11 (Depositions of witnesses) of the Recording of Evidence Act (ROE Act) states:

(1) Notwithstanding anything to the contrary contained in any Act, rule, or practice, in all cases where it is prescribed or required by law that the deposition of a witness is to be read over to and signed by the witness, or that any evidence or other matter is to be reduced to or taken down in writing or signed, or there is some other provision of the law to the like effect, it shall be sufficient for all purposes if the deposition, evidence, or other matter, as the case may be, is recorded under this Act.

[124] See *R v Wallis* [2011] QDC 25

(2) Any reference in any Act to the deposition of any witness or to the depositions of any witnesses taken shall, where the evidence of the witness or witnesses has been recorded under this Act, be read as a reference to a transcription of that record by a recorder.

(3) A transcription by a recorder of a record under this Act need not be signed by the witness or by the court or judicial person in or before whom the deposition, evidence or other matter is taken or given.

Section 11 of the Recording of Evidence Act (ROE Act) seems to render 77(1) obsolete.

Also, section 5 (Recording of relevant matter in legal proceedings) provides:

(1) *All relevant matter* in a legal proceeding is to be recorded.

Relevant matter in a legal proceeding means:

(a) evidence given in the legal proceeding; and

(b)a ruling, direction, address, summing-up or other matter in the legal proceeding.

A *legal proceeding* is defined in section 4 of the ROE Act to include any proceeding (whether civil or criminal) in or before any court, any proceeding before justices, and any proceeding before any court or person (including any inquiry, arbitration heard by the industrial commission, or examination) in which evidence is or may be given, as well as any part of any legal proceeding.

Section 10 (Record and transcription to be evidence) of the ROE Act states:

(1) A record under this Act of a legal proceeding is to be received by a court or judicial person as evidence of anything recorded in the record.

(2) A document purporting to be a transcription of a record under this Act, produced by a recorder, is to be received by a court or judicial person as evidence of anything recorded in the document, except to the extent the document is shown not to be an accurate transcription of the record.

The Criminal Code refers to depositions including provisions where a person has been committed for sentence (section 600), for an accused's entitlement to copies of depositions of witnesses (section 705) and inspection of depositions (section 706).

Instructions

The taking of evidence is recorded under the ROE Act. The ROE may need a consequential amendment to make clear committal proceeding is a legal proceeding given change of reference to examination of witnesses etc.

There should be a clearer definition of depositions of witness to mean the evidence of the witness or witnesses recorded under the ROE Act and includes a reference to a transcription of that record by a recorder. The intention is to include the statement or statement and oral evidence or oral evidence.

It is useful to remove doubt to maintain the current effect of sections 110A(12) and (13) – that a statement admitted as part of a hand up is the evidence and therefore the deposition of the

witness. Subsection makes it clear no further proof (presumably certification) is required. However the ROE also provides for its own form of certification (see section 10 ROE Act). Subsections (13) utility it seems is to allow the use for the offence committed or for any other offence indicted arising out of the same circumstances. Subsection (13)(a) and (b) do not need to be recreated.

Also, Section 110A (11) is not required due to the ROE Act.

Section 110A(15) should be replicated to make clear exhibits mentioned in a statement are evidence as if produced during proceedings.

Section 116 (2) should be replicated to ensure the statements filed as part of a registry committal (or index of the statements) are treated as evidence and the depositions of witnesses.

Sections 105 (Statement may be put in evidence) should be included but updated consistent with the application of the ROE Act. Any statement made in response to being invited by the magistrate under the equivalent of section 104 is evidence and part of the depositions of witnesses. Section 106 (Savings) seems to qualify that section 105 does not limit the prosecutor from giving un evidence any admission or confession or other statement made at any time, which by law would be admissible against the person. To this extent, although a restatement of common law, it may be useful to include.

Item 2 – section 111 (Depositions of persons dead, absent etc) of the Justices Act

Current section 111 of the Justices Act allows for the use of deposition before justices or transcription under the ROE, if the conditions mentioned in subsection (3) are satisfied in the case of the deposition and if the conditions mentioned in subsection (3)(a) and (b) are satisfied in the case of the transcription, without further proof be read as evidence on the trial of that person, whether for the offence for which the person has been committed for trial or for any other offence for which an indictment shall be presented, arising out of the same transaction or set of circumstances as the offence for which the person has been committed for trial, and whether or not combined with other circumstances.

Section 11(2) of the ROE removes the difference between depositions and transcription.

Section 111 (3) is made up of sub paragraphs (a) (b) and (c):

> (a) **the deposition or the transcription** of the record of evidence must be the deposition or the transcription of the record of evidence either of a witness **whose attendance at the trial is not required by the accused person, in accordance with the provisions of the Criminal Law Amendment Act 1892, section 4** and which accused person has duly signed the statement in the manner provided by the said section 4 and the schedule to that Act, or of a witness who is **proved at the trial** by the oath of a credible witness **to be dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on the accused's behalf**;

(b) it must be **proved at the trial**, either by a certificate purporting to be signed by the justices before whom the deposition purports to have been taken or before whom the evidence or statement was given or made or by the clerk of the court or any person acting as such, or by the oath of a credible witness, that the deposition was taken or the evidence or statement was given or made in the presence of the accused unless the accused was excluded from the proceeding whereat such deposition was taken or such evidence or statement was given or made pursuant to the provisions of section 40 or, where the deposition, evidence or statement was taken, given or made in a case where and at a time when the accused was not required to be present in person, that the same was taken, **given or made in the presence of the accused's lawyer and that the accused or the accused's lawyer had the full opportunity of cross-examining the witness**;

(c) the deposition must purport to be signed by the justices before whom it purports to have been taken.

Section 111 refers to the *Criminal Law Amendment Act 1892*, an Act which currently contains only one section because all other provisions have been repealed.

The remaining provision in the Act relates to a defendant indicating at committal whether they require the prosecution witnesses to attend the trial to give evidence, or if the witness' statement can be accepted as is. This does not occur in practice and is not required, making the provision obsolete. Simplification of the law about depositions will replace this 1892 provision, and this Act is recommended to be repealed. This will be part of the Consequential Amendments Bill instructions.

Instructions

Sections 111(1) and (3) require modernisation considering:

a) the operation of the ROE – which provides a record is a transcript and its own certification process (meaning proof by certificate should not be required unless doubt as to accuracy). This means signing of the documents in no longer a contestable issue (see 111(4));

b) the repeal of section 4 of the Criminal Law Amendment Act given it is no longer practice;

c) add 'according to law' to the end of subsection (2) 'opportunity of cross-examining the witness'. This is to take into account the decision to have a registry committal or a hand up committal. This also takes into account where the defendant has not been successful in obtaining an attendance direction, and no cross-examination occurs.

The reliance on the depositions in the current circumstances should be maintained (death, ill, unable travel, absence brought about by the accused or on the accused's behalf.)
It is noted the reliance on the depositions is a matter for the trial, and consideration given if the redrafted section 111 should be included in the Criminal Code Part 8 dealing with higher court procedure.

Item 3 – retention of section 111(2) of the Justices Act

Background

This subsection was added in 1945 and amended by the *Justices Act and Another Act Amendment Act 1974*. It does not appear to have been amended in light of reforms for child-affected witnesses include use of 93A statements and pre-recording of evidence and admissibility under the relevant provisions of the Evidence Act.

Instructions

It appears section 111(2) may not need to be recreated. However detailed consideration of its continued operation given the provisions in the Evidence Act will occur during drafting.

Division 11: Committal procedure if certain charges originally summary proceedings

9.42 Committal procedure if magistrate abstains from summary determination

Background

The new committals framework should set out the default committal procedure to uniformly occur where a non Criminal Code indictable charge is initially proceeded summarily but, after evidence is heard (part heard), the magistrate forms the view the charges ought to be prosecuted on indictment.
This provision applies where the Act does not provide for how the part heard matter should proceed.

Instructions

This provision should apply if this or another Act does not provide for how a part heard summary hearing for an indictable offence should proceed as a court committal. A provision should be included modelled on section 118 of the Drugs Misuse Act 1986 (and similar provisions in other Acts),[125] which states:

[125] See also, for example, *Fisheries Act 1994* (Qld) s 220B, *Adoption Act 2009* (Qld) s 309, *Domestic & Family Violence Protection Act* (Qld) s 181.

(4) Where proceedings are taken with a view to summary conviction of a defendant and the magistrate forms the opinion that the charge ought to be prosecuted on indictment, the magistrate shall abstain from determining the charge summarily and shall instead deal with the proceedings as proceedings with a view to the committal of the defendant for trial or sentence.

(5) Where, pursuant to subsection (4), the magistrate abstains from determining summarily proceedings in respect of a charge—

(a) the plea of the defendant taken at the outset of the hearing shall be disregarded; and

(b) the evidence adduced in the proceedings before the magistrate's decision to abstain shall be deemed to be evidence in the proceedings with a view to the committal of the defendant for trial or sentence; and

(c) before committing the defendant for trial or sentence the magistrate shall address the defendant in accordance with the [equivalent of] Justices Act 1886, section 104.

This type of provision will clarify the steps to be followed by magistrates when they have started a proceeding but form the view a charge is too serious to be dealt with summarily and should proceed on indictment. Given that evidence has been heard by the court, these matters should proceed as a court committal. This instruction has been grouped with committal proceedings for convenience. It may be more appropriate to move under division dealing with indictable offences dealt with summarily. Cross reference for consistency with earlier instructions above about procedure if a Magistrate abstains from dealing with a matter summarily.

Part 10: General Procedure matters

Division 1: Provisions applicable to any proceeding

Instructions

These provisions apply to a summary proceeding and a committal proceeding.

Division 1A: Joint hearings

10.1 Joint hearing of charges on separate charge sheets against same defendant.

Instructions

On the application of the prosecutor or the defendant, the court may order that any number of charges in separate charge sheets against the same defendant can be heard together if all the charges are of a kind that could have been joined in one charge sheet (see rules about joinder

above). This draws on current section 43A (2) of the Justices Act and section 568(12) of the Criminal Code.

10.2 Joint hearing of charges on separate charge sheets against different defendants

Instructions

On the application of the prosecutor or the defendant, the court may order that any number of charges against different defendants be heard together if the charges in the charge sheets are founded on –

a) substantially the same facts; or

b) facts so closely related that a substantial part of the facts is relevant to all the charges.

This draws on current section 43A (3) of the Justices Act.

Division 1B: Separate hearings

10.3 Separate hearing where charge sheet contains more than one charge against the same defendant

Instructions

If a charge sheet contains more than one charge against the defendant, the Magistrates Court may order that any one or more of the charges can be heard separately if the court considers that –

a) the case of the defendant may be prejudiced or embarrassed because the defendant is charged with more than one offence in the same charge sheet; or

b) for any other reason it is appropriate to do so.

This draws on current section 43(4) of the Justices Act and mirrors section 597A of the Criminal Code.

10.4 Separate hearings when two or more persons are charged in the same Charge Sheet

Instructions

When two or more persons are charged in the same Charge Sheet with the same offence or with different offences, on the application of any of the defendants, the court may at any time during the hearing order that charges against a specified defendant be heard separately if the court considers that a hearing with co-accused would prejudice the fair hearing of the charge against the defendant; or for any other reason it is appropriate to do so. This is consistent with section 597B of the Criminal Code.

10.5 Orders made when separate hearings

Instructions

The court may order separate hearings on its own initiative, or on an application by a defendant. The court can make the order at any time before or during the proceedings.
If the court makes orders for separate hearings in either scenario, the court may order the prosecutor to tell the court the order in which:

a) for scenario 1 - the charges will be tried; This replicates section 43(3)

b) for scenario 2 – the order in which the defendants will be tried.

The procedure on the separate hearing of a charge is the same in all respects as if the charge has been set out in a separate charge sheet.

If the court makes an order for separate hearings, the court make may any order for or in relation to bail of the defendant the court considers appropriate.

This is based on similar provisions in section 58 of the *Criminal Procedure Act 2009* (Vic), and section 133 of the *Criminal Procedure Act 2004* (Western Australia).

Drafting will consider whether this provision should be relocated to provisions dealing with summary hearings only.

Division 1C: Direction hearing

10.6 Directions Hearing

Background

Disclosure, case conferencing, case management and committals rely on the use of direction hearings. The scheme in the Bill may increase the frequency of the court's use of direction hearings as one of the case management tools to ensure proceedings are progressing through courts efficiently. Direction hearings are useful in circumstances where the parties are unable to resolve issues between themselves.
The Bill should simplify and clarify the section about direction hearings, ensuring it is easily understood and aligns with the new case management approach for both summary matters and committals.

Instructions

Recreate sections 83A (Direction hearing), 83B (Non-compliance with direction about disclosure) and Division 10B Disclosure obligation direction (sections 83C to 83F) of the Justices Act in the new Bill.

There may be opportunities to update the sections for readability and understanding. It is suggested section 590AA of the Criminal Code could serve as a model provision. Section 64 (issues that may be dealt with before summary trial) of the *Criminal Procedure Act 2004* (WA) may also be instructional.

In the recrafted new section 83A, clarify a direction has the effect of an order of the court in terms of compliance (see section 83A(6) and section 40 (1)(e) of the Justices Act). However, maintain section 83A(7) this does not give rise to its own ground of appeal at this time.

Some of the content of 83A may be appropriate for rules of court, consistent with rule 42 of the Criminal Practice Rules.

Division 10B (disclosure obligations) sections are essentially a subset of direction hearings.
In the recrafted new section 83B where there has been non-compliance with disclosure obligations for section 83A(5)(aa) i.e. in relation to chapter 62, chapter division 3 of the Criminal Code, the court may adjourn a matter for disclosure to be rectified or an explanation provided. If the disclosure obligations are not met and the Court is not satisfied with any explanation – in addition to the current ability to:

a) request an affidavit or require a person the arresting officer to come to court to explain the non-compliance with their disclosure obligations;

b) an order for costs may be made where non-compliance is unreasonable, deliberate or unjustified; The costs are not limited to the scale of cost but are those considered ‘just and reasonable’. The application for costs may be made at the time of the event or at a later time.

Provide that in relation to a direction made under equivalent of section 83A(5)(aa) noncompliance with a disclosure obligation under the Criminal Code. Following appropriate consideration of the disclosure issues and any submissions made by the parties made in court, the magistrate may strike out the charge in circumstances where the noncompliance is deliberate or ongoing (unexcused/unjustified).

An order to strike out a charge would be made in the context of a consideration of the relevant circumstances, including reasons for non disclosure and the impact of that approach on the parties. However, striking out a charge is not a bar to further proceedings.

10.7 Prosecution disclosure

Instructions

Recreate section 41 (Prosecution Disclosure) of the Justices Act in the new Bill, noting the complementary approach created by the new preliminary brief scheme above.
It may be appropriate to re-locate the new defendant disclosure provisions in a separate provision closer to the recreated section 41.

Division 1D: Power to reopen to correct errors

10.8 Power to reopen to fix errors

Background

This recrafts section 147A of the Justices Act which allows a matter to be reopened to correct an error. It will also draw on section 129 of the Justices Act which allows for a recommittal in the case of error.
Currently in cases where the Magistrates Court has recorded a conviction or made an order that is based on or contains an error of fact, it can reopen a proceeding and, after giving the parties an opportunity to be heard, correct and reissue orders. This power can apply (but is not limited to) circumstances where:

a) a conviction or order was recorded or made against the wrong person;

b) the defendant did not know about the original summons to court;

c) the defendant was previously convicted of the same offence; or

d) a conviction or order is based on someone's deceit.

A reopening is different to a rehearing, as the matter is not being decided fresh, but rather is being reopened to correct the error. An application may be made by a party within 28 days of the conviction or order, but a longer period can be allowed. In addition, the court can reopen matters on its own motion.
This power does not apply to an error in sentence, or an error that is a failure to impose a sentence. For those errors, the court may reopen a proceeding under section 188 of the *Penalties and Sentences Act 1992*.

Instructions

Provide for the ability to reopen to fix certain errors in similar terms to current sections 129 and 147A (1) (3) (4) and (5) of the Justices Act.
Expand the power to include reopening orders made based on an error of law as well as fact. Examples of errors of law may also be instructive.
Expand the power to apply to an error where the defendant is committed to the wrong court.
Section 129 Justices Act has complicated drafting. It is intended to amalgamate this provision into a general power to correct errors, with no need to maintain separate provisions, to enable the court to reopen and recommit a matter to a higher court (or to take some other action) where there has been an error, following any type of committal proceeding.
Essentially any order made in error (aside from sentencing) can be reopened for the purposes of correcting the error. The court can reopen matters on its own motion.
The new legislation should allow a party or someone else on their behalf to apply to the court for a reopening. The application by the parties should be within 28 days of the date of conviction or order the subject of reopening application, or such further time in the interests of justice.
In addition, the registry may inform the court of an issue that could require reopening of a matter, and the court may choose to reopen a matter of its own motion if it becomes aware of or is informed about an error. In this regard, section 76B of the *Criminal Procedure Act 1921* (SA) may be a useful template.
The court dealing with a reopening need not be constituted by the same person who constituted the court that made the decision to which the reopening relates.

Division 1E: Transfer of proceedings

Background

The Justices Act contains complicated provisions in relation to transfer of hearings to some other place. This process will be easier if the recommendation to change to a single court structure is adopted.

10.9 Change of venue before evidence heard

Instructions

The draws on section 139(2) and (2A) of the Justices Act.
The new Act should provide a broad simple mechanism for the transfer of a matter between Magistrates Courts. Suggest section 31 of the *Criminal Procedure Act 2009* (Victoria) is a useful template.

31 Court may change place of hearing

If the Magistrates' Court considers that—

(a) a fair hearing in a criminal proceeding cannot otherwise be had; or

(b) for any other reason it is appropriate to do so—

the court may order that the hearing be held at another place or venue of the court that the court considers appropriate.

Include a provision that if a court makes such an order it may make any order and issue any document needed to ensure that any person, including the defendant, whose presence is needed, appears at the new place. The registrar must transfer all relevant documents to that place. It may also make any orders necessary as to bail and remand.

A cross-reference to the general powers of a registrar to make order such as transfer of proceedings where both parties consent may be useful (see powers of registrar below).

10.10 Transfer of proceedings – part heard

Instructions

The draws on section 139(2B) – (2F) of the Justices Act.

Please provide for the transfer of proceedings that is part heard. The proceeding can be transferred wholly or partly to another place. This connects with consequential amendment instructions about when a Magistrate is seized with a matter and the process consequences.

Include a provision that if a court makes such an order it may make any order and issue any document needed to ensure that any person, including the defendant, whose presence is needed, appears at the new place. It may also make any orders necessary as to bail or remand. The registrar must transfer all relevant documents to that place.

Division 1F: Conduct of proceedings

10.11 Power of court to adjourn proceedings

Background

It is intended to consolidate the current powers of the court to adjourn proceedings located across the Justices Act (e.g. sections 84-86, 88, 93, 141 and 143), into a general power of adjournment in relation to both indictable and summary charges.

When the court orders the defendant to be remanded in custody, they may issue a warrant of commitment.[126] In practice these warrants of commitment are not used anymore, because a Verdict and Judgment Record (VJR) is used as the legal authority to convey the defendant to a correctional centre and remand them in custody.[127]

Instructions

Provide the court with a general power to adjourn a charge at any time for any good reason (e.g. of good reason could be defendant to seek legal representation or advice, the services of an interpreter, absence of witnesses). See as possible model sections 40 (1) – (3) and 41 of *Criminal Procedure Act 1986* (NSW) (with modifications as required, particularly changes to warrant of commitment in 41(2)).

This is in addition to powers to adjourn for example in the absence of a party to a summary hearing, and adjournment for in-court diversion.[128]

Also, the power to adjourn includes the power to adjourn to which all parties consent.

Replicate section 88(3) also provides a power to award cost occasioned by the adjournment of a summary offence only.

If at any time a court adjourns a charge, the court may until the new court date or time—

a) allow the defendant to go at large; or

b) remand the defendant in custody; or

c) grant the defendant bail or extend his or her bail.

If a court adjourns a charge it must ensure the parties are advised of the time and place to which the charge is adjourned and for that purpose may make any order and issue any court document a the case requires.

It may adjourn the charge to a later time of the day on which the charge is adjourned (new time) or to a date set by the court (new court date).

[126] *Justices Act 1886* (Qld) s 97.

[127] *Corrective Services Act 2006* (Qld) s 9.

[128] See section 88(1B) of the Justices Act.

The term warrant of commitment is not to be used any longer given the Verdict and Judgment Record (VJR) is used as the legal authority to convey the defendant to a correctional centre and remand them in custody.[129]

If a court has adjourned a charge to a particular time and has remanded the defendant in custody, the court may order that the accused be brought at any time before the court in order that the proceeding be held or continued. This is an order for the purposes of section 69 (Transfer to Court) of the *Corrective Services Act 2006* which provides: The chief executive must produce a prisoner at the time and place, and for the purpose, stated in a *court order* or an *attendance authority*.[130]

If a court has adjourned a charge to a particular time, it may order that the proceeding be held or resumed before that time only with the consent of the parties.

Example of NSW provision

40 Adjournments generally

(1) A court may at any stage of criminal proceedings adjourn the proceedings generally, or to a specified day, if it appears to the court necessary or advisable to do so.

(2) An adjournment may be in such terms as the court thinks fit.

(3) A matter that is adjourned generally must be listed before the court or a registrar not later than 2 years after the adjournment. [note this timeframe is not required to be replicated]

41 How accused person to be dealt with during adjournment

(1) A court may, if bail is not dispensed with or granted to an accused person for the period of an adjournment, remand the accused person to a correctional centre or other place of security during the adjournment.

(2) The warrant of commitment may be signed by any Judge or authorised officer.

(3) A Judge may at any time, by written notice to the parties, shorten or end an adjournment if the accused person is not in custody.

10.12 Use of verdict and judgement record if remand orders made

Instructions

Replicate section 88A which allows for the use a Verdict and Judgement Record (VJR) for the remand of a defendant into custody. This will also be used in place of a warrant of

[129] *Corrective Services Act 2006* (Qld) s 9.

[130] Defined in s 69(4) to include a summons, law list, NTA, or notice from a court a prisoner is required.

committal/commitment. See section 9 (Authority for admission to corrective service facility) of the Corrective Services Act which relies on a VJR as a document for admitting prisoners at a facility.

See further instructions about use of VJR at [10.42]

10.13 Power of registrar to adjourn proceedings

Instructions

Provide a power of the registrar to adjourn matters by consent or own motion replicating sections 23D and 23DA of the Justices Act.
To ensure that the matter is still progressed and is before the court within a reasonable timeframe, there should be no more than three administrative adjournments for a particular matter, and an administrative adjournment should generally be no longer than three weeks in duration, subject to the court's schedule.
To be clear, the registrar can still refuse an application for an administrative adjournment even if the application is made by consent of the parties. The matter would then proceed to the listed court date to be heard before a magistrate.
Replicate section 23D(6) also provides a power to award cost occasioned by any adjournment may be ordered.
Notice requirements providing information about the time, place and reason for the adjournment to be included.
This is in addition to further powers of the registrar set out below.

10.14 Court appearance

Instructions

Section 72 of the Justices Act will be incorporated in the existing section 18 of the *Magistrates Court Act 1921* (but made clear it also applies in criminal jurisdiction) which is consistent with the higher court provisions.

The provision needs to consider the operation of section 10.24 (Representation in court) of the *Police Service Administration Act 1990* which provides that any QPS officer or legal service officer may appear and act for the prosecution for a charge of an offence, even though the officer is not the informant or complainant.

Conduct of case

Also make clear, a party who can appear is entitled to appear before the court to present and conduct, or answer and defend the party's case (see section 616 Criminal Code).

Section 18 Court appearance

(1) In a proceeding, a party may appear in person or by— (a) a lawyer; or (b) with the leave of the court, another person.

(2) In this section— party includes a person served with notice of or attending a proceeding although not named in the record.

This is subject to any other Act. Note section 59 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* applies to summary proceedings for a domestic violence offence (not yet commenced). It may be useful to include a clarifying provision similar to section 21Q (Satisfaction of Criminal Code, section 616) of the Evidence Act.

10.15 When defendant is required to attend court

Instructions

The defendant must attend the first court appearance in person, or if permitted by phone/video, whether or not legally represented, unless there is a reasonable excuse. See instructions above.

Subsequently, if the defendant is represented by a lawyer, the defendant need not attend unless:

a) the court requires the attendance under this Bill or another Act, such as a charge is being heard and determined (including entering a plea of guilty); a court committal is being conducted, or a sentence is being imposed; or

b) the court orders the defendant's attendance.

If represented the court may permit attendance by the legal representative remotely using video or audio link.

If the defendant is unrepresented the defendant must attend at every court event.

If the defendant fails to attend for a summary offence (election made) – the defendant can be proceeded with in their absence, warrant issued, or matter adjourned (see instructions defendant does not appear).

If the defendant fails to attend for an indictable offence -

- the court may excuse a defendant from attending; or
- if the defendant fails to attend when required the court may issue an arrest warrant for the person.

If the defendant required to attend absents themselves without permission (i.e. excuse or leave) of the court during the conduct of the proceedings, the court may issue an arrest warrant for the defendant. This should be subsumed into a general power to issue an arrest warrant.

Rules of court, approved forms or regulations may need to be developed to facilitate these provisions.

10.16 How a defendant is required to attend

Instructions

Any reference in the new legislation to parties attending court is not to be taken as a requirement for physical attendance (including for the defendant's first appearance).[131] There are many ways for an individual to participate in court proceedings without physical attendance, and these should be accommodated.

Attend in relation to a person (e.g. defendant's attendance in court) means to be physically present in court, or if authorised or required to appear remotely using video or audio link.

If a defendant is required to attend before a court in relation to a charge for any purpose other than to be sentenced (see PSA provisions about sentencing), the court may permit the accused to appear before the court by means of a video link or an audio link.

When the accused appears before the court by means of a video link or an audio link the court may deal with the charge as if the defendant attended personally present before it.

Rules of court or regulations may need to be developed to facilitate these provisions.

10.17 Courts power to compel attendance

Instructions

If a court dealing with a charge against a defendant is satisfied that the accused's presence is needed, the court may compel the defendant to attend before the court —

a) by issuing an adjournment notice requiring the defendant's attendance; or

b) by issuing an arrest warrant for the accused; or

c) if the defendant is in custody, by issuing an order as required under the Corrective Services Act.

The issue of an arrest warrant may be justified if the defendant's whereabouts are not known to the prosecutor; or the defendant is the subject of another warrant for his or her arrest, whether under this Act or otherwise; or for any other reason the magistrate is satisfied the issue of the warrant is justified. Instructions below detail the effect of an arrest warrant.

[131] See further information about the defendant's first attendance in chapter 12.

10.18 Defendant may be excluded from proceedings

Instructions

The general rule is the summary hearing including sentencing and committal hearing occurs in the presence of the defendant. Earlier instructions provide for co-defendants in a committal to be excused and there are also contempt provisions which allow for persons other than defendant disrupting the court to be excluded. Contempt provisions are in the Magistrates Courts Act.
Include a power to exclude the defendant from the courtroom if necessary for all matters (summary and committal matters), for example if they are disruptive and to continue a matter in their absence. This power should be similar to the provisions in section 617(2) in the Criminal Code.
Section 140 of the *Criminal Procedure Act 2004* (WA) has a similar provision empowering the Court to order the defendant be removed and the proceedings continue in circumstances where the conduct of the defendant makes it impracticable to continue proceedings in their presence (physically or remotely).
Consideration will be given to whether a section similar to 617(3) of the Criminal Code dealing with illness is required to be replicated.

10.19 Recording of evidence

Instructions

This draws on section 73 and 77 of the Justices Act.
Proceedings under this Act are legal proceedings to which the Recording of Evidence Act 1962 applies.

10.20 Views and inspections

Instructions

Replicate section 77A of the Justices Act to make clear in any proceeding the court may make an inspection or conduct a view. See also the *Jury Act 1995*, section 52 (Inspections and views) for views by juries.

10.21 Particulars

Instructions

Replicate section 573 (Particulars) of the Criminal Code to remove any doubt it applies to all offences. Note application of 574 (Summary convictions).

10.22 Additional powers of court

Instructions

Replicate section 23EA of the Justices Act.

10.23 Court may act on application or own motion

Instructions

Include a provision allowing the court to act on the application of a party to the proceedings or on its own motion modelled on section 337 of the Criminal Procedure Act 2009 (Vic).
Section 337 Court may act on application or on own motion:

(1) unless the context otherwise requires, a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion;

(2) unless the context otherwise requires, a power or discretion referred to in subsection (1) includes a power or discretion to revoke or vary a decision or order made in the exercise of that power or discretion.

10.24 Failure to comply with procedures not invalidate proceedings

Instructions

Provide that a failure to comply with any of the procedural requirements under the Bill does not invalidate the proceedings, but may be grounds for an adjournment.

Division 1G: Proceedings against corporations

10.25 Application

Instructions

This division applies if a corporation is charged with an offence in the Magistrates Court (the corporation is the defendant).
Note instructions above about committal proceedings and corporations dealt with above should be located in this division.

10.26 Corporation may appoint a representative

Background

Section 594A (Presence in court and plea where accused person is a corporation) of the Criminal Code provides how a corporation may be represented in court and how it may enter a plea or conduct its case.

Instructions

Replicate section 594A of the Criminal Code in respect of summary offences (or indictable offences heard summarily).
The provision should provide for the: appointment of a representative (defined in section 594A(5); functions of the representative; and the ability to enter pleas and related matters.
Relocate provisions about corporations and committal proceedings to this division.

10.27 Representative attendance and appearance requirements

Instructions

To remove any doubt the provisions above in relation to attendance, appearance and exclusion apply to the representative of the corporation.

Division 1H: Witness Notices

10.28 Notices to Witnesses - general

Background

Part 4, Division 10 of the Justices Act contains the sections relating to witnesses.[132] These sections provide for the power to have a witness brought before a court to give evidence (via summons), what happens if a witness does not attend or refuses to give evidence, and the circumstances in which a witness is required to produce certain documents.

In addition to these sections, the Criminal Practice Rules contain provisions specifically relating to how evidence can be produced to the court via subpoena. Criminal Practice Rules 30-34 apply to Magistrates Courts proceedings and provide guidance about how medical, hospital or government records are to be produced to the court.[133]

[132] *Justices Act 1886 (Qld)* Pt 4, Div 10, ss 78-83. See also *Justices Regulation 2014,* s 12 (filing and fees).

[133] *Criminal Practice Rules 1999* (Qld) Chp 8, r 30 -34.

The overlap between the Justices Act and the Criminal Practice Rules tend to create confusion in the Magistrates Court about the processes for summonsing witnesses to attend court and give evidence and issuing subpoenas to produce documents.[134]

In general details of who may require a person to attend, what they can require, the process for issuing a witness (fees etc) and who has the power to issue the Notice/s, should be contained in the Act. The details of the form, service, custody, amount of filing fees and access to the items provided should be contained in the Regulations or rules (see for example rules 30 – 34 CPR).

The provisions should also include powers of the court where a person does not comply.

Instructions

Draw on and recraft sections 78, 79, 82, 83 and 91 of the Justices Act. However, with changes to streamline and modernise the current process.

Provide for a new 'notice-based' scheme with the registrar of the relevant Magistrates Court given the power to issue the following:

a) Witness Notice to Attend: to attend and give oral evidence in a proceeding;

b) Witness Notice to Produce a document or a thing; or

c) Witness Notice to Attend and to Produce (produce a document and attend court to give oral evidence).

A person to whom a notice is directed must comply with it. Notices should clearly advise the consequences of non-compliance.

This Part deals with the process of securing a witness' attendance or production of documents. It does not relate to the way in which witness evidence is taken, or heard or other special requirements. The relevant provisions of the *Evidence Act 1977* applies.

The Notices must be in an approved form and contain any information required by regulations or rules. If relating to a committal proceeding it may require indication the witnesses attendance is consented to, or authorised by the court under attendance rules.

To remove doubt, notices are not mandated, and witness can voluntarily attend.
Also, there should be the power to extend witness Notice to Attend if the proceeding is part heard to the time to which the hearing is adjourned.

[134] See *Justices Act 1886 (Qld)* s 83 (regarding the power to order production of documents on a summons to a witness).

In addition, useful reference should also be made to the scheme contained in rules 414 to 423 of the *Uniform Civil Procedure Rules 1999*.

10.29 Procedure for issue of Witness Notices

Instructions

On application of a party to a proceeding the relevant registrar may issue any of the following Notices (one or more) to a person (the witness):

a) Witness Notice to Attend: to attend and give oral evidence in a proceeding;

b) Witness Notice to Produce a document, record or a thing; or

c) Witness Notice to Attend and Produce (produce a document and attend court to give oral evidence).

The application is a request to issue a witness notice. The application should be in an approved form and filed with the relevant registry, and include payment of any prescribed fees.
If a witness is required to produce a record or a thing the Notice must describe it in reasonable detail the document, record or thing required to be produced to the court.
Unlike current Justices Act provisions (sections 78 and 83), there are no current threshold tests for the issue of the subpoena under rule 29 of the Criminal Practice Rules except for the person committed to be tried, indictment presented, or appeal started. It is suggested a suitable similar threshold requirement to rule be applied for consistency and its general application, i.e. the proceeding is listed for hearing, or a charge sheet before the court, or a person starts an appeal. However, such notice may be issued in relation to an appeal only with the leave of the court hearing the appeal. Considerations will be given if any other procedural safeguards are needed. These application for witness notices do not have to be sworn before a Justice of the Peace.

10.30 Service of notices and proof of service

Instructions

Notices to witnesses must be served in accordance with the rules. Rules may provide for the issue of conduct money (reasonable expenses of attending) to be given at or time of service, or other arrangements.
Service must occur a reasonable time before the attendance date, or as set out in the rules. Currently chapter 8, part 2 of the Criminal Practice Rules do not apply to the Magistrates Court. Proof of service of the notice will continue to be required to give rise to consequences for non-compliance.

Information recorded about service of the Notice is presumed to be true, unless the contrary is proved.

10.31 Non-compliance with Notice to Witness

Instructions

Non-compliance action can only be taken if the Court is satisfied of service of the Notice.

Recraft a similar section 79 of the Justices Act for circumstances where a witness fails to comply (attend or produce) with a Notice. Section 79 of the Justices Act gives the Court power to impose:

a) a penalty upon the witness (including in their absence) not exceeding 2 penalty units ($287.50) in certain circumstances and in the absence of the defendant;

b) the Court may also issue an arrest warrant to bring the person before the court to give evidence (section 79(2).[135]

There is currently no express section non-compliance for a witness refusing to take an oath or answer questions for a summary proceeding. See in contrast section 82 of the Justices Act which currently gives the court power to imprison a witness at a committal hearing (for not more than 7 days) who refuses to be examined upon oath concerning a matter, or take an oath, or to answer questions.
This provision does not need to be recreated as it can now be dealt with as a contempt of court as it is in the higher courts. The Criminal Code provides non-compliance without lawful excuse is contempt of court (section 644D).

Section 81 of the Justices Act is not intended to be recrafted. There will no longer be the ability to apply for an arrest warrant in the first instance. Instead, the Court should have the power to issue an arrest warrant for a witness who has failed to comply with the Notice (court order)

10.32 Application of rules to witnesses

Instructions

While the Bill should contain the overarching power to issue the Notices to Witnesses, and the Criminal Practice Rules should be used to supplement the practical detail that applies:

a) what is to occur when documents are produced, including how they are kept by registries and returned after proceedings;

[135] The Criminal Code Chapter 63A provides for Non-attendance of witness – individual or corporation of the Criminal Code. This is in relation to failure to attend, failure to produce or both.

b) how parties may make an application to inspect and/or copy documents including the process for objecting to such applications;

c) setting aside and narrowing of notices to produce documents; and

d) travelling expenses.

This involves an expansion of the application of the rules to the Magistrates Court proceedings.

10.33 Exclusion of witnesses from court prior to evidence

Instructions

Include a provision that the magistrate must make a statement at the beginning of a summary hearing or court committal to make witnesses leave the courtroom until called upon. This should be in a similar form of the proclamation as to witnesses given by the bailiff post jury empanelment, however modified to improve understanding.
Proclamation to witnesses. "*All witnesses in this case are commanded to leave and remain out of the hearing of the court until called upon to give evidence or they will subject themselves to the pains and penalties of contempt of court*."

Division 1I: Court documents

10.34 Service of court documents

Instructions

The Bill should provide for the ways to effect service of document and other things as required, and the service information needed to show proof of service.

Service requirements will be modelled on Part 2 (Service), Chapter 8 of the Criminal Practice Rules 1999 and informed by service requirements in the Uniform Civil Procedure Rules.

The methods and service information requirements should be contained in rules and cover service on individuals, corporations, children and persons with an intellectual impairment. Service outside Queensland is in accordance with the *Service and Execution of Process Act 1992* (Cwlth). For New Zealand, see the application of *Trans-Tasman Proceedings Act 2010* (Cwlth).

The Bill should not prevent a person on whom a court document or other thing is required to be served from consenting to being served by some means other than in accordance with the Bill including by serving it on the person's lawyer. A person who is served in this way is taken to be served in accordance with the Bill.

10.35 Proof of service certificate

Instructions

A signed service certificate that contains necessary service information required in the rules may be tendered in evidence without calling the person who signed the certificate.
When a service certificate is tendered, it is presumed, unless the contrary is proved that the signature is that of the person who made the certificate and the information in the certificate is true.
The service certificate may form part of any court document (approved form).

10.36 Effect of court documents

Instructions

A court document includes any document issued by a court. A court document has effect according to its wording.
In the absence of evidence to the contrary, it is to be presumed that –

a) a court document that purports to have been issued by a court was in fact issued by the court; and

b) the person who issued a court document was empowered to do so; and

c) any signature on a court document is that of the person who issued it.

The validity of a court document is not affected by the death of the person who issued it.

10.37 Presumption as to signatures

Instructions

If a document provided to, or issued by, the court is required to be signed, purports to be signed by the person, it is taken to have been signed by such a person unless the contrary is proved.

10.38 Computer warrants

Background

Computer warrants are already permitted under the Justices Act.[136] This allows for a prescribed warrant to be made and transmitted electronically, without the need for the warrant to be printed, signed by a magistrate, and physically handed to QPS to execute the warrant.

[136] *Justices Act 1886* (Qld) pt 4 divs 6A, 6B. Also, Justices Regulation 2014, Div 2 (ss 6 – 11)

The prescribed warrants include warrants under the Justices Act, *Bail Act 1980*, *Penalties and Sentences Act 1992*, *Police Powers and Responsibilities Act 2000* and *State Penalties Enforcement Act 1999*.
It is not intended to alter the way warrants are issued, managed and executed under current Division 6A of the Justices Act.

Instructions

It is suggested that Division 6A be replicated in Rules of court given the scheme's application to a range of criminal justice warrants and the detailed provisions.
Drafting advice is sought as to whether each of the Acts mentioned (including the new Bill) need to create a head of power to prescribe the warrants as being computer warrants. There may also be a suitable split of content between Rules of court and any subordinate regulations.

10.39 Effect of the issue of an arrest warrant

Background

Earlier instructions deal with the power and effect of an arrest warrant issued to accompany a court attendance notice (see starting proceedings). Various instructions also enable a court to issue an arrest warrant at certain points for example on non-attendance at a mention. The court has a general power to issue an arrest warrant to ensure the defendant's attendance.
In the Justices Act, there are warrants in the first instance, which is when a warrant is issued at the time the complaint against the defendant is made, instead of a summons,[137] or for where a witness has not answered a summons.[138] There are also warrants for the arrest of persons in relation to an indictable offence.[139]

Instructions

Multiple types of warrants doing essentially the same thing do not seem to be serving any benefit. The court should have the general power to issue arrest warrants with the same effect as instructions detailing arrest warrants with starting proceedings. Advice is sought as to the best location of these provisions in the Bill.

[137] *Justices Act 1886* (Qld) s 59.

[138] *Justices Act 1886* (Qld) s 81.

[139] *Justices Act 1886* (Qld) s 57.

10.40 Contents of arrest warrant etc

Instructions

It is intended these arrest warrant provisions detail form, duration, who can execute (directed to), procedure after, revocation. As above drafting advice as to the location of the provisions detailing the contents of arrest warrants to avoid duplication is required.

Division 1J: Court records

10.41 Record keeping and court files

Instructions

Draw on section 98A of the Justices Act.
The registrar has responsibility for *keeping court records of all proceedings* in documentary[140] or electronic form of the Court at the place they are the registrar as required under the Bill and rules.
The court records consist of all court files held at a place.
The registrar must keep a *court file for a proceeding for a defendant* in documentary or electronic form.
The court file should be made up of all court documents and other things forming part of a proceeding against the defendant under this Bill, another Act or the rules.
Previous instructions provided for the responsibility to prepare and file formal records of orders given to parties documenting the outcomes (conviction or dismissal) of summary proceedings or commitment for trial or sentence or discharge for a committal in the verdict and judgement record.
Rule 62 of the Criminal Practice Rules states the registrar must make a record containing the names of the persons tried, sentence or otherwise dealt with by the court. This is the VJR; and sets out: the contents of the VJR; the effect of the VJR; the VJR must be given to the chief executive (corrective services);and the lawyer acting on request. Amendments can be made to the VJR.
The VJR should be a record of all court events, and include outcomes particularly in relation committal proceedings, and matters struck out. The VJR forms part of the court file for a defendant.

[140] The term *document* is defined in the Acts Interpretation Act schedule 1.

10.42 Access to court files

Background

There are currently two schemes in operation relating to copies of court records and access to court files. Currently, section 154 of the Justices Act sets out the requirements for how a person can obtain copies of a court record, what forms part of the record and the limitations on what material can be provided. This section is difficult to understand.

Chapter 12 of the Criminal Practice Rules also applies to Magistrates Courts proceedings and sets out a similar scheme for accessing 'court files' under rule 57 of the Criminal Practice Rules. It is necessary to retain provisions of this type, however the preference is for a consolidated and consistent approach.

Instructions

Provide access to Magistrate Court files for criminal proceedings under this Bill is in the way provided for by the Criminal Practice Rules.
Rule 57 sets out a access allow searching, copying or inspecting all or part of a document on a court file for a proceeding. This includes requiring payment of the prescribed fee under the regulation (if applicable).
For the purposes of access, Rule 57 sets out what does and does not constitute the court file for a proceeding. The contents of the court file should be consistent with Rule 57
Minor amendments need to be made to include the new court documents introduced under the Bill such as Court Attendance Notices, Charge Sheets etc.

10.43 Inspection, obtaining and copying of exhibits

Instructions

As above, only the scheme provided in the Criminal Practice Rules in rule 56 and 56A is to apply. There may be some minor edits required to take into account certain documentary exhibits currently referred to in the Justices Act.

10.44 Return of exhibits, and delivery of certain property

Background

Part 3 of the PPRA contains a comprehensive scheme relating to dealing with things in the possession of the police service.

Section 685B of the Criminal Code provides for when property has come into the custody of the court as an exhibit and enables the court to make orders about its delivery, or other dealings on the application of the prosecutor at the conclusion of the trial.
Section 685B (2) states the order is not a bar to the right of any person to recover the property by action from the person to whom it is delivered. No timeframe is provided for this action.
Current section 39 of the Justices Act enables the court to make orders for the delivery of property in the possession of public officers (not police) in connection with charges or the course of their duty, or when the property is in the possession of the court in connection with a summary proceeding.
Note section 142 of the Corrective Services Act applies section 39 in addition to its own provisions relating to dealing with seized things, see particularly section 141 (return of seized thing).

Instructions

Recreate the substantive intent of section 39 of the Justices Act. However, section 39 should be recrafted to split the two scenarios to improve understanding. Also note the operation of Rule 55 which already deals with a scheme for exhibits.
Also include the application can be made by the prosecutor.
The time frame for making the application for the property in possession of the public officer can be at any time on and subject to any condition the court considers appropriate and consistent with the interests of justice.
For consistency with section 685B the limitation period on recovery proceedings in section 39(3) of the Justices Act should not be retained. It may be also useful for clarity to include the non-exhaustive definition of “property” based on the definition found in section 1 of the Criminal Code.

Acknowledge the operation of rule 55 of the Criminal Practice Rules for exhibits held in the Magistrates Court. A magistrate can make appropriate orders about the custody or disposal of exhibits.
These new provisions would operate subject to any other laws about the forfeiture of certain things. See e.g. section 463 of the *Environmental Protection Act 1994*.

Division 1K: Orders to dismiss, discharge and strike out

10.45 Effect of orders to dismiss, discharge and strike out

Instructions

The terms are currently inconsistently referred to in the Justices Act. This is an important change under the Bill, with the appropriate term used.

To improve understanding of court procedures, the effect of orders to dismiss, discharge and strike out should be clearly set out in the Bill in relation to the ability to recharge a person. This in addition to the effect of these orders used in a particular situation for example the ability to apply for costs.

The terms '**dismissed**' or '**dismissal**' are commonly used in the Magistrates Courts when a matter has come to an end. However, these terms should only apply when a magistrate has considered the evidence alleged against the defendant and made a decision on the merits to dismiss the charge. The order of the dismissal is a bar to further proceedings in relation to the specific charge(s) alleged against the defendant based on those specific alleged facts. The issuing of a certificate of dismissal is proof of the dismissal.

The term '**discharge**' or '**discharged**' is often confused with the term 'dismissal'. A discharge is not a decision on the merits of the case. There is no bar to further proceedings and the prosecutor can re-charge the defendant in these circumstances.

Matters are discharged where:

a) a prosecutor formally offers no evidence to a charge (commonly known as a 'NETO' – no evidence to offer) the charge is formally withdrawn by the prosecution and the court discharges the defendant from the charge. However, this is not a bar to further proceedings on that same charge. Although it may give rise to other applications to prevent continuing proceedings such as for abuse of process.

b) with indictable offences that progress to a committal proceeding. If the magistrate does not consider there is sufficient evidence to put the defendant on trial, then the defendant must be discharged. This is not a bar to further proceedings on that same charge. Prosecution services in the higher court are still able to present an indictment.

When the court '**strikes out**' a charge, the court is making an order to end the matter, but this is not necessarily a bar to further proceedings. An example of a matter being 'struck out' by the court would be if the prosecutor does not appear in court to prosecute the charge and the court 'strikes out' the charge, or if the court does not have jurisdiction for a range of reasons to hear and decide the charge.

Summary of Proposed Terms

Outcome	Decided on the merits of the case?	Bar to further prosecution?
Dismissed	Yes	Yes
Discharged	No	No
Struck out	No	No

For completeness in relation to 'cash bail forfeiture' where the matter is 'ended' under current section 150A of the Justices Act, given bail is forfeited and therefore a form of punishment is imposed – this is 'dismissed' and should be a bar to further proceedings in relation to the defendant on the charge and circumstances.

Division 1L: Powers of the Registrar

10.46 Further powers of registrar

Instructions

In addition to the administrative adjournment powers:

a) Replicate sections 23DA (2)(b) Power of clerk of the court to adjourn hearings in relation to the power to make any orders a magistrate may make with the consent of all parties to a proceeding. For example,

   i) for a consent order be transferred to another place at which the court is held,

   ii) consent adjournment. If all the parties to an application consent to an adjournment of a hearing of the application, they may adjourn the application by noting the adjournment on the court file or filing a consent in the approved form.

b) Replicate section 23EB in relation to a registrar and extend its operation to matters related to sections 651 and 652 of the Criminal Code and similar lengthy adjournments.

c) Replicate section 23EA power to give directions, direct a party to file and serve.

10.47 Open court

Instructions

Equivalent of sections 70 and 71 of the Justices Act will be amalgamated, modernised and contained in the consequential amendments to the Magistrates Courts Act. This is consistent with the approach in the legislation creating the higher courts.

Division 1M: Technology

Background

The Bill should enable and facilitate the use of electronic mechanisms. However, these those mechanisms must not be mandatory. For example, where a defendant does not have access to the internet, there should be no requirement placed on them to email documents or do anything that would normally require the internet. However, where parties are willing and able to participate in electronic court processes, it is in the interests of justice that the more efficient process be adopted.

The use of the term 'electronic communication' is to be broad to allow for emerging technologies.

The new criminal procedures legislation should allow for anything that can be done under the Bill to be done electronically, including execution, filing and transmission of documents. Rule 10 of the Criminal Practice Rules provides that generally a document required to be filed, issued or given may be done so electronically (means by electronic or computer-based means).

There will be no requirement for original documents to be provided in court or to a party to prove authenticity, unless required under another law (for example, the Evidence Act 1977). This should include briefs of evidence and their disclosure, which can be transmitted electronically. Registry staff should also communicate and transmit information to court users electronically where that method of communication is available to the registry and the party has indicated they may be contacted that way. For example, where a court user emails the registry or uses an online portal, the registry will be able to respond via the same method.

Further, there should be no requirement for any document to be hand signed as proof the document came from that person.

Any reference in the new legislation to parties attending court is not to be taken as a requirement for physical attendance (excepting the defendant's first appearance, although attendance remotely is allowed if permitted/authorised). There are many ways for an individual to participate in court proceedings without physical attendance, and these should be accommodated.

The operation of the *Electronic Transactions (Queensland) Act 2001* (the ET Act) is noted. Particularly section 7A which states the ET Act does not apply to particular transactions mentioned in schedule 1, which excludes transactions such as: a requirement or permission for a person to file a document with a court or tribunal for a proceeding; a requirement or permission for a person to sign a document to be filed with a court or tribunal for a proceeding etc..

10.48 Use of electronic technology

Instructions

The Bill should provide for the use of electronic technology in relation to Magistrates Court proceedings under this Act.

The Bill should provide that any action or function that can be done, or power that can be exercised may be completed electronically, unless the Bill or another Act provides otherwise. This should include, but is not limited to:

a) executing, filing and transmitting documents, notices or other information;

b) attending court as a legal practitioner, defendant, victim or witness (including, for defendants, from a correctional centre or another place in the ways currently provided); and

c) conduct of summary hearings and court committals.

However, where a court participant does not have access to the technology used in the court, they must not be disadvantaged by this and must be able to access manual processes as meets their needs.

The provision should be modelled on rule 10 of the Criminal Procedure Rules and provide that unless otherwise stated under this Bill or another Act if:

a) a person is required or permitted to file, lodge or give information in writing to the court; or

b) the court is required to issue or give information in writing to a party; or

c) the signature of the person is required;

d) a person is required to produce a document that is in the form of paper, an article or other material (production of a document); or

e) the original of a document is required to be given.

that requirement or permission is taken to have been met if the person gives the information electronically (by electronic or computer-based means) and is made in accordance with any Regulation or Rules of court.
This should apply to any document under the Bill such as an application, notice, certificate, declaration etc.

A party should be able to advise the registry they want to communicate with them (receive information) electronically and give appropriate contact details. In addition if a party contacts the registry electronically, the registry should be able to return information using electronic means. See section 146A (3C) of the Justices Act.

It is not intended to affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring or permitting information to be given, in accordance with any particular requirements— including information technology requirements such as (a) on a particular kind of data storage device; or (b) by means of a particular kind of electronic communication.

It may be prudent to clarify the status and effect of things done electronically to provide they have the same effect as if that thing has been done using paper or paper form for e.g. a document electronically filed at the registry— (a) may be retained in electronic form by the registry; and (b) is taken for all purposes to be a document in a court file; and the relationship with the Electronic Transactions Act.

10.49 Use of video link or audio link in proceedings

Instructions

Replicate Part 6A Use of video-link facilities or audio link facilities (sections 178C – 178G) of the Justices Act. Section 178C should be recrafted to improve understanding and deal with all persons wanting to attend (witnesses, lawyers etc). The requirement for bail applications for prisoners on remand to only be conducted via video or audio link may be better relocated to the Bail Act.

Include a reference to rule 53 which applies to the Magistrates Court and states, the court may decide to receive evidence or submission by telephone, video-link or another form of communication in a proceeding.

Rules of court may be developed to facilitate this process

Part 11: Miscellaneous

11.1 Statutory Review of the Act

Instructions

Any new Bill should be subject to a legislative requirement to be initially reviewed within five (5) years after its commencement; and then at regular intervals to determine whether it is achieving the stated objectives of remaining contemporary and effective.

The review must be carried out by an independent and appropriately qualified person.

The object of the initial review is to consider the:

a) need to continue to provide for a ‘breach of duty’ jurisdiction in the Magistrates Court;

b) operation and effectiveness of the in-court diversion programs, namely the new Summary Offences Diversion Program and the additional structure placed around referral to Adult Restorative Justice Conferencing;

c) application of any new diversionary programs that could form part of Magistrates Court criminal procedure legislation;

d) any other specific issues recommended by the Attorney-General.

A report of each review is to be tabled in Parliament as soon as practicable after the review is completed.

11.2 Regulation-making powers

Instructions

Replicate section 266 of the Justices Act in the Bill, permitting the Governor in Council to make regulations under this Bill. Matters about which regulations may be made include:

a) fees for filing documents with the registry/Court; and

b) the power to make a regulation about costs includes power to provide for a scale of costs.

11.3 Approved forms

Instructions

Please replicate section 265 Justices Act, allowing the chief executive of the administering agency to approve new forms under the Act. A form approved by the chief executive is the prescribed or approved form for its purpose. Consideration is to be given if a provision similar to section 707 of the Criminal Code, that an approved form is taken to be sufficient for the purpose for which it is to be used and a sufficient statement of the relevant offence or proceeding, is necessary.

11.4 Rules

Instructions

It is generally intended that the *Criminal Practice Rules 1999* made under the *Supreme Court of Queensland Act 1991* will be amended to provide for the rules for the mechanics of the new Bill. Wherever possible, the provisions of the Bill will provide the head of power, rights, responsibilities and consequences, and the rules will provide detailed provisions. This will allow greater consistency of practice and greater flexibility for change if necessary.

Such rules are made with the consent of the rules committee established under the Supreme Court Act. Consequential amendments may be required to Schedule 1 of the Supreme Court Act which currently sets out the topics (subject matter) for the contents of any rules. This is as a result of new provisions being included in the Bill (e.g. private prosecution procedures).

Part 12: Validations, savings and transitional provisions

12.1 Validation, savings and transitional provisions

Instructions

Savings, validation, and transitional provisions should provide certainty and ensure a smooth transition from the Justices Act to the new Bill.

While Part 6 of the *Acts Interpretation Act 1954* (Qld) contains standard provisions applying to all legislative changes, it is anticipated additional transitional, validation and savings provisions will be needed to provide certainty about specific issues. Specific provisions will be identified during drafting of the Bill, including the continued need to retain these earlier provisions in the Justices Act.

They should also have regard to fundamental legislative principles. The *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals. In this context, it is relevant this is a Bill about criminal **procedure**.

Changes to procedures are permitted to have retrospective effect, in that they will apply regardless of when the offence was committed. In the absence of any indication to the contrary, a "procedural" statute is to be construed as retrospective, that is, it can apply to past events. The High Court considered the issue of "procedural" statutes in *Rodway v The Queen* (1990) 169 CLR 515, where it held that:

> *ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial. The principle is sometimes succinctly, if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in Maxwell v Murphy, that no one has a vested right in any form of procedure. It is a principle which has been well established for many years …*

Part 13: Transitional Regulation

13.1 Transitional Regulation making power

Instructions

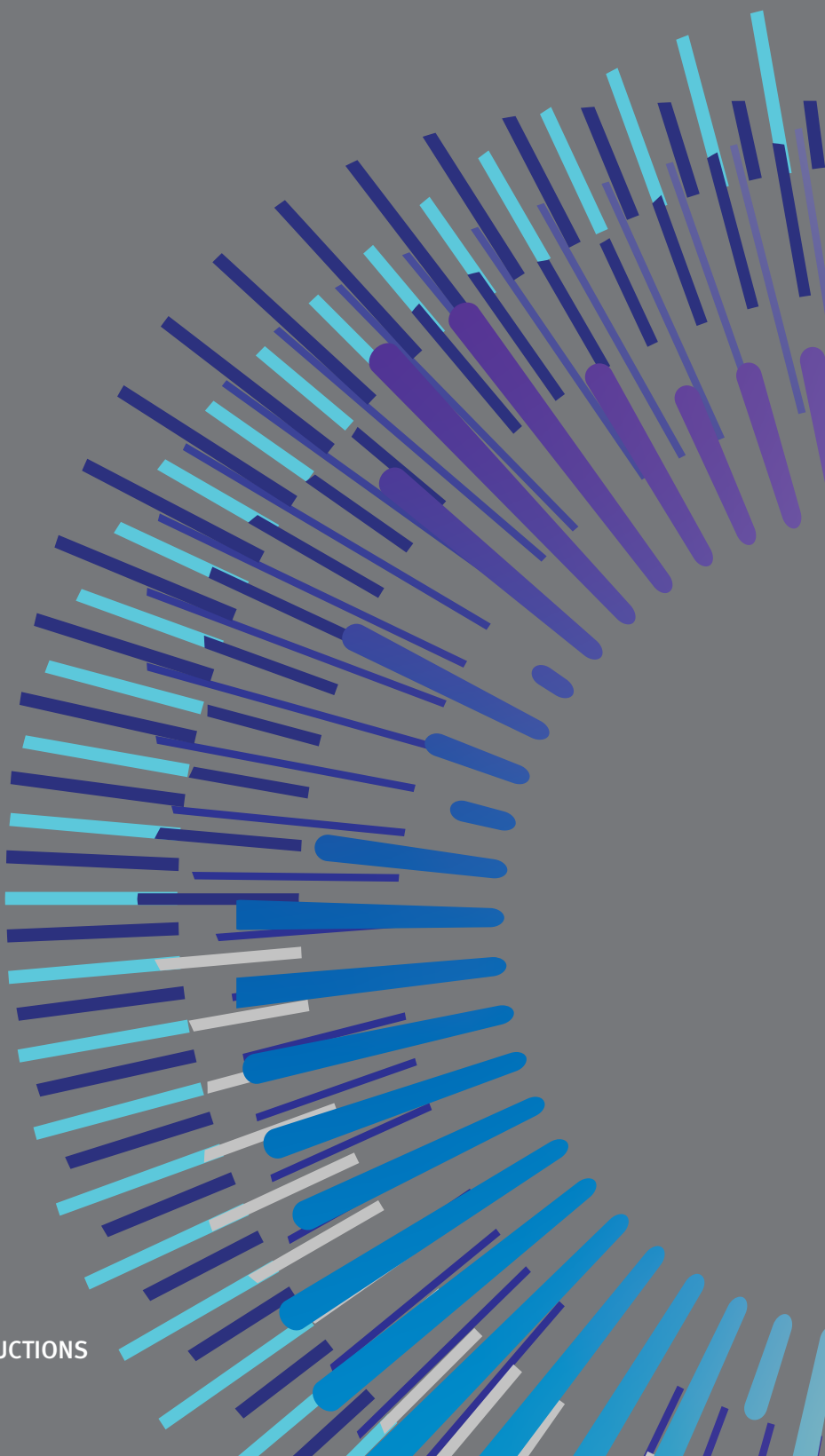
Provide for a transitional regulation-making power under the Bill to allow for the making of a regulation of a saving or transitional nature. Any regulation made under this power expires one year after the Bill commences.

The provision is necessary so that any transitional issues not yet identified relating to the Bill can be effectively redressed in a timely manner. This is especially important given the fundamental role of the Act to the administration of justice and the operation of the Court.

Schedule 1: Dictionary

Please include a Schedule 1 (Dictionary) defining necessary terms to be fully identified and settled during the drafting process.

[END OF INSTRUCTIONS]



CRIMINAL PROCEDURE REVIEW
MAGISTRATES COURTS
VOLUME TWO: APPENDIX C — DRAFTING INSTRUCTIONS