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caxton legal centre inc

Michael Shanahan AM
Reviewer
Criminal Procedure Review – Magistrates Courts

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

Dear Mr Shanahan AM,

Criminal Procedure Review Magistrates Courts

We thank you for the opportunity to make this submission following the Criminal Procedure Review Magistrates Courts Consultation Paper.

Background

- Caxton Legal Centre (**Caxton**) is Queensland's oldest community legal centre. Caxton's vision is for a just and inclusive Queensland.

- We are an independent, non-profit community legal centre providing free legal advice, representation, social work services, information and referrals to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness.

- Caxton has a long history of providing legal advice, representation and social work support to clients who have criminal matters in the Magistrates Courts. These services are provided to clients across a number of our programs:
    - Human Rights and Civil Law Practice advice and casework program – day time and evening advices and casework. Our evening advices are delivered by volunteer lawyers.
    - Men's Bail support program – an integrated lawyer/social worker program providing support to men with complex needs to apply for bail and remain on bail in the community.
    - Social Work Service – the social workers in the Human Rights and Civil Law Practice work with individuals to promote self-determination and autonomy. The Social Work Service offers short-term counselling, court support, and information and referral.

- Clients who access our services are either court users or people who do not qualify for legal aid and cannot afford private legal services.

- For the financial year 2021-2022, Caxton have provided over 1600 criminal law advices and casework services to clients.

- Caxton is grateful for the opportunity to make this written submission in addition to on-line and face to face meetings with the Criminal Procedure Review Team.

Consultation Paper

We have addressed the consultation questions below as they relate to our practices and experience.

Please note that not all the questions are applicable to Caxton clients.

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

We acknowledge the extremely high number of matters that the Magistrate Courts deal with on a day-to-day basis, but welcome changes and revisions detailed below that address the challenges defendants face in navigating the system.

Current procedure varies in practice from Court to Court, and can be opaque, particularly to those appearing before the Court without legal representation.

Caxton clients with no experience of the justice system or who are navigating the system without a lawyer find the experience extremely overwhelming and intimidating.

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

We consider that a contemporary and effective system is one that responds to the current realities of individuals who come before the Court.

Our service has found that the individuals coming into contact with the criminal justice system are increasingly likely to be affected by a number of vulnerabilities or disadvantages. Many of our clients are from culturally and linguistically diverse backgrounds, Aboriginal or Torres Strait Islander individuals, experiencing homelessness, experiencing addiction, financially disadvantaged, experiencing domestic and family violence, or have a physical or mental disability. It is apparent that individuals who experience one of these factors are also very likely to experience an intersection of a number of these factors, *and* that they are more likely to be exposed to the criminal justice system.

In practice, creating a contemporary and effective procedures will involve taking a human rights-based approach and recognising and making efforts to address the diverse needs of those who must navigate this system.

3. **How could criminal procedures in the Magistrates Courts better accommodate the needs of different people? What is needed to allow for better understanding, connection and participation? This might include (but is not limited to) First Nations people, people from culturally and linguistically diverse backgrounds, women, people with disability, victims of crime and the general community.**

Human rights are the basic rights that belong to everyone. It is necessary to ensure that all people who come into contact with the Magistrates Court are treated fairly and with dignity, and that that individual rights are respected.

In our experience, and the experience of our clients, the Magistrates Court is not presently accommodating court users with diverse needs very well.

We consider that taking a human rights-based approach to all procedures is the only way to ensure that the rights of court users are not infringed, that no individual or group is disadvantaged, and also for the court to meet its obligations under the Human Rights Act when acting administratively.

Human rights principle - participation

All people have the right to participate in decisions which affect their human rights. Participation must be active, free and meaningful, and give attention to issues of accessibility, including access to information in a form and a language which can be understood.

Human rights principle – non-discrimination

A human rights-based approach requires the court not to discriminate against court users because of their age, disability, gender, race or sexuality. It also requires the courts not to discriminate against court users on the basis of their post code. Currently, court users in particular geographic locations have greater access to diversionary programs, and other court-based services such as CourtLink and duty lawyer services.

A human rights-based approach to Aboriginal and Torres Strait Islander court users requires not only cultural awareness and sensitivity, but an understanding and acknowledgement of the systemic racism that has existed in our institutions (including courts) since colonisation and still exists.

We appreciate that the criminal justice process necessarily limits some human rights of court users, particularly defendants, but it should not limit the right to equal protection of the law

without discrimination, and should be structured in such a way as to implement human rights principles.

General information about the court system and criminal procedure

Information about the court system and procedure in criminal matters should be available for court users and the general community in a variety of formats, for example, written and video.

Information should be available in a way that can be understood by the range of court users with diverse needs:

- Information must be available in languages other than English, including Auslan;
- Information must be culturally appropriate for Aboriginal and Torres Strait Islander court users;[1] and
- Information must also be available in Easy English for ease of comprehension by court users with disabilities, including those with intellectual and cognitive impairments.[2]

Such information should be accessible online and at the Courthouses. It should also provide court users with information about where they can receive legal assistance and support.

Interpreters

The Human Rights Act provides that a person charged with a criminal offence is entitled without discrimination to a number of minimum guarantees including the free assistance of an interpreter if the person cannot understand or speak English.[3]

Our clients who cannot speak English, including those who use Auslan, commonly report attending court for mentions and not being provided with an interpreter. We also receive reports of incorrect interpreters being booked. The failure to provide an interpreter to a criminal defendant from the very first court appearance can have a significant impact on the ability to progress matters through the court process, as the case study below illustrates. It can also lead to unjust outcomes for individuals. We have been told by clients that they have pleaded guilty to offences where they didn't understand the facts alleged against them because an interpreter was not used to explain the allegations. We have also been told by clients that they have been refused bail and remanded in custody in circumstances where they have not

[1] The Legal Aid Western Australia "Blurred Borders" project provides a good example of culturally appropriate, easy to understand fact sheets and story cards about bail and criminal procedure in Western Australia accessible at https://blurredborders.legalaid.wa.gov.au/

[2] Supporting Justice is a project of the Centre for Innovative Justice at RMIT University that has developed a range of resources for people with disability on how to get support in the criminal justice system and the community to improve justice outcomes. Accessible here https://supportingjustice.net/resources/for-support-workers-carers-people-with-disability

[3] s. 32(I) *Human Rights Act*

understood the bail process or been able to give proper instructions for a bail application because of the lack of an interpreter at court.

To ensure that all court users have access to their right to equal protection before the law, it is crucial that interpreters are provided at each court attendance, from the first occasion a person is brought before the court, and that information about court processes be available in languages other than English.

Case Study: Trevor
Trevor, a deaf client, attended a regional court four times before the first actual "mention" was able to proceed. The matter kept being adjourned with Trevor sitting in the courtroom for hours with little comprehension and growing frustration. It was not until he attended Caxton and could make his requirement for an interpreter understood that we were able to call the court and ensure an interpreter was booked for the next mention.

Disability

People with disability are significantly over-represented as victims of crime and as defendants in the criminal justice system.

In their 2018 report *I Needed Help, Instead I was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia,* Human Rights Watch found that "people with disabilities, particularly cognitive or psychosocial disability, are overrepresented in the criminal justice system in Australia, comprising around 18 percent of the country's population, but almost 50 per cent of people entering prison."[4]

Nation-wide reports on the health of prisoners in Australia have found that one in three prisoners have a chronic health condition that affected participation in day-to-day activities, education or employment.[5]

Prisoners have much higher rates of mental health concerns than the general community. The Australian Institute of Health and Welfare reported that 40% of prison entrants in 2018 reported ever being diagnosed with a mental health disorder.[6]

[4] Human Rights Watch (2018) *I Needed Help, Instead I was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia*, p. 14 accessed at https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf on 12/07/2022

[5] Australian Institute of Health and Welfare, 2019 *The Health of Australia's Prisoners 2018 p. 77* accessed at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true on 12/07/2022

[6] Ibid p. 27

The 2014 Australian Human Rights Commission Report *Equal Before the Law: Towards Disability Justice Strategies*[7] identified the following barriers limiting or preventing access to justice for people with disabilities:

- Lack of community support programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors.
- Lack of support, adjustments or aids to access protections, or being to defend criminal matters or to participate in the criminal justice system.
- People with disabilities experience a relatively high risk of being jailed and are then likely to have repeated contact with the criminal justice system.
- Inability to access effective support mechanisms once in the criminal justice system.
- Styles of communication and questioning techniques used by police, lawyers, courts and custodial officers can confuse a person with disability.
- People with disabilities are less likely to get bail and more likely to breach bail because they have not understood bail conditions.

People with disability can face significant barriers in court specifically. The barriers that our clients experience include:

- A lack of understanding of the role and procedures of the court and a lack of support to assist in understanding;
- The inability to inform the court about the communication assistance they require, or that communication assistance is not being provided once it has been identified;
- Lack of access to information about their rights and the responsibilities of courts and other parts of the justice system;
- Uncertainty about rights to legal advice and representation;
- Inadequate time for certain steps, such as consulting a lawyer or other support people; and
- Pressure to make decisions without sufficient understanding or support to make appropriate decisions.

The *Human Rights Act* requires that criminal defendants have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require assistance.[8]

Being able to meet this obligation requires the early identification of a person's disability and tailoring supports to that person's needs in order to enable their understanding and

[7] Accessed at https://www.humanrights.gov.a/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdfon 12/07/2022

[8] s. 32(j) *Human Rights Act 2019*

participation in the criminal process. We acknowledge that this is complex, particularly given that individuals themselves may not identify as having a disability.

As a means of addressing some of the barriers faced by people with disability in accessing justice in Queensland, particularly those with intellectual or cognitive impairments, we support the recommendations made by the Public Advocate in the submission to the Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland[9] relevant to this review, namely:

- A state-wide court liaison and referral service for people with intellectual impairments should be established to assist with identification, assessment, referral and case management;
- A systematic approach to identifying people with intellectual impairments in the criminal justice system; and
- A system of accessing support people for people with intellectual and mental health impairments who need to engage in the court process, including interpreters and people to assist with communication if needed.

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

We strongly support this.

In particular, we would expect to see guiding principles promoting access to justice for both defendants and victims, and which promote the human rights of all individuals. We are supportive of each of the principles proposed in paragraph 3.8 of the Consultation Paper.

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

We strongly support this.

At present, there is significant inflexibility in the ability for defendants to transfer summary charges between Magistrates Courts. This is especially problematic for defendants who have matters before multiple Magistrates Courts, who have relocated away from the originating Court, and those who wish to participate in court-based programs or diversionary opportunities that are not available at all Courthouses.

[9]Public Advocate *The Need for a Disability Justice Plan in Queensland:* The Submission to the Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland accessed at https://www.justice.qld.gov.au/__data/assets/pdf_file/0006/271095/Submission-FINAL-ADCQ-PA.pdf

We would hope to see a capacity to easily transfer files between Courts under a single Magistrates Court of Queensland (regardless of whether a plea has been entered).

6. **Should the Queensland Magistrates Courts be renamed as Local Courts?**

We consider that this change would not materially affect our clients.

One of our clients responded to this question with "changing a name or not is not essential in helping the general public."

7. **Should the title of 'Magistrate' be changed to 'Local Court Judge'?**

Many of our clients do not distinguish between Judges and Magistrates, and will often refer to a Magistrate as "Judge".

We consider that this change would not materially affect our clients, but would support it on the basis of language unification and simplification.

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

We would strongly support provisions allowing electronic procedures wherever available.

The option should be available for the electronic filing of material and for defendants to apply to appear remotely however in order that defendants obtain the benefit of in court diversion, referral and support programs electronic processes should not completely replace in-person processes.

9. **What criminal procedures in the Magistrates Court could be improved by using technological solutions? Are there any criminal procedures for which technology should not be used? Please provide examples.**

We consider that appearances and filing should be able to be achieved through electronic means.

The increased allowance of remote appearances would be of enormous benefit to individuals who may have difficulties with attending court, such as those with physical disabilities, sensory conditions, childcare responsibilities, and individuals experiencing unstable housing arrangements.

However, we would caution against remote appearances being the default option because our experience in providing court-based services during the COVID-19 Pandemic was that those

clients who appeared remotely where unable to obtain the benefit of services offered at the court such as diversionary referral and support programs.

The ability to request an adjournment online is currently available to practitioners only in some locations. The extension of this feature to all court users would also be beneficial.

We would be highly supportive of a Magistrates Court portal, similar to the Federal Courts portal, which includes orders made and upcoming court dates. This model might be expanded to include QP9 material, bench charge sheets, and even disclosure material (under password protection).

The transition to digital court files would have many benefits, including the ability to inspect remotely (by leave), and ability to more easily transfer files between courthouses.

We receive positive feedback from clients about the use of the court date notification text system.

Case Study: Edgar

Edgar is a man is his seventies, who has several health conditions and an Acquired Brain Injury. He has charges before the Magistrates Court. He finds it overwhelming to attend court in person, and is very concerned about contracting COVID-19 due to his multiple health vulnerabilities. He is frequently permitted to appear in court by phone.

On one occasion, Edgar was ordered to appear in person. He wrote to the Registry and explained he could not attend court in person as he was afraid he might be exposed to COVID-19, and asking whether he could appear by phone. He called the court following his court date and was advised the matter had been adjourned with a warrant to lie on file. Edgar wrote to the Registry requesting leave to appear by phone on the next occasion. He was told that leave was refused.

Edgar did not attend court on the next date, but wrote again to the Registry asking to appear by phone. He did not receive a response.

Sometime later, police attended Edgar's home and executed the warrant.

As a result, he spent ten months in custody before being granted bail following the intervention of our Bail Support Program.

10. Should summary hearings be conducted remotely? Why or why not?

We would support this.

We have observed that the difficulty posed by attending a hearing in person can often overwhelm the other factors which an individual must consider in deciding how to proceed in their court matters. This can result in a defendant pleading guilty even though they do not accept the facts of a charge, or a respondent consenting to the making of a Protection Order even though they do not wish to do so.

While there may be some concerns about the immediacy and impact of evidence received remotely, we would note that this can be overcome through the use of directions (such as in regards to the pre-recorded evidence of a child complainant). This procedure has also been used successfully in other jurisdictions during the pandemic (such as in the Federal Circuit Court).

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

Our service has had little to no involvement with proceedings of this kind.

12. How should new legislation about criminal procedure in the Magistrates Courts deal with the term 'simple offence', and the fact that the Justices Act currently defines this term differently to the Criminal Code? For example, should the new legislation keep the current meaning of the term in the Justices Act but rename it as a 'summary offence'?

We support resolving the disparity in the use of this term.

However, we consider that using 'summary offence' instead would also result in confusion (as it does nonetheless include some indictable offences). We would suggest that the term 'offence which may be finalised in the Magistrates Court' might be more appropriate.

Guidance within the legislation about whether this term includes offences that may be dealt with summarily upon election, prior to such election being made, would be beneficial. This issue arises in relation to offences to which section 172 of the Mental Health Act might be applied, but the defendant does not have capacity to make an election.

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

We strongly support changes to make these sections more readily understandable.

At present, it is extremely difficult for an individual without the benefit of legal advice to determine which court (or courts) a charge may be heard before. We would strongly support a redrafting of these sections to clearly identify which court may hear which charges, and which party has the right to make an election, if applicable.

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

We support the transition of matters commenced by complaint and summons to be commenced instead by notice to appear.

Often individuals who have breach matters before the court (i.e. are charged with contravene requirement of community-based order under section 123 *Penalties and Sentences Act 1992* (Qld)) also have other criminal charges before the court. The matters commenced by complaint and summons are not matters of which the police prosecutors are made aware, which can result in separate court dates being issued for the separate proceedings, as well as confusion for defendants, their legal representatives, and Court staff. We recommend that there be a mechanism in place to ensure that the Registry, Prosecution, and other parties access a common court list, and further that a defendant's court dates be synchronised where possible.

15. How can procedures for starting proceedings be simplified?

This is not an issue our service is able to comment on.

16. Should the new legislation about criminal procedures in the Magistrates Courts have a clear statement of when proceedings have started? For example, should proceedings start on the date that material is filed in court?

As there are inconsistent start dates interstate, the new legislation should have a clear statement of when proceedings have started. As in New South Wales, starting proceedings on the date that the material is filed in court would seem the simplest and most logical practice.

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

At a minimum, the degree of particulars set out in bench charge sheets (or indictments) should be included.

Moreover, there should be provision for dismissal of charges if a sufficiently detailed description of the offence (e.g. QP9 material) is not available at the time of the first mention.

We suggest that such a provision include terms similar to those of the current section 149, barring subsequent charges for the same matter.

18. **If the new legislation provides for a notice about proceedings to replace a complaint and summons, what requirements should there be about information that must be included in that notice? Should the requirements be consistent across all initiating documents, or should there be a requirement to file a second document?**

We consider it appropriate that requirements are consistent across all initiating documents.

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

In our experience, individuals are not widely aware of these provisions, and are not assisted in acting on them by the legislation.

The current provisions do not make it clear how a private individual may commence a complaint in the Magistrates Court.

In practice, a private prosecution is currently prohibitively expensive for our client cohort as it would entail engaging private representation.

We consider that the legislation should plainly set out the procedure for issuing and serving a complaint.

20. **Should the new legislation about criminal proceedings in the Magistrates Courts place any limits on private complaints? Why or why not? For example:**
    a) **Should the additional procedural provisions that currently apply to some indictable offences be extended to any private complaint?**
    b) **Should there be limitations on the circumstances in which a private complaint may be brought, such as where it may be vexatious?**
    c) **Should any private complaint be subject to assessment or review before it can proceed? If yes, how should this operate?**

We consider that any limits placed on the making of a private complaint should be the minimum required to remedy vexatious proceedings. This procedure is rarely used, except when an individual is unable to have their complaint actioned through the usual channels.

As such, we consider that the NSW approach (ultimate determination by a Magistrate) should be preferred to the Tasmanian approach (requiring the approval of the traditional prosecutorial office).

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

We consider the current disclosure obligations are not working consistently.

There is a high level of disparity between different courts in the practical ability to obtain disclosure.

Police Prosecution generally will not agree to disclose material unless it is ordered by the court (this may have justification, such as the need to ensure that requests for disclosure are appropriately recorded).

However, Police Prosecution will often argue that the disclosure of more than one or two items "may as well be the full brief". This causes difficulties, as it is the practice of some courts not to order a full brief of evidence unless a plea of not guilty is entered.

In many cases, a defendant wishes to obtain the evidence that is relied upon by the Prosecution so that they may confirm that the allegations have been accurately described in the charges against them, or to case conference in respect to particular allegations only. A defendant may therefore wish to obtain disclosure without wishing to challenge the charges in their entirety and proceed to a full trial.

In jurisdictions which require a plea of not guilty be entered before a defendant may seek such material, the defendant may be disadvantaged by appearing to fail to expedite the course of the matter, or, more often, may abstain from their right to seek disclosure.

Also, it is common that court-ordered disclosure material will not be made available until a matter's next court date (and in fact, some Magistrates will therefore order material be disclosed on or before the next court date to pre-empt this).

As a result, the matter will usually need to be adjourned for a further period to allow the material to be considered (in particular, where the material is stored on USB or CD and therefore cannot be viewed at court). This results in significant delays in matters undergoing case conferencing.

22. How could the disclosure process be improved? For example, could the new criminal procedure legislation include a staged approach to disclosure, or include timeframes for disclosure in summary and committal proceedings?

It would be beneficial for the legislation to enshrine the defendant's right to disclosure, even to the extent of a full brief of evidence, at any stage of proceedings without requiring that a plea be entered.

More generally, a staged disclosure process that makes a higher level of disclosure available earlier in proceedings may allow successful negotiation to occur sooner.

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

We consider that consistency in this would be beneficial.

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

This is not an issue our service is able to comment on.

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

We consider that current arrangements are not sufficient. There is enormous inconsistency between jurisdictions.

Clients have reported that in some courts, they are told that if they are self-representing then they are not able to case conference or make submissions to the Prosecution. This appears to arise from inconsistency as to the definition of "defence" between Practice Direction 9/2010[10] and the Case Conferencing Protocol.[11]

Even where this is not the case, it is very difficult for an unrepresented defendant to access any form of case conferencing other than attending in person on a designated case conferencing day, and liaising directly with a prosecutor.

[10] https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/85691/mc-pd-9of2010.pdf

[11] https://www.police.qld.gov.au/sites/default/files/2018-08/caseconferencingprotocolsigned.pdf

In addition, it is difficult for unrepresented defendants to navigate the processes that would enable them to provide written submissions, or to verbally discuss the matter with a Prosecutor. Each of these options can be overwhelming and intimidating to our clients.

There are also significant discrepancies between jurisdictions as to what power a Prosecutor has in case conferencing. In some jurisdictions, Prosecutors are able to consider submissions and act immediately (such as by amending the facts of a charge, or offering no evidence), while in others, the Prosecutor returns the decision to the Arresting Officer. This causes case conferencing processes to be significantly slower in some areas.

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

There should be case management requirements embedded into the legislation.

In our view, there should be different requirements for summary matters and committal matters (although there should be consistency in relation to disclosure, as discussed above).

Case conferencing of summary matters could include disclosure directions, pre-trial conferences (which might include mediation), and the listing of a hearing date within a certain time frame of the charge coming to court, regardless of whether the prosecution have complied with the disclosure obligations.

In committal proceedings, we suggest following the New South Wales four-step case management procedure.

27. If the new legislation does include requirements about case management:

a) Should they be mandatory? Why or why not?

The provisions themselves should be mandatory whilst allowing some discretion in relation to extensions of time/adjournments.

b) How should they apply when a defendant is self-represented?

We consider that the Victorian example to be best practice; i.e., actively encouraging all parties, including self- represented defendants, to comply with case conferencing requirements, whilst the court retains some discretion to dispense with the obligation. Allowances are likely to be

required in some cases, specifically in relation to extension of time allowances and potentially further opportunities for diversionary options, as they are in civil jurisdictions.[12]

We note that defendants who are seeking a grant of Legal Aid may need one or more extensions of time built in to the process. We have observed that under current arrangements, defendants may be encouraged by the court to enter a plea while they are still awaiting the allocation of a grant of aid. We consider that this may deprive defendants of their right to legal advice. We would strongly recommend that case management procedures take into account delays that may be faced in successfully applying for a grant of aid, and that defendants are not compelled to progress their matters without legal advice where reasonable steps are being undertaken to obtain representation.

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

We support the introduction of guidelines setting out appropriate timeframes.

Our clients frequently report that the stress caused by their court matters causes a high level of emotional distress, fatigue, and health problems, and that these issues increase the longer a matter remains before the court. Clients both in and out of custody are affected by these concerns. Our clients also frequently comment that they do not understand why their court matters take such a long time to resolve.

Outside of exceptional circumstances (such as pandemic conditions), matters should be able to progress through the Magistrates Court in six months. In-court diversion programs and/or mediation may extend this, but ideally no more than by an extra six months.

We would support timeframes that reflect this, but retain flexibility at the court's discretion.

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

We strongly support in-court diversion and have seen first-hand the difference it can make to clients who are given the opportunity of/exposed to therapeutic jurisprudence.

[12] For example at the QIRC a self-represented party is given two opportunities for a mediation conference prior to a full hearing.

We support a range of diversionary options being available. At times, the courts grapple with a lack of sentencing options. The introduction of further court-based diversion options would assist in this.

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

In our view, at a minimum there should be specialist culturally-appropriate programs, drug programs, traffic programs, mediation options (which would involve expanding the existing scheme) and mental health diversion.

The overrepresentation of First Nations people in our justice system continues to be a national source of shame and early intervention in court diversion schemes is acknowledged as a way to reduce the adverse consequences and provide a means of reintegration and reconnection to the community. Community Justice Groups (CJGs) are best placed to provide feedback of the most appropriate and effective diversion options within their communities.

However, we do note that we receive strongly positive feedback from clients about the Murri Court. The Murri Court is currently operated through the goodwill of local Magistrates, rather than enshrined in legislation. We would support this important diversionary option being made available to defendants at all locations.

We would support diversionary options being available in respect of any summary offences (including any indictable matters that can be dealt with summarily). We would further consider indictable drug offences may be appropriate, particularly when it is clear that, for example, supply charges have eventuated as a direct result of the defendant supporting their own habit.

In relation to safeguards, we note Queensland Health's report "Alcohol and Other Drug Treatment for Criminal Justice Clients: Service Provider Engagement Summary" published 2019, included the following in its summary of findings:

Services acknowledge the need to streamline pathways from the criminal justice system into AOD treatment and revise current approaches in accordance with the principle of treatment matching the needs of the client. Some services suggested an improved model based on triage, whereby clients are referred to a program or treatment type after an initial AOD assessment. A few services further suggested the AOD assessment process is performed under a centralised model. Offering pre and post treatment support was seen as beneficial to both clients and services.

Services supported the notion of expanding the range of pre-court options such as revising eligibility criteria for the Police Drug Diversion Program to include all illicit drugs and introduce adult cautioning or warnings.[13]

31. Should the new legislation about criminal procedure in the Magistrates Courts have specific objectives or principles about 'in-court diversion'? If yes, what should they be?

We support this.

We would strongly support guiding principles of therapeutic jurisprudence and the promotion of the human rights of all participants. In particular, we would suggest the following objectives be considered:

- Promote participants' engagement in the court process;
- Assist in participants' rehabilitation;
- Link the participant to support appropriate services;
- Avoid a first criminal conviction where possible;
- Reduce re-offending by addressing underlying needs;
- Enable the victim's participation; and
- Ensure diversion options are available and consistent in Magistrates Courts across Queensland.

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

Mediation is currently underutilised in matters progressing through the Magistrates Court, which would indicate that the procedure is not working effectively.

Mediation should be actively encouraged by Magistrates and Police prosecution and should be considered/available in relation to all matters progressing through the Magistrates Court.

Mediation cannot currently be accessed in numerous locations, and in matters where the complainant is a police officer. While we recognise that this review is unable to address issues of funding or logistics, we would recommend that the diversionary option of mediation be enshrined in legislation to ensure that it can be accessed equally by all court users.

[13] https://www.health.qld.gov.au/__data/assets/pdf_file/0034/835198/atod-engagement-summary.pdf page 6

Case Study: Mary
Mary is a mother in her thirties, originally a refugee from East Africa with limited English. Following an incident with police, which stemmed from her husband parking temporarily in a disabled zone, she was charged with serious assault police charges.

Tragically she experienced a miscarriage whilst in the watch house.

Having to then attend court on multiple occasions had been extremely retraumatising for her.

Despite the unavailability of restorative justice conferencing with matters relating to the police, the DPP were willing to pay for a private mediator. The police officer and Mary talked through the incident and the matter was resolved with both parties apologising to each other. Following mediation, the DPP offered no evidence in court and the charges were dismissed.

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

Caxton would support the establishment of a scheme similar to Victoria's Criminal Justice Diversion Program which defers determination for twelve months.

Case study: Matt
Matt was a Caxton client with low-level drug charges. A drug diversion program was offered to him – however he had very limited time available due to medical appointments and a significant SPER debt for which he was completing unpaid work through a work and development order.

In Matt's case it was clear that his drug use pertained to stressful circumstances at that period of his life. A deferment of the prosecution would allow him the opportunity to access other supports and demonstrate that prosecution was no longer necessary.

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

As in Victoria, the victim should be consulted where possible, and the court should develop a plan which sets out requirements pertinent to the individual circumstances of the offender.

Procedures and capacity to electronically file evidence/supporting material would need to be established.

If any reoffending occurs during the deferment period then the opportunity could be rescinded.

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

We consider that the introduction of deferred prosecutions enables participants to acknowledge social responsibility for their conduct, while diverting the individual away from the criminal justice system. It also grants participants the opportunity to be connected to social supports when very often criminogenic behaviour emerges due to lack of those supports.

We consider that a deferred prosecution should be considered for:

- First time/low risk offenders;
- First Nations defendants;
- Defendants with mental illness or disability; and
  Defendants experiencing substance addiction, who wish to engage with substance misuse programs.

We would suggest that the victim's position should be sought, and deferral may not be appropriate where the victim is not in agreement.

We consider that a six-month deferment period may be an appropriate starting point, with the possibility of extension where there are reasonable grounds.

Domestic violence offences may be suitable in particular circumstances (as recommended by Women's Safety and Justice Taskforce). We would suggest that appropriate domestic violence offences include those that must proceed summarily, where the victim is agreeable to the deferral. We consider this approach would be particularly effective in diverting first-time domestic violence offenders from further offending behaviour, and eventually leading towards improved safety and potentially reduction in imprisonment rates.

Case Study: Adam
Adam had been diagnosed with schizophrenia and co-morbid polysubstance abuse. He frequently appeared before the Magistrates Court for minor offences. Both the Public Trustee and the Office of Public Guardian were involved. His poor adherence to medication and chaotic lifestyle led to homelessness and eventually custody. A deferred prosecution in his case may have prevented his being repeatedly charged, breaching bail and being remanded in custody. It may also have provided the opportunity for the instigation of a holistic and coordinated treatment plan.

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

Caxton would be fully supportive of such a scheme.

We consider that the Victorian model relevantly addresses the salient issues (such as victim participation, flexibility, and proceeding without the entering of a plea). We do consider that prosecution consent should not be required, as discretion should ultimately sit with the Magistrate.

The main issue we foresee is where the administrative burden would fall.

37. What procedures could be included in criminal procedure laws in Queensland to enable the Magistrates Court to divert a person out of the court system before the person pleads guilty or is sentenced? For example, could the court make its own orders? What types of requirements could be included?

We do hold some concerns about the court making orders that a person engage with services (such as domestic violence counselling, or substance misuse programs). In our experience, particularly with our bail support program, such programs have extensive wait lists. We do not think the participant should be made liable to the availability of those programs, and deemed in breach of court orders if they are unable to obtain admission within the prescribed period. We would instead suggest that the court develop a (non-binding) plan with the participant which may include such programs, but exercise discretion in determining whether the participant has made reasonable efforts in engaging with that plan.

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

Ideally diversion would be available for any defendants on bail in respect of charges able to be finalised summarily, with the support of the victim.

39. Should the Magistrates Court have the power to issue a caution if it is of the view the police officer should have cautioned the adult person (in a similar way to the Childrens' Court)?

We are strongly supportive of this.

Adult cautions are currently underutilised. We have seen Magistrates adjourn matters and strongly encourage the prosecutor to reconsider and request police issue a caution. If court had the power to caution and discharge, then we believe there would have a positive trickledown effect in encouraging police to consider issuing a caution at first instance, ultimately reducing the burden on the court system.

40. Should new legislation about criminal procedure provide, as in the Childrens Court, that instead of accepting a plea of guilty the Magistrates Court can dismiss a matter, and may caution an adult? What issues need to be considered?

We are supportive of the dismiss-and-caution approach currently used under the *Youth Justice Act* in matters where police ought to have cautioned at first instance (as discussed in question 39 above).

However, we consider that there should be a clear distinction between matters in which a caution is necessary, and matters where an absolute discharge is appropriate instead. We consider that the new legislation should include both options.

Dismissing a matter absolutely is different to cautioning, which effectively indicates that a warning to the defendant is appropriate. We would suggest that a caution may be appropriate for matters in which the defendant accepts responsibility for the relevant conduct, while absolute discharge should not be limited to these matters. Absolute discharge is appropriate in trivial matters in which the Magistrate considers that the criminality of conduct alleged is negligible, or mitigating circumstances exist to such an extent that the defendant retains very minimal criminal responsibility.

It may be appropriate for cautions to be unavailable for six months following a defendant's last court-issued caution.

41. Should cautions be formally recorded? If so, in what circumstances could a proceeding end this way? What should be included in the new criminal procedure legislation? What issues need to be considered?

We consider it to be important that cautions are not formally recorded as a form of conviction (such as a conviction that is not recorded.

We consider that the court need not formally record a caution, although we acknowledge that the police may record cautions in (not-for-production) criminal histories. It would be beneficial for the legislation to identify that a caution does not activate the reporting obligations of other agencies.

If a defendant receives absolute dismissal, then no record should be kept.

Some of the impacts that our clients have experienced as a result of being convicted of an offence, even where the conviction is not recorded, include:

- Children being removed;
- Loss of employment;
- Loss of Blue Card or Yellow Card;
- Homelessness;
- Self-harm and suicide attempts;
- Loss of relationships of support; and
- Impact on immigration or visa status.

42. Should the court be able to strike out a charge or order an 'absolute dismissal' for trivial matters (not as part of a sentence)? If so, what matters would be trivial? In what circumstances should this occur?

This option should be available to Magistrates to use their discretion on consideration of the individual circumstances of the matter. Some examples would be:

- where the defendant was a first-time offender;
- trivial/low level drug offences;
- section 7, 8 or 10 of the Summary Offences Act.[14]

43. Are criminal procedures about summary hearings and pleas of guilty, including written pleas of guilty, working in practice? How could they be changed or improved?

Written pleas of guilty are currently under-utilised but this may be due to lack of awareness/knowledge.

[14] Though note the current inquiry into the decriminalisation of certain public offences

At present, the inability to attach documents (e.g. letters of support, medical reports) when lodging an online plea can result in this option being disadvantageous to defendants. This issue needs to be addressed to improve the accessibility and efficacy of this option.

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

We consider that a matter can be dealt with in the defendant's absence where the defendant is legally represented (unless a term of actual imprisonment is anticipated).

We consider that generally, a matter might be dealt with without an appearance where the sentence imposed is one other than imprisonment in any form. However, we note that certain community-based orders require the defendant's consent. We would suggest that documentation for defendants be developed that identifies that matters may be dealt with in their absence if a fine is in range, *or* if they indicate to the court that they understand and agree to engage in a community-based order should the court see fit to make one (indicating consent by, for example, returning a form, emailing the registry, or completing an online acknowledgement).

Where the matter may (or must) result in the disqualification of the defendant's drivers license, we consider that the matter should only proceed in the defendant's absence if the defendant has been given notice of this potential outcome, and has indicated to the court their understanding and agreement to be subject to such an outcome (as above).

45. If a Magistrate is dealing with a matter in the defendant's absence, should the sentencing options available to the Magistrate be restricted? If yes, how?

We consider that the Victorian provisions of not sentencing defendants to a term of imprisonment and being limited on the amount of fine/restitution payment, is appropriate and human rights-based.

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

The main issue experienced by our clients in the committal process has been delay, even with a registry committal.

In addition, defendants without legal representation are not able to proceed by way of registry committal, but often find the procedure of a full hand-up committal to be extremely confusing. Duty lawyers are usually not able to provide advice about conducting a full hand-up, and responsibility for providing an explanation about the process therefore often falls to the

presiding Magistrate. We would recommend that an option be available for self-represented defendants to consent to the committal of their matters on the papers.

Further, registry committals are not currently able to be processed by the Courts where breach of bail charges are outstanding. This frequently results in defendants pleading guilty and being sentenced in relation to breach of bail charges so that their registry committal may be processed. They may then plead guilty to further summary offences either before the Magistrates Court following resolution of their committed charges, or by way of s651 application. As a result, these defendants are exposed to an extra application of the offender levy. We would support a change to the existing subsection 114(d)(i) of the Act to permit matters to be committed while breach of bail charges remains outstanding.

47. Should there be a compulsory direction hearing before a committal takes place? If yes, what should be the purpose and requirements of this hearing? Should there be any circumstances where a directions hearing can be waived (for example, where the parties indicate a matter will proceed as a registry committal)?

We support a mandated direction hearing as a starting point for most matters.

A directions hearing, including a case conference, would encourage the parties to try and resolve the matters in dispute and reach a plea. We know of multiple examples of where submissions were made at the Magistrates Court, rejected, only for the same argument to be made twelve months later on the eve of the trial and be accepted. The impact on the defendant and victim can be catastrophic.

There are circumstances where this process should be waived, including where a registry committal is indicated (either before or after case conferencing).

We also note that committal proceedings are complex and very opaque to unrepresented defendants. We strongly recommend that any additions to this process (including directions hearings) be accompanied by clear procedural information setting out the steps a defendant will be expected to follow in the course of their matter.

48. In relation to the examination of witnesses during committal proceedings, should the law include guidance about what is 'substantial reasons, in the interests of justice'?

We would consider that there is already guidance available and an exhaustive list would unnecessarily fetter a Magistrate's discretion.

49. How can victims' interests be incorporated into Magistrates Court criminal procedures? This includes decisions to divert a defendant out of the criminal justice system, diversionary processes and outcomes, and court proceedings (for example, in closing the court room or considering adjournment applications).

The Charter of Victims' Rights clearly sets out principles that govern the treatment of victims in the administration of justice. In our experience, these rights are not well known, with responsibility for their adherence falling between the court and the police prosecution.

Currently, victims of crime have limited influence on the course of the matter through the Magistrates Court. As a result, there is now growing recognition that victims can be re-victimised through the court process.

In our experience, victims feel very powerless during court proceedings. Their interests should and could be incorporated.

Adopting a human rights-based approach ensures:

- Victims' rights with regard to a fair trial;
- Vulnerable victims such as women and CALD individuals have adequate access to justice;
- Victim safety is considered and acted upon;
- Protection of children and young people who are victims;
- A person's right to access to information held about them; and
- Victims' right to life are protected.

For example, in the adult restorative justice scheme, the defendant sees and hears from the victim directly and can therefore directly appreciate the harm their offending has caused. Increased participation in the process, and influence in how the matter is resolved, provides the victim with agency which can lessen the trauma and reduce the dissatisfaction and frustration that victims currently feel.

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

This is not an issue our service is able to comment on.

51. Should the law be changed so that costs can be awarded in relation to offences under the Drugs Misuse Act 1986 that are heard and decided in the Magistrates Courts, consistent with the current provisions in the Justices Act?

This is not an issue our service is able to comment on.

In summary, Caxton welcomes the Review and its commitment to progression and modernisation to the busiest court system in the Queensland.

This submission was prepared by Lily Fletcher, Faye Austen-Brown and Klaire Coles.

Please do not hesitate to contact Cybele Koning by telephone on [redacted] or by email to [redacted] if you have any questions regarding this submission or if we can be of any further assistance.

Yours faithfully,
Caxton Legal Centre

[redacted]

Cybele Koning
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