Criminal Procedure Review Magistrates Court – Response to Consultation Paper

Submission by Legal Aid Queensland

Legal Aid QUEENSLAND

Criminal Procedure Review Magistrates Court – Response to Consultation Paper

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission in response to the Consultation Paper released in April 2022 in relation to the Criminal Procedure Review of the Magistrates Court.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

In reviewing the consultation paper, we have called upon the experience and expertise of lawyers across the State, including from our Criminal Law Services division, Information and Advice division, and several of our regional offices. Our lawyers represent and provide advice to significant numbers of people who come before the Magistrates Court – our in-house lawyers alone represented 6063 defendants as duty lawyer in the Children's Court, 39,607 defendants as duty lawyer in the Magistrates Court in the 2020/2021 financial year, finalised 2862 matters in the Magistrates and Childrens Courts through grants of aid (at committal, summary hearing or sentence), and our in-house practice piloted a criminal law duty lawyer advice and representation service in Brisbane and Holland Park Magistrates Courts. In addition to the input from our legal practices, we have also called upon the experience and expertise of our First Nations Senior Advisor.

General Considerations

It is clear that the *Justices Act 1886* (Justices Act) is in need of comprehensive review, together with other criminal procedure laws and rules. LAQ hopes that the outcome of the review can achieve improved consistency of practice and procedure across all courts, expediency, fairness and ensure

that the criminal justice system caters and is responsive to all its users. We encourage particular mindfulness in the committee's recommendations to the over representation of First Nations people in the criminal justice system, unrepresented defendants navigating the system and, more generally:

- defendants who experience disadvantage (understanding that the concept of disadvantage is a broad one)
- the diversity of users (including cultural and linguistic diversity)
- accessibility given the remote, regional and rural locations throughout Queensland.

LAQ encourages the review committee to be mindful of the three mechanisms for capturing procedures and processes – namely legislation, Criminal Practice Rules and Practice Directions - in working out how to best create a new system which is adaptive to needs and change, recognising that sometimes changes need to be made more quickly than the wheels of legislative change may permit. We note that any efficiencies gained from reforms may represent consequential savings to our organisation. Converse to this, if changes in procedure introduce additional steps within the system, this could have cost implications for LAQ.

We have responded in more detail to the questions most relevant to our areas of practice or where we see most issues lie, however we are also open to engage in community consultation forums and follow up feedback sessions if the committee seeks that any issue be further canvased.

Submission

Part 2: Contemporary and Effective Criminal Procedure in the Magistrates Courts

Generally, how are criminal procedures in the Magistrates Court working? What could be changed or improved? (Question 1)

From LAQ's perspective the criminal procedures are generally working well but there are areas where there could be a change in procedures so as to improve consistency, efficiency, provide for greater use of diversionary options, and expedite matters. We have included a range of recommendations in our responses to various questions; in particular:

- under Q46 we have suggested the removal of the need for prosecuting agencies to consent to Registry Committals
- in our response to Q47 we support a need for compulsory directions hearings in certain matters to improve timeframes regarding disclosure
- our response to Q48 outlines a need to reframe legislation relating to the test to allow cross-examination in committal proceedings which could increase efficiency in the area of directions hearings.

Further, the addition of guiding principles will add clarity to the philosophies behind the legislation and some of the mechanisms. This clarification could assist in improving the way the system works and the timeframes within which it operates.

Technological advancement and modernisation should be encouraged to expedite processes but must remain in the context of fairness.

As mentioned above in our introduction, we encourage the committee to consider where criminal procedures and processes are best captured – legislation, Criminal Practice Rules or Practice Directions. LAQ supports a criminal justice system which can adapt and improve, noting that time taken to effect change can vary considerably between the three mechanisms.

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

"Contemporary and effective" means the utilisation of technology, new ideologies and updated or current community standards to increase the efficiency and efficacy of the system. Even in light of the technical advancements forced upon the system by the COVID-19 pandemic, there is still room for greater utilisation of electronic processes in registries and court rooms. However, this needs to be in the context of what has proven to work effectively within the system historically as well as fairness of approach and consistency.

How concepts should be applied to criminal procedure laws

Part of the issues we confront in the current day is the modern methods of policing/investigation and the provision of evidence that simply were not in contemplation when the *Justices Act* was first drafted. For example, large tracts of CCTV footage, telephone records, digital recordings. The proposed changes to the current system need to be considered in the context of the new style of investigation, the modern evidence that is available and the overarching need for there to be timely and reliable disclosure of a large body of evidence. Further, consideration needs to be given to building into the new process the ability for that material to be analysed and considered in full by the defendant and/or his/her legal representatives. Efficiency in the system cannot come at the cost of this aspect of the criminal justice process. Any proposed updates to the system in terms of "contemporary and effective" need to consider future further advances in the area of policing/investigation that may impact the system and its litigants moving forward.

It is recognised that this review is focused on improving Magistrate Court criminal procedure, however recognising that is one part of a broader system suggests any changes or modernisation needs to be considered in light of the greater system that will remain and ensuring that there are not unintended consequences that impact each other.

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. (Question 3)

Criminal procedures in the Magistrates Courts could better accommodate the needs of different people by:

- Ensuring the broad dissemination of information, knowledge and education around accessing the system. That information should be variously targeted at different groups of people with specific needs.

- The involvement of interest groups or specialists for specific needs, i.e., these groups or specialists consulting in the process of producing information, knowledge, education and liaison/information officers.

- In line with the above, additional liaison or information officers available at all courthouses.

- Putting in place, as much as possible, practices and procedures which are common to all Magistrates Courts and, where possible, are also in line with the higher courts to improve understanding of processes and minimise the confusion which can occur when, for example, users of the system deal with a different Magistrates Courts in Queensland or have a matter move to a higher court where different procedures apply which could be more consistent (e.g. summons v. subpoenas).

- Ensuring support and sufficient resourcing is given to organisations such as LAQ, the Aboriginal and Torres Strait Islander Legal Service, Women's Legal Service, Community Legal Centres, Victims Groups, Prisoners Legal Service, and other interest groups to increase the knowledge (and its dissemination) in this field.

- Recognising the broad diversity of users to not just include those noted in this question, but all types of diverse capabilities, trauma effected participants, and disadvantage arising from remote locations and limited resourcing in some areas. Ensuring a focus on consistent service delivery and access to justice and programs / diversionary options for all users (for example, broadening access to adult restorative justice conferencing in more areas).

- Training and development programs for court staff designed to explain contemporary First Nations society, customs and traditions and improve cross-cultural understanding.

- Minimise the occasions people (lawyers and defendants) need to attend court houses in person.

Part 3: Key issues about criminal procedure in the Magistrates Court

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

Guiding principles may assist in marking a new era for the court in terms of criminal procedure, however, any such principles should be broad in compass and flexible to withstand the test of time. These guiding principles should demonstrate and support the goals of the new legislation and assist people to understand those goals. The guiding principles should also assist in the implementation of the new scheme.

The consultation paper at 3.7 pp. 23-24 refers to the guiding principles used in the *Queensland Civil and Administrative Tribunal Act 2009* and the *Uniform Civil Procedure Rules 1999 (UCPR)*:

- the objects of the Queensland Civil and Administrative Tribunal Act 2009 include 'to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick'.
- the UCPR include a 'philosophy'. This states that the purpose of the rules is to 'facilitate the just and expeditious resolution' of issues 'at a minimum of expense'. The rules should be applied by courts 'with the objective of avoiding undue delay, expense and technicality and facilitating [that] purpose'. Parties to proceedings 'impliedly undertake' to proceed in an expeditious way.

LAQ supports guiding principles along similar lines.

The guiding principles set out at 3.8 on page 24 of the consultation paper are all supported by LAQ, with some suggested amendments (in italics) to the following principles contained within that list:

- procedures and documents should be simple, easy to understand *and accessible to people who face language and/or literacy challenges.*
- the system should operate in a way that focuses on *users, by engaging with those involved and impacted, using trauma informed practices as required, in order to acknowledge and understand various user challenges, and support rehabilitation.*
- people should not be disadvantaged in proceedings because they are from a culturally or linguistically diverse background and do not speak English as a first language, *or because of their location, financial disadvantage, or because of different capabilities.*
- criminal procedures should be adaptive to modern and changing technology *where appropriate, without reducing the involvement of its users.*

Some other concepts which could be included within guiding principles include:

- Access to justice is facilitated, increased and improved for communities, for those disadvantaged or over-represented.

- Court processes and procedures should consider trauma informed thinking to reduce undue trauma not only for victims but for defendants who can be negatively impacted by a system lacking consistency, transparency and expedience.
- The system should operate to ensure, as far as is possible, safety for its users (cultural, physical and community).
- The criminal justice system should encourage the confidence of its users and the community through transparency (wherever possible), education and accountability.
- Court processes and procedures should be focused on minimising delays, in particular for those in custody.
- Recognition that the needs of the parties accessing the system vary.

Should the law be changed to create a single Magistrates Court of Queensland? (Question 5)

LAQ supports changes which improve consistency in procedure and practice throughout courts in Queensland. Improved consistency encourages efficiency, allowing court users (some of whom may be unrepresented) to have greater understanding, experience less confusion, and move from one jurisdiction to another more easily. We are a far more transient population now compared with 1886. Creating a single Magistrates Court may also assist in centralising resources and improve case management or at least increase the Court's ability to case manage matters.

Anecdotally there are reports of:

- court users having forms rejected from various registries, unaware they are using a form which can be used in a higher court but not the Magistrates Court, or unaware there is a particular practice in an individual Magistrates Court in Queensland (and, further, some courts will allow amendment of forms, others will not). Such issues create delays and require more resources.

- Difficulties in managing matters – where proceedings are commenced and finalised, and the transfer of matters.

It would seem likely that creating a single Magistrates Court of Queensland would be likely to only increase consistencies across the courts, thereby encouraging a more efficient and modern stream-lined approach.

Should the Queensland Magistrates Courts be renamed as Local Courts? (Question 6); and

Should the title of 'Magistrate' be changed to 'Local Court Judge'? (Question 7)

As discussed in the Question 5 response, LAQ supports changes which improve consistency in procedure and practice throughout courts in Queensland given that generally encourages greater

efficiency, and allows court users to have increased understanding about the criminal justice system generally. If this can be achieved by way of a name change, we would support the change.

LAQ does not have a view regarding changing the title of the court or the term "Magistrate".

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

LAQ supports the development of electronic processes and procedures, and any mechanism that can be put in place to increase efficiency whilst ensuring the protection of litigants' rights and ensuring the notions of fairness and justice remain paramount.

LAQ notes the increasing utilisation of electronic processes, including recent legislative amendments, including:

- amendments regarding remote execution of documents under the *Corporations Amendment (Meetings and Documents Act 2022* (Cth), allowing companies to execute contracts, deeds, and company documents electronically, and allow the involvement of video or virtual meetings.

- *Justice and Other Legislation Amendment Act 2021* (Qld) which allows, for example, the witnessing of an affidavit or declaration by remote means such as audio-visual link.

LAQ considers that provisions which allow for the online filing of applications, outlines of submissions, and supporting documentation would enable a more efficient functioning Court. For example, it has been the experience of LAQ in appeals to the District Court pursuant to s222 *Justices Act 1886* (Qld), that in order to obtain a copy of material from the primary court file a request must be made to Search and Copy at the District Court, who then make a request to the relevant Magistrates Court. A copy of the relevant material is then made and scanned back to the District Court Registry, who onfoward it to the requesting party. It can be anticipated that delays could be minimised with the electronic storing of material.

Further, it has been LAQ's experience that the implementation of the Digital Lodgment System by the High Court of Australia has significantly improved the efficiency of filing and serving material. Once uploaded, material is reviewed by a Registrar, and if accepted it is then approved and a digital seal is added to the start of each document. If the filed material is not an originating document, it is automatically served on the other party.

It is noted that in the District and Supreme Courts parties can apply for, and receive, subpoenas via the electronic portal. As previously stated, LAQ supports improved consistency in practices and procedures across all courts in the criminal justice system as it is our view that changes such as these can improve efficiencies, understanding, and access to justice for court users.

LAQ additionally notes that presently in the Magistrates Court the online application for a Court Event Form has been utilised by many practitioners within LAQ and should continue to be encouraged and used frequently by practitioners to list matters. A similar process is in place in both the District and Supreme Courts. The timeframes required to lodge online applications differ between the Magistrates Court and the District and Supreme Courts, with the Magistrates Court requiring the lodgment to be two clear business days prior. It would be beneficial for consistency and ease of use if these were consistent between the courts, in particular the timeframe in the Magistrates Court reduced to align with the higher courts.

While the progress in the use of technology has been welcomed by many in the past two years, it is the experience of many practitioners in regional or non-centralised courts that the technology in place is unable or ill-equipped to allow the remote appearance of more than one party, which has contributed to delay in finalising matters. The inability for both a practitioner and prisoner to appear by video-link (particularly as a result of Covid-19 delays, or court commitments elsewhere), means that often matters are adjourned to another day to either facilitate the transport of the defendant in person, or to accommodate an in-person hearing. In encouraging the upgrading and use of technology, and the continued and increased use of remote appearances, this may assist in increasing the efficacy of proceedings. LAQ notes that some Magistrates Courts will require significant upgrades in technology in order to facilitate these services, which will require significant funding in its own right.

LAQ welcomes the introduction of systems for represented defendants which would, but for hearing dates, not require attendance of any parties unless required or with leave. In our view, court resources are better placed for the hearing of matters (sentences, summary trials, committal hearings, bail applications) and case management of matters allocated to positions such as registrars.

It is in the interests of all parties that matters progress quickly through the criminal justice system, particularly so for defendants who are remanded in custody. However, even if general provisions are put in place to allow for electronic processes and procedures there should continue to be the ability for matters to be dealt with in other ways where appropriate. For instance, the parties should have the ability to apply to deal with matters in another way and the Court should have the ability to over-ride the general provisions (as to electronic processes and procedures) where necessary.

If such processes are to become part of the accepted general provisions of the Court, safeguards should be enacted to protect the system and its parties, including measures instituted to ensure that forgeries and fraudulent documents attempting to be filed are detected. Protocols should be implemented to ensure that the system is not used in a way that perverts the course of justice (and collateral risks). Further, protections need to be implemented to ensure access to such material is not misused or in breach of people's privacy, and the ability to distribute and copy such material from within the electronic court system must be restricted and/or managed. Influence could be drawn from the electronic search and copy procedures in the District and Supreme Courts.

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 (Question 9)

As indicated in previous responses, LAQ supports the implementation of mechanisms to improve efficiency, whilst ensuring the rights of the defendant to a fair trial are protected.

The Magistrates Courts are the busiest jurisdiction in Queensland, with over 104,000 cases (or a little over 94%) sentenced in the Magistrates Courts in 2019-2020.[1] While the District and Supreme Courts have seemingly embraced the use of technology in relation to remote appearances and evidence, such processes may not be as suited to a jurisdiction dealing with such a sheer volume of cases. In some cases however, remote appearances may be the most appropriate way to deal with a matter for a variety of reasons, but this should be with the defendant's consent. There are occasions where not facilitating remote appearances may lead to a delay which creates significant disadvantage for a defendant including, on occasion, spending more time in custody.

While a large proportion of matters proceeding to sentence are by way of pleas of guilty, where hearings do take place requiring the challenging of evidence, subject to the application of the *Evidence Act 1977* (Qld) provisions for special witnesses, evidence in person should remain the default position.

LAQ would also urge caution in relation to reliance on the use of technology, particularly videoconferencing facilities, in circumstances where the defendant is particularly vulnerable, suffers from mental illness, impaired capacity, requires an interpreter, or is a child. Their access to justice should not be impeded by an inability or difficulty in following proceedings.

As in the response to the previous question, one overarching concern is the way in which sensitive material is to be used and protected electronically. For example, statements (both written and digitally recorded) which contain sensitive material such as complaints of offending of a sexual and/or violent nature. There is a need for such material to be protected so that it can only be accessed by designated people or positions. This is to protect the privacy of the complainants and defendants.

It is perhaps outside the scope of this review, however LAQ would urge a recommendation from the review committee to consider the ability for technology to facilitate the remote appearance of an inmate in a correctional centre outside Queensland to sentencing proceedings in Queensland, where that method of appearance is consented to by the defendant. There are reports that interstate correctional facilities have refused to facilitate such appearances, even when Queensland courts are seeking the same with the consent of the defendant. For example – anecdotally New South Wales corrective services have formed the view previously that the *Service and Execution of Process Act*

[1] https://www.sentencingcouncil.qld.gov.au/research/sentencing-trends/200506-to-201920

1992 (Cth) does not apply to an inmate's personal criminal matters in another jurisdiction, and therefore are of the view that there is no authority to have an inmate appear before an interstate courtroom via audio visual link in relation to their own criminal matters in that jurisdiction (their view is s. 597C(4) of the *Criminal Code* (Qld), s. 39B(4)(a) of the *Evidence Act 1977* (Qld) and the corresponding provisions of Part 3 of *the Evidence Act (Audio and Audio Visual Link) Act 1998 No 105* (NSW) are insufficient.

Should summary hearings be conducted remotely? Why or why not? (Question 10)

LAQ does not support a change which would see summary hearings routinely being conducted remotely, or reform which could risk eroding the rights of the defendant to a fair trial. As a guide, it is noted that the District Court and Supreme Court, whilst embracing technology, continue to conduct trials in person with only aspects of some trials conducted electronically.

The starting position for the conduct of a summary hearing ought to be that hearings be conducted in person unless it is in the interests of justice that evidence be taken remotely. This would allow each matter to be assessed on a case-by-case basis and is consistent with proceedings in the District and Supreme Courts. As in the District and Supreme Courts, provisions can be made for the evidence of certain witnesses to be taken remotely,[2] however that should only occur by an order of the Magistrate that it is in the interests of justice to do so.

A move towards remote hearings should be preceded by a tried and tested electronic filing system – i.e., priority should be given to improving access to technology in courthouses and the implementation of a digital filing system before we move to a system that is highly reliant on technology. For example, for remote hearings conducted in the High Court, a test of the connection for each party is conducted around a week prior to the hearing to ensure any issues are identified early. It has been LAQ's experience that despite these tests, there are still occasions where the connection fails, and parties have had to call in using the backup phone line and conduct the hearing by telephone.

LAQ raises concerns that if remote hearings become a default position, that without proper technological foundation or resourcing, there is a risk that already disadvantaged defendants will become further disadvantaged and risk restricting their access to justice.

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

LAQ has limited, if any, involvement in representing people in these proceedings.

---

[2] As already occurs in the Magistrates Courts in certain cases, see for example *Domestic and Family Violence Protection Act 2012* (Qld) s150

How should new legislation about criminal procedure in the Magistrates Court deal with the term 'simple offence' and the fact that 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'? (Question 12)

LAQ agrees that having separate definitions in two different pieces of legislation for the term 'simple offence' can lead to confusion. A single definition of 'summary offence' would be a sensible resolution to the issue resulting in improved understanding for users of the criminal justice system, while decreasing inconsistencies in legislation. As to what the consistent approach should be, LAQ is of the view this type of change could have broad impacts on a number of criminal processes and pieces of legislation. It is not something that we can adequately cover in the timeframes for this Consultation Paper but believe if this step is being considered that specific options be canvassed as part of further consultation processes.

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? (Question 13)

The way in which the current provisions dealing with the laws surrounding indictable offences are drafted are confusing, and difficult to decipher. This can lead to error, confusion and delay, more than a decade since the introduction of Chapter 58A into the Criminal Code. For example it is not uncommon in the Brisbane jurisdiction to find offences which cannot be dealt with summarily having been adjourned to a summary callover and needing to then be adjourned to another callover, and vice versa. An exhaustive list of offences that can be dealt with summarily, located in an Act about summary procedure, would save considerable confusion, time, unnecessary production and appearances of defendants, and prevent error. For example, a list of offences set out similarly to how offences are set out in the Serious Violent Offence schedule within the *Penalties and Sentences Act 1992* would be a considerable improvement on the current format. To overcome the cumbersome nature of the current legislation, unofficial tables of offences interpreting the provisions of Chapter 58A have been circulating since those amendments in 2010.

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 attend court? (Question 14)

LAQ supports the complaint and summons mechanism being replaced by Notices to Appear, in line with other jurisdictions such as Tasmania, to enable criminal proceedings to be started by the Notice to Appear mechanism by persons other than police. In our view, this is another change which simplifies processes, thereby creating greater consistency and understanding.

How can procedures for starting proceedings be simplified? (Question 15)

With the consent of the defendant, electronic service of Notices to Appear, whether that be by SMS or e-mail, could simplify the commencement of proceedings. It is not uncommon to hear reports of:

- defendants misplacing Notices and then being mistaken about their court date - at times missing the correct date and a warrant being issued
- defendants being served with Notices while under the influence of intoxicating substances and having no recollection of service, the station who served them, the court location and/or court date.

If consent has been provided by a defendant for a Notice to Appear to also be provided by SMS or e-mail, that defendant can access that information more readily in most instances (recognising, of course, that not all defendants have or maintain access to these means, and therefore the paper form Notices to Appear would also have to remain).

The timely electronic lodgment of Notices to Appear with courts would also assist. Currently, when proceedings are commenced by Notices to Appear it is not uncommon for there to be no record of such an appearance with a court until close to or on the first court appearance date. Problems arising from this can include:

- legal representatives or defendants making futile enquiries with a registry
- when errors are made, for example, Notices to Appear with erroneous return dates on a weekend, it can be difficult to bring those matters on as there is no record in the court system.

Procedures which enhance timely, reliable access to information for defendants and their legal representatives improve the operation of the criminal justice system.

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

LAQ supports improved clarity in criminal process and procedure and therefore agrees there should be a clear statement of when proceedings have started within any new legislation, similar to section 5 of the *Criminal Procedure Act 2009*. LAQ does not take issue with proceedings starting on the date that material is filed in court however would seek that any legislation or criminal practice rules (whichever is deemed appropriate) prescribe some timeframes for service / attempted service of the notice on the defendant to encourage expedience of process and minimise Prosecution delay between commencing proceedings and the defendant becoming aware.

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

To improve consistency across jurisdictions, LAQ supports the new Magistrates Courts criminal procedure legislation mirroring the position of the higher courts, that is, in keeping with s. 564 of *The Criminal Code* – namely, *the description of the offence should contain the offence with which the person is being charged with such particulars as to the alleged time and place of committing the offence, and as to the person (if any) alleged to be aggrieved, and as to the property (if any) in question, as may be necessary to inform the accused person of the nature of the charge.*

In keeping with the proposed guiding principles, the new legislation should, in ensuring a fair, just system, provide discretion for the presiding Magistrate to strike charges out either on the basis of insufficient particulars or failure to comply with disclosure directions.

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? (Question 18)

LAQ supports consistency in initiating documents, but acknowledges police officers may issue Notices to Appear in time limited or difficult circumstances. Just as can occur in higher courts, at subsequent court dates Prosecutions may seek to amend or present further charges as further evidence comes to light or more consideration is given. While it is desirable that this not occur, and certainly that it does not occur in a delayed way so as to cause delay to proceedings, it is acknowledged that there needs to be a mechanism by which it can occur in a timely way.

Are the current provisions about private complaints in the Justices Act working in practice? If not, why? (Question 19)

Should the new legislation about criminal proceedings in the Magistrates Court place any limits on private complaints? Why or why not? (Question 20)

Presently, there do not appear to be any categorical restrictions on the commencement of private prosecutions under the *Justices Act*. A private prosecutor can commence proceedings by way of complaint under Section 42. This may be done whether the charge is indictable or a charge which must proceed summarily. The volume of private prosecutions is low and the few private prosecutions that have succeeded have served an important remedial function by allowing defendants to be held to account in situations where the police were unwilling to commence proceedings: e.g., *Arndt v Rowe [2011] QDC 313.*

It would be unhelpful if excessive barriers were put in place of private prosecutions, given that most complainants would have to rely on private funds or *pro bono* assistance in order to pursue these proceedings. Nevertheless, it may be worthwhile requiring complainants to seek leave to commence

proceedings where it is mandatory or likely that any trial will proceed by way of indictment, given the potential public cost involved.

LAQ's First Advice Contact Team (FACT) provides advice in relation to these provisions. Our observations include:

- litigants find the process for issuing a summons very confusing, and often documents need to be repleaded after legal advice is provided
- procedural provisions should be clearer in how to commence proceedings, what is required to be demonstrated, and the process should be simplified as much as possible (particularly given there can be cost consequences)
- It may be useful to clearly define and limit the categories of these proceedings.

Further specific recommendations for change include:

- The power to summarily dismiss complaints in Section 102C is unwieldy and unnecessarily cumbersome - it requires security for costs of the application to be paid prior to it being determined. It would be better if this were remodeled on a broadly similar basis to the summary judgment provisions in Rule 292 of the UCPR.

- Change to improve clarity on how proceedings are initiated. The process for issuing a summons is very confusing to self-represented litigants. It is not uncommon for them to try and request the court to issue a civil subpoena even though that concept does not exist in the *Justices Act*. The current prescribed form for a summons assumes that it is the police who are issuing the summons and therefore self-represented litigants have to amend the form to accommodate the different circumstances.

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

The current disclosure obligations are not working in Queensland. Even where directions are set by the court, they are often not complied with and, for not complying, there is no consequence. Our office frequently encounters:

- Briefs of evidence not being provided to Defence in accordance with directions set by the court.
- Delays at case conferencing due to failure to disclose material in a timely way – both in committal and summary streams.
- Misunderstanding of disclosure provisions and what can be disclosed – often Prosecutions refuse to provide material which clearly is relevant and within their possession, suggesting it be summonsed or obtained through Right to Information provisions instead. This can lead to significant delays in proceedings.

- In some regions - refusal to disclose material at case conferencing stage where no plea is entered.
- In some instances – refusals to provide any of the brief until the entire brief is ready. For a voluminous matter this can create considerable delay. It is common experience that, for example, pathologist reports can take many months to be provided, meaning refusal to provide any witness statements or exhibits until that one piece of evidence is available considerably limits the preparation that can occur in the interim. This creates unnecessary delay which, in some instances, results in longer remand time than would otherwise occur.

There are also broader issues in relation to disclosure including, for example, late disclosure of material for sentences. It is also not uncommon for material to be handed over at the bar table by Prosecutions once a matter has been called on, at times leading to matters needing to be stood down or, at times, adjourned.

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? (Question 22)

LAQ supports a 'staged approach' to disclosure, with material available earlier in proceedings with the goal of:

- allowing additional time for fulsome instructions to be taken which could expedite the general process from the Magistrates Court through to the higher courts
- enabling discussions to occur at an earlier stage with a view to resolving matters more quickly
- minimising the delay which currently exists through late disclosure.

Currently Magistrates Court Practice Directions from 2010 allow for requests for statements and exhibits to be made, as well as in some circumstances the production of partial and full briefs of evidence. This is stepped out with specific timeframes[3]. The existence of these specific instructions and processes for parties in practice directions has assisted early resolution but not addressed all issues regarding prompt and full disclosure by prosecution agencies.

LAQ sees the benefit of the concept of a 'preliminary brief' such as is required to be disclosed for summary matters in the Northern Territory and Victoria – including a statement of facts, available witness statements, video footage, records of interview and criminal history. It is noted the Northern Territory requires disclosure within 7 days of the first court mention, and in Victoria it is within 21 days of the charge being filed in the court. Recognising resources and the volume of matters before

[3] Magistrates Court Practice Directions 9 and 10 of 2010.

the courts may make 7 days difficult to achieve, and in wanting to establish procedures and processes which are reliable and are achieved, LAQ supports a 'preliminary brief' disclosure in summary matters within 21 days of the charge being filed with the court, and full disclosure later if the matter remains contested (with prescribed timeframes set). In light of our experiences with the operation of the existing practice directions put in place in 2010, we see a need for reform to be spelt out clearly in legislation.

A key issue is the general observation that there are no consequences for a failure to disclose / comply with disclosure directions. LAQ supports the review considering how to deal with noncompliance. Options may include:

- Greater training about the duty of disclosure.

- Reflection within guidelines of the importance of early resolution and factors that contribute to early resolution like prompt disclosure and improved technology to facilitate this.

- If directions for disclosure are not complied with, the Arresting Officer be required to attend court and/or provide an Affidavit to the court outlining steps taken to obtain material.

- If directions for disclosure for summary matters are not complied with, the default position being that such evidence cannot be relied upon at trial unless leave is given by the court. New legislation could provide guidance as to the factors to be considered in deciding whether leave is granted – for example, the seriousness of the offence charged, public interest, how crucial the evidence is to establishing the elements of the charge, whether there have been appropriate steps taken by the police to obtain the evidence in a timely way etc. To seek to lead the evidence, Prosecutions could have to call the relevant officers to give evidence regarding the reasons for the failure to comply, and then prove why the evidence should be allowed.

Consequences for non-compliance with disclosure obligations would go a long way towards changing what has become quite enshrined and common non-compliance. We believe this additional measure is necessary given the level of non-compliance despite the clear and specific wording of provisions under Chapter 62 Division 3, and a recognized human right of a person charged with a criminal offence to be informed promptly and in detail of the nature and reasons for the charge.[4]

---

[4] Section 32(2)(a) *Human Rights Act 2019*.

Should the Criminal Code disclosure obligations be extended to all offences in Queensland? (Question 23)

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

LAQ supports consistency in relation to disclosure obligations about alibi and/or expert witnesses being the same in the Magistrates Court as it is in the higher courts.

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

Case Conferencing requirements are not working as well as they could be in Queensland. The current case conferencing process between Prosecution and Defence generally sees the below issues arise:

- The person conducting the case conferencing for Prosecution frequently lacks the authority to make decisions and further consultation is required – creating delay.
- In some courts or regions, Prosecutions require Defence to put their submission in writing, leading to further delay (we note this practice is at odds with paragraph 28 of the Case Conferencing Protocol for Summary Offences (2012) which states '*the preparation of a written submission can cause unnecessary delay in finalisation of a case conference and is discouraged. Written submissions should only be used in exceptional circumstances*').
- Often Prosecutors are reluctant to exercise independent decisions from that of the Arresting Officer – e.g.. if the Arresting Officer will not consent to the charge being discontinued, the charge will not be discontinued. This somewhat defeats the purpose of having case conferencing with a prosecutor. Having brought the charge in the first place, the non-legally trained Arrest Officer can lack the expertise and impartiality to make an objective decision. This can be further compounded by seniority differences within QPS (e.g., a police prosecutor may hold the rank of Sergeant, dealing with a Detective Inspector Arresting Officer).
- Disclosure to assist with case conferencing can be refused by Prosecutions – including in some regions/courts it is refused if a plea has not been entered in, leading at times to matters needing to be listed for trial and a broader brief of evidence being assembled and disclosed than needed to occur (causing delay and involving more resources).
- Some areas will not case conference at all.
- The compilation of briefs of evidence can be of a low standard making it difficult to take instructions or negotiate in an effort to resolve matters early.
- In some courts Prosecutions refuse to provide a copy of evidence obtained under section 93A of the *Evidence Act 1977* (including transcripts) despite a defendant

being legally represented, requiring lawyers to attend at their office to view same. This also creates delay, and can hinder preparation of matters as sometimes it is necessary for the preparation of a case to review the 93A multiple times. This will become a broader issue with the roll out of the Department of Justice and Attorney-General pilot for use of Body Worn Camera footage as evidence in chief in some proceedings (in accordance with recent amendments to the *Evidence Act 1977*).

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 (Question 26)

LAQ is supportive of the introduction or furtherance of measures that encourage efficiency within the Court system. As a starting point, any form of case management that achieves these goals is supported by LAQ. However, it is LAQ's experience that much of the delay in the Magistrates Court is largely attributable to inefficient case conferencing in summary matters.

LAQ notes that case conferencing is facilitated in the Magistrates Court, however, in accordance with the response in Question 25 there are concerns about the effectiveness of the process. This is largely due to summary trial prosecutors not having been allocated sufficiently early to enable meaningful attempts to resolve matters, or those participating in the conference lacking the authority to make a decision without further consultation. This process may be improved with staged disclosure of material, as noted in our response to Question 22.

LAQ considers that effective case conferencing would require:

- timely disclosure of material akin to a 'preliminary brief'
- without prejudice discussions between the parties – to be legislated that such discussions cannot be used in relation to any proceedings
- the court to be empowered to deal with case-management and pre-trial issues
- powers for the court to facilitate the case being conducted or concluded efficiently and expeditiously
- the ability for the defendant to refuse or withdraw from the process.

LAQ is of the view that case conferencing, particularly in relation to summary matters, in the presence of a Magistrate is not a practical process. If case conferencing were to take place in the presence of a Magistrate, then the Managing Magistrate should be different to that of a trial or sentencing Magistrate to ensure the defendant's right to a fair trial, and that the Magistracy's independence is maintained. From LAQ's perspective, this is an unnecessary inclusion to the system which would be difficult to achieve in many Magistrates Courts jurisdictions where the Court is presided over by a single Magistrate. LAQ is also concerned that this would have an adverse effect in those remote locations by causing further delays in cases while waiting for another Magistrate to preside. Additionally, the involvement of Magistrates in the case conferencing process has the potential to impinge or restrict the negotiations between the parties by adding a formality or

the imprimatur of their office in circumstances where what is intended is a frank discussion between the parties, as well as blowing out already long court lists.

LAQ notes the existence of Practice Direction 9 of 2010 insofar that it prescribes a case management process that draws distinction between summary and committal matters. It is LAQ's position that the current Practice Direction addresses the difference between the two streams appropriately. If case management procedure was to be legislated that a similar distinction in processes should be included. The focus then should be on enforcement and implementation.

The case management of committal matters is different to that of summary matters in the sense that within the committal process there is not necessarily the need for final decision-making by the prosecution or defendant. However, it is LAQ's position that within the committals process there is a need for early and fulsome disclosure that would achieve a number of benefits including:

- an increase in the time within which to take instructions from a defendant,
- reduce the need for Basha hearings in the higher courts,
- ensure that appropriate evidence is provided at an early stage to address pre-trial hearings in the higher courts (s. 590AA) with respect to issues including admissibility of pieces of evidence or legality of searches.

Case Management targeted at the present issues around disclosure would occasion efficiency in the Magistrates Court for more voluminous and complex matters and, ultimately, the higher courts.

If the new legislation does include requirements about case management: (a) should they be mandatory? Why or why not? (b) how should they apply when a defendant is self-represented? (Question 27)

Mandatory Case Management

LAQ is not opposed to the introduction of legislation mandating case management processes, as long as the defendant's right to a fair trial is maintained. LAQ notes the existence of Practice Direction 10 of 2010 which sets guidelines for the case management of both summary and committal matters.

In general terms, LAQ, is supportive of the present Practice Direction, however, as previously discussed we hold concerns about the current implementation of these directions. Exceptions to compliance with legislative case management requirements should continue to be in place for exclusively Commonwealth matters, Childrens Court, and Specialist Courts and Programs.

LAQ notes that the highly prescriptive approach utilised in other jurisdictions, such as New South Wales, is not an appropriate fit for the Queensland Courts system.

A Court should be empowered to vary the legislative requirements having regard to the circumstances of the case.

Self-represented Defendants

LAQ supports the encouragement of self-represented defendants to comply with case conferencing and case management requirements, however, some safeguards should be put in place. For example, a self-represented defendant should have the process of case conferencing explained to them by a Magistrate in open court so as to ensure they understand the decision they are making and the impact. Additionally, the Court or Registrar should have the ability to dispense with or waive case management obligations (as in South Australia).

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

LAQ remains cautious about the implementation of timeframes for matters to progress through the Magistrates Court. Each case is varied and unique, and a statutorily imposed timeframe has capacity to increase applications before the court (e.g., to dispense with or extend those timeframes) and create a further backlog of matters. However, the implementation of timeframes in relation to particular matters may assist in expediting their resolution. These are discussed in more detail below in relation to Disclosure, Summary Matters and Committal Matters. Any implementation of legislative timeframes should have particular regard to the *Human Rights Act* s. 32 (for example, to have adequate time and facilities to prepare their defence, to be tried without unreasonable delay).

Disclosure

Disclosure is a foundational part of matters progressing through the Magistrates Court. The level of disclosure made, and the timeframes within which that occurs, remains a practical and procedural difficulty in criminal proceedings in the Magistrates Court. A failure to disclose evidence in a timely and fulsome way risks breaches in efficiency, delays in the proceedings, risks of compromising the reliability of the evidence, or may adversely impact the ability of a defendant to test that evidence due to the passage of time. For these reasons, LAQ supports the implementation or enforcement of timeframes around disclosure. Further, LAQ sees value in disclosure being staggered, where necessary, so as to ensure that a defendant is not forced to wait until the entire brief is available before they can start to understand the case against them. For further discussion of disclosure obligations please see the response to Question 22.

Summary Matters

LAQ supports the implementation of timeframes relating to the disclosure of material – see question 22 regarding a ‘preliminary brief’ being made available perhaps within 21 days (similar to Victoria and the Northern Territory).

Committal Matters

LAQ is cautious about implementing timeframes in relation to committal matters such as those in New South Wales. This is particularly due to the reliance in many committal matters on evidence of testing bodies, such as pathology reports, toxicology results, Electronic Evidence Unit Forensic Reports, DNA results or drug-analysis certificates, before they can proceed. It has been LAQ’s

experience that pathology reports can often take in the vicinity of 9-12 months to be prepared, and in some cases defence may seek to obtain their own report before making an application to cross-examine at committal, which can elongate the time required to progress a matter, but can be a very necessary step.

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

The new criminal procedure legislation should encourage, support and include provisions allowing for 'in-court diversion'. For the reasons stated in the consultation paper, there are enormous benefits to offenders and the community when appropriate offenders are diverted from the mainstream Court process.

While police have discretionary powers to divert defendants, those diversionary powers largely rely on the discretion of the individual arresting officer and would seem to be significantly under-utilised. The discretion available to an officer may not be exercised even in circumstances where it ought to be for a range of reasons including, but not limited to:

- the behaviour of the defendant post offence
- time constraints
- resources
- particular views held by the officer about the defendant or the victim
- the nature of the offence alleged.

As a result it is crucial that 'in-court diversion' should be considered by courts as the default position and be available for defendants to, in keeping with the proposed guiding principles, create a justice system which is accessible to all, fair, just and timely.

'In-court diversion' enables decisions about diversions to be made in circumstances where parties can be more objective and less pressured than the circumstances which may present themselves to police using their discretionary powers, with an independent prosecutor considering the Crown's position, and after the defendant has had the opportunity to receive legal advice.

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

We encourage the review committee to recommend as many diversionary options as possible. The Courts have available to them Drug and Alcohol Assessment Referral (DAAR) and Drug Diversion as diversionary options linked directly to sentence. Both Queensland Drug and Alcohol Court and Courtlink are diversionary options however, they are programs that do not involve the complete diversion from the criminal justice system – at the conclusion of the program they involve sentencing proceedings (or trial proceedings in some cases such as those which may have been before Courtlink).

Potential 'in-Court' diversionary options to consider include:

- Courtlink type program where, at the conclusion of the program, the Court had the power to consider dismissing the offences based on the performance of the defendant on the 12 week or so program, their rehabilitation, etc.
- Minor drug diversion options not linked to sentence (noting that DAAR and drug diversion exist for sentence based diversions) – for example a Courtlink type program where, at the conclusion of the program, the court had the power to consider dismissing the offence/s based on the defendant's performance on the program (in addition to the police diversion options which already exist).
- Property offence diversion options where matters can be adjourned and restitution and/or compensation paid in full prior to charges being dismissed in certain matters – increasing the likelihood of victims being appropriately compensated while reducing pressure on SPER, the court system etc.
- Counselling /mediation options for offences between parties who had a relationship of some kind (including friendship, family members and otherwise) leading up to or at the time of the offence and who both consent. It is recognised that there can be circumstances of domestic and family violence where this would not be appropriate, however there are many examples before the courts of friends or partners being prosecuted for offences where, after the offences are dealt with, contact continues and a diversionary option such as that proposed could provide an avenue of assisting parties to obtain assistance with dynamics within the relationship with a view to decreasing repetition or escalation of the alleged behaviour. It is noted that the Women's Safety and Justice Taskforce Report 1 contemplated a new court-based domestic violence perpetrator diversion scheme which is somewhat more restricted than what is contemplated here, but does consider diversion may be appropriate in some situations.

In our submission the review committee should be wary about placing strict restrictions on the categories of offences available for diversionary programs. Each offender and offence is unique. Hard and fast rules about categories of offences risk precluding otherwise suitable defendants. As examples:

- For some D&FV offences early intervention with appropriate strategies can end the offending.
- Some public nuisances are extremely serious and can involve serious violence.
- Some Assault Occasioning Bodily Harm offences involve minimal injuries and occur between people who know each other and where the complainant might be supportive of rehabilitation.

Rather than place restrictions on the types of offending, the most appropriate safeguard is to allow the judicial officer to exercise their discretion after hearing submissions from the parties.

Should the new legislation about criminal procedure in the Magistrates Court have specific objects or principles about 'in-court diversion'? If yes, what should they be? (Question 31)

The inclusion of guiding principles which incorporate reference to "in-court diversion" will, at a philosophical level, encourage broader thinking, support and consideration about such options and ensure they are considered more regularly in practice. This would clearly be to the benefit of LAQ clients who are frequently disadvantaged not only in terms of the criminal justice system but within the community more broadly and they could/would benefit from other ways of being dealt with other than the usual path of the criminal justice system.

The consultation paper at p. 49 at 3.100 and 3.101 references guiding principles about in-court diversion in other jurisdictions:

> In New South Wales, criminal procedure legislation has a part dedicated to 'intervention programs'. There are specific objects for this part, namely:
>
> - to provide a framework for the recognition and operation of programs that offer alternative ways of dealing with people who have committed (or are alleged to have committed) an offence; and
> - to make sure these programs apply fairly to everyone eligible to participate, and that they are properly managed and administered; and
> - to reduce the likelihood of future offending by facilitating participation in these programs.

These objects also recognise that the rights of victims should be protected and maintained in accordance with the Charter of Victims' Rights, and that 'the successful rehabilitation of offenders contributes to the maintenance of a safe, peaceful and just society'.

If the guiding principles about in-court diversion form part of the broader guiding principles, that is, are read in conjunction with or read in the context of the broader guiding principles, then a version of the guiding principles mentioned at 3.100 and 3.101 would be appropriate, however LAQ would suggest inclusion of some of the following concepts:

- accessible and consistent application of in-court diversion – including consideration of regional accessibility (rural, regional and remote areas) and accessibility for defendants in custody
- transparency of the process
- that it is intended to create/facilitate early intervention
- that it is intended to reduce numbers of those in the criminal justice system and in custody
- that in-court diversion facilitates rehabilitation
- the goal is to reduce recidivism
- that it should be available to a broad range of people with different levels of disadvantage.

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

LAQ is of the view that mediation (also known as Adult Restorative Justice Conferencing (ARJC)) of matters in the criminal justice system is not currently working effectively and there is significant room for improvement.

Queensland's ARJC framework is comparatively expansive because it does not specifically exclude particular offences from referral, and can occur at many stages of the criminal process. In practice, however, LAQ's experience of ARJC in Queensland is that it is underutilised.

Queensland Police Sevice's Operational Procedures Manual (3 June 2022) states that qualified mediators from the Dispute Resolution Branch are only available in the following areas: Brisbane City, Holland Park, Ipswich, Gold Coast, Coolangatta, Cleveland, Richlands, Townsville, and Cairns.[5] Further, a conference may only be provided from one of only four offices in Southport, Brisbane, Townsville, or Cairns (although local community justice groups provide restorative justice services to Mornington Island and Aurukun).[6]

According to the OPM, officers and prosecutors may only refer a matter to ARJC when the following criteria are met:

> '(i) the offence(s):
>
> (a) is an offence which is dealt with summarily or, where appropriate, an indictable offence which cannot be dealt with summarily;
> (b) does not involve a breach of a domestic violence order and is not otherwise related to a domestic violence application; and
> (c) can be substantiated by sufficient evidence.
>
> (ii) the offender:
>
> (a) was an adult at the time of the offence;
> (b) accepts the general circumstances of the matter and expresses a willingness for the matter to be referred for a restorative justice conference; and
> (c) is not, at the time of the commission of the offence:
> - the subject of a community-based order;
> - serving a term of imprisonment and is not on parole; or
> - subject to a suspended sentence.

[5] Queensland Police, Operational Procedures Manual (OPM), Effective 3 June 2022, 3.3 Adult Restorative Justice Conferencing, 9.
[6] OPM, 10.

(iii) the victim expresses a willingness for the matter to be referred for an RJC; and

(iv) the parties to the RJC, include the victim and offender, are not prohibited from having contact with each other by a court order or otherwise.

Despite the above criteria, the OIC of the relevant police prosecution corps may authorise the referral of a matter to ARJC.'[7]

It seems as a general rule, matters can only be referred by the Police, Prosecutions or the Court but Defence can 'suggest' restorative justice conferencing. Anecdotally, lawyers report there often being confusion about how to go about the referral process. One lawyer in our office reports being told by Prosecutions that Defence needed to make the referral, however the form requires details about the complainant which made that difficult and the confusion caused delay in the referral process. Studies have found that increased exposure to, and training in, ARJC by police led to more referrals.[8]

LAQ is of the view that reasons for ARJC not working effectively include:

- insufficient resourcing
- insufficient availability – in particular significantly restricted availability in rural, regional and remote areas
- inconsistent approaches – anecdotally our office has had experiences where some prosecutors or regions simply don't 'do' ARJC, some refuse for indictable offences or other offence categories (not consistently throughout Queensland), and some offenders are refused mediation unless they have limited or no criminal history despite that not being a pre-requisite
- decreased rates of referral often because previous refusals can lead to police and practitioners considering it not a viable option
- inadequate exposure to and training in ARJC
- overly restrictive OPMs guiding police (while it is accepted they do state that despite their criteria the OIC of the relevant police prosecutions corps may authorise referral, it is strongly suspected many police may not pursue a referral through their OIC where criteria are not met)
- unexplained and significant delays – from responses as to whether ARJC can occur to the ARJC actually occurring
- where refusals are provided on the basis of a complainant not consenting, sometimes this may be because the complainant has not had the ARJC and court process and/or its benefits and/or potential outcomes explained fully.

---

[7] OPM, 10.
[8] Criminal Procedure Review, Magistrates Court, Consultation Paper, April 2022, 50.

Changes could be made to improve the use of ARJC including:

- increased understanding of First Nations defendants, and defendants suffering from disadvantage or with complex needs. It has been reported that a missed appointment can be met with no tolerance, with the matter being referred back to the court process.
- increased resourcing to make these services more accessible – including consideration of rural, regional and remote area accessibility, and accessibility for defendants in custody.
- increased use of technology to allow a broader use – making it more accessible to users, facilitators, rural, remote and regional areas, and potentially to those in custody.
- increased resourcing to reduce delays associated with the process.
- increased use of technology to address the willingness and appropriateness of parties to take part where there may be safety and/or trauma concerns.
- increased education and training on ARJC, eligibility, processes and benefits.
- less restrictive criteria for referral – LAQ urges the review committee to be wary about placing strict restrictions on the categories of offences or offenders which can be referred to ARJC (for similar reasons as detailed in response to Question 30).
- where a referral to ARJC is refused on the basis of no consent by the complainant, evidence being required that the complainant has had the ARJC process explained to them (including potential benefits and outcomes), the court process explained to them (including what will be required of them and potential outcomes). Consideration should also be given to alternative mediation models to cater for scenarios where the complainant does not participate.
- once a matter is referred to ARJC – more updates about the process so parties can be better appraised of timeframes and realistic adjournments can be sought.

In-Court Diversion and Deferred Prosecutions (Questions 33 – 38)

Questions 33 – 38 cover very similar concepts, some aspects with very little distinction. LAQ supports the increased use of, and broadening of, in-court diversion options, as well as deferred prosecutions. We have responded to the individual questions however note there is significant cross over.

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

LAQ is of the view that an in-court deferred prosecution scheme could work in the Queensland Magistrates Courts. Issues to be considered include:

- Who would be eligible for this scheme?

- Would types of offences be defined for inclusion or exclusion, bearing in mind comments made at Question 30 and the concern that strict categories risk precluding otherwise suitable defendants?
- How long would this process take to be finalised?
- Would prosecution or the complainant need to agree to this outcome? Or could it be something that the Court imposes without this agreement from prosecution? It is assumed that the defendant would need to agree to such order.
- How would the scheme be administered?
- What would be the process for ensuring that all conditions of a diversionary order are completed?
- Would there be additional support for offenders who are illiterate or have other special circumstances in completing these steps?
- Will the services, treatments and other restorative practices be able to be practically administered in all regions? I.e., Are there appropriate support services in small remote indigenous communities to provide the support envisioned under a deferred prosecution agreement?
- Will the persons / service providers administering the support envisioned under a deferred prosecution agreement be able to provide the support in a culturally appropriate way?
- Ensuring there is flexibility within the scheme to allow participants from all areas of the community to participate. It is not intended that this would be a scheme simply for people who have the means to pay monetary relief (compensation or restitution) in exchange for their charge being dismissed.
- What would be the procedure if the diversionary process failed as the conditions of the agreement are not completed? Would the matter then proceed to a sentence proceeding?
- Would there be a mechanism to appeal or challenge this type of order being made both at the time that it was made, and after it was completed and the charge/s were dismissed?

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

In Victoria a similar diversionary process occurs by both prosecution and defence agreeing that the matter should be diverted and indicate this to the Court by filing a diversion notice. Whilst this seems a very practical approach to diverting matters, it is considered that a Magistrate should also be able to refer a matter if during a hearing (bail or sentence) they consider it appropriate – and the defendant consents.

A procedural step of police officers noting in the QP9 the victim's view on diversion might assist in diverting matters at an early stage.

Consideration should be given as to whether the victim's consent is required for this process to occur. It is considered that the victim's views should be sought where possible, however they should not be obliged to participate. If a victim is opposed to the diversion process that should be a matter a court takes into account when considering whether to make the order. However, the victim's

opposition to such an order should not preclude it from happening if its otherwise considered suitable.

The diversion process could take the following form:

- It is indicated to the court that a diversion order is sought, either by submitting a form prior to the appearance or during oral submissions during the appearance.
- The hearing is similar to a sentence hearing in that the prosecution provides the court with information about the offending, presents any evidence of compensation or restitution sought. Submissions are made on the offender's circumstances and antecedents. Parties are able to make submissions on what the conditions of the diversion agreement should contain.
- A diversionary order is made by the court, and it contains conditions that must be completed prior to the next hearing (e.g. letter of apology, payment of compensation, completion of a therapeutic or skills course, completion of allocated hours of volunteer work, etc.).
- The defendant must file evidence of completion prior to the next hearing date.
- At the final hearing the Court:
  - If the diversion order is completed, would dismiss the charges.
  - If the diversion order is not completed:
    - adjourn for a further opportunity to complete, and if necessary, vary the order or
    - vacate the diversionary order and sentence the defendant, taking into consideration any steps taken to complete the diversion order.

The diversion process could occur in a standalone call over or could also occur in any Magistrates Court dealing with summary pleas. This would mean it could be rolled out in courthouses across Queensland. However, it would likely be useful to have someone within the court registry facilitate or supervise these matters. It is likely that additional funding and resourcing would be needed to implement this option.

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

A deferred prosecution should be aimed at youthful or first-time offenders or offenders with limited previous interactions with the Court system.

In Victoria the criteria for a diversion includes:

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

However, the current criteria for an adult justice mediation conference might also form some guidance in forming criteria, it states:

a) that a person has been charged, or there is sufficient evidence to charge the offender at law

b) that both the victim and offender express a willingness for the matter to be referred to an Adult Restorative Justice process

c) the offender does not have a history of related offences within the last five (5) years; nor a conviction dealt with on indictment in the District or Supreme Court

d) the offender is not in breach of any order at the time of the commission of the current offence

e) the offender has not participated in an Adult Restorative Justice process previously

f) the offence is not arising out of conduct about which an application for a domestic and family violence protection order is based, has been made and/or any breach of such order

g) the offender is not in breach of any release conditions

h) there are no orders or conditions (including undertakings as to bail), which prevent contact between the parties for the purposes of an Adult Restorative Justice process.

Broader criteria would enable more flexibility and for orders to be made in a variety of circumstances the court considers appropriate. As indicated in response to other questions, LAQ cautions against strict exclusionary offence criteria as this can have the effect of excluding matters which may be suitable.

It is important that all parties understand the process. In particular, prosecutors should be open to accepting referrals to the scheme. Legislative provisions could assist in this area.

Adjournments for the completion of diversionary orders should be made to enable the conditions to be met, without unnecessarily delaying the completion of the matter. In some instances, a 4-week adjournment might be appropriate or, if there is a condition to complete a course, a lengthy adjournment may be more appropriate to allow that to occur. There should be a procedure for amending the order if it is no longer practical to meet an original condition. For example - if a specified course is no longer available.

It is important that a defendant is given an opportunity to complete the diversionary order. However, lengthy adjournments should be avoided to ensure that matters are finalised in a timely manner.

Finally, consideration should be given to the conditions of bail undertakings if a matter becomes a diversionary matter. Where bail conditions are strict and onerous on the defendant (e.g., daily reporting), the court should consider amending these if the diversionary order is agreed to by the defendant as the delay in finalising the matter for a diversionary process may place undue hardship on the defendant.

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

LAQ supports diversionary options in the Queensland Magistrates Courts. Such options often help target causes of offending, risks of reoffending, assist in rehabilitation, and address the over representation of Indigenous people within the criminal justice system. Queensland already has had the benefit of in-court diversion programs such as the CourtLink program and the Queensland Drug and Alcohol Court and can use those learnings and observations of what does and does not work well to assist in developing other programs which cater to a broader range of defendants, their rehabilitation needs and reoffending risks.

Potential issues to consider include:

- is there sufficient funding for the program?
- program design, that rehabilitation is a core goal, and training needs for staff prior to commencement of the program.
- availability of programs in remote areas. This involves consideration of availability and use of technology and capacity of service providers to engage with those in remote areas.
- availability to those in custody – involving similar considerations as above.
- eligibility criteria not being strictly limited to first-time offenders.
- education for all relevant stakeholders prior to commencement – e.g., police, Magistrates, lawyers being properly educated about the benefits of the program so that there is 'buy in' from all.
- at what point the option is available – e.g., is an acknowledgement of responsibility required? (we note this is not required to participate in CourtLink) Can it be utilised at any time pre-sentence? There are limitations placed on availability of programs in Victoria (see Practice Direction 1 of 2003).

LAQ supports consideration of courts being required to query whether there is capacity for an infringement notice to be issued (pursuant to s. 394 of the *Police Powers and Responsibilities Act 2000*) prior to a plea of being entered for matters where legislation otherwise permits police to take that course as an alternative to commencing proceedings. Legislation does not currently contemplate infringement notices being considered again once proceedings have commenced. LAQ is of the view this type of legislative change could result in more offenders being diverted from the criminal justice system which, in many instances, may assist in rehabilitation (as an effect of an infringement notice is that an entry on the person's criminal history is avoided).

While recognising it may be beyond the scope of the review, LAQ also supports a broadened capacity for police to issue infringement notices for further offences pursuant to s. 394 of the *Police Powers and Responsibilities Act 2000*.

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? (Question 37)

There are many benefits to diversion, and LAQ supports broad terminology, similar to that used in section 59 of the *Criminal Procedure Act 2009* (Victoria) to ensure Magistrates have a wide-ranging discretion as to what can be diverted.

LAQ also suggests consideration be given to a provision in new legislation requiring a Magistrate to ensure that the parties have considered all diversionary options prior to listing for sentence or trial.

It is suitable to set out guidelines including a requirement of acknowledgment of responsibility by the defendant (if appropriate to the diversion, for example a program like CourtLink does not require same) and requiring it to apply to matters that can be resolved summarily. It is suggested that guidelines require the defendant's consent, however LAQ can envisage circumstances where the complainant's consent may not be required and would caution against such consent being mandatory.

The procedure to be adopted could be set out in a Practice Direction or guidelines contemplating how these matters are flagged early in the system, and procedures for assessment of suitability, referral processes and how matters are managed within individual court lists. Coordination from a range of agencies would be required, and their resourcing/availability in various areas would inform the setting of guidelines. The issues identified in Question 36 would need to be considered in the setting of any guidelines.

Legislative reform should contemplate how the matter is concluded if the diversion program is completed (similar to section 59), or if not completed, and how the referral is to be treated with regard to any participation in the programs. Legislative reform may also contemplate the court being able to have regard, when sentencing, to whether the defendant was willing to take part in a diversionary program (whether that occurred or not).

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

LAQ supports the use of diversion programs and as broad applicability as is possible. It is LAQ's view that the review committee should be wary about placing strict restrictions on the categories of offences available for diversionary programs. Each offender and offence are unique. Hard and fast rules about categories of offences risk precluding otherwise suitable defendants / matters, therefore limiting the potential benefits of diversion. Suitability should be determined on a case-by-case basis, not based on a particular class of offence or offender (e.g., only first-time offenders).

The current available model in relation to adult restorative justice through the Department of Justice and Attorney-General requires a victim's consent regardless of the source of referral. Further,

currently the Director within the *Dispute Resolution Centre Act 1990* determines what is a suitable class of dispute for mediation. These requirements limit the availability of diversions, meaning they are not used to their full potential.

In relation to domestic violence offences, it is acknowledged there are potentially ongoing risks and traumas related to the nature of the relationship between the defendant and complainant/aggrieved that may make some diversionary options such as mediation unsuitable. However, a case-by-case assessment and broad frameworks allow for such considerations to be taken into account, with programs and support being offered as are appropriate.

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)? (Question 39)

Yes, the Magistrates Court should have the power to issue a caution to an adult offender. However, there are foreseeable issues if the test for issuing a caution is "whether the police officer should have cautioned the adult person".

The current QPS Operational Procedures Manual at 3.2.3 states that to be eligible to be cautioned by police a person must:

(i) not deny committing the offence; and
(ii) provide informed consent to being cautioned for the offence.

A court may take a strict view of whether the police should have cautioned the offender. For example, the police may not be able to issue a caution if at the time of the arrest the offender has:

- denied the offence or
- exercised their right to silence or
- is too intoxicated to provide consent to a caution.

This should not be used in later proceedings to then prevent a court from issuing a caution where it would otherwise be an appropriate outcome. It is understood that this strict view is sometimes the approach taken by some Magistrates in the Childrens Court.

A more suitable test for issuing a caution could be "is it appropriate in the circumstances".

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? (Question 40)

LAQ is of the view that new legislation should provide this however there are a number of issues which will need to be considered in this process including:

- Would there be "criteria" for an offender to be eligible for a caution? In other jurisdictions where adult cautioning is already occurring consideration is given to:

- Whether or not there was a similar offence in the past 5 years
    - The nature and circumstances of the charge
    - The age of the offender.
- If the offence involves a victim, would they need to be consulted on this outcome prior to it occurring?
- Could other orders also be made in conjunction with a caution being issued such as compensation or restitution?
- Could a caution be issued on charges where there are mandatory penalties (such as license disqualifications under TORUM offences)?
- Would the offender levy still apply?
- What type of offences could a caution be issued for? Would it include any charge that can be dealt with summarily? Or would there be some offences which were prohibited from having cautions issued?
- It is noted that different jurisdictions have approached this in different ways, for example:
    - In Victoria and the UK if the offence is triable summarily and not subject to a mandatory or fixed sentence or penalty (except demerit points) it is eligible.
    - In South Australia cautions cannot be issued for major indictable offences, aggravated offences, other violent offences, sexual offences or some drug offences.

  The benefits of a broader approach would allow a caution to be an option in many more matters. This is important as unlike other diversionary schemes which rely on service providers, cautions are a diversion process which can be immediately implemented in every Magistrates Court in Queensland including rural, regional and remote communities.
- Would both prosecution and defence need to agree that a caution is an appropriate outcome? Or is it an order that a magistrate can make without the parties' consent?
- How would a caution hearing occur? Would parties need to raise this prior to an offender being arraigned or at what stage? Or would the matter progress like a sentence hearing where parties make submissions and the court makes the formal order at the end?
- Would there be a basis to appeal or challenge a caution issued? It is understood in the Childrens Court a caution cannot be appealed by way of s222 *Justices Act* or a sentence review under 117 *Youth Justice Act.* It must be judicially reviewed.

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? (Question 41)

LAQ's view is that a caution should not be formally recorded on a criminal history. To do so would be very similar to a "convict and not further punish" order and detracts from some of the main reasoning behind the issuing of cautions.

Instead, a caution could be recorded on the "Not for production" (NFP) criminal history. This is how cautions are recorded in the Childrens Court. A NFP history contains all offences a person has been

charged with in Queensland even if the outcome is outstanding or the matter was finalised in a way other than conviction (including: no evidence offered, a nolle prosequi, the person was found not guilty after a trial, or a conviction has been quashed on appeal). It is usual practice for a NFP to be provided to the court in bail proceedings. Recording cautions on this document would mean it is visible for a court to see in bail proceedings.

Recording a caution on a NFP history would also ensure that there was a record of the caution that would be easily accessible to the legal representatives in any future proceedings. However, it is noted that a NFP history is not admissible in sentence proceedings.

Consideration should be given to instances where an offender has already received a caution and is before the court in a subsequent proceeding seeking a further caution. The current practice in the Childrens Court in such circumstances is that once an application for a caution is made a caution history, if there is one, can be provided to the court. This is done by prosecutions reading this information from the NFP history onto the record or tendering a copy of the NFP history with any irrelevant entries redacted. Adapting a similar process would ensure that the court can give full consideration to whether it is appropriate to issue a caution in such circumstances.

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? (Question 42)

There may be instances where it could be appropriate for a court to strike out or order an 'absolute dismissal' for trivial matters. There are matters which come before the court which are technically charged correctly, but are trivial by virtue of the factual basis, or when considered with other related charges.

For example - a person with charges on three separate bail undertakings where charges are all adjourned to the same court and date can be charged with three offences of failing to appear if they fail to attend on that one date. The criminality is clearly covered in one charge but technically it can be three charges. In some courts the police prosecutor will offer no evidence on two of the charges, but others will not proceed in that way. In this instance it may be appropriate for the Court upon hearing the facts and circumstances to strike out the other charges.

It is thought that the test for whether a matter is trivial is subjective, so it would be difficult to create a criteria or definition for a "trivial offence", though it is accepted that some general guidance could be provided.

Another consideration is would the court need an indication of a plea to take this action, or could it occur whenever it considers a matter trivial?

It is noted that police are already required under QPS OPM 3.4.3 to consider if a matter is trivial when deciding whether to prosecute. Issues may arise if a court considers something trivial, but police do not. Would there be a way for such a dismissal to be challenged or appealed by the prosecution?

It is accepted that sometimes police have access to additional information on QPRIME which provides context as to why a trivial matter has been charged. Would this become admissible if a court wanted to strike a matter out? For example - a breach of bail offence for failing to report might seem trivial if the facts alleged the offender arrived at the police station 20 minutes after the 4 p.m. reporting deadline. However, if the person is late every day to reporting and has been consistently warned about being charged, whilst still trivial on its own factual basis, there is more context.

If Courts are able to order an absolute dismissal it would be helpful for practitioners to have an understanding of how this differs from cautions and released absolutely s19(1)(a) *Penalties and Sentence Act.*

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

LAQ supports improvements to the process of resolving matters in the Magistrates Courts. LAQ agrees that the option for a written plea of guilty forms an important basis for facilitating the administration of justice, and finalising matters in one of the busiest jurisdictions in Queensland. The procedure related to a written plea of guilty is further analysed in questions 44 and 45, below.

Summary Pleas of Guilty

It has been the experience of many LAQ lawyers that proceedings are delayed or protracted for reasons beyond the control of the defendant, and those problems are particularly compounded in rural and remote jurisdictions. There can often be extensive delays associated with seeking a date for a lengthy plea of guilty, which can be the result of various factors including resourcing issues with the Court (particularly in single Magistrate Courts) and issues in securing a video-link booking with correctional centres.

The Magistrates Courts deal with complex sentencing situations on a daily basis. One of the common complexities relates to the interaction of legislative provisions relating to parole[9], which are occupying more and more of the Court's time. It would create improved efficiency for summary pleas of guilty in the Magistrates Court if there was amendment to the provisions to clear up ambiguity around those issues.[10]

Further, access to interpreters for some languages, and particularly First Nations interpreters is problematic for both summary hearings and pleas of guilty. It is acknowledged that there are often only a few speakers of these languages in existence but nevertheless, accessing interpreters can be very difficult and bring about delays on matters, which in turn further disadvantages First Nations defendants who do not speak English, particularly if they are in custody.

---

[9] In particular, sections 209 and 211 *Corrective Services Act 2006* and sections 160B-D *Penalties and Sentences Act 1992.*

[10] For example, see *Chevathen v QPS* [2017] QDC 270, contra *R v Winkelmann* [2022] QDC 49.

Provision of material with limited notice can cause inefficiencies, delay and waste court listings if further adjournments are required. For example, pre-sentence custody certificates provided to the defence the day of or day prior to a plea proceeding; errors within those certificates or criminal histories; no information regarding restitution.

- *CASE EXAMPLE: In a recent summary plea of guilty before the Townsville Magistrates Court, a total of 12 case authorities were provided to the Court, The majority of them by the prosecution. Issues of deportation were involved which added complexity to the matter. It was flagged with the Court that the sentence would be a lengthy one when it was listed for sentence, however, the sentence still ran over double of the allocated time (two 15 minute time slots were allocated) and as a result of that, video-link sentences listed after it were all pushed back.*

It is also apparent that diversionary options, including the issuing of adult cautions or referring matters to an Adult Restorative Justice Conference are under-utilised and their increased use would lead to less matters being put before the Court and therefore improve the efficiency of the Court.

Summary Hearings

It is not uncommon in the experience of LAQ practitioners for there to be delays in the summary hearing process. For example:

- Insufficient resourcing of the Court Liaison Service and inconsistent approaches to section 172 *Mental Health Act 2016* hearings leading to delays and unfairness for some of the most vulnerable cohort appearing before the courts.
- Late allocation of a prosecutor can lead to on the day discontinuances wasting court, defence and witness/complainant time and resources.

As identified in previous responses, improved case conferencing and disclosure would also assist preparation for and disposition of matters.

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

LAQ is supportive of maintaining the capacity for a Magistrates Court to deal with certain matters in the absence of the defendant, while ensuring safeguards are in place to preserve the defendant's rights. A number of Australian jurisdictions provide the opportunity for a defendant to plead guilty in writing.[11]

Written pleas of guilty[12] form an important basis for facilitating the administration of justice and finalising matters in one of the busiest jurisdictions in Queensland. Our advice lawyers provide

[11] All Australian States and Territories allow a defendant to plead guilty in writing, however different limitations apply in each jurisdiction. For example, in the Australian Capital Territory a written plea is limited to prescribed offences including offences against transport legislation or where the maximum penalty is 10 penalty units.
[12] Pursuant to s146A *Justices Act 1886* (Qld).

advice in relation to this procedure and report written pleas of guilty being of particular assistance to those who are employed and need to deal with relatively minor matters (where attending court effectively means additional punishment because it can mean foregoing income and/or putting employment at risk), and for those who suffer from disabilities (for whom attending court may be particularly difficult physically or because of mental health or other impairments). Written pleas of guilty currently can only be made for a minor offence.[13] Consideration should be given to expanding the range of offences for which a written plea of guilty can be accepted (for example, some driving offences are currently excluded).

LAQ supports continued availability of written pleas of guilty submitted on-line. This option could be enhanced by adopting the format used in several other jurisdictions using prompts in the form seeking information that would address the sentencing principles contained in s9 and s12 *Penalties and Sentences Act 1992* (Qld), which is absent in the Queensland online form.[14] Prompts such as those on the New South Wales form "you should explain how and why the offence happened and give some information about yourself, your financial situation, personal circumstances and general character", would assist a Magistrate in having information before them that allows them to properly consider the sentencing principles in the *Penalties and Sentences Act 1992*(Qld).

Aside from a written plea of guilty, a Court may proceed to make a determination pursuant to s142, s142A and 147 of the *Justices Act 1886* (Qld) in the absence of the defendant.

LAQ's experience in relation to such matters has predominantly been by way of reviewing matters for the purposes of an appeal. Proceedings pursuant to s142, 142A and 147 are often only brought to LAQ's attention long after the event, typically identified upon a subsequent court appearance where the previous sentence causes concern for the legal representative such that they seek an opinion on the rights of review or appeal. This is further explored in Question 45.

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

LAQ supports the consideration of restrictions in the sentencing options available to a Magistrate where the matter is being dealt with in the absence of the defendant, similar to what currently occurs in Victoria and Tasmania.

The Victorian procedural legislation prohibits the court from sentencing defendants to a custodial order, more than 50 penalty units (combined), and restitution or compensation orders that exceed $2000.[15] In Tasmania a conviction cannot be recorded in the absence of the defendant.[16]

---

[13] see s146A (1) *Justices Act 1886* (Qld).
[14] The online form asks for 'What would you like the magistrate to take into account when deciding your sentence? Please provide as much information to help the magistrate understand".
[15] s87 *Criminal Procedure Act 2009* (Vic).
[16] similar to s7 *Sentencing Act 1997* (TAS)

While currently in Queensland those sentenced in their absence can appeal pursuant to s222 *Justices Act,* such an appeal does not entitle the appellant to raise any matter not raised before the Magistrate, or which ought not to have been apparent to the Magistrate at the time of the hearing.[17] The ability to adduce fresh or new evidence on appeal depends on the circumstances.[18]

> *In Kemp v The Commissioner of Police [2021] QDC 30, the appellant had been convicted in her absence. It was not until months later when she was seen by a duty lawyer and the entry on her history was noted that the recording of a conviction potentially rendered the sentence excessive. At first instance the prosecutor identified the value of the stealing was $15.06 worth of fuel. When spoken to by police, she made admissions, expressed remorse, advised she'd been suffering from deterioration of mental health, drug addiction, and financial issues, and had forgotten to return and pay for the fuel. The appellant had no previous convictions. She was sentenced to a $400 fine, and a conviction was recorded.*

It is the experience of LAQ that the issues raised in *Kemp* are not isolated nor sufficiently unusual not to warrant reform. Cases such as *Kemp* are demonstrative of the need to ensure there are limitations on the sentencing options available to the Magistrate when sentenced in their absence. There are already restrictions, in terms of the inability to make a probation order without the consent of the defendant, encapsulated in the *Penalties and Sentences Act 1992* (Qld) s96. A limitation on the imposition of a financial penalty or order would also ensure the Court can comply with s48 *Penalties and Sentences Act 1992* (Qld), and a limitation on the ability to record a conviction would similarly ensure compliance with s12 *Penalties and Sentences Act 1992* (Qld).

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

LAQ sees room for improvement in the registry committal process to improve efficiency and increase consistency in processes across Queensland.

The present registry committal process requires the Prosecution's consent. Philosophically, a committal hearing's purpose is to ensure that a defendant's interests are protected, by determining whether a prima facie case exists. There is no philosophical protection of the Prosecution's interest in a committal hearing. When the Defence completes registry committal paperwork, the defendant is necessarily waiving their rights and protections. The Defence is, in effect, relieving the Prosecution of their burden to prove a prima facie case at committal. This is conveyed to the Prosecution by the appropriate registry committal documentation being forwarded to the Prosecution for its consent. LAQ is not aware of a situation where the Prosecution have not ultimately consented to a registry committal occurring. This approach only produces further delay and risks creating injustice for defendants, particularly those who are in custody and wish for their matters to be progressed to the

---

[17] *Guy v McLoughlin and Anor* [2006] QDC 017.
[18] s222(3) *Justices Act 1886* (Qld); *Gallagher v The Queen* (1986) 160 CLR 392; *R v Spina* [2012] QCA 179..

higher court expeditiously. For these reasons, it is suggested that consideration be given to removing the need for the Prosecution to consent to a registry committal.

LAQ is also aware that in some regions, full hand up committals are strongly discouraged/not utilised, to the extent that even if parties are able to do a hand up committal, the court adjourns the matter to allow a registry committal to occur. It is our view that both full hand up and registry committals should be available options.

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

LAQ submits that there should be compulsory directions hearings before a committal occurs and that, in particular circumstances, the compulsory directions hearing could be waived. The purpose of the directions hearing could be to address outstanding disclosure requirements, or to set a timeline for the committal, for example, provision of particulars, exchange of notices, etc.

The current committal processes provide, as a matter of course, a direction that the full brief of evidence be provided by a certain date. Notwithstanding that direction, it is common for substantial portions of the brief – if not the entire brief – to be unavailable by that date. This is a familiar experience, regardless of whether the matter is being carried by the Police Prosecutions Corps (PPC), or the Office of the Director of Public Prosecutions (ODPP). Often, no explanation is provided for this occurrence.

When a brief is not provided on time, there is rarely any consequence imposed for that failure, Magistrates routinely provide repeated adjournments for provision of the brief, however, there are significant consequences for the defendant.

This causes delay and risks injustices for defendants. Specifically, these delays create significant frustration and disadvantage for defendants who are in custody and require the brief of evidence to, for example, assess if it changes their prospects for a further bail application, to commit their matters, and to conduct case conferencing (both PPC and the ODPP routinely decline to conduct case conferencing until the entire brief is available).

A compulsory directions hearing – and empowering Magistrates to dismiss charges for want of disclosure – would provide the Police and Prosecutions with an incentive to ensure that deadlines are not missed.

Further, it is submitted that a compulsory directions hearing would increase accountability for both parties and ensure matters are progressing in a timely fashion.

It is accepted that there should be an ability to waive the directions hearing, at the agreement of both parties, as many cases simply do not require judicial direction or intervention. This waiver could be achieved by the submission of an online form in advance of the hearing, by oral submissions during

a mention, or by an additional section on the registry committal paperwork. Magistrates should retain the ability to impose directions at any stage regardless of whether they are sought by the parties.

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'? (Question 48)

Yes. LAQ's position is that by providing legislative guidance in relation to the meaning of "substantial reasons, in the interests of justice" that it will increase efficiency, create more consistency in the process of committal proceedings, and help improve understanding for users of the court including self-represented defendants.

The provisions are broad and, our experience is they are open to confusion and differences in interpretation. While the provisions have been interpreted in various Magistrates Court decisions, Magistrates, correctly, do not regard these as binding upon them, and will take alternative views. In practice, some Magistrates interpret "substantial reasons" as requiring the establishment of exceptional circumstances, which was never the intent of the amendments, and, respectfully, does not serve to promote the important purpose of committal proceedings. The implementation of legislative guidance will promote uniformity in approach and decision-making, which is in the interests of justice for all parties involved in committal proceedings.

Legislated guidance will streamline the committal process because the Defence and the Prosecution will know, reliably and precisely, what matters to address in their respective notices. Legislative guidance would also reduce disputes between the parties as to whether the defendant's proposed reasons satisfy the legislative threshold. In turn, it may reduce the need for directions hearings to determine whether the reasons are indeed substantial.

The provisions ought to be amended to include a list of matters that may establish substantial reasons. However, with provisos that the list is not exhaustive and that substantial reasons must be viewed in the particular circumstances of a case.

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) (Question 49)

LAQ is supportive of ensuring the victims' interests are incorporated into criminal procedures, but with the fundamental principle of an accused's right to a fair trial remaining the paramount consideration. Ideally, processes and procedures should be in place to ensure that this incorporation of victims' interests do not cause undue delay or unduly influence the independent decision making of a prosecutor (for example - a victim's opinion on whether a matter should be discontinued, or diverted to certain alternate processes, should not be the sole determiner of whether those things occur).

Processes and procedures to allow victims to participate in proceedings should be clearly defined to ensure:

- Documents provided by victims to police and prosecutors are disclosed to the Defence in a timely way and as far in advance as is possible of trials or sentences.
- Victims can be appraised of their role in proceedings so they can receive adequate legal advice.
- Early identification of whether a victim would be willing to participate in mediation or other processes where their consent is a consideration, to allow defendants to be advised of relevant options (which, in turn, minimises the delays which can be associated with determining such matters).

Are the costs provisions in the current legislation working? What could be improved? (Question 50); and

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* (Question 51)

LAQ has no comment in relation to the issue of costs in the Magistrates Court but notes that overwhelmingly our client cohort would find it difficult, if not impossible, to pay costs orders and therefore we question the utility of such orders being made against such a cohort.

Other issues – appeals to the District Court against decisions of the Magistrates Court

The *Justices Act 1886* (Qld) Part 9 Division 1 governs appeals to the District Court against a decision of the Magistrates Court.

LAQ submits that insofar as the provisions of the *Justices Act* are concerned, the provisions should remain to similar effect, and ensure consistency where possible with the provisions contained in Chapter 67 *Criminal Code 1899* (Qld). However, LAQ highlights that there have been some features of these provisions which have created confusion, and could benefit from improved clarity in any new legislation.

Query regarding expanding the ability to appeal decisions under section 172 *Mental Health Act (Qld)*.

s222(1) permits an appeal against an order made by a Justice. 'Order' is defined in section 4 to include *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 justices committing a defendant for trial for an indictable offence, or dismissing a charge of an indictable offence or granting 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.

The decision of *RRK v Queensland Police Service [2019] QDC 176* considered the ability of a party to appeal against the order of a Magistrate refusing to dismiss charges pursuant to an application under s172 *Mental Health Act 2016* (Qld). Such an application is characterised as an interlocutory application. It was confirmed that s222 only conferred a right of appeal to the District Court in respect to an order which disposes of a complaint, and therefore there is no right of appeal against that decision.

Prohibitions of interlocutory orders are also reflected in matters before higher courts (for example a party may not appeal against an order pursuant to s590AA *Criminal Code 1899* in relation to admissibility of evidence, for example, or against an order pursuant or Division 2A *Evidence Act 1977* in relation to protected counselling communications). Appeals in relation to those matters are only permitted following a finding of guilt. There are policy grounds which prohibit the bringing of appeals against interlocutory rulings, as they may lead to fragmentation of the criminal process, may in the long run prove to have been pointless (for example, if the defendant is found not guilty), and are capable of being misused to exhaust the resources of a less well-heeled opponent.[19] A person aggrieved by a finding may appeal that decision if ultimately convicted of the offence following trial.

However, unlike section 172, where matters are removed to the Mental Health Court, that Court does make an order capable of being appealed to the Court of Appeal.[20] It seems somewhat inconsistent that an application of a similar nature in the Magistrates Court pursuant to s172 *Mental Health Act 2016* (Qld) is incapable of being subject to the same rights, however as is the process in the higher courts, a defendant may still seek to rely upon a defence under s27 *Criminal Code 1899* (Qld) if supported. This may also help to address our concerns raised in Q43 regarding the practical operation of hearings under section 172.

Maintaining ability to appeal conviction after a plea of guilty

S222(2)(c) only permits an appeal against the fine, penalty, forfeiture or punishment being excessive or inadequate, where the appellant has pleaded guilty. However, the District Court has held it does have jurisdiction on appeal to consider whether the plea was an unequivocal plea of guilty.

In *R v Hennessy; Hennessy v Vojvodic [2010] QCA 345*, the Court of Appeal set aside the appellant's pleas of guilty where they had been entered

> *"… without a proper understanding of what was entailed in that plea, so far as acknowledgment of criminal responsibility was concerned, and where he had available to him a well-founded defence of unsoundness of mind. It is quite possible that the appellant was not even fit to plead at the time he appeared before the Magistrates Court*

---

[19] See, for example, Holmes J's judgment in *Pauler v Hall* [2003] 2 Qld R 294.
[20] And is characterised as a civil appeal: s549 *Mental Health Act 2016* (Qld).

in February and April 2007 in light of the medical evidence now available. Accordingly, a miscarriage of justice has occurred and the appellant should be permitted to withdraw his pleas of guilty […]. As a consequence his convictions for those offences should be quashed and the sentences set aside.[21]

An equivocal plea of guilty should not be regarded as a plea of guilty or the admission of the kind referred to in section 222(2)(c) *Justices Act 1886* (Qld).[22]

A miscarriage of justice may arise where an accused pleaded guilty without appreciating that he had an arguable defence to the charge against him.[23]

As is with the higher courts, a body of case-law has been established which provides an exception to the provision and should not be adversely affected by any amendments.

Fresh/new evidence

s223 permits an appellate Court to consider "new" evidence if satisfied there are special grounds for giving leave to admit such evidence.[24] If leave is granted, the appeal is by way of rehearing on the original and on the new evidence adduced.[25] As above, a large body of case-law has been established, primarily through the Court of Appeal and High Court, which is regularly drawn upon by the District Court.

- Evidence that could with reasonable diligence have been discovered at the time the appellant was dealt with for the index offending is not fresh evidence in the legal sense, rather it is new or further evidence.[26]
- The evidence can be received by the court if it is satisfied special grounds exist to admit it. A *"useful guide"*[27] to what amounts to special grounds is that set down by the High Court in *Gallagher v The Queen*[28]:

   a. *Whether the evidence relied upon could with reasonable diligence have been produced by the accused at trial. This is not an inflexible requirement and in some cases the strength of the evidence may otherwise justify an interference with the ordinary rule.*

   b. *The evidence is apparently credible and capable of belief.*

---

[21] *R v Hennessy; Hennessy v Vojvodic* [2010] QCA 345 [40]-[42].
[22] *TLB v Queensland Police Service* [2019] QDC 128 [5]; *Commissioner of Police v James* [2013] QCA 403 [12].
[23] *TLB v Queensland Police Service* [2019] QDC 128 [24].
[24] *Justices Act 1886* (Qld), s223(2).
[25] *Justices Act 1886* (Qld), s223(3)(a)&(b).
[26] *Ratten v The Queen* (1974) 131 CLR 510 at 516-517; *Lawless v The Queen* (1979) 142 CLR 659, 674-676; and *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229, [2] at [10]-[19].
[27] *Pavlovic v The Commissioner of Police* [2006] QCA 134 [30].
[28] (1986) 160 CLR 392.

c. *The evidence if believed might reasonably have led the tribunal of fact "to return a different verdict."*

Appellate courts retain a residual discretion to receive new or further evidence where the failure to do so would result in a miscarriage of justice:[29]

> *In determining an appeal which turns on new or further evidence, there are strictly two questions. The first is whether the court should receive the evidence. The second is whether that evidence, if received, when combined with the evidence at trial, requires that the conviction be set aside to avoid a miscarriage of justice. Frequently those two questions can be conveniently dealt with together.*[30]

These provisions are being interpreted consistently with higher court authority.

Organisation	Legal Aid Queensland
[redacted]	[redacted]
[redacted]	[redacted]
Approved by	Nicky Davies, Chief Executive Officer
Authored by	Criminal Law Services Division, Legal Aid Queensland

---

[29] *R v Spina* [2012] QCA 179 at [34] per McMurdo P; *Mallard v The Queen* (2005) 224 CLR 125 at 131-132 [10]-[13]; *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229 at [3], [19].
[30] *R v Spina* [2012] QCA 179 [34].