Department of Transport and Main Roads
Discussion Paper Feedback

Title of discussion paper:	Criminal Procedure Review: Magistrates Court
Requesting department:	Department of Justice and Attorney-General
DocTrak reference:	[redacted]

The Department of Transport and Main Roads (TMR) has reviewed the discussion paper and provides the following comments:

TMR supports the thrust of the discussion paper on the modernisation of the procedure of the Magistrates Courts.

General Comments

TMR is generally supportive of the need to modernise the procedure currently found in the *Justices Act 1886*. Whilst a new Act is certainly needed, the way in which that information can be accessed by unrepresented litigants (who make up a large majority of people who appear before the Magistrates Courts) needs to be incorporated as a strategic purpose (or a guiding principle). For too long, the fear of providing unsolicited legal advice to defendants has restrained prosecutors from explaining to defendants, in person or in correspondence, the general process of what will happen in court on the first day that a matter is heard. Hence, it falls to the Magistrate to explain to each defendant what the process is at a call-over. This is time consuming and could be more effectively provided to defendants before the first mention date (a hyperlink sent to each defendant's mobile phone with a video, endorsed by the Chief Magistrate, is one possible approach). Engagement with third-party customer-focused designers should be encouraged so that the solution is effective. Thus, approaching the procedural requirements from a customer-first perspective may deliver the reforms that are required, deliver operational efficiencies for the Magistrates Courts, and make it easier for defendants to understand the decisions that they have to make before they first appear in court.

A Single Court

TMR strongly supports the creation of a single Magistrates Court. The current process creates significant injustices to self-represented litigants where multiple offences must be brought in different court jurisdictions and a defendant wishing to represent their interests must travel to each court for the first mention of the matter. This is expensive and unfair.

Whilst offences should continue to be brought before the court that is closest to where the alleged unlawful conduct occurred, it should be qualified with a convenience test. Namely, at the election of the prosecution, or with the consent of the Prosecution and the defendant, it should be lawful to commence all proceedings in the same court. A test similar to that found in section 43(1)(b) of the *Justices Act 1886, or a simpler test,* could be applied. In the alternative, a review of the rules in South Australia, could be adopted with amendment in Queensland.

Provision should also be made for an appropriate jurisdiction in which proceedings can be commenced for extraterritorial offences. TMR currently prosecutes matters under the *Heavy Vehicle National Law (Queensland)*, which permits extraterritorial application under section 16. This may be used, for example, where a single check reveals that a truck driver has committed fatigue-related offences in various States and Territories; application of this provision allows all proceedings to be commenced in Queensland. However, there is currently no allowance under the *Justices Act 1886* by which proceedings can be brought. In other words, if an 'enabling Act' allows for a prosecution to occur, the new procedure Act should also allow the proceeding to commence. Again, a convenience test could be employed to establish the most appropriate first-mention jurisdiction.

Renaming the Magistrates Court and Magistrates

TMR has no formal position with respect to the renaming of judicial officers from Magistrates to Local Court Judge.

The Adoption of Electronic Processes and Procedures

TMR strongly supports the continued uptake of electronic processes and procedures to deliver a more cost-effective outcome for prosecutors and defendants with respect to appearances for procedural steps and sentencing.

The current section 141 of the *Justices Act* provides a magistrate the power to dismiss a complaint if the complainant (prosecutor) fails to appear. In the rare cases that this occurs, the absence of the prosecutor will always be explained by an oversight or perhaps a mishap occurred on the way to court. Electronic appearances by the complainant or another prosecutor will circumvent dismissal. Currently, when a dismissal in these circumstances occur, the departmental complainant simply commences the whole process again, and this requires a defendant to, yet again, appear to answer the summons. The magistrate should be compelled to take steps before dismissal including, for example, contacting the prosecutor to determine the reason for the non-appearance and inviting appearance by electronic means.

Further, the electronic filing of complaints and summons has been discussed for many years. Noting the costs associated with implementing this reform, the new procedures should, at least, authorise this process to occur.

Modernising the Terms Use to Describe Offences

TMR strongly supports amending references to 'simple offences' and 'breaches of duty' in the Justices Act. The Magistrates Courts derive their jurisdiction to hear and determine regulatory matters (using that term widely) from others Acts (an enabling Act in other words). Provisions similar to section 10(1)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* could be adopted to establish the jurisdiction of the Magistrates Court (as distinct from an Industrial Magistrates Court) to hear matters.

Starting Proceedings and Particulars

There has been considerable judicial consideration about whether a complaint has validly commenced. Consideration should be given to whether the decision in *Archer v Simon Transport [2016] QCA 168* will still be good law as to particularising charges at the outset. It seems that if the procedure in accordance with section 368 of the *Police Powers and Responsibilities Act 2000* is to be followed in the future to commence all

Magistrates Court criminal proceedings, it is unlikely that a court could find that a new Notice to Appear (issued in lieu of a complaint) was invalid *ab initio*, as any uncertainty can be cured by the provision of further particulars by way of an 'offence details' form. It is TMR's position that any new *Act* should put it beyond doubt that no charge (however commenced) would be invalid *ab initio*, and that all defects with respect to "adequate particulars" can be rectified by providing better particulars. A Magistrate would still retain a discretion to dismiss a complaint for failing to provide particulars that met each element of a complaint.

When do Proceedings Commence in a Magistrates Court

TMR strongly supports any reforms that clarify when a criminal proceeding has been commenced in court. Adopting a provision similar to that of New South Wales would appear to serve everyone's interests.

Private Prosecutions

TMR does not wish to make a submission with respect to private prosecutions.

Disclosure and Case Conferencing

TMR is strongly supportive of clarifying the disclosure obligations enshrined in the *Criminal Code*. Currently, the convention is that those disclosure obligations apply to every criminal case being prosecuted in the Magistrates Court, irrespective of any prescribed limitations. The obligation on the Prosecution of ongoing disclosure should be included in the new Act.

With respect to obligations on defendants, it would be sensible if they were required to disclose an alibi or expert witness reports before the day of hearing. It makes no sense to appear at a hearing without disclosing those things to the Prosecution in advance.

As to the wider issue of case conferencing, from the Prosecution perspective it would be helpful to know what a case was going to actually be about before the day of the hearing. The development of an agreed statement of issues would help to narrow complex cases or cases that are likely to take more than a day. However, this is probably not a practical step that could be taken with a self-represented defendant. The real fear amongst departmental Prosecutors is that they may be (unfairly) accused of inducing a self-litigant to plead guilty or abandon a point of fact or law in circumstances where the prosecutor was trying to narrow the issues.

Case conferencing should be encouraged, (if not mandatory) in all matters where the charge carries a circumstance of aggravation or where, upon conviction, a higher penalty could be imposed (see requirements in section 47(2)&(4)&(5) of the *Justices Act*) as it is likely that these types of matters are fertile ground for reconsideration by the prosecution of the charges being brought.

Court Diversion Programs, Principles and Mediation

TMR is supportive, in-principle, for diversion programs for adults as long as it is recognised that these programs are inappropriate where the matter is commenced by way of a court-elected infringement notice. The infringement notice (as a concept) was created as a means of diverting people away from the court system and has been a runaway success. However, should a person elect to have an infringement notice matter considered by a court, and the prosecution elects to commence proceedings (noting the decision to prosecute is enlivened when a person elects for court) then

attempting to divert that person from a hearing does not serve either party. By that stage, the defendant has decided to elect for court and the Prosecution has decided to prosecute the matter.

Deferred Prosecution Agreements

TMR is strongly supportive of the concept of deferred prosecution agreements. Under the *Heavy Vehicle National Law (Queensland)* a defendant can enter into an enforceable undertaking with the National Heavy Vehicle Regulator (see section 590A). These have proven to be quite effective and have diverted significant and costly litigation away from the lower courts, particularly in New South Wales. Adopting a similar concept that could be applied under this new procedure Act may achieve policy outcomes for prosecuting agencies without the costs incurred from litigation. The provisions in sections 590A, 590B, 590C and 590D of the *Heavy Vehicle National Law (Queensland)* should be considered as part of any future drafting instructions.

Diversionary Programs

TMR is supportive of diversionary programs if they assist in meeting policy outcomes around the safe operation of vehicles.

Cautions and No Convictions

TMR is cautiously supportive of these concepts. By convention, Magistrates are fairly limited in what they can order if they believe that a proceeding was commenced that was not in the public interest. It is well-established that the decision to prosecute is an Executive decision and it is not for the judiciary to comment on that decision. It is a non-justiciable issue and reasons to prosecute or not to prosecute need not be given under the Judicial Review Act. In practice, magistrates convey their opinions through extra-judicial comments and, upon conviction, penalties that are at the bottom of the applicable range for the offending can represent the views of a judicial officer. It is open to the Parliament to extend, by legislation, these conventions by authorising a judicial officer to dismiss proceedings in light of public interest considerations. However, this is dangerous territory for the judiciary to compare the relative importance of the enforcement of one statutory offence against another and reach a conclusion that the latter offence is trivial compared with the former, and then act upon that conclusion.

A safer position may be one in which a judicial officer directs the prosecuting agency or police officer to consider some relevant (prescribed) administrative action or diversionary program. Such a reform requires wider considerations that are, unfortunately, beyond the terms of reference for this review.

Summary hearings, pleas of guilty and *ex parte* proceedings

TMR strongly supports the re-writing of sections 142 through to 146A of the *Justices Act*. The vast majority of matters commenced by complaint and summons proceed to conviction in the absence of the defendant, and the continuation of the intent of these provisions is strongly supported. The arrest of a defendant for an offence in which the maximum penalty is not imprisonment is not in the public interest. However, it is in the public interest to continue to convict a person who chooses not to appear to represent their own interests. As to sentencing options, if the matter has commenced by way of a court-elected infringement notice and the person has not appeared in answer to the summons, then a Magistrate's sentencing discretion should not be restricted.

Committal Proceedings

TMR does not wish to make submissions with respect to committal proceedings.

Victims of Crime

TMR acknowledges the importance of limiting any additional trauma that may be caused by an inefficient or opaque procedure in bringing a matter to court. However, unfortunately, as a question of fact, the criminal law only regards a person as a victim of crime after the underlying allegation is established to the criminal standard. There is a tension here in which public policy pushes and pulls the courts in different directions.

The interests of victims can be served better by ensuring that the Magistrates Court procedure is clearer. As noted at the commencement of these submissions, using technology (including online videos) to explain the procedure in a certain matter would help victims to understand why matters take a relatively long time to resolve. If victims understand the process, then their expectations of the criminal justice system can be better managed.

Costs (and Fees)

TMR is supportive of the current position that a defendant who is found not guilty should be able to recover their reasonable legal costs.

TMR is not supportive of an accused person having filing fees levied on them pursuant to section 21(2) of the *Justices Regulation 2014* where the complaint was filed by a state-related complainant. As a state-related complainant, TMR does not pay the filing fees and it appears unfair that a defendant should have to pay this fee upon conviction. The offender levy was introduced to recover some of these costs, and it appears that its continuation should be considered as part of any review of fees levied upon conviction.

However, where a defendant has court-elected an infringement notice and on complaint does not appear in answer to the summons (i.e. the matter proceeds ex parte), the court should have the power to impose a significant fee to cover the administrative costs associated with processing the matter.

Other Comments

As noted, the Discussion Paper is not meant to be a complete review of the procedural law in the Magistrates Court or a review of all the relevant issues under the *Justices Act*. Consequently, TMR would like to take the opportunity to make some further, albeit minor, submissions.

- **Notice of Previous Convictions**

It has been the experience of TMR prosecutors that the procedure and degree of proof required by magistrates with respect to Notices of Previous Convictions differs greatly. These reforms offer an opportunity to clarify the status of infringement notices with respect to a Notice of Previous Convictions. Finalised infringement notices are not convictions and are, by their nature, administrative instruments. Traffic histories are often a mixture of convictions and infringement notices, and the weight that can be placed upon an infringement notice on a person's traffic history varies from magistrate to magistrate.

- **Appeals**

TMR strongly supports that section 222 appeals be included in the review, particularly around authorising District Court judges to strike out an appeal. A review of the nature of these appeals would also be welcome.